Conflicts of Laws in Private International Air Law

by

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Extrait

Conflits des lois en matière de droit privé international aérien

La thèse traite des problèmes de conflits de lois, et des développements récents, particulierement en Europe, en relation de transport international aérien.

1) Les rélations contractuelles sont analysées à la lumière des conventions internationales aériennes et d'un apercu de facon comparative des régles, nationals et conventionelles internationales, de conflits de lois applicables aux contrats. Dans les domaines ou les conventions internationales ne donnent pas la solution et ou qu'elles ne sont pas applicables, les solutions se trouvent par application des règles de conflits de lois.

2) Des problèmes de conflits de lois se produisent aussi dans l'interaction entre personnes (contrats, vente d'objets mobiliers, délits, transfer de proprieté—*res in transitu*, mariages, testaments) abord d'un aéronef en vol.

3) L'avion comme mobilier dispendieux et mobile pose des problèmes du point de vue des droits réels dans les conflits des lois.

4) Les accidents d'avions et les responsabilités délictuelles des personnes et des entités engagées tout autant que les obligations provenant de l'assistance et des opérations de sauvetage posent des problèmes de conflits des lois.

Abstract

Conflicts of Laws in Private International Air Law

The thesis deals with problems of conflict of laws and its latest developments, especially in Europe, in relation to international air transport.

1) The contractual situations connected with air transport are analysed in light of the applicable international air law conventions and of a comparative survey of the conflict of laws rules of some states and international conventions on conflict of laws concerning contracts. Where the international air law conventions do not supply the solution or where they are not applicable resort has to be made to the conflict of laws.

2) Conflict of laws also arises in the legal interaction (contracts, sale of goods, transfer of ownership—*res in transitu*, torts, marriages, wills etc) between persons onboard an aircraft in flight.

3)The aircraft as an expensive and highly mobile chattel poses problems from the rights *in rem* point of view in the conflict of laws.

4) Aircraft accidents and the tortious liability of persons and entities involved as well as obligations arising from assistance and rescue operations pose conflict of laws problems.

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Table of Contents

1. Introduction

1.1 Definition of the Problem Area

Conflicts of laws rules or private international law rules are a distinct body of domestic rules used by the courts to determine under the law of which nation state a case shall be treated. It may well happen that, after the use of such rules, the court finds that it is to apply the law of a state other than the state in which it sits. These rules are made to be applied to cases that have some international element, implying that the domestic laws of two or more states can be applied to the same case, to point out the law of, most often, one nation state which shall govern the issue at bar. Since the rules are part of each state's domestic legal system they vary from jurisdiction to jurisdiction—to the same extent as the substantial rules of different states vary. The differences in the substantive laws of different states makes it very interesting for the plaintiffs to search for and have applied the sustantive law that is most favourable to them, in respect of e.g. recoverable damages. Since the substantive law applicable to a case involving international elements will be pointed out by the conflict of laws rules of the forum to which the case has been submitted, the plaintiff will first investigate which forums are availabe to him and then which rules of conflict of laws that forum will probably apply to his case. He will then choose the forum that will, through the use of conflict of laws rules, apply the substantive law which is most favourable to him. Another important factor for the plaintiff is to find out whether the judgement delivered by the chosen court can be executed against the defendant, especially if the defendant has no property in the state where the court sits, the plaintiff will be interested in finding out if a judgement delivered by the chosen court will be recognized and accepted, as a title for execution in a state where the defendant has such property. This process is called forum shopping, i.e. the search for the forum which will most favourably treat the plaintiff's action.

In line with the above, private international law writings are often divided into three parts. The first dealing with jurisdiction, the second dealing with the applicable law, i.e. conflict of laws, and the third dealing

with the recognition of foreign judgements. In the present study we will only deal with the second aspect, the conflict of laws.

The title chosen might need some explanations. Apart from the title the problem dealt with here will be refered to as the conflict of laws. The use, in the title, of the term conflicts of laws is to underline that in the field under scrutiny here there is not merely one conflict between two or more laws but many; there are many areas where potential conflicts between laws may arise in international air transport.

Further the use of the term private international air law is made to distinguish the field dealt with here from public international law problems, international penal law problems and procedural and jurisdictional questions. In some legal systems the problem refered to here as the conflict of laws is called private international law. Therefore, we should explain the meaning of private international air law in this context It has been said by Shawcross & Beaumont that: "International air law cannot correctly be called Private International Law. But in fact the chief object which much of it was designed to effect, and which it has largely effected, is to put an end to the 'conflict of laws'."[1] In line with this it might be said that the body of international private law conventions that exist in the field of international air transport could be called private international air law as distinct from private international law proper (used as an equivalent to the term conflict of laws). Then the title of this work could be interpreted as meaning that we should only investigate the questions where there still exists conflicts of laws in the areas governed by private international air law conventions; searching for lacunae in these conventions. This is not so, however We will here deal with both the problems of conflict of laws raised by lacunae in the conventions for the unification of substative law in the field of international air transport and the problems of conflict of laws in the areas left untouched by unifying conventions. The term private international air law should therefore be interpreted to encompass all private law areas through which international air transport might "fly".

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[1] C.N. Shawcross and K.M. Beaumont, Air Law (London Butterworth, 1951) 23.

Our search for solutions will lead us to exploit also the areas where rules on conflict of laws have been unified through international conventions and as well domestic rules on conflict of laws.

1.2 Purpose of the Study

The purpose of the present study, which is not the first in this field,[2] is to uncover the questions related to international air commerce requiering to resort to the conflict of laws for finding the solution. This involves an investigation not only of legal relationships but also an investigation of the applicable international conventions, often aimed at unification of substantive law. Then the solution to the problem of which law shall apply to a certain legal relationship will be investigated in the light of the latest developments in the field of conflict of laws (private international law). The purpose can therefore (in short) be said to be to bring up to date the solutions to the conflict of laws problems posed by international air commerce.

Significant developments have taken place in the field of conflict of laws during the last few years. Especially the efforts made within the EEC to harmonize national sustantive rules and, more interesting, conflict of laws rules have made valuable contributions to the conflict of laws in relation to international air commerce. The enactment in Switzerland of a new Federal Statute on the conflict of laws, has also contributed. Generally, the interest in the conflict of laws has been hightend in relation to the integration work being undertaken in Europe. There are in fact as many legal systems as there are members in the EEC, and in spite of the common European cultural background they do differ a great deal. The biggest difference of course being between the written law, civil law, and the common law countries. But also as between the civil law countries there are differences. This can be

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[2] F. de Visscher, "*Les conflits de lois en matière de droit aérien*" (1934 II) 48 *Recueil des cours* 285.
H. Sand, Choice of Law in Contracts of International Carriage by Air (LLM Thesis, McGill University, Montreal, 1962).
M. Milde, "Conflicts of Laws in the Law of the Air" (1965) 11 McGill L J 221.
L. M. Bentivoglio, "Conflicts Problems in Air Law" (1966 III) 119 *Recueil des cours* 67.

compared with the situation in the U.S., where all states have their own legal system and all legal relations touching more than one state might cause conflict of laws problems. (The use of the word state will hereafter refere to nation states and not to diffeent parts of a nation state called states.)

1.3 The Disposition

In our effort to bring the solutions to the conflict of laws problems posed by international air commerce up to date we will touch upon many different areas of law. Because of their complexity and preponderant impact, the rules concerning contracts will be dealt with first. Chapter 2, will deal with the treatment of contracts in the conflict of laws generally. In Chapter 3, the contracts especially connected with air transport will be dealt with against this general background. Chapter 4, will deal with the problems posed by persons interacting onboard an aircraft in flight. Chapter 5, analyses the position of the real rights in aircraft in the conflict of laws. The final part of substance, Chapter 6, deals with torts, wrongs (delicts), and related issues in relation to aircraft accidents. A summary and a general conclusion is then provided in Chapter 7.

2. Contracts in the Conflict of Laws; Generalities

2.1 Introduction

There is a vast spectrum of contractual situations connected with air transport. The first that comes to mind is of course the contract of transport, or carriage, of passengers and cargo. But there are also other contractual situations involved here. There are contracts for the affreightment or hire of aircraft, contracts of agency, contracts of insurance, contracts of employment of the crew and contracts of aircraft purchase. Since contracts in the field of international air transport involve a plurality of international elements, conflict of laws rules are important for the parties in determining the law applicable to these contracts. Before dealing more specifically with these kinds of contracts we will look at the general rules of conflict of laws pertaining to contracts.

Conflict of laws related to contracts is one of the oldest topics in private international law.[3] In the early canonist doctrine of the 12th century contracts were said to be governed by the law of the place where they had been concluded; *locus regit actum*.[4] This *lex loci contractus* was said to govern all questions related to a contractual relation.[5] In the 15th century this standpoint was justified by the idea that the parties had consented to the application of this law,[6] by concluding the contract at this place, and later on it was even admitted that the parties could agree to the application of another law.[7] This gave birth to what, during the 19th century, came to be

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[3] Bentivoglio, supra, note 2 at 123.

[4] H. Battifol and P. Lagarde, *Droit International privé*, 7th ed. *Tome II* (Paris: 1983) 257.

[5] Ibid., at 258: "*Il n'est pas distingué apparemment à cette époque entre le fond et la forme.*"

[6] Ibid., at 259.

[7] Id.

called the autonomy of the will.[8] However, the *lex loci contractus* is still of relevance today as we shall see later.[9]

2.2 Parties' Choice of the Applicable Law

Today the private international law of most countries seems to accept the autonomy of the will or, put differently, the right of the parties to a contract to choose the law which they want to have applied to their contract.[10]

In *France* "la Cour de cassation" in its judgement delivered on 5 December 1910, *American Trading Company c. Quebec Steamship Company Limited,*[11] said that the law applicable to contracts, concerning both their form and their effects and conditions, is the law adopted by the parties.[12] The French civil code does not contain any rule on the subject.[13]

In the *Federal Republic of Germany* this principle has also been accepted.[14]

Under the laws of *England* this principle has been accepted since at least 1796.[15] But in the *U.S.* the original Restatement of the Conflict of Laws did

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[8] "*[C]'est l'origine du système qui a été appelé au XIXe siècle, sous l'influence peut être de la formule kantienne, 'l'autonomie de la volonté'.*" Id. .

[9] See, infra, Chapter 2.5.

[10] Report on The Convention on the Law Applicable to Contractual Obligations by Mario Giuliano and Paul Lagarde, Official Journal of the E.E.C. No. C 282, 31/10/80, 1 at 15 [hereafter Report on the Contract Convention].

[11] The judgement reproduced in [1912] *Journal du droit international privé* 1156. See reference in Batiffol & Lagarde, supra, note 4 at 260.

[12] Batiffol and Lagarde, supra, note 4 at 260.

[13] Ibid., at 261.

[14] U. Drobnig, American-German Private International Law, 2nd ed. (New York: Oceana, 1972) 225-232.

[15] Gienar v. Mieyer [1796], 2 Hy. Bl. 603.
See reference in G.C. Cheshire and P.M. North, Private International Law, 11th ed. (London: Butterworths, 1987) 451 [hereafter Cheshire].

not acknowledge any power in the parties to choose the applicable law.[16] This has, however, changed and today the parties are free to choose this law.[17]

In *Denmark*[18] and in *Sweden*[19] the parties' autonomy, or freedom, is also accepted, as it is in *Switzerland*.[20]

A number of international conventions are also based on this principle.[21] The most important, for our purposes in this chapter, is the *E.E.C. Convention on the Law Applicable to Contractual Obligations* (the Contract Convention)[22] which was opened for signature in Rome on June 19,1980.

The Convention is based on a draft convention presented to the Commission of the European Communities by the Benelux countries on 8 September 1967[23] to unify the rules of conflict of

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[16] RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS (St Paul: American Law Institute Publishers, 1971) 558 [hereafter RESTATEMENT]. See also Cheshire, ibid., at 449.

[17] RESTATEMENT, ibid., at §§ 186-187.

[18] O. Lando, *Kontraktstatuttet*, 3rd ed. (Copenhagen: Juristforbundets forlag, 1981) 99-109.

[19] *Skandia v. Riksgäldskontoret* (1937) *Nytt Juridiskt Arkiv* 1.
See also M. Bogdan, *Svensk internationell privat- och processrätt*, 3rd ed. (Malmoe: Liber, 1987) 205.

[20] Article 116 of the Swiss Federal Statute on Private International Law of December 18, 1987, see the English translation in (1989) 37 Am J Comp L 193 at 223 [hereafter Swiss Federal Statute].
See about Swiss law before the statute J.F. Aubert, "*Les contrats internationaux dans la doctrine et la jurisprudence suisses*" (1962) 51 *Revue critique de droit international privé* 19 at 33 -39.

[21] *Inter alia* Article 2 of the Hague Convention on the Law Applicable to International Sales of Goods of June 15, 1955 and Article 5 of the Hague Convention on the Law Applicable to Agency of March 14, 1966. About these two conventions see, infra, Chapter 3.3.2 and Chapter 4.

[22] Official Journal of the E.E.C. No. L 266, 09/10/80 p. 0001.

[23] For the background and main features of the Convention see P.M. North, "The E.E.C. Convention on the Law Applicable to Contractual Obligations (1980): Its History and Main Features" in P.M. North (ed.), Contract Conflicts (Amsterdam: North Holland Publishing Company, 1982) 3.

laws and thus fulfil one of the aims of the treaty of Rome establishing the E.E.C., namely to facilitate the workings of the common market through harmonization of legal conditions in the economic field.[24] This draft was extensively revised before it was signed in Rome on 19 June 1980.[25] The Convention is world wide in effect[26] but there are some limitations to its applicability.[27]

Paragraphs 1-2 of Article 3 of the *Contract Convention* reads as follows:

"1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part of the contract.
2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties."

Paragraph 1 of Article 3 needs little comment after what has been said above. It needs only to be noticed that the Contract Convention does allow *dépecage*, i.e. the applicability of different laws to different parts of the contract.[28]

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[24] Report on the Contract Convention, supra, note 10 at 4.

[25] Cheshire, supra, note 15 at 504.

[26] Article 2.

[27] Article 1, para. 2.

[28] Report on the Contract Convention, supra, note 10 at 17: "Nevertheless when the contract is severable the choice must be logically consistent, i. e. it must relate to elements in the contract which can be governed by different laws without giving rise to contradictions. ...Recourse must be had to Article 4 of the Convention if the chosen laws cannot be logically reconciled."
See Batiffol and Lagarde, supra, note 4 at 274-275 note 574 (7) for references to litterature pro and con *dépecage*. It seems that the *French* view is to allow *dépecage* in complex contracts and in contracts the elements of which are "*plurilocalisés*". Batiffol and Lagarde, ibid , at 274
The legality of *dépecage* is uncertain in the *U.S.*. RESTATEMENT, supra, note 16 § 187.

The second paragraph of Article 3 leaves the parties maximum freedom as to the time at which the choice of applicable law can be made. It may be made either at the time the contract is concluded or at an earlier or later date. The second sentence of this paragraph also allows the amendment of the law initially chosen by the parties.[29] However, the change shall not adversely affect the rights of third parties. This sentence also mentions the question of the formal validity of a contract which we will discuss further below.

2.3 Limitations on the Parties' Freedom

Nevertheless, the *Contract Convention* does limit the parties' freedom in Article 3 para. 3 which reads as follows:

"3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called 'mandatory rules'."

That rules of a mandatory character in the law governing the contract cannot be derrogated from is almost self-evident and an established principle in the conflict of laws.[30] But that the contract also shall be subject to the mandatory rules of a country to which all other elements—except the choice of law clause—relevant to the situation at *the time of the choice* point, is surprising.[31]

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[29] In *Germany, the Netherlands* and *France* this seems to be already accepted, while there is no clear authority on the subject in the laws of *England* and in *Italy* the choice can only be made at the time the contract is concluded. Report on the Contract Convention, supra, note 10 at 17-18.

[30] D. Jackson, "Mandatory Rules and Rules of 'ordre public'", in P.M. North (ed.), Contract Conflicts (Amsterdam: North Holland Publishing Company, 1982) 59 at 61.
See also concerning *France* Batiffol and Lagarde, supra, note 4 at 277-281.

[31] Further on the issue of the applicability of mandatory rules in the Convention see Jackson, ibid. and A. Philip, "Mandatory Rules, Public Law and Choice of Law", in P.M. North (ed.), Contract Conflicts (Amsterdam: North Holland Publishing Company, 1982) 81 and 95-97.

In *England* the choice must be *bona fide* and legal, and not against public policy. This was stated by Lord Wright in *Vita Food Products Inc v Unus Shipping Co Ltd.*[32] It is a well established principle in the conflict of laws, that the forum can refuse to apply a foreign legal rule that is incompatible with the *public policy,* or *ordre public* of the forum.[33] It can be found, *inter alia,* in the Contract Convention, Article 16.[34] However the *U.S.* seems to adhere to the principle that it is the *fundamental policy* of the state whose law would be applicable in the absence of a choice of law and not that of the forum state.[35]

It is, however, not free from ambiguity that the choice must be *bona fide* and legal . "What it presumably means is that the parties cannot pretend to contract under one law in order to validate an agreement that clearly has its closest connection with another law. If after having discovered that one particular provision was void under the proper law, they were to try to evade its consequences by claiming that the provision was subject to another legal system, their claim should not be considered as a *bona fide* expression of their intention".[36] This line of reasoning seems to be close to the principles underlying the concept of *fraude à la loi.*[37]

Further it seems that the English courts can strike down choice of law clauses that are totally unconnected with the contract[38] or meaningless, and

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[32] [1939] AC 277, [1939] 1 All ER 513. See reference in Cheshire, supra, note 15 at 453.

[33] Cheshire, supra, note 15 at 453.

[34] Supra, note 22:"The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ('ordre public') of the forum."

[35] RESTATEMENT,supra, note 16 § 187.

[36] See Cheshire, supra, note15 at 454.

[37] See concerning this issue Batiffol and Lagarde, supra, note 4 at 274-277.

[38] In the *U.S.* there is a requirement that there should exist a resonable basis for the parties' choice or a substatial relationship between the law of the chosen state and the parties or the transaction. RESTATEMENT, supra, note16 § 187. The *French* view seems to be to uphold some connection between the contract and the chosen law. "*Le lien en question doit en tout cas être entendu sans rigidté.*" Batiffol and Lagarde, supra, note 4 at 273.

that the parties cannot choose a "floating" proper law.[39] The freedom is also restricted under, inter alia, the Unfair Contract Terms Act 1977 and the Carriage of Goods by Sea Act 1971.[40]

2.4 Applicable Law in the Absence of Choice

Failing a choice of law by the parties, subsidiary rules are used to determine the law which shall govern the contract. The method used by the courts can be classified as either subjective or objective. The difference between the two was shown in the case *Amin Rasheed Shipping Corporation v. Kuwait Insurance Company*.[41] The subjective method can be characterized by the court trying to infer an intention of the parties by interpreting the contract and then exclusively give weight to the terms of the contract. While the objective method makes use of all of the connecting factors present and more weight will be given to purely objective factors, i.e. factors not showing any special intent of the parties, such as e.g. their residence,[42] both methods involve a weighing of factors and the scales will tip in favour of the law to which most, or the most important, factors point.

Under the laws of *England* the courts will determine whether there is an implied or inferred choice of law in the contract.[43] A choice of jurisdiction or an arbitration clause submitting disputes to a particular country is considered to be a powerful implication that also the law of the country chosen shall be applied.[44] Other factors of this kind are the parties' residence and nationality,

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[39] Cheshire, supra, note 15 at 454-455.

[40] Ibid., at 455 and 466-471.

[41] [1984] AC 50. See reference in Cheshire, supra, note 15 at 460.

[42] Cheshire, supra, note 15 at 461.

[43] Ibid., at 457.

[44] Id. See e.g. Tzortzis v. Monark Line A/B [1968] 1 WLR 406, where the contract showed its most real and substatial connection with Sweden but also provided for arbitration in England and thereby raised an irresistible inference which overrode all other factors. See reference in Cheshire, supra, note 15 at 458.

the terminology or language used, the form and style of the documents, the currency of payment and connected transactions.[45] This is clearly a subjective method but also an objective method exists.

The objective test has been used by the Court of Appeal where neither an express nor an implied intention could be established.[46] The proper law of the contract will then be the law by reference to which the contract was made or that with which the transaction has the closest and most real connection.[47] In ascertaining this law the court will look at all the circumstances of the case.[48] The search for the law applicable to contractual obligations in England can be said to be a multi-stage rocket; express choice, implied choice or the closest and most real connection.

In *France*[49] the proper law will be established, in the absence of a choice by the parties, by the weighing of factors connecting the contract to a special law. The connecting factors do, however, have different weight. First the factors are divided into two groups, intrinsic and extrinsic factors. Intrinsic are factors taken from within the contract, i.e. the same factors that the English courts use in applying the subjective method, while the extrinsic factors are found outside the contract, i.e. such factors that the English courts use in applying the objective method. The extrinsic factors carry greater weight than the intrinsic and there is also an internal hierarchy within the internal and external factors.[50]

German courts search for the hypothetical intention of the parties which in fact is the law of the country with which the contract is most closely

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[45] Cheshire, supra, note 15 at 459.

[46] The Assunzione [1954] P 150, [1954] 1 All ER 278. See reference in Cheshire, supra, note 15 at 462.

[47] Cheshire, supra, note 15 at 462.

[48] Ibid., at 465.

[49] Battifol and Lagarde, supra, note at 289-310.

