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The Conflict of International Agreements in Air Law: A Reasonable Plea for Conventional Uniform Rules

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ABSTRACT

This note surveys the roots of a phenomenon called "conflict of international agreements", which forms a distinctive source of legal uncertainty in trans-border disputes, with a particularly high incidence in the field of air law. The authors suggest that the conflict of international agreements should be understood as an added layer of legal complexity in trans-border air law disputes, beyond the customary questions around applicable law and jurisdictional competence that are commonplace in private international law. The first part of this study maps the main factors that have led to the emergence of this peculiar conflict in the domain of air law. Among them are the following: the fact that national air law legislations have typically been developed by catching up with prior international regulatory initiatives (to the point of inserting, in national provisions, named references to specific treaties); the development of international air law through different generations of treaties with non-overlapping memberships; the possibility for different degrees of membership within the same treaty, and the succession of states. All these factors contribute to the possibility that a judge, tasked with a trans-border air law dispute, might first need to determine the international agreement under which the dispute falls, to settle preliminary questions of applicable law or jurisdiction. Or that he or she might end up—after following the trail of foreign legislation when settling a conflict of laws—having to apply treaties that might not be compatible with the international obligations of his or her jurisdiction of belonging.

The second part of this study then looks at a sample of existing strategies for resolving such uncertainty, by looking at the Vienna Convention on the Law of Treaties, the jurisprudence of the French Conseil d'État, and doctrinal commentary. As a result, the study finds that the horizontality of international law and the difficulty posed by non-overlapping treaty memberships (so that different rules apply to different sets of states) is, at present, insurmountable. This leaves the possibility open, for instance, that a competent court might have to choose between (i) deferring to private international law norms that might lead to the application of incompatible treaties binding in a foreign legal system, and (ii) applying the different treaties ratified by the state of the competent court. This is what case-by-case decision-making at the point of adjudication might entail, in the absence of a renewed impetus for harmonisation. It is on this basis that the authors conclude with a reasoned plea for new initiatives aiming at greater uniformity in international air law.

KEYWORDS

Air law; Conflict of International Agreements; Conflict of Laws; Legal Harmonisation; Uniform Rules

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INTRODUCTION

A dealer in Morocco buys a commodity from another dealer in the United Arab Emirates [hereinafter U.A.E.], the commodity is shipped on a French plane, and it suffers damage in the process. Which law will apply to this tripartite relationship? Will it be the law of U.A.E.(the seller's law), Moroccan law (the buyer's law), or French law (the carrier's law)? This is an oft-recurring uncertainty in private international law, and it exemplifies what happens when a legal relationship includes a foreign element ("*élément d'extranéité*"). Whatever its nature, an element of connection to a foreign legal system makes it harder to ascertain the law that ought to apply to solve a dispute—its impact will also be highly dependent on the facts of each case and the foreign elements at play.[1] For example, national air laws typically acknowledge a connection between an aeroplane and its country of registration, introducing a recurring foreign element peculiar to the domain of aviation.[2] Moreover, cases involving air transport also raise another difficulty: besides conflict at the level of applicable laws, there might also arise conflicts of jurisdiction. That is: one needs to distinguish between cases where adjudication might be undertaken by the national court of state A, and others where the case will need to be brought before a court in state B. This is what conflict of jurisdiction entails.

Now, these two elements alone would not warrant special attention towards conflicts of laws in international aviation, since they ordinarily apply to all other cases involving private international law—including beyond the domain of aviation. What's unique about the domain of civil aviation, however, is that it has come into being primarily on the impulse of international agreements. That is, a large part of the rules governing air law are drawn from international agreements. What's more is that national aviation legislation might simply contain references to this or that treaty, so that a court deciding an air law dispute from state A might end up with the text of an international treaty or protocol called up by the laws of state B. In such cases, the conflict of laws will often boil down to having to apply different treaties, or different versions or protocols of the same treaty, and leave the national judge with the question of having to sort out which treaty to apply in the case at hand. A related uncertainty might arise when a judge would first need to ascertain the applicable treaty, in order to decide on questions of applicable law or jurisdiction (as will be seen in the jurisprudence

[1] *See* Georges Van Hecke, *Principes et Méthodes de Solution des Conflits de Lois* [Principles and Methods for Solving Conflicts of Laws], *in* 126 Recueil des Cours Académie de Droit International de la Haye [Collected Courses of the Hague Academy of International Law] 399, 409 (1969).

[2] *See* Fernand de Visscher, *Les Conflits de Lois en Matière de Droit Aérien* [Conflicts of Law in Air Law] , *in* 1934 Recueil des Cours Académie de Droit International de la Haye [Collected Courses of the Hague Academy of International Law] 297, 306; M. Aboud, Concise Introduction to Moroccan Private International Law 10 (1994); S. Ghannam, Civil Aviation Law 17 (2d ed. 2016).

of the French *Cour de Cassation* in Section 1.3 below). These situations arise because it is not uncommon, in the domain of aviation law, for different countries to not have ratified the same international instruments. Some might have failed to ratify the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air [hereinafter Warsaw Convention],[3] while others might have only ratified its original version. Subsequently, certain countries might have subscribed to the Hague Protocol amending the Warsaw Convention [hereinafter Hague Protocol][4] and to the Montreal Convention for the Unification of Certain Rules for International Carriage by Air [hereinafter Montreal Convention].[5] Other prominent international agreements related to air law would be the Chicago Convention on International Civil Aviation [hereinafter Chicago Convention],[6] with its attendant annexes and amending protocols, and the Rome Convention on Surface Damage Caused by Foreign Aircraft to Third Parties on the Surface [hereinafter Rome Convention].[7] This small sample demonstrates that there is a multiplicity of different agreements in international air law, which might carry non-overlapping memberships. As will be discussed further in the article, this multiplicity has been attenuated only in part by the system put in place through the Chicago Convention.[8] Namely, through the establishment of the International Civil Aviation Organization [hereinafter I.C.A.O.], the said convention has come to play a constitutional role in aviation law,[9] with quasi-legislative powers for I.C.A.O. to issue rules that take on the status of annexes to the convention.[10]

This multiplicity creates a distinctive layer of uncertainty, beyond the existence of conflicts of applicable law and of jurisdiction. We suggest naming this as "conflict of international agreements". There are different approaches that may be adopted for resolving such a conflict. Some have their source in international treaties, while others have been devised through judicial precedent or doctrinal elaboration. Moreover, some

[3] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12th, 1929, 49 Star. 3000, 137 L.N.T.S. 11, reprinted in 49 U.S.C.A. app. at 430 (West Supp. 1976) (entered into force February 13th, 1933) [hereinafter Warsaw Convention].

