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Conflicts of Laws in Private International Air Law

The Contracts of Carriage by Air, Aviation Insurance, Aircraft Purchase, Finance, the Creation of Security Rights in Aircraft

and a Common General Part

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Abstract

Conflicts of Laws in Private International Air Law

The Contracts of Carriage by Air, Aviation Insurance, Aircraft Purchase, Finance, the Creation of Security Rights in Aircraft, and a Common General Part

This thesis deals with the problems of conflicts of laws with respect to contractual private air law, focusing on those contracts which are of a practical importance.
As compared to traditional studies of this legal area, this study applies a very innovative approach to the topic. Due to the vast amount of legal instruments, jurisprudence and legal writings to be handled, it does not appear appropriate to deal with the problems without pointing out common approaches, methods and solutions. In accordance with the economic legal working methods which have been developed by Middle European legal systems, and increasingly can also be observed in a number of common law systems, the aspects, which are common to all kinds of international contracts in private air law, are dealt with in a common *General Part*. Aspects such as the method of interpretation of international conventions, their "interrelations" with the conflicts of laws, and the general approach to "conflicts justice" *(Kegel)* as opposed to the modern American "Choice of Law Revolution" approaches are discussed. The *Specific Part* deals with the particulars of each kind of contract; significant aspects such as the effects of the new IATA Inter-Carrier Agreement (signed at Kuala Lumpur, 1995) are examined, as well as the problems which are encountered in international contracts of aviation insurance, cross-border finance of aircraft, and the creation of security rights, which, because of the sheer monetary sums involved, are of enormous practical significance. The conclusion at the end of the thesis provides two rules to resolve the conflicts of laws with respect to all contractual aspects of private international law: one single common rule as to contractual obligations, and another rule as to real rights in aircraft *(iura in rem)* which require a slightly different approach.

Extrait

Conflits des lois en matière de droit privé interational aérien

Le contrat de transport par air, l'assurance aérienne, la vente d'aéronefs, le financement, le création d'un droit à la sécurité aérienne et une partie générale commune

Ce mémoire examine les problèmes de conflits en lois inhérent au droit contractuel privé aérien, particulièrement aux contrats de grande importance pratique que sont le contrat de transport par air, l'assurance aérienne, la vente d'aéronefs, et de financement.
Face aux études légales traditionelles opérées sur ces contrats, la présente étude applique une approche davantage innovatrice. L'importance des outils légaux et jurisprudenciels rend ainsi appropriée d'analyser en premier les approches, méthodes et solutions par tradition commune à l'ensemble de ces contrats.
Ainsi, en conformité avec les méthodes de travail de droit économique, développées dans les systèmes légaux européens et observées de plus en plus dans certains systèmes de Common Law, ce mémoire analyse dans un premier chapitre général commun des différents aspects propres à tout contrat international de aérien privé.
Au nombre de ces aspects ainsi discuté, figurent les méthodes d'interprétation des Conventions Internationales, leur corrélations avec les conflits de lois et l'approche générale de « Justice Conflictuelle » *(Kegel)* opposé à l'approche américaine moderne de la « Choice of Law Revolution ».
Le chiptre spécifique aux contrats ainsi nommés, s'occupe quant à lui, de dresser les particularités propres à chaque type de contrat, telles que les effets du nouvel accord inter-transporteur de l'AITA (signé à Kuala Lumpur en 1995) et les problèmes liés aux contrats internationaux d'assurance aérienne, au financement hors-frontières des aéronefs et à la création d'un droit de la sécurité qui, de par l'importance des sommes en jeu, est d'une grande portée pratique.
En conclusion, deux règles tenant compte de tous les aspects contractuels de droit international privé, permettent de résoudre ces conflits de loi: une règle simple et commune tirée des obligations contractuelles et une règle tirée des droits réels aériens *(iura in rem)* requérant une approche un peu différente.

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On board aircraft "Llangorse Lake" (G-AWNB),
July 1996

A.K.

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Meiner Familie
in Liebe und Dankbarkeit
zugeeignet

"He that judges without informing himself to the utmost that he is capable, cannot acquit himself of judging amiss."
JOHN LOCKE, An Essay Concerning Human Understanding (1690), 2.21

A. Chapter One: The Necessity for a New Approach

I. International Nature of Private Aviation

Since the aircraft is the paragon of a movable device, built to overcome large distances within the shortest time and able to pass over every type of landscape and topography, aviation is both indispensable for modern economies and not a matter that can reasonably be approached by isolated national legislation. Aviation by its nature is a supranational, but at the least an international matter.

II. Uniform Law and Conflicts of Laws

During this century, numerous private air law conventions have been drafted and most of them adopted and enforced by states. These conventions produce uniform law in that they provide the same set of rules for every country; however, these rules are the national law of these countries and are, therefore, applied within the framework of national law. Moreover, international conventions can never cover a matter exhaustively. E.g. with respect to the *Warsaw Convention*[1] a number of issues, such as the problem of limitations of liabilities by Art. 22, may be more or less settled in the meantime (in the sense that they shall be abolished in time). But even if a new convention on the unification of rules concerning the contract of carriage by air should be drafted[2] and adopted by

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1 Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929. Authentic text: "II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929, Varsovie" (Warszawa 1930), pp. 220-233. For the English translation see Schedule to the United Kingdom Carriage by Air Act, 1932; 22 & 23 Geo, ch. 36. For the US American translation see The Warsaw Convention. Relative to International Transportation by Air. Ratified by U.S. Senate, June 15, 1934, Proclaimed by the President, June 27, 1934: [1934] U.S.Av.R 245. The French and English texts are also reproduced in 18 AASL (1993-II), 323. The Convention is hereinafter referred to as *Warsaw Convention*.

2 An ICAO Working Group has recently encountered this task.

states, such convention *de lege ferenda* would not be an all-embracing body of law, and neither is the *Warsaw Convention de lege lata*. There is a necessity to apply (other) national law in addition to the air law conventions, because air law is not a separate part of the law but merely a special area of application of the law.

The problem of identifying gaps in uniform law, the norms identifying the law which shall apply to matters not addressed by the conventions, as well as the method of reconciling or adjusting *("Anpassung")* uniform law and other law are known as the *conflicts of laws*.

III. What is New with this Approach?

1. Traditional Approaches vs. Current and Future Trends in the World

Traditionally, in common law countries written law is reduced to a minimum in order to leave the development of common law to the law courts. If law is to be unified, which as pointed out is a prerequisite in order to successfully operate aviation, then this unification is done by the adoption of written law in an international convention. Furthermore, if such a convention consists merely of a chain of very specific rules it will be outdated rather soon, which - since the adoption of unified law by states always consumes vast amounts of time and sometimes does not even succeed at all[3] - would be very undesirable. As *Riese* points out in the context of the *Geneva Convention on the Recognition of Rights in Aircraft* of 1948[4], some pieces of international legislation have been adopted only within a very short period of time to fit the needs of a single common law country, and due to this haste and a lack of experience as to conceptual thinking they are not at all master pieces of codified law (which have been widely accepted, anyway, because of "international solidarity", as *Riese* puts it, and

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3 See especially the following two international legal instruments: Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, Signed at Guatemala City on 8 March 1971, ICAO Doc. 8932. Hereinafter referred to as *Guatemala Protocol 1971*. Protocols no.s 1-4 to Amend the Convention for the Unification of Certain Rules Relating to the International Carriage by Air Signed at Warsaw on 12 October 1929, Signed at Montreal on 25 September 1975, ICAO Doc.s 9145 - 9148. Hereinafter referred to as *Montreal Protocols 1-4*. All Protocols are also reproduced in 18 AASL (1993-II), 409; 435. None of these protocols, having been created under the devotion of time and cost consuming effords, has entered into force.

4 Convention on the International Recognition of Rights in Aircraft, Signed at Geneva on 19 June 1948, ICAO Doc. 7620. The text is also reproduced in 18 AASL (1993-II), 517.

because at that time they represented a solution that everyone could live with at least as a minum)[5]. Nevertheless, that *status quo* is not satisfactory, and one has to foster further development. Therefore, the rules for a long-term unification of law[6], covering as many of the important aspects as possible in order to overcome an onerous legal provincialism preventing the full exploitation of private aviation for human societies and their economies, require a different set up, an approach *de lege artis*[7] as to the concept of written law, since only written law is the format of the international unification of private law in general, as well as air law in particular.

An approach frequently applied in civil law jurisdictions is the combination of special rules and general rules, supplemented by a methodology providing for the means and tools to handle such a system[8]. The special rules, e.g. rules with respect to certain contracts, are only as specific as necessary, while the general rules cover all the common features of the different kinds of contracts, e.g. capacity to enter into a contract, non-performance damages, or the determination of the applicable law. A proper methodology supplements this system by providing for tools such as a systematic or teleological interpretation. A "general part" approach as to air law has been applied by *Riese* in his famous treatise[9]. Such approach has been perfected e.g. recently by *Keller/Siehr* as to private international law[10], by *Kropholler* as to uniform international law[11], and before e.g. by *Flume* as to contracts[12]; *Dicey and Morris*[13] apply a conglomerate of general rules, special rules and exceptions moving in the direction of a systematic "general rule - application - exception" approach;

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5 *Riese*, "Luftrecht" (1949), at p. 310.

6 In order to avoid that it may be departed from, as happened to the *Warsaw Convention*. One may remember e.g. the 1965/66 "crisis" in the USA; the 1985 "crisis" in Italy; the European *Malta Agreement* modifying the *Warsaw Convention* regionally; and most visibly the current "*Warsaw* drama".

7 It was *von Savigny* who stated that jurisprudence consists of philophy linked to a *systematic methodology*. See the evaluation of *von Savigny's* lectures and lecture fragments by *Mazzacane*, "Friedrich Carl von Savigny. Vorlesungen über juristische Methodologie 1802-1842" (1993), at p. 30.

8 For differences as to common law methods see *Dainow*, "The Civil Law and the Common Law: Some Points of Comparison", 15 Am.J.Comp.L. (1967), 419; *Jolowicz*, "Development of Common and Civil Law - The Contrasts", [1982] L.M.C.L.Q. 87. As to the yields of a combination of a "general part" in civil law and a proper methodology see *Rheinstein*, "The Approach to German Law", 34 Ind.L.J. (1959), 546.

9 *Riese*, "Luftrecht" (1949). The treatise is divided into a "general part" and a "specific part".

10 *Keller/Siehr*, "Allgemeine Lehren des internationalen Privatrechts" (1986). Also *von Bar*, "Internationales Privatrecht" (1987) in his 2 vol.s-treatise applies the approach that vol. 1 constitutes a *General Part (Allgemeine Lehren)*.

11 *Kropholler, J.*, "Internationales Einheitsrecht. Allgemeine Lehren" (Tübingen: Mohr; 1975).

12 *Flume, W.*, "Allgemeiner Teil des Bürgerlichen Rechts. Band II: Das Rechtsgeschäft" (1965).

13 *Dicey and Morris* on "The Conflict of Laws" (12 ed. 1993; 2 vol.s).

and in an excellent treatise on the conflicts of laws *Tetley*[14] recently used the same approach, referring to the general part and methodology as "the theory" which was subsequently applied to the different specific parts (nationality, contracts, torts etc.), and dividing each part again into general and specific issues. This kind of approach may be yet unusual and innovative for a common law lawyer; especially the tendency indicated by the approach of *Dicey and Morris* shows that the vast thicket of legal rules cannot anymore be handled if the rules are to be considered as chained in singularity, but the rules have to be considered as part of a system of law, justice and equity. *Dicey and Morris* have composed a sophisticated *system of rules* in a very perceptive and progressive approaches. Furthermore, especially in the field of conflicts of laws, the United Kingdom recently transformed the *Rome Convention 1980*[15], which prevents courts from accessing rules of common law in order to apply a Western European uniform approach to the conflicts of laws[16], which witnesses the necessity as realized by a number of states to systematically harmonize their private international law. Singularity, therefore, is on retreat, being replaced by a *systematical* approach to law. One may find other and perhaps even better ways to meet the legal requirements of private trans-border aviation, which forms an essential part of today's economies. *Suum cuique attributus est error,* said *Catullus*, *sed non videmus manticae quod in tergo est* ... The written law approach, however, reflects modern trends, the current and future tendencies to overcome legal provincialism in a truly international and, with respect to Europe, already now a *supra*-national, world.

The task of law is to manage social relationships which are changing with progress and development. Today, the task of private air law is to deliver solutions which facilitate the operation of air services throughout the world by supplying a common and thus reliable, long-lasting set of legal rules or, at the least, legal principles.

2. The New Approach in this Study

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14 *Tetley,* "International Conflict of Laws. Common, Civil and Maritime" (1994).

15 Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980, 80/934/EEC, 23 O.J. EEC (No. L 266) 1 (1980). Hereinafter referred to as *Rome Convention 1980.* The text is also reproduced in *North (ed.),* Contract Conflicts (1982), Appendix A, pp. 347 ff.

16 For details see *infra.*

The approach applied in this study has certain obvious advantages[17]. A general part provides for all the rules which are common when encountering contractual private international air law. It also provides for the means and tools to handle international conventions and to identify gaps which require a true conflicts of laws approach. A specific part deals with the conflicts of laws of contracts in private international air law, applying all the rules, means and tools of the general part as a prerequisite. The *goal of the study* is to find adequate solutions to the conflicts of laws with respect to typical contractual situations in private international air law. The *thesis* at the end of this study will be the *formulation of a single rule which is common to all these contracts as to the applicable law* (beyond already unified matters). This rule can serve as a *general principle* for practical application as well as for the future unification of private international air law.

IV. Scope and Structure of this Study

1. Scope

This study examines the law applicable to contracts in the realm of private[18] international[19] air law. It points out the relevance of the conflicts of laws in the dichotomy of air law as unified by conventions and as "truly" national or domestic. Then the rules, according to which the law

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17 As to the advantage of the approach applied in principle see *Rheinstein,* "The Approach", 34 Ind.L.J. (1959), 546, esp. at pp. 551-553.

18 Private individuals are natural persons, corporations, and other entities having a juridical existence of their own, as long as they act in private capacity. See *in re Maldonado* (C.A.), [1953] 2 All E.R. 1579. Those rules dealing with activities carrier out by countries or states are subject to public international law, or the law of nations. See *The Zamora,* [1916] 2 App.Cas. 77 (92).

19 *Kegel,* "Internationales Privatrecht" (5 ed. 1985), § 1 III (p. 5) points out that private international law also applies in purely domestic cases. Otherwise one would disregard foreign law which, to the same extent as one's own domestic law, is applicable or inapplicable because private international law does or does not refer to it. In fact, there is neither a reason nor a necessity to render disrespect to foreign law by regarding one's own law as superior by nature or sovereignty.
One reason to apply foreign law in purely domestic cases may be an explicit choice by the parties. Incentives to have a purely domestically related relationship governed by foreign law may e.g. reside in the the fact that certain jurisdictions have developed a more sophisticated approach to the matter concerned. Limitations, however, are marked by imperative rules of the *forum* e.g. to prevent *fraus legis* (evasion).

applicable to the contracts at stake is determined, are discussed. A comparison of the best solution to each of the issues will lead to a conclusion rendering a single common underlying principle.

2. Structure

The study is divided into a general part, a specific part, and a conclusion.

The general part presents all the common and thus general rules how to approach private international air law. It also provides for the means and tools to handle private international law.

The general part serves as a prerequisite for the specific part. The specific part of this thesis deals with contractual issues only: Contracts of carriage by air; aviation insurance; contracts of aircraft purchase; aircraft finance and lease; and the creation of security rights.

Although this study (in order to remain within the framework of an LL.M. thesis) is limited to the scope of these contractual matters, the general part is of a universal scope of application as to private international air law, i.e. it is by its nature applicable even beyond the selected matters considered in this study.

The conclusion at the end will formulate the *thesis* in the form of a general rule or common principle as to the applicable law in the conflicts of laws of private international air law.

B. Chapter Two: The General Part

I. Private International Law and the Laws of the Air

1. Private International Law

The term *private international law,* in its broadest sense, refers to a development: coexistence - conflicts - comparison - uniformity.

At the outset, all national laws exclusively focus on the specific issues arising in that society, expressing its "spirit". Thus it is "ignorant" towards laws of neighboring societies. This changes with the emergence and increase of cross-border interactions and trade. The rules must then be created to stipulate on the one hand to what extent domestic law shall apply and govern the facts, and on the other hand when either domestic law does not show an interest to govern a specific factual situation or foreign law appears more appropriate. These rules are referred to as "conflicts of laws", as divided into two parts which reflect a stepwise approach: *choice of law* determining the law that applies, and the *domestic law* (or *substantive law)* rendering the rules that govern the case[20]. Continental European law usually understands the term *private international law* only in the sense of the national or domestic choice of law provisions. Substantive law is merely private law without an international component; and international law exists due to state sovereignty only. This is illustrated by the fact that every state has its own choice of law provisions (sometimes made up by the rule that the *lex fori* be solely applicable[21]) and that there is no private international law as a common, worldwide and uniform set of principles or norms. Its role as state law is also indicated by the fact that it refers to private *state* law, and that even international conventions are only applicable with a sovereign state's consent to be bound to them, no matter whether they concern public or private law.

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20 See e.g. *Bunker*, "The Law of Aerospace Finance in Canada" (1988), pp. 309 ff.

21 Such as e.g. in Soviet private law; see *Bergmann*, "Sowjetisches Luftrecht" (1980), at pp. 154 ff. Although Soviet private international law recogized the principle of private autonomy, the monopoly of the USSR with respect to external trade had, in practice, enourmaous impacts on the possibility to choose the applicable law. See *Firsching*, in: "Staudinger - Kommentar zum Bürgerlichen Gesetzbuch, Internationales Schuldrecht I", "Vorbemerkungen zu Art. 27-37 n.F.", Supplement (12 ed. 1987), introduction to Artt. 27-37 n.F. EGBGB, n. 27.

Because any given state law reflects the particulars of the state's society, the *conflicts law* is also affected by these particulars. They appear in the form of institutions such as *mandatory clauses* or *ordre public reservations*, prevailing over a foreign law if held applicable. Due to these differences, the conflicts law in its substance reflects a broad variety of notions.It is, moreover, observed that an "outstanding characteristic of the conflict of laws is the astonishing lack of consensus on the discipline's goals and methods"[22].

This leads to the next aspect. The analysis and comparison of the functions of legal rules and particulars of different legal systems and social environments are the objectives of *comparative law* as a neighboring discipline to private international law. Furthermore, it is a necessary link to the next step in private international law: the creation of uniform rules in international treaties and conventions. In order to be able to create uniform law that is appropriate to the envisaged factual situations and deemed acceptable by the states that will have to express their consent to be bound by it, and whose societies must find the law also socio-economically suitable, one has to know both the facts and the different social backgrounds[23]. Where there has been insufficient comparative study there will not be a uniform law rule[24].

In the broadest context, the term *private international law* can mean both domestic conflicts provisions as well as treaty law unifying certain aspects of private law internationally. Then all other aspects mentioned above which are linked to these two notions are *eo ipso* encompassed, too. Thus, not only would the method of legal comparison be understood as a sub-discipline of private international law, but private law in general would also be encompassed by the term *private*

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22 *Juenger*, "Choice of Law and Multistate Justice" (1993), p. 1. An impressive characterization was coined by *Prosser*, "Interstate Publication", 51 Mich.L.Rev. (1953), 959 (971): "The realm of conflict of laws is a dismal swamp filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon."

23 *Kegel*, "Internationales Privatrecht" (5. Aufl. 1985), § 1 IX 2 (p. 39): "Die Vereinheitlichung des Privatrechts baut auf der Vergleichung des Privatrechts auf, weil man die Rechte kennen muß, die man vereinheitlichen will."

24 As to the field of private international air law, this is acknowledged in an *obiter dictum* by the US Supreme Court in *Zicherman v. KAL* (1996), 116 S.Ct. 629 with respect to the extent that the *Warsaw Convention* does not provide for a rule as to an aspect where obviously no sufficient comparative legal study had been previously conducted. See also *Kadletz*, *"Fiat lux* - U.S. Supreme Court um Grenzziehung zwischen Einheitsrecht und IPR bemüht" (pending publication, envisaged for IPRax 1996, no. 5).

international law, since the choice of law rules are merely a consequence of the parallel existence of different private laws and intimately linked to this fact[25].

In the course of this study, the term *private international air law* shall refer to all provisions of private air law that are relevant to aviation. The term *conflicts of laws* shall characterize those norms and principles which do not contain substantive law but which specify the applicable law under given circumstances.

2. Conflicts of Laws, Other Conflicts and Links

In this sense, *conflicts of laws* has the same meaning as *choice of law*. As already mentioned above, one may elaborate on differences; this, however, is apparently more a definitional problem than an issue of substance.

A necessary distinction has to be made between conflicts of *laws* and conflicts of *jurisdictions*. The term *jurisdiction* usually embraces every kind of judicial action. The term *conflicts of jurisdictions*, however, merely refers to the question of where the plaintiff can sue, which may be characterized as a procedural or an ancillary[26] matter accompanying the conflicts of laws question. Under unified private law, conventions often provide for a number of jurisdictions available to bring in a law-suit[27]. Then the conflicts situation is transferred to a true choice of jurisdictions-situation in which the plaintiff can choose its favorite *forum* - a phenomenon often described as *forum shopping*[28].

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25 As *Kegel*, "Internationales Privatrecht" (5 ed. 1985), § 1 III (p. 5) puts it: a private law is applicable, even in purely domestic cases, because its *private international law* refers to it.

26 See the classifictaion by *Tetley*, "International Conflict of Laws: Civil, Common, and Maritime" (1994), ch. III (pp. 45 ff.); ch. XXIV (pp. 787 ff.).

27 E.g. Art. 28 (1) of the *Warsaw Convention*; as to its interpretation and future see *Bin Cheng*, "A Fifth Jurisdiction without Montreal Additional Protocol No. 3", 20 Air Law (1995), 118. See also e.g. the *Brussels Convention on the Limitation of Liabilities* adopted at Brussels on 25 August 1924 ("Hague Rules"), Art. 8; *Visby Protocol 1968 to the Hague Rules 1924* adopted at Brussles, 23 Febr. 1968, Art. 8; *Hamburg Rules 1978* adopted at Hamburg, 31 March 1978, Art. 21; *Multimodal Convention 1980* adopted at Geneva on 24 May 1980, Art. 26.

28 See e.g. *McCormick/Papadakis*, "Aircraft Accident Reconstruction and Litigation" (Tucson, Az. 1995), at p. 387.

Although the question as to where to bring the law-suit and the question as to which substantive law applies to the case are two entirely separate issues, there are links. On the one hand, the solution to the conflicts of laws problem may be that the judge must always apply the *lex fori*, regardless[29]. On the other hand, and no matter how much one appreciates or deplores this aspect, the fact must be recognized that the judge will only in exceptional circumstances know and thoroughly apply foreign law as he does his own. One may wonder about the nexus to the tendency to apply the *lex fori* that has been ascertained in spite of the presence of a more or less sophisticated system providing for conflicts rules[30]. In defiance of the fact that the (different) legal systems have developed (different) ways to handle foreign law in proceedings before domestic courts[31], judges seem to feel called in order to balance interests in the *international* case to the same extent as in the *domestic* case; they can do this most directly, and thus better, by the application of their *own* law. These situations result in a *de facto lex fori* principle (*"homeward trend"*[32]). Therefore, the choice of a certain jurisdiction can significantly influence the applicable law and, inherently, the material outcome of the case.

3. The Laws of the Air

Virtually every country on the globe has its domestic legislation on aviation in the form of civil aviation acts, air navigation acts[33], air carriage acts, etc. Since the entire business of civil aviation has

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29 As is the case with respect to international conflicts in *former USSR*. As to inter-state conflicts within the USA, the simple and unambiguous *lex fori* doctrine has been promoted primarily by *Ehrenzweig*, "Private International Law. A Comparative Treatise on American Interational Conflicts Law" (1967). See also *infra*.

30 *Sand*, "Choice of Law in Contracts of International Carriage by Air" (Thesis, McGill 1962), examines more than 100 court decisions on the international carriage by air and observes that the courts strongly favor the application of their own law. This tendency has been characterized as a "homeward trend", which is a general appearance in private international law. See *Sand*, "'Parteiautonomie' in internationalen Luftbeförderungsverträgen", 18 ZLW (1969), 205 (218). See also *Eörsi*, "General Provisions", in: *Galston/Smit (ed.)*, "International Sales" (1984), § 2 (esp. pp. 2-1; 2-9 *et seq.)*; *Whinship*, "Private International Law and the U.N. Sales Convention", 21 Cornell Int.L.J. (1988), 487 (at 529 *et seq.)*; *Diedrich*, Lückenfüllung im Einheitsrecht, IPRax 1995, 353 (356 *et seq.)*. *Ehrenzweig's* approach considers the "homeward trend" and emphasizes the *normative forces of the facts* in that he rather sarcastically turns the trend into a *lex fori*-conflicts rule. *Ehrenzweig*, "Private International Law. A Comparative Treatise on American Interational Conflicts Law" (1967), esp. at p. 51.

31 For an overview see *Tetley*, "International Conflict of Laws" (1994), at pp. 53 ff.

32 *Supra*.

33 The astonishing amount of aerial legislation already at the beginning of this century is indicated by the enumeration of acts and statutes in the different countries in *Müller*, "Das internationale Privatrecht der

been international *ab ovo*, there has always been a need for unified law. However, not only is aviation subject to regulations that are specifically aimed at aviation matters, it is also affected by general laws that imply law applicable to aerial activities merely as a legal reflex (e.g. general transportation law, products liability law, labor law, the law of lease and purchase etc.), so that a variety of unified and purely domestic rules have their own effects on air law.

In the international arena the most important pieces of specific private air law legislation with respect to contract law are the *Warsaw Convention* of 1929 and its additional protocols[34] and the supplementary convention[35], the *Geneva Convention on the International Recognition of Rights in Aircraft* of 1948[36]. Some other important conventions, such as the *Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface* of 1952[37] and its additional protocol[38], aim at non-contractual matters, such as liability in tort/delict.

There is a such a rich number of bilateral, regional, and multilateral international private law conventions which affect air law that it is impossible to mention them all here. For the purposes of this study, however, the most significant convention as to conflicts of laws (not directly linked to air law) is the *Rome Convention on the Law Applicable to Contractual Obligations* of 1980[39]. Its significance is not to be underestimated because it is of *universal application*, i.e. it does not only

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Luftfahrt" (1932), at p. XV. With respect to early aeronautical codes in South America see *François*, "Les risques aériens et l'assurance: Brésil", 15 Rev.gén.air (1952), 203.

34 In addition to the Convention and the *Guatemala1971* and *Montreal 1975 Protocols* already mentioned, the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at the Hague on 28 October 1955, ICAO Doc. 7632; hereinafter referred to as *Hague Protocol 1955*, is of particular importance. The *Hague Protocol 1955* is also reproduced in 18 AASL (1993-II), 351. The entire system of these international legal instruments is hereinafter referred to as *The Warsaw System*.

35 Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by A Person Other than the Contracting Carrier, signed in Guadalajara on 18 Sept. 1961; ICAO Doc. 8181. Hereinafter referred to as *Guadalajara Conv. 1961*. The text is also reproduced in 18 AASL (1993-II), 393.

36 *Supra*.

37 Signed at Rome on 7 Oct. 1952, ICAO Doc. 7364; the text is also reproduced in 18 AASL (1993-II), 541.

38 Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface Signed at Rome on 7 October 1952, Signed at Montreal on 23 September 1978, ICAO Doc. 9257; the text is also reproduced in 18 AASL (1993-II), 577.

39 *Rome Convention 1980, supra.* This Convention has entered into force, as of 1 April 1991, for Belgium, Denmark, France, Germany, Italy, Luxembourg and the United Kingdom and, as of 1 September 1991, for The Netherlands. To this date, the Convention has harmonized the conflict of laws rules for intemational contracts of eight Contracting States.

apply to conflicts of laws between the parties but *to all conflicts problems* brought *before a court in a state party* (Art. 2).

II. The General Methodology

1. Interrelations Between Uniform and Domestic Law

Recurrent problems in private international law in general, as well as in private international air law in particular, are the interrelations between uniform and domestic law, or if applying rather philosophical terms, the "interaction" between internationally unified law and domestic law. This chapter will attempt to provide a basic set of characteristics in order to resolve problems arising from such interrelations, which is the major prerequisite to work with and to apply air law conventions. Improper methodological "handling" of air law conventions - in particular the *Warsaw Convention* as applied by the US courts - has led to misunderstandings and even mistakes in legal interpretation, as has already been shown by commentators[40].

a) The Sources of Basic Problems of International Law

While domestic laws are more tailor-made for the respective cultural and economic features of given individual societies, uniform law in general is rather "archaic"[41]. The reason is to be found in the differences in culture, in the socio-economic environment, etc. It is difficult to bring a number of differing, sometimes contrasting features under one single umbrella of uniform law. Sometimes the economic needs may be congruent to a large extent, but cultural differences can give rise to hostilities or otherwise, preventing emerging uniform law. Sometimes a lack of agreement on internationally

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40 As to the criticism see e.g. *Giemulla/Schmid*, "The Warsaw Convention", Art. 17, sec. IV; *Kadletz*, "Passagiertransport und Warschauer Abkommen in den USA: Methodische Unschärfen bei der Handhabung internationalen Rechts" (pending publication, envisaged for IPRax 1996, no. 5).

41 This term has been taken up by *Bueckling*, "Die Freiheiten des Weltraumrechts und ihre Schranken", in: *Böckstiegel/Benkö*, "Handbuch des Weltraumrechts" (1991), 55, at p. 73; *id.*, Archaisches Weltraumrecht, ÖJZ 1987, 583, following a common terminology in international law in general. For back references as to legal writings and dictionaries see *Bueckling, ibd.*

uniform rules by a certain country may be due to the mere fact that another, politically unfriendly country presides over the drafting committee or the diplomatic conference.[42]

b) Approach to Resolve The Problem

Regarding all these factors, it is easy to imagine that the scope of uniform regulations is usually very limited. The limited scope of a convention intending to unify private law will often already be indicated by its very title, e.g. the "Warsaw Convention for the Unification of *Certain* Rules Relating to International Carriage by Air"[43]. The specific importance with respect to the conflicts of laws resides in the fact that those aspects comprised by uniform law generally do not require to access domestic law, and therefore there is no room for conflicts provisions. However, the relevant *sedes materiae* as to this study lies in the following: If the uniform law is *silent* on certain issues, that silence in general terms is misleadingly ambiguous because it can *either* mean that the gap is to be filled by domestic law, as would be determined by conflicts provisions, *or* that the issue will remain without remedy at all since the uniform rules preempt any otherwise additionally applicable domestic law. This question cannot be solved in the abstract; the answer would depend on a case study on the very specific matter at issue[44].

A nice example can be found in an excerpt of *Alex Meyer's* note on the famous case *SAS v. Wucherpfennig*[45], which has been quoted and translated by *Sand*[46]: "once the Warsaw Convention is held applicable, it is superfluous to ask which national law governs the carriage". There is, however, an important part of that passage by *Meyer* missing[47]: "state law would only apply as far as the Warsaw Convention refers to it or state law is to apply *in addition to it*"[48].[49] The same view as taken

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42 It must also be added that the international arena is archaic for another reason: One may well describe international law as an area dominated by a régime of power. As is found already in *Thomas Hobbes'* "Leviathan" (1651), ch. 19 (pp. 95 ff.): *autoritas, non veritas facit legem.*

43 Emphasis provided.

44 For an example (Warsaw Convention) see *Abnett v. British Airways plc.* (1995), Scots Law Times, issue 16 (17-5-1996), pp. 529 ff. (536 ff.), per *Lord Marnoch.*

45 LG Hamburg (6 April 1955), 4 ZLR (1955), 226 *(SAS v. Wucherpfennig).*

46 *Sand*, "Choice of Law in Contracts of International Carriage by Air" (Thesis, IASL, McGill 1962), at p. 6.

47 *Alex Meyer*, "*SAS v. Wucherpfennig*", 4 ZLR (1955), 232.

48 Translation provided - emphasis original.

by English law is explained by *Morris*, pointing out that conventional law on the carriage by air derogates all other law irrespective of the proper law of contract only as far as matters within the scope of the convention are concerned[50].

It appears that thorough research and precision in the conclusions that are to be drawn in the course of the application of air law conventions are prerequisites for an acceptable solution to the case at issue[51]. The following list provides for some guidance in order to properly identify the relevance of the conflicts of laws in private air law cases, where one usually encounters both uniform law and additionally applicable domestic law.

aa) (Purposely) Limited Scope of Uniform Law

Due to circumstances as mentioned *supra*, the scope of application of the uniform law rule may be very limited. This can be indicated already by the title of the legal instrument, by its preamble, or by the first or the last articles of the international convention which often define the scope of application.

bb) Special Issues Referred to Domestic Law (Explicit Gaps)

Even though an issue generally falls within the scope of application of uniform law, special issues may have been abandoned and referred to domestic law. These references can be *independent*, i.e. they specify the applicable domestic law (e.g. the *lex fori*[52]), or they can be *dependent*, i.e. they may simply state that uniform law does not cover the special aspect at stake[53] (e.g. "The Convention is without prejudice as to ..."). Generally, only in the latter case one also has to ascertain which conflicts

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49 See also *van Dieken*, in: *Reithmann/Martini*, "Internationales Vertragsrecht" (4 ed. 1984), n. 618 (at p. 622).

50 *Morris*, "The Scope of the Carriage of Goods by Sea Act 1971", 95 L.Q.R. (1979), 59 (66): "The truth is, surely, that when an international convention on the law of transport is given the force of law in the United Kingdom, its provisions apply to all disputes *within its scope* regardless of the proper law of the contract. This is certainly true of the Warsaw Convention on carriage by air." [Emphasis added].

51 An exemplary study on these interrelations was conducted by *R. Dettling-Ott*, "Internationales und schweizerisches Lufttransportrecht" (1993), at pp. 57 ff. as to the Swiss law of obligations and the *Warsaw Convention*.

52 E.g. Arts. 21, 22 (1), 25 (1), 28 (2), 29 (2) of the *Warsaw Convention 1929*.

53 E.g. Arts. 24 (1), 24 (2) of the *Warsaw Convention 1929*.

rules apply and then determine the substantive law accordingly. Thus in this case the proper conflicts rule is made up of at least two norms (the convention defining its gap, and the *forum's* conflicts rule directing to the applicable substantive law) which depend on each other in order to choose the applicable law.

cc) Gaps Not Explicitly Mentioned

While the former mode of explicit references usually seems to be applied to very special issues, e.g. the question what constitutes willful misconduct (Art. 25 (1) of the *Warsaw Convention 1929)*, there may also be entire problem areas which are neither governed nor mentioned by uniform law.

Quite often these aspects cover areas where the different legal systems apply approaches that are so different that it is dificult or almost impossible to bring them under one common umbrella. An indicator for this kind of gaps is e.g. a lack of studies conducting functional[54] legal comparisons of the issue. The amount of comparative law at the time uniform law was created, therefore, has to be carefully observed.

Another indicator for this kind of gap can be accessed by an inquiry into the *travaux préparatoires,* since they may reveal the aspects where no agreement was reached by the drafters of the legal instrument. Open disagreement, articulated in conference minutes, on specific matters certainly constitutes an argument against a uniform rule, thus opening the floor for conflicts law, even though the wording of the legal instrument might be ambiguous in some cases.

A more intricate situation will be faced if the drafters seem to have ommitted an issue inadvertently or if they did not realize the ambiguity of the chosen wording[55] . In order to resolve

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54 As to the notion of *functional* legal comparison, which evaluates the socio-economic function of a legal provision, norm, mechanism, or institution see *Zweigert/Kötz*, "Introduction to Comparative Law" - "Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts" (1987), 29 ff. Functional comparison does not only serve the purpose of evaluating a favourable approach to a given problem ("best solution"), but it can also show that the material outcome of a certain case would be the same even in different legal systems, and regardless of their different legal methods. This can often be the case where economic and cultural foundations of societies are similar.

55 As *Blanc*, "La portée de l'application des lois nationales dans les premières conventions internationales de droit privé aérien", 5 Rev.gén.dr.aérien (1936), 386 ff. (389 f.) nicely comments: "Ces imperfections, toutes les conventions internationales en comportant, il faut les considerer avec indulgence et ne voir que la belle oevre

such problems and to provide for a working method, it is necessary to have a brief look at the methods of interpretation of private international air law conventions.

(1) Interpretation of International Legal Instruments in General

In the first place, private international air law conventions are international treaties. As such, they are subject to public international law, and their interpretation is principally governed by Art. 31 of the *Vienna Convention 1969*[56] and the principle of *bona fides*[57] as it applies to international law[58]. Accordingly, at the outset the wording of a provision at stake is analyzed, rendering due regard to the ordinary understanding of the phrase as well as to the specific use of the expression(s) in the legal field concerned and especially to its use by the drafters and signatories of the international legal instrument. The *bona fides* element of the interpretative method also imposes the obligation on the interpreter that the intents and purposes of the drafters and signatories be regarded[59]. The intents and purposes are usually stated explicitly in the title or preamble of the convention - however, their eloquence does not always discharge fruitful substance. The *Warsaw Convention 1929*, for instance, is labeled "for the *Unification* of *Certain* Rules" (emphasis added), which does not allow for conclusions with respect to the extent that the rules relating to carriage are unified.

There are interrelations between a teleological interpretation[60] (or interpretation according to the *effet utile)* and the wording, too, because a verbatim interpretation which is not covered by the

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d'ensemble accomplie" ["These imperfections, all international conventions have them - one should consider them with indulgence and see nothing but the fine work accomplished on the whole." - Translation provided].

56 *Vienna Convention on the Law of Treaties*, done at Vienna on 22 May 1969, opened for signature 23 May 1969. 1155 U.N.T.S. 331. Hereinafter referred to as *Vienna Convention 1969*.

57 See *Seidl-Hohenveldern*, "Völkerrecht" (8 ed., 1994), no.s 332 ff. (at pp. 93 ff.).

58 For an excellent comparison of the principle of good faith as it applies to public international law as opposed to national notions as applied to domestic law see *Bueckling*, "Die Freiheiten des Weltraumrechts und ihre Schranken", in: *Böckstiegel/Benkö*, "Handbuch des Weltraumrechts" (1991), 55 (at pp. 67 ff.).

59 PCIJ (10 Sept. 1923), PCIJ A/B no. 6, at. p. 25 *[German Minorities in Poland]. Seidl-Hohenveldern*, "Völkerrecht" (1994), no. 348 (at p. 96). At this point, the two different methodical notions of historical and teleological interpretation merge. Apparently, the ICJ shifts the emphasis depending on the matter concerned: ICJ (27 Aug. 1952), ICJ Reports 1952, 176 (189) *[US Nationals in Marocco]* applying a historical interpretation as opposed to ICJ (21 June 1971), Gen.List no. 53, ICJ Reports 1971, 16 *[Namibia, S.W. Africa]* applying a "dynamic" interpretation.

60 As legal philosophers elaborate, the law is a "teleological creature". See *Binder*, "Philosophie des Rechts" (1925), at p. 240.

purpose of the treaty and the intents of the drafters and signatories is considered irrelevant *(ut res magis valeat quam pereat)*[61] .

Nevertheless, these *bona fides* interpretations are strictly limited by the principle and the fact of state sovereignty. There is no authority superior to states, and states waive as little sovereignty as necessary to serve the particular purpose of the treaty. Thus any implicit waiver of sovereignty, any extension of treaty regulations by the method of legal analogy, and any conclusions *e contrario* are to be applied only to a *very limited* extent, if at all[62] . The maxim governing the interpretation is to the favor of the state that is bound to any obligation under the treaty: *interpretatio in favorem debitoris, in dubio mitius.*

At any rate, since *justitia remota quid sunt regna nisi magna latronica*[63] , the collective individualism of the international community leaves the interpretation of international legal instruments to the "egocentered" states. Accordingly, due to the absence of a sophisticated legal methodology, international law may well be characterized as an "archaic province of law", i.e. as a little sensitive, "gross bulk of law"[64] . It is certainly the province of law where the *normative forces of the facts*[65] are the least camouflaged and most bluntly visible. However, these aspects coincide with a

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61 PCIJ (28 June 1919), PCIJ A/B no. 6, at. p. 25 [Polish minorities]. *Rouyer-Hameray*, "Compétences implicites org. des organisations internationales" (1962), at p. 91 ; *Seidl-Hohenveldern*, "Völkerrecht" (1994), no. 348 (at p. 96).

62 *Bleckmann*, "Analogie im Völkerrecht", in: Archiv für Völkerrecht, Bd. 17 (1977/78), 161 (169); *Seidl-Hohenveldern*, "Völkerrecht", no.s 332-351 (pp. 94 *et seq.).Raftopoulos*, Inadequacy of the Concept of Analogy in the Law of Treaties (1990); *McDougal/Lasswell/Miller*, The Interpretation of Agreements and World Public Order (1993), pp. 205 ff.; *Rest*, Interpretation von Rechtsbegriffen in internationalen Verträgen (Diss 1971), ch. IV; *Ress/Schreuer*, Wechselwirkung zwischen Völkerrecht und Verfassung bei Auslegung, BerDGVR 23 (1981), pp. 242 ff.

63 *Augustinus*, "De civitate Dei", vol. IV, para. 4.

64 *Bueckling*, "Die Freiheiten des Weltraumrechts und ihre Schranken", in: *Böckstiegel/Benkö*, "Handbuch des Weltraumrechts" (1991), 55 (at p. 73) and *supra*.

65 *"Normative Kraft des Faktischen"*. The phrase is often ascribed to *Georg Jellinek*, "Allgemeine Staatslehre" (3 ed., 1914), at p. 337. *Jellinek* already discussed this notion with respect to international law in "Die Lehre von den Staatenverbindungen" (1882), at pp. 20 ff. (giving further back references). Although he denies a "merely mechanical definition of sovereignty as a sum of single sovereign acts" *(ibd.* at p. 20), he recognizes that "the facts have their significance in 'legal reality' of the states as well as of the individuals [...]. For the recognition of a sovereign it can be demanded that sovereignty is in fact vested with him" *(ibd.* at pp. 22 *et seq.)*. ["Die mechanische Definition der Souveränität als einer Summe einzelner Hoheitsrechte ist daher nicht nur theoretisch unrichtig, sondern auch praktisch unhaltbar." (p. 20) - "[A]llerdings hat das Factische im Rechtsleben der Staaten seine Bedeutung so gut wie im Leben der Individuen [...], es kann zur Anerkennung eines Trägers der Souveränität gefordert werden, dass er dieselbe auch factisch besitze."
The notion of the *normative forces of the facts* played an important role in the controversy between *Hans Kelsen* and *Carl Schmitt* in the 1920s; *the normative forces of the facts* are most strongly and most visibly displayed in *Carl Schmitt*, "Das Problem der Souveränität als Problem der Rechtsform der Entscheidung", in: *id.*, "Politische

tendency having been observed in some jurisdictions[66] that *bona fides* has become a source of the law courts' competency to create law in order to overcome the *horror vacui,* which is allegedly vested in non-regulated areas of law, even though traditionally a law court *"ius facere non potuit"*. This phase was coined with respect to the Roman *praetor* who, although he was *not* supposed to create but *only to apply* law, derived a considerable law-making power from the fact that he could use *bona fides* wherever he found a gap in the legal provisions. This trend finds its confirmation e.g. in the Swiss Civil Code *(Schweizerisches Zivilgesetzbuch, ZGB)* asking the judge to fill the code's gaps, as would have been done by the legislator if it had been faced with a specific case at stake[67]. Methods to fill gaps always imply an evaluation, which is an outcome of a process influenced by subjectivisms, education, socio-economic and cultural background, etc. If, however, the observed trend to fill gaps in law is in fact happening, i.e. it is a reality, then the link to the *normative forces of the facts*, although still under recognition of the principle of international law that states do not want to be bound further than explicitly admitted, will be that the person who *defines* the matter at issue also *governs the case* and its outcome[68]. Especially in US American air law, the way to a proper interpretation was only recently found (again), when the Supreme Court, under the influence of *Justice Scalia,* promoted (as to the *Warsaw Convention 1929)* that "[b]ut where the text is clear, as is here, we have no power to insert an amendment"[69], as had been done in earlier decisions overruled by the one quoted from[70].

Theologie", ch. II, pp. 30-33; their philosopical contence is given in *Carl Schmitt,* "Politische Theologie", *ibd.*, ch. III, at pp. 42 *et seq.*

Sometimes the notion is also referred to as *legal facticism* or *legal phenomonologism*. That there is any *normative*, i.e. *legally* relevant force vested in the facts, must of course, be subject to *decisive objection*. See *Binder,* Philosophie des Rechts (1925), esp. pp. 212-222. At pp. 214 *et seq., Binder* rejects *Puchta's* approach, instrumentalizing such a *facticistic* or *phenomenologistic* apporach.

66 *Bueckling*, "Die Freiheiten des Weltraumrechts und ihre Schranken", in: *Böckstiegel/Benkö*, "Handbuch des Weltraumrechts" (1991), 55 (at p. 69).

67 See also the anlalysis by *Hedemann,* Die Flucht in die Generalklauseln (1933).

68 "The Sovereign is who defines the facts" ["Souverän ist, wer den Sachverhalt definiert" - translation added] says *Schelsky*, Macht durch Sprache, *Deutsche Zeitung* of 12 April 1974.

69 *Scalia J.* in *Chan v. Korean Air Lines* (1989), 21 Avi. 18,228 (18,233 *et seq.)*. In *Zicherman v. KAL* (1996), 116 S.Ct. 629, per *Scalia J.*, this tendency was followed. This dendency was indicated even before in *TWA v. Franklin Mint* (US Supr.Ct. 1984), 18 Avi. 17,778 *per O'Conner J.*

70 The so-called "Lisi litigation" which had served as a leading case for years was overruled. As to *"Lisi"* see *Lisi v. Alitalia* (2nd Cir. 1966), 9 CCH Avi. 18,374. For a brief analysis see *Ehlers,* "Die Entscheidung des U.S. Supreme Court vom 18. April 1989 in Sachen Chan gegen Korean Air Lines zur Haftungsbegrenzung des

(2) The Uniform Private Law Aspect

In the last paragraph, no distinction has been drawn between public and private international law. Conventions governing uniform private international law are created according to the principles of public international law. As pointed out above, at the interface between private law and public international law, a proper approach to a legal problem solution might be blurred. The necessity for a clear methodology, sufficiently sophisticated to govern the *specifica* of *private* international law, therefore, becomes visible.

By contrast against pure public international law, private law conventions are usually of a *dichotomic* character[71] : they contain public law as far as the obligations of states to pursue and serve the purpose of the treaty is concerned, and they convey the private law rules as they are to be uniformly created.

With respect to the public law part, principles of public international law apply without prejudice. This will be of special significance when the role of the treaty language and its effects on interpretation is discussed[72] , because if such a provision is located in a provision belonging to the public international law section of the treaty then the influence of this provision on the interpretation of the private law provisions may be somewhat different from a comparable provision in the private law section.

With respect to the private law part, the entire private law methodology applies, i.e. the literal rule (verbatim interpretation solely based on the wording); the contextual or systematic interpretation (the context of the norm in the system of provisions); the historic interpretation (the intents of the drafters and signatories, *travaux préparatoires)*; and the teleological interpretation (the purpose of the treaty,

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Luftfrachtführers", 39 ZLW (1990), 56. Also going too far: *Stevens J.* in a dissent in *TWA v. Franklin Mint* (US Supr.Ct. 1984), 18 Avi. 17,778.

71 With respect to the *Warsaw Convention* see the excellent discussion by *Sand*, "Choice of Law in Contracts of International Carriage by Air" (Thesis, IASL, McGill, 1962); *Dettling-Ott*, "Internationales und schweizerisches Lufttransportrecht" (1993), at pp. 57 ff.
On the history of treaties conveying private law see *Majoros*, "Konflikte zwischen Staatsverträgen auf dem Gebiete des Privatrechts", 46 RabelsZ (1982), 84.

72 *Infra.*

the goal of a specific provision at issue)[73] - it may also be added that analytical observersations ascertain some "uncertainties with respect to the method of interpretation of uniform law the filling of its gaps in common law jurisdictions"[74]. Especially the historical context may be regarded with respect to conventions governing related matters. The *Warsaw Convention 1929* e.g. was considerably modeled after the *Hague Rules*[75] governing maritime transportation[76]. One may also consult comparative analyses of certain principles reappearing in a number of conventions on related matters[77]. As far as sources beyond the text of the convention itself are concerned, according to a unanimous view of all major legal systems, the interpreter may look at the *travaux préparatoires*, legal decisions of law courts, both domestic and foreign, and legal writings ("la doctrine", as *Lord Diplock* puts it[78])[79].

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73 *Fothergill v. Monarch* (H.L.), [1980] 2 All E.R. 696. *Air France v. Saks* (US Supr.Ct. 1985), 18 CCH Avi. 18,538 = 470 U.S. 392; *Chan v. KAL* (US Supr.Ct. 1989), 21 CCH Avi. 18,228 = 39 ZLW (1990), 59; *Eastern Airlines v. Floyd* (US Supr. Ct. 1991), 23 CCH Avi. 17,367 = 499 U.S. 530; aff'd in pt., rev'd in part, remanded, ibd.17,811.
Mann, "The Interpretation of Uniform Statutes", 62 L.Q.R. (1946), 278; *Bayer*, "Auslegung und Ergänzung international vereinheitlichter Normen durch staatliche Gerichte", 20 RabelsZ (1955), 603; *Guldimann*, "Internationales Lufttransportrecht" (1965), Einl., no.s 32-45 (pp. 12 ff.); *Giemulla/Schmid/Ehlers*, "Warschauer Abkommen", Einl., no.s 32 ff.; *Kronke*, "Warschauer Abkommen", in: "Schlegelberger - Kommentar zum Handelsrecht", Frachtrecht (pending publication), comments on Art. 1.

74 See *Diedrich*, "Lückenfüllung im internationalen Einheitsrecht", IPRax 1995, 353 (356 *et seq.*): "[...] insbesondere wegen der in common law-Staaten anzutreffenden Unsicherheit über die zur Auslegung und Lückenfüllung [von Einheitsrecht] anzuwendenden Methode [...]" [English translation supplied]. *Diedrich, ibd.*, also provides for further references.