[50] Ibid., at 310.

connected.[51] This does not, however, involve an attempt to find the supposed intentions of the parties but to evaluate, on an objective basis, the interests involved reasonably and equitably to find *the center of gravity* of the contractual relationship.[52] The typical elements implying a choice of law being: a jurisdiction or arbitration clause, the use of a standard form contract phrased in accordance with a particular legal system and the common behaviour of the parties in the courts.[53] Failing to establish a hypothetical intention of the parties the courts will, in sales contracts, split the contract and the obligations of each party is governed by the law of his habitual residence.[54] Other types of contracts are governed by the law of the country in which the party having to perform the characteristic performance of the contract has his place of business.[55]

In the *U.S.* the local law of the state which has the most significant relationship to the transaction and the parties will determine the rights and duties of the parties to a contract. Points of contact such as the place of contracting, the place of negotiation, the place of performance, the location of the subject matter of the contract and the domicile, residence, nationality, place of incorporation and place of business of the parties are used in establishing the most significant relationship.[56]

In *Sweden* the courts will use the "individualizing method" to find the law which has the strongest and most relevant connection with the contract.[57] Here they will use both intrinsic and extrinsic factors, greater

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[51] B. Von Hoffman, "Assessment of the E E.C. Convention from a German Point of View", in P.M. North (ed.), Contract Conflicts (Amsterdam: North Holland Publishing Company, 1982) 221 at 226.

[52] Report on the Contract Convention, supra, note 10 at 399 note 34.

[53] Von Hoffman, supra, note 51 at 224.

[54] Ibid., at 226 and Report on the Contract Convention, supra, note 10 at 19.

[55] Von Hoffman, supra, note 51 at 226.

[56] RESTATEMENT, supra, note 16 at § 188.

[57] Bogdan, supra, note 19 at 209 and (1937) *Nytt Juridiskt Arkiv* 1 at 11.

weight being given to extrinsic factors though.[58] If the court does not succede in individualising the contract it will use *in dubio*, or *prima facie*, rules which most often will point to the law of the country in which the party having to perform the characteristic performance has his residence or principal place of business.[59]

In the *Swiss*[60] Federal Statute the law of the state with which the contract has its closest connection is to govern in the absence of a choice of law. There is however a presumption that the law of the state where the party who is to render the performance that is characteristic of the contract has his habitual residence or his place of business, has the closest connection to the contractual relationship.[61] There are also provisions for special types of contracts.[62]

Article 4 para. 1 of the *Contract Convention* reads:

"To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has closer connection with another country may by way of exception be governed by the law of that other country."

The last sentence does, as the last sentence of Article 3 para. 1, allow *dépecage*, which means that not only can the parties themselves choose to have more than one law applied to their contract, but also the court can decide to treat severable parts of the contract separately.

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[58] Ibid., at 210.

[59] Ibid., at 211.

[60] See Aubert, supra, note 20 at 39-50.

[61] The Swiss Federal Statute, supra, note 20 Article 117.

[62] Ibid., Articles 118-121.

To find the law to which the contract is most closely connected the courts will look not only at the contract itself but also factors which supervened after the conclusion of the contract are to be taken into account.[63]

Article 4 para. 2[64] then states the presumption of the characteristic performance, as (we have seen above) a number of national laws do. In para. 3[65] and para. 4[66] it also sets special presumptions for contracts involving immovable property and contracts for the carriage of goods respectively. And in para. 5[67] it states that para. 2 does not apply when the characteristic performance can not be determined, then the law applicable has to be determined in accordance with para. 1. Moreover, that paragraph also provides for the possibility of disregarding the presumptions in paragraphs 2, 3 and 4 when all the circumstances show the contract to have closer connections with another country. Then the law of that other country applies.

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[63] Report on the Contract Convention, supra, note 10 at 20.

[64] "Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of the 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 or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated."

[65] "Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated."

[66] "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 in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods."

[67] "Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country."

2.5 Scope of the Applicable Law

The *Contract Convention*[68] states the scope of the applicable law in Article 10.[69] However, the list is not exhaustive, as indicated by the words "in particular". Shortly, one can say that all matters not explicitly governed by a special law are governed by the proper law of the contract.[70] It is thus more interesting to find what subjects are to be treated in accordance with a special law.

The *material validity*[71] of a contract is to be governed by the proper law. This law then governs issues such as legality, existence of consideration (or *cause*, especially in the French civil law) and the parties' consent and its defects.[72] Nevertheless, the existence of consent - and not its validity (mistake, misrepresentation, duress) – or whether the parties reached an agreement (whether silence is consent and other questions related to offer

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[68] See generally on the position of the Contract Convention in this respect P. Lagarde, "The Scope of the Applicable Law" in P.M. North (ed.), Contract Conflicts (Amsterdam: North Holland Publishing Company, 1982) 49.

[69] "1. The law applicable to a contract by virtue of Articles 3 to 6 and 12 of this Convention shall govern in particular:
(a) interpretation;
(b) performance;
(c) within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law;
(d) the various ways of extinguishing obligations, and prescription and limitation of actions;
(e) the consequences of nullity of the contract.
2. In relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place."

[70] Batiffol and Lagarde, supra, note 4 at 316.

[71] Article 8 of the Contract Convention, supra, note 22 reads:
"1. The existence of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid.
2. Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph."

[72] RESTATEMENT, supra, note 16 § 200: "The validity of a contract, in respects other than capacity and formalities, is determined by the law selected by application of the rules of §§ 187-188." I.e. the proper law.

and acceptance) might be judged by the laws of the parties' habitual residence in accordance with para. 2 of Article 8.[73] "Were these issues to be governed by the proper law of the alleged contract, the law of country A, Y would be bound despite the fact that he would not have been bound under the law of his social and legal environment. Such a result would seem to be unjust."[74] It is to be noticed that the law of the habitual residence may only be invoked for the purpose of showing that a party did *not* consent. Consequently, if only one of the parties wants to show this and the other does not, then this latter party's consent will be governed by the proper law of the contract, thereby para. 2 provides for the cumulative application of these two laws.

As far as *capacity* to contract is concerned the traditional civil law approach is to let this be governed by the national law of the party acting.[75] In *England* this issue has been said to be a matter of "speculation".[76] But in the *U.S.* also the local law of of the state of domicil of the parties is used alongside the proper law.[77] Article 11[78] of the *Contract Convention*[79] states

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[73] This does not seem to be the traditional view in *France*. See Batiffol and Lagarde, supra, note 4 at 316. In the *Swiss* Federal Staute, supra, note 20 Article 123, it is only the question if silence is consent that can be governed by this law. And in *England*, where this view seems to be a novelty, these questions appear to be governed by the law to which the contract naturally belongs, ascertained objectivly in the light of all the circumstances. See Cheshire, supra, note 15 at 472-473.

[74] Lagarde, supra, note 69 at 50.

[75] Ibid., at 51.

[76] "It is clear, at any rate, that the choice lies between the law of the domicil, the law of the place where the contract was made and the proper law in the objective sence." Cheshire, supra, note 15 at 480.

[77] RESTATEMENT, supra, note 16 § 198: "(1) The capacity of the parties to contract is determined by the law selected by application of the rules of §§ 187-188.
(2) The capacity of a party to contract will usually be upheld if he has such capacity under the local law of the state of his domicile."

[78] "In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence."

[79] Supra, note 22.

that a person may not invoke his incapacity under another law if he would have capacity under the law of the country where the contract is concluded, except where the other party was aware of, or at fault in ignoring this incapacity.[80]

The *formal validity* of a contract is dealt with by the Contract Convention[81] in Article 9.[82] This shows the tendency of *favor validitatis* present in most legal systems, by holding the contract valid if it fullfills either the requirements of the proper law or the *lex loci actus*.[83] Further, if a contract is concluded between persons in different countries it suffices if the contract is valid under the proper law or under the law of one of the countries involved.[84] Thus, we can see that the conflict principle *locus regit actum* is still alive.

If we then look at *performance*, the laws of some countries uphold the position that the law of the place of performance governs the modalities of this performance instead of the proper law.[85] The Contract Convention[86]

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[80] This is the *French* position. Lagarde, supra, note 69 at 51.

[81] Supra, note 22.

[82] "1. A contract concluded between persons who are in the same country is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of the country where it is concluded."

[83] Lagarde, supra, note 69 at 52. Report on the Contract Convention, supra, note 10 at 30 *England*, see Cheshire, supra, note 15 at 479. *France*, see Batiffol and Lagarde, supra, note 4 at 258, where the courts, however, seem more severe by requiering, for the application of the proper law, that the parties expressly have chosen to have this question governed by this law. Lagarde, supra, note 69 at 52. For the *U.S.*, see RESTATEMENT, supra, note 16 § 199 at 634. For *Sweden*, see Bogdan, supra, note 19 at 198. For *Switzerland*, see the Swiss Federal Statute, supra, note 20 Article 124.

[84] Article 9 para. 2: "A contract concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of one of those countries." See also the *Swiss* Federal Statute, supra note 20 Article 125 (2).

[85] See e.g. the *Swiss* Federal Statute, supra, note 20 Article 125, and, concerning *Sweden*, Bogdan, supra, note 19 at 196.

[86] Supra, note 22.

makes a division between "performance"[87] and the "manner of performance".[88] Within the latter category we find issues such as: "the money of payment, the hours during which delivery can be tendered, public holidays, the manner in which goods are to be examined, the steps to be taken if they are refused and the form in which, or the time by which, the consignee must protest after verification of the lack of conformity with the contract."[89] It will, however, be the courts seized that will interpret the words "manner of performance" in accordance with the *lex fori*,[90] in so far as the classification of legal matters is done in accordance with that law under the laws of the country of the forum.[91]

The Contract Convention,[92] in Article 10 para. 1 (c), also makes it possible for the *lex fori* to govern the calculation of *damages* in the event of a breach of contract.[93]

After trying to define the domaines where the proper law of the contract is not applicable we might say that all other matters pertaining to a contractual relation are governed by the proper law of the contract. Nevertheless, we will end this section with a few examples of the areas where the proper law

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[87] Ibid., Article 10 para. 1 (b).

[88] Ibid., Article 10 para. 2.

[89] Lagarde, supra, note 69 at 55. See also Report on the Contract Convention, supra, note 10 at 33.

[90] Report on the Contract Convention, supra, note 10 at 33.

[91] The problem of classification in the conflict of laws will not be dealt with here in any detail since it would lead to far. See M. Bogdan, "Aircraft Accidents in the Conflict of Laws" (1988 I) 208 *Recueil des Cours* 9 at 144-151.

[92] Supra, note 22.

[93] But if this issue is governed by a rule of law of the proper law then this law shall apply to the issue. This rule was introduced because in *England* the assessement of damages is a matter of procedure. The same problem exist regarding the matter of prescription and limitation of actions where the traditional common law view has been to regard these matters as procedural, governed by *lex fori*. The other European countries have, however, seen this as a matter for the proper law and this has also become the rule in the Contract Convention, supra, note 22 Article 10 para. 1 (d). Lagarde, supra, note 69 at 55.

is applicable: discharge,[94] interpretation, performance and consequences of non performance,[95] substantial validity, consequences of nullity, most questions concerning offer and acceptance, prescription and limitation of actions, cession and other changes, etc.

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[94] With the exception of the mode of payment.

[95] In the sense of: "the dilligence with which the obligation must be performed; conditions relating to the place and time of performance; the extent to which the obligation can be performed by a person other than the party liable; the conditions as to performance of the obligation both in general and in relation to certain categories of obligation (joint and several obligations, divisible and indivisible obligations, pecuniary obligations); where performance consists of the payment of a sum of money, the conditions relating to the discharge of the debtor who has made the payment, the receipt, etc." Report on the Contract Convention, supra, note 10 at 32.

3. Contracts Especially Connected with Air Transport

After the presentation of the treatment of contracts in the conflict of laws generally we have now to study the contractual situations especially connected with international air transport to discern if there are any differences. In this section we will, therefore, study the contracts of air transport (3.1), insurance (3.2), agency (3.3), employment of the crew (3.4), air charter (3.3) and aircraft purchase (3.5).

3.1 Contracts of Air Transport

To get a grip of and to define the applicable area of the conflict of laws to the contract of air transport is a complicated task. It is a contract to a large degree regulated by international conventions unifying the substantive laws on the issue for the states parties to the conventions. Further, through the cooperation between the airlines of the world within the I.A.T.A.,[96] the terms of this contract have been to a large extent unified and, *nota bene*, thereby predetermined by the airlines: a uniform standard contract. Also its status as a consumer contract, put under special regulations in many countries due to the unequality of bargaining power between the parties, adds to this picture.

3.1.1 The Unified Law of the Air

3.1.1.1 Introduction

Already at the advent of flying did the legal community recognize that with increasing interstate traffic there would be serious confusion due to the

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[96] The International Air Transport Association, the trade association of the world's scheduled (international) airlines. P.P.C. Haanappel, "The IATA Conditions of Contract and Carriage for Passengers and Baggage" (1974) 9 European Transport Law 650 at 650.

application of different private laws in the field of air transport.[97] This was pointed out in March 1922 by the Consultative and Technical Commission of Communications and Transit of the League of Nations.[98] Then, after an invitation by the French government, the First International Conference on Private Air Law was convened in Paris.[99] It worked from October 26 to November 4 1925 and was attended by 43 states.[100] At this conference a resolution was adopted which provided for the creation of the, now almost mythological, *Comité International Technique d'Experts Juridiques Aériens* (CITEJA). "The purpose of this body was to develop a comprehensive code of private international air law through the preparation of draft conventions which were referred for approval to diplomatic conferences."[101] The first session of the body was held from May 17 to 21, 1926.[102] A draft convention prepared at the same conference which created the CITEJA was later revised by CITEJA and presented to the Second International Conference on Private Air Law which was held in Warsaw in 1929.[103] This conference adopted a convention which has come to be known as the Warsaw Convention[104] and which entered into force on February 13, 1933.[105]

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97 See para. 2 of the preamble of the Warsaw Convention, infra, note 104.

98 G.F. FitzGerald, "The International Civil Aviation Organization and the Development of Conventions on International Air Law" (1978) III Annals of Air and Space Law 51 at 52.

99 N.M. Matte, Treatise on Air- Aeronautical Law (Toronto: Carswell, 1981) 378.

100 FitzGerald, supra, note 98 at 53.

101 Id.

102 Id.

103 Matte, supra, note 99 at 378.

104 *Convention pour l'unification de certaines règles relatives au transport aérien international (1929)*, the French language is the only official (authoritative) language of the Convention, Article 36. The official U.S. translation reads: Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention) 49 Stat. 3000; T.S. 876 (entered into force 13 February 1933).

105 Matte, supra, note 99 at 378.

The purpose of the Warsaw Conference was to make a convention for the unification of the substantive laws pertaining to international air transport[106] of the ratifying states, rather than to make strictly a conflict of laws convention. "Having recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier,"[107] states the preamble to the Convention. The Convention did not, however, manage to unify all rules in this area, as we shall see later.

Today the Warsaw Convention is still the most widely ratified and therefore the most important private air law convention, even though a series of amending and supplementing conventions have been produced over the years to adapt the Convention to modern day conditions.[108] This

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[106] See the definition of international transportation in Article 1 of the Warsaw Convention, supra, note104. "It is, I think, apparent from the subject-matter with which the Convention deals and from its contents that the removal of these difficulties by means of a uniform international code, to be applied by the Courts of the various countries adopting the Convention, is one, at any rate, of the main objects at which the Convention aims; and it is in my judgment essential to approach it with a proper appreciation of this circumstance in mind." L.J. Greene in Grein v. Imperial Airways Ltd. (1937) 1 K.B. 50.

[107] The Warsaw Convention, supra, note 104 preamble para. 2.

[108] Conventions *amending* the Warsaw Convention:
1. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 (Hague Protocol) ICAO Doc. 7632 (entered into force 1 August 1963).
2. 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 (Guatemala City Protocol, 1971) ICAO Doc. 8932 (not yet in force).
3. Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 (Montreal Protocol No. 1, 1975) ICAO Doc. 9145 (not yet in force).
4. Additional Protocol No. 2 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 September 1955 (Montreal Additional Protocol No. 2, 1975) ICAO Doc. 9146 (not yet in force).
5. Additional Protocol No. 3 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 Protocols Done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971 (Montreal Additional Protocol No. 3, 1975) ICAO Doc. 9147 (not yet in force).
6. 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 (Montreal Protocol No. 4, 1975) ICAO Doc. 9148 (not yet in force).

family of conventions have come to be called the "Warsaw system",[109] but it must be noticed that only two of these instruments have entered into force, apart from the original Warsaw Convention.[110]

3.1.1.2 An Incomplete Unification[111]

3.1.1.2.1 General Scope of the Unified Law of the Air

As is evident from the title, and what many authors[112] have underlined the Warsaw Convention is only a convention for the unification of *certain*[113] (*certaines*) substantive rules, relating to the documents of carriage and to the carriers liability, areas not covered by the unified rules are to be governed by

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Convention *supplementing* the Warsaw Convention:
1. 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 (Guadalajara Supplementary Convention, 1961) ICAO Doc. 8181 (entered into force 1 May 1964).

For a general presentation of the Conventions mentioned see M. Milde, "ICAO Work on the Modernization of the Warsaw System" (1989 No. 4/5) XIV Air Law 193.

[109] The Warsaw system refers to those international air law treatise which establish uniform rules regarding traffic documents, liability of the air carrier, notification of damages and jurisdiction. The main convention is the Warsaw Convetnion, supra, note 104. The remainder of the system consists of amendments and supplements to this convention, supra, note 108.

[110] The Hague Protocol and The Guadalajara Convention, supra, note 108. Milde, supra, note 108 at 198.

[111] For examples on the applicability of the Warsaw system see K.S. Cagle, "The Role of Choice of Law in Determining Damages for International Aviation Accidents" (1986) 51 JALC 953 at 959-966.

[112] Eg: Milde, supra, note 2 at 242. Bentivoglio, supra, note 2 at 128. Sand, supra, note 2 at 8.

[113] "The word 'certain' was chosen because the Convention cannot and would not deal with general principles of the private laws of contract which are different in civil law and in common law and differ from country to country and no state would change its law on that matter for the sole purpose of accomodating contracts for carriage by air." R.H. Mankiewicz, "From Warsaw to Montreal with Certain Intermediate Stops; Marginal Notes on the Warsaw System" (1989 No. 6) XIV Air Law 239 note *.

the principles of conflict of laws.[114] Yet, some conflict solving provisions are incorporated into the Convention, but that does in no way solve all potential conflicts.

Firstly, the scope of the Convention is limited by its own terms. Article 1 of the Convention[115] limits its scope to "international transportation". Following the definition[116] the carriage, to be international, must be—according to the contract of carriage—between two different countries both being parties to the Warsaw Convention (a one-way trip), or a round trip departing from and returing to a country party to the same Convention, even if it involves a stopping place in a country not party to the Convention. *A contario,* it follows that a one-way trip between two countries not parties to the Convention, or between one country party to it and another country not party to it is not "international" and therefore not regulated by the Convention. Further, that a carriage departing from and returning to a country (round trip) not party to the Convention is not subject to the Convention, even if it involves a stopping place in a country party to it.

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[114] de Visscher, supra, note 2 at 327.

[115] Supra, note 104: "1. This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.
2. For the purpose of this convention the expression 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.
3. Transportation to be perfomed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the soverignty, suzerainty, mandate or authority of the same High Contracting Party."

[116] Ibid., para. 2.

A special problem, related to the conflict of laws (or conflict of Conventions) issue, has arisen with the adoption of the Hague Protocol.[117] This protocol does in Chapter III ("Final Clauses") state that, as between the parties to the Hague protocol, the Warsaw Convention and the protocol shall be read and interpreted together as one single instrument to be known as the Warsaw Convention as amended at The Hague.[118] Further, that ratification[119] or adherence[120] to the Hague Protocol by a state that is not a party to the Warsaw Convention shall have the effect of adherence to the Warsaw Convention *as amended* by this protocol. "In order to avoid the trouble of going through two acts of ratification it would be simpler to provide that the ratification of the Protocol implies the ratification of the Convention. This solution would have the additional advantage of making the Convention rules applicable to a flight between a Protocol State and a Convention State because both States would be Parties to that Convention."[121] If this holds true then there would be no conflict of laws problems in exactly the mentioned case: carriage "between a Protocol State and a Convention State". Otherwise, a one way trip between two such countries would not be governed by the Warsaw Convention or the Hague Protocol, due to a lack of treaty relationship[122] between the two states required for the application of both conventions.[123]

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[117] Supra, note 108.

[118] Ibid., Article XIX.

[119] Ibid., Article XXI para. 2.

[120] Ibid., Article XXIII para. 2.

[121] Mankiewicz, supra, note 113 at 245.

[122] "This is of particular legal importance because in fact a new separate and distinct international instrument has been created which is binding only with respect to the parties thereto. States which become parties only to the Warsaw Convention as Amended at The Hague, 1955 have *no convention-based legal relationship* with those States which are parties only to the original Warsaw Convention." [Emphasis added] Milde, supra, note 108 at 197.

[123] The Warsaw Convention, supra, note 104 Article 1, and the Hague Protocol, supra, note 108 Articles I and XVIII.

Article 40 of the Vienna Convention on the Law of Treaties[124] has been invoked to support the drafters intention,[125] but that provision only (for our purposes) deals with the case where a state becomes a party to a convention after the entry into force of an amending agreement, and not with the case where the state becomes a party to the amending agreement but not to the original convention; the inverse situation. "For instance, it is submitted with great respect but also with some confidence, that the United States Supreme Court's decision in *Chan et al. v. Korean Air Lines Ltd.*[126] rested on the erroneous premise that in accepting the 1955 Hague Protocol through adherence, South Korea became not only party to the Warsaw-Hague Convention in accordance with Article XXIII(2) of the Protocol, but also a party to the unamended Warsaw Convention, thus rendering South Korea and the United States, which is not a party to the Warsaw-Hague Convention, to be '[a]t least with respect to the unamended portions of the Convention...parties to the same treaty',".[127]

Whatever the solution to this extremely intricate treaty-law problem may be it suffices for our purposes to acknowledge that there might be room for the conflict of laws for the solution of this problem, briefly presented above.

Parenthetically, it should be noticed that some courts in the United States have used conflict of laws rules to resolve conflicts between the two conventions. Even though the U.S. is not a party to the Hague Protocol the courts might render judgement on the basis of this protocol in cases brought before them, if the conflict of laws rules point to that Protocol. In one case, in which a horse transported from Canada to New Zealand (both parties to the Warsaw Convention and to the Hague Protocol) caught a disease while on

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[124] U.N. Doc. A/CONF. 39/27, 23 May 1969.