[4] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, September 28th, 1955, 478 U.N.T.S. 371 (entered into force August 1st, 1963) [hereinafter Hague Protocol].

[5] Convention for the Unification of Certain Rules for International Carriage by Air, May 28th, 1999, 2242 U.N.T.S. 309 (entered into force November 4th, 2003) [hereinafter Montreal Convention].

[6] International Civil Aviation Organization Convention on Civil Aviation, December 7th, 1944, 15 U.N.T.S. 295 (entered into force April 4th, 1947) [hereinafter Chicago Convention].

[7] Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, October 7th, 1952, 310 U.N.T.S. 181 (entered into force February 4th, 1958) [hereinafter Rome Convention].

[8] *See* Maria Jose Morillas Jarillo et al., Derecho Aéreo y del Espacio [Air and Space Law] 25 (2014).

[9] *See* Paul S. Dempsey, *The Future of International Air Law in the 21st Century*, 64 German J. Air & Space L. 215 (2015). *See also* Brian Havel & John Q. Mulligan, *International Aviation's Living Constitution: A Commentary on the Chicago Convention's Past, Present, and Future*, 15 Issues Aviation L. & Pol'y 7 (2015).

[10] *See* Paul S. Dempsey, *Compliance & Enforcement in International Law: Achieving Global Uniformity in Aviation Safety*, 30 N.C. J. Int'l L. & Com. Regul. 1, 5 (2004).

of these approaches would apply generally, while others are limited to specific sets of conflicting provisions in international air law. In this article, we endeavour to penetrate some of this complexity, in order to make a reasonable plea for the adoption of uniform rules as—still—the most promising way out.

Conflict between sources of international law is not a new question in private and public international law, with the earliest such instance dating back to the 17th century.[11] With specific reference to air law, aviation is one of those domains where the historical sedimentation of treaties has not been followed up by a harmonised legal regime. Hence, the conflict of international treaties remains a significant variable to reckon with. This article surveys the most recurring reasons that give rise to a conflict of international agreements in air law, whilst also charting the (patchwork) solutions that might be available to address those instances of conflict in the absence of uniform rules.

In giving examples of possible solutions, we adopt a holistic approach that looks at different sources: international agreements, pronouncements of national courts, doctrinal commentary based on the air transport legislation of the North African and the Middle Eastern jurisdictions with which the authors are most conversant—specifically Morocco and the U.A.E.. In this way, we chart different proposed solutions for resolving the conflict of international agreements, in the absence of a unified international legal regime applying to air law. With this goal in mind, Section 1 makes the case for considering the conflict between international agreements as an added layer of complexity beyond conflicts of (national) laws, and describes some of the roots of this difficulty. Instead, Section 2 looks at a sample of solutions that exemplify different possible ways of approaching the problem. These are drawn from the Vienna Convention on the Law of Treaties, from the jurisprudence of the French *Conseil d'État*, and from doctrinal commentary to the relevant laws of Morocco and the U.A.E.. Finally, the conclusion draws together these different strands, composing a global picture of the combined difficulties raised by the conflict of international agreements in air law—a picture that motivates our reasonable plea for a renewed effort at harmonisation of this province of international law.

[11] Ana G. López Martín, *Conflicto entre Tratados: Tempestad o Calma en el Derecho del Mar? [Conflict Between Treaties: Storm or Calm Ahead for the Law of the Sea?]*, 3 Nueva Época [New Era] 241, 243 (2006).

1. CONFLICT OF INTERNATIONAL AGREEMENTS VERSUS CONFLICT OF LAWS

Traditionally, conflict of laws arise when the case at hand presents one or more elements that connect it to a foreign legal system. The conflict of international agreements in connection to aviation law—the focus of this paper—arises from two specific sources of complications, examined below. The first is the recurring reference of national legal texts to international treaties (which is only moderated by countervailing police rules and public order reasons). This point is explored in the first sub-section. The section after that focuses instead on the incongruences stemming from the proliferation of international agreements and protocols in air law, and the unevenness in their membership and degrees of possible accession.

1.1. DEFERENCE OF NATIONAL AIR LAWS TO INTERNATIONAL AGREEMENTS

One might be excused for assuming that subjecting a matter to national regulation will cover it more or less comprehensively. This observation, however, does not apply to national air laws, since most of them defer to international agreements for the interpretation and understanding of multiple crucial concepts. In this section, we look at the laws of Morocco and the U.A.E. as an illustration of a phenomenon, which we suggest points to a structural feature of this particular specialist regulatory domain.

In Morocco, air law matters have fallen—between 1962 and 2016—under the purview of Law No. 2.61.161 on the Regulation of Civil Navigation. Since 2016, they have been transposed to the new Law No. 40.13 on Civil Aviation of June 16, 2016 [hereinafter Civil Aviation Code]. Still, the remit of the Code is restricted by the scope of international agreements related to civil aviation. This limitation can be noticed on three levels. First, at the level of the interpretation of concepts. Indeed, all aviation-related terms in the Civil Aviation Code and in any implementation instruments are to be interpreted in conformity with the definitions found in international agreements. This is what Article 2(1) of the Civil Aviation Code states, to the point of embedding a direct reference to the 1944 Chicago Convention, with its attached annexes and protocols, and its subsequent amendments. Secondly, another evidence of subordination can be found in the statement, contained in Article 2(2) of the Civil Aviation Code, which "inserts" relevant international agreements (the 1944 Chicago Convention, the 1952 Rome Convention, the

Geneva Convention on the International Recognition of Rights in Aircraft;[12] the Montreal Convention, each with their respective amending protocols) by deeming mentions of a convention in the national legal text, akin to reference to the substantive norms found in that convention. Third, one final point relates to the prevalence of international agreements over national law. As stated in Article 3 of the Moroccan Civil Aviation Law, national law only applies in matters of aviation insofar as it isn't in contradiction with applicable international norms.