75 *Supra.*

76 See the statements of *Sir Alfred Dennis* at the Conference in Warsaw 1929, in: *Gouvernement de Pologne (ed.)*, "II Conférence Internationale de Droit Privé Aérien, Varsovie 4-12 Octobre 1929, Procés-Verbaux" (1930), at p. 29. See also *ibd.* at pp. 15; 164; and the official report of the Swiss rapporteur *Pittard* in 1 Zeitschr.f.ges.LuftR (1927/28) - Beilage (Attachment), at pp. 8 ff. (10 f.). See further *Ripert*, "La Convention de Varsovie du 12 octobre 1929 et l'unification du droit privé aérien", 57 Clunet (1930), 90 (at pp. 98; 100); *Goedhuis*, "La Convention de Varsovie" (1933), at pp. 174 ff.; *Milde*, "The Problems of Liabilities in International Carriage by Air" (1963), at p. 42; *Sand*, "Zum Mythos der Verschuldenshaftung", 17 ZLW (1968), 103 (104 f.); *Miller*, "Liability in International Air Transport" (1977), at pp. 58 ff.

77 In transportation law e.g. the notion of fault liability accompanied by a reversal of the burden of proof or the principle of limitation of liability, rendering specific importance to willful misconduct as a prerequisite to overcome the limitation, appear in a number of conventions: Art. 17 CMR; Art. 26 CIM; Art. 16 MT Conv.; Art. 16 CMNI. For comparative analysis see *Kadletz*, "Haftung und Versicherung im internationalen Lufttransportrecht" (pending study - Dr. iur. Dissertation, submitted to the Faculty of Law at Ruprecht Karls University, Heidelberg), at pp. 46 ff.; 114 ff.

78 *Lord Diplock* in *Fothergill v. Monarch* (H.L.), [1980] 2 All E.R. 696, at p. 704.

79 See *Fothergill v. Monarch* (H.L.), [1980] 2 All E.R. 696, at p. 702 f. *per Lord Wilberforce*, citing also from a decition of the French decision of the *Cour de Cassation* giving references as to German, Italian, Dutch, and Begian law; *ibd.* at pp. 704; 708 *per Lord Diplock*; *ibd.* at p. 716 *per Lord Scarman*. See *Zicherman v. KAL* (1996), 116 S.Ct. 629 per *Scalia J.*; *Eastern Airlines v. Floyd* (US Supr.Ct. 1991), 23 CCH Avi. 17,367 = 499 U.S. 530 per *Marshall J.*; *Chan v. KAL* (US Supr.Ct. 1989), 21 Avi. 18,228 *per Scalia J.*; *TWA v. Franklin Mint* (US Supr.Ct. 1984), 18 Avi. 17,778 *per O'Conner J.*; *Day v. TWA* (1975), 528 F.2d 31.

The methodological instrument of *analogy*, however, might require a more careful approach. In no way may an intentional omission of the unification of law by the legislator be neglected by an energetic, creative thrust of adjudicative or executive powers[80]. Generally, the aforementioned trend to expand law[81] fosters the latent danger that an excessive use of analogies exhaustively extends the scope of application of uniform law. To pick out only two examples: In the USA international treaties are the superior law of the land[82], and in Germany treaty law becomes an equal part of national law[83]. In both cases the private law as conveyed by the treaty becomes a *lex specialis* within its scope of application. An excessive use of analogies, therefore, would completely derogate domestic law which would otherwise be applicable in addition to the uniform rules. Sometimes this may well be the purpose of the treaty. However, if states become active in the international arena, such an important aspect as to how to understand and to handle the law of the treaty would certainly have to be *unambiguously expressed* in the treaty itself. In the absence of such a provision, analogies must be used very carefully, and only after a very thorough evaluation of the section or provision at issue. An expansion of the law as unified by a convention to issues not addressed by the convention, as proposed as a general method by some continental European writers, a so-called development of unified law exclusively within the autonomous realm of the unifying convention[84], must be rejected as to this generality, because it constitutes a rule of excessive analogy *(Kropholler*, therefore, points out very correctly that the application especially of teleological rules - which can be used to expand the scope of legal regulations - is not to exceed the framework of the law as unified by the convention[85]). A treaty such as the *Warsaw Convention 1929* which carries the title "for the Unification of *Certain* Rules"[86] prescribes that there be some room to apply domestic law in addition

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80 See *Chan v. KAL* (US Supr.Ct. 1989), 21 Avi. 18,228 *per Scalia J.*; *TWA v. Franklin Mint* (US Supr.Ct. 1984), 18 Avi. 17,778 *per O'Conner J.*; *Mankiewicz*, "The Liability Régime of the International Air Carrier" (1981), at pp. 15 *et seq.*; 161 ff.; *Lukoschek*, "Das anwendbare Recht bei Flugzeugunglücken" (1984), at p. 27; *Dettling-Ott*, "Internationales und schweizerisches Lufttransportrecht" (1993), at p. 64.

81 *Supra.*

82 US Constitution, Art. VI sec. 2.

83 Arts. 59, 32 Grundgesetz. For a discussion see *Seidl-Hohenveldern*, "Völkerrecht" (1994), no.s 576-595 (pp. 148 ff.); under no.s 596-599 (pp. 151 *et seq.)* the similar legal situation in Austria is decribed.

84 See *Diedrich*, "Lückenfüllung im internationalen Einheitsrecht", IPRax 1995, 353 (at pp. 355; 357), supplying further references.

85 *Kropholler*, "Internationales Einheitsrecht" (1975), at pp. 292 ff.

86 Emphasis added.

to it. However, it does not propose to what extent treaty law governs the contract of carriage, and when or where domestic law steps in. The *lacunae* of the Convention encompass e.g. the entire aspect of the elements, which constitute a contract of carriage. Apart from this kind of rather obvious gap, there are gaps which require a very sophisticated approach. For instance, the question whether the term "damages", as foud in Arts. 17 and 18 of the *Warsaw Convention 1929,* is subject to an interpretation within the uniform Conventional framework or whether it merely constitutes a reference to domestic law and its notion of recoverable damages[87].

Another example directly affecting conflicts rules is that the *Warsaw Convention 1929* explicitly refers to the *lex fori*[88] in certain singular provisions. Does this constitute a principle under which all aspects of the contract of carriage not dealt with by the Convention itself are governed by the *lex fori*? Or do we merely face sporadically disseminated provisions which might, to the contrary, be considered exceptional?[89] Again, the answer to this question requires a thorough and methodical approach.

dd) The Treaty Language

The drafting language plays an important role in the course of interpretation of a treaty. Frequently misunderstood - especially with respect to the French drafting language of the *Warsaw Convention 1929* - the effect of the language on the interpretation of the treaty and on the identification of *lacunae* requiring a conflicts of laws approach must be considered briefly within the framework of international law.

(1) Treaty Law and Its Links to National Law

87 *Zicherman v. KAL* (1996), 116 S.Ct. 629. *Kadletz*, "*Fiat lux* - U.S. Supreme Court um Grenzziehung zwischen Einheitsrecht und IPR bemüht" (pending publication, envisaged for IPRax 1996, no. 5).

88 Art. 21 (contributory negligence), Art. 22 (1) (periodical payments), Art. 25 (1) (fault equivalent to willful misconduct), Art. 28 (2) (judicial procedure), Art. 29 (2) (method of calculation for the period of limitation); and Art. 22 (4) as amended by the *Hague Protocol 1955* (compensation for litigation expenses).

89 For a discussion see *infra.*

Since only states are subjects in the realm of public international law[90] the binding effects of treaties solely strike upon states. By contrast, private law is aimed at an application between individuals who can merely be bound by state legislation, or under exceptional circumstances by legislative powers of a supra-national institution such as the European Union. In order to render binding force upon private individuals to a treaty its provisions must be transferred into inter-individual law[91] . Sometimes treaties can provide for self-executing norms which become binding upon their ultimate addressees without further national legislation[92] - this, however, is not the case with private international air law conventions. As opposed to *Mankiewicz* who once wrote that "by ratification of conventions, the ratifying state enacts the agreed rules as national law and does not assume any further duty"[93] , *Rinck* is quoted in the *Minutes* of the *Hague Conference* of 1955[94] with the words: "It was generally agreed that all conventions on the unification of private of private law obliged the states only to transform the rules into national law as was expressly said in Article 1 of the Rome Convention of 1933". This statement is further supported by Art. XV of the *Geneva Convention on the International Recognition of Rights in Aircraft of 1948*[95] .

The ratification of a private international air law convention, therefore, does not suffice to enact its private law provisions; it merely creates the obligation of the High Contracting Parties to bring these

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90 For a detailed discussion see *Seidl-Hohenveldern*, "Völkerrecht", no.s 600-951 (at pp. 153-212), also dealing with the exceptions.

91 For the United States see *Foster v. Neilson* (US Supr.Ct. 1829), 2 Pet. 253 = 7 L.Ed. 415: "When the terms of the stipulation import a contract, when either of the parties engages to perform a articular act, the treaty addresses itself to the political, not to the judicial department; and the legislature must execute the contract before it can become a rule for the Court."

92 According to Chief Justice *Marshall* in *Foster v. Neilson* (US Supr.Ct. 1829), 2 Pet. 253 = 7 L.Ed. 415, this is the case "whenever it operates of itself, without the help of any legislative provision". Generally see *Seidl-Hohenveldern*, "Völkerrecht" (1994), no.s 556-575 (at pp. 143 ff.). See also *Riese*, "Luftrecht" (1949), at pp. 57 ff. In *Indemnity Insurance Co. v. Pan Am* (S.D.N.Y. 1945), [1945] U.S.Av.R. 52 (54), it was stated that "whether a treaty is self-executing or requires implementing legislation depends upon its terms, whether they call for further action or whether they are enforceable without legislation". In the same decision, quoting Chief Justice *Stone* in *Aguilar v. Standard Oil Co.* (US Supr.Ct. 1943), 318 US 724 (738) = 87 L.Ed. 1107, it was held that a treaty may well be self-executing in part only.

93 *Mankiewicz*, "Rechtsnormenkonflikte zwischen dem Warschauer Abkommmen und dem Haager Protokoll", 5 ZLR (1956), 246 ff. (249). Translation: "Conflits entre la Convention de Varsovie et le Protocole de la Haye", 19 Rev.Gen.Air (1956), 239 ff.

94 Minutes I (ICAO-Doc. 7636) at p. 291.

95 Art XV: "The Contracting States shall take such measures as are necessary for the fulfilment of the provisions of this Convention and shall forthwith inform the Secretary General of the International Civil Aviation Organization of these measures."

provisions into force[96]. The modalities of implementation of the treaty provisions vary from state to state[97]. Some merely adopt international law, others transform it[98].

Courts of numerous states have ruled upon the exact legal foundations of their opinion on *Warsaw* cases as an example of an international private air law convention.

In one of the earliest decisions concerning the uniform private air law, *Grein v. Imperial Airways*, Lord Justice *Green* held:

> The rules laid down are in effect an international code declaring the rights and liabilities of the parties to contracts of international carriage by air; and when by the appropriate machinery they are given the force of law in the territory of a High Contracting Party they govern (so far as regards the courts of that Party) the contractual relations of the parties to the contract of carriage of which (to use language

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96 While the *Geneva Convention 1948* explicitly imposes this obligation, the *Warsaw Convention 1929* does not contain a similar article. It may further be taken into account that private law conventions do generally not impose on states the same degree of adherence after signing and prior to ratification as do treaties purporting pure public international law (Art. 18 (c) of the *Vienna Convention on the Law of Treaties* of 1969). *Lord Atkins* arrived in *Philippson v. Imperial Airways*, [1939] U.S.Av.R. 63 (72) at the conclusion that "there is no obligation of any kind to ratify, and even after ratification there was complete freedom to 'denounce', i.e. to withdraw from the [Warsaw] Convention". However, in order to become released from the obligation obligation established by a states' expression of its consent to be bound internationally, the formal denunciation cannot be deemed dispensable, even though there might be no further obstacles or requirements conditional upon withdrawal by international law. As far as the *Warsaw Convention 1929* is concerned in particular, one must regard the purpose of the convention. It is to unify certain rules relating to international carriage by air. In that it has been agreed that private air law conventions require national implementation, the public international law part of the convention would be meaningless if a ratification would not be deemed to imply an obligation (which is not specified as to further details, though) of states to bring them into force. This is an exemplary practical application of a teleological interpretation and the maxim *ut res magis valeat quam pereat*. See *supra*.
That a private air law convention obliges states to subject cases falling within the scope of the convention to conventional law is also recognized by *Mankiewicz*, "Rechtsnormenkonflikte zwischen dem Warschauer Abkomme und dem Haager Protokoll", 5 ZLR (1956), 247; *Dettling-Ott*, "Internationales und schweizerisches Lufttransportrecht", at p. 57.

97 See the list of examples rendered by *Sand*, "Choice of Law in Contracts of International Carriage by Air" (Thesis, IASL, McGill, 1962), at pp. 17-21; *Dettling-Ott*, "Internationales und schweizerisches Lufttransportrecht" (1993), at pp. 59 ff.

98 An adoption creates a certain dependency upon the international provision, i.e. if e.g. the adopted treaty ceases to exist also the validity of the nationally adopted piece of legislation has come to an end. By contrast, a proper transformation creates law at a second (*scil.* the national) level which is of an independent existence from the treaty. The technique applied depends on the theory adhered to or favoured by the constitutional provisions of a specific state: The monistic approach consideres (public) international law and national (domestic) law as a single set of legal provisions. See esp. *Seidl-Hohenveldern*, "Völkerrecht", no.s 539-575 (at pp. 140 ff.). The dualists perceive international law and national law as two separate sets of legal norms. Their major promoters were *Anzilotti* and *Triepel*, with respect to air law this doctrine forms a foundation for *Riese*, "Luftrecht" (1949), at pp. 57 ff., and *Sand*, "Choice of Law in Contracts of International Carriage by Air" (Thesis, IASL, McGill, 1962), at pp. 17-21. Constrasting from a radically monistic approach (e.g. *Scelle)*, the more and more prevailing view appears to be a moderate monism as applied by *Seidl-Hohenveldern*, *ibd.* Generally see further *Bothe/Vinuesa* (ed.), "International Law and Municipal Law" (1982); *Conforti*, "International Law and Domestic Legal Systems" (1993). See also *Guggenheim*, "Völkerrechtsschranken im Landesrecht" (1955).
With respect to private air law see the examples in the brief summary of *Dettling-Ott*, "Internationales und schweizerisches Lufttransportrecht", at pp. 59 ff.

> appropriate to the legal systems of the United Kingdom) they become statutory terms[99].

In *Fothergill v. Monarch*, this aspect was treated as a matter of course by *Lord Wilberforce*:

> It is first necessary to establish the nature and status of art 26 [*scil.* of the English *Carriage by Air and Road Act 1979, s. 2*][100]. The Warsaw Convention of 1929, which contained an art 26 in similar form, was agreed to in a single French text, deposited with the government of Poland. It was introduced into English law (not being, of course, self-executing) by the Carriage by Air Act 1932.[101]

In subsequent decisions English courts have taken this matter for granted[102].

Similarly, in *United International Stables Ltd. v. Pacific Western Airlines* the Supreme Court of British Columbia merely mentioned as an *obiter dictum* that "central to the matter is the Carriage by Air Act, R.S.C. 1952 as amended, 1963 (Can.), c. 33". It then quotes *Greene J.* in *Grein v. Imperial Airways*, stating: "The Carriage by Air Act, 1932, was passed for the purpose of giving binding effect in this country to the Convention signed at Warsaw [...]", thus implying that the transforming legislation is to decide the case[103].

I n the Australian decision *Georgopoulos & Anor v. American Airlines*[104], Judge *Ireland* placed remarkable emphasis on the fact that it is national law that governs *Warsaw* cases. The judge deviated from a US Supreme Court precedent rendered fresh from the press[105]. The issue at stake was the meaning of "bodily injury" in Art. 17 of the *Warsaw Convention 1929*. The Australian court held that "the applicable law is Australian law"[106].

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99 *Grein v. Imperial Airways* (C.A. 1936), 1 CCH Avi. 62 (74).

100 Addendum in brackets provided.

101 *Fothergill v. Monarch Airlines* (H.L.), [1980] 2 All E.R. 696 (699).

102 See e.g. *Swiss Bank Corp. v. Brink's-MAT Ltd.* (1986 Q.B.D.), [1986] 2 All E.R. 1 per *Bingham J.*

103 *United International Stables Ltd. v. Pacific Western Airlines Ltd.* (B.C. Supr.Ct. 1969), 5 D.L.R. 3rd 65 (67; 68), per *Seaton J.* See also *Stratton v. Trans Canada Airlines* (Dominion of Canada, B.C. Supr.Ct. 1961), [1961] U.S.Av.R. 246.

104 *Georgopoulos & Anor v. American Airlines* (N.S.W. Supr.Ct.), judgment of 10 Dec. 1993, no. S 11422/1993; in part reproduced in Lloyd's Aviation Law of 15 Jan. 1994. Hereinafter it is referred to the original document of the judgment as issued by the court.

105 *Eastern Airlines v. Floyd* (1991), 23 CCH Avi. 17,367 = 499 U.S. 530; 17,811.

106 *Georgopoulos v. AA*, at p. 11.

This means that the law governing the case is the Australian *Civil Aviation (Carriers' Liability) Amendment Act* (Cth) of 1991[107], being the internal Australian legislation transforming the *Warsaw System* as adhered to by Australia. The court arrives at "the conclusion that the Anglo-Australian approach to nervous shock is such that it is to be classified as 'bodily injury' within the meaning of the *Civil Aviation (Carriers' Liability) Act.*"

As the inquiry conducted by *Sand*[108] shows, early US American decisions have refrained from attributing private international air law conventions operative effects in absence of implementing legislation. In the cases of *Robertson v. General Electric Co.*, *Choy v. Pan Am*, and *Wyman v. Pan Am* the courts required that there be implementing legislation in order to derive rights from the Convention[109]. The approached was completely reversed in 1956 with *Noël v. Linea Aeropostal Venezolana*[110]. As of yet, none of the US Supreme Court decisions with respect to the *Warsaw System* or any other private international air law convention has addressed this issue[111]. The tendency

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107 *Ibd.* p. 12 *et seq.*

108 *Sand*, "Choice of Law in Contracts of International Carriage by Air" (Thesis, IASL, McGill, 1962), at p. 18.

109 *Robertson v. General Electric Co.* (4th Cir. 1929), 32 F.2d 495, although not an air law case, had been proposed to serve as a precedent by *Lissitzyn*, "The Legal Status of Executive Agreements on Air Transportation", 17 JALC (1950), 444.
In *Choy v. Pan Am* (S.D.N.Y. 1942), [1942] U.S.Av.R. 93 (98)*Clancy*, D.J., held :
"There is no enabling act vesting the ownership of the cause of action stated by the Warsaw Convention nor even stating who may be thought to be injured by a death and, though the liability stated in Art. 17 is part of the treaty which was adopted, we do not understand how it can be defined or enforced without statutory assistance which it has not as yet received."
In *Wyman v. Pan Am* (N.Y. Supr.Ct. 1943), [1943] U.S.Av.R. 1 (4), the court found:
"The right to any recovery in this action thus must depend on some statute."

110 *Noël v. Linea Aeropostal Venezolana* (Supr. Ct. N.Y. 1956), 144 F.Supp. 359 = 4 CCH Avi. 18,204; aff'd (2d Cir. 1957), 5 CCH Avi. 17,544 = 247 F.2d 677 = [1957] U.S.Av.R. 274; cert. den. (1957), 355 U.S. 907. It was stated:
"While there was at first some doubt as to whether the Convention was self-executing to any extent *(Choy v. PanAm)*, there is no doubt at this time that at least insofar as the Convention creates a rebuttable presumption of liability upon the happening of the accident (Art. 17) and a limitation thereof except upon the showing of willful misconduct (Art. 25) that it is self-executing."
Similarly, *Rifkind*, D.J., held in *Indemnity Insurance Co. v. Pan Am* (S.D.N.Y. 1945), [1945] U.S.Av.R. 52 (54):
"As I read the treaty and particularly the provisions pleaded in the answer I construe them as self-executing."

111 *Zicherman v. KAL* (1996), 116 S.Ct. 629 per *Scalia J.*; *Eastern Airlines v. Floyd* (US Supr.Ct. 1991), 23 CCH Avi. 17,367 = 499 U.S. 530 per *Marshall J.*; *Chan v. KAL* (US Supr.Ct. 1989), 21 Avi. 18,228 *per Scalia J.*; *Air France v. Saks* (US Supr.Ct. 1985), 18 CCH Avi. 18,538 = 470 U.S. 392; *TWA v. Franklin Mint* (US Supr.Ct. 1984), 18 Avi. 17,778 *per O'Conner J.*

and undertone of these decisions, however, seem to suggest a literal application of the US Constitution[112] as to this matter and thus some support to *Noël* [113].[114]

Most states seem to require at least an adoption[115] of the conventional provisions in order to render them operative[116]. *Romanelli* observes: "The Warsaw Convention always applies as internal law of the Italian legal system."[117], as was impressively demonstrated when the *Corte costituzionale* declared the adopting legislation concerning the *Warsaw Convention*[118] contrary to the Italian Constitution[119].[120]

Accordingly, what emerges subsequently to the process of signing a private air law convention is a variety of legislative activities on the national level, creating uniformity by the parallel[121] enacting of

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112 Art. IV, sec. 2 of the US Constitution provides that "[...] all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

113 In federal Appelate Court decisions, too, solely brief notes are dropped on how the *Warsaw Convention* is to be treated. A typical phrase is found e.g. in *Abramson v. JAL* (3rd Cir. 1984), 18 CCH Avi. 18,064 (18,065) per *Sloviter*, Ci.J.: "The circumstances under which under which a carrier may be liable to its passengers in international transportation are specified in Art. 17 of the Warsaw Convention, *a treaty of the United States*." [emphasis added]. See also *DeMarines v. KLM* (E.D.Pa. 1977), 14 CCH Avi. 18,212 (18,213): "The Warsaw Convention is a treaty which applies to all international air transportation."

114 Austria e.g. considers the *Warsaw Convention* a self-executing treaty. See *OGH Wien* (15 Dec. 1951 - 2 Ob 293/61 and 2 Ob 294/61), 11 ZLR (1962), 150 (152) *(Heitz v. Allgemeine Unfallversicherungsanstalt)*, and *Ebner*, "Österreich und das Warschauer Abkommen", 1 Zeitschr.f.VerkehrsR (1956), 145.

115 As to the notion of adoption contrasted to transformation *supra*.

116 Cf. the summary provided by *Sand*, "Choice of Law in Contracts of International Carriage by Air" (Thesis, IASL, McGill, 1962), at p. 18.

117 *Romanelli*, "Il trasporto aereo di persone" (1959), at p. 207.

118 Legge no. 841 of 19 May 1932, Art. 1 and legge no. 1832 of 3 Dec. 1962, Art. 2.

119 *Cost.* (6 May 1985), no. 132, Riv.dir.int.priv.proc. 1985, 325 = IATA Legal Inform. Bulletin no. 641 (Oct. 1985), p. 251 *(Coccia v. Turkish Airlines)*. For detailed discussions see *Ballarino/Busti*, "Diritto aeronautico e spaziale" (1988), at pp. 653 ff.; *Guerreri*, "The Warsaw System Italian Style: Convention Without Limits", 10 Air Law (1985), 294 ff.; *Kuhn*, "Keine Haftungslimitierung nach Art. 22 I WA, WA/HP vor italienischen Gerichten", 35 ZLW (1986), 99 ff.; *Brand*, "Verfassungswidrigkeit der Haftungsbegrenzung im internationalen Lufttransport", IPRax 1987, 193.

120 The terminology as used by the different authors quoted in the footnotes above may require a short note: *Sand*, "Choice of Law in Contracts of International Carriage by Air" (Thesis, IASL, McGill, 1962), pp. 18 *et seq.* seems to understand the term *transformation* as a general description of internally enacting treaty law; with respect to Italy, he infers from the decision in *Palleroni v. SANA*, 8 Rev.gén.dr.aérien (1939), 309 (311) that Italian courts consider the *Warsaw Convention* self-executing, however, again he refers to Italy under the headline "Different Effects of Transformation". Some of the commentators on *Cost. in re Coccia v. Turkish Airlines (supra)*, also use the term *transformation* with respect to the Italian statutes (specified *supra)*. The terminology used by *Seidl-Hohenveldern*, "Völkerrecht", no.s 539-575 (pp. 140-148) distinguishes *transforming* legislative action and *adopting* legislative action. Cf. also *supra*.

121 *Sand*, "Choice of Law in Contracts of International Carriage by Air" (Thesis, IASL, McGill, 1962), at p. 26 prefers the phase "parallel legislation" in comparison to some legislation in the Scandinavian states from the term "uniform law".

statutes of the same basic substance[122] (states may as well enact supplemental legislation[123] "on autarchic grounds"[124] which is not only deemed useful[125] but sometimes considered necessary in order to render certain provisions of a convention operative[126]).

(2) National Laws and Their Link to the Treaty Language

At the first glance, it seems that the internally enacted, transformed or adopted uniform law can safeguard the universal application of an international private air law convention's provisions[127]. Differences that could eventually amount to true conflicts of several such statutes seem to hibernate in latency[128].

The source of the real problem that has to be faced, however, dates back to the beginning of time when, at Babel, mankind was struck by the malediction of having to operate with countless different languages as a divine punishment. Each sovereign state has at least one official language, and despite

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122 In *Grein v. Imperial Airways* (C.A.), [1936] U.S.Av.R. 184 (235) per *Greene*, L.J., it was held:
"By `unification of certain rules` is clearly meant `the adoption of uniform rules relating to international carriage by air` that is to say, rules which will be applied by the courts of the High Contracting Parties in all matters where contracts of international carriage by air come into question."
Riese, "Luftrecht" (1949), at p. 63 states:
"Damit wird aber kein `internationales Recht`, sondern nur ein international gleichförmiges Recht der einzelnen Vertragsstaaten geschaffen". ['It is not `international law`, but merely an internationally uniform law of each single state party created.' - translation added].

123 I.e. legislation in addition to enacting the provisions of the conventional law which further specifies and complements it. A different kind of legislation is dealt with when states declare the convention be the applicable law also in cases of purely domestic carriage.

124 *Rabel*, "Conflict of Laws" III (1950), at p. 306.

125 *Goedhuis*, "La Convention de Varsovie" (1933), at p. 263; *Blanc*, "La portée de l'application des lois nationales dans les premières conventions internationales de droit privé aérien", 5 Rev.gén.dr.aérien (1936), 386 ff. (389).

126 *Calkins*, "The Cause of Action under the Warsaw Convention", 26 JALC (1959), 217 ff. (232) deems Art. 24 of the *Warsaw Convention* such a provision. *Sand*, "Choice of Law in Contracts of International Carriage by Air" (Thesis, IASL, McGill, 1962), at p. 116 in n.187 considers such view that otherwise the entire convention would be rendered inoperative "conceivable". At any rate, today's legal systems' private laws are far enough developed to provide for acceptable solutions by their national law, regardlessly. A special implementing legislation with respect to Art. 24 of the *Warsaw Convenion* in order to make it a useable instrument at all, therefore, does not appear a prevailing issue.
See also *Mankiewicz*, "The Liability Regime of the International Air Carrier" (1981), at p. 2; *Dettling-Ott*, "Internationales und schweizerisches Lufttransportrecht" (1993), at pp. 57 *et seq.*

127 In *Nordisk Transport v. Air France* (C.d'A. Paris 1953), 7 Rev.fr.dr.aérien (1953), 105, The Avocat Géneral *Albucher, ibd.* at p. 111, coins the phase "une loi uniforme, universellement applicable".

128 *Makarov*, "Die zwischenprivatrechtlichen Normen des Luftrechts", 1 Zeitschr.f.ges.LuftR (1927/28), 150 (187) applies the term "latente Gesetzeskollision" as had been coined by *Kahn*, "Gesetzeskollisionen", in: *Lenel/Lewald*, "Abhandlungen zum internationalen Privatrecht" (1928), 92.

the fact that due to cultural congenialities and the heritage of colonial imperialism several countries have at least one of their official languages in common, there still remain enough languages to lose oversight. Furthermore, it has been called a "miracle" that, as far as the *Warsaw Convention 1929* is concerned, the three German-speaking countries, Germany, Austria, and Switzerland, managed to agree upon a single common translation[129] - by contrast to some English-speaking countries with respect to which at least a British, an American, and an Irish text exist[130]. The influence of language on thoughts, concepts, and ultimately on facts of life have already been mentioned; it is important to note that it is not only the one who defines the facts who governs a case[131], but also (and probably more obviously) the one who defines the law. The languages which rules are expressed in differ from state to state and from country to country. As a consequence the uniformity disintegrates - and the leviathan awakes as the latent conflicts of state-internal statutes giving effect to uniform law break through[132]. Modestly put, one can agree with *Ripert* that it is "sometimes rather toilsome to translate rules into that have been adopted at an international conference a national law which is influenced by the particular society's spirit"[133]. The scope of the true problem is not outlined by simply regarding the linguistic aspect in itself. It also has to be taken into account that "legal terms are symbols which presuppose the background of a whole legal system in order to make sense"[134].

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129 See *Schweickhardt*, -comment-, ASDA-Bulletin (1959, no. 13), at p. 18.

130 The divergencies of these texts are displayed in *The Warsaw Convention. Relative to International Transportation by Air. Ratified by U.S. Senate, June 15, 1934, Proclaimed by the President, June 27, 1934*, [1934] U.S.Av.R 245. See also *Association of the Bar of the City of New York:* "Report on the Warsaw Convention as Amended by the Hague Protocol", 26 JALC (1959), 255. Sometimes the English and the American translations were considered "substantially the same", *Lord Ormerod* in *Preston v. Hunting Air Transport, Ltd.* (Q.B.D. 1956), 4 CCH Avi. 18,010 (18,012).
In *Holzer Watch v. Seaboard & Western Airlines* (N.Y. City Ct. 1958), 5 CCH Avi. 17,854 = [1958] U.S.Av.R. 142 *Rivers, J.*, held, however, that an American court is only bound by the American translation:
"As translated by the United States Department of State, the Warsaw Convention is the law of the land. The court is thus bound by our official translation without regard to the British translation."

131 *Supra.*

132 The same phenomenon as it appears in maritime law has been referred to as "Statutenkollision". See *Stödter*, "Zur Statutenkollision im Seefrachtvertrag", *Liber Amicorum* for *Albot Bagge* (1956), at p. 220.

133 *Ripert*, "L'unification du droit aérien", 1 Rev.gén.dr.aérien (1932), 251 ff. (259): "On a malheureusement parfois assez de peine à trduire dans une loi nationale, qui doit être inspirée par la génie propre d'un peuple, des règles adoptées dans une conférence internationale à la suite de discussions et de transactions où l'on sacrifice volontiers l'harmonieuse technique et la pureté de la langue." - [Translation provided].

134 *Sand*, "Choice of Law in Contracts of International Carriage by Air" (Thesis, IASL, McGill, 1962), at p. 25.

Thus, in order to give the "uniform" law the legal breath of life it takes more than an ordinary dictionary because the objective is to *translate foreign law into national law*. Since the different legal cultures display a wide variety of different legal notions and institutions, a translation of an international legal instrument can never transfer the provisions of that instrument without deviations from the original, sometimes to a lesser, sometimes, however, to a greater extent.

Two examples illustrate such deviations:

Art. 17 of the *Warsaw Convention 1929* reads in the French format of the original draft[135] "Le transporteur est responsable du dommage [...]", while the translation into English format provides "The carrier shall be liable ...". The French version unambiguously supposes that Art. 17 is a true and independent cause of action. The English wording, however, is less precise and allows for an understanding as to which it only refers to domestic law. Since on the one hand, the *Warsaw Convention 1929* regulates the international carriage by air with respect to its *contractual* implications[136], while on the other hand US common law grants compensation in cases of personal injury or death (and only these circumstances are affected by Art. 17) on *negligence* or *wrongful death statutes* which (being categorized as torts) do not belong into the category of contractual remedies, such an interpretation went well with traditional interpretations of common law by US courts, and was applied accordingly[137]. Due to the obligation to foster uniform interpretation and development of conventional law[138], the US courts have subsequently corrected their understanding and now interpret Art. 17 in accordance with its original meaning[139].

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135 Art. 36 of the *Warsaw Convention 1929*.

136 See Arts. 3, 4 of the Convention, regulating particulars of the documents of carriage, presupposing the existence of a contract of carriage. See *Riese*, "Die internationale Luftprivatrechtskonferenz im Haag zur Revision des Warschauer Abkommens, September 1955", 5 ZLR (1956), 4, pointing out that Article 25 A of the Convention as inserted by Article XIV of the *Hague Protocol 1955* - declaring the liability limits of Art. 22 applicable also to the liability of agents and employees - is a foreign element in the *Warsaw System*, because its substance focusses on contractual issues, while it does not deal with delicts/torts. Very clear as to this distinction *Milde*, "The Problems of Liabilies in International Carriage by Air" (1963) at p. 17.

137 *Noël v. Linea Aeropostal Venezolana* (2nd Cir. 1957), 5 CCH Avi. 17,544 = 247 F.2d 677 = [1957] U.S.Av.R. 274; *Komlos v. Air France* (S.D.N.Y. 1953), 3 CCH Avi. 17,969 = 111 F.Supp. 393 = [1953] U.S.Av.R. 471; aff'd (US Ct.App. 2nd Cir. 1953), 4 CCH Avi. 17,281 = 209 F.2d 436; *Husserl v. Swissair* (S.D.N.Y. 1975), 13 CCH Avi. 17,603 (17,610 f.); *Zousmer v. CPA* (S.D.N.Y. 1969), [1970] U.S.Av.R. 496 = 307 F.Supp. 892.

138 See already *supra*, where the application of the maxim *ut res magis valeat quam pereat* was discussed.

139 *Benjamin v. British European Airways* (2nd Cir. 1978), 572 F.2d 913; *in re Mexico Aircrash of October 21, 1979 (Haley, Tovar & Dzida et al. v. Western Airlines)* (9th Cir. 1982), 708 F.2d 400 = 17 CCH Avi. 18,387; *Boehringer Mannheim Diagnostics v. Pan Am* (5th Cir. 1984), 737 F.2d 456; *Dorizas v. KLM* (N.D.Ill. 1984),

The second example involves the legal notion of *willful misconduct* in common law jurisdictions, which is a term that does not have a corresponding term in civil law jurisdictions. The *Warsaw Convention 1929* merely provides merely for limited liability up to a certain sum as specified in Art. 22. Under Art. 25, in cases of aggravated negligence or intent of the carrier as to the causation of the damage, the carrier cannot avail itself of this limitation. The French language of the original draft specifies the two exceptions as "dol" and "faute [...] équivalente au dol" under the *lex fori*. The English translation reads "[...] if the damage is caused by his willful misconduct or by such default on his part as [...] is considered to be equivalent to willful misconduct". Under common law, however, *willful misconduct* embraces both forms of fault as mentioned separately in the French wording. The only remaining possibility for an equivalent would be (ordinary) negligence. This interpretation, however, would not conform with the balance of the entire liability system of the Convention. Therefore, "default equivalent to willful misconduct" is a meaningless and superfluous phrase. For the English delegate at the Warsaw Conference, *Sir Alfred Dennis*, who was the only representative of a common law jurisdiction at the Conference[140], it was absolutely clear what Art. 25 was all about. He trusted the common lawyer and his ability to reasonably translate the meaning of the French format into legal terms of common law.[141]

A private international air law convention may well specify one or more languages as the language(s) which is (are) decisive for its interpretation. Due to their sovereignty, states can also

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606 F.Supp. 97; *Harpalani v. Air India* (N.D. Ill. 1985), 622 F.Supp. 69; *Newsome v. Trans International Airlines* (Supr.Ct. Ala. 1986), 20 CCH Avi. 17,360.
The entire development is reflected *in re Mexico Aircrash of October 21, 1979 (Haley, Tovar & Dzida et al. v. Western Airlines)* (9th Cir. 1982), 708 F.2d 400 = 17 CCH Avi. 18,387.
Commentators have been kept busy to analyze the case law: *Calkins*, "The Cause of Action under the Warsaw Convention", 26 JALC (1959), 217; *Lowenfeld/Mendelsohn*, "The United States and the Warsaw Convention", 80 Harv.L.Rev. (1966/67), 497 (519 ff.); *Meadows*, "Warsaw Convention - Independent Cause of Action - Casenote", 44 JALC (1979), 669; *Miller*, "Liability in International Air Transport" (1977), at pp. 224 ff.; *Corrigan*, "Benjamins v. British European Airways, Hawker Siddley Aviation, Ltd. and Hawker Siddley Group, Ltd., 572 F.2d 913, 6 March 1978 - Casenote", 4 Air Law (1979), 27; *Haanappel*, "The Right to Sue in Death Cases Under the Warsaw Convention", 6 Air Law (1981), 66; *Kuhn*, "Haftung für Schäden an Frachtgütern nach dem Warschauer Haftungssystem und dem LuftVG" (1987), at pp. 37 ff.; *Barett/Lewis*, "Warsaw Convention Creates a Cause of Action for Emotional Injuries, But Precludes Claim for Punitive Damages", 14 Air Law (1989), 267; *Goldhirsch*, "The Warsaw Convention, Annotated" (1988), at p. 56.

140 In *Floyd v. Eastern Airlines* (11th Cir. 1989), 872 F.2d 1462, at p. 1478, therefore the *Warsaw Convention* was described as a "creation of civil lawyers".

141 See *Gouvernement de Pologne (ed.)*, "II Conférence Internationale de Droit Privé Aérien, Varsovie 4-12 Octobre 1929, Procés-Verbaux" (Warszawa 1930), at pp. 40-42.

specify a language that shall guide the interpretation; although they would be in violation of public international law if such a provision of internal law does not conform with the obligations arising under the treaty. In general terms, the more precisely a convention addresses the significance and scope of its original drafting format, the less hairsplitting "phrase jugglers" and self-appointed "chief legal semanticists" will be tempted to interfere with the uniformity which, nevertheless, is hard enough to achieve anyway.

(3) A Precedence: the Warsaw Convention 1929 [142]

The *Warsaw Convention 1929* may serve as a precedent in order to exemplarily indicate and apply the principles with respect to the significance of the language as outlined above. However, as will be seen, the *Warsaw Convention 1929* serves as an unfortunate example, too. It would appear easy to blame the drafters for omissions and misconceptions; but the reason that this particular international convention repeatedly has been on the spot is probably found in the fact that it has been subject to a myriad of legal decisions and writings. An ocean of jurisprudence hosts, according to the laws of probabilities, legions of legal demagogues readily willing to deviate from the "righteous path" of methodology of interpretation. However, also apart from such dubious activities, a very human factor has played and will always play its role: *suum cuique attributus est error*[143] .

(a) Language Chosen by the Convention

In Art. 36 of the Convention, the French format is assigned originality as to the copy filed with the Polish government:

> La présente Convention est rédigée en français en un seul exemplaire qui restera déposé aux archives du Ministère des Affaires Étrangères de Pologne, et dont une copie certifiée conforme sera transmise par les soins du Gouvernement polonais au Gouvernement de chacune des Hautes Parties Contractantes.

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142 As to the following section see *Kadletz*, "*Fiat lux* - U.S. Supreme Court um Grenzziehung zwischen Einheitsrecht und IPR bemüht" (pending publication, envisaged for IPRax 1996, no. 5).

143 *Supra.*

The English version reads:

> The Convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affaires of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

By reference to Art. 36, many contributors to the law of international carriage by air have attributed binding force only to the French format for the process of interpretation of the private law conveyed by the Convention as to literal meaning and legal notions *("Rechtsbegriffe")*[144].

Art. 36, however, does not explicitly state that the French format is the format which states have to implement internally, or at least that the French format is decisive in cases of doubt related to private law. Moreover, as has been pointed out above, in order to render internationally uniform legislation, states have to enact the provisions of the Convention internally due to their sovereignty. Since this enactment, which exclusively and originally constitutes the binding force upon private law subjects, will usually[145] be accompanied by a translation into the one or one of the countries official languages, it might well appear illegal for a court of a given (non French) state party to apply French legal notions. In addition, one may well ask the question whether it can be expected from the judge of a non-French court to interpret and handle French law as well as his own.

Apparently, this question requires closer inquiry.

(b) The Dichotomy of the Warsaw Convention 1929

144 *Air France v. Saks* (US Supr.Ct. 1985), 18 CCH Avi. 18,538 = 470 U.S. 392; *Eastern Airlines v. Floyd* (US Supr. Ct. 1991), 23 CCH Avi. 17,367 = 499 U.S. 530; aff'd in pt., rev'd in part, remanded, ibd.17,811. *Giemulla/Schmid*, "Warschauer Abkommen", Art. 17, no. 2; *Giemulla, ibd.*, Einl., no.s 36 *et seq.*; *Guldimann*, "Internationales Lufttransportrecht" (1965), Einl., no.s 36, 44.

145 *Seidl-Hohenveldern*, "Völkerrecht", no. 369 (at p. 100) ascertains that a translation is provided "in any case" [translation supplied] - and this even in *public* international law where the norms of the treaty do not send a signal to the entirety private subjects as to what the legal consequences of their private activities will be.

The *Warsaw Convention 1929* is an international treaty conveying private law. As such it is necessarily of a dichotomic[146] nature. A treaty is an international instrument of binding force solely between states, and accordingly also the *Warsaw Convention 1929* contains public international law, laid down in Arts. 36-41[147] and relating to diplomatic acts such as ratification, accession, denunciation, and reservation.

Since it is the purpose of the Convention to set out private international law, it also contains the model uniform rules that have to be enacted by the states (Arts. 1-35).

(c) Interpretation of Art. 36

Art. 36 states that there shall be only one original format of the Convention. This Article creates obligations which are *exclusively* of a *public* international legal nature, in detail: that the Polish government has to file the single original copy in its archives, and that it has to send certified copies to the High Contracting Parties. No reference is made to private law. Art. 36 merely serves as proof of the authentic linguistic format of the Convention as it is binding between the state parties involved. Such clauses have proliferated, especially since World War I, when states started to put more emphasis on their respective nationalities and languages[148]. The reason why French was chosen as the (only) language of the *Warsaw Convention 1929* is to be found in the mere fact that French was

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146 *Sand*, "Choice of Law in Contracts of International Carriage by Air" (Thesis, IASL, McGill, 1962), at p. 16 prefers the Latin derivate "dualistic" from the Greek.

147 Arts. 35 A and 42 as introduced by Arts. XIV, XV of the *Guatemala City Protocol 1971* would have added to this part of the *Warsaw System*. Nevertheless, the *Protocol* would have affected the *Warsaw Convention 1929* as amended by the *Hague Protocol 1955* only, and it has never entered into force.

148 After Latin had been the traditional language of treaties, French took over that dominant position in the 18th century. In order to safeguard an orderly solution of differences between states as to the contence of treaties especially after World War I, authenticy clauses became a common means. See *Seidl-Hohenveldern*, "Völkerrecht", no.s 367-371 (pp. 99 *et seq.)*; *Hilf*, "Die Auslegung mehrsprachiger Verträge" (1973), pp. 5 ff.; *Tabory*, "Multilingualism in International Law and Institutions" (1980), pp. 13 ff.
As to an example in the traditional practice of European courts see RG (28. Sept. 1921 - I 277/21) RGZ 102, 403 (404); RG (1 July 1926 - IV 47/26) RGZ 114, 188 (190) [concerning the authenticy of the French and English versions of the *Treaty of Versailles - Treaty of Peace Between the Allied and Associated Powers and Germany*, 28 June 1919, 11 Martens Nouveau Recueil des Iraites (3d), 323]. See also ÖVwGH (31.5.1957) ILR 1957, 639. *James Buchanan & Co. Ltd. Babco Forwarding and Shipping (UK) Ltd.*, [1977] 3 All E.R. 1048 = [1978] A.C. 141.

the diplomatic language of that time[149], and accordingly the working language at the Warsaw Conference was French (and as well had been at the Paris Conference of 1925). After World War I French started to lose its prevalence as to diplomatic relations (as can be clearly seen in the Protocols amending the Convention which are drawn up as several authentic texts in different languages), and Art. 36 is present merely to unambiguously prove the existence of a single copy. Thus, one must conclude, that if Art. 36 is of any significance as to interpretation of the Convention, then it can only be in relation to disputes between *state parties*.

(d) Impacts on Private Law

Even though Art. 36 is, by its nature, a provision of pure public international law, there may be some impacts on private law in the broader context of the Convention.

When translating a set of legal rules one encounters the difficulty of transferring legal notions and symbols[150]. This, of course, had already been taken into account prior to the *Warsaw Conference*.

Makarov stated as early as 1927: "Each legal concept of a particular legal system, even though it has been introduced to that legal system by way of a treaty, is organically linked with all its concepts."[151]

Thus, a glimpse at the original French text may at least be useful for the interpretation of ambiguous parts of the Convention.

Mankiewicz, however, finds that "by ratification of convention, the ratifying state enacts the agreed rules as national law and does not assume any further duty"[152]. But there must be a deeper

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149 See note *supra*. See also *Sand*, "Choice of Law in Contracts of International Carriage by Air" (Thesis, IASL, McGill, 1962), at p. 25.

150 *Supra*.

151 *Makarov*, "Die zwischenprivatrechtlichen Normen des Luftrechts", 1 Zeitschr.f.ges.LuftR (1927/28), 150 ff. (187): "Freilich darf man aber auch nicht behaupten, daß die Errichtung eines Weltluftrechts alle möglichen Gesetzeskollisionen restlos abschaffen wird. Prof. *Schreiber* hat schon Gelegenheit gehabt, hervorzuheben, daß auch dann, wenn ein einheitliches Recht vorhanden sein wird, die Gerichte der verschiedenen Staaten den gleichlautenden Gesetzen eine in vielen Punkten voneineander abweichende Anwendung geben werden. Der Grund dafür liegt in der Tatsache, daß jeder Rechtsbegriff einer bestimmten Rechtsordnung, auch wenn er im Wege eines Staatsvertrages eingeführt ist, mit ihren sämtlichen Begriffen organisch verknüpft ist." [Translation supplied].

meaning to this phrase than merely expressing the obligation to internally enact a set of legal rules. That a different understanding would not entirely reflect the obligations imposed by the Convention is suggested by the title of the Convention, displaying its purpose as "for the unification" of those rules laid down in Arts. 1-35. Thus a state that has ratified the Convention is not only under the obligation to legislate on the national level, *but it is also urged to foster uniformity, scil.* uniformity according to the model provisions of the Convention[153]. It becomes obvious that the obligation to "enact the agreed rules as national *law*", as *Mankiewicz* puts it, does not only embrace the obligation to enact national legislation in form of *acts or statutes*, but the word *"law"* suggests that also the *judicial functions* of a state in *interpreting and applying* the Convention are implied[154]. Accordingly, the courts have to render their decisions with due respect to the wording of the "genetic father" of the national legislation, to apply *Makarov's* terminology[155].

In *Fothergill v. Monarch*, *Lord Roskill* clearly points out the guideline:

> In my judgment it is now clear that where the source of the legislation in question is not the ordinary Parliamentary process, but is an international treaty or convention, it is legitimate to look at that source in order to resolve ambiguities in the legislation which has made those treaty or convention provisions part of the ordinary municipal law of this country.[156]

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152 *Mankiewicz*, "Rechtsnormenkonflikte zwischen dem Warschauer Abkommen und dem Haager Protokoll", 5 ZLR (1956), 246 ff. (249); *id.*, "Conflits entre la Convention de Varsovie et le Protocole de la Haye", 19 Rev.gén.air (1956), 239 ff.

153 "[...] and uniformity is the purpose to be served by most international conventions", *Lord Scarman* in *Fothergill v. Monarch* (H.L.), [1980] 2 All E.R. 696 (at p. 715).

154 This, of course, is only valid to the extent a state government's international agreement to adhere the convention binds the entire state. Where on constitutional grounds the government agreement is merely understood as an executive arrangement the is no binding force upon the courts in the absense of ratification of a constitutional body acting on behalf of the entire state. Such problem has arisen in Britain with respect to the Bermuda I(II) bilateral agreement with the United States: see *Pan American World Airways v. Department of Trade* (C.A.), [1976] 1 Lloyd's L.Rep. 257 per *Lord Denning, M.R.*

155 This is clearly expressed also in the Swiss case Obergericht Kanton Zürich (23 Jan. 1958), 8 ZLR (1959), 55 = ASDA Bulletin 1958, Nr. 3, pp. 4 ff. (*Froidevaux v. Sabena)*, and in the Belgian case *Fischer v. Sabena* (Trib. prem.inst. Bruxelles 1950), 4 Rev.fr.dr.aérien (1950), 411. It should, however, be noted that in both countries French is an official language, and therefore recourse may well be sought to it more easily than in other countries.

156 *Fothergill v. Monarch* (H.L.), [1980] 2 All E.R. 696 (at p. 719).

In doing so they have to take into account decisions of courts and their interpretations in other jurisdictions applying the Convention, too, as a part of the international obligation to foster uniformity[157].

Lord Wilberforce, in *Fothergill v. Monarch*[158], held that the true significance of the French format contrasted against a national translation resides in the fact that "it cannot be judged whether there is an inconsistency between the two texts unless one looks at both".

The French text of the *Warsaw Convention 1929*, therefore, serves as the common denominator of any interpretation of the text, and thus constitutes an important element of the unification process as to private international air law.

(e) Special Supplementary Legislation

The conclusion of the foregoing chapter (with respect to the impact of the French language on the interpretation of any of the different "Warsaw Statutes", as *Sand* characterizes them[159], by the state parties) is arrived at due to the very genetics of the *Warsaw System* itself - a system of parallelism of "uniform" national laws dealing with international fact situations and being all "organically linked"[160] to the model as agreed upon in the international treaty *Warsaw Convention 1929*.

Nevertheless, some states have adopted legislation supplementing the mere transformation of Arts. 1-35 of the *Warsaw Convention 1929*, according to which in case of any inconsistency between the text in a state's national language as enacted by national legislation and the original French text, the French text shall prevail[161]. Since this is the law e.g. in the United Kingdom, the *House of Lords*

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157 *Fothergill v. Monarch* (H.L.), [1980] 2 All E.R. 696; *Stag Line Ltd. v. Foscolo, Mango & Co. Ltd.*, [1932] A.C. 328 (350), per *Lord MacMillan*. *Riese*, "Luftrecht" (1949), pp. 65 ff. (rendering numerous references of all major legal systems); *Kadletz*, "*Fiat lux* - U.S. Supreme Court um Grenzziehung zwischen Einheitsrecht und IPR bemüht" (pending publication, envisaged for IPRax 1996, no. 5).

158 *Fothergill v. Monarch* (H.L.), [1980] 2 All E.R. 696, at p. 699.