[125] G. Legier, "*L'application de la Convention de Varsovie par les jurisdictions américaines: présentation de la jurisprudence récente.*" (No. 3) 163 *Revue francaise de droit aérien* 251 at 253 note 9.

[126] 21 Avi 18,228. (US Supreme Court, April 18, 1989).

[127] B. Cheng, "What is Wrong With the 1975 Montreal Additional Protocol No. 3?" (1989 No. 6) XIV Air Law 220 at 223.

board the carrying aircraft, the Ninth Circuit Court of Appeals said: "Instead, we use the choice of law rules of California, the state in which this action was filed, to determine the applicable law. ... California applies the law of the place where a contract is to be performed, or, if a contract does not specify a place of performance, the law of the place where it was made. Cal. Civ. Code § 1646. The contract of carriage was performed by shipping Super Clint between two Hague Protocol countries and the Air Waybill covering his shipment indicates that the contract of carriage was made in Canada, a Hague Protocol country. We therfore apply the Warsaw Convention as amended by the Hague Protocol."[128] This course of action might be less open to criticism than the one dealt with above and, at any rate, it shows that conflict of laws rules can be of interest also in a case of forum shopping—even though the avoidance of this was one of the rationale for the unification of law in this field.[129]

Secondly, according to the second sentence of Article 1 paragraph 2, the Convention does not apply to purely domestic carriage or cabotage. This means carriage performed entirely (without any stopping place anywhere else) within the territory of a country party to the Convention (*petite* cabotage), or between two territories subject to the same contracting state's authority (*grande* cabotage). The change in the wording made by the Hague Protocol[130] does not change what has been said.

Thirdly, the Warsaw Convention[131] itself excludes some types of carriage from its scope of application. Exceptional carriage, such as experimental and

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[128] Nevelle R Stud v. Trans International Airlines 18 Avi 17,684 (US Fed. C. A. 9th Cir., March 8, 1984). See also The Bank of Nova Scotia v. Pan American World Airways Inc. 16 Avi. 17,378 (US Dist. C., S.D.N.Y., February 27, 1981), where the choice was less underlined since in the case at issue the the application of either convention would lead to the same result.

[129] It must be remembered that a court applying either Convention must have due regard of the forum provision in the Warsaw Convention, supra, note 104 Article 28, which was not changed by the Hague Protocol.

[130] "Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another state is not international carriage for the purposes of this convention." Hague Protocol, supra, note 108 Article 1 para. 2 second sentence.

[131] Supra, note 104.

other extraordinary carriage,[132] gratuitous carriage not performed by an "air transportation enterprise",[133] carriage by a state which has reserved itself from the application of Article 2[134] and carriage performed under the terms of any international postal convention.[135]

Fourthly, the liability provisions of the Convention only applies to the transportation by air of cargo,[136] and to passengers while on board or in the course of embarking or disembarking.[137]

In *conclusion* we must submit that the Warsaw Convention is not an all-covering international instrument and "the question as to which law applies to these groups of cases 'must (until some direct authority becomes available) depend on the general principles applicable to contract, torts, etc.' "[138]

3.1.1.2.2 Lacunae in the Warsaw Convention

Even if the Warsaw Convention would be found to be generally applicable there are a few areas to which the Convention does not extend, and there are a few problems to which the Convention does not supply the solution. These are often matters where solutions have to be provided through

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[132] Ibid., Article 34.

[133] Ibid., Article 1 para. 1 *a contrario.*

[134] Ibid., Additional Protocol to the Warsaw Convention (inserted after Article 41).

[135] Supra, note 104 Article 2 para. 2.
The Hague Protocol, supra, note 108 Article II, changed the wording of this Article: "This Convention shall not apply to carriage of mail and postal packages." The intention was to exclude carriage of mail even if it was not covered by any postal convention. L.B. Goldhirsch, The Warsaw Convention Annotated (Dordrecht: Martinus Nijhoff Publishers, 1988) 18.

[136] Supra, note 104 Article 18.

[137] Ibid., Article 17.

[138] Shawcross and Beaumont, supra, note 1 at 23.

interpretation, according to the *lex fori*, or through the use of general principles of conflict of laws.[139] It is of utmost importance to distinguish between cases of interpretation of the Convention and cases not regulated by the Convention.[140] It is submitted that only the latter cause problems of conflict of laws. This is so because rules of interpretation of statutes form part of the law of procedure of the forum, *lex fori*, and "[q]uestions of procedure shall be governed by the law of the court to which the case is submitted".[141]

a) Issues not Regulated by the Convention

It is obvious that the Warsaw Convention does not include rules pertaining to the existence and validity of the contract of carriage.[142] These are matters

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[139] de Visscher, supra, note 2 at 327: "*En réalité, comme l'indique son titre officiel lui-même, la Convention s'est bornée à régler certains points particulièrement urgents; d'autre part, dans les matières mêmes qu'elle traite, elle s'est gardée d'aborder certains problèmes de fond, où sa méthode d'unification se serait heurtée à des obstacles invincibles, et où la méthode des conflits de lois conserve par conséquent tous ses droits.*"

[140] M. Bogdan, "Conflict of Laws in Air Crash Cases: Remarks from a European's Perspective" (1988) 54 JALC 303 at 325-326, seems to hold, on the other hand, that *all issues* not regulated by the Convention should be regulated by *the conflict of laws* of the court seized of the case: "Nevertheless, there remain a number of important issues that are neither regulated by the Convention's above mentioned substantive rules nor covered by any of the Convention's references to lex fori. Of importance in air crash cases, for example, are the questions of who is entitled to claim damages in the case of a passenger's death, what types of injuries and damages are compensated (e.g. whether the emotional suffering is to be compensated) and how damages are computed (e.g. how much a lost finger is worth). While some believe that these matters should generally be regulated by the substantive rules of lex fori, others maintain that the legal system designated by conflict rules of the forum country should control. ...In fact, the opposite approach, favoring the application of the private international law of the forum, is preferable since it supports the general principle that the law of the country having the most relevant connection to the case should apply. Although national conflict rules may vary, they are generally based on this principle and would often be more conducive to uniformity of results than would a mechanical application of the substantive law of the forum country." See also Bogdan, supra, note 91 at 82-85.

R.H. Mankiewicz, The Liability Regime of the International Air Carrier (Antwerp: Kluwer, 1981) 3, holds that all questions not specifically dealt with by the Convention but within its ambit are to be dealt with by the *lex fori*. *A contrario*, we might submit that all questions *outside the ambit* of the Convention should be settled by the law chosen to govern the case by the courts conflict of laws rules.

[141] Warsaw Convention, supra, note 104 Article 28 para. 2.

[142] Sand, supra, note 2 at 8.

refered to above[143] as the formal and material validity of the contract and the parties' capacity to contract. The manner of performance, on the other hand, is dealt with by the Convention, but the issues of faulty performance (not giving rise to the application of the liability rules in the Convention) and non-performance[144] as well as cancellation of the contract,[145] liability of the passengers vis-à-vis the carrier and the passenger's non-compliance with express or implied instructions of the carrier are left out.[146] Important to note, further, is that the Convention does not deal with the format or language of the documents of carriage (with the exception of the air waybill; Articles 5 through 16), why they may take any form as long as the applicable law also is silent on the issue.[147] Nor does it provide for the mentioning of the parties to the contract (also here with the exception of the air waybill; Article 8),[148] or the negotiability of the ticket[149] and air waybill.[150]

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[143] Supra, Chapter 2.5.

[144] Mankiewicz, supra, note 140 at 14: "Indeed, damage caused by non-execution or faulty performance of the contract is different, and may not result from the death, wounding or other bodily injury of the passenger (art. 17), from destruction or loss of, or damage to, any registered baggage or cargo (art. 18) or from delay (art. 19), for which the Convention provides exclusive coverage. ...Moreover, the former may have been caused by an event or act that occured or was committed outside the time periods prescribed by Articles 17 and 18 (2). Recovery for it is clearly outside the scope of the Convention. On the other side if such damage is in fact identical with damage contemplated in Articles 17 to 19, its recovery is subject to the conditions and limits of the Convention by virtue of Article 24 (1)."

[145] Id.

[146] Ibid., at 15.
See also O.N. Sadikov, Conflicts of Laws in International Transport Law" (1985 I) 190 *Recueil des cours* 189 at 243.

[147] Mankiewicz,supra, note 140 at 55.

[148] Ibid., at 58.

[149] The I.A.T.A. conditions of carriage of March 1988 Article III (d) states that a ticket is not transferable.

[150] Hague Protocol, supra, note 108 Article IX, states: "Nothing in this Convention prevents the issue of a negotiable air waybill."

An interesting provision in the Warsaw Convention is Article 33[151] from which it can be deduced that the carrier might be prevented from refusing to enter into a contract of transportation by domestic law[152] and, further, that the same law might put restrictions on the carrier when making its own regulations.[153] Which law constitutes this "domestic law" has to be decided according to the principles of conflict of laws, but intricate *ordre public* problems might arise in this context.[154]

Also intimately related areas such as insurance and agency were not the object of the uniform regulation.[155]

b) Problems of Interpretation

Of course, one of the problems with an international convention for the unification of substantive law is that of uniformity of interpretation.[156] A convention of this kind, such as Warsaw, is to be used and interpreted by the courts of the countries adhering to the convention[157] as if it was just another law of the *lex fori*.[158] These problems are not really of interest for a conflict of

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[151] Supra, note 104: "Nothing in this convention shall prevent the carrier either from refusing to enter into any contract of transportation or from making regulations which do not conflict with the provisions of this convention."

[152] Goldhirsch, supra, note 135 at 175: "For example, in England the Race Relations Act, Section, 20, prohibits discrimination on racial grounds. The U.S. Federal Aviation Act prohibits discrimination in air travel in all respects, not merely racial grounds."

[153] Haanappel, supra, note 97 at 658.

[154] See further, infra, Chapter 3.1.2.

[155] See about these contracts, infra, Chapter 3.2 and Chapter 3.3.2.

[156] See Mankiewicz, supra, note 140 at 20-26, for a survey of different standards of interpretation.

[157] The problems related to the transformation of the Convention into national laws is not dealt with here. See Sand, supra, note 2 at 16-26.

[158] "*C'est ainsi que, soit sur les questions intéressant l'ordre public international, soit sur des questions de détail secondaires, il a été laissé au juge saisi tout latitude d'appliquer sa loi nationale.*" Blanc, Y. -J., "*La portée d'application des lois nationales dans les premières conventions internationales de droit privé aérien*" (1936) 5 *RGDA* 386 at 386.

laws survey, since it is by the national judges, exercising their duties within their own legal environment under the norms in force there, that the interpretation is to be made[159] and not by the norms of any other country made applicable through intervention of the conflict rules of the *lex fori*.[160] Another question is how uniformity can be upheld in such a situation.[161]

Examples of this are the definition of bodily injury in Article 17,[162] [163] the interpretation of Article 3,[164] the meaning of delay in Article 19[165] and the definition of wilful misconduct in Article 25.[166]

"The Warsaw Convention does not contain provisions for its interpretation; therefore each national court is bound to apply its own rule of interpretation in defining the meaning and significance of the word *dommage*. . ." Mankiewicz, supra, note 140 at 18, citing the case *Surprenant v. Air Canada* [1973] *Recueil des décisions de la Cour d'Appel* (CA Quebec) 107.

[159] "The Convention is now part of the federal law of this country. Absent some explicit provision to the contrary, therefore, it should be interpreted in light of and according to that law." Husserl v. Swissair 13 Avi 17,603 (US Dist. C., S.D.N.Y., February 10, 1975).

[160] "The question that divides this House is whether, in interpreting Article 26, it is legitimate to have recourse to the official minutes of the Hague Conference of 1955 at which the protocol to the Warsaw Convention of 1929 was agreed. This, as it seems to me, raises a question of constitutional significance as to the functions of courts of justice as interpreters of written law that is in force in the United Kingdom." Lord Diplock in Fothergill v. Monarch Airlines Ltd. (1980) 3 WLR 209 (H.L.).

For an in-depth study of differences in interpretation between the municipal courts of different Warsaw countries see G. Miller, Liability in International Air Transport; The Warsaw System in Municipal Courts (Deventer: Kluwer, 1977)

[161] According to J.W.F. Sundberg, "A Uniform Interpretation of Uniform Law" (1966) 10 Scandinavian Studies in Law 219 at 224, "[t]he method by which a treaty is made binding upon national courts and agencies has a definite relationship to the ways in which it can be interpreted." To maintain uniformity he advocates that the interpretation of a treaty term should be made according to the foreign legal meaning which the legislature had in mind. And that this can be achieved if the courts allow decisions from other jurisdictions to have persuasive authority.
In Fothergill v. Monarch Airlines Ltd. (1980) 3 WLR 209 (H.L.) Lord Wilberforce said that an interpretation of the Carriage by Air Act 1961, implementing the provisions of the Warsaw Convention as amended at The Hague, had to involve: "1. Interpretation of the English text, according to the principles upon which international conventions are to be interpreted. 2. Interpretation of the French text according to the same principles but with additional linguistic problems. 3. Comparison of these meanings."

[162] See for a case survey Goldhirsch, supra, note 135 at 58-60. See also Mankiewicz, supra, note 113 at 255.

[163] For a very thorough interpretation of Article 17 see Floyd v. Eastern Airlines Inc. 21 Avi 18,401 (US Fed. C.A. 11 Cir. May 5, 1989) at 18,407-18,415: "After careful consideration of the

3.1.1.2.3 Conflict Rules in the Warsaw Convention

On some issues the Warsaw Convention[167] itself gives references to the *lex fori* of the court seized of the case in accordance with the forum provision in Article 28 para. 1. These are: the interpretation and effect of contributory negligence,[168] whether damages may be awarded periodically,[169] what constitutes fault equivalent to wilful misconduct,[170] questions of procedure[171] and the method of calculating the period of limitation.[172]

However, in Article 24 para. 2 the Warsaw Convention does not refer the issue of who are the persons that have the right to bring suit and what their respective rights are to the *lex fori*. This issue then has to be settled through the rules of the conflict of laws.[173]

French legal meaning of the treaty terms, the concurrent and subsequent legislative history and conduct of the parties, the case law and the policies underlying the Warsaw Convention, we are persuaded that Article 17 provides recovery for purely mental injuries unaccompanied by physical trauma."

[164] Goldhirsch, supra, note 135 at 23-28.

[165] Ibid., at 75-84.

[166] Ibid., at 119-128.

[167] Supra, note 104.

[168] Ibid., Article 21.

[169] Ibid., Article 22.

[170] Ibid., Article 25.

[171] Ibid., Article 28 (2).

[172] Ibid., Article 29 (2).

[173] In Re Air Crash Disaster at Malaga 19 Avi 18,086, the court held that the laws of the claimants' domicile gave them the right to maintain suit without the necessity of having a personal representative appointed.

On the other hand de Visscher, supra, note 2 at 333: "*En ce qui concerne les personnes qui peuvent agir en cas de décès, la loi nationale du défunt semble le plus naturellement compétente.*"

3.1.2 The Contractual Situation

In view of the applicability of the Warsaw Convention we can conclude that the contractual situation will be different in cases of carriage under the said Convention (Warsaw carriage) and cases not under that Convention (non-Warsaw carriage). The Warsaw Convention provides mandatory rules[174] or, as said by Greene, "[t]he 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 the language appropriate to the legal systems of the United Kingdom) they become statutory terms."[175] And, as we have seen before, mandatory rules may not be derrogated from by contract.[176] Nevertheless, in cases where the Warsaw Convention is inapplicable (non-Warsaw Carriage) it's rules may, in principle, be derrogated from by contract. If however the rules of the Convention has been incorporated into the contract by reference ("Warsaw Clauses"[177]), or if the country, the law of which is applicable to the contract, has enacted the Warsaw Convention as the law of the land applicable to all air carriage ("Warsaw Acts"[178]) then its rules will still govern the contract.

In Re Paris Air Crash Disaster of March 3, 1974 (1975) 399 Fed. supp. 732 (D.C. Cal. 1975) the court used the 'most significant contacts' test to find the law of the jurisdiction which had the most interest in the issue.

[174] Bentivoglio, supra, note 2 at 132.

[175] Grein v. Imperial Airways, Ltd. (1937) 1 K.B. 50.

[176] "The new convention substantially modified carriers' legal position insofar as it restricted the contractual freedom which they had hitherto enjoyed in many jurisdictions." J.G. Gazdik, "Uniform Air Transport Documents and Conditions of Contract" (1952) XIX JALC 184 at 184. The first sentence of Article 32 of the Warsaw Convention, supra, note 104, reads: "Any clause contained in the contract and all special agreements entered into before the damage occured by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void."

[177] J.W.F. Sundberg, Air Charter (Stockholm: P.A. Norstedt & söner, 1961) 242.

[178] Id.

Through the I.A.T.A., the airlines of the world have developed a standard set of conditions to be inserted into the contracts of air transport entered into by its member airlines.[179] These conditions are called *conditions of contract* and *conditions of carriage.* The latter are the conditions and terms upon which a carrier accepts passengers, baggage and cargo for transportation and the former represents the abstract of the conditions of carriage printed on the transportation document.[180] The conditions of carriage are not binding[181] upon the airlines while the conditions of contract are.[182] Besides these conditions the carriers do adopt regulations specific for each airline and incorporate these (often through reference) into the air transport document. These conditions constitute the substance of the contract of air transport. A hierarchy of norms is established by Article II paragraphs 4 and 5 of the conditions of carriage.[183] It follows that the Warsaw Convention and imperative rules of any applicable laws, government regulations, orders or requirements invalidates any provision in the conditions of carriage that is contrary to such a norm.[184] Further, that the conditions of carriage take precedence over the carrier's own regulations, but that applicable tariffs in force in the U.S. or Canada prevails over these conditions.[185]

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[179] See generally Gazdik, supra note 176.

[180] Haanappel, supra, note 97 at 650.

[181] They have the status of Recommended Practice, the latest edition being of March 1988.

[182] They have the status of a Traffic Conference Resolution; Res. 275 B (for passengers and baggage).

[183] General Conditions of Carriage, issued March 1988.

[184] See for the older rule J.G. Gazdik, "The New Contract Between Air Carriers and Passengers" (1957) XXIV JALC 151 at 157.

[185] "Perhaps the best existing method to protect the air passenger is the method followed by the American and Canadian legislators. The *tariff system* in force in those countries, requires prior administrative approval of the so-called *rules tariffs* of the carrier by the competent aeronautical authorities. The IATA conditions of contract and carriage have to be incorporated into these rules tariffs. ...When approved, these rules tariffs become part of the contract of carriage between the passenger and the airlines, and as such, they are binding on all parties irrespective of actual knowledge." Haanappel, supra, note 97 at 658. See also Gazdik, supra, note 176 at 193-197.

A very important fact in this context is that the contract of air transport is an *adhesion contract,*[186] a kind of standard contract. The terms of it are, as we have seen, lagely predetermined by the air lines through the I.A.T.A. and "[t]herefore 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."[187] Only some minor particulars such as the places of departure and destination, the fare, class of service, etc. are left open. At least the contract of air transport of passengers is, furthermore, a *consumer* adhesion contract and thus subject to government regulations,[188] since the passenger is usually not an experienced businessman but a private citizen.

3.1.3 The Conflict of Laws Situation

As we have seen there are situations to which the Warsaw Convention does not apply. Either to situations falling outside its scope altogether or to situations not regulated by that Convention. In these cases it is necessary to find the applicable law through the rules of the conflict of laws.[189]

In this context we must take the problem of classification, (*qualification*), into consideration, i.e. under what rules of conlict of laws the problem under scrutiny shall be determined. For example whether the question is one of

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[186] "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." Haanappel, supra, note 97 at 652.

[187] Ibid., at 652.

[188] M. Bogdan, Travel Agency in Comparative and Private International Law (Lund: Juridiska Föreningen, Studentlitteratur, 1976) 151.

[189] "*L'application de la Convention de Varsovie n'exclut, cependant, pas la nécessité de poser des règles de conflit, étant donné que cette Convention n'embrasse pas tous les Etats appartenant à la communauté internationale d'une part, et que d'autre part ses dispositions n'épuisent pas tout les problèmes de la matière dont nous occupons.*" (1959) 48-I *Annuaire de l'Institut de Droit International* at 385.

tort, falling under the conflict rules of tort, or one of contract, falling under the conflict rules of contracts. As to matters such as material and formal validity there should be no doubt that they are contractual in nature, but when we consider cases of death or wounding of passengers or damage to or loss of baggage, hand baggage or cargo this distinction becomes crucial since it can be both a breach of the contract or a delict.[190] For the plaintiffs this is of great importance since the recoverable damages differ,[191] as do rules as to who has the right to bring action[192] and the legality of limitation or exclusion clauses.[193] The Warsaw Convention does govern these issues, the latter two in Articles 24 (2) and 22 and 23 respectivly, and the former in Articles 17 and 19. The former issue is however one of interpretation of the Convention[194] and not one settled directly by the Convention. But outside the Convention this distinction is of the utmost importance from the conflict of laws point of view, since different conflict rules apply to contractual and delictual actions.[195]

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[190] "Many serious gaps of the Warsaw Convention—such as e.g. the determination of the parties entitled to sue—will not be, however, filled by the determination of the 'proper law of the contract' the scope of which is limited." Milde, supra, note 2 at 247.

[191] "Recovery under contract generally comprises compensation for all actual or future expenditures incurred by or on behalf of the injured person, *i.e.*, in the common law language: liquidated or special damages, and *dommages matériels* in civil law terms. ...'Indirect damages' are recoverable only if they are not too remote."..."In contrast, *recovery in tort* may be limited to specific kinds of damages. Compensation for suffering, mere nervous shock, etc., that is to say 'general damages', which are known in civil law countries as *dommages moral*, are often but not always granted." Mankiewicz, supra, note 140 at 165.

[192] Under *French law* every contract contains an implied *stipulation pour autrui*, meaning that the relatives of a passenger killed in an accident takes over the right to sue on the contract from the deceased. Mankiewicz, supra, note 140 at 160. While it at *common law* does not exist any cause of action in these cases (i.e the relatives cannot sue on behalf of the deceased), why such a cause has to be provided by statute. Miller, supra, note 161 at 226.
See also M. Pourcelet, *Transport Aérien International et Responsabilité* (Montréal: Les Presses de l'Universtié de Montréal, 1964) 189-210.