Since air transport has become one of the most common means of passenger mobility, as well as a vector for export goods of significant value,[13] it has gained economic importance. This creates a demand for states to take interest and issue national provisions. Yet, the objectively transnational character of this activity usually results in cross-border disputes. [14] If international investments are to be regulated preferentially through international agreements,[15] this rationale applies *a fortiori* to air law. This reveals all the limits of a nation-by-nation regulatory approach, and has made it so that this sector—more than others—has deferred authority to international legal sources since its inception.

If the internationalisation of civil aviation demonstrates the limits of national air laws, Article 310 of the Moroccan Civil Aviation Code explicitly acknowledges this by stating as follows: "Any other procedure necessary for the proper application of this law *and its compatibility with international agreements* may be decided by a regulatory provision, if needed" . The Emirati legal system also follows the same approach in Federal Law No. 20 of 1991 [hereinafter U.A.E. Civil Aviation Law]. There, at Article 19, it states: "The provisions of the Chicago Convention and all protocols and agreements relating to civil aviation, to which the State is a party, shall be considered to be complementary to the provisions of this Law in a manner consistent with its provisions".

Moderating this picture of unfettered dominance of international legal sources, one needs to, nevertheless, remind oneself of the existence of "police rules" ("*règles de police*").[16] These would be rules pertaining to matters of security that are, in their essence, *jus cogens* of the national legal system where they are found.[17] These rules are

[12] Convention on the International Recognition of Rights in Aircraft, June 19th, 1948, 310 U.N.T.S. 151 (entered into force September 17th, 1953).

[13] *See*Barthélemy Mercadal, *Transports Aériens* [Transport By Air], Repértoire De Droit Commercial [Com. L. Collection] 1 (2015).

[14] *See, e.g.*, Jean-Pierre Tosi, *Transports Aériens* [Transport By Air], *in* [Vol. T] Répertoire de Droit International [International Law Collection] 1 (2015).

[15] *See* Dominique Carreau, *Investissements* [Investments], *in* [Vol. I] Répertoire de Droit International [International Law Collection] 1, 46 (2020).

[16] *See* Michel Redon, *Aviation Civile* [Civil Aviation] *in* [Vol. A] Répertoire de Droit Pénal et de Procédure Pénale 1 [Criminal Law and Criminal Procedure Collection] (2012).

[17] *See* A. A. Salama, U.A.E. Private International Law: A Comparative Study 93 (2002).

susceptible of enforcement, regardless of the law that conflict of law rules might otherwise indicate,[18] and they also apply to all situations falling within their purview, irrespective of considerations concerning their national or international nature. As an example, the Moroccan Civil Aviation Code contemplates a number of such police rules susceptible of immediate application. These are the rules related to aircrafts, airports, air navigation, employment in the aviation sector, and civil aviation accidents.

Additionally, any foreign law that might be deemed applicable pursuant to conflict of law rules ought to be set aside, whenever its application would contradict non-negotiable social arrangements and legal concepts defining the "public order" of the country in which the court is located, and which the court cannot therefore overlook.[19] There is a subtle difference between public order and police rules. When police rules change between the trial and the occurrence of an incident, from which a dispute originates, courts are bound to apply the police rules in force at the time of the incident. On the contrary, if public order shifts (for example, through the enactment of a new law that marks such a shift), the new notion of public order will also apply retroactively.[20] It should be noted that public order is, in fact, the most used exception to justify non-compliance with international agreements.[21] This is a concept that is significantly based on the preponderant considerations at any given time, and which is to be constantly adapted to the economic, social, and political checks enacted in the concerned state.

1.2. PROLIFERATION OF INTERNATIONAL CIVIL AVIATION AGREEMENTS

International agreements have been significantly expanding the scope of international law.[22] This trend has been even more marked in the field of air transport. In this field, internationally agreed rules have been necessary since the beginning of activity in this field, to discipline the liability of air carriers and to establish common protocols relating to transport documents. The 1919 Paris Convention[23] was the first international agreement on air navigation, incorporating a set of principles that were conceived at the

[18] *See, e.g.*, M. Pierre Mayer, *Lois de Police* [Police Laws], *in* [Vol. L] Répertoire de Droit International 1 (2009).
[19] *See* Paul Lagarde, Ordre Public [Public Order], *in* [Vol. O] Répertoire de Droit International 1 (1998).
[20] *Id.* at 53.
[21] *See e.g.*, Yves Gautier, Ordre Public [Public Order], *in* [Vol. O] Répertoire de Droit Européen 2 (2004).
[22] *See* Emmanuel Roucounas, *Engagements Parallèles et Contradictoires* [Parallel and Contradictory Ratifications], *in* 206 Recueil des Cours Académie de Droit International de la Haye [Collected Courses the Hague Acad. Int'l l.] 9, 21 (1987) (Fr.).
[23] *See* Convention Relating to the Regulation of Aerial Navigation, October 13th, 1919, 297 L.N.T.S. 173 (entered into force on April 9th, 1920).

International Aviation Law Conference.[24] This was followed by the 1929 Warsaw Convention,[25] which was adopted ten years on from the first regular aerial route between Paris and London.[26] This convention, and its amending Hague protocol,[27] formed for a long time the foundational international legal documents disciplining air transportation. These were expanded upon through the four Montreal protocols of 1975.[28] The approach adopted in the Warsaw Convention (limited liability for damage suffered by passengers, and exceptions in favour of air carriers) later came to be seen as skewed against air travellers: they were thus found to be inconsistent with the needs of victims of air accidents and with the development of the aviation industry.[29] The piecemeal development of an international framework for aviation law continued with the 1944 Chicago Convention,[30] the 1963 Tokyo Convention,[31] the 1970 Hague Convention[32] and the 1971 Montreal Convention,[33] to name but a few.[34] While the constitutive role played by the Chicago Convention has been mentioned already, with its bestowal of quasi-legislative powers upon I.C.A.O., it also needs to be mentioned that the Chicago system is itself marred by a degree of unevenness of application that is not dissimilar to that of other treaties. Different jurisprudential positions have been advanced, concerning the extent of enforceability of the annexes to the Chicago Convention towards the entirety of its membership.[35] This means that while the Chicago

[24] *See* Carmen Pardo Zaragoza, *Análisis de la Evolución Jurídica del Derecho Aeronáutico Desde 1911 a 1955 a Través de las Organizaciones Aéreas Internacionales* [A Study of the Legal Evolution of Air Law Between 1911 and 1955 Through International Air Organizations], 33 Revista Europea de Derecho de la Navegación Marítima y Aeronáutica [Eur. J. Aviation and Mar. Navigation L.] 31, 38 (2016) (Spain.).