159 *Sand*, "Choice of Law in Contracts of International Carriage by Air" (Thesis, IASL, McGill, 1962), at p. 26.

160 *Makarov, supra.*

161 E.g. in the United Kingdom under the *Carriage by Air Act 1961*, sec. (1), subsection (2):
"If there is any inconsistency between the text in English in Part I of the First Schedule to this Act and the text in French in Part II of that Schedule, *the text in French shall prevail.*" [emphasis supplied].
Similarly, the *Civil Aviation (Carriers' Liability) Amendment Act (Cth) 1991*, sec. 8 (2) reads:

applied in its decision in *Fothergill v. Monarch* the French text "as a part of our law"[162]. In accordance with the principles outlined above, the statute applied in *Fothergill v. Monarch* under English law merely emphasizes the obligation that a state - in all its functions including the exercise of judicial functions - is under the international obligation to foster uniformity. Therefore, the principles applied by the *House of Lords* in *Fothergill v. Monarch* do in fact apply also in other legal systems; and thus the decision renders precedence in general.

It should, however, be noted that a clear provision adds to the proliferation of an unambiguous understanding not only of the Convention's substantive provisions but also to the method of how to apply and interprete them[163].

(f) A Choice of Law Rule or an Ancillary to Interpretation?

The French text prevails in the case of conflicting interpretations, and, as was pointed out earlier[164], the reference to the French format does not imply a reference to a "popular meaning"[165] but "to the meaning which the terms of the Convention have acquired in French law"[166]. As a seemingly logical deduction, it has been pronounced a "principle of the prevalence of the French legal system when interpreting the Convention", such as e.g. by *Sundberg*[167], qualifying this mechanism as an "indirect choice of law rule", as *Sand* refers to it[168].

"If there is any inconsistency between the text of a convention set out in a Schedule snd the text that would result if the French authentic texts of the instruments making up the Convention were read and interpreted together as one single document, *the latter text prevails*." [emphasis supplied].

162 "First, the problem of the French text. Being scheduled to the statute, it is part of our law", says *Lord Scarman* in *Fothergill v. Monarch*, *ibd.* at p. 715.

163 As is stated by *Goedhuis*, "La Convention de Varsovie" (1933), p. 263:
"States can do useful work, on the one hand, by completing the rules of the Convention in so far as they are incomplete, on the other hand, by providing an interpretation for those provisions which are not entirely clear, thus dissipating doubts regarding their true remaining." ["En mettant en harmonie leurs législations nationales avec les règles internationales posées dans la Conventions, les Etats, peuvent faire oevre utile, d'une part, en complétant les règles de la Convention en tant qu'elles sont incomplètes, d'autre part, en donnant aux dispositions qui ne sont pas tout-à-fait claires, une interprétation par laquelle tous les doutes au sujet de leur vrai sens soient dissipés." - English translation provided].

164 *Supra.*

165 In *Zicherman v. KAL* (1996), 116 S.Ct. 629 the use of "popular terms" was discussed and rejected.

166 *Sundberg*, "Air Charter. A Study in Legal Development" (1961), n. 8 (p. 248 f.).

167 *Sundberg*, ibd., at p. 249.

168 *Sand*, "Choice of Law in Contracts of International Carriage by Air" (Thesis, IASL, McGill, 1962), at p. 21.

If that was to be the case, then two consequences are conceivable: Either the reference is made to French law as was developed to the year of signing the Convention, i.e. 1929 (one might call it a "frozen reference"), or the reference constitutes a true recognition of the primacy of the French legal system as it develops with time (as opposed to the former, a "dynamic reference").

The former interpretation was discussed by the US Supreme Court in *Zicherman v. KAL*[169]. Also analyzing its former judicial findings in *Air France v. Saks*[170] and *Eastern Airlines v. Floyd*[171], *Justice Scalia* held that (as to the question how to determine "damage" or "dommage", respectively, under Art. 17 of the *Warsaw Convention 1929*):

> What is at issue here, however, is not simply whether we will be guided by French legal usage *vel non*. Because, as earlier discussed, the dictionary meaning of the term *'dommage'* embraces harms that no legal system would compensate, it must be acknowledged that the term is to be understood in its distinctively *legal* sense - that is, to mean only *legally cognizable* harm. The nicer question, and the critical one here, is whether the word *'dommage'* establishes *as the content of the concept 'legally cognizable harm'* what French law accepted as such in 1929. No case of ours provides precedent for the adoption of French law in such detail. In *Floyd*, we looked to French law to determine whether *'lésion corporelle'* indeed meant (as it had been translated) 'bodily injury' - not to determine the subsequent question (equivalent to the question at issue here) whether 'bodily injury' encompassed psychic injury. See 499 U.S., at 536-540. And in *Saks*, once we had determined that in French legal terminology the word *'accident'* referred to an unforeseen event, we did not further inquire whether French courts would consider the event at issue in the case unforeseen; we made that judgment for ourselves. See 470 U.S., at 405-407.[172]

Indeed, the method applied by the US Supreme Court reflects what is understood, in civil law terms, by the two-prong approach to legal problems as to *definition of legal criteria* and *subsumption* (or *subsumtion*).[173]

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169 *Zicherman v. KAL* (1996), 116 S.Ct. 629.

170 *Air France v. Saks* (US Supr.Ct. 1985), 18 CCH Avi. 18,538 = 470 U.S. 392.

171 *Eastern Airlines v. Floyd* (US Supr. Ct. 1991), 23 CCH Avi. 17,367 = 499 U.S. 530; aff'd in pt., rev'd in part, remanded, ibd.17,811.

172 Emphases original.

173 See the methodological contributions by *Engisch*, "Subsumtion und Rechtsfortbildung", in: *Professors of the Faculty of Law of the Heidelberg University (ed.)*, "Richterliche Rechtsforbildung. Erscheinungsformen, Auftrag und Grenzen. Festschrift der Juristischen Fakultät zur 600-Jahr-Feier der Ruprecht-Karls-Universität Heidelberg" *(Liber Amocorum on the occasion of the 600th anniversary of the Ruprecht Karls University Heidelberg)* (1986), 3 (at pp 3 ff.); *Bydlinsky*, "Juristische Methodenlehre und Rechtsbegriff" (1982), at pp. 391 ff.

To draw the picture somewhat more clearly: If a legal norm, a rule, is dealt with, then the work of the lawyer bound to resolve an actual case requires two steps. First, he has to point out what the rule is. Legal terms have to be defined in order to make them comprehensible, or to draw legal conclusions usable in a special given case from an abstract idiom[174]. The second step is the *subsumption*, a process whereby the facts of the given case are brought "under" the legal definitions and criteria as deduced for the case at issue. If it is legally possible to connect the relevant facts of the case with the legal definitions and criteria, then the conclusion provided by the rule applies to the case.

The US Supreme Court states in the passage quoted above that the *subsumption* has to be conducted only with respect to the *Warsaw System*, as applicable under the law of the USA. The application of French law is explicitly denied.

The validity of this statement is supported by three arguments, the first of which is also briefly touched upon in *Zicherman v. KAL*: Legal notions vary considerably, sometimes even irreconcilably, from jurisdiction to jurisdiction. This circumstance is so easily ascertainable that the negotiators and signatories of the *Warsaw Convention 1929* could *not* have been ignorant concerning it. Thus, it can*not* have been the "shared expectations of the contracting parties"[175] that French law, developed under specific circumstances and tailor-made to fit French socio-economic and cultural needs, would govern cases in foreign countries whose societies live and develop under different circumstances. To import such foreign elements sounds rather implausible.

The second point against the application of "French 1929 law" lies in the inter-temporal conflict of the fact that it would compel the judicial bodies of every state party to study French legal history until 1929. To further pursue such a view would, with all due respect, result in absurdity.

This, however, leads to the last argument. If all other state parties' courts would not be allowed to apply e.g. a French decision rendered in 1930, would then at least France be able to take a 1930

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174 "Konkretisierung unbestimmter Rechtsbegriffe". As to a comparative approach to the method from a common law perspective see *Dainow*, "The Civil Law and the Common Law: Some Points of Comparison", 15 Am.J.Comp.L. (1967), 419 (esp. at pp. 431 *et seq.)*. See also *Rheinstein*, "The Approach", 34 Ind.L.J. (1959), 546 (esp. at p. 552).

175 *Justice Scalia* in *Zicherman v. KAL* (1996), 116 S.Ct. 629, quoting *Justice O'Connor* in *Air France v. Saks* (US Supr.Ct. 1985), 18 CCH Avi. 18,538 = 470 U.S. 392.

decision into account, since the *Warsaw Convention 1929* applies only by force of *state-internal* law *(supra)* - which is French law, the alleged "law of the Convention" itself?! An answer in the affirmative would again lead *ad absurdum*.

Anyway, all states apply the uniform law as their national, internal law. If state-parties were willing to import French law into their domestic legal systems, this would be a major step affecting the state-parties' sovereignties. As pointed out above, in the international arena, such a major step would have to be expressed more clearly than by way of an indirect deduction from Art. 36 of the Convention[176]. The derogating impact of an import of foreign law by the adoption of an international convention on the national legal systems would be too momentous.

At the same time, this implies a denial of the "dynamic interpretation", the alternative to the "frozen interpretation" as mentioned above. One could even find that a recognition of the French legal system including all its developments after the conclusion of the *Warsaw Convention* in 1929, would be a most exceptional recognition of a primacy of the French legal system. It is highly unlikely that any state would accept such a clause in an international treaty not only because legal systems are made to suit the needs of the specific social relations they affect, but also for prestigious reasons (such a recognition of primacy could be easily understood as French political superiority). Neither *explicite* nor *implicite*.

Returning to the two step approach of legal interpretation, the ultimate significance vested in Art. 36 and the French format of the Convention is its significance as a decisive ancillary in the process of definition of legal notions and legal criteria within the framework of the Convention, expressing a certain balance between the interests of carriers, passengers, and shippers/consignors/consignees. Only at this abstract level can the French format of the Convention be of a prevailing character in the case of ambiguities or deviations. The law that applies to facts, that is connected with the facts in the course of *subsumption*, is the (internal, national) law of the state party which governs the case.

176 On the method of interpretation of treaties: *supra*.

Thus, only as an ancillary means on an abstract level can one seek recourse to French legal materials as a reference in order to render the terms of the French format of the Convention more comprehensible. By no means can Art. 36 be considered an indirect choice of law rule.

(g) Conclusions for the Application of Conflicts Rules

Summarizing, the conclusions that have to be drawn with respect to the effects on the rules of conflicts of laws are:

(aa) The reference to the French format in Art. 36 of the *Warsaw Convention 1929* does not constitute a reference into French law that would render it applicable to international carriages by air (no choice of law provision). A provision of such a significance would be drafted more explicitly and unambiguously.

(bb) In the course of interpreting the Convention, one has to carefully determine very whether a certain word, term or phrase of the Convention actually regulates the matter concerned, or whether it merely mentions a legal consequence[177] and excludes the details from the scope of the Convention. In the latter case a true conflicts of laws situation arises. In order to properly determine the presence or absence of a gap one has to compare the internally enacted version of the Convention to the French format of the *Warsaw Convention 1929*.

This applies not only to the *Warsaw Convention 1929*, but to any international private law convention.

2. The Approach to Conflicts of Laws

177 As was the case e.g. in *Zicherman v. KAL* (1996), 116 S.Ct. 629, where the question was concerned whether the *Warsaw Convention 1929*, providing in Art. 17 for the recovery of *"damages"*, constitutes a notion of damages as of itself, or whether *"damages"* in Art. 17 is the mere mentioning of the legal consequence to the situation as described in Art. 17, i.e. whether *"damages"* only refers to domestic law in order to specify the legally cognizable damages. The Supreme Court correctly took the latter point of view.

a) The *"horror vacui"*

As *Bueckling*[178] observes, there is a general tendency to extend substantive law[179]. The "logical force of the law to expand"[180] is being celebrated as a glorious victory over the *"horror vacui"* [181], the fear of having to confess that there is no rule as to a case at stake. Although e.g. in *Zicherman v. KAL*[182] the US Supreme Court only recently showed that a "no rule approach" under the *Warsaw Convention* does not mean that there is no solution to the case[183], contemporary approaches to legal problems in today's constantly narrowing world, which is witnessing the globalization of trade and industries, are undoubtedly attracted to the ideal of uniformity[184]. This attraction is not a recent appearance, as is revealed when giving regard to the Roman *praetor*[185] who *de facto* governed the law "in that he applies equity, wherever he finds a gap"[186]. Objections, however, do not only have to be raised against the latent danger of a violation of the maxim *ius facere non putuit* underlying modern notions of separation of powers, checks and balances *("Gewaltenteilung")*. The filling of sometimes merely assumed "gaps" must also be strikingly decovered as "a sentimental allocation of

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178 *Bueckling*, "Die Freiheiten des Weltraumrechts und ihre Schranken", in: *Böckstiegel)/Benkö*, "Handbuch des Weltraumrechts" (1991), at pp. 55 ff.

179 *Ibd.* at p. 69.

180 "Die `logische Expansionskraft des Rechts'", *ibd.* [translation provided].

181 *Ibd.*

182 *Zicherman v. KAL* (1996), 116 S.Ct. 629.

183 The Court identified a gap in the *Warsaw* rules and filled it with domestic law.

184 In numerous cases, the courts could not resist to bend and stretch provisions of uniform law in order to achieve an interpretation pertaining to the court's considerations as to justice and equity. See e.g.: *Franklin Mint Corp. v. TWA* (2nd Cir. 1982), [1984] 1 Lloyd's L. Rep. 220 = 690 F.2d 303; rev'd under *TWA v. Franklin Mint* (1984), 466 U.S. 243 = 80 l.Ed.2d 173 = [[1984] 2 Lloyd's l.Rep. 432 = 33 ZLW (184), 231 [currency]. As to this issue see the note by *Rudolf* in 33 ZLW (1984), 231. See also *Martinez*, "Article 22 of the Warsaw Convention and *Franklon Mint v. TWA*", 16 Cornell Int.L.Rev. (1983), 397. See further the critical discussion by *Wiedemann*, "Die Haftungsbegrenzung des Lftfrachtführers nach dem Warschauer Abkommen" (1987), at pp. 193 ff. *Husserl v. Swissair* (S.D.N.Y. 1973), 12 CCH Avi. 17,637 = 351 F.Supp. 702 = [1973] U.S.Av.R. 825; aff'd (2nd Cir. 1973), 485 F.2d 1240; *Husserl v. Swissair II* (S.D.N.Y. 1975), 13 CCH Avi. 17,603 = 388 F.Supp. 1238 = Air Law 1976, 262 [notion of "damage" in Art. 17 WC - broad interpretation]. *Air France v. Saks* (1985), 470 U.S. 392 - as to the notion of accident in Art. 17 WC, for the more logical narrow approach see the critique by *Schmid*, in: *Giemulla/Schmid*, "Waschauer Abkommen", Art. 17, no.s 8 ff. *Day v. TWA* (2nd Cir. 1976), 13 CCH Avi. 18,145 = 528 F.2d 31; *Evangelinos v. TWA* (3rd Cir. 1977), 14 CCH Avi. 17,612; for a critique of a too broaden understanding see *Schmid*, in: *Giemulla/Schmid*, "Waschauer Abkommen", Art. 17, no.s 16 ff.; *Kadletz*, "Passagiertransport und Warschauer Abkommen in den USA: Methodische Unschärfen bei der Handhabung internationalen Rechts"[184] (pending publication, envisaged for IPRax 1996, no. 5).

185 *Supra.*

186 *Binder*, "Philosophie des Rechts" (1925), at p. 987.

gentleness and hardship according to unsteady standards"[187]. It is this the scenario that the drafters and negotiators of private international air law did not agree upon: uniform law is a common denominator (and probably the lowest), as found by the delegates of the different states and cultures sitting at the drafting and negotiating tables. Equitable filling of gaps, which they did not agree upon, is not embraced by the "unified law" adopted in private air law conventions because of a lack of agreement due to the (sometimes irreconcilable) differences in standards, notions, cultural habits, and even religious influences. Therefore, the *horror vacui* has to be encountered - and overcome, since matters which are abandoned by the uniform law convention are simply "abandoned to that national law which would be recognized as competent by the principles of private international law"[188].

The true objective of the *conflicts of laws* is to ascertain the law which is recognized as competent to resolve the case in substance (as far as uniform law does not provide for a solution). The question is *how* to ascertain that substantive law, *what* are the appropriate *criteria*?

Since the private law of aviation is especially concerned, the legal issues to be touched upon are *obligationes* (as to the different kinds of contracts reaching from labor law to contracts of carriage and to finance structures, and beyond), *rei* (especially securities in aircraft finance), and *personae* (happenings such as marriage or last wills done aboard an aircraft, even though these rarely occur[189]). This variety of issues indicates that it is unlikely that a common most-suitable solution will be found, i.e. point of contact *(Anknüpfungspunkt)*, for all matters concerned. Despite the small probability for a general solution[190], it may well be possible to find solutions equally applicable at least to a certain number of issues, and possibly to deduct some general principles, too. This study will try to formulate a thesis as to contractual obligations in private air law.

b) The Approach to International Conflicts

187 *Hedemann*, "Die Flucht in die Generalklauseln" (1933), at p. 75: "ein sentimentales Verteilen von Milde und Härte nach ungesicherten Maßstäben" [English translation supplied].

188 *DeVisscher*, "Les conflits de lois en matière de droit aérien", 48 Rec.des Cours (1934-II), 285, at p. 332: "Ces problèmes devront être tranchés selon lois nationales." [English translation provided].

189 These aspects are therefore excluded from the scope of this study. For a discussion see e.g. *Milde*, "The Problems of Liabilies in International Carriage by Air" (1963), at pp. 79-135.

190 The (in)famous "Patentlösung", a single universal *clou* ready to solve every problem.

As "eccentric" as the professors of the law of conflicts have been characterized[191], as multicolored are the variety of different solutions and doctrines to the conflicts of laws problem presented. The variety extends from rather old, almost ancient maxims to new, specialized solutions, some conservative, some revolutionary, others tailor-made only for very specific issues or societies and their legal systems.

Private autonomy, the wind blowing into the sails of modern approaches, certainly favors the parties' choice as to the applicable law. In the case that there is no ascertainable or no valid choice (these problems will be discussed *infra)*, it is necessary to qualify certain points of contact as appropriate for the determination of the applicable law. Once again, recourse must be sought to the prevailing notion of private autonomy, and thus determine the appropriate law from the standpoint of the parties of the contract of carriage. A government may have an interest in the application of its own law once a case is pending before one of its law courts. Nevertheless, "it is obvious that no court can do justice if it refuses absolutely to recognize the existence of a foreign law or of any right acquired thereunder"[192]. The exclusive application of the substantive *lex fori*, therefore, does not serve the purpose of substantial justice. Moreover, in the arena of internationally unified law it merely transfers the choice of law problem into a choice of jurisdiction problem *(forum shopping)*, instead of rendering a solution. Therefore, the problem of an international balance of the factors influencing the determination of the applicable law still remains[193]. On the one hand it is believed that a single conflicts rule should govern all passengers and shippers of cargo and other persons aboard an aircraft uniformly[194]. On the other hand, if private autonomy is the recognized and prevailing principle of private law, then a uniform treatment does not have to be a necessary criterion. Obligations are of a relative nature, and the law governing the relationship may depend on the parties and the contents of

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191 *Supra.*

192 *Graveson*, "The Conflict of Laws" (5 ed. 1965), at p. 8.

193 *Kegel*, "Internationales Privatrecht" (6 ed. 1987), at p. 54 uses the term "internationalprivatrechtliche Gerechtigkeit" which *Juenger*, "Choice of Law and Multistate Justice" (1993), at p. 69 translates as "conflicts justice".

194 *Caspers*, "Internationales Lufttransportrecht" (1930), at p. 12; *Riese*, "Internationalprivatrechtliche Probleme auf dem Gebiete des Luftrechts", 7 ZLR (1958), 271 (280); *Milde*, "Conflicts of Laws in the Law of the Air", 11 McGill L.J. (1965), 220 (245).

the contract. One would like to agree with *von Savigny* that the purpose of the legal rules is to serve private interests rather than vice versa[195]. Certainly the latter solution might be considered preferable for the convenience of the lawyer. But does this constitute an asset superior to the requirement that the law has to balance social interests appropriately?! The answer must be in the negative. In *von Savigny's* system, the *situs* of the concerned legal relationship has to be determined[196]. Also involving the criterion of predictability[197], in the most ideal case such *situs* (which ever method might apply to determine) will create congruence of individual justice and the more or less subconscious expectations of the parties to the contract of carriage, i.e. those circumstances that would have been reasonably contemplated by the parties if they had considered the issue. However, this approach will scarcely bring about decisional harmony among all the courts in the world and has in its entirety been criticized as an "ideal [that] will forever remain a phantom"[198]. Some commentators may therefore draw the conclusion that for practical purposes "a choice-of-law rule need not achieve perfect justice at any time it is invoked in order to be preferable to a no-rule approach"[199]. This represents the logical antonym of an allegedly more "modern" approach which recruits more "policy aspects"[200] for its opposition against the classical doctrine[201].

Basically, the points of contact being subject to discussion in the conflicts of laws arena have not changed[202]; the discussion merely circles around a different emphasis on each of them[203]. It does not

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195 *Savigny*, "System des heutigen Römischen Rechts" IV (1849), at p. 116.

196 *Ibd.* at pp. 108, 118, 120, 200.

197 See *Riese*, "Internationalprivatrechtliche Probleme auf dem Gebiete des Luftrechts", 7 ZLR (1958), 271 (280); *Milde*, "Conflicts of Laws in the Law of the Air", 11 McGill L.J. (1965), 220 (245).

198 See *Juenger*, "Choice of Law and Multistate Justice" (1993), p. 69 citing *Fritz Sturm*.

199 *Rosenberg*, "A Comment on *Reich v. Purcell*", 15 UCLA L.Rev. (1968), 641 (644).

200 *Sand*, "Choice of Law in Contracts of International Carriage by Air"r (Thesis, IASL, McGill; 1962), at p. 62. Generally see the modern American approaches especially the "better law approach", usually attributed to *Leflar* (see e.g. *Leflar*, "Conflicts Law: More than Choice Influencing Considerations", 54 Calif.L.Rev. [1966] 1584), and the "governmental interest analysis" as shaped by *Currie* (see *Currie*, "Selected Essays in the Conflict of Laws" [1963]). For a recent analysis see *Brilmayer*, "The Role of Substantive and Choice of Law Policies in the Formation and Application of Choice of Law Rules", 252 Rec. des Cours 1995, 9 (esp. ch. III on "Substantive Policies and their Role in Choice of Law").

201 Although usually equally allocated to the "American Conflicts Revolution", *Beale's* "vested rights"-approach takes more from *von Savigny* than from what subsequently shaped "true" policy approaches. See e.g. *Beale*, "A Treatiese on the Conflicts of Laws" III (1935), 1950-1975.

202 See list *supra*.

203 It may be considered a typical appearance that e.g. *Milde*, "Conflicts of Laws in the Law of the Air", 11 McGill L.J. (1965), 220 (245-247) does not conclude his evaluation with a clearly satisfying result. Even before *Riese*,

appear too surprising, therefore, that after scholarly legal approaches had not brought about any convincing solutions, authors were attracted by the emerging American "revolutionary" ideas[204].

The so-called "choice of law revolution" in the USA[205] is probably the most important example displaying a departure from traditional notions of conflicts problems. Many ideas have evolved in this process which have been celebrated especially with respect to air disaster litigation[206]. Nevertheless, as these protagonists themselves admit, these attempts to a "sensible and far more flexible functional approach to the resolution of choice-of-law problems"[207] are not free from legal turbulences in which one witnesses "the courts' use of terminology and techniques from competing methodologies". Moreover, in the course of what is characterized as "judicial eclecticism", the approaches applied by the courts are observed to show a "tendency to pick and choose from competing approaches fashioning a solution to a particular choice of law problem"[208]. As *Kreindler* exemplarily presents and highly recommends in his treatise on the American way of handling the conflicts problems, it is important to convince the court of a *material* and *substantive* bias in the application of any other than the favored legal system[209]. This approach does in fact require a *substantive* and *material* multi-prong examination of a number of different legal evaluations of the case: At first the case has to be solved according to all legal systems that can possibly have a connection with the case; then one compares the *material* and *substantive* outcomes of the different solutions; and finally one decides on which is the most favorable solution. The problem, however, will always be to justify *why* one

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"Luftrecht" (1949), at pp. 394-397 had described the situation in his concluding remarks as "yet uncertain" ("[...] wie ungewiß die Entscheidung der angedeuteten kollisionsrechtlichen Fragen heute noch ist").

204 See e.g. *Sand*, "Choice of Law in Contracts of International Carriage by Air" (Thesis, IASL, McGill; 1962), at pp. 63-65 who was obviously dissatisfied with the traditional approaches.

205 A very recent overview is given by *Brilmayer*, "The Role of Substantive and Choice of Law Policies in the Formation and Application of Choice of Law Rules", 252 Rec. des Cours 1995, 9.

206 See esp. *Kreindler*, Aviation Accident Law (looseleaf), ch. 2, § 2.02.

207 *Kreindler, ibd.* at p. 2-6; quoting *R. Leflar, L. McDougal, R. Felix*, "American Conflicts Law" (2 ed. 1989), at p. 291, who as amatter of fact, however, do not take such a strong view.

208 *Kreindler* himself, *ibd.* at p. 2-8, quotes these passages from *Westbrook*, "A Survey and Evaluation of Competing Choice of Law Methodologies: A Case for Electicism", 40 Mod.L.Rev. (1975), 408 (409). See also the very perceptive analysis by *Juenger*, "Choice of Law and Multistate Justice" (1993), at pp. 139 ff.

209 *Kreindler, ibd.* at p. 2-11, refers to *Kilberg v. Northeast Airlines* (1961), 9 N.Y.2d 34 = 211 N.Y.S.2d 133 = 172 N.E.2d 526, where he in his pleadings argued that in a case where a New York citizen, who had lived all his life in New York and had become a victim to an aircrash in Massachusetts, the damages should be awarded accoding to New York law because it allowed for higher compensation than the "archaic" *(ibd.)* law of Massachusetts. *Kreindler* argued that the fog that caused the aircrash could have occurred in Massachusetts as well as in New York or anywhere else.

solution is favorable *in its material and substance*, and to *predict* the reasoning. In *Kilberg v. Northeast Airlines*[210] e.g. Massachusetts law constitutes a trade-off between air carrier and passenger interests, hence a certain limitation of liability. Is Massachusetts law inapplicable merely because Massachusetts law allegedly does not have an interest to be applied to a New York citizen who had lived all his life in New York where such limitation does not exist? What would the solution be if the victim were without a steady place of residence - why should such a person be subject to a different legal system even though he might have been carried under an identical contract of carriage and victim to the same aircrash?

Such unpredictable and unsteady jurisprudence motivated *Ehrenzweig* to a simple solution which, nevertheless, was based on vastly extensive scholarly studies that cannot be overestimated[211]. Not without elements of cynicism[212], he concluded in his analysis that, in practice, courts are strongly attracted by the law that the deciding judges know the best: the *lex fori*. The onerous extent to which this is true, especially of aviation litigation, was shown in *Sand's* analysis[213].

As a true leader of the "choice-of-law revolution" - although his thoughts had already been anticipated by *Wächter* more than a century before[214] - *Currie*[215], the acknowledged pioneer of the famous American "governmental interest analysis"[216], found that a state will usually have an interest

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210 *Supra.*

211 *Ehrenzweig*, "Private International Law. A Comparative Treatise on American International Conflicts Law. Including the Law of Admiralty" (1967).

212 See *ibd.* at p. 51.

213 *Sand*, "Choice of Law in Contracts of International Carriage by Air" (Thesis, IASL, McGill; 1962) examined more than 100 judicial decisions as to matters of international air transportation. He ascertained what earlier in this thesis has been described as a "homeward trend" of the courts: they tend to apply their own substantive law. See also a later evaluatio by *Sand*, "'Parteiautonomie' in internationalen Luftbeförderungsverträgen", 18 ZLW (1969), 205 (esp. 210 ff.). As to the *"homeward trend"* see also *supra.*

214 *Wächter*, "Über die Collision der Privatrechtsgesetze verschiedener Staaten" (part 1), 24 AcP (1841), 230; (ptarts 2, 3 & 4), 25 AcP (1842), 1; 161; 361.
For an evaluation of *Wächter's* theories see *Sandmann*, "Grundlagen und Einfluß der internationalprivatrechtlichen Lehre Carl Georg von Wächters" (1979); *Nadelmann*, "Wächter's Essay on the Collision of Private Laws of Different States", 13 Am.J.Comp.L. (1963), 414.
On the *Wächter's* role as a prethinker of *Currie's* as well as *Ehrenzweig's* approaches see *Baade*, "New Trends in the Conflict of Laws", 28 Law & Contemp.Problems (1963), 673 (at 675 in N.9): "The similarities between the views of Currie and Wächter a haundred years earlier has been observed before"; *Wengler*, "The Significance of the Principle of Equality in the Conflict of Laws", 28 Law & Contemp.Problems (1963) 822 (at 829 in N.31): "Currie's theories are reminiscent of those advanced by Carl Georg von Wächter more than a hundred years ago."

215 *Brainerd Currie*, "Notes on Methods and Objectives in the Conflict of Laws", (1959) Duke L.J. 171. Reprinted in: *Currie*, "Selected Essays in the Conflict of Laws" (1963), at pp. 177-187.

216 See *Tetley*, "International Conflicts of Laws: Civil, Common and Maritime" (1994), at p. 12.

in the application of its own law which merely reflects its social, economic or administrative policy. Although *Currie* recognized that there are *true* and *false* conflicts, i.e. that not every legal system having contact to the facts has a genuine interest in its application, he promoted the application of the *lex fori* in almost every case. His approach was criticized as lacking the necessary degree of equity and balance of the discovered interests[217]. Later on, *Van Mehren* and *Trautman*[218] introduced a system giving a guideline on how to weigh the interests involved without such an inflexible recourse to the *lex fori*. *Baxter*[219] proposed another approach to the evaluation of interests in his "comparative impairment theory", requiring the court to decide which states' interest will be least impaired by the application of a legal system[220]. This approach has been influential in California[221], in Louisiana where it is reflected in some revised conflicts provisions of the Civil Code[222], and also slightly modified in New York[223]. In the *Restatement Second* of 1969, *Reese*[224] used *Morris'* "most significant relation rule"[225] and implemented a modified version into an approach which is not free from ambiguities. As *Tetley*[226] cogently displays, the *Restatement Second, 1969* introduces two concepts, "interests" and "policies", in sec. 6 (b) and (c); and then refers to sec. 6 in general in the sections dealing with contracts (sec. 188) and torts (sec. 145) in particular. The logical conclusion to be drawn is that both "interests" and "policies" as elements of the interest analysis and the most significant relationship are "inextricably linked in the Restatement Second"[227].

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217 *A.E. Anton*, "Private International Law" (2 ed. 1990), at p. 41. See also *Scoles & Hay*, "Conflict of Laws" (2 ed. 1992), at pp. 583-591.

218 "The Law of Multistate Problems" (1965), at pp. 341-375.

219 *Baxter*, "Choice of Law and the Federal System", 16 Stan.L.Rev. (1963), 1.

220 For further interpretation of the "comparative impairment" approach see *Morris*, "The Conflict of Laws" (4 ed. 1993), at p. 455; *Cheshire & North*, "Private International Law" (12 ed. 1992), at p. 34.

221 See e.g. *Travellers Insurance Co. v. Workmen's Compensation Appeals Board* (1967), 68 Cal.2d 7; 64 Cal.Rptr. 440. *Horowitz*, "The Law of Choice of Law in California: A Restatement", 21 U.C.L.A. L.Rev. (1974), 719.

222 See Arts. 3519; 3537; 3542.

223 *Istim Inc. v. Chemical Bank* (1991), 78 N.Y.2d 342.

224 *Willis L.M. Reese*, a professor of Columbia University, served as the reporter for the American Law Institute. As to his personal views see e.g. *Reese*, "Choice of Law: Rules or Approach", 57 Cornell L.Rev. (1972), 315.

225 *Morris*, "The Proper Law of a Tort", 64 Harv.L.Rev. (1951), 881; at p. 888 refers to "the proper law" as "[...] the law which, on policy grounds, seems to have the most significant connection with the chain of acts and consequences in the particular situation before us." Some preparatory thoughts are already found in his earlier publication: "Torts in the Conflict of Laws", 12 Mod.L.Rev. (1949), 248.

226 "International Conflicts of Laws: Civil, Common and Maritime" (1994), at p. 13.

227 *Tetley, ibd.*

In re Paris Air Crash, a California Court held that these approaches constitute an "unanswerable enigma"[228]

As *Juenger* excellently comments: "eclecticism codified"[229].

Illinois[230] and Texas[231] e.g. apply an interpretation of this rule. *Leflar*[232] replaced the task of evaluating each states' or government's interests with a list of "choice influencing factors"[233]. Although *Leflar* himself put equal emphasis on each of the choice influencing considerations, regard has been given only to the last of these considerations: the "better rule of law"[234]. *McDougal III*[235] takes this a step further when he promotes a "best rule of law" theory, according to which, instead of choosing between two interests, one must "first identify all interests", i.e. "the interests asserted by the decision makers of all significantly affected states"[236]. Subsequently, *McDougal III* attempts the "development and application of transnational laws", a *ius gentium* to resolve transnational disputes[237]. Not only does this approach remind one of earlier attempts by *Zitelmann*[238] and *Frankenstein*[239], but here the characterization of this approach as "substantive" and "teleological"[240] is also justified to an even higher degree than *Leflar's* approach[241]. Finally, classifications such as

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228 *In re Paris Air Crash of March 3, 1974* (C.D.Cal. 1975), 399 F.Supp. 732, at p. 741.

229 *Juenger*, "Choice of Law and Multistate Justice" (1993), at p. 105.

230 *Champagnie v. W.E. O'Neill Constr. Co.* (1979), 77 Ill.App.3d 136; 395 N.E.2d 990.

231 *Duncan v. Cessna Aircraft* (Tex. 1984), 665 S.W.2d 414.

232 *Leflar & McDougal*, "American Conflicts Law" (4 ed. 1986), esp. at p. 279; *Leflar*, "Conflicts Law: More Than Choice Influencing Considerations", 54 Calif.L.Rev. (1966), 1584.

233 (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the *forum's* governmental interests; (5) application of the better rule of law. For concise evaluations see *Tetley*, "International Conflicts of Laws: Civil, Common and Maritime" (1994), at p. 14; *Juenger*, "Choice of Law and Multistate Justice" (1993), at pp. 103 ff.

234 See e.g. the application of this approach in Hawaii, Minnesota, and Wisconsin:
California Federal Savings & Loan Assoc. v. Bell (1987), 735 P.2d 499; *Hime v. State Farm Fire & Casualty Co.* (Minn. 1979), 284 N.W.2d 829, cert. den. (1980), 444 U.S. 1032; *Schlosser v. Alis-Chalmers Corp.* (1978), 86 Wis.2d 226; 271 N.W.2d 879 - respectively.
See also *Tetley*, "International Conflicts of Laws: Civil, Common and Maritime" (1994), at p. 14 (who also mentions New Hampshire); *Scoles & Hay*, "Conflict of Laws" (1992), at pp. 600-604; *Juenger*, "Choice of Law and Multistate Justice" (1993), pp. 103-105.

235 *McDougal III*, "Toward Application of the Best Rule of Law in Choice of Law Cases", 35 Mercer L.Rev. 483.

236 *Ibd.* at p. 484.

237 *McDougal III*, "Private International Law: Ius Gentium Versus Choice of Law Rules or Approaches", 38 Am.J.Comp.L. (1990), 521 (at pp. 521; 537).

238 *Zitelmann*, "Internationales Privatrecht", 2 vol's (1897-1903).

239 *Frankenstein*, "Internationales Privatrecht", 4 vol's (1926-1930).

240 *Tetley*, "International Conflicts of Laws: Civil, Common and Maritime" (1994), at p. 15.

241 *Leflar's* approach had been criticized as "teleological or substantive" by *Borchers*, "The Choice-of-Law Revolution: An Empirical Study", 49 Wash. & Lee L.Rev. (1992), 357 (364).

"substantive", "teleological", "unilateral", and "multilateral" are abandoned by *Juenger*[242], who, arriving at his own substantive, teleological approach, proclaims that the proper law be chosen by result-oriented conflict rules in order to attain a just solution. The goal is the achievement of "stability and fairness"[243]. *Juenger's* scholarly study, appreciated as "a convincing plea to recognize that USA courts are already applying the substantive approach in the conflicts of law"[244], certainly matches its self-assigned ultimate objective, to provide for "multistate justice", to create "a new *ius commune*"[245].

It is a matter of course, even for a civil law jurisdiction, to include the practice of law courts into the development of conflicts of laws rules. The brief evaluation of the American conflicts revolution, however, reads like a series of restatements, a scholarly reaction to the course of US American court decisions, sometimes rather hopeful (such as *Leflar, McDougal* and *Juenger),* sometimes rather resigned (such as *Ehrenzweig). Juenger,* who drafted a new tort conflicts rule for products liability cases[246], may at present be considered as the prime mover of the American development (although nobody would expect to see him free from criticism[247]). His approach - as well as any of the American approaches, theories, rules, etc. - is a substantive, material, and (as it is often put) a teleological one.

This type of "Multistate justice" on the one hand embraces - to apply a dictum of a Minnesota Supreme Court Judge which seems to be well in line with the American development in general - "a consideration that must inevitably influence the decision of a court [in] its research for the 'better law' - one that to the court appears to present a sounder view [...]. This is, of course, the way any court worth its salt selects the law it uses."[248] "Multistate justice" in this said sense, on the other

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242 *Juenger,* "Choice of Law and Multistate Justice" (1993), at pp. 86-88.

243 *Ibd.* at p. 86.

244 *Tetley,* "International Conflicts of Laws: Civil, Common and Maritime" (1994), at p. 15.

245 *Juenger,* "Choice of Law and Multistate Justice" (1993), at p. 193. See also at p. 236: "multistate justice [...] to be dispensed everywhere".

246 *Juenger,* "Choice of Law and Multistate Justice" (1993), at pp. 196 *et seq.*

247 *Borchers,* "The Choice-of-Law Revolution: An Empirical Study", 49 Wash. & Lee L.Rev. (1992), 357 (383 f.); *Lowenfeld,* "Friedrich K. Juenger: 'Choice of Law and Multistate Justice'", 88 Am.J.int.L. (1994), 184; *Sedler,* "Professor Juenger's Challenge to the Interest Analysis Approach to Choice-of-Law: An Appreciation and a Response", 23 U.C. Davis L.Rev. (1990), 865. See also *Juenger's* response: "Governmental Interest Analysis and Multistate Justice: A Reply to Professor Sedler", 24 U.C. Davis L.Rev. (1990), 227.

248 *Heath v. Zellmer* (1967), 35 Wis.2d 578 (598 f.) = 151 N.W.2d 664 (673 f.), per *Hefferman J.*

hand, can *only* be applied to a federal system consisting of rather independent individual legal systems, *if one condition is met:* A prerequisite will always be certain *common denominators*, such as culture, language, education, economy, administration and their reflections in law - just as e.g. in the USA. A "better/best law approach" or a "comparative impairment" analysis would be difficult, if not impossible, to conduct if the legal systems involved are such as Nepal, Saudi Arabia, Argentina, and Oregon. The amount of resources required to resolve the case in each of the four very different legal systems would already be considerable - and, moreover, who to decide that a case is "better governed" by either of these legal systems?

Another concept, the concept of "governmental interest analysis" as brought by *Reese* into the *Restatement Second* of 1969, has been compared to *von Savigny's* legal relationship theory. At the same time, however, it must be conceded that the "relationship" in *Reese's* concept consists of the states' or government's interests[249]. This vastly differs from *von Savigny's* notion, which locates the *situs* of a legal relationship in the relationship between the parties, i.e. in a *private* bipolar relationship. Learned authors who are more concerned with truly international cases than with multistate jurisdictions agree that in the field of *private* law as a general rule state interests do *not* have to prevail[250]. From a very modern perspective there may be some restrictions to *von Savigny's* approach, especially for the sake of consumer protection to prevent *fraus legis* (evasion). The principle, however, should remain the fostering of justice on the basis of *private autonomy,* which is better served by *von Savigny's* approach than by *Reese's*.

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249 *Tetley*, "International Conflicts of Laws: Civil, Common and Maritime" (1994), at p. 24.

250 *Kegel*, "The Crisis of Conflict of Laws", 112 Recueil des Cours (1964-II), 90 (at p. 182); *Heini*, "Privat-oder 'Gemein'-Interessen im internationalen Privatrecht?", 92 Z SchweizR (1973), 381 (388); *Jayme*, "Zur Krise des 'Governmental Interest Approach'", in: *Lüderitz/Schröder*, "Internationales Privatrecht und Rechtsvergleichung im Ausgang des 20. Jahrhunderts - Bewahrung oder Wende? Festschrift für Gerhard Kegel" (1977), 359 (at pp. 360). At p. 366, *Jayme* ascertains: "Considering the latest development of the 'governmental interest approach', it is obvious that it constitutes rather an obstacle to the work of the courts than that it is pertaining to it. The lack of ascertainment of fundamental mechanisms of the conflicts of laws has rendered the new approach useless as to legal pratice. Complaining remarks of the judges increase. The consequences are uncertainty and arbitrariness." - "Betrachtet man die jüngste Entwicklung des 'governmental interest approach', so fällt vor allem auf, daß er die Entscheidungen der Gerichte eher behindert als fördert. Die mangelnde Einsicht in Grundmechanismen des Kollisionsrechts hat dazu geführt, daß sich die neue Methode in der Praxis als unbrauchbar erweist. Unmutsäußerungen der Richter nehmen zu. Unsicherheit und Willkür sind die Folge." [translation supplied].

The consequences to be drawn from the recognition that the relevant relationships are *private law* relationships, are twofold:

First, as *Tetley* precisely describes it[251], *Juenger, McDougal, Leflar,* and *Weintraub*[252], in their theories, reflect the American propensity to treat all persons to a single event identically although their interests, claims, and rights may be different. In fact, in a system of private autonomy where parties can *choose* whether and under which conditions they will *contract*, the necessity to treat persons being parties to *different contracts* equally does not cogently emerge. (One may, however, also add that - in a complementary situation - a necessity to treat persons differently in *tort* based actions remains unproved, either.)

Secondly, as *Kegel* points out[253], the American approach of constantly intermingling policies of substantive justice with the law of conflicts results in an obscure vanishing of conflicts law in the "'black hole' of substantive law". Justice with respect to the private interests must be a private international justice, a *conflicts justice*[254]. Conflicts justice vests a due degree of respect as to foreign legal systems and the cultures reflected by them. Substantive justice, as a second step, has to be sought by the proper application of a particular legal system to a relationship; and where the *forum* state wants to safeguard minimum substantive requirements (e.g. with respect to consumer protection or labor law), *ordre public* reservations and mandatory clauses may be used to a reasonable extent.

There has, of course, been as much great admiration among European scholars for the American conflicts theories as in the USA[255]; nevertheless it seems that the international approach to resolve the conflicts of laws might take a direction which is different from these very modern, but as "single-country multi-jurisdiction" inherently restricted rules.

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251 *Tetley*, "International Conflicts of Laws: Civil, Common and Maritime" (1994), at p. 16, n. 44.

252 *Weintraub*, "Commentary on the Conflict of Laws" (3 ed. 1986).

253 *Kegel*, "Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers", 27 Am.J.Comp.L. (1979), 615 (617).

254 It may not be overlooked, however, that also *Kegel* admitted that "even if conflicts justice has preference on principle it must retreat in serious cases behind substantive justice"; although the rule-exception relation is clearly expressed: *ibd.* at p. 632.

255 See e.g. *Siehr*, "Domestic Relations in Europe: Economic Equivalents to American Evolutionists", 30 Am.J.Comp.L. (1982), 37 (71); *Kegel*, "The Crisis of Conflict of Laws", "The Crisis of Conflict of Laws", 112 Recueil des Cours (1964-II), 90 (at pp. 180-182). Apparently, *Axel Flessner* is the most recent protagonist of a "substantive justice and equity" approach to the conflicts of laws in Europe who thoroughly elaborated his approach in a treatise. See *Flessner*, "Interessenjurisprudenz im internationalen Privatrecht" (1990).

The revolutionary element in the American approach is vested in its endeavor for substantive justice, involving an essential element of prejudice as to substantive law[256]. The classical approach, however, tries to avoid such prejudice. The reasons for that this classical approach proves pertinent to the solution of the conflicts of laws question are manifold:

The "American Conflicts Revolution"[257] is national in its theory and practice. It has emerged mainly to resolve conflicts of inter-state commerce. As *Tetley* observes: "The American common law system is *relatively* uniform from state to state, as compared with Europe or the rest of the world."[258] It must first be logically concluded that, these theories are developed mainly on the ground of common but not under civil law; second, that state governments only promote their interests by statutes where a different approach from "general notions" is indicated; and third, that the judges can quite easily access and understand a different state's law and policy where such sporadical interventions have occurred. In the described environment, it is easy to evaluate "governmental interests" and "better", i.e. more appropriate or more modern laws.

Rarely do American courts or writers consider the truly international problem[259], which creates a situation different from the European - due to geographical facts, the *Rome Convention on the Law Applicable to Contractual Obligations* of 1980 creating a uniform European conflicts law[260], and in England especially because of the Privy Council's authority on other Commonwealth jurisdictions.

In the USA, the social and administrative realities are perceived to assign a very special task to litigation. In order to characterize this task one may apply *Tetley's*[261] terminology, as he re-introduces *Aristotle's* distinction between "distributive' and "corrective" justice: While the USA hosts a more "corrective" social and administrative system, i.e. correcting losses (compensate damages) when they occur, other countries may host more "distributive" systems such as public

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256 As to an aviation case see e.g. *Griffith v. UA* (Penn. Supr.Ct. 1964), [1964] U.S.Av.R. 647.

257 *Juenger*, "Choice of Law and Multistate Justice" (1993), at p. 88.

258 *Tetley*, "International Conflicts of Laws: Civil, Common and Maritime" (1994), at p. 17 [emphasis original].

259 Cases such as *Babcock v. Johnson* (1963), 12 N.Y.2d 473 or *Lauritzen v. Larsen* (1953), 345 U.S. 571 are exceptions, as well as the considerations by *Weintraub*, "The Extraterritorial Application of Antitrust & Security Laws. An Inquiry into the Utility of a 'Choice-of-Law' Approach", 70 Texas L.Rev. (1992), 1799.

260 Convention on the Law Applicable to Contractual Obligations, opened for signature at Rome on 19 June 1980, 80/934/EEC, 23 O.J. Eur. Comm. (No. L 266) 1 (1980). Hereinafter referred to as *Rome Convention 1980*. The text is also reproduced in *North (ed.)*, "Contract Conflicts" (1982), Appendix A.

261 *Tetley*, "International Conflicts of Laws: Civil, Common and Maritime" (1994), at pp. 21 *et seq.*

health insurances, etc.[262] To put it bluntly: the latter systems can afford a more systematic approach because they are not forced to constantly escape from rules in order to socially safeguard the existence of e.g. wrongdoers from the legal standpoint who, nevertheless, as the socially weaker would be unable to survive.

Furthermore, one must address the question whether it is really feasible to evaluate "competing" governmental interests. Does it conform with comity of nations for a court to deem a foreign government *"uninterested"*? And what exactly is subject to the analysis: interests or policies? And in either case: whose interests - the government's or the person's conderned? Is it practically possible to evaluate a foreign legal system as a "better" law than another system, and at the same time *respect* all legal systems? Again, rarely have these issues been addressed by American writers[263] .

The traditional concepts, however, involve elements of respect before the *régime* of foreign norms[264] , based on the reasonable assumption that a government does not have a material interest in prevailing application of its own law since private law governs by its very nature only relations between *private* subjects. The balance, therefore, is to be sought almost purely on the level of conflicts of laws[265] . No regard is given to substantive law, i.e. the material outcome, unless ethic fundamentals of the state concerned are affected *(ordre public* reservations). Although the *general* approach to the features of conflicts of laws in the international arena owes due regard to culturally and religiously highly-sensitive issues as well as to secular issues such as the negotiability of an air waybill, the matters of *private international air law* are not too far remote from the former highly-

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262 For details and references see *Tetley, ibd.*

263 For an attempt see *Lowenfeld*, "Renvoi Among the Law Professors: An American's View of the European View of American Conflict of Laws", 30 Am.J.Comp.L (1982), 99. Nevertheless, questions raised such as by *Tetley, ibd.*, usually seem to be left unanswered.

264 As yet another example may serves the application of *lex patiae* as promoted by *Mancini* in his famous inauguaral address at the University of Turin *"Della nazionalità come fondamento del diritto delle genti"* ("nationality as the basis of international law"), 1851. *Mancini's* evaluation procedes on the premisis of equal treatment of citizens and aliens, and, since as far as private law is concerned the government cannot have an interest in unconditional application of its own law which is territorially limited, the foreign *lex patriae* is be to recognized with respect to foreign citizens, in absence of a special choice of law by the parties involved to govern their personal relationship. See also *Mancini, P.S.*, "Il principio di nazionalita" (1920).

265 Especially promoted by *Kegel*, "The Crisis of Private International Law", 112 Rec.d.Cours (1964-II), 91; *Id.*, *Kegel*, "Internationales Privatrecht" (5th ed. 1985), § 2. See also *OLG Stuttgart* (18 Dec. 1970 - 1 V A 2/70), NJW 1971, 994 (994): no evaluation of a "better law", no prevalence of a "culturally superior" law. See also *BGH* (20 June 1979 - IV ZR 106/78), BGHZ 75, 32 (41).

sensitive issues: For instance, the capacity to enter into contractual relationships and the compensability of non-economic damages affect these sensitive matters. Therefore, since the problem at stake is *true* private *international* law (i.e. conflicts of laws between nations), the - as opposed to the American conflicts "revolution" - rather "traditional" approaches are those to focus upon in order to find practicable and internationally acceptable solutions.