[193] In France "the *ordre public* character of rules of delictual liability makes such clauses null and void." Miller, supra, note 161 at 237.

[194] See cases on this issue in Goldhirsch, supra, note 135 at 58-59. See also Mankiewicz, supra, note 140 at 155-160.

[195] "*S'il y a responsabilité contractuelle, ce sera la loi du contrat qui sera compétente, c'est-à-dire, normalement, la loi du principal établissement du transporteur. ...Si le tribunal estime qu'il y a responsabilité délictuelle, ce sera, suivant les règles ordinaires, la lex loci, la loi du pays où le fait dommageable se sera produit.*" de Visscher, supra, note 2 at 334.

There has, moreover, been a long discussion on this issue in relation to Article 24 (2); whether the Convention creates a "cause of action" or not.[196] This depended[197] largely upon the issue whether the system of liability in the Convention was to be looked upon as being based on delict or contract.[198] Therefore, the question that presents itself, also in this case, is whether actions brought outside the Convention's general scope are contractual or delictual in nature.[199] This is, ultimately, from the conflict of laws point of view, a question to be settled through classification by the court seized of the case, through the rules of classification used by that court,[200] before the proper conflict of laws rule can be chosen. [201]

The problem of what law to apply to cases outside the Warsaw Convention was discussed by *l'Institut de Droit International.*[202] There it was said that the question of classification and the so-called preliminary question

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[196] See Mankiewicz, supra, note 140 at 160-166. Miller, supra, note 161 at 224-247. G.N. Calkins, "The Cause of Action under the Warsaw Convention" (1959) 26 JALC 217 (part I) and 323 (part II).

[197] See for a case review Floyd v. Eastern Airlines Inc. 21 Avi 18,401 (US Fed. C. A. 11th Cir., May 5, 1989) at 18,406-18,407.

[198] Pourcelet, supra, note 192 at 179-188.

[199] For the civil law countries the liability is contractual while it in the common law countries the issue is less clear. "By the Carriage by Air Act, 1932, as amended, the British appear to have eliminated the difficulties latent in an action for the death of a passenger where liability is both contractual and delictual." The act "changed the rule of conflict of law". Calkins, supra, note 196 (part II) at 324.

[200] See generally on the problem of classification (*qualification*) *inter alia* Batiffol and Lagarde, supra, note 4 at 338-351 and Cheshire, supra, note 15 at 43-52.

[201] "*Il est à observer que la question de savoir s'il y a obligation contractuelle ou délictuelle est incontestablement une question de qualification. C'est donc une question préalable à la mise en jeu des règles de conflits de loi. ...Or, suivant que la loi du for considère qu'il y a responsabilité délictuelle ou contractuelle, les règles usuelles de conflit des lois désigneront des lois radicalement différentes.*" de Visscher, supra, note 2 at 334.

[202] (1959) 48-I *Annuaire de l'Institut de Droit International* at 385, 407, 422 and 470. (1963) 50-II *Annuaire de l'Institut de Droit International* at 203 and 250.

were left to the general principles of private international law.[203] Consequently, their solution to what law to apply to the *contract of transportation* only applies if the classification process shows the problem to be contractual.[204] In section 5 of its 1963 resolution *l'Institut de Droit International* adopted the following conflict rule:

"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."[205]

First, we see that the parties' freedom to choose the applicable law in contracts of air transport was maintained as it is in ordinary contracts. This is also the possition taken in the *U.S.*,[206] and no special rules were given in the *Contract Convention*. The I.A.T.A. conditions of carriage of 1931 did contain a choice of law clause,[207] but today there is no such clause.

Since the contract of air transport, through the unifying work of the I.A.T.A., is an adhesion contract and, at least as far as the carriage of passengers and their baggage is concerned, a consumer contract such a unilateral choice of law would probably run counter to the public policy, *ordre public*, or imperative rules of many states.[208] Interestingly enough

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[203] *"Il n'est pas, à mon avis, nécessaire de régler dans notre projet quelques questions spéciales qui sont ou bien des questions préalables (par example la détermination de l'ayant-droit d'intenter une action en responsabilité après le décès d'un voyageur) ou des questions de qualification (par example le problème de la nature contractuelle ou délictuelle de l'action de cet ayant droit), ces questions devant être réglées par les dispositions générales du droit international privé."* (1959) 48-I *Annuaire de l'Institut de Droit International* at 422.

[204] For the view of *inter alia* Soviet law see Sadikov, supra, note 146 at 244.

[205] (1963) 50-II *Annuaire de l'Institut de Droit International* at 374.

[206] RESTATEMENT, supra, note 16 § 197.

[207] Article 22 para. 4 (1) of these conditions called for the application of the *lex fori* of the court of the carriers principal place of business. Milde, supra, note 2 at 244.

[208] Milde, supra, note 2 at 244. Bogdan, supra, note 188 at 131. The *Swiss* Federal Statute, supra, note 20 Article 120 para. 2: "A choice of law [by the parties] is prohibited."

contracts of carriage have been explicitly excluded from the Article dealing with consumer contracts in the *Contract Convention*.[209] Nevertheless, that Convention does provide for the application of other forms of protection.[210] A very interesting feature of this Convention is, however, that it makes a distinction between contracts for scheduled air carriage and non-scheduled, inclusive charter, carriage. Article 5 para. 5 reads:

"Notwithstanding the provisions of paragraph 4, this Article shall apply to a contract which, for an inclusive price, provides for a combination of travel and accomodation."

Therefore, in the case of a contract for a so-called "package tour" the contract is regarded as a consumer contract governed by Article 5. That Article paras. 2 and 3 acknowledges the parties' freedom to choose the applicable law only under certain circumstances,[211] and provides for the subsidiary application of the law of *the consumer's habitual residence* under the same circumstances.[212]

See also O. Lando, "Consumer Contracts and Party Autonomy in the Conflict of Laws" in Mélanges de droit comparé en l'honneur du doyen Åke Malmström (Stockholm: Norstedts, 1978) 141 at 151-152: "The freedom of the parties to choose the applicable law will, as mentioned above, depend upon a weighing of interests: on one hand, the interests of the society demand tha application of its protective mandatory rules. This interest is the stronger and the worthier of consideration the more the contract in question is regulated by mandatory requirements, and the more closely it is connected with the country concerned. It is generally stronger in consumers contracts than in commercial contracts. On the other hand, the interests of international trade call for a certain freedom."

209 Supra, note 22 Article 5 para. 4 (a).

210 Supra, Chapter 2.3.

211 "2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:
-if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
-if the other party or his agent received the consumer's order in that country, or
-if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy."

212 "3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the

In the American case *Fricke v. Isbrandtsen Co.*[213] the District Court of New York held that a unilaterally imposed choice of law provision in a contract of carriage by boat should not be enforced unless the party urging enforcement provided the other party, illiterate in the language of the contract, with knowledge of what was intended.

Suffice it to say that even if the parties are free to choose the law applicable to consumer contracts (with the exception of the law of Switzerland) the public policy of the court seized or the imperative rules of the *lex causae* might render such a clause invalid for consumer protection purposes.[214]

Secondly, the law to be applied in the absence of choice was proposed to be the law of the *principal place of business of the carrier.*[215] During the discussions preceding the *Contract Convention* relating to the contract of carriage of passengers, two different views were put forward.[216] Some delegations favoured the application of the law most closely connected with the contract, i.e. the application of the rule in Article 4 para. 1.[217] Others opted for the application of the rule embodied in that Article's second paragraph,[218] that of the characteristic performance, arguing that otherwise the result would be the application of several laws to passengers on the same

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country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article."

213 (1957) 151 Fed. Supp. 465.

214 "The contractual clauses should normally be accepted and applied by the courts, provided that they have really been recognized by the consumer (traveller) at the time of the conclusion of the contract and that they are not exorbitant. ...It is thus submitted that the party autonomy should normally be allowed also in travel contracts of consumer nature." Bogdan, supra, note 188 at 136.

215 Milde, supra, note 2 at 245 with further references, counted that at least six laws had been contemplated by the doctrine.

216 Report on the Contract Convention, supra, note 10 at 22.

217 Id.

218 Id.

journey. This is also the position taken by Milde: "Several 'policy requirements' may be conceived in this connection; the basis of them seems to be to apply such law which would fistly have a real connexion with the given contract of carriage and the application of which would be reasonably forseeable by the parties concerned and, secondly, a law which would guarantee that all persons and goods on board the same aircraft would be subject to the same law."[219]

The solution finally adopted in the *Contract Convention* is to apply the presumption in Article 4 para. 2,[220] i.e. the law of the place where the party having to effect the characteristic performance of the contract has his principal place of business, if the contract is entered into in the course of that party's trade or profession. However, "package tours" are treated differently, as we have seen above, and a special rule applies to the carriage of goods.[221]

The *American* solution is slightly different.[222] The contract shall be governed, in the absence of choice, by the "local law of the state from which the passenger departs or the goods are dispatched, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the contract and to the parties, in which event the local law of the other state will be applied."[223]

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[219] Milde, supra, note 2 at 245.

[220] The Contract Convention, supra, note 22.

[221] Ibid., Article 4 para. 4, reads: "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 in which the place of loading or the pace of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods."

[222] We will only consider the RESTATEMENT, supra, note 16.
See Mankiewicz, supra, note 140 at 4-5 for cases from different states of the U.S. pertaining to this issue.

[223] RESTATEMENT, ibid., § 197.

French courts has applied the law of the place where the contract was made.[224] And a *German* court has applied the center of gravity method.[225]

3.1.4 Concluding Remarks

This survey of the law applicable to the contract of carriage by air has involved a lot of different aspects and it is usefull to recapitulate some of them. The Warsaw Convention unifies only certain areas of the contract of air carriage namely the documents and the liability of the carrier. Therefore, the conflict of laws rules applies to the following issues; the question of existence of consent (the law of the parties' places of habitual residence), the question of legal capacity, (the national law of the party acting), the question of formal validity—the Convention does not regulate the format, language and only some particulars have to be mentioned—(either the proper law of the contract or *lex loci actus*) and the manner of performance (the law of the place of performance[226]). While other issues, such as the material validity (except the existence of consent), consequences of faulty performance (outside the liability rules of the Convention), non-performance, non-compliance with the carriers' regulations and nullity, cancellation, negotiability, interpretation, discharge and substantial validity are to be governed by the proper law of the contract.

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[224] In *S.A.S. c. Cie Lafortune* (1972) *RFDA* 49 (Paris Court of Appeals February 3, 1971), because the contract was made in France and did not indicate any other intention of the parties, and in *UTA c. Blain* (1977) *RFDA* 181 (Paris Court of Appeals January 6, 1977) because, since the carriage originated in France, the contract was concluded in France and the air waybill had been issued by a French carrier it was assumed that the parties intended to have the law of France applied to their contract. Mankiewicz, supra, note 140 at 4.

[225] Munich Court of Appeals 3 February 1977, (1977) *ZLW* 157. Mankiewicz, supra, note 140 at 4.

[226] This rule does cause problems when performance is to take place in mid-air over the territories of many different countries, where the "place of performance" is hard to establish. It is submitted by Bogdan, supra, note 188 at 165, that the manner of performance is to be governed by the law of the carrier. Meaning that it is the law applicable to the contract, in the absence of choice; i.e. the law of the carrier's principal place of business, that is to govern also this issue.

What has been said above applies both to Warsaw carriage and non-Warsaw carriage. In non-Warsaw carriage the proper law of the contract might also govern all other issues dealt with by the Convention, but the liability regime might be subject to the conflict of laws rule pertaining to tort. This depends on the issue of classification.

The parties are free to choose the law applicable to their contract, but since this contract is an adhesion consumer standard contract the court might render such a clause invalid for public policy reasons or because it conflicts with mandatory provisions of the applicable law. A special rule has been established by the Contract Convention pertaining to 'package tours' which are to be considered as consumer contracts afforded special protection.

In the absence of choice the law of the carrier's principal place of business governs the contract of air transport. "This law is easily ascertainable, foreseeable and stable."[227] "C'est une solution logique,.."[228]

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[227] Milde, supra, note 2 at 247.

[228] de Visscher, supra, note 2 at 325.

3.2 Contracts of Insurance

3.2.1. The Contractual Situation

A good definition of insurance is found in the Quebec Civil Code, Article 2468:

"Insurance is a contract whereby one party, called the insurer or underwriter, undertakes, for a valuable consideration, to indemnify the other, called the insured, against loss or liability from certain risks or perils to which the object of the insurance may be exposed, or from the happening of a certain event."

It is clear, from this definition, that an insurance presupposes a contract, and since air transport is highly international in character problems of conflict of laws might arise in relation to these contracts.

Roughly, we can divide the contracts of insurance, related to air transport, into three cathegories; a) insurance taken by the aircraft operator, b) insurance taken by the aircraft manufacturer and c) insurance taken by passengers and others using the services of the aircraft operator. The following presentation of different cathegories of air transport insurance, a) and b), follows the analysis made by Bunker.[229]

a) The aircraft operator is especially exposed to risk, and here follows a presentation of the typical risks and the insurance cover presently used: *Passengers legal liability insurance;* to cover legal liability for death, wounding or bodily injury of passengers and for delay of passengers. (These are cases often covered by the Warsaw Convention[230]). *Third party legal liability;* to cover legal liability "in respect of accidental injury to or death of persons or damage to property on the ground and outside the aircraft,

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[229] D.H. Bunker, The Law of Aerospace Finance in Canada (Montreal: McGill University, Institute and Centre of Air and Space Law, 1988) 189-231. See also Matte, supra, note 99 at 585-589.

[230] See generally D.A. Kilbride, "Six decades of Insuring Liability under Warsaw" (1989 No. 4/5) XIV Air Law 183.

provided such injury, death or damage is caused directly by the aircraft or by objects falling therefrom."[231] (Some of these cases are dealt with in the Rome Convention.[232]) *Baggage and cargo liability;* to cover liability for damage sustained in the event of the destruction or loss of or damage to any goods. (Also here the Warsaw Convention is often applicable.) *All risk hull and engine insurance;* to cover loss of or damage to the aircraft itself.

b) The risk to which the aircraft manufacturer is exposed in relation to air transportation is *products legal liability insurance,* which covers the very costly product liability suits by the victims of air crashes.[233]

c) Passenges are exposed to the risk of death, wounding or bodily injury and damage to or loss of their baggage and others that use the air medium for cargo transportation are exposed to the risk of damage to or loss of their cargo.

3.2.2 The Conflict of Laws Situation

Generally, we have to be aware that many countries have strictly regulated or have put severe control on the insurance market. This is especially true about the conditions under which an insurance policy is offered. Most often, the contract of insurance is an adhesion contract and since the buyer has no bargaining power in relation to the conditions of contract, it is desirable to protect him against abusive practises. This is true at least as far as consumer adhesion contracts (such as the insurance taken by the passenger) are concerned but might have some relevance even in the relation between the insurer and another commercial entity. This is of greater importance in

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[231] Bunker, supra, note 229 at 207.

[232] Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Signed at Rome, on 7 October 1952, ICAO Doc. 7364 (entered into force 4 February 1958). Amended by: Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface Signed at Rome on October 1952, Signed at Montreal on 23 September 1978, ICAO Doc. 9257.

[233] See more about this, infra, Chapter 6.3.

relation to life insurance contracts than in relation to e.g. transportation or reinsurance contracts.[234]

There is, accordingly, a conflict of interest as far as the conflict of laws is concerned. On the one hand, there is the interest of the state, that have enacted protective legislation, to have all of the insured in its territory protected by its laws. This is especially true about life and accident insurance but also, to some extent, about liability insurance. Furthermore, socio-political considerations, call for the application of this law when it comes to insurance of property, movable or immovable. On the other hand, there is the interest of the insurance company to have all its insurance contracts governed by the same law.[235]

Most countries apply the general conflict of laws rules pertaining to contracts. Nevertheless, in *France* and the *U.S.* there has been a tendency of applying the law of the country where the risk is situated.[236] In the *U.S.* life insurance contracts are governed, in the absence of choice, by the law of the state in which the insured had his habitual residence at the time the insurance was requested, unless, with respect to the particular issue, some other state has a more significant relationship to the contract and to the parties, in which event the local law of the other state will be applied.[237] Contracts of fire, surety or casualty insurance are governed by the law of the state in which the risk is situated, and no choice of law is permitted.[238] Reinsurance and transportation insurance are not mentioned in the RESTATEMENT, but the courts show a tendency of applying the law of the principal place of business of the insurer and the parties are free to choose the law applicable.[239]

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[234] O. Lando, *Kontraktstatuttet*, 3rd ed. (Copenhagen: Juristforbundets forlag, 1981) 384.

[235] Ibid., at 384-385.

[236] Ibid., at 385.

[237] RESTATEMENT, supra, note 16 § 192.

[238] Ibid., § 193.

[239] Griese, "Marine Insurance Contracts in the Conflict of Laws. A Comparative Study of the Case Law" [1958/59] 6 UCLA L Rev 55. See reference in Lando, supra, note 234 at 387.

In *France* the law of the place of conclusion of the contract, i.e. most often the law of the habitual residence of the insured, has been held to be applicable.[240]

The *Contract Convention*[241] excluded explicitly contracts of insurance that "cover risks situated in the territories of the Member States of the European Economic Community".[242] This exclusion was necessitated by the work being done to regulate the internal insurance market.[243] Nevertheless, the parties to this Convention are free to apply rules based on the Convention even to risks situated in the Community, subject to the Community rules which are to be established.[244] The Convention is, *a contrario*, applicable to insurance of risks situated outside the territories of the said countries and such contracts may fall under the consumer contract rule, Article 5.[245]

Generally speaking, the European contracts of insurance have not been very international in character up until now,[246] since the European countries have laws requiring that an insurance company that wants to set up business in a country, other than the country of which it is a national, must often do that as either a national of that country or as an agent that is totally bound by the laws of that country.[247] Therefore, the risks insured and the principal

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[240] Batiffol & Lagarde, supra, note 4 at 302.

[241] Supra, note 22.

[242] Ibid., Article 1 para. 3.

[243] Report on the Contract Convention, supra, note 10 at 13. Nevertheless, reinsurance contracts are covered by that Convention even if the risk is situated within the territory of the Member States of the European Economic Community. The Contract Convention, supra, note 22 Article 1 para. 4.

[244] Report on the Contract Convention, supra, note 10 at 13.

[245] Id.

[246] This is rapidly changing though, at least within the European Economic Community. Lando, supra, note 234 at 395.

[247] Ibid., at 389.

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.[248]

3.2.3 Concluding Remarks

"Save for the consequences of the neglect to insure under the Convention of Rome, and the definition and limitation of the rights of insurers and Third Parties contained in the protocol thereto, there is no international private law relating to the insurance of aircraft, and therefore the Conflict of Laws has to be considered."[249]

It is submitted by Lando[250] that in contracts of transport insurance and of aircraft and ship insurance, being to a great extent international in character, the parties are free to choose the law applicable to their contract. In the absence of choice, the law most in line with the interests of the insurance company should govern. Other types of insurance are to be governed by the law of the place where the insured risk is located and where the insurer has its principal place of business. In case of the risk and the principal establishment of the insurer being in different countries, the law of the former should govern.[251] As to the parties' freedom to choose the law applicable to their contract, a lot of reasons for limiting this freedom can be put forward, not only in relation to consumer insurance contracts but also in relation to commercial insurance contracts, since insurance companies probably have a dominant possition towards almost any insurance buyer. We have also said above that the insurance contract is an adhesion contract and as such often put under strict regulation.[252]

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[248] "*Le contrat d'assurance l'est à la loi du domicile ou du siège de l'assureur. Mais, quand la Compagnie d'assurances a des succursales en d'autres pays, c'est généralement le droit de ces pays qui régira les portefeuilles locaux.*" Aubert, supra, note 20 at 49.

[249] Shawcross & Beaumont, supra, note 1 at 537.

[250] Supra, note 234 at 396.

[251] Ibid., at 397.

[252] Ibid., at 399 and Lando, supra, note 209 at 153 -154.

3.3 Contracts of Agency and Aircraft Charter and the Status of the Actual Carrier

3.3.1 Introduction

Turning now to the contract of agency and the contracts concluded through an agent it is necessary to distinguish between a contract concluded through an agent and a contract concluded with, e.g., a travel organizer acting in his own name. The difference lies in the fact that the *travel organizer* acts, in relation to the passenger, as the carrier, while the *agent* merely represents either the carrier or the passenger in concluding the contract. "Contracts with forwarding or booking agents, on the other hand, are completely different from contracts of carriage in the rights and obligations which they confer or impose on the parties, but it is sometimes dfficult in practice to decide to which category a particular contract belongs. A forwarding or booking agent is simply an agent employed by an intending consignor or passenger to make a contract with someone else to perform the carriage; the former's rights and obligation depend entirely on the law of agency and not on the law of carriage. Cases may arise, however, in which the forwarding or booking agent is the agent of the carrier, or even, according to the contract, himself the carrier."[253] We will here first study the rules of agency and thereafter the status of the travel organizer.

3.3.2 Agency

If we look to the *contractual situation* we can distinguish first the contract between the principal and the agent whereby the agent is appointed the representative of the principal and secondly the contract which the agent concludes on behalf of the principal. As far as the conflict of laws is concerned these contracts are to be treated in accordance with the general rules pertaining to contracts.[254] That is to say, the proper law of each contract

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[253] Shawcross & Beaumont, supra, note 1 at 313.

[254] See, supra, Chapter 2.

will be determined in accordance with what has been said above. Concerning *the contract between the agent and the principal* this is the case in the U.S.,[255] Germany,[256] Switzerland[257] and Sweden.[258] In England there seems to be authority for the above solution[259] and that the proper law "is in general the law of the country where the relationship of principal and agent is created".[260] In France on the other hand, this contract seems to be submitted to the same proper law as the contract which the agent is preparing on account of the principal.[261]

The position taken in the Contract Convention is to apply the general principles of conflict of laws applicable to contracts.[262] In the Hague Convention on the Law Applicable to Agency of March 14, 1978 Article 6, it is stated that in the absence of choice the applicable law shall be the law of the state where the agent has his business establishment or, if he has none, his

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[255] RESTATEMENT, supra, note 16 § 291: "Relationship of Principal and Agent[·] The rights and duties of a principal and agent toward each other are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties and the transaction under the principles stated in § 6. This law is selected by application of the rules of §§ 187-188.