[25] *See* Warsaw Convention, *supra* note 3.

[26] Mercadal, *supra* note 13, at 8.

[27] Hague Protocol, *supra* note 4.

[28] Respectively: Additional Protocol No. 1, I.C.A.O. Doc. 9145 (1975); Additional Protocol No. 2, I.C.A.O. Doc. 9146 (1975); Additional Protocol No. 3, I.C.A.O. Doc. 9147 (1975); Montreal Protocol No. 4, I.C.A.O. Doc. 9148 (1975). See A. Hernández Rodríguez, *El Contrato de Transporte Aéreo de Pasajeros: Algunas Consideraciones Sobre Competencia Judicial Internacional y Derecho Aplicable* [*The Contract of Passenger Air Transport: Considerations on International Jurisdiction and Applicable Law*], 3 Cuadernos de Derecho Transnacional [Transnat'l L. Notebooks] 179, 181 (2011).

[29] M. R. Pickelman, *Draft Convention for the Unification of Certain Rules for International Carriage by Air: The Warsaw Convention Revisited for the Last Time*, 64 Journal of Air Law and Commerce 273, 274 (1998).

[30] Redon, *supra* note 16, at 14.

[31] Convention on Offences and Certain Other Acts Committed on Board Aircraft, September 14th 1963, I.C.A.O. Doc. No. 8364 (entered into force December 4th, 1969).

[32] *See generally* Convention for the Suppression of Unlawful Seizure of Aircraft, December 16th, 1970, 860 U.N.T.S. 105 (entered into force October 14th, 1971).

[33] *See generally* Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, January 26th, 1971, 974 U.N.T.S. 177 (entered into force September 23rd, 1973).

[34] A further passage in the regulation of international air transport was the so-called "Montreal Agreement" of 1966 which, however, was not a multilateral treaty, but rather an agreement between the US and international air carriers, in light of American dissatisfaction with the low liability limits established in the 1955 Hague protocol to the Warsaw Convention. As such, it only applied to U.S. citizens. See J. C. Batra, *Modernization of the Warsaw System - Montreal 1999*, 65 Journal of Air Law and Commerce 429, 431 (2000).

[35] M. Folchi, Tratado de Derecho Aeronáutico y Política de la Aeronáutica Civil [Treatise of Air Law and Politics of Civil Aviation] (2011).

Convention has centralised the production of norms to an extent, it hasn't conclusively addressed the conflict of international agreements stemming from non-overlapping membership across treaties or within the same treaty.

In an attempt to consolidate and update international air law, the Montreal Diplomatic Conference led to a new agreement on 28 May 1999, which sought to take over the regulation of those aspects of international transport that had hitherto fallen within the scope of the 1929 Warsaw Convention.[36] Besides consolidating the existing regime, the 1999 Montreal Convention[37] also amended the Warsaw system both in form and in substance, notably by removing liability ceilings in the case of death or bodily injury (for accidents due to the carrier's fault), which had earlier been regarded as something of a problematic legacy of the Warsaw system.[38] The Montreal Convention currently enjoys broad international adoption with the notable accession of the Russian Federation in 2017, and only a few remaining gaps on the African continent and in East Asia. This does create a degree of uniformity in the specific areas taken on by this Treaty, albeit without conclusively removing the unevenness of the international air law regime as a whole.

In general, every stage in the development of international aviation law testifies to the predominant international pressures of each period.[39] This means, both, that aviation law has come into being predominantly through international conventions, and also that those conventions have often taken a sectoral approach. For instance, while some seek to harmonise the rules relating to international air transport with a view to reducing conflicts of laws, others discipline a range of different subjects, such as: rules and protocols pertaining to international civil aviation, offences and other dangerous acts committed on board of an aircraft, combating the unlawful seizure of aircrafts and other harmful acts that would threaten the safety of civil aviation. This multiplicity has engendered a phenomenon, which has started to be named by doctrinal contributors the "conflict of international agreements".[40]

Quite apart from the subject differences between different treaties are the different degrees of ratification undertaken by different countries, especially when taking into consideration the role played by "flexibility devices" such as reservations

[36] M. Camenale Pinto, *Reflexiones Sobre la Nueva Convencion de Montreal de 1999 Sobre el Transporte Aereo* [Reflections on the New 1999 Montreal Convention on Air Transport] 6 Revista Derecho Privado 183, 188 (2000).
[37] *See* Montreal Convention, *supra* note 5.
[38] Tosi, *supra* note 14, at 2.
[39] J. W. Salacuse, *The Little Prince and the Businessman: Conflicts and Tensions in Public International Air Law*, 45 Journal of Air Law and Commerce 807, 809 (1980).
[40] C. Briere, Les Conflits de Conventions en Droit International Privé [The Conflict of International Agreements in private International Law] 419 (LGDJ, 2001).

("*reserves*") and options ("*faculties*"). While reservations allow a country to limit the scope of application of a convention, options afford signatory states alternative degrees of compliance for the purpose of giving implementation to a treaty regime.[41] An increase in the number of reservations, and an expansion of options, have also increased the unevenness of implementation of international treaties, and have therefore contributed to the conflict of international agreements in air law.[42]

Last, but not least, is the factor consisting in the succession of states: when a state is separated from another state, a special situation may arise when the original state had ratified an initial version, while the newly formed state might have acceded to the amended version of the international agreement.[43] This type of hypothesis adds another layer of possible complexity to the conflict of international agreements on air law.