Since very different features are involved in the multi-colored scenery of a nation's legal notions reflecting different cultural, religious, social and economic notions, emphasis should be given to the aspect of practical foreseeability from the perspective of the parties involved in the contract of international carriage by air, i.e. to those conflicts rules that meet the requirement of determining the law whose application is to be reasonably expected by the parties, since it is closely connected to the carriage[266]. Quite often the criterion of uniform treatment of all passengers aboard an airplane is mentioned[267]. If this is understood to mean the application of the same substantive law to each person on board, then the necessity of such a rule is *not* self-evident: E.g. there may be a 200 seat aircraft operated by airline A. 50 seats may be chartered by B and the respective passages sold to passengers #1-50, and another 50 seats, #51-100, chartered by C who sold the respective passages to an independent travel agent D who, finally, is party to the contracts of carriage with passengers #51-100. Seats #101-200 are directly sold by A. How can all passengers expect to be treated by the same substantive law?[268] They have different partners to their contracts of carriage and meet inside the aircraft only because of economic convenience and arrangements of their contractual carriers, so that an expectation of uniform treatment in substance of different obligations[269] cannot be expected by the very nature of the relativity of contractual obligations. Furthermore, it appears more important to apply a uniform conflicts of laws rule to all international carriages as one step to relieve the current "open law situation"[270] as to conflicts than to achieve uniform treatment in substance for the mere

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266 Accordingly, *Alex Meyer*, "*SAS v. Wucherpfennig*", 4 ZLR (1955), 232 (235), looks for points of contact that dominate *("beherrschen")* the legal relationship (applying former German law).

267 *Supra.*

268 Similarly asks *Tetley*, "International Conflicts of Laws: Civil, Common and Maritime" (1994), at p. 19: "Why should all victims of an aircrash be treated similarly if they contracted in different jurisdictions with the air carrier?".

269 Obligations may e.g. differ in locations of departue and destination.

270 *Sand*, "'Parteiautonomie' in internationalen Luftbeförderungsverträgen", 18 ZLW (1969), 205 (at p. 217).

casualness of sitting in the same aircraft, especially in the perspectives of passengers #1-50 and #51-100, respectively, in the example.

Equity forms an important part of all law, but it should not constitute a major criterion in the process of resolving the conflicts of laws[271]. Equity is a part of substantive law; it would be difficult to believe a major legal system might exist without remedies of equity. In addition, where the fundamentals of a legal system could be violated by the consequent application of the proper foreign law, *ordre public* reservations are indicated to resolve these *very exceptional* cases. In general, the doctrines to be applied to serve private international justice should be sought from among "traditional" notions such as *lex rei sitae, lex loci contractus, lex banderae, lex loci solutionis, lex loci executionis, lex loci laesionis, lex loci delicti commissi, lex domicilii, lex patria, etc.* A detailed discussion *in concreto* with respect to the different subjects will be provided in the respective sections of this study[272].

III. Party Autonomy vs. Doctrinal Approaches

"The first solution which comes to the mind of any modern lawyer dealing with any contractual relations is the application of the principle of party autonomy in the choice of law - *lex voluntatis.*"[273] As mentioned *supra*, it is one of the fundamentals of modern private law, and it also affects private *international* law in that the parties' choice of a certain legal system to govern their contract will be given due regard[274].

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271 *Supra.*

272 For an overview of different points of contact see *Lauritzen v. Larsen* (1953), 345 U.S. 571; *Hellenic Lines v. Rhoditis* (1970), 398 U.S. 306. *Müller*, "Das internationale Privatrecht der Luftfahrt" (1932), at pp. 72 ff.; *Riese*, "Luftrecht" (1949), at pp. 393-397; *Id.*, "Internationalprivatrechtliche Probleme auf dem Gebiet des Luftrechts", 7 ZLR (1958), 271 (280); *Milde*, "The Problems of Liabilies in International Carriage by Air"(1963); *Id.* "Conflicts of Laws in the Law of the Air", 11 McGill L.J. (1965), 220 (245) ; *Sand*, "'Parteiautonomie' in internationalen Luftbeförderungsverträgen", 18 ZLW (1969), 205 (217); *Frings*, "Kollisionsrechtliche Aspekte des internationalen Luftberförderungsvertrages". 26 ZLW (1977), 8; *Mankiewicz*, "Liability of the International Air Carrier (1981), at p. 4; *Magdelénat*, "Air Cargo" (1983), at pp. 39 ff.; *Lagerberg*, Conflicts of Laws in Private International Air Law (Thesis, IASL, McGill; 1991), pp. 6-20; *Dettling-Ott*, "Schweizerisches und internationales Luftrecht" (1993), at pp. 78-93.

273 *Milde*, Conflicts of Laws in the Law of the Air, 11 McGill L.J. (1965), 220 (243).

274 On the relevance of a selection of the applicable law by the parties see esp. *Haudeck*, "Die Bedeutung des Parteiwillens im internationalen Privatrecht" (1931). *Haudeck's* publication has been honoured to be "the best

In the absence of a choice, a doctrinal approach is indicated. As far as common law litigation is concerned, the doctrinal approach has to follow the concepts developed by the courts; as far as the development of law *(leges ferendae)* and the theory of cognition *(Erkenntnistheorie)* are concerned, it is pertinent to discuss and recognize the favorable solution(s). This discussion must take place with respect to each of the different particulars at issue (contracts of carriage, insurance, aircraft purchase, finance, and the creation of security rights).

1. The Proper Application of *lex voluntatis*: *voluntas aperta*

Probably the most significant legislative piece of work from the last one and a half decades with respect to the conflicts of laws is the *Rome Convention* of 1980 *on the Law Applicable to Contractual Obligations*[275]. Today, it is implemented by virtually all member states of the European Union, even though in a number of states the Convention is still subject to immense controversy (in England e.g. the implementation of the Convention has been characterized as an incapacitation of the English courts[276]).

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treatiese on the autonomy of the parties" by *M. Wolff.*, "The Choice of Law by the Parties in International Contracts", 49 Juridical Review (1937), 110, at p. 121, n. 1.

275 The Convention is reproduced in O.J. 1980 L 266/1. A report written by Giuliano and *Lagarde* was also published in O.J. 1980 C 282/1. For a general evaluation of the Convention see the contributions in *North* (ed.), "Contract Conflicts" (Amsterdam, New York, Oxford 1982); *Morse*, "The EEC Convention on the Law Applicable to Contractual Obligations", 2 Ybk.Eur.L. (1982), 107 ff.; *Lagarde*, "The European Convention on the Law Applicable to Contractual Obligations", 22 Va.J.Int.L. (1981), 91 ff.; *Delaume*, "The European Convention on the Law Applicable to Contractual Obligations: Why a Convention?", 22 Va.J.Int.L. (1981), 105; *Juenger*, "The European Convention on the Law Applicable to Contractual Obligations: Some Critical Observations", 22 Va.J.Int.L. (1981), 123; *Id.*, "Parteiautonomie und objektive Anknüpfung im EG-Übereinkommen zum Internationalen Vertragsrecht - Eine Kritik aus amerikanischer Sicht", 46 RabelsZ (1982), 57; *Mann*, "The Proper Law in the Conflicts of Laws", 36 I.C.L.Q. (1987), 437 ff.; *Lando*, "The EEC Convention on the Law Applicable to Contractual Obligations", 24 C.M.L.R. (1987), 159 ff.

276 *Mann*, "The Proper Law of Contract - An Obituary", 107 L.Q.R. (1991), 353 ff. (354). His view is supported by *McLachlan*, "Splitting the Proper Law in Private International Law". 61 Bit.Ybk.Int.L. (1990), 311 ff.
The German review of private international law is commented on by *Lorenz*, "Vom alten zum neuen internationalen Schuldvertragsrecht", IPRax 1987, 269.
Genrally see also *Lando*, "European Contract Law", 31 Am.J.Comp.L. (1983), 653, who points out that the challenge in Europe is very different from the forumlation of Restatements in the USA. While in the USA the Restatement simply reiterates existing law, "The Principles of European Contract Law have to be stablished by a more creative process", *ibd.* at p. 657.

Art. 3 (1) of the *Rome Convention 1980* displays what has been "created" (to apply *Lando's* phrase[277]) into European contract law: "A contract shall be governed by the law chosen by the parties."

The notion of a deliberately selectable proper law of the contract does not concur with the approaches of early concepts applying objective tests referring to localizing factors, either in the literal sense *(locus regit actum)* as e.g. in the Canonist doctrine of the 12th century[278], or by localizing the legal relationship, as e.g. by *von Bar*[279]. Although it was no one less than *von Savigny*, the promoter of the famous *situs* theory, who favored party autonomy[280], *Juenger* finds that the principle of party autonomy prevailed "against all notions of legal theory"[281]. As a matter of fact, it appears only consistent with private law and sensible that if the parties can choose where to conclude, to perform, etc. the contract, and thus *indirectly influence* the law governing the legal relationship, they must be able to *directly choose* the applicable law by reference as well. Therefore, it is little surprising that private autonomy as to the selection of the applicable law to a contract has become a "common asset of all developed legal systems"[282].

As to a brief outline of the strains of the *lex voluntatis*, although scholars cheer *Dumoulin* as the alleged initiator of this concept[283], it was already *Huber* who had recognized the parties' autonomy to

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277 *Supra.*

278 The phrase *locus regit actum* was coined by Italian glossators and their French colleagues. See *Battifol/Lagarde*, "Droit international privé" II (7 ed. 1983), 257; *Lagerberg*, "Conflicts of Laws in Private International Air Law" (Thesis, IASL, McGill 1991), at p. 5. *Juenger*, "Choice of Law and Multistate Justice" (1993), at p. 13 characterizes them as the inventors of "multilateralism" in the formulation of conflicts approaches. As to this important distinction between "one-sided" and "all-sided" rules see *M. Wolff*, "Private International Law" (2 ed. 1950), at. p. 96.

279 *Von Bar*, "Theorie und Praxis des IPR" (2 ed. 1889), at pp. 4 ff. [Also published as translated: "The Theory and Practice of Private International Law"; 2 ed. Edinburgh: W. Green & Sons]. See also *Lewald*, "Das deutsche IPR" (1931), at pp. 200 ff.

280 *Von Savigny*, "System des heutigen Römischen Rechts" VIII (1849), at pp. 206, 210 *et seq.*

281 *Juenger*, "Parteiautonomie und objektive Anknüpfung im EG-Übereinkommen zum Internationalen Vertragsrecht - Eine Kritik aus amerikanischer Sicht", 46 RabelsZ (1982), 57 (63): "Dennoch hat sich das Prinzip der Parteiautonomie gegen alle rechtstheoretischen Anfeindungen durchgesetzt." [English translation provided].

282 *Juenger, ibd.* at p. 64: "Somit erstaunt es nicht, daß das Prinzip der Parteiautonomie seit geraumer Zeit Gemeingut aller entwickelten Rechtssysteme geworden ist." [English translation provided].

283 *Batiffol/Lagarde*, "Droit international privé" (6 ed. 1976) at p. 231; *Cheshie/North*, "Private International Law" (10 ed. 1979), at p. 21; *Raape/Sturm*, "Internationales Privatrecht" (6 ed. 1977), 407. See also *Chauveau*, "Droit Aérien" (1951), p. 123.
Gamillscheg, "Der Einfluß Dumoulins auf die Entwicklung des Kollisionsrechts" (1955), at pp. 110-121 renders proof to the contrary.

select the applicable law in that he pronounced that the *lex loci contractus* shall not be applicable if the parties had considered a different legal system[284]. This thought was adhered to by *Lord Mansfield* in his famous *obiter dictum* in *Robinson v. Bland* (1760)[285], to be further continued in *Gienar v. Mieyer* (1796)[286] and ever since[287]. In the USA, *Chief Justice Marshal* also adhered to these previous thoughts in *Wayman v. Southard* (1825)[288]; it influenced *Joseph Story*[289], was for some reason not acknowledged by the *Restatement First*, but now forms part of the *Restatement Second*[290]. In France, the *Cour de Cassation* rendered a leading decision recognizing the principle of party autonomy as to the choice of law[291]. In Canada, if the parties have expressly selected a proper law, in the absence of vitiating factors, this choice will be upheld by the courts[292]. In Denmark[293] and Sweden[294] the principle of party autonomy is also accepted, as it is in the codes of Switzerland[295] and Germany[296].

Accordingly, the *lex voluntatis* has been held readily applicable in air law as well as space law[297]. Since air and space law are not separate areas but part of general law, the application of general doctrines should not face any obstacles. Thus the choice-of-law freedom was recognized by the

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284 *Huber*, "Praelectiones Iuris Romani et Hodierni" (1747), lib. I, tit. 3 no. 10, at p. 27 *et seq.*

285 *Robinson v. Bland* (1760), 1 Black W. 256; 96 E.R. 141.

286 *Gienar v. Mieyer* (1796), 2 Hy. Bl. 603.

287 See e.g. *Cheshire/North*, "Private International Law" (11 ed. 1987), at p. 451.

288 *Wayman v. Southard* (1825), 23 U.S. (10 Wheat.) 1, 48.

289 *Story*," Commentaries on the Conflict of Laws" (7 ed. 1872), at pp. 275; 326.

290 *Restatement (Second) of the Conflict of Laws* (1971), 558, at §§ 186 *et seq.*

291 *American Trading Co. c. Quebec Steamship Coo. Ltd (Cass. - Fr.* - 1912), Journ.dr.int.priv. 1912, 1156.

292 *Vita Food Prod. Inc. v. Unus Shipping Co.*, [1939] A.C. 277; *Miller & Partners Ltd. v. Witworth Street Estates Ltd.* [1970] A.C. 598 (603); *Drew Brown Ltd. v. Te Orient Trader*, [1974] S.C.R. 1286.

293 *Lando*, "Kontraktstatuttet" (3 ed. 1981), at pp. 99-109.

294 *Skandia v. Riksgäldskontoret*, (1937) Nytt Juridiskt Arkiv 1 *(Sweden)*. See also *Bogdan*, "Svensk internationell privat - och processrätt" (3 ed. 1987), 205; *Lagerberg*, "Conflicts of Laws in Private International Air Law" (Thesis, IASL, McGill; 1991), at p. 7.

295 *Bundesgesetz v. 18.12.1987 über das Iinternationale Privatrecht (IPRG)* (Bbl 1988 I 5-60), Art. 116 (Swiss Federal Statute on Private International Law of December 18, 1987; English translation provided in 37 Am.J.Comp.L. [1989], 193, at 223).
On Swiss law prior to the reform see *Aubert*, "Les contrats internationaux dans la doctrine et la jurisprudence suisses", 51 Revue critique de droit international privé (1962), 19 (33-39). On the reform see *Samuel*, "The New Swiss Private International Law Act", 37 I.C.L.Q. (1988), 681. The novelty of the Swiss code is pointed out by *Simeonides*, "The New Swiss Conflicts Codification: An Introduction", 37 Am.J.Comp.L. (1989), 187. For a comprehensive treatise on the new code see *Schnyder*, "Das neue IPR-Gesetz" (1988), and *Dessemontet (ed.)*, "Le nouveau droit internaional privé suisse" (1988).

296 Art. 27 *EGBGB (Einführungsgesetz zum Bürgerlichen Gesetzbuch in der Fassung vom 25. Juli 1986)* - BGBl. I, 1142. - *a.F.*
On the reform see *Wegen*, "Federal Repulic of Germany: Act on the Revision of the Private International Law", 27 I.L.M. (1988), 1.

297 See *Sand*, "'Parteiautonomie'" in internationalen Luftbeförderungsverträgen, 18 ZLW (1969), 205 and the examples cited there. As to space law see *Jenks*, "Space Law" (1965), at p. 295.

Institute de Droit International in its *Brussels Resolution* of 1963[298], Art. 5 (1)[299]. Summarizing, an express choice of law will be held valid.

2. Determination of a Conclusive Will? - A Critique

The proper application of *lex voluntatis* implies an inquiry of the will of the parties: Should their minds, based on the same expectations, have agreed upon a certain choice of law, then this is a proper and conclusive stipulation constituting a contract of reference *(Verweisungsvertrag)*, even if not expressed. Such implied choice of law may be found in references to a certain jurisdiction or an arbitration clause submitting disputes to a particular country. As *Lagerberg* states[300] examining English law, other such indications may be the parties' residences, the nationality of the parties involved, the language and terminology used, currency of payment, style of documents and similar circumstances, an approach he characterizes as "clearly a subjective method".

However, what is deemed "subjective" is ultimately determined by a normativistic[301] approach, an approach applying legal evaluations rather than simple facts such as the fact of a clear express selection of the law by the parties (e.g. "This contract shall be governed by ... law"). This is where differences between an express and an implied selection reside.

Usually the parties of a contract of carriage merely bear in their mind the socio-economic effects of their agreement: transportation for consideration. The idea of a true choice of law governing their agreement is *not* a factum. And even if such an idea was present in the minds of the parties, who is to

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298 50 *Annuaire de l'Institut de Droit International* II (1963), pp. 373-376. For a critical discussion see *Milde*, "Conflicts of Laws in the Law of the Air", 11 McGill L.J. (1965), 220.

299 On Art. 5 (1) see *Makarov*, "Conflits de lois en matière de droit aérien", 48 *Annuaire de l'Institut de Droit International* I (1959), p. 386.

300 *Lagerberg*, "Conflicts of Laws in Private International Air Law" (Thesis, IASL, McGill; 1991), pp. 11 et seq.

301 As to the notion of *normativism* (whose true sense is sometimes difficult to access for those exclusively educated in the traditions of common law) see *Binder*, "Philosophie des Rechts" (1925), at pp. 686 ff., explaining why legal sciences are "normative sciences" *(Normativwissenschaften)*. To respectfully simplify and bring it down to a single sentence: The judge has to discover the legal rules, i.e. the *norm*, that governs a certain social relationship at issue. One may then discuss as to who creates or has created the rule and where it is ultimately vested (in the society or merely in a statute or legal decision). For this discussion see e.g. *Binder, ibd.*, and at p. 230: justice is not vested in the rule, in the *norm*, but justice is vested in the *relationship* between the *rule* and a certain, definite *notion* (of justice) *(Rechtsidee)*. This supports understanding the necessity for a *teleo*logical consideration.

prove it? Furthermore, from a practical point of view, when a contract of carriage is agreed upon, making use of the IATA standard clauses without a choice of law rule, whose minds should be the decisive ones to determine a silent but conclusive will to pinpoint a certain law to govern the contract: the executive general of the carrier and the employer of a business traveler, or the travel agent who sells the ticket and the passenger?! Such tests may be called "subjective". More frankly, however, they merely represent what is *legally deemed* "subjective", as is shown, for instance, by the requirement occurring in some jurisdictions that contracts exceeding a certain amount of money be in written form. In the latter example the form requirement supersedes the will. Similarly, in the former case (choice of law), an *appropriate* point of contact has to be looked for, *scil.* what is *normativly deemed appropriate* - such appropriation is subject to *legal* and not to factual considerations.

E.g. the German conflicts of laws rules formerly applied an approach which first examined the expressed choice of law by the parties. In the absence of an express choice, a conclusively "implied" choice had to be evaluated. If such choice was not implied in the contract, either, as a subsidiary solution, a *hypothetical analysis* of which law the parties *would have chosen* if they had taken a choice would have had to take place. However, the line between the second and the third prong of this approach is difficult to draw in practice and rather of an academic character; in 1985 the hypothetical approach was replaced by an objective test involving rebuttable presumptions according to different points of contact[302].

Similar to what the German Federal Supreme Court *(Bundesgerichtshof, BGH)* had already found, in absence of an express choice of law, the Canadian courts will ascertain the proper law objectively in the light of the facts and circumstances of each case, having regard to factors such as the place of contracting, the place of performance, the place of residence or the principal place of business of the parties, the subject matter of the contract, the language or the money used - any factor which connects the contractual relationship to a particular system of law[303]. A reference as to inferred party

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302 See Art. 28 *EGBGB*. For a detailed discussion of the former law see *Kegel*, "Internationales Privatrecht" (5 ed. 1985), pp. 374-386. That the former approach was more normativistic than a subjective test was already clearly expressed in *BGH* (18 Oct. 1965 - VII ZR 171/63), BGHZ 44, 183 (186).

303 *Elter v. Kertez*, [1960] O.R. 672 (682 f.); *Imperial Life Assurance Co. v. Colmenares*, [1967] S.C.R. 443; *O'Brien v. CPR*, [1972] 3. W.W.R. 456; *Arnoldsen Y Serpa v. Confederation Life Assoc.* [1974] 2 O.R. (2d) 484.

intentions has been held *unnecessary and misleading*; instead of following a *legal fiction* of presumed intentions, the courts have to follow an *objective test* which applies the indicators mentioned above and which is "formulated solely on the basis of that system of law with which the transaction has its closest and most real connection"[304].[305] Almost verbatimly the same wording as used by the Canadian Supreme Court in its leading decision[306], had already been applied by the Austrian learned jurist *Walker* in his treatise on private international law when he speaks of "presumptive intentions" and "fictious covenants of the contract"[307].

Although "presumed party intentions" should "alert" the judge[308] to apply due care in examining and researching the true intentions of the parties involved[309], it apparently opens the door widely for the court to impose its own interpretations of policy on the parties' intentions. Some find this simply "misleading"[310]. Others, such as *Kegel,* consider the consistence of such notions (presumed party intentions) as "legal caoutchouc"[311], in spite of the fact that the *Rome Convention 1980* has forced western European states to (re-) introduce it[312].

It appears that the use of indications is a means of normativity, applied by the court concerned in order to reach a decision according to the principle of good faith and equity. Consistently, in absence of an express choice of law there is no "purely subjective method" of universal acceptance since notions of normativism vary *("lex caoutchouc"). Ultimately* the test is an *objective* one giving due regard to the circumstances of the contract.

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304 *Bunker*, "The Law of Aerospace Finanace in Canada" (1988), p. 325.

305 *Etler v. Kertesz* (1960), 26 D.L.R. (2d) 209; *Imperial Life Assurance Co. v. Colmenares,* [1967] S.C.R. 443.

306 *Imperial Life Assurance Co. v. Colmenares,* [1967] S.C.R. 443

307 *Walker,* "Internationales Privatrecht" (1921), at p. 342: "Auch der 'präsumptiven Intention' der Parteien, der 'fingierten Parteibestimmung' wird Folge gegeben.".

308 *Lorenz*, "Vom alten zum neuen internationalen Schuldvertragsrecht", IPRax 87, at p. 271: "The subjective formula alerts the judge to examine the perspective of the parties." ["Die subjektive Formel mahnt den Richter, sich in die Rolle der Parteien im Zeitpunkt des Vertragsabschlusses zu versetzen" - English translation provided].

309 *Martin Wolff,* "The Choice of Law by the Parties in International Contracts", 49 Juridical Review (1937), 110 (at pp. 130-132).

310 *Bunker*, "The Law of Aerospace Finanace in Canada" (1988), p. 325.

311 *Kegel*, "Internationales Privatrecht" (5 ed. 1985), at p. 396: "Art. 27 (realer Parteiwille) [Art. 3 Rom-Abk.]: Die Parteien können das Vertragsstatut wählen (I 1); die Wahl muß ausdrücklich sein oder sich 'mit hinreichender Sicherheit aus den Bestimmungen des Verrtages oder aus den Umständen des Falles ergeben' (Kritik: Kautschuk)".

312 "The choice must be demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case" - Art. 3 (1) [2].

Therefore, the assumed will of the parties is read into the contract and is based on certain indications whose value is assessed by a third person, namely the judge, and therefore does *not* provide for a recommendable point of contact. Instead, the *indicating criteria themselves* are to be examined as to their reasonableness to serve the purpose of rendering an appropriate solution to the conflicts of laws problem in contracts of international carriage by air.

3. Restrictions of Party Choices

Although the freedom of the parties to select the applicable law is held readily applicable in air law, there are certain restrictions. In air law, mainly two aspects are involved: *fraus legis* committed by illegally evading to a different jurisdiction by the parties[313], and *contrats d'adhésion* which may state an explicit choice but do not represent a proper application of the *lex voluntatis*.

For instance, under the Warsaw Convention, Art. 32 provides for a mandatory character of the liability rules to the extent that the carrier cannot contract out of his liability as established in the Convention, so that a "choice of law clause would have to be formulated very carefully"[314]. Furthermore, the number of legal systems available is considered limited to either the laws of the *fora* under Art. 28 of the Warsaw Convention[315] or at least the circle of states that are a party to the Convention[316].

Moreover, the maxim of complete private autonomy postulates equal bargaining power of the parties involved. Neither do the parties of a contract of carriage by air bargain the covenants of the contract (unless the demand of a major business customer, conceivable solely in cargo transportation, matches the economic size of the carrier), nor has the customer the opportunity to influence any

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313 Especially Canada proceeds into new dimensions after *Moguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R.4th 256; [1990] 3 S.C.R. 1077: see *Hunt v. T & N plc.*, 109 D.L.R.4th 16; [1993] 4 S.C.R. 289. On the development see *Edinger*, "The Constitutionalization of the Conflict of Laws", 25 Can.Business L.J. (1995), 38; *Finkle/Labrecque*, "Low Cost Legal Remedies and Market Efficiency: Looking Beyond *Moguard*", 22 Can.Business L.J. (1993), 58 (at pp. 82 ff.).

314 *Milde*, "Conflicts of Laws in the Law of the Air", 11 McGill L.J. (1965), 220.

315 See e.g. *Riese*, "Luftrecht" (1949), at p. 470.

316 See e.g. *Guldimann*, "Internationales Lufttransportrecht" (1965), at p. 181. The practical significance of this aspect is certainly somewhat reduced facing the list of *Warsaw Convention* parties (see 18 Ann.Air Sp.L. II (1993), pp. 374-379).

single condition. The customer is subjected by a "thicket of Conditions of Carriage"[317], his agreement is a fiction, and the notion of a true "contract of reference" *(Verweisungsvertrag)* is a mere illusion. The legal remedies developed in many jurisdictions serving consumer protection, especially with respect to *contrats d'adhésion,* would apply. Apparently in order to avoid uncertainties concerning the validity of such clauses, IATA did not continue to make use of choice-of-law provisions[318].

But also with respect to contracts of insurance, considerations of public policy may influence a choice of law, even if it is stipulated among business parties of equal bargaining power[319].

4. Objective Tests:

The Currently Prevailing Doctrines and the Framework of Air Law

The forward trend in the development of private international law is directed at the application of a "closest relation test", supplemented by a number of guidelines and presumptions when a legal relationship is most closely related to a certain legal system.

In the USA, the *"most significant relationship"* test of the *Second Restatement*[320] requires the court to apply the law of state which has the closest relationship to the parties and the contents of the contract at issue, as far as considered relevant by state policies *(supra)*. The factors which have to be given due regard are: the place of contracting; the place of negotiation of the contract; the place of performance; the location of the subject matter of the contract; and the domicile or place of incorporation or place of business of the parties. This doctrine is applied in several jurisdictions in the USA, including e.g. Illinois[321] and Texas[322].

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317 *Kaufman,* J. in *Lisi v. Alitalia* (2nd Cir. 1966), 9 CCH Avi. 18,374 (18,378), quoting *MacMahon,* J. delivering the opinion in the previous instance.

318 The pre-war version from 1931 (so called "Antwerp version") contained a choice-of-jurisdiction provision in Art. 22 (4) (1) (passengers) and Art. 21 (4) (1) (cargo), contemplating at the same time application of the *lex fori.*

319 The issue being the coverage of e.g. punitive damages. For a discussion see *infra.*

320 Restatement (Second) of Conflicts of Laws (1969).

321 *Champagnie v. O'Neill Constr. Co.* (1979), 77 Ill.App.3d 136 = 395 N.E.2d 990.

322 *Duncan v. Cessna Aircr. Co.* (Tex. 1984), 665 S.W.2d 414.

Not substantially different from the "most significant relationship" test is the *"center of gravity"* test. Not greatly applicable in the USA, it authorizes the court to examine all significant factors which might be pertinent to select the law of the state to which the contract has the greatest number of contacts.[323]

In Canada, if the parties have not selected the proper law, the courts will ascertain the proper law objectively in the light of the facts and circumstances of each case, having regard to factors such as the place where the contract is concluded, the place of performance, the place of residence or the principal place of business of the parties, the subject matter of the contract, the language or the money used - any factor which connects the contractual relationship to a particular system of law[324] . By ascertaining the proper law of the contract, courts ought not to unduly frustrate the intention of the parties to enter into contractual relationships by selecting a system of law to govern the contractual obligations which would invalidate the contract[325] .

In Europe, the legal systems have become visibly shaped by the *Rome Convention 1980*, providing in Art. 4:

> "(1) To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract will be governed by the law of the country with which it is most closely connected. [...]
>
> (2) [...] it shall be presumed that the contract is most closely connected with the country where the party who is to affect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated. [...]
>
> (4) A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country of in which the place of loading or the place of discharge or principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country."

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323 *Margo*, "Conflicts of Laws in Aviation Insurance", 19 Air Law (1994), 2 ff. (3).

324 *Elter v. Kertez*, [1960] O.R. 672 (682 f.); *Imperial Life Assurance Co. v. Colmenares*, [1967] S.C.R. 443; *O'Brien v. CPR*, [1972] 3. W.W.R. 456; *Arnoldsen Y Serpa v. Confederation Life Assoc.* [1974] 2 O.R. (2d) 484.

325 Unless in the very exceptional cases where such a conlcusion is overwhelmingly called for. *N.V. Handl M.J. Smits Import-Export v. English Exporters (London) Ltd.* [1955] 2 Lloyd's Rep. 317; *Coast lines Ltd. v. Hudig and Veder Chartering N.V.* [1972] 2 Q.B. 34; *Sayers v. Int. Drillig Co. N.B.* [1971] 1 W.L.R. 1176. The English precedents are found applicable to Canadian law by *Bunker*, "The Law of Aerospace Finanace in Canada" (1988), at p. 321.

One must, however, face the question whether a "closest relationship test" is useful as to the interests of air law.

With respect to the contract of carriage, such a test must - respectfully - be considered as vague, or even meaningless: If a "closest connection to the carriage by air" is considered the solution of the question as to which law applies, then we would be much better off by simply choosing one of the traditional doctrines listed above - thereby, if not perfect solutions in every single case, at least creating certainty. And even a look at the ancillaries and guidelines as to how the closest relation can be ascertained (country, domicile, performance etc.) reveals that "everything is possible" in the course of legal evaluation and decision-making. This could be avoided by applying a single clear doctrine that would decide whether it is the law of the country of the place where the contract was concluded, the country of origin or of the destination, the country where the passenger, shipper/consignor/consignee or the carrier is domiciled, etc. Especially *de lege ferenda* (with respect to a revision of the *Warsaw System)* this approach is *not recommendable*. It may be noteworthy, nevertheless, that the *Rome Convention 1980* contains, in Art. 4 (2), a presumption that the closest relation is vested with the law of the place where the party having to effect the characteristic performance of the contract has its principal place of business. This, however, is only valid if the party enters into the contract in the course of its ordinary course of business. Not only are e.g. "package tours" and the carriage of goods treated differently (Art. 4 (4))[326], but this presumption also still remains a *mere presumption* - law courts and legal writers may *depart* from it, creating legal disunification. Its value is, therefore, rather limited.

In contracts of aircraft purchase, this approach may be more appropriate; however, there are special conventions dealing with international sales of goods may apply[327].

In contracts of insurance, public policy may exclude or dictate certain guidelines. This e.g. is the reason why the *Rome Convention 1980* expressly excludes contracts of insurance from its scope and leaves this issue open for special EU legislation[328].

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326 *Schultsz*, "The Concept of Characteristic Performance and the Effect of the E.E.C. Convention on the Carriage of Goods", in: *North* (ed.), "Contracts Conflicts" (1982), pp. 185 ff.

327 For details see *infra*.

328 For details see *infra*.

Finally, it must be remembered, what is the objective of defining legally relevant points of contact in the resolution of the conflicts of laws.

As *Kegel* puts it:

"The objective of *every* rule of private international law is to determine the closest relationship. If legislation cannot reach this goal, it should keep silence and leave the task to find solutions to jurisprudence and legal teaching. It appears especially inappropriate, if the codified law mentions a point of contact, but, nevertheless, has a 'closer relationship' prevail, applying the proverb 'Drum prüfe, wer sich ewig bindet, ob sich nicht noch was besseres findet'. By contrast, jurisprudence and legal teachings may apply 'closest relationship' notions, in order to remember the objectives of private international law or to reject inappropriate points of contact."[329]

Finally, the conclusion is that it is evidently necessary to discuss the application of traditional choice of law notions with respect to the different aspects of private air law, depending on the contract concerned: carriage, insurance, purchase, finance, creation of security rights.

IV. Scope of Application of the Applicable Law

Once a certain legal system is held applicable to a legal relationship, its scope of application embraces the interpretation of law, in contracts the interpretation of the contract, the performance, consequences of the breach of obligations, the extinguishing of obligations, prescription, the nullity of a contract and its consequences, etc. This is especially reflected by the *Rome Convention 1980* in Art. 10. Also of paramount importanceis that the *Giuliano-Lagarde*-Report does not indicate any controversy as to these aspects[330]. Traditionally, matters of procedure have been subject to the *lex*

329 *Kegel*, "Internationales Privatrecht" (5 ed. 1985), § 6 I 4 b.cc., at pp. 174 *et seq.*:
"Aufgabe *jeder* Norm des IPR ist, die jeweils engste Verbindung zu bestimmen. Wenn der Gesetzgeber das nicht kann, sollte er schweigen und Rechtsprechung und Lehre das Füllen der Lücken überlassen. Insbesondere macht mäßigen Eindruck, wenn das Gesetz Anknüpfungen nennt, dann aber ängstlich die engere Verbindung vorgehen läßt nach dem Motto: 'Drum prüfe, wer sich ewig bindet, ob sich noch was besseres findet.'
Rechtsprechung und Schrifttum dagegen dürfen die 'engste Verbindung' anrufen, um an die Aufgabe zu erinnern oder rechtspolitisch falsche Anknüpfungen zurückzuweisen." [English translation provided].

330 *Report*, comments under Art. 10.

fori. Tetley, however, goes even a step further, promoting an innovative approach[331] in doing away also with the strict distinction between substance (any law) and procedure (strictly *lex fori),* which may be characterized as a "loosening" of the rigidity of the procedure-*lex fori* connection[332].

331 *Tetley,* "International Conflicts of Laws: Civil, Common and Maritime" (1994), ch. II, III - pp. 37 ff.; 45 ff. (esp. pp. 49 ff.).

332 Already the revised Swiss code on private international law of 18 Dec. 1987 has set aside these traditional categories, and has therefore been characterized as "the first statute in Europe to overcome the traditional division between procedural and substantive law". See *Symeonidis,* "The New Swiss Conflicts Codification: An Introduction", 37 Am.J.Comp.L. (1989), 187, at 188.

C. Chapter Three: The Specific Part

I. The Law Governing the Contract of Carriage

1. The Applicable Unified Law and Its Shortcomings

Albeit the *Warsaw Convention on the Unification of Certain Rules Relating to International Carriage by Air* of 1929, being one of the most important private law conventions in the world, was created to solve uncertainties as to which law governs an international carriage by air, one cannot postulate that all conflicts of laws problems have been solved by the drafting of the Convention[333]. As pointed out in the *General Part*, the international unification of law has always been limited to certain aspects; the remaining issues, the *lacunae* or gaps, have to be filled with domestic law (which may well be domestic law as unified under another private law convention[334]). A prerequisite to this process is to ascertain which domestic law applies, requiring a conflicts of laws approach. With

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333 *Alex Meyer* in his note on *SAS v. Wucherpfennig* has been quoted by *Sand*, "Choice of Law in Contracts of International Carriage by Air" (Thesis, IASL, McGill; 1962), p. 6 with the words "once the Warsaw Convention is held applicable, it is superfluous to ask which national law governs the carriage." In fact, there is a decisive part of his statement missing (see 4 ZLR [1955], 232): "state law would only apply as far as the Warsaw Convention refers to it or state law is to apply *additionally*." [Translation provided, emphasis original].
As *Morris*, "The Scope of the Carriage of Goods by Sea Act 1971", 95 L.Q.R. (1979), 59 (66) correctly points out: "The truth is, surely, that when an international convention on the law of transport is given the force of law in the United Kingdom, its provisions apply to all disputes *within its scope* regardless of the proper law of the contract. This is certainly true of the Warsaw Convention on carriage by air." [Emphasis added].
Dettling-Ott, "Internationales und schweizerisches Lufttransportrecht" (1993), at p. 64 also confirms that "the judge has to answer the question as to the proper law of the contract" ["Das bdeutet, dass der Richter die Frage nach dem auf die Beförderung anwendbaren Recht zu beantworten hat." - English translation provided]. See also *Ruhwedel*, "Der Luftbeförderungsvertrag (2 ed. 1988), at pp. 26 *et seq.*; *Guldimann*, "Internationales Lufttransportrecht" (1965), Art. 24, N. 8; *Bogdan*, "Conflict of Laws in Air Crash Cases: Remarks from a European's Perspective", 54 JALC (1988), 303 (326).

334 E.g. the payment for the carriage by cheque or by bill-of-exchange is not governed by the *Warsaw Convention*, but in Europe by the domestic laws as unified under the *Geneva Conventions of 7 June 1930* and *19 March 1931* (for the unification of rules relating to cheques and bills-of-exchange). The U.S.A., Great Britain and Spain, however, have not acceeded to these uniform law conventions (see the information provided by *Chr. von Bar*, "Internationales Privatrecht", vol. I (1987), n. 76 [at p. 60]), although both means of payment are of major significance also for those states. As to the economic significance see e.g. *Froehlingsdorf*, "Besonderheiten des spanischen Wechselrechts", IPRax 1983, 251.
It would therefore be incorrect to say that where the law as unified under the *Warsaw Convention* does not apply, unified law would not apply at all.
For a compehensive study as to the conflicts between international conventions see *Majoros*, "Konflikte zwischen Staatsverträgen auf dem Gebiete des Privatrechts", 46 RabelsZ (1982), 84.

respect to the *Warsaw Convention*, the following "shortcomings" of the unified law have to be regarded:

a) The *Warsaw Convention* and Its Limited Scope of Application

In the first place and most obviously, the *Warsaw Convention* applies only to certain international carriages, depending on the location of the carriage (Art. 1: departure and destination within the territories of High Contracting Parties; agreed stopping places), as well as several other criteria basically concerning the economic character of the carriage (carriage for reward [Art. 1], no experimental flight [Art. 34][335], no transportation performed by a state which availed itself of reservations [Art. 2]). Thus, not only is an international carriage not meeting these requirements not covered by the Convention, but also cabotage falls with of the scope of the convention; and aspects such as nationality of the aircraft, the air carrier, the passenger, or the place of ticket sales do not play a role, either.

b) Explicit Gaps

aa) Explicit Gaps With References

To some extent the *Warsaw Convention* explicitly refers to the *lex fori:*

Art. 21 (contributory negligence)[336], Art. 22 (1) (periodical payments), Art. 25 (1) (fault equivalent to willful misconduct)[337], Art. 28 (2) (judicial procedure), Art. 29 (2) (method of calculation for the period of limitation), and Art. 22 (4) as amended by the *Hague Protocol 1955* (compensation for litigation expenses).

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335 About the historic reasons to place this exclusion at the end of the Convention see *Guldimann*, "Internationales Lufttransportrecht" (965), Art. 34, no. 2.

336 Art. VII of the *Guatemala City Protocol 1971* (not in force) replaces this discretionary provision by a mandatory rule, deleting the reference to the *lex fori*.

337 Replaced by Art. XIII of the *Hague Protocol 1955*.

The characterization of these references is not subject to unanimous determination (do they refer to substantive law or merely to the *forum's* conflicts law?) and still has to be evaluated.

bb) Explicit Gaps Without References

Some articles of the *Warsaw Convention* explicitly mention legal aspects that escape the scope of the Convention without referring to a certain *forum*:

Art. 24 (1) (causes of action ["however founded"]), Art. 24 (2) (persons entitled to bring action in cases of personal injury and death), and, as amended by the *Hague Protocol 1955*, Art. 15 (3) (negotiability of the air waybill) as well as Art. 25 A (actions against agents and servants of the air carrier).

c) Gaps not Explicitly Mentioned in the Convention

This group of legal issues involves aspects that go beyond the *specifica* of carriage by air, and therefore are not subject to special aerial legislation. This group includes, for instance, rules on the creation of contracts; capacity to enter into contractual obligations; form, validity and nullity of the contract; forms of payment and their legal implications (credit cards, cheques, bills of exchange[338]).

Less obvious is the question whether the scope of the Convention, which intends to unify only *certain rules* concerning international carriages by air, affects the determination of gaps, too. For instance, it is submitted that one of the primary objectives of the *Warsaw Convention* was (and, noting that no effective changes have been brought about to date, is) to protect, retrospectively, the fledgling airline industry from exorbitant damage claims, because it used the new and, to a large extent, untested technical device "aircraft". Therefore, does Art. 17 WC only cover accidents in which the inherent risks of air travel, and especially risks due to the new emerging technology, are

338 See *supra*.

realized? This aspect deserves closer consideration, because if this presumption holds true, an indirect reference to subsidiarily applicable domestic law in cases of accidents due to other causes emerges.

d) "Creeping" References

So far, this study has revealed that the only explicit references rendered by the *Warsaw Convention* are those invoking the *lex fori*. Two further aspects which may not readily be visible also have an impact on the choice of law.

First, in order to enact the Warsaw Convention in states, official translations of the original drafting text (or texts, with respect to the subsequent protocols) have to be produced. Due to different legal systems and the effects of cultural, economic, social, etc. differences, it is not always possible to exactly translate the legal notions of the drafting format into the national language. The discovery and adequate handling of such differences is the international obligation of a party to the Convention, which means, therefore, that the municipal courts of a state are urged to seek recourse to the original format, as signed by the High Contracting Parties, in order to comply with the state's international obligation. This aspect has already been extensively discussed *supra*.

Secondly, as has also been pointed out *supra*, municipal courts always apply national law, rather than the original Convention which was signed by the High Contracting Parties. Therefore, differences in legal interpretation are conceivable due to the different backgrounds of the legal cultures in the application of unified air law.

Recently, these aspects have been clearly pointed out in Anglo-Australian and Anglo-American jurisprudence:

In the decision *Georgeopoulos v. American Airlines* (Supr.Ct. N.S.W. 1993)[339], the Australian court had to consider the issue of compensability of mental injury in a Warsaw case. As the court also had to take into account the decision of the US Supreme Court in *Eastern Airlines v. Floyd* of

339 Unreported.

1991[340], it may appear somewhat surprising that the Australian court departed from the American point of view, holding that "the Anglo-Australian approach to nervous shock is such that it is to be classified as 'bodily injury' [...]"[341]. The reason for this decision is vested in the remaining part of this phrase: "[...] within the meaning of the Civil Aviation (Carrier's Liability) Act, 1959 (Cth)"[342]. The Australian court applies Australian law[343], i.e. the Act transforming Warsaw provisions: "The question turns away from the interpretation of a foreign phrase in a Convention [i.e. lésion corporelle in Art. 17] and reverts to the interpretation of an English phrase in an Australian statute."[344] Hence, the significance of the transforming Act becomes visible in that it renders the cause of action, and the Convention merely serves as a means of interpretation of the former, as well as foreign decisions do. The system of parallelism of laws is clearly realized and pointed out by the court: "Uniformity, while desirable, is not mandatory [...]"[345].

Another example is found in the US Supreme Court's decision in *Zicherman v. KAL*[346]. The court had to determine which damages are compensable under Art. 17 of the Convention. The decision rejects the view that, due to a lack of further precision in the wording of Art. 17, the interpretation be subject to an examination of the ordinary meaning of "damage", or "dommage", respectively. Since in earlier decisions, *Air France v. Saks*[347] and *Eastern Airlines v. Floyd*[348], the court had used French jurisprudence in order to determine the meaning of Warsaw provisions, the court also had to address the question as to what extent French law, especially in the state it had reached by 1929, may dominate the court's considerations. It was realized that Art. 17 merely sets out the circumstances constituting a legal cause of action, and thus only to this extent may the French language and its legal connotations of 1929 provide assistance in interpretation. On the other hand,

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340 23 CCH Avi. 17,367 = 499 U.S. 530.

341 Art. 17 of the *Warsaw Convention* grants compensation for "death, wounding and other bodily injury", having raised the question for about half a century whether or not mental injuries are encompassed by this provision. See e.g. *Goldhirsch*, "The Warsaw Convention Annotated" (1988), at pp. 58-60.

342 Judgment, at p. 34.

343 Judgment, at p. 11.

344 Judgment, at p. 16 [addition in brackets provided].

345 Judgment, at p. 25.

346 Judgment of 16.11.1996, 116 S.Ct. 629

347 470 U.S. 392 (1985).

348 499 U.S. 530 (1991).

the court acknowledges that - in 1929 - the drafters of the Warsaw Convention "could not have been ignorant of the fact that the law on this point varies widely from jurisdiction to jurisdiction". Therefore, differences and subsequent developments of domestic laws must have been taken into account in 1929. Accordingly, the conclusion is reached that the word "damage", or "dommage", respectively, merely means "legally cognizable harm" without prejudice as to the substance of compensability. Hence, Art. 17 refers to domestic laws to specify what harm is considered compensable.

e) A Teleological Approach to the *Warsaw Convention* and Its Effects on Conflicts of Laws

The obvious purpose of the *Warsaw Convention* is to unify private law rules governing international carriages by air, and the limited scope of that unification to cover only "certain" rules has already been pointed out above. The primary target of the key Art. 22, establishing the (in)famous liability limits favoring the airlines, was to protect the fledgling airline industry[349] . Moreover, two other arguments which today might easily be overlooked seem to have promoted such a view in 1929: First, the limitation of liability per cargo unit was well-known from maritime law and had been a hot international issue only at the eve of *Warsaw*[350] . Secondly, not only was the early passenger considered as a pioneer of the air to the same degree as the pilot and the entire fledgling air transport enterprise, but also as a person of a significant economic status who could enjoy both the adventures of travel as well as the extravagant convenience of traveling by air[351] . Hence, policy and socio-economical considerations rendered the legitimacy for requiring the airline customers' resources to subsidize the airlines by a rigorous limitation of liability.

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349 See the Conference Materials: *Conférence International de Droit Privé Aérien* (1926) p. 55; *II Conférence International de Droit Privé Aérien (1930)*, at pp. 15, 126. The literature on this aspect is countless in number. See e.g. *Reed v. Wiser and Neuman* (2nd Cir. 1977), 555 F.2d 1079 (1089); *Drion*, "Limitation of Liabilities in International Air Transport" (1955), pp. 15 *et seq.* (no. 16); *Wiedemann*, "Die Haftungsbegrenzung des Warschauer Abkommens" (Diss.; Erlangen-Nürnberg; 1987), at pp. 8-10.

350 See *Drion*, "Limitation of Liabilities in International Air Transport" (1955), at pp. 15 et seq. (no. 16); *Selvig*, "Unit Limitation of Carrier's Liability" (1960), at pp. 17, 20 *et seq.*

351 See *Oppikofer*, "Zur Entwicklung des privaten Luftversicherungsrechts, Veröffentlichungen aus dem Institut für Versicherungswissenschaft der Universität Leipzig" (special ed., ca. 1937/38), at p. 8.

One might be tempted to hold the reversal of the burden of proof in the system of Arts. 17-20 of the *Warsaw Convention* as another element of such a thorough balancing of interests, this time in favor of the airline customer. However, due regard should be given to the fact that the reversal of the burden of proof for fault had already become a general institution in the law of obligations in a number of jurisdictions[352], thereby partially superseding the maxim *actor legit probatio*, rendering proof of the fact that this "concession" to the airline customer is a negligible, if not a non-existing concession. The domestic laws of major legal systems already applied the same approach.

Proceeding on the ground of these observations there are a number of conclusions to be drawn. The "certain" liability rules of the *Warsaw Convention* aim in a specific direction: The fundamental target is to protect the fledging airline from the vast consequences attached to the risks inherent in air travel. Any additional protection against any other risks is not appropriate, and the passenger is not put at a disadvantage by the application of non-*Warsaw* rules as to these other risks. Therefore, the *scope of the liability rules in the Convention* being subject to the limitation by Art. 22 altogether *must be limited* to such *risks inherent* to or at least showing a certain *close inner relationship to air travel.* An example may serve to illustrate the consequences: If (in a case where all other requirements as to the application of the *Warsaw Convention* are met) e.g. a stewardess serving coffee on board a flying aircraft pours some of the hot liquid over a passenger and causes injury, then according to the conclusion drawn above, the applicability of the *Warsaw* rules depends on whether the cause has to be sought in aerial circumstances (e.g. turbulences) or if the event is merely due to the stewardess's negligence[353]. In the latter case, there is no reason to supply the air carrier with a means to avail himself of compensation to the real extent of damage caused (provided the actual damage exceeds the *Warsaw* limit), nor has the passenger a substantive advantage from the application of the *Warsaw*

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352 See e.g. Obligationenrecht (Confoederatio Helveticae) Art. 97; Code civil (France) Art. 1142; Bürgerliches Gesetzbuch (Germany) §§ 282, 285; Allgemeines Bürgerliches Gesetzbuch (Austria) § 1298. As to the general historic origins of the reversal and its effects on the law of tranportation see *Kadletz*, "Haftung und Versicherung im internationalen Lufttransportrecht" (pending study - Dr. iur. Dissertation, submitted to the Faculty of Law at Ruprecht Karls University, Heidelberg), at pp. 46 ff.; 114 ff.

353 With respect to this aspect see the opinions rendered by the German Supreme Court *BGH* (24 June 1969 - VI ZR 71/67), NJW 1969, 2014 (2015); BGH (24 June 1969 - VI ZR 48/67), NJW 1969, 2014; BGH (28.9.1978 - VII ZR 116/77), NJW 1979, 495; BGH (27.10.1978 - I ZR 114/76), NJW 1979, 494 (495). See also *Müller-Rostin*, "*Abramson v. JAL*", TranspR 1985, 391 (392).

rules since the reversal of the burden of proof is nothing unknown to the general provisions in the laws of obligations. The only remaining argument in favor of the application of the *Warsaw* rules might be seen in a possible extension of the uniformity of the law to also govern such cases not arising from aerial risks. However, the objective of the *Warsaw Convention* is merely to unify *certain* rules. Taking the teleology of the Convention into account, too, a subsumption[354] under *Warsaw* provisions of cases without an inner relation to aerial risks would require a certain degree of deliberation. Even Art. 24, restricting damages to the Conventional provisions "however founded", expressly limits its scope of application to cases covered by Arts. 18, 19 (Art. 24 [1]) and Art. 17 (Art. 24 [2])[355].

The question whether this situation *de lege lata* is satisfactory differs. Perhaps *de lege ferenda* a different approach appears more appropriate to meet the requirements of a strongly interrelated and narrowly-woven international network of carriers and carrier alliances, who are legitimately looking for a high degree of universally-accepted uniformity.