[256] Drobnig, supra, note 14 at 246.

[257] Swiss Federal Statute, supra, note 20 Article 126 para 1: "When the agency is based on a contract, the relationship between the agent and the principal is governed by the law applicable to their contract."

[258] Bogdan, supra, note 19 at 214.

[259] Dicey and Morris, The Conflict of Laws, 11 ed. (London· Stevens & Sons Ltd , 1987) 1339.

[260] Id.

[261] Batiffol and Lagarde, supra, note 4 at 328-329. "*Quant au contrat de mandat, il est suggéré de le soumettre à la loi du ou contrats qu'il prépare, et une présomption en ce sens se rencontre en jurisprudence.*"

[262] Report on the Contract Convention, supra, note 10 at 13.

habitual residence.[263] These two conventions overlap one another but it is not the purpose here to investigate further into that relationship.[264]

In search for the proper law of the contract in applying the rule of "characteristic performance", in the absence of choice, the agent's performance has been submitted as the one characteristic for the contract.[265] It must be remembered, though, that the appointment of an agent by e.g. an IATA airline is often done on a standard form contract dictated by the airline in which the law applicable might be choosen.[266] This proper law governs the mutual rights and obligations of the parties, the liabilities of the agent as a mandatary of the traveller for a wrong booking or for a bad choice of carrier and the substantive services provided by the agent himself, e.g. the arrangement of a visa.[267]

Looking at *the contract concluded through the agent* between the principal and the third person, as e.g. a contract of air transport, the general rules applicable to contracts shall apply in accordance with what has been said above.[268] The fact that an agent is the intermediary does not change this positon.[269]

We shall now turn to the highly complicated issue of the *agent's authority to bind his principal vis-à-vis third persons*.[270] This is also called the external

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[263] Further that if the place where the agent shall act is the same as any of these places the law of that state shall apply.

[264] See on this issue Report on the Contract Convention, supra, note at 13 and P. Blok, "*Haagerkonferencens 13. samling*" (1978) *Nordisk Tidsskrift for International Ret* 146 at 172.

[265] Bogdan, supra, note 188 at 167 and 168.

[266] Ibid , at 169.

[267] Ibid , at 167.

[268] See, supra, Chapter 3.1. Blok, supra, note 264 at 165.

[269] Bogdan, supra, note 188 at 165-166, seems to be of the same opinion but stresses that it is the law of the carrier that governs the issue of the modalities of performance.

[270] See generally Lando, supra, note 234 at 224-236.

aspect of the agency contract. This question was explicitly excluded from the scope of the Contract Convention,[271] because "it is difficult to accept the principle of freedom of contract on this point".[272] Before adopting Article11 of the 1978 Hague Convention on the Law Applicable to Agency[273] some delegations argued for the application of the proper law of the contract entered into through the agent to the question at issue here.[274] This seems to be the possition taken in France[275] and in England.[276] In the Swiss Federal Statute[277] it is stated that this issue is to be "governed by the law of the state in which the agent has his place of business, or, if such place of business does not exist or is not ascertainable by the third party, by the law of the state in which the agent carries out his main activity in the particular case".[278] This latter position and the one taken in Article 11 of the Hague Convention[279]

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[271] Supra, note 22 Article 1 para 2. (f).

[272] Report on the Contract Convention, supra, note 10 at 13.

[273] "As between the principal and the third party, the existence and extent of the agent's authority and the effects of the agent's exercise or purported exercise of his authority shall be governed by the internal law of the State in which the agent had his business establishment at the time of his relevant acts.
However, the internal law of the State in which the agent has acted shall apply if -
a) the principal has his business establishment or, if he has none, his habitual residence in that State, and the agent has acted in the name of the principal; or
b) the third party has his business establishment or, if he has none, his habitual residence in that State; or
c) the agent has acted at an exchange or auction; or
d) the agent has no business establishment.

Where a party has more than one business establishment, this Article refers to the establishment with which the relevant acts of the agent are most closely connected."

[274] Blok, supra, note 264 at 166.

[275] Batiffol & Lagarde, supra, note 4 at 328. Where the agency contract is governed by the proper law of the contract that was entered into by the agent, on behalf of the principal, which law also governs this issue.

[276] Dicey & Morris, supra, note 259 at 1341.

[277] Supra, note 20.

[278] Ibid., Article 126 para. 2.

[279] Supra, note 273.

seem to be very close to one another and point to the application of the law of the place where the agent acted or to the law of the place where he has his business establishment and from which he is, therefore, supposed to act. This means that a special conflict rule has been adopted for this question,[280] and traditionally this has been the case in, *inter alia*, Germany,[281] Sweden[282] and Switzerland.[283]

3.3.3 The Contract of Aircraft Charter and The Status of the Actual Carrier

Here we will deal with the contract between the traveller and the organizer and the contracts between the organizer and the providers of substantive services. It was stated above that the travel organizer contracts in his own name and therefore no contractual relationship exists between the travellers and the providers of substantive services. The liabilities between these latter persons are, therefore, strictly extra-contractual, even though an international convention has put both the provider of an aircraft and the organizer under the umbrella of the Warsaw Convention, as we shall see later on.

As we have seen above[284] the Contract Convention provides a special rule for "package tours", considered to be consumer contracts. This means that the weaker part in the *contract between the organizer and the traveller* is afforded special protection in the conflict of laws.

However, the *contract between the organizer and the providers of substantive services* is a strictly commercial contract where no consumer aspects has to be taken into consideration. For our purposes the contract for

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[280] Blok, supra, note 264 at 166.

[281] Drobnig, supra, note 14 at 246.

[282] Bogdan, supra, note 19 at 215.

[283] Batiffol & Lagarde, supra, note 4 at 329.

[284] Supra, Chapter 3.1.3.

the charter of aircraft[285] is of the utmost importance. *L'Institut de Droit International* adopted the following rule (Article 3) in its 1963 Resolution:[286]

"The hiring and affreightment of aircraft shall be regulated by the law to which the parties have indicated their intention to submit it.
If the parties have not indicated their intention in this matter, the chartering[287] and affreightment shall be subject to the national law of the aircraft."

First, the parties are free to choose the law applicable to thier contract.[288] This solution is met with approval and it has even been questioned whether it was necessary at all to state this obvious general principle of conflict of laws.[289]

The second rule, however, provokes some questions. Before dealing with them we have to distinguish between different types of air charter.[290] Two kinds are frequently refered to in the doctrine.[291] They are "Bare Hull" and otherwise.[292] In the latter category falls both "Time Charter" and "Voyage

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[285] "Air charter is to be defined as relating to contracts which have been entered into by means of a special document, the charter party, exactly in the same way as the maritime charter is believed once to have arisen (carta partita)." Sundberg, supra, note 177 at 502-503.

[286](1963) 50-II *Annuaire de l'Institut de Droit International* at 374.

[287] It is to be noted that the French version does not use the equivalent in French to chartering but instead repeats the word hiring (*location*) from the first sentence. The change of wording in the English version is therfore probably only a misstake. See (1963) 50-II *Annuaire de l'Institut de Droit International* at 366.

[288] And often they seem to use this possibility. See the contracts annexed to J.W F. Sundberg, Air Charter (Stockholm: Norstedts & söner, 1961). See also Sadikov, supra, note 146 at 249, stating that the standard contract used by Aeroflot for the charter of aircraft provide for the application of the Air Code of the USSR.

[289] Milde, supra, note 2 at 238.

[290] It is not the purpose here to investigate into all forms of air charter agreements. We will, therefore, settle for a more general distinction.

[291] K. Grönfors, Air Charter and the Warsaw Convention (Stockholm: 1956) 119. Sadikov, supra, note 146 at 246. Bentivoglio, supra, note 2 at 140.

[292] Shawcross & Beaumont, supra, note 1 at 470.

Charter".[293] A "Bare Hull" charter involves only the aircraft, without the operating personnel, and can be classified as *de facto* a contract of hire (wet lease).[294] The classic definition of the other cathegory reads: "a contract of carriage relating to the whole capacity of an aircraft, equipped with crew, for a particular voyage or series of voyages (Voyage Charter), or for voyages to be ordered by the Charterer during a specified period" (wet lease).[295] This other cathegory is also called affreightment.[296]

The "Bare Hull" charter agreement is nothing but "a sample of the lease contract"[297] and therefore Bentivoglio stated that "since a lease is a contract wich implies the transfer of possession of a *res* with the right to use it, the *lex rei sitae* will be dominant, leaving room to party autonomy in that limited area in which real rights are not at stake. Moreover, since the *situs* of an aircraft is generally considered as being placed in the country where the aircraft is registered as to nationality, it turns out that the law of the flag will have primary authority."[298] This is also the rule in Italy.[299] Sadikov on the other hand contends that "under general principles of conflict of laws the *lex rei sitae* is applicable to proprietary and not to contractual rights. The subject of our examination is not property relations, but contract of hire (lease)."[300] He argues, consequently, in favour of the application of the proper law of the contract to this kind of charter agreements.

It is submitted that the part of the contract which pertains to the transfer of possession of the *res*, i.e. where real rights are at stake, is governed by the *lex*

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293 Ibid., at 471.

294 Sadikov, supra, note 146 at 247.

295 Shawcross & Beaumont, supra, note 1 at 471.

296 Bentivoglio, supra, note 2 at 141.

297 Sundberg, supra, note 177 at 236.

298 Supra, note 2 at 143.

299 Report on the Contract Convention, supra, note 10 at 19.

300 Supra, note 146 at 248.

rei sitae (in the case of aircraft the law of nationality of the aircraft is substituted for the *lex rei sitae*),[301] while the other part is governed by the proper law of the contract (the characteristic performance being the one undertaken by the lessor).

The contract for the chartering of an aircraft equipped with a crew (affreightment) should, according to rule number two, i.e. in the absence of choice, also be governed by the national law of the aircraft. It is submitted that in this case, which does not involve the transfer of possession of a *res*, this rule is ill suited. It has also been proposed that the law of the operator's principal place of business should be the proper law of the contract.[302] We think that a special rule to be applied to this kind of contracts in the absence of choice is unnecessary. This is a strictly commercial contractual relationship with no special protected interests involved, such as consumer or creditor protection, why the general rules applicable in the absence of choice[303] are to be given full latitude. This seems to be the position taken by Bentivoglio[304] even though Sadikov interprets him to argue in favour of the application of the law applicable to the contract of carriage.[305]

We will now turn to a discussion of *the status of the provider of substantive services*, in this case the aircraft operator or the actual carrier, as far as liabilities are concerned. We have said above that the relation between the provider and the traveller is strictly extra-contractual, since it is the organizer that contracts with both separately in his own name—that is however not always the case.[306] "The Warsaw Convention of 1929 applies to

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[301] See, infra, Chapter 5.

[302] Bogdan, supra, note 188 at 182.

[303] See, supra, Capter 2

[304] Supra, note 2 at 144.

[305] Supra, note 146 at 248.

[306] In Block v. Compagnie Nationale Air France 10 Avi 17,518 (US Fed C A 5th Cir, November 8, 1967) the actual carrier had issued tickets to the passengers and that was why a contractual relation between the provider and the passenger had been established.

the *contract* of carriage and does not contain particular rules relating to international carriage by air performed by a person who is not a party to the contract of carriage ('actual carrier' who performs the actual carriage by virtue of the authority from the 'contracting carrier')."[307] This has caused some difficulties in the past[308] due to the fact that under the original Warsaw Convention, interpreted with the French civil law as a background, an actual carrier which performs the carriage on behalf of the contracting carrier becomes the *préposé* of the contracting carrier.[309] This means that he falls within the scope of the Warsaw Convention and that the plaintiffs cannot recover more damages than is allowed under that Convention. Furthermore it means that the acts of the *préposé* are imputed to the contracting carrier.

Under common law there is a distinction made between servants and agents on the one hand and independent contractors on the other.[310] Only the acts of the former are imputable to contracting carrier under the rules of agency.[311] To the contrary, in civil law both fall under the notion of *préposé*.[312] Therefore, when the text was translated into English the liability limits set up by the Warsaw Convention could be circumvented by suing the independent contractor, the actual carrier, instead of the contracting carrier, the former being extra-contractually liable. Even though Mankiewicz, a civil law lawyer, found the Warsaw Convention sufficient to deal with this situation,[313] ICAO began to work on a new convention to clarify[314] the

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[307] Milde, supra, note 108 at 198.

[308] See Grönfors, supra, note 291 at 60-115, and R.H. Mankiewicz, "Charter and Interchange of Aircraft and the Warsaw Convention. A Study of Problems Arising From the National Application of Conventions for the Unification of Private Law" (1961) 10 Int'l Comp L Q 707.

[309] Mankiewicz, supra, note 113 at 252.

[310] Goldhirsch, supra, note 135 at 68.

[311] Sundberg, supra, note 177 at 335.

[312] Mankiewicz, supra, note 140 at 45.

[313] Mankiewicz, supra, note 140 at 47, and, supra, note 113 at 252.

[314] "This clarification was necessitated by the more recent modalities of air transport operations in which one party enters into the contract of carriage with the passengers or shippers (as charterer or freight forwarder) and another party in fact performs the actual

situation.[315] The new Convention was adopted by a diplomatic conference convened in Guadalajara, Mexico, on 18 September 1961, and is, therfore, called the Guadalajara Convention.[316] "The sole purpose of the Guadalajara Convention of 1961 is to extend the application of the Warsaw Convention or that Convention as amended also to the 'actual carrier'."[317] [318] [319]

3.3.4 Concluding Remarks

We have now established the law applicable in agency relations, in travel organizer relations, and to the contract for the charter of an aircraft. Further we have touched upon the status of the provider of substantive services, the actual carrier, as regards the liability towards the travellers.

The complexity of the issues discussed here have been demonstrated by Mankiewicz in relation to brokers: "The broker is simply an intermediary between the carrier and his client, except when he is charged with the delivery of the goods to the carrier or to the consignee. In the latter case, he is the servant or agent of the consignor or the carrier, and his liability is

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carriage without being in direct contract relationship with the passenger or the shiper." Milde, supra, note 108 at 198.

[315] Legal Committee, Eleventh Session, Tokyo, 12-25 September 1957, ICAO Doc. 7921, LC/143, Vol. I, Minutes, Vol. II, Documents.

[316] 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 at Guadalajara on 18 September 1961 (Guadalajara Convention). ICAO Doc. 8181 (entered into force on 1 May 1964).

[317] Milde, supra, note 108 at 198.

[318] The Guadalajara Convention, supra, note 316, defines the *contracting carrier* as "a person who as a principal makes an agreement for carriage governed by the Warsaw Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor" (Article I b)) and the *actual carrier* as "a person, other than the contracting carrier, who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage contemplated in paragraph b) but who is not with respect to such part a successive carrier within the meaning of the Warsaw Convention." (Article I c)).

[319] See also Sundberg, supra, note 177 at 388-396.

governed by the national law of agency when he is acting for the consignor, and by the Warsaw system, if applicable, when he is acting for the carrier."[320]

[320] Mankiewicz, supra, note 140 at 49.

3.4 Contracts of Employment

3.4.1 Generalities

Employment contracts in the conflict of laws represent a very interesting topic since they contain traditional contractual elements and are an area where states have a tendency of intervening in the [illegible] of public policy, or *ordre public*. This tendency shows that states want to protect the economically weaker, the employee, in this kind of contracts. This has, of course, repercussions upon the conflict of laws issue, especially considering the scope of mandatory rules and ordre public.[321]

This is especially true of the *Contract Convention*,[322] which in Article 6[323] deals with employment contracts.[324] The freedom to chose the applicable law is admitted, but the employee cannot, thereby, be prevented from invoking the mandatory rules of the law of the place where he habitually carries out his work or, if this is not one place but many, the law of the country in which he was engaged. There is also some room left for the application of the law of another country to which the contract might be more closely connected.

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321 Philip, supra, note 31 at 97. See also Batiffol and Lagarde, supra, note 4 at 277.

322 Supra, note 22.

323 "1 Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.
2. Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed.
(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country, or
(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated.
unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country." Ibid.

324 See C.G.J. Morse, "Contracts of Employment and the E.E.C. Contractual Obligations Convention" in P.M. North (ed.) Contract Conflicts (Amsterdam North Holland Publishing Company, 1982) at 143. Report on the Contract Convention, supra, note 10 at 25.

The same laws apply in the absence of choice, instead of the supplementary method used in Article 4.[325]

The parties' freedom to choose the applicable law in employment contracts is, according to the *Swiss* Federal Statute,[326] strictly limited to "the law of the state in which the employee has his habitual residence or to the law of the state in which the employer has his place of business, his domicile or his habitual residence."[327] Otherwise applicable is primarily the law of the place where the employee habitually carries out his work,[328] and, if this place is not one but many, the law of the employers place of business, or, in the absence thereof, his domicile or his habitual residence.[329]

The parties' freedom to choose is also limited in *France* where the law of the country where the employee carries out his work governs the contract. It is, however, possible for the parties to make a choice, but only if it will afford the employee a better treatment than under the above mentioned law.[330]

In *Sweden* there seems to be no prohibition for the parties to choose the law which shall govern their contract. And, further, the supplementary method[331] may be used in establishing the law applicable in the absence of choice. If this method gives no conclusion an *in dubio*-rule making the law of the place where the work is carried out will apply.

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325 See, supra, Chapter 2.4.

326 Supra, note 20.

327 Ibid., Article 121 para. 3.

328 Ibid. para. 1.

329 Ibid para. 2.

330 Batiffol and Lagarde, supra, note 4 at 278: "*Et de fait, après avoir hésité pendant un temps entre la loi d'autonomie et la loi du lieu d'exécution, la Cour de cassation paraît bien rattacher dans ses derniers arrêts le contrat de travail à la loi du lieu d'exécution et ne permettre aux parties d'y déroger que dans un sens favorable au salairié.*"

331 The "individualizing method", see, supra, Chapter 2.4.

3.4.2 The Contract of Employment of the Crew of an Aircraft

Judging from the solutions presented above at least the very common reference to the law of the place where the employee habitually carries out his work is ill suited for the contract of employment of the crew of an aircraft. An aircraft passes rapidly over the territories of many states and also over the high seas making it impossible to determine in what country the work is carried out. Of course, the problem does not arise in purely domestic air transport, and as long as these transportations do not show an international element they are of no importance for the conflict of laws. But a foreign carrier exercising a right of cabotage[332] with its own crew, or simply the fact that a carrier employes foreigners as members of its crew for domestic services provides an international element. Further, the employment of foreigners in international air transport does also create conflict of laws problems.

The problem was studied by CITEJA in 1932, during the preparation of a *Draft Convention on the Legal Status of the Flying Personnel*, which never became a convention.[333] However, Article 2 of the 1932 draft provided for the application of the law of the nationality of the aircraft.[334]

L'Institut de Droit International also studied the issue during its work on a resolution pertaining to conflict of laws problems in air transport.[335] The starting point of the discussion was the solution presented by Makarov to

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[332] See Article 7 of the Convention on International Civil Aviation, Signed at Chicago in 1944 (the Chicago Convention), ICAO Doc. 7300/6. "Each contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory. Each contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other State or an airline of any other State, and not to obtain any such exclusive privilege from any other state."

[333] Milde, supra, note 2 at 239.

[334] Id.

[335] (1959) 48-I *Annuaire de l'Institut de Droit International* at 381-385, 428, 444, 447, 453 and 469. (1963) 50-II *Annuaire de l'Institut de Droit International* at 197-203 and 248-250.

apply the law of nationality of the aircraft.[336] Audinet, on the other hand, proposed the application of the law of the place of establishment of the carrier at which the crew was engaged.[337] Then, de La Pradelle opted for the application of the *lex loci contractus* considering the fact that aircraft may be leased without crew; bare-hull or *coq nue*, or interchanged.[338] The difference between the views of Audinet and de La Pradelle is mearly one of definition. The first draft then adopted the rule that the law of the nationality of the aircraft would govern the contract except where the aircraft was used by a foreign company (under a contract of lease or interchange), when it would be governed by the law of the place of contracting.[339] This was criticized by Jenks and Batiffol,[340] and the solution finally adopted in Article 4 reads:

"The contract of employment of the crew of an aircraft shall be governed by the law to which the parties have indicated their intention to submit it.
If the parties have not indicated their intention in this matter, the contract shall be governed by the national law of the aircraft."[341]

The first paragraph leaves it to the parties to decide what law shall govern their contract. As we have seen above the parties' freedom in employment contracts has been severely diminished in the modern day conflict of laws, and we therefore submit that there exist no unlimited freedom of the parties today, as proclaimed in this paragraph.

The second paragraph gives the supplementary rule that in the absence of choice the contract shall be governed by law of the flag state of the aircraft in

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336 A. Makarov, (1959) 48-I *Annuaire de l'Institut de Droit International* at 381.

337 A. Audinet, ibid., at 428.

338 P. de La Pradelle, ibid., at 444.

339 Ibid., at 469: "*Le contrat d'engagement du personnel de l'aéronef est régi par la loi nationale de l'aéronef et, pour le cas où l'aéronef est exploité par une compagnie étrangère et affrété sans équipage, par la loi du lieu de conclusion du contrat*"

340 (1963) 50-II *Annuaire de l'Institut de Droit International* at 198-203.