1.3 CONFLICTS OF INTERNATIONAL AGREEMENTS ON AIR LAW: EXAMPLES FROM THE FRENCH COUR DE CASSATION

The proliferation of international agreements that has just been described has its counterpart in the difficulties that arise at the stage of adjudicating disputes related to air law. In this respect, it is useful to examine a sample of jurisprudential decisions that testify to the added layer of deliberation—determining the applicable treaty—that this proliferation demands of national judges.

Here, it is useful to begin from the precedent set by a French Court, in connection to the crash of an airborne Airbus plane on 23 August 2000. The plane was registered in the Sultanate of Oman, it had been manufactured by Airbus, and it was being used by Gulf Air to undertake a journey between Cairo and Bahrain. The crash resulted in the loss of life of anyone on board the plane, crew and passengers alike. Compensation was subsequently sought from entitled parties both from Airbus, with headquarters in Paris, and from Gulf Air, which is based in Bahrain. In the case at hand, the *Cour de Cassation* referred to the 1929 Warsaw Convention, to sort out competing elements of connection (the law of the airplane manufacturer versus the law of the carrier). The Court took notice of competing lawsuits having been filed against the

[41] *See* W. Paul Gormley, *The Modification of Multilateral Conventions by Means of "Negotiated Reservations" and Other "Alternatives": A Comparative Study of the I.L.O. and Council of Europe—Part One*, 39 Fordham Law Review 59 (1970).

[42] M. H. Van Hoogstraten, *La Codification par Traités en Droit International Privé Dans le Cadre de la Conférence de la Haye* [Treaty-Based Codification in private international Law in the Hague Conference Framework] 122 Recueil des Cours Académie de Droit International de la Haye 337, 398 (1967).

[43] *See* R. H. Mankiewicz, *Les Nouveaux États et les Conventions de Droit Aérien* [Newly-Formed States and International Air Conventions], 7 Annuaire Français de Droit International 752, 754 (1961).

manufacturer and the air carrier and clarified that "after inspecting that the air carrier does not belong to the European Union, the Warsaw Convention dated 12 October 1929 mandates, as *jus cogens*, the jurisdiction of the air carrier, regardless of other connections". [44] In another case, the *Cour de Cassation* deemed it legitimate, for parties entitled to compensation after an air crash, to ask a lower French Court to declare its lack of competence on the basis of the 1999 Montréal Convention—so that those parties could protect their right to choice of forum under that convention:

> Since the parties are compelled [by the American judge they initially approached] to bring the dispute before a court that is not chosen by them, the parties to such dispute may, within the framework of the Montreal Convention, have a current and legitimate interest to examine the right to choose the jurisdiction determined by the said Convention.[45]

In yet another case, an air carrier had mishandled certain medical goods, which had been irreparably damaged. While the carrier claimed the jurisdiction of the country where it had its business headquarters, the *Cour de Cassation* affirmed French jurisdiction on the basis that the transportation contract had been entered into by a French subsidiary of the carrier. In so doing, it explicitly referred to "the Montreal Convention dated 29 May 1999, [which affirms] the territorial jurisdiction of the subsidiary by whom the transport contract has been concluded".[46]

Finally, the same court, in a pronouncement issued on 21 November 2012, had to decide on the applicability of either a European regulation or the Warsaw Convention of 1929 to a case of damages due to an air passenger who had suffered a delayed flight, inbound from Algeria, and operated by an Algerian carrier. Having determined that the Warsaw Convention was applicable, it quashed the lower court's decision for not having made explicit how it was applying the criteria for assessing damages set out in the Warsaw Convention, whereby "the carrier remains liable for the damage resulting from the delay in the air transportation of passengers, luggage and goods, unless the carrier proves, together with its subsidiaries, that it took the necessary measures in order to avoid the damage, or that it was impossible to take such measures".[47]

[44] Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 12, 2009, R.C.D.I.P. 2010, 2, at 372 (note H. Muir-Watt) (Fr.).
[45] Cour de cassation [Cass.] [supreme court for judicial matters] civ., Dec. 8, 2011, R.C.D.I.P. 2012, 1, at 138 (note A. Maitrepierre) (Fr.).
[46] Cour de cassation [Cass.] [supreme court for judicial matters] com., Nov. 8, 2011, R.C.D.I.P. 2012, 3,, at 607 (note C. Legros) (Fr.).
[47] Cour de cassation [Cass.] [supreme court for judicial matters] civ., Nov. 21, 2012, R.C.D.I.P. 2013, 4, at 916 (note J. M. Jude) (Fr.).

This small sample of cases, all drawn from the jurisprudence of the French *Cour de Cassation*, offers an example of how national judges are routinely faced with the task of first having to sort out the applicable treaty—and not only with respect substantive matters (such as the calculation of damages), but also on questions of competent jurisdiction or applicable law. [48]

2. PATCHWORK SOLUTIONS FOR ADDRESSING THE ABSENCE OF UNIFORM RULES

When cases have points of contact with more than one legal system, national conflict of laws rules merely provide an indirect solution, because the problem they address is the immediate question met by the court being approached in a particular jurisdiction, namely: figuring out the prevailing connection and resolving on the applicable legal provisions. When a judge determines to hold jurisdiction over a case, he or she is only bound to apply the conflict of law rules from his or her legal system.[49] And yet, conflict of laws rules can be different for each legal system—based on the rules of attribution they enact, to claim jurisdiction in different situations when a foreign element might also be present.[50]

In the case of air law, the uncertainty does not merely involve questions of jurisdiction or applicable law that can be sorted through national norms of private international law. Instead, national judges have to refer back to treaties, which may suffer from uneven implementation because of the reasons elucidated in Section 1: overlap of different treaties, multiple treaty amendments, reservations and options, and succession of states. In view of the foregoing, this section examines closely the conflict between international agreements, as disciplined in the Vienna Convention on the Law of Treaties [hereinafter Vienna Convention].[51] It also presents various examples of judicial practice and doctrinal elaboration, which show possible solutions that might be applicable in the field of international air law—with varying degrees of generality—in the absence of wider harmonisation at the level of international treaty sources.