De lege lata, however, the *Warsaw Convention* leaves a number of blanks - according to this teleological approach even to a larger extent than often assumed - to be filled with domestic law.

f) *Lex fori* as a *"Warsaw* Principle"?

Hence the question arises which law is to fill these blanks.

More than once, the principle of a general *lex fori* reference has been read into the *Warsaw Convention*[356], usually based on the observation that the only explicit references provided for in the

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354 As to the method and technique of *subsumption* see *supra. General Part.*

355 Art. 24 reads:
"(1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
(2) In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights."

356 E.g. *de Visscher*, "Les conflits de lois en matière de droit aérien", 48 Rec. des Cours (1934-II), 279 (331); *Riese*, "Luftrecht" (1949), at p. 397; *LG Hamburg* (6.4.1955), 4 ZLW (1955), 226 (230) [famous under *"SAS v. Wucherpfennig"]. Rabel*, "The Conflict of Laws" II (1960), at p. 342 does not recognize a principle, although in "The Conflict of Laws" III (2 ed.; 1964), at p. 342 he does not seem to exclude it (in an ambiguous phrase).

Convention are those to the *lex fori*[357] . Had this been the basic idea of the drafters, then it would have been much easier to adopt one single provision in the Convention referring to the *lex fori* not only for the cases explicitly mentioned in the Convention but for all other gaps as well. The merely sporadic mentioning of the *lex fori* and the general hesitation at the *Warsaw Conference* to adopt conflicts rules[358] constitute facts which do not speak in favor of such a theory.

aa) No Pertinence Vested in the *lex fori*

At the first glance, the desire for *lex fori* rules appears understandable. A judge concerned with a case would be able to apply the law he knows best, and it would also manifest an observed so-called "homeward trend"[359] . However, to recognize this trend as a fact and to render normative force to this fact[360] - as has been done in the USA[361] - are still two entirely different things. It may also seem that the idea of *lex fori* vests a degree of foreseeability as to which law applies; although certainly a number of other points of contact - properly applied - do not lack this preferable feature, either. The same answer must be held against the argument that if all courts solve those matters not covered by the Convention according to the same principle then they would not harm a continuing unification of law[362] . On the contrary, the application of the *lex fori* by the courts of each of the state parties to the

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357 *Supra.*

358 See especially the opinions delivered by *Ripert* and *Ambrosini*: *Gouvernement de Pologne (ed.)*, "II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929, Varsovie, Procés-verbeaux" (Warszawa 1930), at p. 44. *Sundberg*, "Air Charter: A Study in Legal Development" (1961), at p. 242 observes an "utter hostility [...] relating to conflict of law solutions" on the Conference.

359 As to the phenomenon referred to as *"homeward trend"* see already *supra*. See also *Sand*, "Choice of Law in Contracts of International Carriage by Air" (Thesis, McGill 1962); *Ehrenzweig*, "Private International Law. A Comparative Treatise on American Interational Conflicts Law" (1967), at p. 51 and *passim*; *Sand*, "'Parteiautonomie' in internationalen Luftbeförderungsverträgen", 18 ZLW (1969), 205 (218); *Eörsi*, "General Provisions", in: *Galston/Smit (ed.)*, "International Sales" (1984), § 2 (esp. pp. 2-1; 2-9 *et seq.)*; *Urwantschky*, "Flugzeugunfälle mit Auslandsberührung und Auflockerung des Deliktsstatuts" (1986), at p. 123; *Whinship*, "Private International Law and the U.N. Sales Convention", 21 Cornell Int.L.J. (1988), 487 (at 529 *et seq.)*; *Dettling-Ott*, "Internationales und schweizerisches Lufttransportrecht" (1993), at p. 79; *Diedrich*, Lückenfüllung im Einheitsrecht, IPRax 1995, 353 (356 *et seq.)*.

360 As to the *normative forces of facts* see *supra.*

361 *Supra.*

362 This argument is promoted by *Riese/Lacour*, "Précis de Droit Aérien" (1951), at p. 226; *Lukoschek*, "Das anwendbare Recht bei Flugzeugunglücken" (1984), at p. 27. See also *Dettling-Ott*, "Internationales und schweizerisches Lufttransportrecht" (1993); at p. 64, who rejects this view.

Warsaw Convention would result in a substantive disunification and in inadequate solutions as to private international justice (justice on the conflicts-of-laws-level)[363] .

bb) No Uniformity Vested in the *lex fori*

There is, however, yet another problem inherent to the notion to apply the *lex fori* as a general principle. Was *lex fori* to be understood as a reference directly to substantive law, then the foreseeability would be reduced to a considerable extent by the number of *fora* available under Art. 28 (2) of the *Warsaw Convention*. One could possibly argue even more destructively to uniform law: If the scope of the Convention is argued to be limited to certain aspects of liability, would it then not only be a matter of logical consequence to conclude that Art. 28 of the *Convention* does not apply at all in cases concerning issues not covered by the Convention?!

However, even without such a drastic interpretation one has to take into consideration that - different from the law governing the procedure before the court (Art. 28 [2])[364] - the correct understanding of the reference to the *lex fori* is *not* to use it as a direct reference into substantive law. Instead, it seems to be a reference to the domestic private international law of the *forum*, thus including the *forum's* conflicts rules: According to the methodology as outlined in the *General Part*[365] , especially the hesitation on the *Warsaw Conference* to adopt any conflicts of laws rules at all must be interpreted as an expression of the will not to touch the areas that are not unified by the Convention[366] . This view finds support in the observations of early researchers who, with respect to the realm of conflicts of laws as to contracts of air carriage before the background of the law of obligations, in general ascertain: "There is no field of private international law hosting a higher

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363 *Supra.*

364 As to Art. 28 (2) see *Milor SRL v. British Airways Plc.*(C.A., 9 February 1996), The Times, Law Report, 19 February 1996, per *Phillips L.J.* and the exhaustive comments by *Giemulla/Schmid*, "The Warsaw Convention", Art. 28.

365 *Supra.*

366 See esp. *Sand*, "'Parteiautonomie' in internationalen Luftbeförderungsverträgen", 18 ZLW (1969), 205 (206).

degree of confusion than this one"[367] . Since there is no solution to the problem in international conventions, and, moreover, the matter was subject to immense controversy, - in accordance with the principles of interpretation as explained in the *General Part* - the interpretation has to be such that the sovereign legal systems of the state parties are the least impaired. Thus the reference to the *lex fori* encompasses *all* the rules of the *forum*. Therefore, the conflicts of laws rules of the *forum* still have to be applied[368] .

Only where the text of the *Warsaw Convention* would explicitly supersede such provisions - as e.g. in Art. 23 - the *lex specialis* principle orders - as an exception - a different approach[369] .

Consequently, the *forum* may eventually hold its own law inapplicable, inappropriate or otherwise and refer to a different law. Then the aspect of foreseeability is affected in a number of ways: First, the substantive *lex fori* may not apply; second, the court may have to classify/qualify legal notions and institutions in order to apply them under its own procedural etc. law, which enhances the danger that the foreign law may not apply without being "coined" to a certain extent; third, the application, classification, and qualification of foreign law hosts the latent danger of its misinterpretations[370] ; finally, the court may be bound by provisions of its own law which prevent it

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367 *Müller*, "Das internationale Privatrecht der Luftfahrt" (1932), at p. 72: "Auf keinem Gebiete des internationalen Privatrechts herrscht größere Verwirrung als gerade hier." [English translation provided].

368 This seems to be the general understanding. See e.g. *OLGt Düsseldorf* (12.1.1978), VersR 1978, 964. *Kronke*, "Schlegelberger - Kommentar zum Handelsrecht, Frachtrecht" (pending publication), Art. 1, n. B.II.1.; *Guldimann*, "Internationales Lufttransportrecht" (1965), Einl., no. 42: the reference to the *lex fori* may be not attributed any effect beyond that the parties to the contract be treated as usual if no unifying rule exists: "a) Wenn im Wortlaut der vorgenannten Art. 21, 22, 28 und 29 auf die lex fori verwiesen wird, so hat es hier nicht notwendigerweise sein Bewenden mit den einschlägigen materiell- oder prozeßrechtlichen Normen der lex fori, sondern diese kann nach ihrem eigentlichen Internationalprivat- oder prozeßrecht auf eine weitere Rechtsordnung weitergreifen. Das ergibt sich aus folgender Überlegung: Mit der Verweisung will doch wohl nichts anderes bewirkt werden, als daß die Parteien im betreffenden Punkt gleich einem Streitpunkt behandelt werden, der dem Abkommen nicht unterworfen ist. Praktisch könnte eine solche Weiterverweisung in den Fällen von Art. 21 in Frage kommen. b) Wo das Abkommen nicht ausdrücklich auf die lex fori verweist, sondern die Frage des anwendbaren Rechts offen läßt, gilt der Grundsatz erst recht: Anwendbar ist jenes Recht, das nach dem Internationalprivatrecht des angerufenen Gerichts maßgebend ist [...]".
See also *Ruhwedel*, "Der Luftbeförderungsvertrag" (2 ed. 1987), at p. 28; *Mankiewicz*, "On the Application of National Law Under and in Margin of the Warsaw Convention", 6 Air Law (1981), 79 (81) giving also further references.

369 See foregoing footnote.

370 Cf. e.g. the judgment rendered by *RG* (4 Jan. 1882 - I. 636/81), RGZ 7, 21 (famous as the "Tennessee Bill-of-Exchange Case"): A bill-of-exchange subject to US law was at issue in the law suit; the defendant wanted to avail himself from liability with reference to the applicable statute of limitation. However, since under the applicable US law the statute of limitation is a remedy of procedural law, and under German conflicts law the procedure is subject to *lex fori*, the court did not apply the provision of the statute - and created an eternal

from applying the foreign law in a genuine way, i.e. *ordre public* reservations affecting e.g. capacity to enter or the form of a contract, or the compensability of certain damages. Then again, the conclusion is, that a general *lex fori* principle is (merely) as good as any.

cc) Substantive *lex fori* Principle Disregarding Party Autonomy

Yet another argument must be held against a *lex fori* principle. Although the contract of carriage is an obligation of a relative legal nature, the parties to the contract and its object (the carriage) are fixed. Does it appear sensible that the same contract between the same parties with the same objective is subject to a different legal system depending on where the parties bring a law suit? Such ultimate relativity hardly makes sense. The application of the substantive *lex fori* (beyond exceptional considerations of the *ordre public)* to contracts of carriage by air has, therefore, been considered as "entirely unacceptable"[371] .

dd) *Lex fori* as a "Last Resort"

As should be mentioned for the sake of theoretical completeness, it has been submitted that in spite of the insufficiencies of a general connection *(Anknüpfungspunkt)* with the substantive *lex fori,* it may be of some significance in serving as a subsidiary point of contact where no other acceptable solution can be found[372] . This proposal, coming from the learned authors of a Treatise on a *General Part* of Private International Law, could be characterized as a general "last resort" principle in

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obligation, due to an incorrect qualification of the statute of limitation. As under German law the limitation is a matter of substantive law, the provisions of the statute correctly would have had to be qualified as substantive law for the purposes of German conflicts law *(eius est interpretari, cuius est condere;* or as already *Thomas Hobbes* had put it - *"Leviathan"*, ch. 19: *auctoritas, non veritas facit legem)* in order to accomplish a just and fair solution to the issue. Subsequently, the *Bundesgerichtshof (BGH)* has handled such matters differently: BGH (9 June 1960 - VIII ZR 109/59), IPRspr. 1960/61, no. 23 (p. 94).

371 *Müller,* " Das internationale Privatrecht der Luftfahrt" (1932), at p. 77.

372 *Keller/Siehr,* "Allgemeine Lehren des internationalen Privatrechts" (1986), at p. 394.

conflicts law. In private international air law, however, one would only have to be resorted to it in the - unlikely - case that every other possible solution would be entirely unacceptable.

It must be observed that both civil and common lawyers agree that a *"homeward trend"* induced by alleged *lex fori* principles in internationally unified private law is to be avoided by all means[373].

2. Conflicts of Laws - Possible Solutions

Thus, the alleged principle of prevalence and preferability of the *lex fori* disintegrates. Eventually a *lex fori* principle hosts the same degree of (un)foreseeability and disunification as any other principle. The current situation, therefore, is characterized by a multitude of different conflicts of laws provisions due to preferences of the domestic legislators[374].

a) The Existence of Conflicts *de lege lata* and *de lege ferenda*

As *Makarov* stated in 1927[375], i.e. already two years prior to the *Warsaw Conference*,, the need for inter-private laws rules in air law prevails as long as different air laws exist, and, moreover, even the establishment of an air law of a worldwide scope of application, i.e. of absolute universality, will never succeed to make all conflicts of laws provisions redundant.

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373 See *Eörsi*, "General Provisions", in: *Galston/Smit (ed.)*, "International Sales" (1984), § 2 (pp. 2-1; 2-9; 2-10); *Winship*, "Private International Law and the U.N. Sales Convention", 21 Cornell Int.L.J. (1988), 529 (530); *Diedrich*, "Lückenfüllung im internationalen Einheitsrecht", IPRax 1995, 353 (356 *et seq.*). See also the references given as to a *"homeward trend"*; *supra.*

374 *Lauritzen v. Larsen* (1953), 345 U.S. 571; *Hellenic Lines v. Rhoditis* (1970), 398 U.S. 306. *Müller*, "Das internationale Privatrecht der Luftfahrt" (1932), at pp. 72 ff.; *Riese*, "Luftrecht" (1949), at pp. 393-397; *Id.*, "Internationalprivatrechtliche Probleme auf dem Gebiet des Luftrechts", 7 ZLR (1958), 271 (280); *Milde*, "The Problems of Liabilies in International Carriage by Air"(1963); *Id.* "Conflicts of Laws in the Law of the Air", 11 McGill L.J. (1965), 220 (245) ; *Sand*, "'Parteiautonomie' in internationalen Luftbeförderungsverträgen", 18 ZLW (1969), 205 (217); *Frings*, "Kollisionsrechtliche Aspekte des internationalen Luftberförderungsvertrages", 26 ZLW (1977), 8; *Magdelénat*, "Air Cargo" (1983), at pp. 39 ff.; *Mankiewicz*, "Liability of the International Air Carrier (1981), at p. 4; *Lagerberg*, Conflicts of Laws in Private International Air Law (Thesis, IASL, McGill; 1991), pp. 6-20; *Dettling-Ott*, "Schweizerisches und internationales Luftrecht" (1993), at pp. 78-93.

375 *Makarov*, "Die zwischenprivatrechtlichen Normen des Luftrechts", 1 ZgesLuftR (1927/28), 180 (at p. 186).

Moreover, every approach to a systematic resolution of conflicts is a *modus vivendimodus vivendi*, including conflicts. To put with a famous dictum by *Wengler: "concordantia discordantium pactorum"*[376].

The current situation of the *Warsaw Convention* and its supplementary protocols, usually referred to as the *Warsaw System*, is rather dissatisfactory. IATA recently initiated an *Inter-Carrier Agreement* as an attempt to save the *System* from complete disintegration, somewhat similar to the 1965/66 crisis. Eventually, ICAO might again take the initiative in *Warsaw* issues[377] to induce dialogue on a new convention in order to replace the peculiar conglomerate of *Warsaw Convention*, Supplementary Convention, protocols and private agreements. However, will this new system include more detailed provisions on issues such as the notion of compensable damages? If a future system was to replace *Warsaw* and be accepted to the same extent all over the world, major compromises would have to be expected. Therefore, national peculiarities, cultural, religious and social features, have to be taken into account. Some societies tend to commercialize all kinds of damages, others may consider compensation for any damage beyond measurable economic loss ethically unacceptable. Thus, uniformity as to some substantial issues will not be achievable, may not even appear desirable, in order to accomplish the highest degree of acceptance of the central provisions of uniform law. Therefore, not only *de lege lata*, but also *de lege ferenda* the question will arise: which law governs those parts of the contract not covered by unified law? The primary conflicts of laws problem resides not in the question which of the different points of contact would be most "appropriate", but in the lack of a uniform conflicts of laws norm[378], characterized as "désunification judicaire"[379].

b) Conflicts of Laws-Concepts

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376 *Wengler*, as quoted by *Majoros*, "Konflikte zwischen Staatsverträgen auf dem Gebiete des Privatrechts", 46 RabelsZ (1982), 84 (at p. 86).

377 Currently there is a Working Group examining perspectives of a convention on the unification of legal aspects of international carriage by air *de lege ferenda*.

378 Imperatively demanded by *Sand*, "'Parteiautonomie' in internationalen Luftbeförderungsverträgen", 18 ZLW (1969), 205 (at p. 217).

379 *Mankiewicz*, "Le sort de la Convention de Varsovie en droit écrit et en Common Law", in: *Mélanges en l'honneur de Paul Roubier*, vol. II (1961), 105 (at p. 110).

Hence the question arises which law is to fill these blanks.

aa) The Private Autonomy Principle: *lex voluntatis*

The application of the one principle readily considered by the "modern lawyer: *lex voluntatis*"[380] to private international *air* law has already been discussed and confirmed[381] .

(1) *Voluntas aperta vs. voluntas obtrusa*

As mentioned above[382] , the application of *lex voluntatis* has to be agreed upon as to the obvious selection of the applicable law by the parties *(voluntas aperta)*.

Although it is also common to acknowledge also implied selections, for the reasons already mentioned *supra*, this thesis rejects the recognition of "implied choices" which are usually imposed by the courts *(voluntas obtrusa)*. This rejection applies to both consumer contracts and business contracts. As to the latter category, one may well expect the professional parties to unambiguously agree upon a selection of the applicable law, and to present their agreed choice in a clear way; otherwise the applicable law shall be determined according to a clear provision law governing the conflicts of laws rather than being subject to vague reasonings by a court applying its notions in the name of the parties. As to the former category, consumer protection, the factual situation will usually be such that a passenger is a co-contractant to a *contrat d'adhésion*; he will either be compelled to accept the carrier's choice of law in the conditions of contract, or there will be no agreement on a choice of law at all, and thus certainly no implied choice.

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380 *Milde*, "Conflicts of Laws in the Law of the Air", 11 McGill L.J. (1965), 220 (at p. 243).
381 *Supra.*
382 *Supra.*

For this reason, with respect to contracts of carriage by air, the situation of an implied selection of the applicable law will scarcely arise. It may, however, be conceivable with respect to business contracts. Then such a choice will be upheld in most jurisdictions according to the general principles of the rules on conflicts of laws of obligations, if the choice is demonstrated "with reasonable certainty"[383]. Some jurisdictions, such as e.g. Canada, may apply higher requirements as to "reasonable certainty than others[384]; and *de lege ferenda* it would be desirable to do away with the possibility of an implied choice as to contracts of carriage by air, at least as a *lex specialis* in the rules of conflicts of laws of obligations.

(2) *Lex voluntatis* - Freedom and Restrictions

The choice-of-law freedom was recognized by the *Institute de Droit International* in its *Brussels Resolution* of 1963[385], Art. 5 (1)[386].

However, under the *Warsaw Convention*, Art. 32 provides for a mandatory character of the liability rules to the extent that the carrier cannot contract out of his liability as established in the Convention[387], so that a "choice of law clause would have to be formulated very carefully"[388].

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383 *Supra.*

384 See foregoing footnote.

385 Reproduced in 50 *Annuaire de l'Institut de Droit International* II (1963), at pp. 373-376. For a critical discussion see *Milde*, Conflicts of Laws in the Law of the Air, 11 McGill L.J. (1965), 220.

386 Art. 5 reads:
"The contract of carriage of passengers and goods shall be governed by the law to which the parties have indicated their intention to submit it.
When the parties have not settled the law applicable, the contract shall be governed by the law of the principal place of business of the carrier".
On Art. 5 (1) see *Makarov*, "Conflits de lois en matière de droit aérien", 48 *Annuaire de l'Institut de Droit International* I (1959), 386.

387 Art. 32 *WC* reads:
"Sont nulles toutes les clauses du contrat de transport et toutes conventions particulières antérieures au dommage par lesquelles les parties dérogeraient aux règles de la présente Convention soit par une détermination de la loi applicable, soit par une modification des règles de compétence. Toutefois, dans le transport des marchandises, les clauses d'arbitrage sont admises, dans les limites de la Convention, lorsque l'arbritrage doit s'effectuer dans les lieux de compétence des tribunaux prévus à l'article 28, alinéa 1".
"Any clause contained in the contract and all special requirements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the carriage of goods

Furthermore, the number of legal systems available is considered limited either to the laws of the *fora* under Art. 28 of the *Warsaw Convention*[389] or at least to the circle of states that are a party to the Convention[390].

Yet another aspect promotes restrictions to the freedom of choice of law. The maxim of complete private autonomy postulates equal negotiating power for the parties involved. Neither do the parties of a contract of carriage by air negotiate the covenants of the contract (unless the demand of a major business customer, conceivable solely in cargo transportation, matches the economic size of the carrier), nor has the customer the opportunity to influence any single condition. The customer is subjected by a "thicket of Conditions of Carriage"[391], his agreement a fiction, and the notion of a true "contract of reference" *(Verweisungsvertrag)* a mere illusion[392]. The legal remedies developed in many jurisdictions serving consumer protection, especially with respect to *contrats d'adhésion*,

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arbitration clauses are allowed, subject to this Convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of Article 28."

388 *Milde*, "Conflicts of Laws in the Law of the Air", 11 McGill L.J. (1965), 220. See also *Guldimann*, "Internationales Lufttransportrecht" (1965), Art. 32, no. 2 ff.; *Dettling-Ott*, WA, at p. 80, N. 17; p. 292; and the conclusions drawn by *LG Hamburg* (7 Sept. 1977), RIW 1977, 652.

389 Among the numerous authorities as to this aspect see e.g. *Milor SRL v. British Airways Plc.*(C.A., 9 February 1996), The Times, Law Report, 19 February 1996, per *Phillips L.J.; Rothmans of Pall Mall (Overseas) Ltd. v. Saudi Arabian Airlines Corporation*, [1981] Q.B. 368. *Riese*, "Luftrecht" (1949), at p. 470; *Giemulla/Schmid*, "The Warsaw Convention", Art. 28; *Shawcross & Beaumont*, "Air Law" (4 ed.), para. VII (137).

390 See e.g. *Guldimann*, "Internationales Lufttransportrecht" (1965), at p. 181. The practical significance of this aspect is certainly somewhat reduced facing the list of *Warsaw Convention* parties (see 18 Ann.Air Sp.L. II (1993), pp. 374-379).

391 *Kaufman, J.* in *Lisi v. Alitalia* (US Ct.App. 2d Cir. 1966), 9 CCH Avi. 18,374 (18,378), quoting *MacMahon*, J. delivering the opinion in the previous instance.

392 See *Haanappel*, "The IATA Conditions of Contract and Carriage for Passengers and Baggage", 9 E.T.L. (1974), 650, at 652:
"In general, the party on which an adhesion contract is imposed, is bound by it, even if he has not read it or does not know the terms of it; the usual construction to reach this aim is the *legal fiction* of agreement: in signing or in accepting - as in the case of an airline ticket - the contract, the contracting party agrees to all terms which the other party unilaterally imposes upon him. [...] There is *no bargaining power* on the part of the passenger, and the only 'freedom' left to him is to take the contract as it is, in other words to 'adhere' to it, or to leave it."
Virtually the same formula had already been used by *Sand*, "'Parteiautonomie' in internationalen Luftbeförderungsverträgen", 18 ZLW (1969), 205, at p. 212.
Art. 18 of the IATA General Conditions of Carriage (Passenger and Baggage), as published in IATA Recommended Practice 1724 (reproduced in *Giemulla/Schmid/Ehlers*, "Warschauer Abkommen". Appendix III-1) and Art. 11 of the IATA standard conditions of carriage as contained in IATA Resolution 724, Attachment A (reproduced in *Giemulla/Schmid/Ehlers*, "Warschauer Abkommen", Appendix III-7) explicitly state that "[n]o agent, servant or representative of the air carrier has authority to alter, modify or waive any provisions of this contract." As a survey conducted by the author of this thesis reveals, this clause is applied by virtually every international carrier on the globe. As *Sand, ibd.* at p. 212, in n. 60 reveals, compliance with this clause is extremely strict. Acts contrary to this clause led to severe measures by IATA against the carrier in the past.

would apply[393]; the *Rome Convention 1980* however excludes contracts of carriage from some special provisions of consumer protection[394], although carriages within the framework of an arranged package tour e.g. are subject to such protection[395].

Apparently in order to avoid uncertainties concerning the validity of such clauses, IATA did not continue to make use of choice of law provisions[396].[397] Choice of law provisions were held as contrary to English law[398], as not in conformity with French and Swiss law[399], as "contrary to

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393 See e.g. *Bogdan*, "Travel Agency in Comparative and Private International Law" (1976), at p. 151.

394 Art. 5 (4) (a) explicitly exempts contracts of carriage.

395 Art. 5 (5) states:
"Notwithstanding the provisions of paragraph 4, this Article shall apply to a contract which, for an exclusive price, provides for a combination of travel and accomodation."

396 The pre-war version from 1931 (so called "Antwerp version") contained a choice-of-jurisdiction provision in Art. 22 (4) (1) (passengers) and Art. 21 (4) (1) (cargo), contemplating at the same time an application of the *lex fori*.
On these clauses see the publications of their creator *Döring*, "Convention concernant le contrat de transports aériens. Avant-propos et commentaires", Droit Aérien 1930, 415; *id.*, "Luftrechtliche Arbeiten innerhalb des Internationalen Luftverkehrsverbandes (IATA)", 1 Arch.f.LuftR (1931) 41; *id.*, "Die Neugestaltung des Luftbeförderungsvertrages im europäischen Luftverkehr", 2 Arch.f.LuftR (1932), 1; *id.*, "Les tâches juridiques de l'IATA", Revue Aéronautique Internationale 1935, 68.
Having been significantly shaped by *Lufthansa Syndicus Döring*, these clauses have been referred to as "*Döring* clauses" ["*Döring*-Klausel"]. See *Sand*, "'Parteiautonomie' in internationalen Luftbeförderungsverträgen", 18 ZLW (1969), 205 (at p. 215). The suspect that the clauses had been created either by *Döring* or by Major *Beaumont* incited a Dutch court in 1936 to have both lawyers provide legal opinions on a case at stake (see Nederlandse Jurisprudentie 1936, 316. Since the clauses did not comply with English law, however, their true authorship must be with *Döring*. The non-compliance with English law was ascertained in *Kidston v. Lufthansa* (C.A. 1936), [1938] 1 Lloyd's L.Rep. 2, per *Scrutton L.J.*

397 IATA's so-called "Bermuda conditions" of 29 March 1949 did away with the "*Döring* clauses".
The text of the "Bermuda conditions" is reproduced in *Alex Meyer*, "Internationale Luftfahrtabkommen", vol. 1 (1953), pp. 163 ff.
As to these clauses see *Gates*, "IATA Conditions of Carriage", IATA Bull. no. 9 - 1949, pp. 53 ff.; *Gazdik*, "Analysis of Certain Aspects of the Law of Contracts Relating to International Carriage of Goods by Air" (Thesis, McGill; 1950), pp. 40 ff.; *id.*, "Uniform Air Transport Documents and Conditions of Contract", 19 JALC (1952), 184; *Lemoine*, "Standardizating the Conditions of Carriage", IATA Bull. no. 15 - 1952, at p. 60.
Subsequent versions have never contained a choice of law provision. See *Lemoine*, "Vers une uniformisation du contrat de transports aérien international", RFDA 1954, 103; *Schweickhardt*, "Die neuen Beförderungsbedingungen der IATA für den Luft-Personen- und -Gepäckverkehr" in: "Beiträge zum internationalen Luftrecht. Festschrift für Alex Meyer" [after 1975 often referred to as "Festschrift Alex Meyer I"] (Düsseldorf; 1954), pp. 117 ff.; *Rudolf*, "Die neuen IATA-Beförderungsbedingungen für Fluggäste und Gepäck", 20 ZLW (1971), 153; *Sand*, "'Parteiautonomie' in internationalen Luftbeförderungsverträgen", 18 ZLW (1969), 205 (at p. 211); *Lagerberg*, "Conflicts of Laws in Private International Air Law" (Thesis, IASL, McGill; 1991), at pp. 40 *et seq.*

398 *Kidston v. Lufthansa* (C.A. 1936), [1938] 1 Lloyd's L.Rep. 2, per *Scrutton L.J.*

399 This had already been ascertained by *Lemoine*, "Traité de droit aérien" (1947), at p. 402; *Riese/Lacour*, "Précis de Droit Aérien" (1951), at p. 223; *Romang*, "Zuständigkeit und Vollstreckbarkeit im internationalen und schweizerischen Luftprivatrecht" (1958), at pp. 80 ff.; and by *Gernault*, in: ICAO Doc. 7450 - LC/136 I, p. 243.
The new Swiss code on private international law (IPRG) expressly prohibits a choice of law in consumer contracts: Art. 120 (2) IPRG. Its applicability to contracts of carriage under Swiss law is discussed by *Dettling-Ott*, "Schweizerisches und internatioanles Lufttransportrecht", at pp. 81; 83 ff.

fundamental public policy of the United States"[400], and considered with skepticism by the majority of legal commentators[401]. A survey of the current practice of a number of airlines[402] reveals that the use of choice of law provisions in contracts of carriage among the airlines is no longer fashionable among those carriers that used them in the past[403]. This trend is given momentum by national legislation or a tendency of the law courts in a number of states to apply at least certain consumer protective rules, no matter which law governs the contract (mandatory or imperative clauses)[404]. Sometimes these rules are not even found in legislature devoted to private international law, but rather in consumer protection acts[405].

It appears noteworthy that the Commercial Court of the Kanton Zürich (19 Sept. 1991), SJZ 1992, 37 decided to acknowledge a choice of law by the parties in a case where otherwise the proper law of the contract would have been Lybian law according to Art. 117 IPRG. That an international carriage by air in general may be subject to a choice of law agreement between the parties had already been recognized by the Swiss Supreme Court *(Bundesgericht; BG)* ASDA Bull. 1959/3, 10 (at that time, however, applying former Swiss law).

400 CAB Order E-1590 of 18 Mai 1948 (referring to Art. 7 of IATA resolution no. 115/520 = 215/520 = 315/520). See also *Fricke v. Isbrandsen Co.* (S.D. N.Y. 1957), 151 F.Supp. 465.

401 See *Milde*, "Conflicts of Laws in the Law of the Air", 11 McGill L.J. (1965), 220 (at p. 244); *Lando*, "Consumer Contracts and Party Autonomy in the Conflict of Laws", in: *Mélanges de droit comparé en l'honneur du doyen Ake Malmström* (1978), 141 (at pp. 151 *et seq.)*.

402 Including *Aeroflot, Aerolineas Argentinas, Air Canada, American Airlines, British Airways, Lufthansa, Northwest Airlines, Sabena, Singapore Airlines*. See further the observations made by *Achtnich*, "Luftrechtliche Betrachtungen anläßlich des Absturzes eines Flugzeuges der Königlich Niederländischen Luftverkehrsgesellschaft (KLM) am 22. März 1952 bei Frankfurt a.M.", 1 ZLR (1952), 333.

403 As to the latter, *Sand*, "'Parteiautonomie' in internationalen Luftbeförderungsverträgen", 18 ZLW (1969), 205 (at pp. 213; 216) mentions *Aeroflot* and *Sabena*. As *Rudolf*, "Die neuen IATA-Beförderungsbedingungen für Fluggäste und Gepäck", 20 ZLW (1971), 153 reports, *Sabena* stopped already in 1971 making use of choice of law clauses. *Lufthansa* must have made use of an indirect choice of law rule in its cargo conditions, providing for the application of the *lex fori* and then repeating the possible *fora* under Art. 28 (2) of the *Warsaw Convention* - a *Döring* heritage? Today, however, no such clause is found in the *Lufthansa* conditions (6 ed., 1 May 1992 of the Conditions of Carriage for cargo as approved by the German Minister of Transport according to § 42 *LVO* in connection with § 11 *LVG* under file number AZ L3-5-225 L/58 of 8 December 1958).

404 As to Canada see e.g. *Moguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R.4th 256; [1990] 3 S.C.R. 1077; see also *Hunt v. T & N plc.* (1993), 109 D.L.R.4th 16; [1993] 4 S.C.R. 289. On the development see *Edinger*, "The Constitutionalization of the Conflict of Laws", 25 Can.Busin.L.J. (1995), 38; *Finkle/Labrecque*, "Low Cost Legal Remedies and Market Efficiency: Looking Beyond *Moguard*", 22 Can.Busin.L.J. (1993), 58 (82 ff.). In Switzerland, the contract of air carriage has frequently been characterized as a consumer contract which under Art. 120 (2) IPRG shall not be subject to a choice of law rule. Courts have applied this rule even under ambiguous circumstances; see *Bezirksgericht Zürich* (16 May 1989), SJZ 1990, 216 = ASDA Bull. 1991/1, 12 ff. For an ordinary case see *Bezirksgericht Zürich* (2 Febr. 1988), ZR 87 no. 92, 218.

405 E.g. in Germany the Act on Conditions of Contract *(Gesetz über die Allgemeinen Geschäftsbedingungen - AGBG)* requires that it be applied even if foreign law is to govern the contract in cases where the following criteria are met: The contract must have been concluded subsequent to advertisemants of one of the parties within Germany; the party must have its permanent residence in Germany, and must have agreed on the contract within the territorial scope of application of the Act - § 10 *AGBG*. On its significance as to air law see *Böckstiegel*, "Zur Bedeutung des neuen AGB-Gesetzes für die Beförderungsbedingungen der Fluggesellschaften", in: *Bodenchatz, M. / Böckstiegel, K.H. / Weides, P.*, "Beiträge zum Luft- und Weltraumrecht. Festschrift zu Ehren von Alex Meyer. Sonderausgabe der Zeitschrift für Luft- und Weltraumrecht"(1975), 55 (at pp. 57 ff.).

(3)*Lex voluntatis* - Contesting Its Legal Soundness

More than thirty years before *Milde* wrote that "the first solution which comes to the mind of any modern lawyer dealing with any contractual relations is the application of the principle of party autonomy in the choice of law - *lex voluntatis.*"[406], *Hermann Müller*[407] proved that he was *not* one of those "modern lawyers"[408]; his perceptive and tempting legal approach, however, does even today not at all lack legal soundness. In a section on party autonomy in private international air law, he observed that choice of law provisions can be null and void under mandatory rules of the *forum*, especially in standardized conditions of carriage. In conformity with traditional authorities on private international law in general[409], he points out that the agreement on the selection of a certain legal system to govern the contract of carriage is itself a contract *(Rechtsgeschäft):* a *"contract of reference" (Verweisungsvertrag)*. Legal significance and consequences to this agreement are rendered to a declaration by the parties only by the legal system governing the declaration[410]. Whether the agreement between the parties is legally cognizable, therefore, is *a matter of law* (a question of *normativism)* which cannot be examined under the law which is referred to by the parties' agreement in the "contract of reference" *(Verweisungsvertrag)*, but under a *legal system as determined by general rules*. Thus, the will of the parties can *only* obtain its legal significance, i.e. its quality as a legally cognizable agreement, by first applying a different legal system in order to

406 *Milde*, "Conflicts of Laws in the Law of the Air", 11 McGill L.J. (1965), 220 (243).

407 *Müller*, "Das internationale Privatrecht der Luftfahrt" (1932), at pp. 74-76.

408 Although he clearly realized that the Supreme Court of the Germany was tending to abandon its former approaches (based on the *lex loci solutionis* doctrine) in favour of choice of law freedom ("Das Reichsgericht und ein Teil der deutschen Wissenschaft erkennen den Parteiwillen als massgebend für die Bestimmung des anzuwendenden Rechts an. [...] Inwieweit es damit seine Lehre vom Erfüllungsort über den Haufen wirft, soll hier nicht erörtert werden."); *ibd.* at p. 75.

409 *Niemeyer*, "Positives Internationales Privatrecht" (1896), p. 6; *Gutzwiller*, "Internationalprivatrecht" ([s.d.] ca. 1920), at pp. 1605 *et seq.*; *Rabel*, "Die deutsche Rechtsprechung in einzelnen Lehren des internationalen Privatrechts", 3 RabelsZ (1931), 753 (pp. 756 ff.); *Wahl*, "Das Zustandekommen von Schuldverträgen und ihre Anfechtung wegen Willensmangels", 3 RabelsZ (1931), 774 (at 775; 790 ff.); *Walker*, "Internationales Privatrecht" (1921), at pp. 343 *et seq.*.

410 See foregoing footnote; esp. *Niemeyer, ibd.*.

ascertain its legal relevance[411] . In order to avoid this complicated procedure, *Müller* suggests that the will of parties not be taken into consideration when looking for an appropriate point of contact as to contracts of international carriage by air. Before the background of all kinds of consumer protection in choice of law issues[412] and in the "age of mandatory rules", the approach of contesting the legal soundness of the freedom to choose does not appear without some convincing *effét*. Some may even predict that it will again become a "modern" approach[413] .

(4)Conclusion

As to *lex voluntatis*, the conclusion is that it does not render a favorable solution of the conflicts of laws problem with respect to commercial contracts of international carriage by air. Although modern codifications of private international air law still refer to the *subjective test* as the first point of contact in a checklist of tests, this test is subject to many restrictions, some due to consumer protection in general, some due to Art. 32 of the *Warsaw Convention* in that a choice of law provision might cut some of the rights of the passenger or shipper/consignor/consignee - the CAB had even declared a cargo clause as contrary to public policy. The subjective approach, therefore, does not seem to qualify as a useful and recommendable point of contact in the conflicts of laws of the contract of international carriage by air.

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411 As a matter of course, the legal systems may in practice be the same - but if they are, then this is due to a different relevant point of contact. This aspect, however, was subject to controversial highest jurisprudence in Germany: see RG (10 May 1884 - I. 114/84), RGZ 12, 34 (36); RG (30 Jan. 1889 - I. 331/88), RGZ 23, 31 (33). There has, however, also been jurisprudence to the conctrary: see e.g. RG (22 Febr. 1881 - III. 341/80), RGZ 4, 242 (246); RG (8 July 1883 - I. 317/82), RGZ 9, 225 (226 f.); RG (21 Oct. 1887 - III. 136/87), RGZ 20, 333 (334-336); RG (5 Nov. 1889 - III 242/89), RGZ 24, 112 (113); RG (4 Febr. 1890 - III. 105/89), RGZ 26, 135 (151 ff.). Jurisprudence, too, seems traditionally have to favored the view that the law that is *referred to* is to govern also the questions of legal prerequisites *(Vorfragen)*: see e.g. *Walker*, "Internationales Privatrecht" (1921), at pp. 343 ff. rendering further back references as to legislative proposals issued by *Niemeyer* and *Gebhard*. See also *Zitelmann*, "Internationales Privatrecht" I (1897), at p. 278.
Walker, ibd., at p. 346 concludes in his discussion that the parties may choose the law to govern a contract deliberately, unless imperative rules *of the law applicable according to private international law* interfere. See also *Wengler*, "Internationales Privatrecht" (1981), at pp. 556 *et seq.* reflecting current tendencies.

412 *Supra.*

413 As to this aspect see esp. the essay by *Juenger*, "Parteiautonomie und objektive Anknüpfung im EG-Übereinkommen zum Internationalen Vertragsrecht. Eine Kritik aus amerikanischer Sicht", 46 RabelsZ (1982), 57.

bb) Objective Tests

Hence, the traditional points of contact applying objective tests have to be examined as to whether they provide for acceptable solutions.

In order to qualify certain points of contact as appropriate for the determination of the applicable law, the objectives must be defined. Since it is still the area of private law that is concerned, the prevailing notion is still private autonomy, and thus the appropriate law is to be determined from the standpoint of the parties of the contract of carriage. A government may have an interest in the application of its own law once a case is pending before its court. However, "it is obvious that no court can do justice if it refuses absolutely to recognize the existence of a foreign law or of any right acquired thereunder"[414]. The exclusive application of substantive *lex fori*, therefore, does not serve the purpose of substantial justice[415]. Moreover, in the arena of internationally unified law it merely transfers the choice of law problem into a choice of jurisdiction problem, instead of rendering a solution.

The problem of an international balance of the factors influencing the determination of the applicable law still remains[416], and it is believed that a single conflicts rule should govern all passengers and persons interested in cargo aboard an aircraft uniformly[417]. On the other hand, if private autonomy is the recognized and prevailing principle of private law, then a uniform treatment does not necessarily have to be a decisive criterion. Obligations are of a relative nature, and the law governing the relationship may depend on the parties and the contents of the contract. To apply a simple example: If passenger X flies London - Paris - Rome; and Y flies Paris - Rome - Athens; why

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414 *Graveson*, "The Conflict of Laws" (5 ed.; 1965), at p. 8.

415 See also *supra*.

416 *Kegel*, "Internationales Privatrecht" (6 ed.; 1987), at p. 54 uses the term "internationalprivatrechtliche Gerechtigkeit" which *Juenger*, "Choice of Law and Multistate Justice" (1993), at p. 69 translates as "conflicts justice".

417 *Frankenstein*, "Internationales Privatrecht", vol. II (Berlin 1929), at p. 218; *Caspers*, "Internationales Lufttransportrecht" (1930), at p. 12; *Riese*, "Internationalprivatrechtliche Probleme auf dem Gebiete des Luftrechts", 7 ZLR (1958), 271 (280); *Milde*, "Conflicts of Laws in the Law of the Air", 11 McGill L.J. (1965), 220 (245).

should these contracts be treated equally even if X and Y sit next to each other on Paris - Rome? The contracts have nothing in common. They might even be concluded with different (contractual) carriers. One would like to agree with *von Savigny* that the purpose of legal rules is to serve private interests rather than vice versa[418]. Certainly the latter solution might be considered preferable for the convenience of the lawyer, which - however - is not an asset superior to the requirement that the law balance social interests appropriately. It is in order to balance the social interests of the *private* parties, why, according to *von Savigny's* system, the *situs* of the legal relationship concerned has to be determined[419]. Also involving the criterion of foreseeability[420], in the most ideal case such *situs* (which ever method might apply to determine) will create *congruence* of individual justice and the more or less subconscious expectations of the parties of the contract of carriage, i.e. those circumstances that would have been reasonably contemplated by the parties if they had considered the issue. However, this approach will scarcely bring about decisional harmony and has, in its entirety, been criticized as an "ideal [that] will forever remain a phantom"[421]. Some may draw the conclusion that for practical purposes "a choice-of-law rule need not achieve perfect justice at any time it is invoked in order to be preferable to a no-rule approach"[422]. This represents the logical antonym of the modern approach, which recruits more "policy aspects"[423] in its opposition to the classical

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418 *Savigny*, "System des heutigen Römischen Rechts" IV (1849), at p. 116.

419 Ibd. at pp. 108, 118, 120, 200. That this means the *situs* of the *private relationship*, as opposed to doctrines promoted in the US, has already been pointed out. See *supra*.

420 See *Riese*, "Internationalprivatrechtliche Probleme auf dem Gebiete des Luftrechts", 7 ZLR (1958), 271 (280); *Milde*, "Conflicts of Laws in the Law of the Air", 11 McGill L.J. (1965), 220 (245).

421 See *Juenger*, "Choice of Law and Multistate Justice" (1993), p. 69 citing *Fritz Sturm*.

422 *Rosenberg*, "A Comment on *Reich v. Purcell*", 15 UCLA L.Rev. (1968), 641 (644).
See also a dictum by *Donovan, L.J.* in *Formosa v. Formosa* (C.A.), [1962] 3 All E.R. 419 (424):
"But these rules of private international law are made for men and women - not the other way round - and a tidy logical perfection can never be achieved. Certain elementary considerations of decency and justice ought not to be sacrificed in the attempt to achive it."

423 *Sand*, "Choice of Law in Contracts of International Carriage by Air" (Thesis, IASL, McGill : 1962), at p. 62. Generally cf. the modern American approaches especially the "better law approach", usually attributed to *Leflar* (see e.g. *Leflar*, "Conflicts Law: More than Choice Influencing Considerations", 54 Calif.L.Rev. [1966] 1584), and the "governmental interest analysis" as shaped by *Currie* (see *Currie*, "Selected Essays in the Conflict of Laws" [1963]). For a recent analysis see *Brilmayer*, "The Role of Substantive and Choice of Law Policies in the Formation and Application of Choice of Law Rules", 252 Rec. des Cours 1995, 9 (esp. ch. III on "Substantive Policies and their Role in Choice of Law").

doctrine[424]. Nevertheless, that the classical doctrine and the traditional approaches still provide for more appropriate solutions in a multicultural world founded on reciprocal respect as to cultural, religious, social, and economic reflections in the law, has already been pointed out *supra*.

As has also been mentioned *supra*[425], modern approaches to private international law apply a closest relationship test. That such approach, especially by codified law, is not a very fortunate solution - since it is the objective of *every* conflicts rule to determine the law with the closest connection to the facts - has also been shown[426]. With respect to contracts of carriage of goods, modern codifications, mainly following the *Rome Convention 1980*, render a certain presumption: It is assumed that the contract have its closest connection with the law of the carrier's principal place of business (Art. 4 (4) of the *Rome Convention* of 1980)[427]. In all other cases, carriages conducted in the course of business of the carrier will be subject to the general rule of Art. 4 (2), leading to the same solution. Carriages not performed during the ordinary course of business will be subject to the law of the country where the characteristic performance, i.e. the carriage, takes place (Art. 4 (2)). Thus, with respect to carriages by air the applicable law will be either the *lex domicilii* of the *carrier* (and not of the passenger as proposed in the IATA agreement[428]) or the *lex loci solutionis*. These doctrines will, therefore, have to be considered as emerging principles and analyzed critically.

Since very different features are involved in the multi-colored scenery of a nation's legal notions, reflecting different cultural, religious, social and economic values, emphasis should be given to the aspect of practical foreseeability from the perspective of the parties involved in the contract of international carriage by air, i.e. to those conflicts rules that meet the requirement of determining the law that is reasonably to be expected, since it is closely connected to the carriage[429]. Quite often the

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424 Although usually equally allocated to the "American Conflicts Revolution", *Beale's* "vested rights"-approach takes more from *von Savigny* than from what subsequently shaped "true" policy approaches. See e.g. *Beale*, "A Treatiese on the Conflicts of Laws" III (1935), 1950-1975.

425 *Supra.*

426 *Supra.*

427 For a discussion of this special rule see *Schultsz*, "The Concept of Characteristi Performance and the Effect on the E.E.C. Convention on Carriage of Goods", in: *North (ed.)*, "Contract Conflicts" (1982), pp. 185 ff.

428 For a detailed discussion see *infra.*

429 Accordingly, *Alex Meyer*, "*SAS v. Wucherpfennig*", 4 ZLR (1955), 232 (235), looks for points of contact that dominate *("beherrschen")* the legal relationship (applying former German law).

criterion of uniform treatment of all passengers aboard an airplane is mentioned[430]. If this criterion is meant to apply the same substantive law to each person, then the necessity of such a rule is not self-evident: E.g. there may be a 200 seat aircraft operated by airline A. 50 seats may be chartered by B and the respective passages sold to passengers #1-50, and another 50 seats, #51-100, chartered by C who sold the respective passages to an independent travel agent D who, finally, is party to the contracts of carriage with passengers #51-100. Seats #101-200 are directly sold by A. How can all passengers expect to be treated by the same substantive law? They have different partners to their contracts of carriage and meet inside the aircraft only because of economic convenience and arrangements of their contractual carriers. Therefore, an expectation of uniform treatment in substance of different obligations[431] cannot be expected by the very nature of the relativity of contractual obligations. Furthermore, it appears more important to apply a uniform conflicts of laws rule to all international carriages as one step to relieve the current "open law situation"[432] than to achieve uniform treatment in substance for a mere casualness, especially in the perspectives of passengers #1-50 and #51-100, respectively, in the example.

According to these objectives, the different points of contact shall be evaluated.

cc) The Law of the Flag *(lex banderae)*

Although the principles held applicable in international air law should not depart from general principles of private international law, some peculiarities of the special legal area - which are also found in the much more traditional area of maritime law[433] - may induce special considerations. Since the principle of nationality of aircraft is one of the prevailing principles in international air law,

430 *Supra.*
431 Obligations may e.g. differ in locations of departue and destination.
432 *Sand*, "'Parteiautonomie' in internationalen Luftbeförderungsverträgen", 18 ZLW (1969), 205 (217); *Rudolf*, "Die neuen IATA-Beförderungsbedingungen für Fluggäste und Gepäck", 20 ZLW (1971), 153 (164).
433 See for instance the first edition of *Dicey*, "The Conflict of Laws" (1896), at p. 623 (rule 154).

one is tempted to favor the law of the flag as the indicator of the law governing the carriage[434]. This criterion is unambiguous and also meets the requirements of those who demand equal treatment aboard the aircraft. However, modern aircraft finance techniques, aircraft interchange, charter and block seat arrangements prevent the passenger from realizing the state of registry of the aircraft, not only at the time the contract of carriage is made but also when the passenger subsequently boards the aircraft. The same is true with respect to joint airline ventures and pools[435]. The nationality of the aircraft does not necessarily have to be the same as the nationality of the airline as indicated by the multi-colored emblems on the aircraft's tail[436], and the nationality of the aircraft is hardly perceptible even for passengers interested in it because it follows a code of letters, more or less tinily painted onto the aircraft's body. Therefore, this criterion does not meet the requirement of foreseeability. It is far beyond possessing any inner connection with the contract of carriage[437].

Only as far as non-commercial aviation is concerned, the *lex banderae* may deserve some consideration[438]. In general aviation, the state of registry usually is the home state of the carrier. And similar to the *Hague Convention on Road Traffic*[439], which declares the law of the state of registry applicable as to road accidents, by way of analogy it has been proposed that the *lex banderae* apply in

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434 See *Bentivoglio*, "Conflicts Problems in Air Law", 119 Rec. des Cours (1966-III), 69, esp. at p. 81: "[...] 'nationality' of aircraft being used as a pertinent connecting factor." The Italian *Codice della navigazione* declares the law of the flag applicable in air law (Art. 10).

435 The best known example is probably *Scandinavian Airways System (SAS)*. Another very early examples is a former German-Russian Airline *(Deutsch-Russische Luftverkehrsgesellschaft - DERLUFT)*; see *Döring*, "Internationales Recht der Privatluftfahrt" (1927). For early pools under an IATA umbrella see *Caspers*, "Internationales Lufttransportrecht" (1930), at p. 19. As to modern pooling in general see *Littlejohns*, "Legal Issues of Aircraft Finance", in: *Hall*, "Aircraft Financing" (2 ed., 1993), 281 (at pp. 292 ff.).