341 Ibid., at 374.

which the personnel are working. Already during the deliberations in *l'Institut de Droit International*, preceding their 1963 resolution, this provision was criticized.[342] Another critic was Milde: "It may be submitted that the contract of employment need not have any legal relation to the country where the aircraft is registered. The contract of employment does not create any legal link between the crew and the aircraft (or the place of the registration of the aircraft) but between the crew as employees and the air transport enterprise as employer. The employer and the employees are the relevant parties to a contract of employment and their mutual rights and duties form the substance of the contract of employment. In these mutual relations between the employer and employees the nationality of the aircraft may be quite an accidental element which can hardly influence the contract or establish a persuasive legal link between the contract of employment and the law of the state where the aircraft is registered."[343] He would rather see the law of the employer's permanent place of business as the one to govern these contracts.[344]

Bentivoglio states that as it is the flag state that decides on the status of the operating crew on the international level under Article 32 of the Chicago Convention,[345] and that therefore the contract must comply with the "statutory prescriptions and regulations" of this state, it is the law of this state that should govern these contracts.[346] A chosen law would, according to the same author, be viewed as a "contractual reception" subject to the approval

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342 Supra, notes 336, 337 and 338.

343 Supra, note 2 at 241.

344 Id.

345 Supra, note 332. "(a) The pilot of every aircraft and the other members of the operating crew of every aircraft engaged in international navigation shall be provided with certificates of competency and licenses issued or rendered valid by the State in which the aircraft is registered.
(b) Each contracting State reserves the right to refuse to recognize, for the purpose of flight above its territory, certificates of competency and licences granted to any of its nationals by another contracting State."

346 Supra, note 2 at 145.

of the law of the nationality of the aircraft.[347] Exceptionally, in the case of "bare hull charter", the law of the employers place of business may govern the contract.[348]

The major weakness with Bentivoglio's view is that he only considers the contract of employment of the *operating* crew, i.e. the personnel engaged in the navigation and piloting of the aircraft, while the other members of the crew are left out from his conflict rule. To apply different conflict rules to different parts of the crew seems unnecessary even though they certainly are employed on different terms and may belong to different trade unions. In the conflict of laws there are not different laws applicable to different categories of employment contracts; engineering, consulting or plumbing, rather a general rule applies to all different contracts of employment. This is further emphasized by the fact that during the deliberations preceeding the Contract Convention the group of experts renounced the need for a special rule pertaining to the employment contracts of the crew of ships.[349]

A further weakness is that Article 32 of the Chicago Convention only deals with a public international law requirement that the professional competence of the pilot and the other members of the operating crew of an aircraft engaged in international navigation, must be certified by a license. It does not in any way deal with the contract of employment of the crew of an aircraft. Furthermore, Article 83 *bis* of the same Convention permits the transfer of functions under Article 32 to the state of the operator.

3.4.3 Concluding Remarks

Since the resolution of *l'Institut de Droit International* of 1963 new rules have developed in the conflict of laws especially in so far as employment

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347 Id.

348 Ibid., at 146.

349 Report on the Contract Convention, supra, note 10 at 26.

contracts are concerned. It is therefore submitted that Article 6 of the resolution is of little relevance under modern day conditions.

As we have seen above there is still some freedom left for the parties to choose the law applicable to employment contracts. This freedom might, however, be limited. In the absence of choice, the law of the place where the work is carried out is to govern the contract. If the work is carried out in different places (in many territories) the law of the employer's principal place of business governs the contract. This is especially the case in the air transport sector where the crew is engaged in one country but executes their duties under the contract over and in the territories of different countries. Since most carriers today are one-nation based, the law applicable will be the law of the nation of which the carrier is a national carrier—or one of many national carriers. It is submitted that this is a good rule since the nationality of air carriers is well known and most personnel engaged by them are also nationals of that country.

3.5 Contracts of Aircraft Purchase

3.5.1 Introduction

Under this heading we will not attempt to analyse the substance of these contracts, but simply to look at some peculiarities inherent in the contracts for the purchase of movables. The problem centers around the fact that the contract, in addition to giving rise to *inter partes* obligations, also transfers a right *in rem*, i.e. ownership. Consequently, there is a conflict between the law applicable to obligations (the law chosen by the parties) and the law applicable to real rights (the *lex rei sitae* or the law of the nationality of the aircraft). This is not a specific problem of international air law and it will not be dealt with in any great detail. Moreover, the law applicable to contracts has been dealt with above[350] and the law applicable to rights *in rem* will be dealt with later on.[351]

3.5.2 The Conflict of Laws

1. "An aircraft is a chattel and therefore the law governing its sale is the law of Sale of Goods."[352] If we, then, first look to the law applicable to *contracts for the international sale of goods*[353] we are confronted with a few differences from the ordinary rules pertaining to contracts. The Hague Convention on the Law Applicable to the International Sale of Goods of June 15, 1955 is explicitly not applicable to the purchase of registered aircraft.[354] *A contrario*, it

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[350] Supra, Chapter 2.

[351] Infra, Chapter 5.

[352] Shawcross & Beaumont, supra, note 1 at 467.

[353] The United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF 97/18 Annex I (1980), is a convention for the unification of substantive laws in the field of the international sale of goods but is explicitly not applicable to the sale of aircraft, Article 2 (e). V.G. Maurer, "The United Nations Convention on Contracts for the International Sale of Goods" (1989) 15 Syracuse J Int'l L & Com 361 at 366.

[354] Article 1.

is applicable to contracts for the purchase of aircraft not yet registered.[355] For this kind of purchase the Convention admits the parties' right to choose the applicable law.[356] In the absence of choice the law of the vendors domicil, when he receives the order or the law of the place where the vendor's establishment is located, that received the order, will be applicable.[357] If, however, the vendor receives the order in the country where the buyer is domiciled the law of this country will be applicable.[358] The Convention is made applicable to the transfer of the risk but not in relation to third parties,[359] since some countries consider the transfer of the risk as an issue related to the transfer of ownership.[360] For other countries the rules of the Convention are only applicable to the *inter partes* relation.

In the *U.S.* the parties are free to choose the law applicable to their contract and in the absence of such a choice there is a presumption for the application of the law of the vendors place of business.[361] Nevertheless, the issue is not totally clear.[362] In *England* "[i]t is clear that the contractual rights and obligations fall to be determined by the *proper law of the transfer* [Emphasis added]".[363] The concept of the proper law of the transfer is analogous to the proper law of the contract, i.e. to find the law which has the most real connection to the transfer. Under this doctrine the parties are still free to

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355 Lando, supra, note 234 at 290-291.

356 Article 2.

357 Article 3 para. 1.

358 Article 3 para. 2.

359 Article 5.

360 Lando, supra, note 234 at 295. E g. France, Batiffol and Lagarde, supra, note 4 at 196.

361 RESTATEMENT, supra, note 16 § 191.

362 Lando, supra, note 234 at 289.

363 "This category includes such questions as whether there is an implied condition that the subject-matter of the transfer is of merchantable quality or fit for a particular purpose, or whether the transfer itself is formally valid." Cheshire, supra, note 15 at 791.

choose the law applicable. *France,*[364] *Switzerland*[365] and the *Scandinavian countries*[366] are all parties to the 1955 Hague Convention.

2. Turning now to the *law applicable to real rights* (e.g. ownership[367]) and the possible conflicts with the law applicable to the contract, we will *infra*[368] find that the law traditionally applied to this issue is the *lex rei sitae,* but that as far as aircraft are concerned the law of the country of nationality of the aircraft has taken the place of the *lex rei sitae.* Therefore, what will be said about the *lex rei sitae* applies instead to the law of nationality of the aircraft.

"Although the Sales Law applies to the obligations of buyer and seller arising from a contract of sale it does not apply, for example, to the question of the passing of property under the contract. Thus the latter issue will still fall to be determined by the conventional rules of private international law."[369] In *England* the choice lies between the proper law of the transfer and the *lex rei sitae.* The choice between them depends, basically, on whether the issue under consideration is contractual or proprietary.[370] In *France* the same division is made.[371]

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[364] Batiffol and Lagarde, supra, note 4 at 311.

[365] Swiss Federal Statute, supra, note 20 Article 118.

[366] Lando, supra, note 234 at 290.

[367] de Visscher, supra, note 2 at 306-318.

[368] Infra, Chapter 5.

[369] Cheshire, supra, note 15 at 504.

[370] Ibid., at 790.

[371] "*La jurisprudence est de fait bien fixée sur ce que* ***les contrats, même générateurs de droits réels, sont soumis à la loi d'autonomie.*** *Il s'ensuit certainement la compétence de cette loi pour les conditions de formation du contrat et pour les droits de créance qu'il engendre, par example celle du prix dans la vente. Au contraire les droits réels constitués ou transférés sont soumis à la loi de la situation du bien; cette soumission s'impose évidemment pour le contenu des droits réels que le contrat peut engendrer; mais il faut certainement l'étendre à des conditions de création des droits réels qui, même par contrat, sont propres à ces droits: la question se pose essentiellement pour les formalités destinées à rendre la constitution ou le transfert opposables aux tiers – publicité réelle pour les immeubles, tradition pour les meubles – et qui d'ailleurs sont exigées dans certains systèmes pour le transfert du droit même entre les parties.*" Batiffol and Lagarde, supra, note 4 at 193.

3. Therefore, we might submit in *conclusion*, that the contract for aircraft purchase, as far as the *inter partes* obligations are concerned, is governed by the law applicable to the contract; i.e. the law chosen by the parties or in the absence of choice either the proper law of the transfer, the law made applicable through the 1955 Hague Convention (if applicable) or another law. On the other hand the *lex rei sitae* (the law of nationality of the aircraft) governs issues such as the creation and the contents of real rights, especially in relation to formalities necessary to protect these rights from the claims of third parties, e.g. registration or transfer of possession.[372]

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[372] de Visscher, supra, note 2 at 309.

4. Acts and Facts Taking Place On Board an Aircraft in Flight

4.1 Introduction

Under this heading scholars have traditionally treated the problems arising from conflict of laws rules that attaches decisive importance to the locus of an act or fact, when this locus is onboard an aircraft in flight.[373] The acts and facts dealt with are contracts, births, deaths, marriages, wills, torts and crimes. The problem in a nut shell is to decide what law the court shall apply to a case, the facts of which have taken place onboard an aircraft in flight, when the conflict of laws rule that he is applying points to the application of the law of the locus where the fact and act took place. When the locus is an aircraft in flight shall the judge apply the law of the subjacent territory or, failing a subjacent territory or not, the law of the nationality of the aircraft, the law of the principal business of the carrier, the law of the place of departure or the law of the place of destination.

Much attention was devoted to this problem during the deliberations in *l'Institut de Droit International* before the adoption of the 1963 resolution.[374] *L'Institut* started out by discussing 4 different Articles[375] pertaining to rights

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[373] See, *inter alia*, de Visscher, supra, note 2 at 342-379, Lord McNair, The Law of the Air, 3rd ed. (London. Stevens & sons, 1964) 271-306, F. de Planta, *Principes de Droit International Privé applicables aux actes accomplis et aux faits commis a bord d'un aéronef* (Genève: Librairie E. Droz, 1955), R. Coquos, "*Les perspectives d'avenir du Droit Privé International Aérien*" (1938) VII *RGDA* 29 at 34-38, Y.-J. Blanc, "*De la loi applicable aux contrats passés par les passagers au cours d'un transport aérien international*" (1934) I *Nouvelle revue de droit International Privé* 67, O. Riese, "*Réflexions sur l'unification internationale du droit aérien, sa situation actuelle, ses perspectives* (1951) *RFDA* 131 at 143, V. Pappafava, "*Les Contrats aériens. Du moment et du lieu où l'on doit considérer comme conclu un contrat entre deux parties, l'une en avion et l'autre à terre.*" (1923) *Revue Juridique Internationale de la Locomotion Aérienne* 305, Bentivoglio, supra, note 2 at 102-122, (1959) 48-I *Annuaire de l'Institut de Droit International* at 395-404, 409-410, 422-424, 429, 462-466 and 471, and (1963) 50-II *Annuaire de l'Institut de Droit International* at 214-235 and 257-269, Milde, supra, note 2 at 257-261, especially note 161 page 257 for further references.

[374] (1963) 50-II *Annuaire de l'Institut de Droit International* at 257-269.

[375] (1959) 48-I *Annuaire de l'Institut de Droit International* at 409-410.

in rem,[376] contracts,[377] marriages[378] and wills.[379] The conflict rules that were discussed were the *lex rei sitae* (for rights *in rem*), *lex loci actus* (for the formal requirements of a contract or a will) and *lex loci celebrationis* (for the formal requirements of a marriage). (We will not go into a more detailed examination of these rules) here. The Article that was finally adopted reads:

"If a legal act has taken place or a fact giving rise to legal liability has occured on board of an aircraft in flight in an area not subject to State sovereignty, or whenever it is not possible to determine the territory over which the flight has taken place at the time of the act or fact giving rise to legal liability, the national law of the aircraft is substituted for the law of the place where such act or fact has occured.
If the act covered by the preceding paragraph relates to goods situated on board an aircraft, the national law of the aircraft shall be substituted for the law of the situation of the goods "

As we can see *l'Institut* adopted the principle of territoriality, meaning that whenever an aircraft is flying through the airspace of a state any act taking place on board shall be deemed to have taken place in that state. Only in the case of flight over an area not subject to the sovereignty of any state (as over the high seas) or when it is uncertain over which territory an act did take place does the rule point to the application of the law of the nationality of the aircraft. It has principally been between these two principles, the principle of territoriallity and the principle of the nationality of the aircraft, that the discussions in the doctrine have pendulated.[380] "It is submitted that by raising a question whether the territory of the overflown state or the aircraft itself should be considered as *locus actus*, the doctrine is creating a non-existing artificial problem; while in the airspace of a foreign state, the aircraft, its crew and passengers are in the territory of that state and are

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376 Ibid., Article 11.

377 Ibid., Article 12.

378 Ibid., Article 13.

379 Ibid., Article 14.

380 See on this discussion Bentivoglio, supra, note 2 at 112-116.

subject to its jurisdiction, laws and regulations in all respects.[381] While in the airspace of a foreign state, the aircraft does not enjoy any "extraterritoriality" and no analogy with vessels on the high seas may be drawn."[382]

Bentivoglio, on the other hand, argues for the application of the principle of nationality[383] and criticizes the solution adopted by *l'Institut*: "We have seen however, in the course of the previous chapter, that there are sufficient reasons why this type of approach, still linked with the traditional doctrine in the field, appears no longer tenable."[384]

What ever the solution it must be realized, from a pragmatic point of view, that cases involving births, marriages, wills and, to a lesser degree, contracts, transfer of movables, crimes and torts on board an aircraft in flight are very rare; "some of them seem highly improbable in practice."[385] We will, therefore, only briefly examine the conflict of laws rules of some countries pertaining to some of these acts and facts. At the outset we would like to disqualify the cases of births (citizenship) and crimes[386] since they do not qualify as cases of private law.

4.2 The Different Acts and Facts

1. We shall now look at contracts concluded on board an aircraft in flight. As we have seen above,[387] there is still some room for the application of the *lex*

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[381] "This conclusion follows from the general international law which considers the airspace as an integral part of the state territory; Art. 1 of the *Chicago Convention* is declaratory of this general rule." Milde, supra, note 2 at 169.

[382] Ibid., at 259.

[383] Supra, note 2 at 103-122.

[384] Ibid., at 116.

[385] Milde, supra, note 2 at 258.

[386] See generally on penal air-aeronautical law Matte, supra, note 99 at 325-373.

[387] Supra, Chapter 2.5.

loci actus in the field of *contracts*, but only as a subsidiary rule, concerning the formal validity, in *favor validatis*. We have also seen that the manner of performance of a contract is governed by the law of the place of performance.[388] If these places are in the aircraft we may, consequently, encounter some problems.

In addition, the very common practise of selling goods in the course of air carriage should often be subject to the rules pertaining to the international sale of goods. *The Hague Convention on the Law Applicable to the International Sale of Goods of June 15, 1955*[389] acknowledges the parties' freedom to choose the law applicable to their contract.[390] In the absence of choice the law applicable shall be the law of the vendor's residence when he received the order, or the law of the place in which he has an establishment that received the order, or the law of the buyer's residence if the vendor or his agent received the order in that country. How these subsidiary rules are to be applied in this case is a matter of speculation. One possible solution would be to apply the law of the carriers principal place of business as the law of the vendor (the second subsidiary rule is of little importance in this case). The case at issue involves, moreover, consumer aspects, and the provisions of, inter alia, the *Contract Convention*[391] might be applicable as *lex specialis*.

2. In relation to *marriages* the conflict of laws rules of many countries state that the formalities of a marriage are governed by the *lex loci celebrationis*. Matters of a formal character are *inter alia*; the competence of the person executing the marriage, the procedure to be followed, the necessity of prior notification and witnesses.[392]

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[388] Id.

[389] The Convention is not applicable to the parties' capacity to contract, the form of the contract and the relation to third parties, Article 5.

[390] Article 2.

[391] See, supra, concerning consumer contracts, Chapter 3.1.2.

[392] See Batiffol and Lagarde, supra, note 4 at 59-60, and Cheshire, supra, note 15 at 561.

Under the laws of *England* there are a few exceptions to this rule. First, there are two statutory exceptions one pertaining to consular marriages[393] and one pertaining to marriages of members of British forces serving abroad[394] which shall be valid as if they were solemnised in the The U.K..[395] Secondly, there is the common law exception.[396] Originally it sufficed that the marriage was *per verba de praesenti*, but in 1843 the House of Lords added the condition that an episcopally ordained priest or deacon, whether of the English or Roman Catholic Church, should perform the ceremony.[397] This kind of marriage is applicable a) in countries where the common law is in force, b) where the compliance with the *lex loci* is prevented by some insuperable difficulty and c) marriages of military forces in belligerent occupation.[398] This kind of marriage is not accepted in England, only in other territories Whether marriages on a ship on the high seas does require the services of a clergyman is not totally clear as far marriage of necessity is concerned. It seems that this requirement could be done away with if there is some element of urgency.[399] In summary, we find no indication that the laws of England should apply extraterritorially, except under very special circumstances, and, as far as marriage in an aircraft is concerned, "[i]t is submitted that in such cases an English court will apply the law of the subjacent state, regardless of the nationality of the aircraft, to determine the legal consequences of these events".[400] A marriage in an aircraft over the high seas could be valid with a clergyman present or without, in a situation of necessity, by virtue of the personal law of at least one of the contracting

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393 Cheshire, supra, note 15 at 563.

394 Ibid., at 565.

395 Ibid , at 563 and 565.

396 Ibid , at 566.

397 Id.

398 Ibid , at 566-572.

399 Ibid., at 574.

400 Lord McNair, supra, note 373 at 302.

parties, because "[t]here can be no lex loci".[401] This possition definetly renounces the principle of nationality of the aircraft.

In *France* the formation of a marriage is also governed by the principle of *locus regit actum*,[402] the only exception being consular marriages.[403] In the *U.S.* this principle governs not only matters of form but also matters of substance.[404] The *Scandinavian* countries do, at least between themselves, adhere to the same principle.[405]

3. Turning to *wills*, the point in issue is the formal validity of the will. It would seem reasonable to apply the *lex loci actus* also to this act, but that possition is not accepted in *France*[406] and has suffered severe draw-backs in relation to the principle in *favor validatis* in other countries.[407] In *England*,

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[401] Ibid , at 305.

[402] "*Le mariage étant considéré comme un acte juridique quant à sa formation, est soumis à la règle locus regit actum pour ses conditions de forme. celles-ci seront déterminées par la loi du lieu de sa célébration* " Batiffol and Lagarde, supra, note 4 at 37.

[403] Ibid., at 47

[404] Ibid., at 38.

[405] Bogdan, supra, note 19 at 138.

[406] "*Cependant la succession testamentaire dérive d'un acte juridique, le testament, et on aurait pu attendre l'application de la loi de cet acte comme on la trouve pour le contrat de mariage Mais la compétence, admise, de la loi successorale ne permet de laisser le testateur se référer à une autre loi que dans les matières sur lesquelles la loi successorale ne porte pas de dispositions impératives*". Batiffol and Lagarde, supra, note 4 at 396

[407] In *England* the domicil of the testator was the only connecting factor recognised by the common law, but the Wills Act of 1861 added the place of acting as a subsidiary rule. Then the implementation of the 1961 Hague Convention on the Formal Validity of Wills and later the 1973 Washington Convention in International Wills further changed the rules. Cheshire, supra, note 15 at 836-841 and 850.

The 1961 Hague Convention on the Formal Validity of Wills, Article 4, holds a testament valid as to form if it meets the requirements of the *lex loci actus* or the law of the testators domicil, habitual residence or nationality, either at the time of making the will or at death.

The 1973 Washington Convention on International Wills sets up a special, additional, form for testaments and every testament complying with this form is then held valid in all the contracting states See K.H. Nadelman, "The Formal Validity of Wills andd the Washington Convention 1973 providing the Form of an International Will" [1974] 22 Am J Comp L 365

in the case of a will made on board an aircraft the law of the place of execution receives special statutory treatment.[408] The testator may comply with either the law of the place, in the territory of which the aircraft in grounded[409] or, in other cases[410], with the law of the nationality of the aircraft.[411]

4. *Rights in rem* have traditionally been governed by the *lex rei sitae*.[412] Here, we shall only discuss the law applicable to the transfer of tangible movables situated in the aircraft. The problem is known as *res in transitu*. When rights in movables are transfered, and at the time of this transfer are situated in an aircraft, the application of the *lex rei sitae* is very inconvenient. But what law is the more suitable? There seems to be no clearcut answer.[413] As alternatives the law of the owner's domicil, the law of the place of ultimate destination,[414] the law of the place of dispatch and the proper law of the particular transfer have been suggested.[415] If the transfered goods are represented by a document, e.g an airwaybill, and this document is capable of an independent dealing (i.e. is negotiable), it has been held that to a certain extent the rights *in rem* of the transaction are to be governed by the law

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[408] The 1963 Wills Act section 2 (1) (a), ibid.

[409] Lord McNair, supra, note 373 at 305, holds that this also applies if the aircraft is in flight through the territorial airspace of that state. In which case the law of the subjacent state shall govern

[410] Lord McNair, ibid , at 305 holds that over the high seas there is no *lex loci* and therefore the court shall apply the *lex domicilii* of the maker or another system of law, most appropriate in the circumstances.

[411] Cheshire, supra, note 15 at 837. J.H.C. Morris, The Conflict of Laws, 3rd ed. (London: Stevens and sons, 1984) 394-395.