[48] *See generally* Cour d'Appel [C.A.] [regional court of appeals] Orléeans, Dec. 14, 2007, R.C.D.I.P. 2008, 4, at 311 (note H. Gaudemet-Tallon) (Fr.).
[49] *See* Cour d'Appel [C.A.] [regional court of appeals], Oct. 3, 1984, R.C.D.I.P.. 1985, 3, at 526 (note H. Synvet) (Fr.).
[50] *See* Aboud, *supra* note 2, at 187.
[51] *See* Vienna Convention on the Law of Treaties, May 23rd, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27th, 1980) [hereinafter Vienna Convention].

2.1. THE CONFLICT OF INTERNATIONAL AGREEMENTS IN THE VIENNA CONVENTION ON THE LAW OF TREATIES

The Vienna Convention applies to treaties among states (Article 1). Even though a distinction is sometimes made between "conventions" (issue-specific) and "treaties" (general matters of international law), this distinction makes no difference to the scope of application of the Vienna Convention. Indeed, Article 2 describes a treaty as: "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

For our purposes, Article 30 is the one that addresses the issue of application of different treaties to the same subject matter. The article lays down a number of rules. First, when a later treaty states that it is subject to—or not to be considered incompatible with—a previous one, then the previous treaty prevails. Second, when all the signatories of an earlier treaty have signed a subsequent treaty, without terminating or suspending the earlier one, the earlier treaty remains in force only insofar as it does not contradict the subsequent treaty. Third, when two successive treaties regulate the same subject matter, but have non-overlapping memberships, various scenarios arise. When two states are signatories to both the first and the subsequent treaty, then the later treaty applies, with the earlier treaty being effective only insofar as it is not incompatible with the later one. Instead, when a state has subscribed to both the earlier and the later agreement, and another state has subscribed only to the earlier—or only to the subsequent—agreement, then their reciprocal relationship is to be governed by the treaty to which both states are members.

2.2 THE CONFLICT OF INTERNATIONAL AGREEMENTS IN THE JURISPRUDENCE OF THE CONSEIL D'ÉTAT

The rules we have just described are in place to address the conflict of international agreements. However, because not all states are signatories to the Vienna Convention, then their value *vis-à-vis* non-signatories is most likely that of rules of customary international law. This is the case of France, which is not a signatory to this convention. For this reason, it belongs to a discussion of the status of existing international law norms on the conflict of international agreements, to see how the question has been addressed just in one such case by the *Conseil d'État*, the highest judicial authority of

France for solving administrative disputes. This court put forth, in December 2011,[52] a three-stage approach, which describes how a French Administrative Court ought to address the situation in which it is asked to apply conflicting provisions from different treaties. It is relevant to note that this decision (which discusses conflicting treaty commitments ratified by the same state) also bears relevance to the topic discussed here—the conflict of international agreements in air law, where different states are not signatories to the same agreements—because the situation could arise when a dispute in the domain of aviation presented elements of connection to different national legal systems and these, as it would often happen in air law, simply contained a second-order reference to treaty norms—except, not the same ones!—without a clear priority between those norms. [53] Alternatively, the question of which treaty to apply might also arise in order to establish the applicable law or jurisdiction, as has been seen in Section 1.3 above.

In such cases, according to the *Conseil d'État*, French courts ought first to ascertain whether a conflict of international agreements is indeed actual, and not just hypothetical. This means determining whether the uncertainty relates to rules that have the same scope of application. In addition, the judge must ascertain whether the provisions of competing agreements might both take effect in the domestic legal system. If that were the case, the second-stage question would then arise: which agreement should prevail? The *Conseil d'État* mandates that lower judges should seek to address the conflict by relying on customary rules of international law, with a concern to interpret the provisions of different treaties so as to ensure their mutual accommodation and, when applicable, their harmony with constitutional integrity and public order. It is worthwhile noticing here that the *Conseil d'État* was likely suggesting to apply Article 30 of the Vienna Convention by classifying it as a customary principle of international law (since France is not a signatory, the binding character of such a provision had to be justified otherwise than as a treaty norm): this is why custom is raised here as a rule for solving a conflict between international agreements.

The third stage scenario arises when it has not been possible to find mutual accommodation between the conflicting treaties. In this case, a French administrative judge would have to only apply the provisions of the treaty in view of which the administrative body—whose decision is being brought before the judge—reached its decision, and leave out the conflicting treaty. To bring this back to our main topic—the conflict of international agreements in air law—the *Conseil d'État* decision means that a

[52] Conseil d'Etat [C.E.] [highest administrative court], Dec. 23 2011, 303678, Revue Constitutions 2012, 2, at 295 (note A. Levarde) (Fr.).

[53] The *Conseil d'État* suggested that conflict of international agreements is a widespread problem, beyond the domain of administrative law. It mentioned, for instance, international economic law, where conflicts might exist between conventions establishing a preferential economic system and separate bilateral agreements.

national judge is ultimately responsible for choosing only one of the conflicting rules from different treaties that might apply to a particular dispute. The decision equally clarifies, however, that the consequence of having to make one such decision might be—in the third-stage scenario when the conflict between two conventions is unresolvable—that the state will become liable under international law for failing to comply with a treaty that has been left out by the court's decision.[54] Hence, when there is a conflict between mutually exclusive rules set down in international agreements, the international responsibility of the concerned state arises as a result of the choice made, as the case may be, by either the judge or the government[55]—this is because the provisions of international agreements ought generally to be applied in a manner that is clear and unconditional.[56]

2.3. DOCTRINAL PROPOSALS ON THE CONFLICT OF INTERNATIONAL AGREEMENTS IN AIR LAW

Because many of the rules concerning air law are founded on international agreements, in many cases, this leads to the emergence of a conflict due to the uneven regulatory landscape resulting from the proliferation of treaties. It is useful to remind oneself that it is not uncommon for state constitutions to give international law a place in the hierarchy of sources that prevails over national legislation, either immediately upon ratification (monist systems) or upon implementation via legislation (dualist systems).[57]

At the same time, when we enlarge the gaze beyond the (vertical) relationship between national law and international legal sources, to look at the (horizontal) conflict of laws of different states—each possibly informed by a different treaty (or a different version of the same treaty)—then hierarchical criteria are of limited guidance.[58] Hierarchy in a traditional sense merely describes the internal legal structure of one state, taken as the focus of observation. This explains why private international law has

[54] Incidentally, it is worth noticing that this approach entails that the internal division of powers between the executive (who normally has the authority for making decisions concerning treaty obligations) and the judiciary (which is another state body) isn't relevant in the face of international law: a judge setting aside the provisions of a treaty on grounds of incompatibility with another treaty will still attract the state's liability under the misapplied treaty.