436 See *Dettling-Ott*, "Internationales und Schweizerisches Lufttransportrecht" (1993), at p. 90: "Das Emblem, das die Gesellschaft auf den Schwanz des Flugzeugs aufmalt, läßt nicht mit Sicherheit auf die Registrierung schließen." See also ***Bernstein***, "The Lessee's Guide to Structuring the Cross-Border Aircraft Lease", in: *Hall*, "Aircraft Financing" (2 ed.; 1993), 159, at p. 169: "[There are] Boeing 747 aircraft which carry US N-registration designations but which are operated by non-US carriers. These aircraft are relicts of the cross-border ITC lease age in the US."

437 *Caspers*, "Internationales Lufttransportrecht" (1930), at pp. 20 *et seq.*; *Müller*, "Das internationale Privatrecht der Luftfahrt" (1932), at pp. 76 *et seq.*; *Milde*, "Conflicts of Laws in the Law of the Air", 11 McGill L.J. (1965), 220 (246); *Urwantschky*, "Flugzeugunfälle mit Auslandsberührung und Auflockerung des Deliktsstatuts" (1986), at pp. 132 *et seq.*; *Dettling-Ott*, "Internationales und schweizerisches Lufttransportrecht" (1993), at p. 90 also reject this doctrine.

438 The *Warsaw Convention* does not apply since the carriage is not perfomed for reward (Art. 1).

439 As to the Convention see *Keller/Siehr*, "Allgemeine Lehren des internationalen Privatrechts", at p. 312.

non-commercial air carriage cases if the passengers and the aircraft have the same nationality[440]. This, however, is an exception and does not represent the majority of cases.

dd) Law of the Place where the Contract was Concluded

(lex loci contractus)

Formerly, *lex loci contractus* was *the* prevailing doctrine. In 1932, *Müller* reported its application by statutes in Italy and Japan, its application in court decisions in Austria and Poland, and its general recognition in France, Belgium, the Netherlands, Spain, England, the USA, and Russia[441]. In Germany, it had been recognized until *von Savigny's* influence prevailed and courts subsequently preferred an application of the *lex loci solutions*[442]. Commentators have continued to propose this doctrine[443] which, in the absence of an explicit choice of law, is said to be the most "salient"[444]. *Riese* also refers to the statement by the US delegate *Calkins* of ICAO's Legal Committee (Lisbon, 27 Sept. 1948)[445] that "a contract made in New York for carriage between Argentina and South Africa should be governed by United States laws." This point of view probably displays a consciousness for American concerns in international trade[446]. The doctrine has continued to be applied by French[447], Austrian[448], British[449] and Canadian[450] courts.

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440 *Bentivoglio*, "Conflicts Problems in Air Law", 119 Rec. des Cours440 (1966-III), 69, at pp. 159 *et seq.*; *Dettling-Ott*, "Internationales und schweizerisches Luftransportrecht" (1993), at p. 91.

441 *Müller*, "Das internationale Privatrecht der Luftfahrt" (1932), at pp. 80 *et seq.*

442 On *von Savigny's* doctrine see *von Savigny*, "System des heutigen Römischen Rechts" VIII (1849), at pp. 207 ff. Its influence on German teaching and jurisprudence is discussed by *Müller*, "Das internationale Privatrecht der Luftfahrt" (1932), at p. 73.

443 *Ripert*, "Responsabilité du transporteur aérien", Rev.Jur.Int.Loc.Aérienne 1923, 363; *Van Houtte*, "La responsabilité civile dans les transports aériens intérieurs et internationaux" (1940), at pp. 38, 93, 132. *De Juglart*, "Traité élémentaire de droit aérien" (1952), at p. 240; *Rodière*, "Droit de transports terrestres et aériens" (1960), no. 400. *McNair* (Kerr/Evans), "The Law of the Air" (3 ed.; 1964), at pp. 136-137; *Magdelénat*, "Air Cargo" (1983), at p. 40.

444 *McNair*, ibd.

445 *Riese*, "Luftrecht" (1949), at p. 394, n. 16; *Id.*, "Internationalprivatrechtliche Probleme auf dem Gebiete des Luftrechts", 7 ZLR (1958), 271 (280)

446 *Drion*, "Limitation of Liabilities in International Air Transport", no. 229, observes a movement in favour of the *lex contractus* in the USA.

447 See e.g. Cour d'Appel Paris (9 Nov. 1956), RFDA 1957, 147 *(Laboratories Lafayette c. P.A.A. et Sté C.M.B.)*; and an annotation in RGA 1956, 379. For further back references see *Magdelénat*, "Air Cargo" (1983), at pp. 40

However, apart from such interests of individual states as were certainly influenced by the *SS Missouri* decision[451], some commentators state that all contracts of international air carriage are concluded at the principal place of business or subsidiary places of business of the carrier[452]. In a system of worldwide travel agency networks, this is not true. The place where the contract is concluded does not prejudice the carriage itself. Not only can a contract of carriage from A to B be concluded in Z, which has nothing to do with the carriage, but passengers, with the aid of modern media ("information highway internet", "tele shopping"), can go shopping for the cheapest fares to sellers around the world![453] Who could ulitmately determine the place where the contract was concluded under such circumstances? The emerging issues are striking enough that some countries discuss legislative action as to the implications of private international law for tele shopping[454]. Apart from its roots in medieval doctrine[455], it appears that this criterion was suitable for major maritime harbors such as London in previous centuries, when the cargo actually had to be taken to the docks, where the contract was then concluded. Under this assumption *McNair's* view[456] favoring this doctrine does not seem unreasonable. Today, however, the notion of *lex loci contractus* does not fit the purposes of private international air law at all[457].

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f.; *Lemoine*, "Traité de droit aérien" (1947), at p. 389; *Lureau*, "Responsabilité du transporteur aérien" (Paris 1961), p. 246.

448 Supreme Court of Austria *OGH Wien* (5 Oct. 1955), ÖJZ 1955, 673; and (15 Dec. 1961), 11 ZLW (1962), 152.

449 In its famous decision *in re Missouri Steamship Co.* (1889), 42 Ch.D. 321, per *Chitty J.*, the court held English law applicable under the doctrine *lex loci contractus*, although the cargo (cattle) had been shipped in Boston by an American company. This decision was rendered before the background of English recognition of exemption clauses in favor of the (English) carriers, while American law promoted shipper interests - in air transport of 1948, it was the USA that tried to protect its carriers.

450 *Candian Pacific v. Parent (P.C.)*, [1917] A.C. 195; *Scott v. American Airlines*, [1944] 3 D.L.R. 22 (Ont.).

451 See *supra*.

452 See e.g. *Müller*, "Das internationale Privatrecht der Luftfahrt" (1932), at p. 81.

453 A feature whose effect is accelerated not only by "grey market" offers but also by deregulative and liberalizing measures.

454 Especially in Germany preparatory works for legislation as to tele shopping have been commenced. For verification contact one of the experts preparing legal opinions for the legislative bodies involved: *Professor Dr. Herbert Kronke*, Director, Institute of Foreign Law and International Private and Business Law, Ruprecht Carls University Heidelberg, Heidelberg, Germany.

455 *Supra. General Part.*

456 *Supra.*

457 See also *Dettling-Ott*, "Schweizerisches und internationales Lufttransportrecht", at p. 89: "It does hardly make any sense to subject a contract of international carriage exclusively to the law of the place where the contract was conluded, because it involves elements of chance." ("Es ist kaum sinnvoll, den Vertrag über eine internationale Beförderung ausschließlich dem Ort des Vertragsschlusses zu unterstellen, weil diesem Kriterium oft etwas zufälliges anhaftet.") [English translation provided].

In general, this is reflected by an observed retreat of the *lex loci contractus* doctrine in legal teaching[458] as well as in the law courts, even in England[459].

ee) Law of the Agreed Place of Departure

This point of contact appears favorable on first view, because it is known to both the carrier and the passenger. However, as is conceded even by one of the major promoters[460], this doctrine may be difficult to provide for useful solutions if the departure, in fact, does not take place for whatever reason. One could possibly reason that the contract of carriage governing the legal relationship specifies a certain place of departure which may be the relevant point of contact, regardless of factual circumstances. *Caspers'* criticism[461] that in cases of mixed, multimodal and successive carriages, confusion and disharmony as to the correct point of departure in a specific case will be a probable consequence, appears more convincing.

ff) Law of the Agreed Place of Destination
(lex loci solutionis - lex loci executionis)

If a connection is to be drawn between the performance of the obligation established by the contract and the selection of the law governing it, then it would be the place of the performance. This is e.g. recognized by the *Rome Convention 1980* in Art. 4 (2)[462]. Since the goal of the contract of carriage is to create an obligation to achieve transportation to the agreed place of destination, and the

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458 *Keller/Siehr*, "Allgemeine Lehren des internationalen Privatrechts" (1986), at pp. 344; 348; 352 ff.

459 The German Federal Supreme Court *(Bundesgerichtshof, BGH)* held that the *lex loci contractus* has to stand back, by contrast to other points of contact. The court applied the law of the place of destination and the law of the principal place of business of the carrier. See *BGH* (30 March 1976 - IV ZR 143/77), NJW 1976, 1581. According to a note in ZLW 1988, 334, the English *Court of Appeals* held in a decision rendered on 26 Febr. 1988 English law applicable in a case where an English citizen had concluded a contract of carriage in Bangladesh.

460 *Lemoine*, "Traité de Droit Aérien" (1947), at pp. 399 *et seq.*

461 *Caspers*, "Internationales Lufttransportrecht" (1930), at p. 16.

462 *Supra.*

transfer to that destination absolves the carrier from his contractual obligation (secondary obligations such as the service of food are merely subordinate obligations), this place is likely to be considered the place of performance[463].

However, the destination as a point of contact faces the same objections as the place of departure, considered above, as to uncertainties whether jurisdictions different from those cited above would reach the same legal conclusion.

Another aspect does not speak in favor of the application of this doctrine, either. The *Warsaw Convention* expressly vests the consignor with the right to stop the carriage of goods or to direct the goods to a different destination (Art. 12). Since the consignor may change the destination of the carried goods, a recognition of this doctrine would enable the consignor to change the law governing the carriage *unilaterally* and *in the course of the carriage*. If it is recognized that a single doctrine for the international carriage of passengers as well as goods is a preferable solution to a two tiered system - which appears rational - then the doctrine of *lex loci solutionis* or *lex loci executionis* does not render an acceptable solution.

gg) Law of the Place where the Breach of the Contractual Obligation Occurred *(lex loci laesionis)*

The application of a *lex loci laesionis* doctrine in the contractual context[464] finds its equivalent in the *lex loci delicti (commissi)* rule of the law of torts/delict. As to extra-contractual liability, *lex loci*

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463 This notion is recognized e.g. by the German Federal Supreme Court: BGH (14 April 1953 - I ZR 152/52), BGHZ 9, 221 (223); BGH (22 Nov. 1955 - I ZR 218/53), BGHZ 19, 110 (112); BGH (18 Oct. 1965 - VII - ZR 171/63), BGHZ 44, 183 (186); 7 ZLR (1958), 421 (422); *BGH* (30 March 1976 - VI ZR 143/74), NJW 1976, 1581. See also *OLG Frankfurt* (26 April 1983 - 5 U 75/82), ZLW 1984, 177 (181); *OLG Frankfurt* (11 Nov. 1986 - 5 U 240/85), ZLW 1987, 197; *LG Hamburg* (7 Sept. 1977), RIW 1977, 652. It has further been applied in *Petrire v. Spantax* (2d Cir. 1985), 765 F.2d 263. See also already *Caspers*, "Internationales Lufttransportrecht" (Berlin 1930), at p. 11; *Müller*, "Das internationale Privatrecht der Luftfahrt" (1932), at pp. 73 f.; *Koffka-Bodenstein-Koffka*, "Luftverkehrsgesetz und Warschauer Abkommen" (1937), at p. 241. See further *Schultsz*, "The Concept of Characteristi Performance and the Effect on the E.E.C. Convention on Carriage of Goods", in: *North (ed.)*, "Contract Conflicts" (1982), pp. 185 ff. However, *Riese*, "Luftrecht" (1949), at p. 395 indicates that this notion is not shared by all civil law jurisdictions.

delicti has been, and still is, the predominant doctrine[465] . The factor justifying an effect of the delictual doctrine on the contract may be sought in the following aspects:

First, in continental European jurisdictions damages are founded either on contract or on delict. However, local differences (even though they may be due to systematical deviations), merely have a marginal effect; whether e.g. under French law only one of the foundations can serve as a cause of action in a damage claim (exclusivity) or e.g. under German law both can be pursued (cumulation) does not affect the fact that delictual provisions may be recruited to seek recovery for damages that have occurred in connection with the carrier's performance of a contract of carriage[466] . In Art. 24 (1) of the *Warsaw Convention,* which limits claims "however founded" to the scope of the *Convention,* due regard is given to these legal concepts. Therefore, one might argue that the delictual conflicts rule may equally apply to contractual provisions - designated *lex loci laesionis* - in order to prevent conceptual inconsistencies in the process of awarding compensation.

Second, due to the language of the English translation of the Convention, which is ambiguous in this respect[467] , US courts had held that the Conventional law did not provide for a cause of action but merely described the scope of liability; an identification of the "true" cause of action in the additionally applicable domestic law(s) would then be required[468] . Different from continental European notions, US courts characterize particularly damages resulting from death or injury as torts[469] . Even though US courts have subsequently recognized the provision of Art. 17 of the *Warsaw*

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464 See e.g. *Lapeijne,* "Für die Beurteilung der internationalen privatrechtlichen Vertragsverletzungen nach der *lex loci laesionis* ", Festschrift *Streit* (1939), 531 ff.; *Sand,* "'Parteiautonomie' in internationalen Luftbeförderungsverträgen", 18 ZLW (1969), 205 (217), n. 91.

465 See *Bentivoglio,* "Conflicts Problems in Air Law", Rec. des Cours 1966-III, 69 (151) and the references provided there in n. 14; *Dettling-Ott,* "Schweizerisches und internationales Lufttransportrecht" (1993), at p. 91.

466 Although especially in *Warsaw* cases French courts tend to admit only contractual claims. See e.g. *Cass. (Fr.)* (22. Apr. 1969), RFDA 1969, 397 *(Lloyd's v. Sté Aérofret, Cie Alitalia et Cie UTA)*; *Cour d'Appel Paris* (25 Feb. 1954), RFDA 1954, 45 (48) *(Consorts Hennessy v. Air France)*. German and Italian courts, however, acknowledge the general dichotomy of actionable grounds also in *Warsaw* cases. See e.g. BGH (24 June 1969 - VI ZR 45/67), 19 ZLW (1970), 199 (206); *Cass. (It.)* (9 March 1953), 4 ZLR (1955), 70 (72) *(Calcio Torino v. Alitalia)*.

467 Art. 17: "The carrier shall be liable [...]" - "Le tranporteur est responsable du dommage [...]"

468 *Komlos v. Air France* (S.D.N.Y. 1952), 111 F.Supp. 393; rev'd on other g'ds (2nd Cir. 1953), 209 F.2d 436; cert. den. (1954), 348 U.S. 820; *Noel v. Linea Aeropostal Venezolana* (S.D.N.Y. 1956), 144 F.Supp. 359; aff'd (2nd Cir. 1957), 247 F.2d 677; cert. den. (1957), 355 U.S. 907.

469 See e.g. *Supine v. Air France* (E.D.N.Y. 1951), [1951] U.S.Av.R. 448; *Kilberg v. Northeast* (N.Y. Supr.Ct. 1961), [1961] U.S.Av.R. 1; *Griffith v. United Airlines* (Penn. Supr.Ct. 1964), [1964] U.S.Av.R. 647.

Convention as an independent cause of action[470], with respect to questions not addressed by the Convention, such as the compensability of certain types of damages, the legal framework is, to a large extent, provided by statutory law which applies to tortuous actions. Thus, the connotation of extra-contractual law is still present[471].

However, not only can it be very difficult to ascertain where certain damage occurred during a carriage by air, but also, in the case that damage occurs over the high seas, there is no legal *régime* of the place since airplanes are not flying parts of the territory of their country of registry. Therefore, the necessity would emerge to designate an additional system (e.g. the law of the flag) to govern the case subsidiarily. These undue burdens imposed by this doctrine render it inappropriate to resolve the conflicts of laws problem[472].

hh) Law of the Contracting Carrier's Principal Place of Business *("lex domicilii quaestuarii")*

This point of contact has a long tradition[473]; it is applied by German courts[474] as well as by US courts[475], is recognized by the *Rome Convention 1980*[476], and enjoys approval by a majority of commentators[477], but it is not free from doubt, either.

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470 *Benjamins v. British European Airways* (2nd Cir. 1978), 572 F.2d 913; cert. den. (1979), 439 U.S. 1114. For further references confirming *Benjamins* see *Giemulla/Schmid*, "The Warsaw Convention", Art. 17, no. 2.

471 See also e.g. *Lowenfeld*, "Aviation Law", VI-5 1.31; *Miller*, "Liability in International Air Transport" (1977), at pp. 241; 271; *Mankiweicz*, "Selected American Decisions on the Warsaw Convention and Related Matters", 34 ZLW (1985), 145 (157).

472 See also the discussion from a "classical" point of view by *Milde*, "The Problems of Liabilies in International Carriage by Air" (1963), at p. 17.

473 See the references given by *Riese*, "Luftrecht" (1949), at p. 396. As to the background of this doctrine in private international law in general see *Niemeyer*, "Positives Internationales Privatrecht" (1894), at p. 29; *Frankenstein*, "Internationales Privatrecht", vol. II (1929), at p. 173.

474 It has been applied by German courts even before codified law came under review in 1985 *(Gesetz zur Neuregelung des IPR v. 25.7.1986)*, as implementing the *Rome Convention 1980*. See *BGH* (30 March 1976 - VI ZR 143/74), ZLW 1976, 354; *LG München I* (15 July 1975 - 18 O 461/73), ZLW 1977, 155; *AG Köln* (27 Nov. 1980 - 124 [115] C 3029/79), ZLW 1981, 315. See also *LG Berlin* (15 March 1984), reported by *Urwantschky*, "Flugzeugunfälle mit Auslandsberührung und Auflockerung des Deliktsstatuts" (1986), at pp. 110 f.

475 *Campbell v. Air Jamaica, Ltd.* (2nd Cir. 1988), 863 F.2d 1; *Kapar v. Kuwait Airways Corp.* (D.D.C. 1987), 663 F.Supp. 1065; *Benjamin v. British European Airways* (2nd Cir. 1978), 572 F.2d 913.

476 Art. 4 (2).

The quality of this point of contact has principally been doubted by *Lemoine*[478] for several reasons, the first of which, namely that the doctrine fails in the case of several successive carriages, faces objections since it is clear that either successive carriages involve several different contracts which may well be governed by different legal régimes; or a single contractor organizes several successive carriages constituting a situation where eventually only one contract exists.

Lemoine's other reasons are that the carrier may perform air carriage on other continents far away from his principal place of business, and that, in the case of an airline that is organized as a pool, the principal place of business is not readily perceivable by the carrier's co-contractor. As *Riese*[479] admits, *Lemoine's* points are hardly rebuttable. *Caspers*, on the other hand, has no difficulties applying the law of the carrier's principal place of business to a carriage in Asia or South America performed by a European carrier[480]. He adheres to the general opinion that typical mass contracts have to be localized at the principal place of business of the entrepreneur[481].

At any rate, the carrier's co-contractor is able to readily find out the principal place of business of his carrier by a quick look at the document of carriage. Yet another aspect is agreed upon when considering this point of contact: According to *Riese*[482], the application of the law of the carrier's principal place of business subjects all passengers and cargo aboard an aircraft to the same law.

As pointed out above, the contractual carrier can be different from the person actually performing the carriage by air. Obviously, the general clearly-formulated requirement of non-discrimination of

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477 See the primary promoter of this doctrine in private international air law *Caspers*, "Internationales Lufttransportrecht" (1930), at pp. 20 f. See also *de Visscher*, "Les conflits de lois en matière de droit aérien", 48 Rec. des Cours (1934-II), 279; *Goedhuis*, "National Air Legislation and the Warsaw Convention" (1937), p. 271; *Bustamente y Sirven*, "Derecho internacional aéreo" (1945), p. 45; *Riese*,"Luftrecht" (1949), at p. 396 ; *Id.*, "Internationalprivatrechtliche Probleme auf dem Gebiet des Luftrechts", 7 ZLR (1958), 271 (281); *Milde*, "The Problems of Liabilies in International Carriage by Air" (1963), p. 19; *Id.*, "Conflicts of Laws in the Law of the Air", 11 McGill L.J. (1965), 220 (247); *Bentivoglio*, "Conflicts Problems in Air Law", 119 Rec. des Cours (1966-III), 69 (140); *Rudolf*, "Der Flugschein im internationalen Linienverkehr", 18 ZLW (1969), 90 (92). *Riese*, ibd. at p. 396 refers also to the pre-war IATA conditions of carriage *(scil.* Art. 22 (4) (1) of the "Antwerp version", 1931) which provided that actions for damages against the carrier were to be brought at the place of the carrier's principal place of business. Since this clause also contemplated application of the *lex fori*, in fact it has to be considered a choice of the law of the carrier's principal place of business.

478 *Lemoine*, "Traité de Droit Aérien" (1947), p. 395.

479 *Riese*, "Luftrecht" (1949), p. 396.

480 *Caspers*, "Internationales Lufttransportrecht" (1930), at p. 21.

481 See *Niemeyer*, "Positives Internationales Privatrecht" (1894), at p. 29; *Frankenstein*, "Internationales Privatrecht", vol. II (1929), at p. 173.

482 *Ibd.*

passengers aboard the same aircraft[483] is to be understood with respect to the same contracting carrier.

jj) Law of the Domicile of the Passenger *("lex domicilii vectoris")*

In the traditional doctrine, the *lex domicilii,* has only been taken into consideration with respect to the carrier, and due to the difficulties of ascertaining the exact location of what is legally attributed the "domicile", it has been rejected as an unusable criterion[484]. However, since the 1960s the idea to consider the law of the domicile of the passenger as a decisive point of contact has been circulated in the USA[485]. It almost appears as a late *hommage* à *Mancini*[486] that the IATA Inter-Carrier Agreement, adopted on 31 October 1995 during the Annual General Meeting at Kuala Lumpur, provides for the introduction of a domicile clause into the carriers' conditions of carriage. Under Art. 1 of the Agreement the carriers that have signed it will "take action to waive the limitation of liability for recoverable compensatory damages in Art. 22 paragraph 1 of the Warsaw Convention [...] so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger."

The history of this clause may be outlined briefly by some facts: the USA has been dissatisfied with the limitation of liability in passenger cases since the 1960s, and especially after the *Guatemala Protocol* of 1971, the *Montreal Additional Protocol No. 4* of 1975 and the *Supplemental Compensation Scheme* had failed, the potential move to denounce the *Warsaw Convention* became more and more visible. The airlines tried to react through IATA, analogously to their actions in 1965/66, by an agreement to increase the liability limits. The US Department of Transportation, however, imposed upon US carriers the requirement of unlimited liability for US citizens. The notion

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483 *Supra.*

484 See *Riese*, "Luftrecht" (1949), p. 396.

485 See *The Brooklyn Bar Association* in the critical note by *Meyer*, 9 ZLW (1960), 314; *Mendelsohn*, "A Conflicts of Laws Approach to the Warsaw Convention", 33 JALC (1967), 624 (628-632).

486 *Supra. Mancini*, of course, favored the doctrine of *'personal statute'* which is an approach slightly different from a *domicile* doctrine. As to the differences see *e.g. Dicey & Morris*, "The Conflict of Laws" (12 ed.), at pp. 164 f..

of reference exclusively to US citizens was certainly due to the supplemental compensation facilities that could have been introduced under Art. XIV of the *Guatemala Protocol* according to the discretion of states.

To attribute significance to this point of contact, however, raises several objections:

First, the notion of domicile, or residence, is not subject to uniform determination, especially under European civil law. While Anglo-American common law still adheres to some very specific notions of domicile, and Québec recently adopted the concept into its new civil code, it is quite doubtful whether a person's domicile constitutes an appropriate point of contact for the determination of the law applicable to the contract of carriage. As opposed to North America, continental European jurisdictions do not only recognize a variety of different connotations of a "domicile" but also recognize several different residences as attributed to a citizen at the same time without singling out a specific "domicile"[487]. In general, *Raape/Sturm* have observed "retreat of the domicile principle"[488] since the 1950s; in 1964 *Kahn-Freund* described it as "a superannuated concept"[489]; and *Dicey and Morris* observe that the domicile's "preeminence is less secure than was formerly the case [...], the courts and, especially, legislature are making increasingly use of various forms of residence [...], a reflection in part of the growing influence of international conventions on the English rules of the conflict of laws."[490]. In fact, the replacement by or at least substantive uniformity by reform with the notion of habitual or permanent residence is greatly debated in the United Kingdom[491]. Although reform movements in England are observed to bring the concept closer to the European notion of habitual or permanent residence[492], and some commentators also observe that leading American

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487 To the difficulties of determining a "decisive" domicile, the problem that different jurisdictions apply different tests - due to state sovereignty - to ascertain the domicile, is added. This is clearly pointed out by *Wengler*, "Internationales Privatrecht" I (1981), at pp. 242, 255. For an overview over the different legal positions see *Raape/Sturm*, "Internationales Privatrecht" I (6 ed. 1977), at p. 117.

488 *Raape/Sturm*, "Internationales Privatrecht" I (6 ed. 1977), at p. 116. Further references *ibd.*, n. 104. See also *Vischer/Planta*, "Internationales Privatrecht" (2 ed. 1982) evaluating Swiss law.

489 *Kahn-Freund*, "Statutes: The Willis Act, 1963", (1964) 27 Mod.L.Rev. 55 (57). Also cited by *Dicey & Morris*, "The Conflict of Laws" (12 ed.) at p. 165 to indicate the future development.

490 *Dicey & Morris*, "The Conflict of Laws" (12 ed. 1993), at pp. 163 *et seq.*

491 As to the different proposals, esp. the most radical one made by Ireland, see *Dicey & Morris*, "The Conflict of Laws" (12 ed.), at pp. 165 *et seq.*

492 *Dicey & Morris, ibd.*

understanding of domicile gets closer to the notion of habitual residence[493], even the best conceivable case will be "close" but not subject to uniform interpretation. Thus differences remain, and no international obligation would order an attempt at a uniform interpretation. Moreover, since considerable work has been achieved in Europe with the Hague Conferences fostering the notion of "habitual residence"[494], and even England is still hesitating to adhere to this concept in general, the USA would probably be reluctant if it came to the adoption of a uniform understanding in the sense of the international work already done by the Hague Conferences. Therefore, the concept of "domicile" is not applied and not even adequately recognized among the major legal systems in the world so that, from this perspective, it does not appear to be an appropriate point of contract as to the contract of carriage.

Second, it discriminates against different co-contractors of a carrier if they are deemed to have domiciles in different legal systems. Even *Mancini*, the prime promoter of *lex patriae* and related notions[495], granted the parties involved the right to choose a different law to govern their legal relationship. As to the contract of carriage by air, it has to be taken into account that the passenger is subdued by standard conditions of carriage, i.e. he is subject to a *contrat d'adhésion*. Since the agents of the carrier are usually not entitled to change the standard conditions[496], the passenger's only choice is to "take it or leave it!"[497]. Although the standardization of contracts is recognized in principle virtually throughout the modern world, the legal systems will certainly reserve their right to examine in particular such unilaterally imposed clauses, balancing the factors of socio-economic power and monopoly against fairness and good faith[498].

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493 See e.g. *deWinter*, "Nationality or Domicile?", 128 Rec. des Cours (1969-III), 347 (419-493); *Cavers*, "'Habitual Residence': A Useful Concept?", 21 Am.Univ.L.R. (1972), 475. In Manitoba, under the *Domicile and Habitual Residence Act 1983*, habitual residence and domicile are identical.

494 The notion was first used about a century ago in the *Hague Convention on Private Law* of 12 June 1902. See *van Hoogstraten*, "La Codification par traités en droit international privé dans le cadre de la conférence de la Haye", 122 Rec.des Cours (1967- III), 343 (359). See also *Walker*, "Internationales Privatrecht" (1921), pp. 44 ff. As to references to its subsequent application by the *Hague Conferences* see *Dicey & Morris*, "The Conflict of Laws" (12 ed.), at pp. 161 ff.

495 *Supra.*

496 And, moreover, as *Sand*, "'Parteiautonomie' in internationalen Luftbeförderungsverträgen", 18 ZLW (1969), 205 (212) reports, IATA sanctions non-compliance with standard conditions by "severe measures".

497 See *Sand*, *ibd.*

498 Only as one famous example of these virtually everywhere recognized notions may *Frank*, J. be quoted: "The passenger having no real choice about the matter cannot *in fairness* be said to have joined in a 'choice of law'

The exact method of implementation into the carriers tariffs does not yet seem to be clear. However, even if the IATA provision was understood to leave the passenger the choice *after* an accident *has occurred* of either pursuing an action on *Warsaw* grounds, or to settle the case according to the provisions of the IATA agreement, it may be doubtful whether a court eventually confronted with a case will accept such a discriminating choice of law in standardized contractual provisions.

This may appear especially probable since courts also take economical factors into consideration[499]. Thus they will not overlook the fact that the Japanese initiative of 1992[500], too, led to a contractual waiver of the limits, but without a domicile clause - although both Japanese and US American victims "cost" the airline insurers more than ten times as much as a European[501]. Japan, therefore, seems to prove, and this is the third objection, that a domicile clause is not an economical necessity.

Consistently, the law of the domicile of the passenger does not seem to be an appropriate choice of law.

kk) Conclusion - A Synthesis

A completely convincing rule resolving the conflicts of laws problem, unfortunately, does not adorn the concluding remarks of the survey of accessible candidates. Apparently a rule favoring the law of the contractual carrier's principal place of business still seems to deliver the best balance of the factors of reasonable predictability (flying BA will usually create a reasonable presumption as to the application of English law) and the equal treatment of co-contractors. Another asset would be that in

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merely because the carrier has inserted a provision to this effect." - *Siegelman v. Cunard White Star* (2nd Cir. 1955), 221 F.2d 206.

499 See especially *Corte costituzionale* (6 May 1985) no. 132, Riv.dir.int.priv.proc. 1985, 325 in its famous decision *Coccia v. Turkish Airlines*. For a discussion see *Ballarino/Busti*, "Diritto aeronautico e spaziale" (1988), at pp. 653 et seq.

500 See e.g. *Hayashida*, "Waiver of Warsaw Convention and Hague Protocol Limits of Liability on Injury or Death of Passengers by Japanese Carriers", ZLW 42 (1993), 144; *Abe*, "The so-called 'Japanese Initiative'", 6 Korean Journ.Air & Sp.L. (1994), 149.

501 See the figures given by *Schultz*, "Der Luftfahrt-Versicherungsmarkt in angespannter Lage", VersWirt 1994, 979 (982): Japanese 1.5 mio. US-$, US American 2.0 mio. US-$, German 150.000 US-$.

the aggregate the majority of cases would be subject to a well-developed law as to standardized contracts of carriage by air. This is because the majority of contracts are concluded with the large carriers of the well-developed countries, which, due to their experience with legal issues concerning carriages, will have an equally-developed legal system to handle such cases. This also seems to be favored by authors tending toward the "policy" approach of modern US conflicts of laws theories[502].

In a world of deregulated and liberalized international air transportation, air carriers may change the locations of their headquarters due to alliances and mergers (e.g. flying an American carrier under Dutch law?); they may escape to legal oases for tax and labor law reasons (e.g. flying former flag carriers under the law of the Caymans or Island?); and they may serve routes without any connections to the country of the principal place of business (e.g. flying from Bogotà to Lima under English law, or from Singapore to Bangkok under German law?). Would the application of the legal systems as exemplarily proposed in brackets be appropriate?!

Müller's reason to promote the *lex loci contractus* in private international air law is that he wants to apply a legal system which is more closely connected to the facts in cases as indicated above. He proceeds on the assumption that the passenger or shipper always contracts directly with the carrier, and locates the contract, even if concluded by telephone, in the specific office of the carrier where the contract was concluded. Thus he is able to subject the contract to the law of the place where the carrier's office, concluding the contract, is located. For the reasons mentioned above, the *lex loci contractus* doctrine does not serve as an acceptable basis for this approach any longer[503].

The idea, however, seems to vest a sensible approach to the problem: the applicable law is to be the law of the place of the carrier's office that sells the ticket[504]. Otherwise, i.e. if the ticket is sold by a travel agent, the application of the carrier's principal place of business would appear a likely

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502 See the final conclusions drawn by *Sand*, "Choice of Law in Contracts of International Carriage by Air" (Thesis, IASL, McGill; 1962), p. 65. The absence of a definitive statement as to this aspect leads to the attribute "not unequivocally" as to whether true concurrence exists: see *Milde*, "Conflicts of Laws in the Law of the Air", 11 McGill L.J. (1965), 220 (247, n. 116).

503 *Supra.*

504 Such a "broad" understanding has already been aimed at in the decisions in *BGH* (16 June 1982), BGHZ 84, 339 = NJW 1983, 518 and *OLG Hamburg* (18 Nov. 1982), VersR 1983, 1056, where the choice of jurisdiction according to Art. 28 of the *Warsaw Convention* was extended to the place of business of an authorized agent.

solution. Thus, a modified *principal place of business* doctrine would be arrived at. The problem, however, are cases such as e.g. a passenger domiciled in Germany buys a *Lufthansa* ticket (Singapore-Germany) in an official *Lufthansa* office in Singapore. Since both the carrier and the passenger are domiciled in Germany and also the place of performance (= destination) is Germany, a German court would likely hold German law as more closely connected to the case than Singapore law[505]. Had the passenger flown from Singapore to Hong Kong, then he would not necessarily have had a justifiable interest in the application of German law only because his domicile or residence is the same as the headquarters of the carrier. Perfect justice at any time is unachievable by a simple rule. As to the former case, however, an acceptable solution qualifying the case as a true exception has to be found. Obviously, the exception is created by the cumulative appearance of a number of points of contact. The exception could, therefore, be formulated as follows: If the carrier's headquarters and the passenger or shipper are domiciled in the same country, given that the contract is not concluded by an office of the carrier within the country of his principal place of business, then *if the point of origin or destination is located within this country of common domicile*, the application of the law of the country of the common domicile can be expected.

This leads to the following rule:

(1) The law governing a contract of international carriage by air is the legal system of the country in which the office of the carrier with which the contract is concluded is located.

(2) If the contract is concluded not with an office of the carrier but with a travel agent or otherwise, then the law of the country of the principal place of business applies (in the latter case the carrier's co-contractant has no justifiable interest to rely on the application of a legal system where the carrier has no direct business but only acts through IATA or other computer networks of sales agents).

(3) If, however, the principal place of business of the carrier *and* the domicile of the passenger or shipper are located in the same country, *and* the point of departure or destination is also located in

505 As to these aspects see *BGH* (27 Nov. 1979 - VI ZR 267/78), ZLW 1980, 143; *OLG Frankfurt* (26 April 1983 - 5 U 75/82), ZLW 1984, 177 (181).

that same country, then the law of that country governs the contract (as the closest connection, substantially overriding other points of contact).

This two-tiered rule with its single exception may not be a perfect solution. Nevertheless, it is a simple rule matching the modern trend as indicated by the *Rome Convention 1980*, Art. 4 (2); it frankly recognizes an exception in the case of a closer connection to a different legal system to preempt any recourse to general principles. As such, it could serve as an independent rule governing the conflicts of laws with respect to contracts of international carriage by air.

II. The Law Governing Insurance Contracts

At the interface of aviation insurance and the conflicts of laws two esoteric fields of law collide. Since the substance of both fields is accordingly difficult to handle and the insurance practice of commercial aviation departs in many respects from common insurance law[506], a very brief introduction to the relevant background of insurance in general and aviation insurance in particular shall be used as a ground to resolve the evolving conflicts problems.

1. An Introduction to Insurance Contracts Problems

a) Nature of Insurance

While legal liability involves the obligation to compensate damage unduly caused to the legally-protected assets of others, insurance in general is the contractual obligation of the insurer to indemnify its co-contractant if a risk as specified in the contract should realize. The cocontractant, the insured, owes a valuable reward for the insurer's obligation to cover the risk; whether the risk realizes or not does not affect the consideration.

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506 E.g. *Lagerberg*, "Conflicts of Laws in Private International Air Law" (Thesis, IASL, McGill; 1991), did not touch upon commercial aviation insurance at all.

The cradle of insurance is said to have been found at least as early as the times when *Hammurabi's* caravans crossed the oriental deserts, around 2250 B.C.; a common arrangement among the participants provided for a share of losses. The same maxim constitutes the famous *lex Rhodia de iactu* rule, which entered modern maritime law as *havarie grosse*[507]. Accordingly, insurance has been described as the "prior arrangement to spread the risk among as many heads as possible"[508]. The transportation sector is considered to be the "mother of insurance"[509]. With the advent of aviation (and now increasingly space activities, too) and the enormous liability risks attached to it, the insurance sector, which originally had been considered a mere ancillary to overcome liability questions, increasingly became *the* safeguard as to the viability of air transportation[510]. Traditional civilist legal thinking of the 19th century tended to perceive the two parties involved in a damage claim merely as isolated individuals. This notion stopped already a long time ago to meet the facts of today's economic environments which have been consolidated to associations, pools, and entire blocks.

Although one still finds statements as to which recourse is an important part of the reality of insurance law[511], which sounds plausible since it seems to facilitate a decrease or at least a lack of decrease of premiums, the true reality must be different[512]. Experts describe the extent to which recourse is sought as amazingly reduced[513], and the economic calculations follow a direction opposite to that originally assumed: The vast economic resources of monolithic blocks of insurance companies and consortia suffices to compensate a considerable amount of damages out of its own

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507 See "Haftung und Versicherung im internationalen Lufttransportrecht" (pending study - Dr. iur. Dissertation, submitted to the Faculty of Law at Ruprecht Karls University, Heidelberg), at pp. 1 ff.

508 "Vorherige Absprache über die Verteilung möglicher Schäden auf viele Schultern" [translation provided]: *De la Motte* at the *Symposium of the German Association for Transportrecht* as quoted by *Meyer-Rehfueß*, Aktuelle Fragen des deutschen und internationalen Landtransportrechts, TranspR 1994, 326 ff. (335).

509 *Von Schultheß*, "Die Transportrisiken in der Luftversicherung" (1945), at p. 7.

510 *Von Schultheß*, "Die Transportrisiken in der Luftversicherung" (1945), at p. 88 uses the term "Lebensfrage".

511 *Basedow*, "Der Transportvertrag" (1987), at p. 476.

512 This is the *ratio* of a jurisprudence voiding clauses under which recourse would be preempted. As to Germany see: *BGH* (8 Febr. 1952), BGHZ 5, 105 (110); *LG Hamburg* (22 June 1950), VersR 1950, 166. As to Austria see: *HG Wien* (4 Jan. 1994), TranspR 1994, 304.

513 *Selvig*, "The Hamburg Rules, the Hague Rules and Maritime Insurance Practice", 12 Journ.Mar.L.Com. (1981), 299 (316); *de la Motte*, "Transport- und Verkehrshaftungsversicherung im internationalen Güterverkehr", TranspR 1981, 63 (65).

pockets, a practice which apparently comes cheaper than costly trials against each other[514]. As early as 1926 *Ripert* concluded: "Everything after all comes down to a settlement between underwriters."[515]/[516]

Unlimited insurance coverage, of course, will not be supplied by any insurer[517] (solely the peculiar system of the P.&I. Clubs providing for marine insurance can provide for coverage without limits[518]). Nevertheless, the aviation insurance market is able to provide coverage for very high sums[519]; major airlines are insured for up to 2.0 billion US-$[520] *combined single limit*[521]. Although

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514 The factual division of insurance markets into different damage compensating collectives is discussed by *Basedow*, "Der Transportvertrag" (1987), at pp. 476 ff. *Tunc*, "Responsabilité civile et assurance", in: "Hommage à René Dekkers" (1982), 343 (350) reports about the ultimate consequence of this development in form a personal accident insurance in connection with a no-damage-claim model.

515 *Ripert*, "Traité de droit maritime", vol. II (2 ed. 1926), no. 1231 - quoted and translated by *Drion*, "Limitation of Liabilities in International Air Transport" (1955), n. 23 (p. 24).

516 This development is also displayed in space law where cross-waivers of liability are not only common but a requirement to obtain government approval of the entire project. See *Kadletz*, "Versicherungen im Weltraum" (pending publication, envisaged for VersR, August 1996).

517 See especially *de la Motte*, "Versicherungswesen und Versicherungsrecht", in: *Herber (ed.)*, "Gütertransport und Versicherungen" (1990), 1 (4). See also *Lowenfeld/Mendelsohn*, "The United States and the Warsaw Convention", 80 Harv.L.Rev. (1966/67), 497 (499 f.); *MacIntyre*, "Where are you going? Destination, Jurisdiction, and the Warsaw Convention: Does Passenger Intent Enter the Analysis?", 60 JALC (1995), 657 (at p. 665).
Ott, "Die Luftfrachtbeförderung im nationalen und internationalen Bereich - anwendbares Recht, Vertrag, Versicherung"(1990),at p. 135, however, proceeds upon a wrong presumption when he draws his conclusions from the alleged fact that airlines hold insurance policies without limits. Also *Giemulla*, "Zur Versicherungspflicht des Luftfahrzeughalters", 38 ZLW (1989), 114 (115), alleges a principle of unlimited coverage in aviation; this allegation is corrected by *Schönwert*, "Zur Versicherungspflicht des Luftfahrzeughalters", 39 ZLW (1990), 77.

518 See *Kebsschull*, "Grundsätze der Protection- und Indemnity-Versicherung", 59 ZgesVersWiss518 (1970), 561, at pp. 584 ff. This phenomenon is due to the construction of P.& I. Clubs as a mutual insurance of ship owners.

519 As to this aspect see: *Kilbride*, "Six Decades of Insuring Under Warsaw", 14 Air Law (1989), 183 (191); *Schultz*, "Der Luftfahrt-Versicherungsmarkt in angespannter Lage", VersWirt519 1994, 979 (983); *Gates*, "Stopping Place or Destination...? Unlimited Liability or Warsaw/Hague", in: *Willis Corron Aerospace (ed.)*, "The Willis Information File" (London), Newsbrief, Update January 1993, p. 5 (8); *Medniuk*, "Airline Insurance - Can We Get It Right?" , in: *Willis Corron Aerospace (ed.)*, "The Willis Information File" (London), Newsbrief, Update May 1993, p. 2. See also the conclusion drawn by *Drion*, "Limitation of Liabilities in International Air Transport" ([s.l. - s.n.] 1954), at pp. 16 f. (no. 17) already as early as 1954: "The idea that aviation would be impossible without limitation of liability is flatly contradicted by the facts.", which presupposes that very high insurable sums must be available for the airlines. See further *Orr*, "Verschulden als Haftungsgrundlage", 4 ZLR (1955), 179, at p. 181.

520 See *Kadletz*, "Zur Versicherungspflicht bei internationalen Luftbeförderungen", 44 ZLW (1995), 284; *Kadletz*, "Haftung und Versicherung - Verhaltenssteuerung und Managementphilosophie", VersR 1995, 270; *Kadletz*, "International Conflicts of Laws in Contracts of Aviation Insurance - Focused on the Problem of *Dépeçage*" (pending publication, envisaged for 45 ZLW (1996), no. 4 or 46 ZLW (1997), no. 1); *Schultz*, "Der Luftfahrt-Versicherungsmarkt in angespannter Lage", VersWirt520 1994, 979 (983) ; *Schönwerth/Müller-Rostin*, "Die Luftfahrtversicherung in der Praxis", 36 ZLW (1987), 229, at p. 232; *Gerathewohl*, "Rückversicherung - Grundlagen und Praxis" II (1979), at p. 468; *Tobolewski*, "Against Limitation of Liability: A Radical Proposal", 3 AASL (1978), 261(263). See also "Lloyd's zahlt für Jumbo der KAL", Süddeutsche Zeitung (14 Sept. 1983), p. 31 and "KAL auch in Deutscland versichert", Frankfurter Allgemeine Zeitung (6 Sept. 1983), p. 13 (on the

such high coverage is more or less easily affordable[522], it is, however, in no way dispensable for air service operations to make sure they are adequately insured. The insurance coverage that is bought by airlines tops many times any mandatory insurance requirements imposed on air service operators by states[523].

With respect to the insurer's obligation, *Hirst, J.* in *The Italia Express*[524] considered whether the insurer promises under the contract of insurance in the first place to preserve the interests of the insured, and only if damage occurs the secondary obligation to compensate arises[525]. Such a notion has, of course, to be rejected. The insurer is only under the obligation to cover certain specified risks; this is the insurer's primary and sole obligation[526].

b) Different Situations of Colliding Interests

The interests that have to balanced with respect to insurance can be divided into two categories.

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combined single limit of KAL at the time KAL was downed by a USSR air force interceptor on 1 Sept. 1983: 400 mio. US-$).

521 The *combined single limit* policies provide for coverage for a number of different risks (e.g. third party liability; contractual liability of contracts of carriage, interchange of aircraft, charter; loss of license; products liability risks; etc.) altogether covered up to a certain single limit.

522 *Kilbride*, "Six Decades of Insuring Under Warsaw", 14 Air Law (1989), 183 (191); *Gates*, "Stopping Place or Destination...? Unlimited Liability or Warsaw/Hague", in: *Willis Corron Aerospace (ed.)*, "The Willis Information File" (London), Newsbrief, Update January 1993, p. 5 (8); *Medniuk*, "Airline Insurance - Can We Get It Right?" , in: *Willis Corron Aerospace (ed.)*, "The Willis Information File" (London), Newsbrief, Update May 1993, p. 2; *Brise*, "Some Thoughts on the Economic Significance of Limited Liability in Air Passenger Transport", in: *Kean, A.* (ed.), "Essays in Air Law" (1982), 19 (at p. 23); *Bin Cheng / Dutheil de la Rochère*, "Draft Convention on an Integrated System of International Aviation Liability Covering International Carriage by Air and Surface Damage Caused by Foreign Aircraft" (1983), at p. 555. See also *Goodfellow* in ICAO-Doc. 7379, LC/34 (Montréal 1953), at p. 130.

523 See the survey by *Kadletz*, "Zur Versicherungspflicht bei internationalen Luftbeförderungen", 44 ZLW (1995), 284.
It also reported that the aircraft fleet value underwritten by insurers worldwide exceeds their market value by 25%. The reason is to be sought in the fact that due to aircraft leasing practices the loss risks are born by the lessor who, therefore, insists on the highest possible insurance coverage. For an analysis see *Swiss Re (publ.)*, "Sigma", no. 1/1996, at p. 18.

524 Reported an discussed by *Clarke*, "Nature of the Insurer's Liability", [1992] L.M.C.L.Q. 287.

525 See e.g. the definition of an insurance contract provided in Art. 2468 of the Civil Code of Québec.

526 One may quote *Jhering*, "Das Schuldmoment im römischen Privatrecht" (1867), at p. 40, who describes the cause of *(culpa* based) liability as to "not the damage gives rise to the duty to compensate, but the *culpa*" [translation provided - "nicht der Schaden verpflichtet zum Schadensersatz, sondern das Vershulden"]. By contrast, if an insurance contract specifies the occurrence of a certain type of damage as a risk, then the insurer's obligation to indemnify arises as a consequence of the occurrence of the damage.

The first category is characterized by a more equal socio-economic bargaining power for both of the negotiating parties to an insurance contract. When a major airline or, as has become a common appearance in the aviation market, a pool of several airlines[527] seeks for insurance coverage, they in fact may well negotiate and bargain.

The second category is concerned with an inequality of e.g. a shipper or a passenger looking for coverage as to his cargo and life, respectively.

c) Aviation Insurance in an International Market

For historical reasons, the London insurance market had become the most important market for the insurance of risks related to aviation[528]. Even today, risk underwriting is still very much centered in London, mainly because the London market has the capacity to satisfy the needs of the entire world of international aviation[529], but also because the tradition of hundreds of years of maritime risk underwriting promises a degree of stability in procedure and reliability, which embraces the development of model clauses and their recognition by English law courts, too[530].

Nevertheless, there have emerged a number of other important insurance markets around the world which underwrite aviation risks[531], and reinsurance spreads risks all over the globe. In the

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527 One of the largest pools has been KSSAF with the Lloyd's Syndicate *Ariel* as leading underwriter. The master placement of two years ago embraced more than ten comanies of the *KLM* group, 7 companies of *SAS*, 4 companies of *Swissair*, and 3 companies of *Finnair*.

528 See *Margo*, "Aviation Insurance" (2 ed. 1989), at pp. 19 ff.; p. 333; *Diederiks-Verschoor*, "An Introduction to Air Law" (5 ed. 1993), at pp. 154 f.; *Shawcross & Beaumont*, "Air Law' (4 ed.), para. VII (63); *Kadletz*, "Haftung und Versicherung im internationalen Lufttransportrecht" (pending study - Dr. iur. Dissertation, submitted to the Faculty of Law at Ruprecht Karls University, Heidelberg), pp. 12 ff.; 143 ff.

529 According to *Schultz*, "Der Luftfahrt-Versicherungsmarkt in angespannter Lage", VersWirt 1994, 979 (282), the London insurance market is able to supply 245% of the world's airlines' insurance coverage needs.

530 See the model clauses as provided in the *Manual of Standard Policy Forms, Proposal Forms, Clauses and Endorsements* by *Lloyd's Aviation Underwriters Association (L.A.U.A.)* in London. The manual is reproduced in Margo, "Aviation Insurance" (2 ed. 1989), Appendix, pp. 353-557. *Margo*, "Conflict of Laws in Aviation Insurance", 19 Air Law (1994), 2 ff. (6) points out the significance to choose exactly the recognized wording in order to make sure that the traditional interpretation will be applied.

531 *Margo*, "Aviation Insurance" (2 ed. 1989), at pp. 47 ff.; *Diederiks-Verschoor*, "An Introduction to Air Law" (5 ed. 1993), at p. 155; *Tobi*, "The Insurer's Point of View", 11 Air Law (1986), 84 (86); *Kadletz*, "Haftung und Versicherung im internationalen Lufttransportrecht" (pending study - Dr. iur. Dissertation, submitted to the Faculty of Law at Ruprecht Karls University, Heidelberg), pp. 148 ff.

traditional market of Lloyd's of London, as well as in other markets for the insurance of large aviation risks, the risks are never placed with a single underwriter but always with a number of different insurers, one of whom has the position as a leading underwriter[532]. Although quite often all of the underwriters are domiciled in the same country, aviation insurance policies nowadays may well be signed by a number of insurers in different countries[533]. Both scenarios, placing of risks of a non-English company with London insurers and the placing of risks with several insurers in different countries, involve different jurisdictions. In the absence of a uniform law governing the law of insurance contracts, it is necessary to provide for conflicts of laws rules that foster certainty as to the vital interests of both of the parties to the insurance contract[534].