[412] Batiffol and Lagarde, supra, note 4 at 163.

[413] "The most that can be said is that, when a conflict arises concerning a chattel 'in transit', the proper law of the transfer must be determined in the light of principles mentioned in this study, having regard to the facts of the particular case." P.A. Lalive, The Transfer of Chattels in the Conflict of Laws (Oxford: Clarendon Press, 1955) 192-193.

[414] The Swiss Federal Statute, supra, note 20 Article 101, adopts this rule.

[415] Cheshire, supra, note 15 at 800.

applicable to that document.[416] Also the application of the law of the state of nationality of the carrying aircraft might be relevant.[417]

5. Lastly, we shall consider the case of *torts* committed onboard an aircraft in flight, whereby the application of the *lex loci delicti* rule might become problematic. In this context we will not go into any details on the present state of torts and the *lex loci delicti* rule in the conflict of laws, this will be dealt with in detail *infra*.[418] It suffices here to say that the *lex loci delicti* rule is still alive in the civil law countries while it has lost considerable ground in the common law[419] countries.[420] In countries that do not rigidly uphold this rule the problem of torts committed onboard an aircraft does not create any special problems. In the other countries, however, a solution has to be found. Batiffol & Lagarde propose to apply the law of the nationality of the aircraft, at least over the high seas, implying that the law of a subjecent territory would be the *lex loci* in other cases.[421]

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[416] Id., and Bogdan, supra, note 19 at 233. The Swiss Federal Statute, supra, note 20 Article 106, reads: "1. The law designated in an instrument determines whether this instrument embodies [ownership of] the merchandise. In the absence of such designation, this question is governed by the law of the state in which the issuer has his place of business.
2. When the instrument embodies [ownership of] the merchandise, the real rights relating to the instrument and to the merchandise are governed by the law applicable to the instrument as a movable.
3. Where more than one person assert real rights on the merchandise, some directly and others by virtue of an instrument, the law applicable to the merchandise itself determines which of these rights shall prevail."

[417] Cheshire, supra, note 15 at 801 and Batiffol and Lagarde, supra, note 4 at 167 and 168.

[418] Infra, Chapter 6.

[419] See especially concerning this case at common law; Lord McNair, supra, note 373 at 281-288.

[420] Nevertheless, while France and the Scandinavian countries still adheres to the principle West Germany, the Netherlands and Switzerland seem to accept certain exceptions. Batiffol and Lagarde, supra, note 4 at 239-242. See also S. Stromholm, Torts in the Conflict of Laws (Stockholm: 1961).

[421] Supra, note 4 at 246

4.3 Concluding Remarks

In conclusion we have found that the sphere of applicability of conflict of laws rules attatching special significance to the *locus* of acts and facts have to a large extent been reduced by other rules. Nevertheless, some problems might still arise and it is submitted that the rule established by *l'Institut de Droit International* "may be considered as very satisfactory. It would help to fill the vacuum in such cases where, according to general principles of private international law, the *lex loci actus* is to be applied to a particular legal relation but no *situs* in the legal sense exists (area not subject to State sovereignty) or the *situs* cannot be determined with accuracy at a given moment. In such cases it is justifiable to exchange the aircraft itself as a fictitious *locus* and to apply the national law of the aircraft. The same applies for goods situated onboard an aircraft; under similar circumstances the *lex rei sitae*—in fact non-existent or undeterminable—is to be replaced by the national law of the aircraft."[422]

It is important here to note that it is the application of general principles of private international law to relations onboard an aircraft in flight that have been scrutinized here and not rules specifically relevant to air law. Further that, at least some of the problems, have a very limited practical importance. Therefore, we have limited the presentation to the extent necessary.
"M. BATIFFOL demande que la longueur du débat soit proportionnée à l'importance de la question."[423]

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[422] Milde, supra, note 2 at 261.

[423] (1963) 50-II *Annuaire de l'Institut de Droit International* at 230.

5. Security Rights in Aircraft

5.1 Introduction

The purchase of aircraft cannot be undertaken without effective financing. "Aerospace financing is a continuous struggle between two opposing requirements. Unlike the financing of real property or plant and machinery where the assets are fairly stationary, aerospace related equipment is both very *expensive dangerous and highly mobile.* In conflict is the need of the user to have as much operational freedom as possible, and the need of the finacier to ensure that the equipment is preserved in a good condition and readily accessible should there occur an event of default.

In the final analysis, it is the user who must prevail since the equipment cannot be put to proper use if it is confined to the custody of the finacier or its agent. Consequently, it is important that *adequate security* be afforded to the finacier without unduly limiting the ability of the user to exploit the equipment to its fullest potential and therby giving further assurance to the financier of its potential to service the debt."[Emphasis added][424]

The question here is how the adequate security devices used to finance the purchase of the very expensive[425], dangerous and mobile aircraft are to be treated in the conflict of laws. Due to the higly mobile nature of this kind of movable property the application of the *lex rei sitae* rule is highly impracticable. The security devices used differ of course from jurisdiction to jurisdiction but in short they include: hypothec, mortgage, pledge, trust deeds, equipment trust, conditional sale, hire-purchase, leases etc.[426] Since we

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[424] Bunker, supra, note 229 at 135.

[425] "A new Boeing 747-400 for instance, will cost more than U S. $125 million in 1987, depending on customer-specified equipment, and more modest narrow-bodied aircraft may cost in excess of U.S. $25 million each." Bunker, ibid., at 179. (Today, 1990, the Boeing 747-400 cost close to U.S. $190 million)

[426] See Bunker, supra, note229 at 135-179, and for a comparative survey Matte, supra, note 99 at 546-565.

have dealt with the conflict of laws problems related to the contract of aircraft purchase[427] and the contract of aircraft charter (and leases)[428] we will here consider only rights *in rem*.[429]

5.2 The Geneva Convention

The second Assembly of ICAO, convened in Geneva adopted, on June 19 of 1948, the *Convention on the International Recognition of Rights in Aircraft*.[430] From the title and from the preamble[431] it is clear that the Convention did not attempt to set up a uniform code of security devices or to provide for the enforcement of real rights,[432] but merely to provide for the international recognition of rights in aircraft created under the laws of the applicable jurisdiction.[433] In addition, it provides for the registration, and publicity, of these rights,[434] for the establishment of a preferential order among certain claims[435] and for international conditions of sale in execution.[436]

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[427] Supra, Chapter 3.5.

[428] Supra, Chapter 3 3.

[429] de Visscher, supra, note 2 at 318-323.

[430] ICAO Doc. 7620.

[431] "WHEREAS it is highly desirable in the interest of the future expansion of international civil aviation that rights in aircraft be recognised internationally." Ibid., para. 2 of the preamble.

[432] G N. Calkins, "Creation and International Recognition of Title and Security Rights in Aircraft" (1948) XV JALC 156 at 166.

[433] Article I.

[434] Articles II and III.

[435] Articles IV, VII (5) and VII (6).

[436] Article VII.

The rights *in rem* that the contracting states undertake to recognise are enumerated in Article I, which reads:

"(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 to 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 indebtedness; *provided that* such rights
(i) 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 (ii) are regularly recorded in a public record of the Contracting State in which the aircraft is registered as to nationality.
The regularity of sucessive recordings in different Contracting States shall be determined in accordance with the law of the State where the aircraft was registered as to nationality at the time of each recording.

(2) Nothing in this Convention shall prevent the recognition of any rights in aircraft under *the law* of any Contracting State, but Contracting States shall not admit or recognise any right as taking priority over the rights mentioned in paragraph (1) of this Article. [Emphasis added]"

The rights enumerated in (a) to (d) need no further explanation, since "[t]he language adopted in the Convention, as shown by its legislative history, was broadly intended to cover security devices such as conditional sales and leases in addition to all types of mortgages To qualify for international recognition, the underlying security interest must be 'contractually created', thereby excluding statutory, common law or judicial liens."[437]

There are further prerequisites for the international recognition of these rights stated in (i) and (ii); that the rights have been constituted *in accordance with the law* of nationality of the aircraft and are regularly recorded in a public record held by the same state. This looks like a contradiction to the stated intention of the drafters—merely to recognise rights in aircraft—for it

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[437] J.W.F. Sundberg, "Rights in Aircraft" (1983) VIII Annals Air Space L 233 at 237.

is prejudicial in favour of the law of nationality of the aircraft in relation to the creation and transfer of real rights in aircraft. 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. Consequently, it will be necessary for a court which is seized with a problem in the future to consider under what law a given transaction was consummated, applying to its decision the law of conflict of laws of the Contracting State whose nationality the aircraft bears."[438] It is thus clear that the Convention is only prejudicial to the question what state's conflict rules are to govern the creation and transfer of real rights in aircraft. Traditionally this would have been a question for the conflict rules of the *lex fori* to resolve.

Nevertheless, "[a] Contracting State may prohibit *the recording* of any right which cannot validly be *constituted* according to its national law" [Emphasis added],[439] thus depriving rights constituted in accordance with the law made applicable through the conflict of laws rules of the state of nationality of the aircraft of priority, according to section (i) of para. (1) read in conjunction with para. (2). Paragraph (2) paves the way for *the recognition* of any rights in aircraft under the law of any[440] contracting state;[441] e.g. rights in an aircraft under construction and not yet registered.[442] These rights shall not, however, take priority over the rights mentioned in paragraph (1).[443] Therefore, a state, being the state of nationality of the aircraft or not, might recognize as valid, in a juridical proceeding, a right created under the law of any contracting state, as long as it does not admit this right to take *priority*

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438 Calkins, supra, note 432 at 164.

439 Article II (3).

440 As to the meaning of this word see Matte, supra, note 99 at 568 note 45.

441 The French version reads: "*Aucune disposition de la présente Convention n'interdit aux Etats contractants de reconnaître, par application de leur loi nationale, la validité d'autres droits grevant un aéronef.*"

442 Matte, supra, note 99 at 568.

443 Article I para. (2) *in fine.*

over the rights created in accordance with the law of nationality of the aircraft.

It is therefore submitted that the Convention, even if only implicitly, makes it crucial for the creditors to have their securities created and transfered in accordance with the law of the state of nationality of the aircraft. And, consequently, the Convention does prejudice in favour of the application of this law also to the issue left for the entire law of the state of nationality of the aircraft; *the creation and transfer of real rights.*

As to the *effects* of the recording of any right mentioned in paragraph (1) with regard to third parties, Article II (2) provides that this shall be determined by "the law of the Contracting State where it is recorded."

5.3 The Conflict of Laws

The issues traditionally governed by the law applicable to rights *in rem* are numerous an quite complex diverging from jurisdiction to jurisdiction.[444] The Swiss Federal Statute,[445] Article 100, states:

"1. The *acquisition and loss* of real rights in movables are governed by the law of the place where the movable was situated at the time of [the occurence of] the facts upon which such acquisition or loss is based.
2. The *content and the exercise* of real rights in movables are governed by the law of the place where the movable is situated.[Emphasis added]"

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[444] For a comparative analysis pertaining to rights in aircraft see Matte, supra, note 99 at 546-565.

[445] Supra note 20.

The emphasized words, acquisition and loss, content and the exersice, may be used as general definitions of the issues governed,[446] and will suffice for the purposes of this study.

The question that presents itself is, what law shall be applied to these issues. Generally speaking, the traditional approach is to apply the *lex rei sitae,*[447] as we have seen in the Swiss Federal Statute,[448] to questions of this kind. Nevertheless, its application to real rights in aircraft seems impracticable due to the mobility of the aircraft. *L'Institut de Droit International* adopted the following rule:[449]

"Rights *in rem* and private law claims in respect of an aircraft shall be governed by the law of the nationality of the aircraft.
Nevertheless creditors entitled to sums due for rescue of the aircraft and to special expenses essential for the maintenance of the aircraft may claim the preferences and the order of priority recognized to them by the law of the State where rescue or maintenance operations have been terminated.
A change of nationality of the aircraft shall not affect rights already acquired."

To substitute the law of the nationality of the aircraft for the *lex rei sitae* has been prefered by many authors[450] and by many jurisdictions.[451] There is

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[446] Batiffol and Lagarde, supra, note 4 at 174, use the words *contenu des droits réels (détermination des prérogatives du propriétaire, de l'usufruitier ou du gagiste)* and *modes d'acquisition (prescription acquisitive, contrats ou autres).*
E. Rabel, The Conflict of Laws (Ann Arbor. University of Michigan Law School, 1958) at 125, uses the words "conditions and effects of the conveyance".

[447] "[I]t is at present the universal principle, manifested in abundant decisions and recognized by all writers, that the creation, modification and termination of rights in individual tangible physical things are dtermined by the law of the place where the thing is physically situated." Rabel, supra, note 446 at 30.

[448] Article 107 of this Statute states, however, that this Statute shall not prejudice the provisions of other laws relating to real rights on ships, aircraft and other means of transportation.

[449] (1963) 50 II *Annuaire de l'Institut de Droit International* at 374.

[450] For references see Milde, supra, note 2 at 234 notes 60-64. Lalive, supra, note 413 at 191.

[451] Batiffol and Lagarde, supra, note 4 at 165-166 note 10. Bogdan, supra, note 19 at 233. A. Philip, *Dansk international privat- og proceret,* 3'rd ed. (Copenhagen: 1976) 391-392.

no indication that this rule would only be applicable in the case where the *lex rei sitae* is undeterminable—as in the case of flight over the high seas—and not when the aircraft is flying through the airspace or standing on the territory of a state.[452] The last paragraph follows logically from the adoption of this principle. The *rationale* for the principle has been underlined by Milde:[453] "The need for security and stability of legal relations requires that these relations be attatched to a single, permanent and stable law which would be forseeable for all parties concerned. The best solution to be found is undoubtedly in favour of the law of the place of registration of the aircraft, which is known to all concerned, is stable and unique."

The second paragraph almost reiterates Article IV (1) of the Geneva Convention.[454]

5.4 Concluding Remarks

As we have seen the Geneva Convention does not purport to introduce a uniform set of security devices but merely to provide, under certain conditions, for the international recognition of rights in aircraft. Nevertheless, the creditors wanting to ascertain priority for their claims are implicitly encouraged to make sure that the security they have been offered can be registered in the state of nationality of the aircraft. Following the path of the Convention many states now recognize that the law of the state of nationality of the aircraft shall also govern the creation and contents of these security rights. Thus, we are faced with the fact that the law of the nationality

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[452] Morris, supra, note 411 at 375, seems to be of the opinion that the law of the nationality of the aircraft is so restricted.

[453] Supra, note 2 at 235.

[454] "In the event that any claims in respect of (a) compensation due for salvage of the aircraft, or (b) extraordinary expenses indispensable for the preservation of the aircraft give rise, under the law of the Contracting State where the operation of salvage or preservation were terminated, to a right conferring a charge against the aircraft, such right shall be recognised by Contracting States and shall take priority over all other rights in the aircraft." Supra, note 449.

of the aircraft governs real rights in aircraft. Therefore, when the Geneva Convention in Article I para. (1) section (i) mentions *the law* of the state of nationality of the aircraft—meaning the entire law of that state—it is, in fact, the substantive law of the same state that is applicable. Creditors are therefore faced with a monopoly position of the law of the state of nationality of the aircraft and should adapt their security devices accordingly.

6. Aircraft Accidents; Torts and Related Issues

6.1 Introduction

In this final chapter we shall look at aircraft accidents and the problem of the conflict of laws to determine the law applicable to the issue of tortious liability. For a change, we will start with a short conflict of laws analysis and thereafter turn to specific issues to determine the scope of the applicable law and if any modifications to the general rule are called for. This latter part will deal with damages sustained by passengers, aircraft operators and by third parties on the ground.

6.2 The Conflict of Laws; *Lex Loci Delicti* Today

"The principle unanimously established by the canonists and later the statutists since the 13th century and generally adopted to-day is that the *lex loci delicti commissi* governs."[455]

The meaning of this rule is that a claim for damages resulting from a tort shall be governed by the law of the place where the alleged tort occured. It is said that the rule is derived from the vested rights doctine holding that a right acquired under the laws of one state "are capable of vesting and permanently adhering in a person until destroyed by the operation of such law."[456] Therefore, the law applicable shall be the law to which the person acting owes obedience at the decisive moment and, conversely, the law that guarantees the right which has suffered an infringement.

This rule has for a long time been and, often, still is the general rule under which the law applicable to tort claims is determined.[457] The advantages of

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[455] Cheshire, supra, note 15 at 514.

[456] J.B. Wolens, "A Thaw in the Reign of Lex Loci Delicti" (1966) 12 JALC 408 at 411-412.

[457] See generally Strömholm, supra, note 420 at 77-115.

the rule are its ease of application, predictability of outcome and its symmetry of application to the parties[458]—especially in cases resulting from big disasters involving many injured, such as an air crash. The disadvantages are that the place of injury is not always easy to ascertain, that the vested rights doctrine ignores the interests that other jurisdictions have in the outcome and that it is unfair to the plaintiff since the place of injury is entirely fortuitous.[459] (The latter point, fortuity, is of course particularly relevant in aviation accident cases.) In *France*[460] and in *Sweden*[461] the rule seems to be more or less untouched, while in other countries the rule has either been replaced or provided with exceptions because of dissatisfaction with the traditional approach and often on public policy grounds.[462]

In *Germany* the *lex loci delicti* is still the basic rule[463] but it has been provided with exceptions. If the tortfeasor is German he is protected by Article 38 (before the 1986 reform Article 12) EGBGB:[464] "By reason of an unlawful act committed in a foreign country, no greater claims can be enforced against a German than those created by German law."[465] Further, if both the tortfeasor and the plaintiff are Germans, German law alone is to

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458 Cagle, supra, note 111 at 953 and 974.

459 Ibid., at 975.

460 Since the case: Civ. 25 mai 1948, *Lautour c. Veuve Guiraut*, (1948) *Recueil Dalloz* 357. See reference in Batiffol and Lagarde, supra, note 4 at 237-239.

461 Since the case *Cronsoie v. Forsikringaktieselskabet National* (1969) *Nytt Juridiskt Arkiv* 163.

462 For a comparative outlook see Cagle, supra, note 111 at 973-988, and B. Hanotiau, "The American Conflicts Revolution and European Tort Choice-of-Law Thinking" (1982) 30 Am J Comp L 73.

463 Drobnig, supra, note 14 at 213.

464 The Introductory Law to the Civil Code, BGB (Bürgerliches Gesetzbuch), (1896).

465 Translation by Drobnig, supra, note 14 at 214. Another translation by B Dickson, "The Reform of Private International Law in the Federal Republic of Germany" (1985) 34 Int'l & Comp L Q 231 at 236 note 27: "claims arising out of a tort committed abroad cannot be brought against a German national to a greater extent than is allowed for by the German law."

govern the tort.[466] A German in the above sense is a German national or an organization subject to German law. It is the not the common nationality, in the latter exception, that demands the application of German law, rather it is the common place of residence why the rule should be restricted to Germans ordinarily residing in Germany.[467] There seems to be some authority, even for the recognition of the parties' choice of the applicable law.[468]

Under the *Swiss* Federal Statute[469] the parties may agree to the application of the law of the forum at any time after the occurence of the injurious event.[470] The general rule in the absence of choice is the *lex loci delicti,*[471] but if the injured party and the tort feasor have their habitual residence in the same state the law of that state will govern.[472] A further exception is made for the law applicable to a pre-existing legal relationship if the act violates that legal relationship.[473]

In the *Netherlands* an exception to the *lex loci delict* rule exists when the consequences of a tortious act belongs to another nation's legal sphere.[474]

It should be noticed, also, that *the Hague Convention of May 4, 1971 on the Law Applicable to Traffic Accidents,* in Article 3, as a general rule adopts

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[466] Established by a regulation of December 7, 1942. Drobnig, supra, note 14 at 215 note 16.

[467] Ibid., at 215.

[468] Ibid., at 216.

[469] Supra note .

[470] Ibid., Article 132.

[471] Ibid., Article 133 para. 2 sentence 1. But if the result of the act occured in another state the law of that state will apply if the tortfeasor should have forseen the that the result would occur there. Ibid., Article 133 para. 2 sentence 2.

[472] Ibid., Article 133 para. 1.

[473] Ibid., Article 133 para. 3.

[474] For example in a car accident in a foreign country between two Dutch nationals. Judgment of June 16, 1955, Court of Appeals, Holland (1955) *Nederlandese Jurisprudentie* 615. See reference in Batiffol & Lagarde, supra, note 4 at 240.

the *lex loci delicti*, but exceptions in favour of the law of the place of registration of the vehicle were admitted.[475] (See, *infra*, the Hague Convention of October 21, 1972 on the Law Applicable to Products Liability.)

Under the laws of *England* the situation is somewhat complex. "English law, according to the prevalent view, has so intimately blended the *lex loci delicti commissi* and the *lex fori* that the court is not the mere guardian of its own public policy, but is required to test the defendant's conduct by reference to the English as well as well as to the foreign law of tort."[476] The rule relates back to the ruling in *Philips v. Eyre*[477] as modified by *Boys v. Chaplin*.[478] In this latter case the House of Lords was unanimous, but "this unanimity is clouded by the bewildering variety of reasons for their Lordship's conclusions."[479] The rule thereby established has come to be called the rule of "double actionability", i.e. there must be actionability by the *lex fori* and the *lex loci delicti*.[480] Or, stated differently, the tortfeasor can always invoke the protection of the English law.[481] This rule is, nevertheless, a general rule and the latter jugment decides that there should be flexible exceptions in favour of the law which has the most significant relationship with the occurence and the parties.[482]

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[475] Batiffol and Lagarde, supra, note 4 at 242-244.

[476] Cheshire, supra, note 15 at 519.

[477] [1870] LR 6 QB 1. See reference in Cheshire id..

[478] [1971] AC 356. See reference in Cheshire id..

[479] Cheshire, supra, note 15 at 519 and 519-520 respectivly for their different reasons.

[480] Ibid., at 521.

[481] Batiffol and Lagarde, supra note 4 at 240.