[55] *See* G. Guillaume, *Le Juge Administratif et la Combinaison des Conventions Internationales* [Administrative Courts and the Combination of International Conventions] [2012] Revue Française de Droit Administratif 19 (2012).

[56] *See, e.g.*, Conseil d'État [C.E.] [highest administrative court], Apr. 11, 2012, 322326, Revue constitutions 2012, 2 at 297 (note A. Levarde) (Fr.).

[57] For a contextualisation of this observation to a sample of Arab constitutions, see G. P. Parolin, *The Constitutional Framework of International Law in the Gulf: Ratification and Implementation of International Treaties in G.C.C. Constitutions*, 34 Arab Law Quarterly 34 (2020).

[58] *See* R. Encinas de Munagorri, *Droit International Privé et Hiérarchie des Normes* [Private International Law and the Hierarchy of Norms], 21 Revue de Théorie Constitutionnelle et Philosophie du Droit 71 (2013).

been a long-standing topic of controversy and doctrinal scepticism, as familiar hierarchies of sources do not hold much sway.[59] (last visited Oct. 16, 2021). In connection to the specific issue examined in this paper—the conflict of international agreements in air law—it is also worthwhile noticing that rarely do international treaties establish a hierarchy among themselves (except in the first case contemplated at Article 30 of the Vienna Convention, where a treaty expressly states its subordination to a previous one).[60] This is precisely why conflicts of international agreements arise! In the light of this, it is useful to look at some doctrinal proposals to navigate this predicament.

Let us assume, if we go back to the hypothetical case with which we opened this article, that a judge had to consider the application of Moroccan law. This is where the inextricability of national law from international agreements in the field of aviation comes home to roost. Article 443 of Law No. 15-95 of 1996 [hereinafter Moroccan Commercial Code] defines the contract of carriage and already contains a clause that demands "observing the provisions of special regulations in the field of transport and international conventions to which the Kingdom of Morocco is a party". Embedded in national law, a judge would already find there a first reference to international treaties. In the field of aviation, Moroccan Law No. 40.13 on Civil Aviation contains additional references to international conventions. The following quotations from this law help give a sense of just how pervasive and literal the embeddedness of international agreements in a national system might be. First, let us consider Article 96(1):

> The conditions for establishing the liability of the operator of an aircraft [. . .] are subject to the provisions of the Rome Convention. The limits of liability stipulated in the Convention, and any other convention ratified by the Kingdom of Morocco that amends or supplements it, shall also be applied to aircraft registered in Morocco

.

Next, we might consider Article 206(2): "Air transport contracts must be drawn up in accordance with the provisions of the Montreal Convention [. . .] related to the unification of certain international air transport rules."

[59] *See* J. G. Castel, *Les Approches des Systèmes de Droit International Privé et les Conventions Internationales* [The Approaches of Private International Law Systems and International Agreements], AHJUCAF, Les approches des systèmes de droit international privé et les conventions internationales

[60] *See, e.g.*, Conseil d'État [C.E.] [highest administrative court], Dec. 23, 2011, 303678, Revue trimestrielle de droit européen 2012, 1, at 929 (note D. Ritleng) (Fr.).

Article 223 makes another indirect reference to international agreements: "In the event that a flight from Morocco is cancelled or delayed, passengers are entitled to obtain assistance according to the conditions and methods specified under a regulatory provision, taking into account the provisions of *international agreements* applicable in this field."

Last, but not least, Article 38(1):

> The provisions agreed upon under this Article shall be the subject of conventions between the Kingdom and the countries concerned. These conventions shall be legally filed with the International Civil Aviation Organization (I.C.A.O.) in order to be registered in accordance with the provisions of the Chicago Convention on International Civil Aviation.

In the space of a few articles, it can easily be appreciated how, embedded in Moroccan Law No. 40.13, are several references to conventions on civil aviation, such as the Rome Convention, the Montreal Convention, and the Chicago Convention. This form of external reference also recurs in the legislation of another Arab country, like the U.A.E., where the U.A.E. Civil Aviation Law for instance contemplates a clause (Art. 19) to save the provisions of any bilateral agreements, thereby multiplying the sources of potential conflicts of international agreements.

These cases exemplify how a judge tasked with a dispute in air law will be referred—by national legislations—to international agreements, and this may lead to him or her applying the provision of treaties, which might be in conflict with the international treaty obligations of his or her own state of belonging. Hence, this is why private international law norms might, in this case, conflict with the international legislation in force in the state to which the competent judge belongs. Some commentators have candidly admitted that this is a possibility that grows exponentially, the greater the accumulation of agreements in a particular regulatory domain.[61]

In the context of aviation law, this exponential growth follows from the piecemeal accumulation of an international regulatory architecture. As new trans-boundary legal problems were encountered with respect to international air transport, a number of sectoral conventions and protocols were adopted to address them, even though the wider systemic effect has been a weakening of national air laws and the emergence of conflict at the level of international agreements. An honest appreciation of the origin of this problem, and of the fact that its solution is currently

[61] *E.g.*, D. Bureau, *Les Conflits de Conventions* [The Conflicts of International Agreements], 14 Droit International Privé 201 (2001).

left to the point of application by national judges, should help create an awareness that the solution of the problem likely lies at the same level where it originated: namely at the level of international treaty-making. Particularly so, when existing international agreements haven't really been awake to the potential for conflict between them, and have therefore refrained from including any provisions to manage potential conflicts.