2. Airline Insurance

a) Construction of Airline Policies

As already outlined above, airline insurance contacts cover very high sums, and typically, those are not only signed by a number of underwriters, but also on the side of the insured there are a number of companies specified, usually subsidiaries of the parent airline or holding. The tailor-made policies also define exactly which risks are covered as to the fleet, the personnel, legal liability to any extent (i.e. including liability as a manufacturer or importer[535]), as well as cargo[536] and passenger

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532 See *Caplan*, "Insurance, Warsaw Convention, and Changes Made Necessary by the 1966 Agreement and Possibility of Denunciation of the Convention", 33 JALC (1967), 663, at p. 665; *Schultz*, "Der Luftfahrt-Versicherungsmarkt in angespannter Lage", VersWirt 1994, 979, at pp. 980 f. The course of business is also described in *Rozanes v. Bowen* (C.A. 1928), 32 Lloyd's L.Rep. 98 (101), per *Scrutton, L.J.* and by *Adel Salah El Din*, "Aviation Insurance - Practice, Law and Reinsurance" ([s.l. - s.n. - s.d.] ca. 1971), at pp. 214; *Margo*, "Aviation Insurance" (2 ed. 1989), at pp. 66 ff.

533 *Margo*, "Conflict of Laws in Aviation Insurance", 19 Air Law (1994), 2 ff. (2).

534 *Lagerberg*, "Conflicts of Laws in Private International Air Law" (Thesis, IASL, McGill; 1991), at pp. 49 *et seq.*, however, finds that "risks insured and the principal establishment of the insurer have traditionally been in one and the same country, and that is why no problems of conflict of laws have arisen." This may be true of special insurance requirements such as compulsory accident insurances directly for the benefit of passengers, as exists e.g. in Germany under § 50 LuftVG. But even in these cases, the European law internationalizes insurance under market liberalization. And, moreover, most domestic insurance markets do not have the resources to absorb risks related to the airline or aircraft manufature business on their own. That is why risks usually are at least in part covered abroad.

535 Which can be important for European airlines under the Eurpoean Product Liability Law with respect to import and sale-and-lease-back of aircraft. See *Fobe*, "Aviation Products Liability and Insurance in the EU. Legal Aspects and Insurance of the Liability of Civil Aerospace Products Manufacturers in the EU, For Damage to Third Parties" (1994), at pp. 37-63.

accident insurances[537]. Since the maximum liability sum covers all of these risks, this kind of policy is referred to as *combined single limit* insurance policy. Because they are absolutely tailor-made for the very specific needs of the airline, a more detailed description of the general features is not possible.

b) Contractual Selection of the Governing Law

Generally, a single jurisdiction will govern the insurance contract as to its validity and interpretation, and since the tailor-made policies will apply certain legal notions and symbols in the description of risks and obligations affected, an explicit and unambiguous choice of law should be made by a contractual clause[538]. As *Margo* observes: "For reasons which are unclear, however, several policies issued in connection with major airline risks do not state what law is to apply in the event of a dispute."[539]

This lack of attention can hardly be explained because it is a common occurrence that insurers and the insured are located in a number of different jurisdictions[540].

c) Conflicts of Laws in Airline Insurance Contracts

aa) The General Solution

As far as airlines are concerned, the typical problem of *contrats d'adhésion* involving the balance of different bargaining powers in the process of entering into the contract is not really prevailing.

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536 Cargo insurance if the airline offers at the same time or by a subsidiary company such coverage to their customers.

537 Passenger accident insurances taken by the airline for the direct benefit of the passenger are compulsory in some jurisdictions. For details see *Kadletz*, "Zur Versicherungspflicht bei internationalen Luftbeförderungen", 44 ZLW (1995), 284.

538 The London standard policy AVN 1A provides for such a clause under *general condition 11*: "This policy shall be construed in accordance with English law."

539 *Margo*, "Conflict of Laws in International Aviation Insurance", 19 Air Law (1994), 2, at p. 3.

540 See *Margo*, "Aviation Insurance" (2 ed. 1989), at p. 323.

Therefore, virtually all jurisdictions allow for a selection of the law governing the contract, provided the selection is made in good faith and is not inconsistent with public policy, according to general principles outlined in the *General Part* of this thesis[541] .

The European approach to reach this solution, however, involves a slight detour. When ascertaining the law resolving the conflict of laws, at the outset one looks at the *Rome Convention 1980 on the Law Applicable to Contractual Obligations*, as implemented by the *forum* state, which provides for the possibilities of express and implied selections of the applicable law by the parties. The Convention, however, as of itself expressly excludes contracts of insurance with respect to risks located within European Union states from its scope (contracts of reinsurance, however, are subject to the Convention), because insurance contracts are to be dealt with by special European legislation. The *Second Non-Life (Insurance) Directive*[542] fills this gap in that it provides for some limitations as to the choice of law for the sake of consumer protection. Where there is no social imbalance, i.e. so-called *"large risks"* are insured, however, "virtually unlimited freedom to choose the applicable"[543] exists. Such *"large risks"* are, *inter alia,* aircraft and liability for aircraft[544] . Since the Directive does not contain an exhaustive set of rules governing the latter cases, one has to seek recourse to general provisions, which usually means to the *Rome Convention* as enacted in the respective states. English law, e.g., provides for a special reference to the implementing legislation with respect to the *Rome Convention*[545] , preventing courts from accessing the formerly developed principles of common law. Accordingly, contracts of insurance as to aviation risks are subject to the ordinary choice of law rules.

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541 *Supra.*

542 Second Council Directive of June 22, 1988 on the Co-Ordination of Laws, Regulations and Administrative Provisions Relating to Direct Insurance Other Than Life Insurance and Laying Down Provisions to Facilitate the Effective Exercise Freedom to Provide Services - [1988] O.J. L 172/1, p.1; amending the First Council Directive of July 24, 1973 - [1973] O.J. L 228/3, p.3.

543 *Dicey and Morris*, "The Conflicts of Laws" (12 ed. 1993), at p. 1355.

544 See *Second Non-Life (Insurance) Directive*, Art. 5; Art. 7 (1) (f) in connection with Annex A to the *First Non-Life (Insurance) Directive*. Its implementation in English is displayed by the *Insurance Companies Act 1982*, Sched. 3 A. *Insurance Companies (Amendments) Regulations 1990*, S.I. 1990 No. 1333; S.I. 1993 No. 174. Sched. 3 A, Part I, para. 5 (2) (a). For details see *Dicey and Morris*, "Conflicts of Laws" (12 ed.), Rule 187 at pp. 1350 ff.

545 *Insurance Companies Act 1982*, sec. 96 B, as inserted by S.I. 1990 No. 1333, Reg. 4. For a discussion see *Dicey and Morris*, "Conflict of Laws" (12 ed. 1993), at p. 1355.

Under English law, the proper law of an insurance contract is the legal system by reference to which the contract is made, or the legal system with which the transaction has its "closest and most real connection"[546]. If no express selection of a proper law is made by the parties, the courts will look to the "presumed intention" in so far as this appears from the policy itself and from the circumstances surrounding its conclusion[547]. The basic method was characterized by *Lord Wright* in *Mount Albert S.C. v. Australian Temperance & General Mutual Life Assurance Society Ltd.*[548]

As do the European legal systems, Canada also applies the subjective approach, i.e. a recognition of the parties' choice, in the absence of which a closest relationship test will be applied[549].

bb) A Special Problem: Punitive Damages

A major problem is faced, however, when it comes to the legality of indemnification of punitive damages - a legal means to award exorbitant damages in the USA - and the validity of contractual clauses preventing assignments of damage claims or recourse claims.

In the absence of an express choice of law, the approaches to a solution of the conflicts of laws can vary.

(1) The Difficulty to Ascertain the Applicable Law

In the USA, in the absence of an express selection by the parties, courts have generally applied five different rules in order to determine the proper law of a contract: The traditional *lex loci contractus* approach (not fashionable in the USA any more); the "most significant relationship" test

546 *Amin Rasheed Shipping Corp. v. Kuwait Insurance Co.* (H.L.), [1983] 2 All E.R. 884 (888).
547 *DuPont de Nemours & Co. v. Agnew*, [1987] 2 Lloyd's Rep. 585 (592), per *Bingham L.J.*
548 (C.A.), [1938] A.C. 224 (240). Quoted by *Hobhouse J.* in *Forsikrinksaktieselskapet Vesta v. Butcher*, [1986] 2 All E.R. 488; aff'd (C.A.) [1988] 1 Lloyd's Rep. 19.
549 *Supra.*

(Restatement, Second; favored by a number of states including Illinois[550] and Texas[551]); the "center of gravity test" (rarely applied any longer[552]); the "governmental interest" approach (applied by numerous states among them California[553] and New York[554]); and the "choice influencing factors" (primary promoted in Hawaii[555], Minnesota[556], and Wisconsin[557]) rule[558].

Of those doctrines which are still *en vogue*, the substance of the *"most significant relationship"* doctrine closely resembles approaches in other jurisdictions which apply a truly international and not - as in the USA - primarily an inter-state approach[559]. By contrast, the *"governmental interest analysis"* requires an approach to all substantive laws involved plus an analysis of the policies behind the law. This may be a practicable solution within the US jurisdictions, maybe also with respect to jurisdictions based on a comparable common law, but what will the analysis look like when civil laws with a different underlying scope of compensation are concerned[560], or e.g. Arabic laws which are even more remote from US common law? We would probably witness a *"homeward trend"*, because it is likely that a court will apply the law that it knows the best and whose underlying policies it understands. The result would closely resemble the *"choice-influencing factors"* theory.

As *Margo* states[561], in the case of a policy issued by underwriters in London to a Japanese airline, a Californian court would certainly find that the contract is governed either by English or by Japanese law, not, however, by California law. However, as soon as more than one insurer is substantially involved in the contract and these insurers are located in different countries (e.g. Scandinavia, France, Switzerland, Germany, USA), it will be difficult to anticipate the law that will be held applicable by a court in California. The decisive role of substantive legal policy considerations in both of the foregoing theories involves an element of substantive evaluation and

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550 *Champagnie v. O'Neill Constr. Co.* (1979), 77 Ill.App.3d 136 = 395 N.E.2d 990.
551 *Duncan v. Cessna Aircr. Co.* (Tex. 1984), 665 S.W.2d 414.
552 See *Margo*, "Conflicts of Laws in Aviation Insurance", 19 Air Law (1994), 2 ff. (3).
553 *Travellers Insurance Co. v. Workmen's Compensation Appeals Board* (1967), 68 Cal.2d 7 = 64 Cal.Rptr 440.
554 *Istim Inc. v. Chemical Bank* (1991), 78 N.Y.2d 342.
555 *California Federal Savings and Loan Ass. v. Bell* (1987), 735 P.2d 499.
556 *Hime v. State Forum Fire & Casualty Co.* (Minn. 1979), 284 N.W.2d 829; cert.den. (1980), 444 U.S. 1032.
557 *Schlosser v. Allis-Chalmers Corp.* (1978), 86 Wis.2d 226 = 271 N.W.2d 879.
558 *Supra. General Part.*.
559 On this problem see *General Part. Supra.*
560 *Supra.*
561 *Margo*, "Conflicts of Laws in Aviation Insurance", 19 Air Law (1994), 2 ff. (4).

political emphasis that makes it difficult and "virtually impossible", as *Margo* attributes it, to establish which law governs the interpretation of the policy until the court renders its respective decision.

As long as these very specific conflicts rules are applied in the USA it is likely that, as soon as there is a relation or a contact in the USA, US law will be held applicable.

(2) The Particular Problem of Punitive Damages

Punitive damages are a legal instrument applied for a number of purposes: compensation of litigation expenses[562], consequential damages[563], immaterial damages[564], and as a means of "civil punishment"[565]. Although punitive damages are subject to severe criticism, within the USA as well as abroad[566], courts still continue to award enormous amounts of punitive damages[567] so that the

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562 See *Day v. Woodworth* (1851), 54 U.S. [13 How.] 363 (372 f.); 14 L.Ed.1st 181 (185 f.); per *Grier J.* See also *Haskell*, "The Aircraft Manufacturer's Liability for Design and Punitive Damages - The Insurance Policy and the Public Policy", 40 JALC (1974), 595, at p. 609; *Barlow/Kerr-Smiley*, "Recovery of Punitive Damages from Insurers in Non U.S. Jurisdictions", 11 Air Law (1986), 58, at p. 59.

563 See *Washington*, "Damages in Contract at Common Law", 47 L.Q.R. (1931), 345 (358); *Haskell*, "The Aircraft Manufacturer's Liability for Design and Punitive Damages - The Insurance Policy and the Public Policy", 40 JALC (1974), 595, at p. 609; *Barlow/Kerr-Smiley*, "Recovery of Punitive Damages from Insurers in Non U.S. Jurisdictions", 11 Air Law (1986), 58, at p. 59; *Formby*, "Insurability Against Punitive Damages", 23 So.Tex.L.J. (1982), 443 (445).

564 See *Haskell*, "The Aircraft Manufacturer's Liability for Design and Punitive Damages - The Insurance Policy and the Public Policy", 40 JALC (1974), 595, at p. 609. See also *-note-*, "Vindictive Damages in Actions for Torts", 14 L.Ed.1st (1851), 181 (183).

565 On the history of punitive damages see *Lord Devlin* in *Rookes v. Bernard* (H.L.), [1964] A.C. 1129 (1220 ff.). See also *McGregor* on "Damages" (13 ed. 1972), ch. 11 (no.s 300 ff.); *Washington*, "Damages in Contract at Common Law", 47 L.Q.R. (1931), 345 (358); *-note-*, "Exemplary Damages in the Law of Torts", 70 Harv.L.Rev. (1957), 514 (518 ff.).

566 See the dissenting opinion of *O'Connor J.* in *TXO Production Corp. v. Alliances Resources Corp. et al.* (1993), 113 S.Ct. 2711 (2728 ff.; 2742 ff.). See also *Lord Denning, M.R.* and *Ackner L.J.* in *Smith Cline & French Laboratories v. Bloch* (C.A. 1982), [1983] 1 W.L.R. 730 (733 f.; 734 f.); *German Constitutional Court (Bundesverfassungsgericht) BVerfG* (7.12.1994), ZIP 1995, 70 (73). See further *Hirthe/Otte*, "Die Rechtsentwicklung im Haftungsrecht in den Vereinigten Staaten von Amerika im Jahre 1993", VersR 1993, 1387 (1393); *Böhmer*, "Spannungen im deutsch-amerikanischen Rechtsverkehr in Zivilsachen", NJW 1990, 3049 (3051); *Stiefel/Stürner*, "Die Vollstreckbarkeit US-amerikanischer Urteile exzessiver Höhe", VersR 1987, 829.

567 *O'Connor J. (supra)* characterized the development in the USA as "skyrocketing". In fact, the US Supreme Court affirmed the award of 10 mio. US-$ (although the actual damages were less than a 500th of this amount) in *TXO Production Corp. v. Alliances Resources Corp. et al.* (1993), 113 S.Ct. 2711. Another famous example is the case *Pease v. Beechcraft Corp.* (1974), 38 Cal.App.3d 412 (434); 113 Cal.Rptr. 416 (419) per *Whelan J.* (actual damages 4 mio. US-$ - punitive damages 17 mio. US-$). See also *Donnelly*, "Importance of the Exemplary Award Issue in Aviation Litigation", 42 JALC (1976), 825 ff. (843 ff.).

insurance against punitive damages has become a question of economic survival for major sections of business. Due to the "civil punishment" purpose of punitive damages, a number of states in the USA have enacted prohibitions as to the insurance of these damages on public policy grounds[568]. An equally long list of US states, however, allow for the insurance of punitive damages[569] as does the law in the most important aviation insurance market of the world, London[570]. The conflicts of laws problem as to punitive damages, therefore, is of great significance in the USA.

Usually, a policy does not indicate whether punitive damages are embraced or not. It is generally believed that continental European policies cover punitive damages awarded under the (foreign) jurisdictions which recognize this kind of damages. As far as the USA is concerned, an insurance clause obliging the insurer to indemnify the insured as to "all sums which the insured shall become legally obliged to pay because of bodily injury or property damage" has been held to include an award of punitive damages[571].

Although there might be differences in the interpretation of policy wordings as to punitive damages[572], the conflicts of laws problem resides in the fact that the public policy of some states forbids the insurability of punitive damages. As pointed out[573], some states, by allowing for punitive damages awards, are provided with legal grounds to recover "true" damages that cannot be otherwise compensated, while in other states punitive damages serve a purpose of "social education". Generally, in the former case there will be no reasonable objections against the insurance of punitive damages.

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568 The leading case is *Northwestern National Casualty Co. v. McNulty* (Ct.App. 5th Cir. 1962), 307 F.2d 432. Long lists of the courts and states following this decision are provided by *Barlow/Kerr-Smiley*, "Recovery of Punitive Damages from Insurers in Non U.S. Jurisdictions", 11 Air Law (1986), 58, at p. 59 in n. 160; *Margo*, "Aviation Insurance" (2 ed. 1989), at p. 296 in n. 104. See also *Shawcross & Beaumont*, "Air Law" (4 ed.) I, para. VIII (86); *Awford*, "Punitive Damages in Aviation Products Liability Cases", 10 Air Law (1985), 2 (5); *Shipley*, "Liability Insurance Coverage as Extending to Liability for Punitive or Exemplary Damages", 20 A.L.R.3rd (1968), 343 (347 ff.).

569 Leading case is *Lazenby v. Universal Underwriters Insurance Co.* (Supr.Ct. Tenn. 1964), 214 Tenn. 639; 383 S.W.2d 1. For lists of the courts and states following *Lazenby* see the dissenting opinion of *Holman J.* in *Harrel v. The Travellers Indemnity Co.* (Supr.Ct. Oreg. 1977), 279 Or. 199; 567 P.2d 1013 (per *Tongue J.*), at pp. 1022 ff. (1026), as well as the sources cited in the footnote above. See also *Kenny*, "Punitive Damages in Aviation Cases: Solving the Insurance Dilemma", 48 JALC (1983), 753 ff. (764 f.).

570 *Du Pont de Nemours & Co. et Endo Laboratories v. Agnew* (C.A. 1987), [1987] 2 Lloyd's L.Rep. 585 (594) per *Binham L.J.* See also *Margo*, "Aviation Insurance" (2 ed. 1989), at pp. 294 ff.; *Diederiks-Verschoor*, "An Introduction to Air Law" (5 ed. 1993), at p. 155.

571 *Mazza v. Medical Mutual Insurance Co.* (1984), 311 N.C. 621 = 319 S.E.2d 217.

572 See *Braley v. Berkshire Mutual Insurance* (Me. 1982), 440 A.2d 359.

573 *Supra.*

By contrast, in the latter case the *"governmental interest analysis"* and the *"choice-influencing factors"* theories will have their effects on the conflicts of laws.

Recent case law, however, reveals a mild application of anti-insurance doctrines. Where e.g. punitive damages were awarded in Texas and West Virginia against a corporation under Delaware law insured with an Illinois insurer who seeks a declaration from a California federal court that California law prohibit insurance coverage for the said punitive damages[574], the court strictly limited the application of California policy to California. The court held that the reason for the prohibition of insurance of punitive damages under California law is to safeguard its citizens through punishment and deterrence of tortfeasors. But as the harm occurred in Texas the Californian policy does not prevail, especially with regard to the policy applied in Texas where punitive damages also serve compensatory purposes, and thus insurance of punitive damages is allowed for. Accordingly, the application of California law would greatly impair Texas policy and law.

Even though in cases of serious wrongdoing the prohibition of insurance of punitive damages may well be enforced[575], it is observed that there is a trend within American jurisprudence to avoid the prohibition of insurance of punitive damages if possible by applying conflicts of laws rules accordingly[576].

cc) Clauses Preventing Recourse Claims

Very often carriers or their insurers agree on quota-sharing agreements to prevent the recourse of other (injured) parties' insurers[577]. Since the reason for recourse claims is to make the party which caused the damage liable, involving elements of conduct control and the intention to keep the

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574 *Continental Casualty Co. v. Fiberboard Co.* (US Distr.Ct. N.D. Cal. 1991), 762 F.Supp. 1368; aff'd mem. (9th Cir. 1992), 953 F.2d 1386.

575 See e.g. *Home Insurance Co. v. American Home Products Corp.* (2nd Cir. 1989), 873 F.2d 520; aff'd in part, rev'd in part, (2nd Cir. 1990), 902 F.2d 1112.

576 See *Posner*, "Coverage for Punitive Damages: A Choice of Law `Shell Game'", 60 *Defense Counsel Journal* (1993), 335; *Margo*, Conflicts of Laws in Aviation Insurance, 19 Air Law (1994), 2 ff. (6).

577 See e.g. no. 4.4; 4.5 of IATA resolution 660, Attachment A: Interline Traffic Agreement - Cargo. See also *LG Hamburg* (22 June 1950), VersR 1950, 166.

insurance premiums a reasonable cost factor[578], some courts tend to declare clauses in conditions of carriage which contain an exclusion of recourse claims against the carrier null and void[579]. For these policy reasons, a court may well hold its own law applicable in order to have the policy consideration influence the case.

d) The Proper Law and *Dépeçage* of Airline Insurance Contracts[580]

Independently from the existence of a choice of law clause, the problem of *dépeçage*, the severance or splitting of the proper law of an insurance contract, deserves closer consideration, because even though none of the underwriters may be domiciled in England[581] and these policies are tailor-made for the individual needs of the respective airlines, it is common to refer to certain standard clauses as have been developed in the leading aviation insurance market of the world, London, and published in the *Handbook of Lloyd's Aviation Underwriters Association (L.A.U.A.)*[582].[583] These clauses contain e.g. inclusions or exclusions of certain risks.

To choose a rather simple example: If an airline in a (continental) European Union state X is insured with insurers domiciled in that same country, the policy is construed in the national language of state X, and the premiums are payable in the national currency, then the law governing the contract is likely to be the law of state X. If, however, the contract refers to certain London standard clauses

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578 The extent as to which recourse is sought, however, is very low. See *Selvig*, "The Hamburg Rules, the Hague Rules and Maritime Insurance Practice", 12 Journ.Mar.L.Com. (1981), 299, at p. 316; *de la Motte*, "Transport- u. Verkehrshaftungsversicherung im multimodalen Güterverkehr", TranspR 1981, 63, at p. 65. On the effects on conduct control see *Kadletz*, "Haftung und Versicherung - Verhaltenssteuerung und Managementphilosophie", VersR 1995, 270.

579 See *German Supreme Court BGH* (8 Dec. 1975 - II ZR 64/74), BGHZ 65, 364 (365 f.); *BGH* (9 July 1979 - IV ZR 104/78), VersR 1979, 609 (907); BGH (9 Nov. 1981 - II ZR 197/80), NJW 1982, 992.

580 This problem has been focused on by *Kadletz*, "International Conflicts of Laws in Contracts of Aviation Insurance - Focused on the Problem of *Dépeçage*" (pending publication, envisaged for 45 ZLW (1996), no. 4 or 46 ZLW (1997), no. 1).

581 Sometimes states may require their airlines to insure with domestic insurers. See e.g. *Kadletz*, "Zur Versicherungspflicht im internationalen Lufttransport", 44 ZLW (1995), 270 ff.

582 L.A.U.A. was founded in 1935 as an organization fostering the common interests of Lloyd's aviation risks underwriting members. For details see *Margo*, "Aviation Insurance" (2 ed. 1989), at pp. 39 *et seq.*

583 *The L.A.U.A. Manual of Standard Policy Forms, Proposal Forms, Clauses and Endorsements.* Reproduced in *Margo*, "Aviation Insurance" (2 ed. 1989), at pp. 353-557. For a commentary on the most important clauses see *Adel Salah El Din*, "Aviation Insurance - Practice, Law and Reinsurance" (1971), at pp. 80-128

by mentioning only their "official" designation, such as e.g. AVN-46 B[584], will these clauses then also be subject to the law of state X?

Or will the clauses, which are drawn up in English language and apply English legal notions, be subject to English law, which makes it necessary to split the proper law of the contract? This problem would have to be encountered not only if there is no express choice of law in the contract (which is reported to happen very frequently[585]), but also in spite of the presence of a such clause which might well relate merely to a part of the insurance contract[586].

As has been pointed out by aviation insurance law experts[587], the standard clauses are referred to because they have been developed and shaped over centuries of maritime and decades of aviation practice by insurers, ship and aircraft owners, and the English law courts. Thus even every comma in every single sentence is of significance as to the recognition and interpretation of the clauses. The standardization fosters stability, a vital feature when it comes to extensive risks such as rendering insurance coverage to an airline. Would the application of a continental European legal system to these clauses, as shaped by English common law, be appropriate?

aa) Ascertainment of the Applicable Law

At the outset, the law resolving the conflict of laws has to be ascertained.

At first, one looks at the *Rome Convention 1980 on the Law Applicable to Contractual Obligations*[588], as implemented by the *forum* state[589].

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584 AVN.46 B is a *noise exclusion* clause. Some other important and frequently used clauses are e.g. AVN.48 B (war exclusion); AVN.51 (extended coverage/hull); AVN.52 B (inclusion of war risks); AVN.55 (aircraft all risks extension); AVN.57 (aircraft accident insurance USA/Canada); AVN.59 (non-aviation liability); AVS.103 (50/50 provisional claims settlement); AVS.104 A (general policy exclusions).

585 See *Margo*, "Conflicts of Laws in Aviation Insurance", (6).

586 This cogently follows from the recognition of the concept of *dépeçage* as an expression of the parties' private autonomy: the parties may well choose one legal system to govern the contract in general while they evidently must have had a different legal system in mind as to a specific part of the contract. For a discussion see *infra*.

587 See *Margo*, "Conflicts of Laws in Aviation Insurance", 19 Air Law (1994), 2, at p. 6.

588 For references as to the Convention and evaluations see *supra*.

589 The recent transformation of the *Rome Convention* into English law is subject to immense controversy. It has been characterized as an incapacitation of English courts by *Mann*, "The Proper Law of Contract - An

The Convention provides for the possibility of an *express* as well as of an *implied* choice of law by the parties (Art. 3). Otherwise the applicable law will be determined as the law with which the contract has the closest relationship (Art. 4). In both cases, severability *(dépeçage)* of the contract is possible, i.e. parts of the contract may be governed by a law different from the law applicable to the rest of the contract (Art. 3 (1) [3]; 4 (1) [2]).[590]

As already indicated, the Convention in itself expressly excludes contracts of insurance with respect to risks located within European Union states from its scope (contracts of reinsurance, however, are subject to the Convention), because insurance contracts were intended to be dealt with by special European legislation.

The *Second Non-Life (Insurance) Directive*[591] fills this gap in that it provides for some limitations as to the choice of law for the sake of consumer protection. Where there is no social imbalance, i.e. so-called *"large risks"* are insured, however, "virtually unlimited freedom to choose the applicable law"[592] exists. Such *"large risks"* are, *inter alia,* aircraft and liability for aircraft[593].

Obituary", 107 L.Q.R. (1991), 353 ff. (354). With respect to the concept of *dépeçage* his view is entirely supported by *McLachlan*, "Splitting the Proper Law in Private International Law", 61 Bit.Ybk.Int.L. (1990), 311 ff.

590 The concept of *dépeçage* had been practiced in Switzerland, where it was abandoned in 1952: see the Swiss Supreme Court *(Bundegericht; BG)* (9 June 1906) BGE 32 II 415; *BG* (12 February 1952) BGE 78 II 74.
It was also practiced in Germany from about 1860, but it was virtually abandoned before private international law came under review in 1985/86: see *Drobnig,* "American-German Private International Law" (1972), at pp. 266 ff.; *Wagner,* "Statutenwechsel und dépeçage im internationalen Deliktsrecht" (1988), at pp. 58 ff.
In English law, the possibility of splitting was examined in *Jakobs v. Crédit Lyonnais* (C.A. 1884), 12 Q.B.D. 589; the concept was as well recognized already in *Dicey's* First Edition: *Dicey*, "The Conflict of Laws" (1896), p. 540.
On the recognition of severance by US American courts see *Lillegraven v. Tengs* (Alaska 1962), 375 P.2d 139. See further *Scoles/Hay*, "Conflict of Laws" (1982), at pp. 40, 75, 660, 692; *Wagner, ibd.*, at pp. 96 ff. For recent decisions as to severance see *Foster v. United States* (11th Cir. 1979), F.2d 1278; *Holzsager v. Valley Hospital* (S.D.N.Y. 1979), 482 F.Supp. 629; *Reyno v. Piper Aircraft* (3rd Cir. 1980), 630 F.2d 149; *Brylant v. Silverman* (Ariz. 1985), 703 F.2d 1190. The difference of the American approach is displayed in Art. 11 (2) of the *Restatement Second, Conflict of Laws*, which recommends that complex fact patterns should be severed into a number of "issues" - even if there is no necessity as to the application of different legal systems. The question then arises which is the proper "rule-selecting-rule". The US American tendency to favor individual equity from operating rules (which would foster predictability of the law) leads the concept of severance into an entirely different direction. For a comparative analysis and for numerous further references see *Wagner, ibd.*, at pp. 97.

591 Second Council Directive of June 22, 1988 on the Co-Ordination of Laws, Regulations and Administrative Provisions Relating to Direct Insurance Other Than Life Insurance and Laying Down Provisions to Facilitate the Effective Exercise Freedom to Provide Services - [1988] O.J. L 172/1, p.1; amending the First Council Directive of July 24, 1973 - [1973] O.J. L 228/3, p.3.

592 *Dicey and Morris* on "The Conflicts of Laws" (12 ed. 1993), at p. 1355.

593 See *Second Non-Life (Insurance) Directive*, Art. 5; Art. 7 (1) (f) in connection with Annex A to the *First Non-Life (Insurance) Directive*. Its implementation in English is displayed by the *Insurance Companies Act 1982*,

Since the Directive does not contain an exhaustive set of rules governing the latter cases, one has to seek recourse to general provisions, which usually means to the *Rome Convention* as enacted in the respective states. English law, e.g., provides for a special reference to the implementing legislation with respect to the *Rome Convention*[594], preventing courts from accessing the formerly developed principles of common law.

Accordingly, the contract of insurance as to aviation risks in the given example is subject to the ordinary choice of law rules. As there is no express choice of law rule in the contract, the search for hints as to an implied choice, demonstrated with reasonable certainty, begins. In this given case, all circumstances[595] lead to the conclusion that the law of country X is to govern the policy; at least in general, because there is still the question whether the insurance contract can be - or even must be - severed with respect to the standard clauses.

bb) Intention and Legal Admission with Respect to *Dépeçage*

The crucial question whether the contract may be severed involves two aspects, the first of which relates to the parties' intentions as to *dépeçage*, while the second determines the extent as to which *dépeçage* is legally admissible.

(1) *Dépeçgae* Intended?

The first question is one of factual findings, namely, is *dépeçage* intended by the parties involved?

Sched. 3 A. *Insurance Companies (Amendments) Regulations 1990*. S.I. 1990 No. 1333; S.I. 1993 No. 174. Sched. 3 A, Part I, para. 5 (2) (a). For details see *Dicey and Morris* on "Conflicts of Laws" (12 ed.), Rule 187 at pp. 1350 ff.

594 *Insurance Companies Act 1982*, sec. 96 B, as inserted by S.I. 1990 No. 1333, Reg. 4. For a discussion see *Dicey and Morris* on "Conflict of Laws" (12 ed. 1993), at p. 1355.

595 One of the most significant circumstances usually is a choice of jurisdiction clause.

The concept of such severability of the contract is directly linked to the principle of private autonomy. If it is up to the parties to choose the applicable law, they may also choose different legal systems to govern different parts of the contract[596].

There is, however, a slight difference between an express choice or a choice which is "demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case" (as says Art. 3 (1)) on the one hand, and a legal system which is imputed by ascertaining the closest connection to it (under Art. 4 (1)) on the other hand. In the former case, the parties can select a law applicable even to a mere part of the contract if they like. By contrast, in the latter case the court may only "by exception" apply a different legal system to a severable part of the contract if that part has a closer connection with it (constituting an objective test).

It has frequently been stated that the distinction between an implied choice and a closest relation test is difficult to define. *Kegel* characterizes inferred implied choices as "caoutchouc"[597], others find it "misleading"[598]. Similarly, the Supreme Court of Canada abandoned the "legal fiction of presumed intention" in favor of an objective closest relation test[599].

In general, it seems that for the purposes of deciding whether to split the contract at issue or not, three categories are possible: (1) explicit choice by the parties; (2) tacit choice by the parties as demonstrated by the circumstances; and (3) otherwise: objective test of the closest relationship. Apparently, the less explicitly the choice is expressed, the more exceptionally the court should have the recourse to sever.

In the case presented above, the law of state X governs the contract. The reference to the standard clauses is made in order to take advantage of a traditional and reliable practice in the insurance

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596 This view is supported the *Giuliano-Lagarde-Report* at p. 23. *Lando*, "The EEC Convention on the Law Applicable to Contractual Obligations", 24 C.M.L.R. (1987), 159, at p. 168 also reports that *dépeçage* was not favored in cases where the parties to a contract had not selected any law. See also *Dicey and Morris* on "Conflict of Laws" (12 ed. 1993), at p. 1208.

597 *Kegel*, "Internationales Privatrecht" (5ed. 1985), at p. 396: "Art. 27 (realer Parteiwille) [Art. 3 Rom-Abk.]: Die Parteien können das Vertragsstatut wählen (I 1); die Wahl muß ausdrücklich sein oder sich 'mit hinreichender Sicherheit aus den Bestimmungen des Verrtages oder aus den Umständen des Falles ergeben' (Kritik: Kautschuk)".

598 *Bunker*, "The Law of Aerospace Finance in Canada" (1988), at p. 325.

599 *Imperial Life Assurance Co. v. Colemares*, [1967] S.C.R. 443.

market and its reflections in jurisprudence. In order to avoid unintended mistakes, a policy would usually refer only to the name of the clause (e.g. AVN-46 B), instead of spelling it out.

Since no translation of the standard clause that is referred to in the contract exists, the parties make the clauses part of their contract in the English wording of the clauses. In addition, in order to benefit from the stability of the legal interpretation of these clauses, the parties would certainly not want a court in state X to attempt an interpretation which would require a translation of the original text and the legal notions. This translation would have to substitute common law notions with terms of continental European civil law, a task whose solution, some may consider, should be kept as Heaven's secret.

Therefore, it appears that the English standard clauses are intended to be governed by English law.

(2) *Dépeçage* Admitted?

The second question addresses to what extent *dépeçage* is admissible.

In general, *dépeçage* is considered as less desirable because it does not foster oversight.

The *Giuliano-Lagarde Report* on the *Rome Convention* suggests that only so-called "complex contracts" may be severed as to different types of agreements (e.g. joint venture agreements)[600]. *Lando* mentions a contract which is at the same time a sale of goods and a distributor agreement as to *dépeçage*[601] under the *Rome Convention*. *Dicey and Morris* find that where an issue relating to "the general obligation" of the contract arises, such as e.g. frustration, severance would be "wholly inappropriate"[602]. In 1961 *Raape* stated more generally: "A legal *pot-pourri*, put together by the

600 *Giuliano-Lagarde Report*, at pp. 17; 23.

601 *Lando*, "The EEC Convention on the Law Applicable to Contractual Obligations", 24 C.M.L.R. (1987), 159, at p. 168.

602 *Dicey and Morris* on The Conflict of Laws [N.16], at p. 1208.

parties *ad libitum* is not tolerable."[603] *Kahn-Freund* also agrees that "no contractual obligation can exist in more than one system, simultaneously or consecutively"[604].

A well-known dictum by *Lord MacDermott* seems to reflect the tendency of the courts in general:

"Though there is no authority binding your Lordships to the view that *there can be but one proper law* in respect of any given contract, it is doubtless true to say that *the courts of this country will not split the contract in this sense readily or without good reason.*"[605]

Sometimes, however, the term *"multiplicity of the proper law"* is mentioned in English jurisprudence. But it usually refers to the phenomenon that the mode of performance is governed by a law different from that governing the obligation[606], as pointed out in by the C.A. in *Jakobs v. Crédit Lyonnais* (1884) and already by *Dicey on Conflicts* in the first edition of 1896[607].

Nevertheless, in *Savigny's Treatise on the Conflict of Laws* of 1849, where he promotes his famous *situs theory*, it is submitted that the obligations of the two parties to a contract may well be subject to different legal systems[608], and the leading German commentary on private law observes in its current edition that opinions are split equally as to whether the different obligations arising under a contract can be subject to the government of different legal systems[609].

In the only case example[610], the High Court of England - at that time still applying common law - held that the proper law of a reinsurance contract was English law. An ascertainment of the parties' true contractual intentions, however, leads the court to the conclusion that the parties had selected

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603 *Raape*, "Internationales Privatrecht" (5 ed. 1961), at p. 472: "Ein von den Parteien ad libitum aus den verschiedensten Rechtsordnungen zusammengesetztes Schuldstatut, so eine Art rechtlichen Potpourris oder Mosaiks, ist nicht zu dulden." [English translation provided].

604 *Kahn-Freund*, "General Problems of Private International Law" (1976), at p. 256.

605 *Kahler v. Madland Bank, Ltd.*, [1950] A.C. 24, at p. 42 [emphasis added].

606 *Jakobs v. Crédit Lyonnais*(C.A. 1884), 12 Q.B.D. 589 (599): while English law governed the obligation, the court examined whether French law would govern the "method of performance" to deliver f.o.b. in Algeria.

607 *Dicey*, "The Conflict of Laws" (1896), at p. 540.

608 *Von Savigny*, "Treatise on the Conflict of Laws" (1849) as translated by *Guthrie* (2 ed. Edinburgh 1880).

609 *Heldrich* in: *Palandt (Begr.)*, "Das Bürgerliche Gesetzbuch und Nebengesetze" (55 ed. 1996), Art. 27 *EGBGB*, no. 9 (at p. 2297).

610 *Forsikringsaktieselskapet Vesta v.Butcher*, [1986] 2 All E.R. 488 per *Hobhouse J.*; aff'd [1988] 1 Lloyd's Rep. 19 and [1989] A.C. 852 (H.L. and C.A.).

Norwegian law to apply to that part of the contract dealing with the insured's breach of warranty. The decision was subsequently affirmed by the House of Lords[611].

Apparently, there is a tendency, departing from a formerly more strict approach, by the courts to subject at least parts of tailor-made complex contracts to different legal systems, if pertinent to the interests of the parties.

In this perspective, it can be expected that the airline insurance contract given in the example at the beginning will be subject to *dépeçage*: The law of state X governs the policy as it is drawn up in the national language, while the English standard clauses can most appropriately only be dealt with under English law.

cc) Additional Requirements

The courts of that given state X, however, will apply English law to any extent only if the underlying principle, that the parties can also choose a legal system to govern their contract, to which the factual circumstances do not have any contact, is recognized. In English law, this has been recognized since the Privy Council's decision in *Vita Food Products v. Unus Shipping* of 1939[612]. It is assumed that limitations as to the choice of law in the different systems serve the purpose of consumer protection *(evasion; fraude à loi; fraus legis)*, which is a purpose that is of no relevance in the case of airline or aircraft manufacturer insurances. In any event, the *Rome Convention* does not prohibit choosing a law that has no relation to the contract, not even in purely domestic cases[613].

dd) Scope of Application of the Applicable Law(s)

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611 See foregoing footnote.

612 *Vita Food Products, Inc. v. Unus Shipping Co., Ltd.*, [1939] A.C. 277.

613 See also *Morse*, "The EEC Convention on the Law Applicable to Contractual Obligations", 2 Ybk.Eur.L. (1982), 107, at p. 112.

It may be worth noting that the *Rome Convention 1980* also provides a guideline as to the scope of the applicable law governing the obligations. Art. 10 provides that the applicable law extends to the interpretation, the performance[614], the breach of contract, the extinguishing of obligations and the limitation of actions, and the consequences of nullity of the contract. Therefore, the application of English law as to the standard clauses especially embraces the application of English legal interpretation to these clauses as well.

ee) Conclusion

Thus, the conclusion is that airline insurance policies, and certainly aviation insurance policies in general, which refer to the standard clauses as developed and used in the London insurance market, are subject to *dépeçage*: Even though such policies may be governed by a legal system different from the English, English law is likely to be held applicable with respect to the standard clauses in order to maintain the parties' expectations as to the stability in interpretation of these clauses.

e) Evaluation

Once again, it is shown that the US doctrines are tailor-made for US domestic inter-state concerns. A comparative analysis of substantive outcomes of cases as to law and policy would overtax the courts in international cases, which unavoidably would lead to a *homeward trend* and, thus, the application of the *lex fori,* which is not appropriate for a "true" international case. It is, however, shown by the punitive damages example that courts have the tendency to validate indemnification under the insurance contracts[615] which, at least, seems to indicate some certainty as

614 With respect to aviation insurance contracts this may be potentially significant as to duties such as to disclose, to notify, or to mitigate.

615 This is the impression *Margo,* "Conflict of Laws in Aviation Insurance", 19 Air Law (1994), 2, leaves the reader with when he presents current US American cases as to the controversial question of indemnification for punitive damages. As to this subject see *supra.*

to upholding party intentions. Nevertheless, this trend might change with modifications to state policies and, thus, does not offer an appropriate solution to the conflicts of laws.

Again, a "truly" international approach offers more appropriate solutions. The most important rule to be regarded is to explicitly choose the applicable law in the contract (which is still a point as to which current practice has to improve upon).

The objective approaches, similar and sometimes even explicitly referred to as the "most significant relationship" test, offer a high degree of predictability.

For instance, an "international" risk placed with a London insurer e.g. will basically specify the insurer, the insured and the risk. At this stage, there is a London party to the contract and a party abroad. The currency unit used in airline insurance policies is USD[616], which brings another parameter into the scene. The decisive factors will be as follows: Traditionally, the leading insurer has a predominant position on part of the insurers[617], i.e. if the leading insurer is located in England then this is a strong indicator. The language of the policy will be English to be on safe ground with respect to the standard wordings. That the currency unit, USD, is usual for London aviation insurances, so that this will not, under normal circumstances, indicate the application of US law. The contract will usually be concluded in London, which is not a strong indicator in itself, but another argument in favor of the application of English law as the proper law of the insurance contract. In general, there is a good argument for the law of the jurisdiction where the risk is placed.

Where a number of insurers are domiciled in different countries, and especially if the different portions are substantial, then different laws might govern different parts of the contract *(dépeçage)*. In addition, severance may be expected if the substantial relationship of the contract is with a non-English jurisdiction and the application of Lloyd's AVN clauses indicates the necessity to recognize that these clauses be governed by English law.

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616 *Abdel Salah El Din*, "Aviation Insurance - Practice, Law and Reinsurance" (1971), pp. 60 ff.

617 As to the role of a leading insurer see *Caplan*, "Insurance, Warsaw Convention, and Changes Made Necessary by the 1966 Agreement and Possibility of Denunciation of the Convention", 33 JALC (1967), 663 (at p. 665); *Schultz*, "Der Luftfahrt-Versicherungsmarkt in angespannter Lage", VersWirt 1994, 979 (980 f.); *Margo*, "Aviation Insurance" (2 ed. 1989), at pp. 66 ff.
Also courts have had to consider the position of leading insurers: *OLG Bremen* (13 Jan. 1994), VersR 1994, 709; *OLG Hamburg* (6 May 1993), TranspR 1994, 25 (28).

If any such consequence is not favored by the parties, or if they find another law more appropriate to govern the contract, then it is indispensable to include a clause which explicitly selects the applicable law as to the entire contract of certain exactly specified parts of it.

In general, it is, in any event, highly recommendable to provide for an express choice of law in contracts of aviation insurance.

f) Recommendation for a General Rule

Even though conflicts rules in insurance law are observed to solve the question of the applicable law in favor of the law where the risk is located, this rule seems to be appropriate for real estate and housing rather than for airlines having aircraft intended to be constantly serving its purposes, i.e. flying throughout the world, and sometimes not even touching the country of the airline's principal place of business nor the state of registry. Looking for a better approach to the problem's solution, the notion of a "closest relationship" is not a very good one, either, for the reasons already outlined *supra.* When an airline not domiciled in England shops for insurance coverage e.g. in London, then the insurer will, like a vendor, instinctively presume the application of English law, the law of the insurer's headquarters deciding on the provision of such a substantial risk coverage. So will the airline, too, since it went abroad to come to London and cannot reasonably expect to find its own law applicable. Moreover, if the carrier has to comply with certain requirements typical only for its domestic legal system (e.g. compulsory insurances, such as passenger accident insurances[618]), the policy will have to mention this explicitly. It does not seem to be an artificial approach, therefore, to apply the law of the country of the insurer's principal place of business. This approach would comply with commercial practice as indicated by Art. 3 of the *Rome Convention 1980*, providing that contracts concluded within the ordinary course of business of a party be subject to the law of the country of that party's principal place of business; since the conclusion of a contract of aviation

618 In Germany e.g. prescribed by § 50 LuftVG.

insurance is an ordinary business for the insurer, while an extraordinary one for the airline, the insurer's principal place of business would be the decisive one.

3. Reinsurance and "Cut Through"

Another and, to some extent, similar potential conflicts of laws problem may occur in relation to reinsurance "*cut through*" clauses. A *cut through clause* is a provision in a contract of reinsurance pursuant to which the insurers agree that, if the primary insurers are unable to make payment to the insured under the primary policy for a particular reason, the reinsurers will make payment directly to the insured regardless of the fact that there is no privity of contract between the insurers and the insured. This type of clause frequently appears among other insurance requirements imposed on aircraft lessees by operating lessors[619].

They are intended to protect lessors and/or financers from being denied the proceeds of an insurance policy where the insured aircraft is damaged or destroyed and the primary insurers are unable to make payment because of financial instability or currency exchange restrictions.

Sometimes *cut through clauses* are insisted upon by aircraft lessors and/financers even where the primary insurance is placed in a reputable insurance market with recognized insurers so that the risks of financial, political, and currency exchange instabilities are greatly reduced.

As to the conflicts of laws aspect, the difficulty resides in the validity of the *cut through clause* under different legal systems. In the USA, *cut through clauses* are classified as third party beneficiary contracts and, as such, are generally enforceable[620]. The fact, however, that there is no privity of contract between the reinsurers and the (primary) insured renders to the unenforceability of *cut through clauses* under English law[621].

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619 *Margo*, "Conflict of Laws in Aviation Insurance", 19 Air Law (1994), 2 (at p. 6).

620 *Buckner-Mitchell v. Sun Indemnity Co.*, 82 F.2d 434 (D.C. Cir. 1936), cert. den. (1936), 298 U.S. 677; *American Reinsurance Co. v. Insurance Commissioner of the State California* (C.D. Cal. 1981), 527 F.Supp. 444.

621 *Woodar Investment Development Ltd. v. Wimpey Construction (UK) Ltd.*, [1980] 1 All. E.R. 571 = [1980] 1 W.L.R. 277.

There can be little doubt that the party requiring the insertion of a *cut through clause* would like to ensure that the insurance contract, at least as to this aspect, will be governed by a legal system which validates such clauses. Once again, *dépeçage* of the contract as to application of different legal systems seems possible although, under the strong influence of substantive policy considerations under US jurisdictions, it might be less predictable whether such a "selection of legal raisins" strategy would be recognized. As *Margo* puts it, the "only sure way"[622] of ensuring that *cut through clauses* will be held enforceable is an explicitly-formulated selection of the law which is to govern the contract of reinsurance and its interpretation as stipulated by the co-contractants.

III. Aircraft Purchase, Lease, Finance, and Security Rights

Contracts of aircraft purchases, finance contracts, and the creation of security rights in aircraft are very closely interrelated. Usually they are part of an even broader framework: The currency of the revenue of the purchaser and the currency the manufacturer or financer asks for may be subject to a considerable exchange rate bias. Taxation, company law, and labor law considerations may urge the participants in aircraft acquisition and finance to invent and apply certain features and tricks to the transactions. State requirements, such as "substantial ownership and control" requirements, may interfere with these intentions of the private participants; and finally, government subsidies and national security requirements may have impacts on the transactions at issue which influence the private law applications.

1. Aircraft Purchase

As to the law of aircraft purchase. it is found that "an aircraft is a chattel, albeit an unusually valuable one, and the sale of aircraft if governed by the general law as to the sale of goods"[623] . The

622 *Margo*, "Conflict of Laws in Aviation Insurance", 19 Air Law (1994), 2, at p. 6.
623 *Shawcross & Beaumont*, "Air Law" (4 ed.), para. V (45).

international conventions on the law of sales of goods, the *Hague Convention 1955*[624] and the *Vienna Convention of 1980*[625] (CISG) explicitly exclude contracts of aircraft purchase from their scopes of application[626]. Thus the general principles of the conflicts of laws have to be applied.

This primarily means the application of the *lex voluntatis*[627]. A survey as to the practices of major aircraft manufacturers[628] reveals that, without exception, contracts of aircraft purchase as to commercial and business aircraft include an explicit selection of the of law governing the contract[629]. As to the preferable choices, it is observed that "[i]t is likely that the sale agreement under which title is transferred will be governed by English or New York law"[630], thus the jurisdictions traditionally preferred as to international trade. In the absence of an explicit selection there is almost unanimity among the major legal systems in favor of the application of the law of the principal place of business of the vendor[631].

The true problem as to the conflicts of laws in contracts of aircraft purchase resides in the fact that the purchase contract, the finance contract, and the creation of security rights is frequently done within the framework of a single agreement. There are also situations where manufacturers will render financial support e.g. by direct credit to the purchaser[632]. Moreover, very often there is not a single purchase agreement as to the fully-equipped aircraft. Either the purchaser buys the airframe, the engines, and other equipment separately from the specialized manufacturer and has them assembled, or there is one contract and the question arises whether the manufacturer/vendor merely

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624 The Hague Convention on the Law Applicable to th International Sale of Goods of June 15, 1955. See *Lando*, "Kontraktstatuttet" (3 ed. 1981), at pp. 290 ff.

625 *Convention on the Law Applicable to Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18, Annex I (1980).* See *Meurer*, "The U.N. Convention on Contracts for the International Sale of Goods", 15 Syracuse J.Int.L.&Com.(1989), 361.