One immediate way to address this shortcoming is by agreeing on explicit provisions regulating only the conflict of agreements—separating the issue of conflict from the substantive regulation enacted in each agreement.[62] Another solution, different from a centralised codification of conflict rules, would be the inclusion of "conflict of agreement" rules in each separate agreement.[63] At the same time, this would still suffer from the same problems of uneven ratification and implementation across the international community: logically the rules for conflict of agreements included in one agreement could not bind non-signatory countries. This difficulty is compounded by the fact that, for example in connection with the Warsaw Convention, some countries have ratified only the original version, but not the subsequent ones, like the Hague or the Montréal Protocols, [64] So even within the membership of the same agreement there are different degrees of participation. If the countries involved in an air dispute are more than just two, the problem can quickly appear unmanageable through an approach seeking to include "conflict of agreement" provisions separately in each treaty.

At an even more granular level, some commentators have focused on suggesting solutions for each separate hypothesis of conflict of agreements in international air law. It is useful—as an example—to consider Mercadal's examination of the different possible scenarios arising from the entry into force of the 1975 Montreal Protocols amending the 1929 Warsaw Convention.[65] It is useful to report the different possible scenarios as a list, in order to provide a flavour for the granularity of the approach proposed by Mercadal:

1. The relations of a state that is a signatory to one of the protocols with a non-signatory state cannot be governed by the protocol(s) accepted by only one of the states involved.

2. Montreal Protocol No. 1 amended the original Warsaw Convention, while Protocol No. 2 amended the Warsaw Convention as supplemented in the Hague. Hence, an air transport case involving a state that has ratified the original Warsaw Convention

[62] *See* V. Goesel, *Codification du Droit International Privé et Droit des Traités* [Codification of Private International Law and the Law of Treaties], 38 Annuaire Français de Droit International 358, 360 (1992).
[63] *See* H. V. Houtte, *La Réciprocité des Règles de Conflits dans les Conventions de la Haye* [The reciprocity of Conflict of Law provisions in the Hague Convention], 1991 Revue Belge de Droit International 491, 492 (1991).
[64] *See, e.g.*, Mercadal, *supra* note 13, at 12.
[65] *Id.*

and its amending Protocol (Montreal Protocol No. 1), on the one hand, and a state that has ratified the Convention as amended in the Hague (Montreal Protocol No. 2), on the other hand: this dispute will then be solved by only applying any common provisions to which both states are bound.

3. A dispute between a state acceding to the Warsaw Convention, as amended in the Hague, on the one hand, and a state acceding to the Convention amended in the Hague and also to its amending Protocol (Montreal Protocol No. 2), on the other hand, shall be subject to the common version (i.e. the Hague Protocol).

4. In the case of two states acceding to the Warsaw Convention as amended in the Hague, but which have subsequently implemented different protocols (respectively, say, Protocol No. 2 and Protocol No. 4), a dispute with elements of connection to their respective systems ought to be solved by applying once again the common version, i.e. the Warsaw Convention amended in the Hague, without its later Montréal Protocols.

Mercadal's solutions seem to suggest that a case-by-case approach could then be that of seeking, for each specific instance of conflict, whether a common version of an air law convention exists—to which both states have subscribed—and then use that, excluding any provision ratified by only one of the countries involved. Nevertheless, despite the precision of Mercadal's suggestion to focus on each case separately, this still leaves a large burden on judges, and it doesn't necessarily offer a broader set of criteria on which a judge may rely in unforeseen cases.

CONCLUSION

In this note, we have charted a recurring type of uncertainty that surfaces in international disputes on air law, when the legislation of different countries comes into play, and that legislation—in turn—refers back to incompatible international agreements, or different versions thereof. This means that, if the competent judge were simply to enforce the international agreements referred to in the foreign legislation—applicable according to the rules of private international law—this would simultaneously clash with the lack of assent given by the judge's state of belonging, either to the agreement in question, or to the specific version implemented in the foreign state with which the dispute at hand has elements of connection. Conflicts of international agreements also arise when questions of applicable law or jurisdiction need to be sorted after figuring out whether the states involved are privy to the same convention, since only this would settle any questions of attribution.

In earlier sections, we have traced the source of such a conflict in the gradual sedimentation of an international legal framework for air law (hence, the proliferation of agreements). This multiplies the unevenness within international air law, due to states' decisions to join, or refrain from joining, different rounds of international rule-making. Moreover, because national legislation has often developed under the impulse of international agreements, its scope is often directly limited by applicable treaty provisions.

Because of these factors, the conflict we have focused on in this article is not just a conflict that can be assimilated to any odd matter of private international law. While the latter is often concerned with determining the applicable law or the competent court, this is not the matter of competition between two or more national laws belonging to different countries. Instead, we suggest it is a matter of conflict between international agreements that are not issued by a legislative authority, but are ratified according to the rules of international law. When different states have ratified mutually incompatible agreements, the resulting uncertainty is compounded by the fact that international law does not come with a set of generally applicable conflict rules. In this respect, there seem to be few alternatives to the international codification of uniform conflict rules, with the caveat that their broadest possible ratification by the international community ought to be ensured (thereby disqualifying the approach of including separate conflict provisions in each of the existing agreements, as discussed in Section 2).

In the absence of one such initiative, there is no way around individual instances of conflict being sorted on a case-by-case basis at the point of judicial application. In this respect, we find that the pronouncement of the French *Conseil d'État* discussed in Section 2 offers useful guidance to regulate the discretionary power of the competent judge. For instance, this ought always to be exercised within the framework of any applicable rules of private international law, and—if one follows the French *Conseil d'État*—also with reference to the customary rules of international law. In this respect, in its 2011 decision discussed earlier (Section 2), this French Court acknowledged that the rules of the Vienna Convention (especially Article 30) might not apply—as treaty norms—but that they might count as customary international law to help address conflicting treaty norms. Eventually, however, the Court also recognised the risk—that is omnipresent without a harmonisation effort—that the judge's decision to solve in isolation a conflict of international agreements in an air law dispute might involve setting aside treaty provisions to which the state, to which the Court belongs, is bound—and therefore activate its international responsibility for failing to give implementation to binding treaty norms.

Without a doubt, the concerted effort to build an international air law framework is laudable. However, the multiplicity and succession of international conventions related to air law, compounded by the specificity of national conflict of laws rules, has widened the scope of conflict between international agreements, without univocal solutions that would contribute to legal certainty. On this basis, we deem it reasonable to end with a plea for international efforts, directed specifically at the harmonisation of international air law.