626 UN Convention *(supra)*, Art. 2 (e); The *Hague Convention 1955 (supra)*, Art. 1.
The *Hague Convention 1955*, however, excludes merely contracts as to "registered aircraft" - it may be concluded that aircraft not yet registered are subject to the Convention where applicable.

627 *Supra.*

628 Including *Airbus, Boeing*, and *Bombardier*. The survey was conducted by the author of this thesis.

629 This view seems to be supported by *Magdelénat*, "Negotiating an Aircraft Purchase Contract". 5 AASL (1980), 155 (158).

630 *Littlejohns*, "Legal Issues of Aircraft Finance", in: *Hall*, "Aircraft Financing" (2 ed. 1993), 281 (285).

631 As to the US see *Restatement (Second) of the Conflict of Laws* (1971), § 191. As to European law see the *Rome Convention* 1980, Art. 3 (2).

632 As to this practice see *Deighton*, "Sources of Finance", in: *Hall*, "Aircraft Financing" (2 ed. 1993), 15 (27); *Barron*, "Manufacturers' Support: Current Trends", in: *Hall*, "Aircraft Financing" (2 ed. 1993), 259 (261).

acts as an agent for the purchaser or is considered itself the purchaser of the equipment[633] . In such cases, the concept of *dépeçage* or severability of the contract, allowed for by the *Rome Convention 1980,* may be recalled: The contract must be split into several bilateral agreements as to the purchase of certain parts from different vendors and/or finance agreements and/or the creation of security rights. As to this problem see also *infra* on *Aircraft Lease and Finance*.

2. Aircraft Lease and Finance

a) Introduction

Since the aircraft is the paragon of a movable borders-crossing asset, one would expect a rich body of case law and some academic devotion to the conflicts of laws aspects concerning the legal implications of transboundary financing and leasing. However, on the one hand, the surprising fact is that neither the contractual aspects of international aircraft financing and leasing, nor the property law aspects of security interests in aircraft seem to have been the subject of litigation or caught the attention of academic studies[634] . On the other hand it does not appear likely that there are no problems of conflicts of laws arising in this field. Legal advice as to these issues is, of course, based on very thorough research since the implications beyond a "simple lease" (comparison of tax implications, company law, interests etc.) are very complex. Are we to believe that the parties' advice on such complex issues is absolutely "waterproof"? The more likely conclusion is that out-of-court settlements must be a regular means to reach an agreement on controversial matters, perhaps

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633 Information kindly supplied by *Bombardier Inc. - Aerospace Group - North America, Montréal, Qc., Canada* indicates that with respect to airline aircraft a single contract with the manufacturer can be the regular case. The same is true of *Learjet*. As to *Challenger*, almost all different constellations are possible.

634 As to both, international and Dutch observations see *Polak*, "Conflict of Laws in the Air", 17 Air Law (1992), 78; *Diederiks-Verschoor*, "An Introduction to Air Law " (4 ed. 1991), at pp. 177-179; and (5 ed. 1993), at pp. 183-185; *Diederiks-Verschoor*, "Aircraft Financing and Interational Law", in: *van Velten (ed.)*, "85 jaar Nederlandse Vereniging van Hypotheekbanken" (1991), 197; *Bunker*, "The Law of Aerospace Finance in Canada" (1988), at pp. 309 ff., also merely reports general aspects of conflicts of laws but no specific case law of studies. See also *Holloway*, "Air Finance" (1992), at pp. 125 ff.; *Littlejohns*, "Legal Issues of Aircraft Finance", in: *Hall*, "Aircraft Financing" (2 ed. 1993), 281 (285; 304).

due to the fact that the parties want to have the complex situation resolved by specialized experts rather than by a law court.

b) The Law Applicable to the Contractual Issues

A well-developed and widely-accepted set of uniform rules dealing with the contractual rights and obligations of the parties to an international contract of financing or leasing an aircraft, a *"lex mercatoria aeronautica"*[635], does not exist. Thus, the determination of the law governing the (multiparty[636]) contract or contracts whereby financial arrangements for a particular aircraft are made is left to ordinary (i.e. national) choice of law rules[637]. Different from insurance contracts[638], which are excluded from the *Rome Convention 1980*, the Convention embraces finance contracts, i.e. that all its features (especially the possibility of an express selection of law and *dépeçage*) apply.

Once again, the importance of an express choice of law as stipulated by the parties in the contract cannot be overstated[639]. In the absence of a contractual selection by the parties, the points of contact according to general conflicts of laws rules will indicate the applicable legal system. The *Rome Convention 1980* applies the "closest connection test"[640], supplemented by a presumption that the closest connection is presumed to be vested with the principal place of business of the party obliged to render the "characteristic performance" of the contract, i.e. the vendor or lessor of the aircraft[641]. The presumption, nevertheless, is rebuttable if there seems to be a closer connection with another country (Art. 4(5)).

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635 As *Polak*, "Conflict of Laws in the Air", 17 Air Law (1992), 78, puts it.

636 *Supra.*

637 "However well-drafted and extensive a contract may be, there will always be gaps or even issues purposefully left unprovided, which must all be filled up by reference to national law", *Polak, ibd.*

638 *Supra.*

639 *Polak*, "Conflict of Laws in the Air", 17 Air Law (1992), 78 (79).

640 As to the criticism this concept in written law has to be regarded with *supra.*

641 *Polak*, "Conflict of Laws in the Air", 17 Air Law (1992), 78 (78-80), however, considers primarily the domicile instead of focussing on the principal place of business which would seem more appropriate since aircraft vendors and lessors pursue exactly this business as their professional business.

While usually the law of the seller's or lessor's central administration at the time of conclusion of the contract will prevail, problems may arise in the case of a multiparty contract whereby several parties undertake to render certain services in return for the payment of monetary sums. It may prove to be difficult to ascertain the characteristic performance, i.e. "the one and only performance which is regarded as characteristic of a complex set of contractual rights and obligations"[642]. Here again, the concept of *dépeçage* -or severability of parts of the contract is not only "helpful"[643], but is also a tool pertaining to the interests of the parties.

It should be kept in mind, however, that the transborder implications of finance contracts are usually due to taxation: lessors try to establish companies in "tax havens", leveraging advantages to other companies abroad; lessees try to find a way to obtain the greatest advantages in their home country, be it e.g. by recruiting intermediaries. It must be noted, however, that the multiparty contract will be severed for the purposes conflicts of *private* laws only.

An aircraft purchase agreement connected with a lease agreement[644] can be severed into a number of bilaterals, identified by the characteristic performance of each of the bilateral agreements: the manufacturer and the lessor; the lessor and the lessee; or where the air services operator himself is the formal purchaser of the aircraft one has to distinguish between the purchase agreement and the finance contract with the operator's bank. Since it is still a *unity* of rights and obligations that is created by a *single* multiparty contracts, it is, of course, the most favorable solution to have the entire contract governed by a single legal system. Where this is not possible, severance can generate secondary problems: The interrelations between different parts of the contract may make interpretative coordinations *(Anpassung)* of these parts necessary in order to avoid leaps and frictions. Unambiguous selections of the applicable law(s), therefore, seem to be an imperative feature of this type of contract, and where it is unavoidable to subject parts of the contracts to different legal systems

642 *Polak*, "Conflict of Laws in the Air", 17 Air Law (1992), 78 (80).

643 *Polak, ibd.*

644 For instance, the lessee, an air services operator, will select the aircraft and agree with the manufacturer and /or vendor on the features of the aircraft. The lessor will be the formal purchaser, and then lease it to the lessee. All persons may be domiciled in different countries.

(e.g. for policy reasons or reasons of recognition as to taxation) it may be required to address the coordination between these parts in the contract, too.

c) Assignments

Finally, it may be worth noting, that under the *Rome Convention 1980*, assignments of contractual rights may be governed by a law different from the contract (Art. 12). In general, *Tetley* submitted an approach under which all such questions may be subject to a proper law of their own - the court is prevented from accessing the *lex fori* by camouflaging assignments as procedural[645], and under recognition of *dépeçage* the proper law governing the relationship between assignor and assignee may be different from the law governing the assigned obligation.

3. The Creation and the Recognition of Security Rights

a) Introduction

Aircraft financing and leasing is primarily a matter of contractual rights and obligations. The parties may stipulate the covenants of the contract and the law governing it and enjoy virtually unlimited freedom by doing so. Since "aerospace related equipment is very expensive, dangerous and highly mobile"[646], the debtor may suffer a substantial loss or even go bankrupt, leaving the creditor with nothing but contractual remedies (i.e. damages in case of non-performance), thus becoming empty-handed unless security rights *in rem* are created to safeguard the creditor's position. It is the law of (movable) things which is at stake here, which hosts a very distinct feature from the law obligations: rights have an *erga omnes* effect, i.e. they have effect not only against co-contractants but against everyone.

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645 *Tetley*, "International Conflict of Laws" (1994), ch. II (p. 37 ff.); ch. III (45 ff.); esp. at pp. 47 f.; 60 ff.; 67 f.
646 *Bunker*, "The Law of Aerospace Finance in Canada" (1988), at p. 135.

The problems at issue involve two different levels:

The first is the private interests that have to be balanced especially by the law of *iura in rem* with respect to aircraft: on the one hand the aircraft operator's interest in his ability to exercise as much operational freedom as possible, and on the other hand the financier's interest in ensuring that the equipment is in a good condition and readily accessible in the case of default or non-performance of the debtor[647].

The second problem is located on the conflicts of laws level: On the one hand each state has its own idiosyncratic system of security rights, which often consists only of an exclusive number *(numerus clausus)* of certain *iura in rem* having *erga omnes* effect. Each state has a legitimate interest in applying its system, rendering a balanced solution to the problem mentioned above to all assets located within its territory. On the other hand, the free flow of assets from one state to another should not result in an abridgment of security rights created in one state, each time such assets are moved to another state[648]. Such an abridgment of vested rights in the case of cross-border traffic would render the use of movable assets for the granting of security rights meaningless. It is the objective of conflicts of laws rules to provide for a reconciliation of these opposing interests.

b) The *Geneva Convention 1948*

It is generally acknowledged that with the adoption of the *Geneva Convention on the International Recognition of Rights in Aircraft* of 1948[649] "a major step towards a workable 'extra-territorial' effect of security rights in aircraft"[650] was taken[651].

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647 See *Bunker, ibd.*

648 See *Polak*, "Conflict of Laws in the Air", 17 Air Law (1992), 78 (81).

649 *Convention on the International Recognition of Rights in Aircraft*, Geneva, 19 June, 1948, 310 UNTS 151; ICAO Doc. 7620.

650 *Polak*, "Conflict of Laws in the Air", 17 Air Law (1992), 78 (81).

651 For a detailed analysis of the Convention see *Gernault*, Le projet de l'O.A.C.I. concernant la reconnaissance internationale des droits sur aéronefs, RFDA 1948, 1; *Calkins*, "Creation and International Recognition of Title and Security Rights in Aircraft", 15 JALC (1947), 156; *Guldimann*, "Dingliche Rechte, besonders Pfandrechte, an Luftfahrzeugen", SJZ 1948, 372; *Wilberforce*, "The International Recognition of Rights in Aircraft", 2 I.L.Q. (1948), 42; *Riese*, "Das Genfer Abkommen über die Internationale Anerkennung von Rechten an

Once again, we must apply the rules for the interpretation of private law conventions as laid down in the *General Part*[652]. As the title *("recognition")* and the preamble[653] clearly suggests, the Convention did not attempt to set up a uniform code of security devices or to provide for the enforcement of real rights[654], but merely provide for the international recognition of rights in aircraft created in different jurisdictions (Art. I). In addition, it provides for the registration and publicity of these rights (Arts. II, III), as well as for the establishment of a preferential order among certain claims (Arts. IV, VII (5), (6)), and for international conditions of sale in execution (Art. VII). The wording adopted by the Convention is very broad by intention in order to cover all types of conditional sales, leases, mortgages and *hypothecae* for international recognition (uniform law could not be agreed on due to the vast differences as to the legal institutions in the different systems)[655]:

"Article I

(1) The Contracting States undertake to recognise:
(a) rights of property in aircraft;
(b) rights to acquire aircraft by purchase coupled with possession of the aircraft;
(c) rights of possession of aircraft under leases of six months or more;
(d) mortgages, hypotheques and similar rights in aircraft which are contractually created as security for payment of an indebtness [...]."

Luftfahrzeugen", Jahrb.f.int.u.öff.R. 1949; *id.*, "Luftrecht" (1949), at pp. 275 ff.; *Diederiks-Verschoor*, "An Introduction to Air Law" (1993), at pp. 165-183.

652 *Supra.*

653 Paragraph 2: "Whereas it is highly desirable in the interest of the future expansion of international civil aviation that rights in aircraft be *recognised* internationally" [emphasis added].

654 See *supra.*

655 As to the different institutions there has been considerable devotion: see e.g. *Döring*, "Das Internationales Recht der Privatluftfahrt" (1927), at pp. 49 ff.; *Milch*, "Die Luftfahrzeughypothek" (1930); *Kopsch*, "Über die Verpfändung von Luftfahrzeugen" (1932); *Burkhard*, "Das Pfandrecht an Luftfahrzeugen" (1933); *Knauth*, "Airplane Mortgages, Their Purposes and Juridical Effects", speech and paper presented to the Interamerican Bar Association, Lima, 1947 (VII topic 8); *Guldimann*, "Dingliche Rechte, besonders Pfandrechte, an Luftfahrzeugen", SJZ 1948, 372; *Riese*, "Luftrecht" (1949), pp. 267 ff.; *Hofstetter*, "L'hypotèque aérien" (1950); *Stieber*, "Zukunft der Luftfahrzeughypothek", 1 ZgLuftR (1927/28), 187; *Johnston*, "Legal Aspects of Aircraft Finance" (Thesis, IASL, McGill 1961); *Milde*, "Conflicts of Laws in the Law of the Air", 11 McGill L.J. (1965), 220, at pp. 233 ff.; *Sundberg*, "Rights in Aircraft", 8 AASL (1983), 233 (237); *Lagerberg*, "Conflicts of Laws in Private International Air Law" (Thesis, IASL, McGill; 1991), at pp. 82 ff.; *Holloway*, "Air Finance" (1992), at pp. 125 ff.; *Shawcross & Beaumont*, "Air Law" (4 ed.), para. V (54); *Bernstein*, "The Lessee's Guide to Structuring the Cross-Border Aircraft Lease", in: *Hall*, "Aircraft Financing" (2 ed. 1993), 159 (169 f.).

Erga omnes effect is provided if the security rights are (1) created by contract[656]; (2) have been constituted in accordance with the law of the Contracting State in which the aircraft was registered as to nationality at the time of their constitution; and (3) that such rights were regularly recorded in the public record of the Contracting State in which the aircraft is registered as to nationality.

There are a number of conflicts of laws implications due to the vast number of ancillary questions and exceptions that have been discussed[657] but never tested.

One of the most interesting points is related to the fact that recognizable security rights must "have been constituted in accordance with *the law* in the Contracting State where the aircraft was registered", as stated in Art. I (1) (I). This might seem to be a paradox in light of the purpose of the Convention to merely *recognize* and not touch the legal basis of the constitution or creation of security rights. The origin of this wording, however, can be explained by the fact that there was a lack of agreement on the question as to which law is to govern a contractual creation of a security right at the conference. As *Riese* reports, the controversy in the Legal Committee of ICAO focused on the application of the *lex loci contractus*, the law of the register (under public law), or the law of the record (under private law)[658]. The solution, therefore, had to be sought in a - hidden - reference to choice of law rules. As *Calkins* finds, the phrase *in accordance with the law* means "the entire law of a Contracting State, including its law on conflict of laws."[659] *Riese*, however, points out that this question remained unanswered[660] at the Geneva Conference (8:9 votum)[661]. Therefore, while

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656 Thus excluding "statutory, common law or judicial liens", as states *Sundberg*, "Rights in Aircraft", 8 AASL (1983), 233 (237). See also *Riese*, "Luftrecht" (1949), at pp. 285 *et seq.* Already the *Brussels Protocol* rejected an equal treatment of non-contractual security rights. As *Riese, ibd.*, reports, it was the Norwegian Delegate *Alten* who concluded that it is the hesitation of states to recognize foreign legal decisions what prevents the recognition of judicial security rights.

657 See *supra*, and esp. *Riese*, "Luftrecht" (1949), at pp. 375 ff.

658 See *Riese*, "Luftrecht" (1949), at p. 279, also discussing the fact that some jurisdictions do not have a double register (record) system (due to stricter comliance with - mandatory - registrations).

659 *Calkins*, "Creation and International Recognition of Title and Security Rights in Aircraft", 15 JALC (1947), 156, at p. 164. Followed by *Lagerberg*, "Conflicts of Laws in Private International Air Law" (Thesis, IASL, 1991), at pp. 84 ff.

660 *Riese*, "Luftrecht" (1949), at pp. 280.

661 Misleading therefore *Lagerberg*, "Conflicts of Laws in Private International Air Law" (Thesis, IASL, 1991), at p. 85: "The intention of the drafters, however, was different and the phrase 'in accordance with the law' shall be read to mean 'the entire law of a Contracting State, including its law on conflict of laws [...]'" (quoting Art. I of the *Geneva Convention 1948* and *Calkins*, "Creation and International Recognition of Title and Security Rights in Aircraft", 15 JALC (1947), 156, at p. 164.

Guldimann doubts whether the reference to "the law" embraces the conflicts rules of a state[662], other authorities such as *Riese*[663] and *Lord Wilberforce*[664] apply a legal approach examining the wording which unambiguously facilitates an inclusion of the conflicts rules; the chairman of the drafting committee *Alten* is also quoted as to the opinion that the wording "the law" would be vast enough to include codified and customary law of all kinds[665]. Thus, a court seized of a case, is likely to consider under which law the transaction was consummated, a prerequisite to which a decision on the applicable law is according to the choice of law rules of the Contracting State whose nationality the aircraft bears. Consequently, the *Geneva Convention* does not resolve the conflicts of laws - not even within its scope of application.

c) The Conflicts of Laws - A Solution to the Problem

In the dilemma outlined above resides one of the major reasons that, especially since the late 1960s, the emergence of a new type of aviation insurance has been seen: aircraft title insurance[666]. The necessity for an easy, unambiguous, and readily applicable rule resolving the conflicts of laws as to real rights in aircraft is therefore indicated by juridical as well as economic needs since aircraft title insurance coverage is another factor enhancing the costs of the operation of air services.

Although *de Visscher* in a lecture[667] that was considered as "excellent"[668] by distinguished air lawyers, influenced the subsequent doctrinal approaches in favor of the *lex rei sitae*[669], the prevailing opinion has always favored the law of registration *(lex patriae; lex banderae)* of the aircraft[670]. In

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662 *Guldimann*, "Dingliche Rechte, besonders Pfandrechte, an Luftfahrzeugen", SJZ 1948, 372, at p. 375.
663 *Riese*, "Luftrecht" (1949), at p. 281, n. 20.
664 *Wilberforce*, "The International Recognition of Rights in Aircraft", 2 I.L.Q. (1948), 421, at p. 423.
665 See *Riese*, "Luftrecht" (1949), at p. 281, n. 20 (also giving further references).
666 See *Kingsnorth*, "Insurance Considerations", in: *Hall*, "Aircraft Financing" (2 ed. 1993), 323 (327); *Brownlees*, "Political Risk and Deprivation Insurance", in: *Hall*, "Aircraft Financing" (2 ed. 1993), 329 (333 ff.).
667 *De Visscher*, "Les conflits de lois en matière de droit aérien", 48 Rec. des Cours (1934-II), pp. 285 *et seq.*
668 "Ausgezeichnet" - *Riese*, "Luftrecht" (1949), at p. 280 in n. 19.
669 See e.g. *Hamel J.*, "Aviation", in: Répertoire de Droit International (1921 ff.), II, p. 300; *Arminjon*, "Précis de droit international privé", vol. II (2 ed. 1934) at p. 127.
670 See e.g. *Döring*, "Das Internationales Recht der Privatluftfahrt" (1927), at pp. 50 ff.; *Makarov*, "Die zwischenprivatrechtlichen Normen des Luftrechts", 1 ZgLuftR (1927/28), 150, at pp. 175 *et seq.*; *Niboyet*, "Traité de droit international privé français", vol. IV (Paris 1947), at p. 604; *Wolff*, "Das internationale

spite of the *lex rei sitae* being the traditional approach to real things in general, one must address the question whether this doctrine is pertinent to the interests of all parties involved. The traditional rule of *lex rei sitae* as to security rights is not without an exception - and this exception is a major one because it has always served as a "legal ancestor" of the rules of air law and frequently been analogously applied[671] : In maritime law the law of the state of the ship's registry, the "law of the flag", is applied[672] . As to the aircraft being an even faster movable than a ship, the *lex rei sitae* doctrine quite obviously does not render an easily applicable rule. It might certainly be correct to take into account that the aircraft, when passing through the airspace of different countries, is subject to the jurisdiction of these countries[673] ; from this point of view the application of the *lex rei sitae (lex loci rei volantae,* respectively) appears to present a nice "all-round" solution. *Morris* seems to willing to apply both doctrines, depending on whether the aircraft passes through sovereign airspace or over other territories (high sees, parts of Antarctica)[674] . As in numerous fields of the law, however, (although desirable) public law and private law do not necessarily have to apply identical notions if such identity would be pertinent to academic niceties rather than to the interests of the parties involved. Furthermore, "the country of registration is given paramount importance in international

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Privatrecht Deutschlands" (3 ed. 1954), at pp. 174 ff.; *Hofstetter,* "L'hypotèque aérien. Etude de droit comparé et de droit international" (1950), at p. 209; *Milde,* "Conflicts of Laws in the Law of the Air", 11 McGill L.J. (1965), 220, at pp. 234 ff.; *Bentovoglio,* "Conflicts Problems in Air Law", 119 Rec. des Cours670 (1966-III), 69 (90ff.). Already at the 7th International Congress of the CIJA in Lyon, a corresponding rule had been proposed, as reports *Döring, ibd. - Döring, ibd., Milde, ibd.,* and *Batiffol/Lagarde,* "Droit international privé", vol. II (7 ed. 1983), at pp. 165 ff. mention a considerable number of states that followed quite early the nationality notion. Some Scandinavian references are supplied by *Lagerberg,* "Conflicts of Laws in Private International Air Law" (Thesis, IASL, McGill; 1991), at p. 87 in n. 451. Also the *Brussels Resolution* applies this concept.
Misleading are the statements by *Littlejohns,* "Legal Issues of Aircraft Finance", in: *Hall,* "Aircraft Financing" (2 ed. 1993), 281, who states at p. 285 that "under the rules of private international law, the validity of a transfer of a tangible asset such as an aircraft is governed by the law of the counrty where the aircraft is situated at the time of transfer", but nevertheless finds at p. 304 that a "problem that might be encountered in some cross-border financings is that the laws of the airline's own country may insist on the financing document (particularly if it is a lease or mortgage) being governed by those laws".

671 As to the nexus of maritime and air law see *supra, General Part.*

672 For a comprehensive study on maritime conflicts of laws see *Tetley,* "International Conflicts of Laws: Civil, Common and Maritime" (1994), ch. VII (pp. 179 ff.) [law of the flag]; ch. XVII (pp. 533 ff.) [mortgages, liens etc.]. See also *Tetley,* "The Law of the Flag, 'Flag Shopping' and Choice of Law", 17 Tulane M.L.J. (1993), 139; *Id.,* "Maritime Liens, Mortgages and Conflict of Laws", 6 U.S.F.Mar.L.J. (1993), 1.

673 This is due to Art. 1 of the *Chicago Convention 1944.*

674 *Morris,* "The Conflict of Laws" (3 ed. 1984), at p. 375. The findings are similar in *Trustees Executors and Agency Co. Ltd. v. I.R.C.,* [1973] Ch.D. 254.

conventions", both public *and* private, as *Dicey and Morris* observe[675]. And where *Dicey and Morris* carefully reconcile the opposing positions in formulating that "a civil aircraft may sometimes be deemed to be situate in its country of registration"[676], it also seems possible to put the rule more honestly: Since it is readily applicable and the nationality of an aircraft is easily ascertainable, the doctrine of *lex banderae* provides for such a clear and stable solution that a number of states were already willing to follow it in their earliest aerial legislation[677].

Thus, the most appropriate and prevailing rule is the *lex banderae*. Its application to the problem pointed out above, the conflicts rules of the "law of the state of registry" as referred to in Art. I (1) (i) of the *Geneva Convention 1948*, would mean that in its ultimate effects the provision may be read as a reference to the substantive law of the state of registry of the aircraft.

The practical implications for aircraft finance contracts, therefore, are that securities have to be arranged according to the *lex banderae*, the aircraft's *lex patriae*, i.e. the law of the state of registry. This phenomenon has been described as a "monopoly position of the state of nationality of the aircraft"[678]. Even if this solution may create the onerous burden on the part of the creditors to prepare arrangements to create and constitute security rights under the law of a "tax haven", it is favorable because of its stability, reliability, and simplicity.

As a matter of course, neither the *Geneva Convention 1948* (Art. I (2)) nor any other provision would prevent a state from the recognition of other security rights (e.g. security rights for an aircraft under construction which is not yet registered[679]). The only obligation imposed on a state party to the *Geneva Convention 1948* is that it may not render priority to such rights over rights covered by the *Geneva Convention* itself (Art. I (2)). Being a piece of international legislation, in the absence of a special rule[680] the Convention, however, does not oblige states to extend the scope of application of

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675 *Dicey & Morris*, "The Conflict of Laws" (12 ed. 1993), at pp. 936 f. See also *Wengler*, "Internationales Privatrecht" (1981), at pp. 262 ff.

676 *Dicey & Morris*, "The Conflict of Laws" (12 ed. 1993), exception 2 to rule 114, at p. 936.

677 See the lists of examples quoted by *Döring*, "Das Internationales Recht der Privatluftfahrt" (1927), at pp. 50 ff., 53 ff.; *Milde*, "Conflicts of Laws in the Law of the Air", 11 McGill L.J. (1965), 220, at p. 235; *Bentivoglio*, "Conflicts Problems in Air Law", 119 Rec. des Cours (1966-III), 69. See also *supra*.

678 *Lagerberg*, "Conflicts of Laws in Private International Air Law" (Thesis, IASL, McGill; 1991), at p. 89.

679 See *Matte*, "Treatise on Air-Aeronautical Law" (1981), at p. 568.

680 *Supra. General Part.*

the Convention to aircraft registered under its own law (except for an exclusive number of explicit privileges[681]).

d) The Recognized Actions and Remedies: A Limitation

One may face the question whether the recognition of security rights under the *Geneva Convention 1948* also encompasses ancillary rights such as the right of repossession. Some legal systems allow for repossession by the creditors, some consider repossession as invalid[682]. Applying the methodology of the *General Part*[683] to the *Geneva Convention 1948*, in the absence of an unambiguous statement in the Convention's text and the *travaux préparatoires*, it is the *teleology* as to the Convention that leads the way of interpretation: The goal of the Convention is to safeguard the *priority* of security rights in aircraft which, in the absence of an explicit regulation as to ancillary remedies of security rights, means that the Convention only aims at the *recognition of priorities*. Since not comprised by the *Geneva Convention 1948*, repossession clauses will not even be recognized under the application of the *lex banderae* (neither, of course, under the *lex rei sitae*) if the *lex fori* considers such clauses as contrary to its *ordre public*. Here an exceptional case of the prevalence of the *forum's* mandatory policy requirements can emerge.

681 For details see the excellent treatise by *Riese*, "Luftrecht" (1949), at pp. 275-308.
682 See the examples given by *Polak*, "Conflict of Laws in the Air", 17 Air Law (1992), 78 (81 f.).
683 *Supra.*

D. Chapter Four: The Conclusion.

A General Rule as to the Conflict of Laws in Private International Air Law

The objective declared at the outset of this study was to formulate a thesis as to a general rule on the conflicts of laws in commercial contractual private international air law.

The major issues of contractual private air law as examined in this study can be divided into two categories: obligations and real rights.

1. As to the contractual obligations of carriage by air, aviation insurance, aircraft purchase, and aircraft finance, which have all been subject to this study, apart from sporadic exceptions[684] *one single* general principle has been found in order to resolve the conflicts of laws: the law of the **principal place of business** of the party which is obliged to perform the typical obligation of the contract (i.e. the carrier, the insurer, the vendor, the lessor) - ***"lex domicilii quaestuarii"***.

Therefore, this rule may be added to the *General Part* of private international air law, and (of course, without prejudice to the minor exceptions as indicated where appropriate in the course of this study) may be used in order to resolve the conflicts of laws. It may also be considered in the course of the unification of private international air law *de lege ferenda.*

2. As to the creation of security rights, private international air law departs from the general notion of *lex rei sitae* - in air law, nevertheless, a different, but also very traditional approach is applied: ***lex banderae***, being an approach well-known from maritime law.

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684 Such as e.g. the extraordinary rule with respect to contracts of international carriages by air if the laws of the domiciles of the carrier *and* the passenger, and the law(s) of the destination or/and the origin of the air carriage are congruent. See *supra.*

E. Epilogue

It is not a secret that lawyers, educated in different legal systems, of course proceed in their approach to problems on the basis of their well acquired philosophical[685] abilities[686]. In a truly international *forum*, mutual respect and an understanding for the numerous and different approaches is required in order to foster cultural and economic exchange as well as piece in the world.

The author hopes that this study - which has been conducted under the auspices of the *Institute of Air and Space Law* as a place of enriching mutual exchange among the legal cultures of the world - applying some methods and approaches of Middle European civil law and its legal theory will have been of interest and use as a source of ideas and references also for common law lawyers who probably would have applied a different approach[687].

685 It was *von Savigny* who said that jurisprudence is the nexus of philosophical thinking and systematic methodology. See the evaluation of *von Savigny's* lectures and lecture fragments by *Mazzacane*, "Friedrich Carl von Savigny. Vorlesungen über juristische Methodologie 1802-1842" (1993), at p. 30.

686 See *Flessner*, "Interessenjurisprudenz im internationalen Privatrecht" (1990), at p. 143, addressing the question at who's "service" private international law is meant to be.

687 The methodologies adopted under and applied in the different major legal systems in the world are displayed, analysed, and compared in an excellent treatise by *Fikentscher*, "Methoden des Rechts. In rechtsvergleichender Darstellung", 4 vol.s (1975).

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* Note: Authors' names appear in alphabetical order.
Any abbreviations uncommon in North America are explained in the footnotes.
Titles of publications other than English, French or Latin are translated in the footnotes.

688 "Legal Implications of the Crash of an Airplane of Royal Dutch Airlines (KLM) on 22 March 1952 at Frankfurt/Main".

689 ZLR = Zeitschrift für Luftrecht.

690 Rev.crit.dr.int.priv. = Revue critique de droit international privé.

691 Air & Space Law, respectively.

692 "Air and Space Law".

693 "Private International Law".

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695 "Interpretation and Supplementation of Internationally Unified Law by Municipal Courts".

696 RabelsZ = Rabels Zeitschrift für ausländisches und internationales Privatrecht.

697 Rec. des Cours = Recueil des Cours.

698 "Soviet Air Law. Fundamental Principles and the Practice of Civil Aviation".

699 "Philosophie of Law".

700 Rev.gén.dr.aérien = Revue génerale de droit aérien.

701 "The Concept of Analogy in Public International Law".

702 AVR = Archiv des Völkerrechts.

703 "The Significance of the New 'Unfair Contract Terms Act' with Respect to the Conditions of Carriage of the Airlines".

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Georgopoulos & Anor v. American Airlines (N.S.W. Supr.Ct.), judgment of 10 Dec. 1993, no. S 11422/1993 [unreported].

Austria

OGH Wien[862] (15 Dec. 1951 - 2 Ob 293/61 and 2 Ob 294/61), 11 ZLR (1962), 150 *(Heitz v. Allgemeine Unfallversicherungsanstalt).*
OGH Wien (5 Oct. 1955), ÖJZ[863] 1955, 673.
HG Wien (4 Jan. 1994), TranspR 1994, 304.
ÖVwGH[864] (31 May 1957), ILR 1957, 639.

Belgium

Fischer v. Sabena (Trib. prem.inst. Bruxelles 1950), 4 Rev.fr.dr.aérien[865] (1950), 411.

Canada

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Drew Brown Ltd. v. Te Orient Trader, [1974] S.C.R. 1286.

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* Note: abbreviations uncommon in North America are explained in numbered footnotes.

** Note: Countries are sorted in alphabetical order.
Cases are sorted by case names in common law jurisdictions.
Cases are sorted by court hierarchy in those civil law jurisdictions where an indication of case names is not common.

862 OGH = Oberster Gerichtshof Wien (Supreme Court of Austria).

863 ÖJZ = Österreichische Juristenzeitung (journal).

864 ÖVwGH = Österreichischer Verwaltungsgerichtshof (Supreme Court of Austria in Administrative Affairs).

865 Rev.fr.dr.aérien = Revue française de droit aérien (journal).

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Imperial Life Assurance Co. v. Colmenares, [1967] S.C.R. 443.
O'Brien v. CPR, [1972] 3. W.W.R. 456
Scott v. American Airlines, [1944] 3 D.L.R. 22 (Ont.).
Stratton v. Trans Canada Airlines (Dominion of Canada, B.C. Supr.Ct. 1961), [1961] U.S.Av.R. 246.
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Confoederatio Helveticæ (Switzerland)

BG[866] (9 June 1906), BGE 32 II 415.
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Laboratories Lafayette c. P.A.A. et Sté C.M.B. (C.d'A. Paris 1956), 11 Rev.fr.dr.aérien (1957), 147.
Lloyd's v. Sté Aérofret, Cie Alitalia et Cie UTA (Cass. 22. Apr. 1969), RFDA 1969, 397.
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BGH (14 April 1953 - I ZR 152/52), BGHZ 9, 221.
BGH (22 Nov. 1955 - I ZR 218/53), BGHZ 19, 110.
BGH (17 April 1958 - VII ZR 96/57), 7 ZLR (1958), 421.
BGH (9 June 1960 - VIII ZR 109/59), IPRspr.[876] 1960/61 no. 23 (p. 94).
BGH (18 Oct. 1965 - VII ZR 171/63), BGHZ 44, 183.
BGH (24 June 1969 - VI ZR 71/67), NJW[877] 1969, 2014.
BGH (24 June 1969 - VI ZR 45/67), 19 ZLW (1970), 199.
BGH (24 June 1969 - VI ZR 48/67), NJW 1969, 2014.
BGH (8 Dec. 1975 - II ZR 64/74), BGHZ 65, 364.

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866 BG = Bundesgericht (Swiss Federal Supreme Court).
867 Upper Court of the *Kanton Zürich.*
868 Commercial Court of the *Kanton Zürich.*
869 Circuit Court *Zürich.*
870 Cass. = Cour de cassation (Supreme Court of France).
871 C.d'A. Paris = Cour d'Appel Paris (Court of Appeals, Paris).
872 BVerfG = Bundesverfassungsgericht (German Federal Constitutional Court).
873 ZIP = Zeitschrift für Wirtschafts- und Insovenzrecht (jounal).
874 BGH = Bundegerichtshof (German Federal Supreme Court).
875 BGHZ = Entscheidungssammlung des Bundesgerichtshofes in Zivilisachen (German Federal Supreme Court Reporter, Civil Law Division).
876 IPRspr. = Rechtsprechung auf dem Gebiete des internationalen Privatrechts (journal).
877 NJW = Neue Juristische Wochenschrift (journal).

BGH (30 March 1976 - VI ZR 143/74), NJW 1976, 1581.
BGH (30 March 1976 - IV ZR 143/77), ZLW[878] 1976, 354.
BGH (28 Sept. 1978 - VII ZR 116/77), NJW 1979, 495.
BGH (27 Oct. 1978 - I ZR 114/76), NJW 1979, 493.
BGH (20 June 1979 - IV ZR 106/78), BGHZ 75, 32.
BGH (9 July 1979), VersR[879] 1979, 609.
BGH (27 Nov. 1979 - VI ZR 267/78), ZLW 1980, 143.
BGH (9 Nov. 1981 - II ZR 197/80), NJW 1982, 992.
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LG Hamburg (7 Sept. 1977), RIW 1977, 652
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Cost.[886] (6 May 1985) no. 132, Riv.dir.int.priv.proc.[887] 1985, 325 = IATA Legal Inform. Bulletin no. 641 (Oct. 1985), p. 251 *(Coccia v. Turkish Airlines)*.
Cass.[888] (31 March 1938), 8 Rev.gén.dr.aéien (1939), 309 *(Palleroni v. SANA)*.
Cass. (9 Mar. 1955), 4 ZLR (1955), 70 (72) *(Calcio Torino v. Alitalia)*.

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878 ZLW = Zeitschrift für Luft- und Weltraumrechtsfragen (journal).
879 VersR = Versicherungsrecht (journal).
880 RG = Reichsgericht (German Supreme Court, -1945).
881 RGZ = Entscheidungssammlung des Reichsgerichts in Zivilsachen (German Supreme Court Reporter, Civil Law Division, -1945).
882 OLG = Oberlandesgericht (Upper Court of Appeals).
883 LG = Landgericht (Circuit Court).
884 RIW = Recht der internationalen Wirtschaft (journal).
885 AG = Amtsgericht (County Court).
886 Cost. = Corte costituzionale (Italian Constitutional Court).
887 Riv.dir.int.priv.proc. = Rivista di diritto internazionale privato e processuale (journal).
888 Corte di cassazione.

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[889] (Journal).

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Travellers Insurance Co. v. Workmen's Compensation Appeals Board (1967), 68 Cal.2d 7 = 64 Cal.Rptr 440.
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Zicherman v. KAL (1996), 116 S.Ct. 629.
Zousmer v. CPA (S.D.N.Y. 1969), [1970] U.S.Av.R. 496 = 307 F.Supp. 892.

CAB Order E-1590 of 18 Mai 1948 (referring to Art. 7 of IATA resolution no. 115/520 = 215/520 = 315/520).

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Materials

I. International Conventions

1. Air Law

Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at **Warsaw** on 12 October **1929**. Authentic text: "II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929, Varsovie" (Warszawa 1930), pp. 220-233.

English translation: Schedule to the United Kingdom Carriage by Air Act, 1932; 22 & 23 Geo, ch. 36.

US American translation: The Warsaw Convention. Relative to International Transportation by Air. Ratified by U.S. Senate, June 15, 1934, Proclaimed by the President, June 27, 1934: [1934] U.S.Av.R 245.

Convention on International Civil Aviation, Signed at Chicago, on 7 December **1944**, ICAO Doc. 7300/6 (1980). The text is also reproduced in 18 AASL (1993-II), 3.

Convention on the International Recognition of Rights in Aircraft, Signed at **Geneva** on 19 June **1948**, ICAO Doc. 7620. The text is also reproduced in 18 AASL (1993-II), 517.

Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Signed at **Rome** on 7 October **1952**, ICAO Doc. 7364; the text is also reproduced in 18 AASL (1993-II), 541.

Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at **The Hague** on 28 September **1955**, Signed at Guatemala City on 8 March 1971, ICAO Doc. 8932. The text of the protocol is also reproduced in 18 AASL (1993-II), 409.

Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by A Person Other than the Contracting Carrier, signed in **Guadalajara** on 18 Sept. **1961**; ICAO Doc. 8181. Hereinafter referred to as *Guadalajara Conv. 1961*. The text is also reproduced in 18 AASL (1993-II), 393.

Protocols no.s 1-4 to Amend the Convention for the Unification of Certain Rules Relating to the International Carriage by Air Signed at Warsaw on 12 October 1929, Signed at **Montreal** on 25 September **1975**, ICAO Doc.s 9145 - 9148. The Protocols are also reproduced in 18 AASL (1993-II), 435.

Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface Signed at Rome on 7 October 1952, Signed at **Montreal** on 23 September **1978**, ICAO Doc. 9257; the text is also reproduced in 18 AASL (1993-II), 577.

2. International Instruments Relative to Transportation Law (other than by transportations by air)

International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, signed at Brussels on 25 August 1924 ("Hague Rules").

Visby Protocol 1968 to the Hague Rules 1924 adopted at Brussles, 23 Febr. 1968 ("Visby Rules").

Convention on the Unification of Rules Relating to International Transportation by Railways, signed at Geneva on 19 May 1956 ("CIM").

United Nations Convention for the International Transport of Goods by Sea, adopted at Hamburg, 31 March 1978 ("Hamburg Rules").

Convention on the Unification of Rules Relating to International Transportation by Road, signed at Geneva on 7 May 1978. ("CMR").

United Nations Convention on International Multimodal Transport of Goods, adopted at Geneva on 24 May 1980. ("MT-Conv.").

3. International Instruments Related to Other Matters

Treaty of Peace Between the Allied and Associated Powers and Germany (Treaty of Versailles), 28 28 June 1919, 11 Martens Nouveau Recueil des Iraites (3d), 323.

Convention for the Unification of Rules Relating to Cheques, Signed at Geneva, 7 June 1930, RGBl. 1933 II, pp. 377 ff. (Appendix I).
Convention for the Unification of Rules Relating to Bills-of-Exchange, Signed at Geneva, 19 March 1931, RGBl. 1933 II, pp. 536 ff. (Appendix I).
Convention Applicable to International Sales of Goods, Signed at **the Hague** on June 15, **1955,** 15 U.N.T.S. 149.
Convention on the Law of Treaties, Done at **Vienna** on 22 May **1969,** Opened for Signature on 23 May 1969, 1155 U.N.T.S. 331.
Convention on the Law Applicable to Contractual Obligations, opened for signature in **Rome** on 19 June **1980,** 80/934/EEC, O.J. 1980 L 266/1. The text is also reproduced in *North (ed.),* Contract Conflicts (1982), Appendix A, pp. 347 ff.
Convention on the Law Applicable to Contracts for the International Sale of Goods, Signed at **Vienna 1980,** U.N. Doc. A/CONF.97/18, Annex I (1980).

II. European Legislation

First Council Directive of July 24, 1973 on the Co-Ordination of Laws, Regulations and Administrative Provisions Relating to Direct Insurance Other Than Life Insurance - [1973] O.J. L 228/3, p.3.
Second Council Directive of June 22, 1988 on the Co-Ordination of Laws, Regulations and Administrative Provisions Relating to Direct Insurance Other Than Life Insurance and Laying Down Provisions to Facilitate the Effective Exercise Freedom to Provide Services - [1988] O.J. L 172/1, p.1.

III. National Legislation

1. Constitutions

Constitution of the United States of America.
Grundgesetz für die Bundesrepublik Deutschland, of 23 May 1949, BGBl. I 1, BGBl. III 100-1. ("GG" - Germany).

2. Civil Codes

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Allgemeines Bürgerliches Gesetzbuch, of 1811. (ABGB - Austria).
Bürgerliches Gesetzbuch, of 18 August 1896, RGBl. 195, BGBl. III 400-2. (BGB - Germany).
Obligationenrecht, of 30 March 1911, SR 220. (OR - Confoederatio Helveticae).
Zivilgesetzbuch, of 10 December 1920. (ZGB - Confoederatio Helveticae). Engl. translation: Wyler, S./Wyler, B.: "The Swiss Civil Code", 2 vol.s (Zürich, ReMaK 1987).

3. Other Acts and Statutes

Einführungsgesetz zum Bürgerlichen Gesetzbuche, of 18 August 1896, RGBl. 604, BGBl. III 400-1. ("EGBGB" - Germany).
Luftverkehrsgesetz, as revised and announced as of 14 January 1981, BGBl. I 61; as amended, 17 December 1993, BGBl. I 2123. ("LuftVG" - Germany). Text in its latest version is also published in *Giemulla/Law/Barton/Müller-Rostin,* "Luftverkehrsgesetz" (Neuwied, Berlin: Luchterhand; looseleaf; 19th issue January 1995), pp. 1 ff.
Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen, of 9 December 1976, BGBl. I 3317, BGBl. III 402-28. ("AGBG" - Germany).
Bundesgesetz über das internationale Privatrecht, of 18 December 1987, Bbl 1988 I 5-60). ("IPRG" - Confoederatio Helveticae).
English translation provided in 37 Am.J.Comp.L. [1989], 193, 223.
Legge no. 841 of 19 May 1932 (Italy).
Legge no. 1832 of 3 Dec. 1962 (Italy).
Carriage by Air Act 1961, 2 Halsbury's Statutes (3 ed.) 612. (UK).
Carriage by Air Act 1932. (UK).
Carriage by Air and Road Act 1979. (UK).

Carriage by Air Act, R.S.C. 1952 as amended, 1963 (Can.), c. 33. (Canada).
Civil Aviation (Carrier's Liability) Act, of 1959 (Cth). (Australia).
Civil Aviation (Carriers' Liability) Amendment Act (Cth), of 1991. (Australia).

IV. Resolutions, Restatements, Conference Materials

1. Resolutions

Institut de Droit International: Brussels Resolution on the Conflicts of Laws in the Air of 11 September 1963; 50 Annuaire de l'Institut de Droit International II (1963), pp. 373-376

2. Restatements

Restatement (Second) of the Conflict of Laws (St. Paul; American Law Institute Publishers, 1971).

3. Conference Materials

Gouvernement de la France (ed.), "Conférence International de Droit Privé Aérien" (Paris; Imprimerie Nationale; 1926).
Gouvernement de Pologne (ed.), "II Conférence Internationale de Droit Privé Aérien, Varsovie 4-12 Octobre 1929, Procès-Verbaux" (Warszawa 1930).
Horner, R.C. / Legrez, D., "International Conference on Private Law Affecting Air Questions. Minutes of the Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw" (South Hackensack, N.J.: Rothman, 1975).
International Conference on Private Air Law at the Hague, September 6-14, 1955, Minutes I = Collected Papers, McGill Law Library (KLQAC 161 Hcp Cutter), *Originals* of Proceedings. Reproduced in ICAO-Doc. 7636.
Proceedings of the Second ICAO Assembly, Geneva, June 1-21, 1948, ICAO Doc. 6736-C/775.
ICAO Legal Committee, First Session, Bruxelles, September 10-25, 1947, Minutes and Documents (published Montreal 1948).

V. Other Materials

1. Governmental Publications

Colonial Annual Report on Hong Kong for the year 1947 (London: Colonial Office; 1947).

2. Non-Governmental Publications

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Willis Corron Aerospace (ed.), "The Willis Information File" (London).

IMAGE EVALUATION
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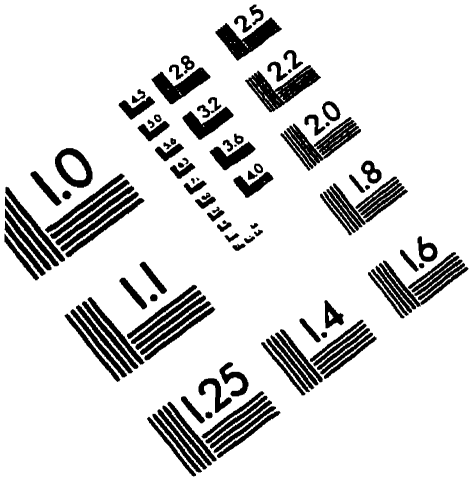

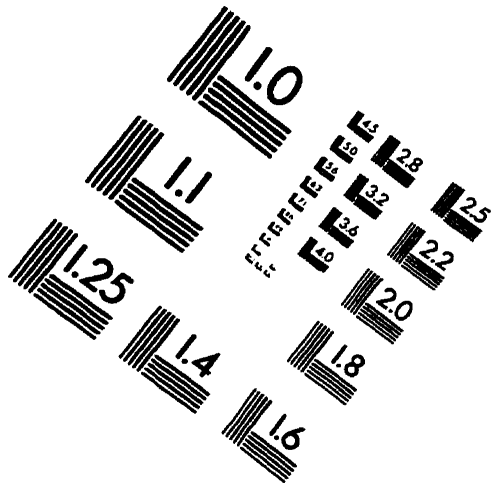

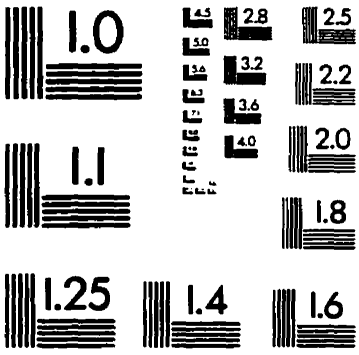

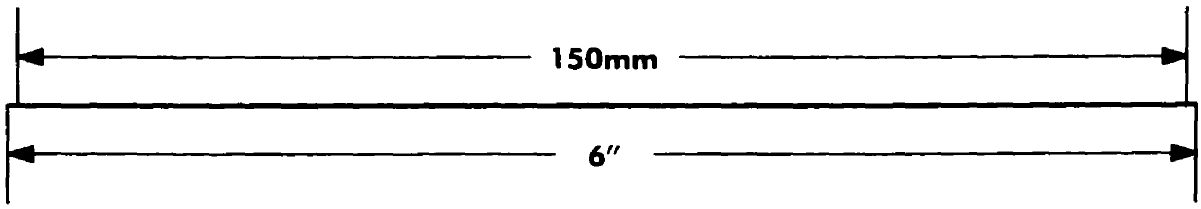

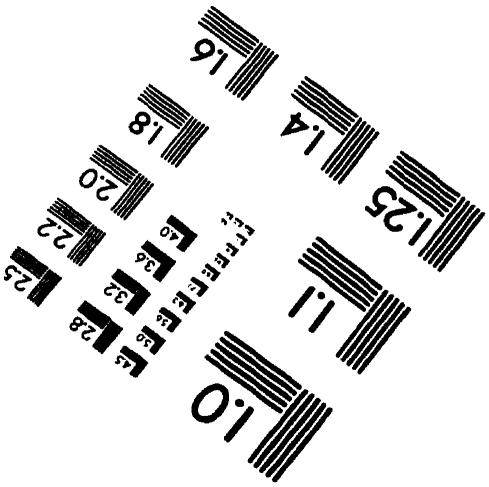

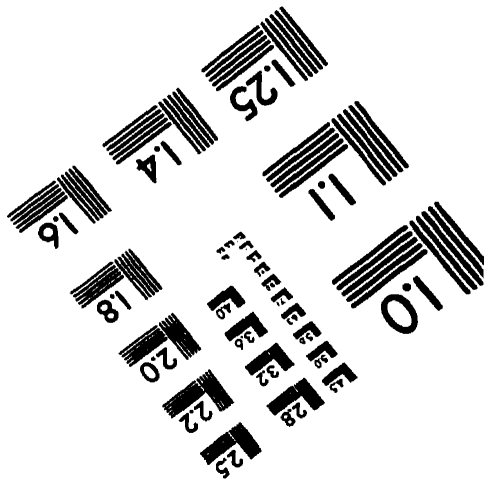

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