[482] Cheshire, supra, note 15 at 536, and Dicey & Morris, supra, note 259 at 1373-1378

The great revolution[483] in relation to the law applicable to torts has taken place in the *U.S.*, but it has not lead to any great clarity, on the contrary.[484] Morris stated, in 1951,[485] that "[i]f we adopt the proper law of a tort, we can at least choose the law which, on policy grounds, seems to have *the most significant connection* with the chain of acts and circumstances in the particular situation before us.[Emphasis added]"[486] A foreign tort should, consequently, be adjudged according to the social environment in which it has been committed.[487] In *Babcock v. Jackson*, of 1963, the New York Court of Appeals said that it is the law of the state which has the *most significant relationship* with the occurence and with the parties that determines their rights and liabilities in tort.[488] A few years later the RESTATEMENT[489] adopted the following rule:[490] "The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has the most significant relationship to the occurence and the parties."[491] There are also other approaches to this issue and there seems to

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[483] Called "the American conflict revolution" by Willis L.M. Reese, "American Choice of Law" (1982) 30 Am J Comp L 135. The first Restatement of Conflict of Laws (1934) § 378 adopted the *lex loci delicti*. Today fewer than twenty states adheres to this rule. L.S. Kreindler, 1 Aviation Accident Law (New York: Bender, 1987) § 2.03 [1].

[484] See. *In re* Air Crash Disaster Near Chicago, Ill on May 25, 1979, 500 F. Supp. 1044 (N.D. Ill. 1980), *rev'd in part, aff'd in part*, 644 F 2d 594 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981). A.F. Lowenfeld, "Mass Torts and the Conflict of Laws: The Airline Disaster" (1989) Univ Ill L Rev 157. See also on this case C. Cage, "Conflict of Laws" (1982) 47 JALC 339.

[485] J.H.C. Morris, "The Proper Law of a Tort" (1951) 64 Harv L Rev 881. See also J.H.C Morris, "Torts in the Conflict of Laws" [1949] 12 Modern Law Rev 248-252.

[486] Ibid , at 888.

[487] Cheshire, supra, note 15 at 515.

[488] [1963] 12 NY 2d 473 at 477. See reference in Cheshire, supra, note 15 at 516.

[489] Supra, note 16.

[490] Ibid., § 145 (1).

[491] The court shall consider: the needs of various legal systems; the policies of the forum; the interests of other states in the issue, the policies of these states; the parties' expectations; the policies of the particular area of law; the certainty, predictability and uniformity of the outcome; and the ease in determining and applying the law. Ibid., § 6 (2).

be no uniformity within the U.S.[492] as to what law to apply to torts.[493] The prevailing system has also been put under severe attack in recent years, especially in relation to air crash cases.[494] It is also important to keep in mind that in the U.S. there are not merely international conflicts but also inter-state conflicts, which further complicates the issue.

6.3 Actions for Damages Sustained by Passengers

We will now more closely investigate into the actions brought by passengers (or others deriving their rights from a deceased passenger) in relation to damages sustained in the course of an international air carriage. "[I]n the past fifteen years most litigation resulting from airplane disasters has involved at least two major defendants, the airline operator and the manufacturer, and often a third, the federal government as operator of air traffic control."[495]

1. The liability regime of the *airline operator* in international air transport is, as we have seen above,[496] most often governed by the Warsaw system. Since

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In applying these principles the court should consider the following contacts. the place of the injury; the place of the conduct causing injury; the domicile, residence, nationality, place of incorporation and place of business of the parties, and the place where the parties' relationship is centered. Ibid., § 145 (2).

[492] "Each of the more than fifty states and territories within the United States has its own set of conflict rules" Bogdan, supra, note 140 at 331.

[493] Cagle, supra, note 111 at 973-981, accounts for four approaches: (1) the "most significant contacts test," (2) the "most significant relationship test," (3) the "governmental interests analysis" and its refinement the "comparative impairment approach" and (4) the "choice-influencing considerations approach". Further, Lowenfeld, supra, note 484 at 163, mentions the New York's "functional equivalent of the *Restatement* (Second) test" See also Bogdan, supra, note 140 at 331-341.

[494] A.A. Ehrenzweig, "Specific Principles of Private International Law" (1968 II) 124 *Recueil des cours* 254 at 325.
Willis L.M. Reese, "The Law Governing Airplane Accidents" (1982) 39 Wash & Lee L Rev 1303.
Lownefeld, supra, note 484.

[495] Lowenfeld, ibid, at 157.

[496] Supra, Chapter 3.1.

we have already analysed that system and the scope of its applicablitiy,[497] we will deal here with the cases where that system does not apply. In these cases the law to be applied will depend on the conflict of laws analysis used by the court seized of the case.[498] We have also said, above,[499] that the conflict of laws analysis (i.e. what law the court will decide to apply to a certain case) in turn will depend on whether the court, in classifying the action, for conflict of laws purposes, finds the action sounding in tort or in contract. The country whose law will be chosen to apply will, probably, differ if the action sound in tort rather than in contract and vice versa. How the result of the classification will turn out is hard to predict and differs from jurisdiction to jurisdiction, but some guidance might be provided by determining how different jurisdictions look upon airline operators liability domestically.

In *common law* countries[500] there is a distinction made between common carriers and private carriers.[501] A common carrier is a carrier who undertakes to transport anyone or anything upon payment of his charges.[502] A private carrier is a carrier which does not hold himself out to be a common carrier.[503]

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[497] Id

[498] "If nations' domestic laws conflict, then courts must look to choice of law rules to determine which liability limit to apply. Thus, the choice of law analysis used by a court will ultimately determine how much damages an injured passenger will receive." Cagle, supra, note 111 at 954.

[499] Supra, Chapter 3.1.

[500] See on tort liability generally H.G. Gatlin Jr., "Tort Liability in Aircraft Accidents" (1951) 4 Vanderbilt L Rev 857.

[501] Miller, supra, note 161 at 51.

[502] "In the United States, a common carrier is defined as a person who undertakes to transport for hire goods or passengers or both for all who reasonably apply, according to the method of transportation which he offers to the public. In English law,a common carrier of goods is a carrier who holds himself out as being prepared to carry for any one who wishes to engage his services and is prepared to pay his charges. His public calling to carry goods may be limited to goods of certain types, or to certain areas or routes. A common carrier of passengers is a carrier who holds himself out as providing transport from one place to another for all who are prepared to pay his charges. A common carrier cannot refuse to carry a particular person, unless he has reasonable grounds to do so " Id.

[503] Id.

The liability of the common carrier of goods is strict[504] while the liability of the common carrier of persons is based on negligence;[505] the carrier "has a duty to use the greatest amount of care and foresight which is reasonably necessary to secure the safety of the person whom he undertakes to carry" [506] The private carrier of persons and goods is only liable for his wilful acts or negligence.[507] A common law court would, therefore, probably classify the issue as one sounding in tort,[508] applying its conflict of laws rule of tort,[509] at least as far as actions for death of a passenger are concerned [510]

In France, as a representative for the *civil law* countries, carriers of goods and passengers are under a strict contractual duty to safely transport passengers and goods, a duty to achieve a result—*obligation de resultat*.[511] Consequently, a French court would, probably, classify the air carriers liability as contractual[512] using its conflict of laws rule of contract.[513]

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[504] Id.

[505] The doctrin of *res ipsa loquitur* makes the burden of establishing negligence by the plaintiff less harsh. Ibid., at 52.

[506] Id.

[507] Id.

[508] Conserning actions under the Warsaw Convention see Matte, supra, note 99 at 404. "Thus, this doctrine and the majority of decisions rendered by Anglo-American Courts, consider actions based on art. 17 as tortious."

[509] Bentivoglio, supra, note 2 at 148.

[510] Sundberg, supra, note 177 at 297: "The approach includes only the wrongful death cases. As to mere passenger injury and cargo damage it is normal to proceed in contract."

[511] Miller, supra, note 161 at 54.

[512] Concerning actions under the Warsaw Convention see Matte, supra, note 99 at 403. "[U]nder civil law doctrine and in the European Courts, actions brought under arts 17 to 19 are of a contractual nature, given that all transportation by air (except in the case of a stowaway or that of an invalid contract) are based on a contract of transportation."

[513] Bentivoglio, supra, note 2 at 156.

Whatever the outcome of the classification issue may be, the country, the law of which has been choser to govern a specific case by the conflict of laws rules of the forum, might have enacted special legislation for air transport. The air transport laws of different countries might differ considerably with regard to the issues of the air carriers liability. Some countries have made the Warsaw system, in its different appearances, part of their domestic laws ("Warsaw Acts"[514]),[515] other countries have enacted their own liability regimes and in yet other countries there might not be any special liability regime at all and only the ordinary liability rules apply.[516] Therefore, not only may the liability be based on different grounds, strict liability or negligence with or without presumed fault or with the application of *res ipsa loquitur*, but also the heads of damages may differ as may the amount recoverable, limited or unlimited liability, from country to country.[517]

In passing, we should notice that in some instances the plaintiff can sue also the *employees* of the carrier. We have seen above[518] that there is a difference between the common law and the civil law countries in dealing with the servants, agents and independent contractors of the carrier in relation to the Warsaw Convention and the Guadalajara Convention. Under Article 25 (2) of the Warsaw Convention and Article XIII of the Hague Protocol, amending the former Article, the carrier may not avail himself of the liability limits in Article 22 for the acts and omissions of his servants and agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result (wording of Article XIII of the Hague

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514 Sundberg, supra, note 177 at 242

515 Mankiewicz, supra, note 140 at 2. As far as the recoverable damages are concerned Ireland, France, Belgium and Switzerland apply the Hague Protocol, while Germany applies the Guatemala Protocol. Cagle, supra, note 111 at 971 and 971 note 110.

516 Mankiewicz, supra, note 140 at 2.

517 "Conflict of laws has become a game—or rather an element in the game—quite skillfully played by certain masters who have realized that neither resourceful discovery nor seduction of a jury is the whole story of an airplane accident case. I fly a good deal, and my wife has instructions that if I go down, she is to get in touch with a particular New York attorney who is skilled in discovery, working juries, *and* conflict of laws" Lowenfeld, supra, note 484 at 158.

518 Supra, Chapter 3.3.3.

Protocol) provided that these persons acted within the scope of their employment.[519] This rule merely makes the acts of a servant or agent imputable to the carrier. Further, Article 25 A of the Hague Protocol enables a servant or agent of the carrier to invoke the liability limits in Article 22 in an action brought against him, if he proves that he acted within the scope of his employment and it is not proven that he acted with intent to cause damage or recklessly and with knowledge that damage would probably result. Consequently, a plaintiff cannot recover more against the servant or agent than he can from the carrier.

It has been held that an action against such a servant or agent can only be based on the national tort law of the country to which the conflict of laws rules of the forum point.[520] Consequently, the plaintiff may not avail himself of the presumption of fault provided for by the Convention while the defendant may invoke the limited liability, if he acted within the scope of employment. It is also this national tort law that applies to all issues in actions outside the general scope of the Warsaw system, against such servants and agents.

2. The second major defendant is usually *the manufacturer* of the crashed aircraft.[521] The often limited amounts of damages recoverable from the airline operator made the plaintiffs seek other defendants whos liability was not limited and who had "deep pockets". These cases have been based on rules pertaining to products liability In the *U.S.* product liability cases can be based on negligence,[522] breach of warranty[523] (express[524] or implied[525]) and

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519 Goldhirsch, supra, note 135 at 124-126.

520 Mankiewicz, supra, note 140 at 47

521 See generally Sadikov, supra, note 146 at 249-251.

522 In the landmark case of Mac-Pherson v Buick Motor Co (1916) 217 N.Y 382, 111 N E 1050, the rule of non liability, i e. that a manufacturer or vendor is only liable to persons who are in privity of contract with him for negligence in the manufacture or sale of the products he handles, was overruled After that decision the manufacturer of a thing of danger has a duty to make it carefully if he knows that the thing will be used by other persons than the purchaser. H. Duintjer Tebbens, International Product Liability (The Hague T M.C Asser Institute, 1979) 15-16.

strict product liability [526] As to the law applicable to product liability cases we are here again confronted with the issue of classification. Cases involving negligence[527] or strict liability are clearly sounding in tort rather than in contract,[528] but what about breach of warranty actions. There is some authority for applying to such an action the choice of law rule applicable to contracts.[529] Nevertheless, also the *lex loci delicti*[530] and the most significant

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In Sievers v. Beechcraft Manufacturing Co 16 Avi 18,141 (US Dist. C., E D L., July 18, 1980) a negligence based case was brought against an aircraft manufacturer.

[523] See the Uniform Commercial Code (1976) § 2-318.

[524] An express warranty has been made to extend to persons not in privity of contract with the manufacturer. It has evolved into a strict liability for misrepresentation Duintjer Tebbens, supra, note 522 at 17-118

[525] The implied warranty attach to any sale of movable goods. It can be a warranty of merchantability or of fitness for purpose. In Henningsen v. Bloomfield Motors Inc. (1960) 32 N J 358, 161 A 2d 69, "[t]he court decided also that the warranty liability extended to the dealer (vertical privity) and could be invoked by the injured wife (horizontal privity) The implied warranty is not conditional upon any knowledge or fault and is to that extent strict " Duintjer Tebbens, supra, note 522 at 18

In Goldberg v Kollsman Instrument Corp 8 Avi 17,629 (N Y C.A May 9, 1963) the implied warranty doctrin was invoked against an aircraft manufacturer.

[526] See the RESTATEMENT, supra, note 16 § 402 A.
After Greenman v. Yuba Power Prod. Inc. (1962) 377 P. 2d 897, 27 Cal. Rptr. 697, the courts of the U.S. rapidly started to apply the notion of strict products liability in tort rather than the far stretched notion of implied warranty Duintjer Tebbens, supra, note 522 at 21-22.

Mc Gee v Cessna Aircraft Corp (1978) 82 Cal. App. 3d 1005, 147 Cal. Rptr. 694, Manos v. Trans World Airlines 11 Avi 17,966 (US Dist. C. N.D.Ill. January 11, 1971) and Kramer & Kramer v. Piper Aircraft Corp , Florida Supreme Court, No 69,494, February 11, 1988, are strict product liability cases involving aircraft manufacturers.

[527] H.N Kinzy, "Current Aviation Decisions in Conflict of Laws" (1975) 41 JALC 311 at 319.

[528] Kinzy, ibid, at 314-318.

[529] Kinzy, ibid, at 319-323 and Manos v. Trans World Airlines 295 Fed. Supp. 1170 (N.D Ill. 1969), Quant v Beech Aircraft Corp 317 Fed Supp. 1009 (D. Del. 1970), Holcomb v. Cessna Aircraft Co. and Continental Motors 439 F.2d 1150 (5th Cir. 1971).

[530] Uppgren v Executive Aviation Services Inc 326 Fed. Supp 709 (D Md. 1971), Paoletto v. Beech Aircraft Corp 464 F 2d 976 (3rd Cir 1972) and Raritan Trucking Corp. v Aero Commander Inc. 458 F 2d 1106 (3rd Cir 1972).

contact rule[531] have been applied Maybe, the fact that strict liability in tort and implied warranty without privity of contract might merely be two different ways of describing the very same cause of action, the application of the conflict of law rule pertaining to torts should be used. And ,consequently, product liability actions should be classified as sounding in tort.[532]

In *Europe* there have been efforts made on the one hand to unify substantive laws on product liability and on the other to unify conflict of laws rules on this subject. *The Hague Convention of October 21, 1972 on the Law Applicable to Products Liability* is an attempt to unify the contracting states' conflict of laws rules in this area.[533] "This Convention is based on the so-called 'grouping of contacts' and its effect in a typical air crash situation most often gives the plaintiff a choice between the law of the place of the crash and the law of the defendant manufacturer's principal place of business."[534] *The European Convention of January 27, 1977 on Products Liability in Regard to Personal Injury and Death* is not a conflict of laws unification but lays down some elementary substantive provisions. Then

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531 O'Keefe v. Boeing Company 335 Fed Supp. 1104 (S D N.Y. 1971).

532 Bogdan, supra, note 140 at 341

533 "Article 4[ ] The applicable law shall be the internal law of the State of thr place of injury, if that State is also – a. the place of the hab .ual residence of the person directly suffering damage, or b the principal place of busin .ss of the person claimed to be liable, or c the place where the product was acquired by the person directly suffering damage "

"Article 5[·] Notwithstanding the provisions of Article 4, the applicable law shall be the internal law of the State of the habitual residence of the person directly suffering damage, if that State is also – a the principal place of business of the person claimed to be liable, or b the place where the product was acquired by the person directly suffering damage."

"Article 6[:] Where neither of the laws designated in Article 4 and 5 applies, the applicable law shall be the internal law of the State of the principal place of business of the person claimed to be liable, unless the claimant bases his claim upon the internal law of the State of the place of injury."

"Article 7[:] Neither the law of the State of the place of injury nor the law of the State of the habitual residence of the person directly suffering damage shall be applicable by virtue of Article 4, 5 and 6 if the person claimed to be liable establishes that he could not reasonably have forseen that the product or his own products of the same type would be made available in that State through commercial channels '

534 Bogdan, supra, note 140 at 327.

there is *the EEC Council Directive on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, adopted on July 25, 1985.*[535] This Directive introduces the principle of no-fault liability of the producer for damage caused by a defect in his product.[536] It is an attempt to unify the substantive laws of the member states of the E.E.C. on products liability.[537] For aircraft manufacturers the "state of the art" defence is of particular interest.[538]

The *Swiss* Federal Statute,[539] in Article 135, gives a particular rule for products liability as distinct from the general rule pertaining to torts.[540]

3. A third defendant is often *the government* of the state in which the accident occured, for supervising the airlines and airports especially the air traffic control,[541] or the government of the state of which the aircraft is

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[535] (1985) Official Journal of the E.E.C. No. L 210/29.

[536] Article 1.

[537] For a short survey of this Directive and its implications on the European aircraft manufacturers, see C. Mannin, "The effects in aviation of the EEC Directive on product liability" (1986 No. 6) XI Air Law 248, and N.M.L. Hughes, "Aviation Liability Law: Recent Developments in the U.K.; Some Contrasts with the U.S.A." (1989 No. 1) XIV Air Law 2 at 7-11.

[538] Article 7 (e).

[539] Supra note 20.

[540] "1. Claims based on a defect in, or a defective description of, a product are governed, at the choice of the injured party: (a) By the law of the state in which the tortfeasor has his place of business or, in absence thereof, his habitual residence; or (b) By the law of the state in which the product was acquired, unless the tortfeasor proves that the product has been marketed in that state without his consent.
2. When claims based on a defect in, or a defective description of, a product are governed by foreign law, no damages other than those that would be awarded under Swiss law for such injury may be awarded in Switzerland."

[541] In Grossman v. His Majesty the King 3 Avi 17,479 Canada Exchequer Court, November 15, 1950, the court said that the crown would be liable for negligence in failing to give adequate warning to pilots using the airport See also the French cases presented in (1982) 36 *RFDA* 494-505 and E. Quenzes, "*La responsabilité des Services de la Circulation Aérienne en cas d'accident d'aéronef*" (1985) 39 *RFDA* 13.

registered as to nationality, for certification.[542] There is no clear cut answer to the question of what law applies to the liability of the government. It would, nevertheless, be probable that a court seized of such a case applied the conflict of laws rule pertaining to torts. But there is a strong argument in favour of applying the *lex loci delicti*, in contrast to the modern approaches, since it is under the laws of that state the governmental agency undertakes its responsibilities and the existence of negligence should only be determined against that background. A governmental agency cannot act in accordance with the laws of another nation state.

4. In *conclusion* we have found that the conflict of laws rules of tort differ slightly from jurisdiction to jurisdiction. It is this rule that finds application to aircraft accidents at least in relation to the manufacturer and the government involved since the Warsaw system often governs the liability of the air carrier. Nevertheless, the air carrier's liability in non-Warsaw cases will often be governed by the law made applicable through the conflict of laws rule of tort,[543] even though this depends upon the issue of classification.

With the adoption of the new theories the problem of the application of the *lex loci delicti* rule to aircraft accidents on the high seas vanishes. But for the countries which still uphold this rule as a general one the problem may still arise. For these cases *l'Institut de Droit International* did not provide any special rule. It might, however, be justified to make an analogy between the case of an aircraft accident taking place over the high seas and that of a tort commited onboard an aircraft in flight over the high seas, thereby adopting the law of the nationality of the aircraft as substitute for the *lex loci*. This problem is further complicated by the establishment of the place where the tortious act was commited; in the air by the crew or the air traffic control or

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[542] "The Federal Aviation Act of 1958 directs the Secretary of Transportation to promote flight safety by establishing minimum standards governing the designs, materials, construction, and performance of aircraft." M.E.F. Plave, "United States v. Varig Airlines: the Supreme Court Narrows the Scope of Government Liability under the Federal Tort Claims Act" (1985) 51 JALC 197 at 213.

[543] In Griffith v. United Airlines Inc. (1964) Avi 649 (S.C. Pen. October 14, 1964), the Supreme Court of Pennsylvania adopted the most significant contacts approach

on the ground when certified or manufactured. It is submitted that only the former cases are to be governed by the analogy.

In addition to the traditional conflict rule of tort, some scholars have advocated new conflict rules custom-made for air crash cases. Mendelsohn[544] advocates the application of the law of the habitual residence of the passenger, and also proposes an amendment to that effect to be introduced into the Warsaw Convention.[545] Reese[546] advocates that a plaintiff should be allowed to choose, in an action against the carrier, between the place of the carrier's principal place of business, the place where the carrier's act or omission causing the accident was committed (such as the place of error in navigation or the place where the carrier maintained, inspected or repaired the airplane) the place of departure or the place of intended destination. And, as against the manufacturer, the plaintiff would have the choice between the place of manufacture or design, the producer's principal place of business, the place of departure or place of destination.[547] It should be said that Reese also gives specific rules for the recovery of punitive damages.[548] Bogdan advocates the application of the law of the carrier's principal place of business or that of the place of registration of the aircraft, to the liability of the air carrier.[549] Further, the application of *lex loci delicti* (the place of defective manufacture) or of the law of the country of registration of the aircraft, to the liability of the aircraft manufacturer.[550] Lowenfeld, wants to see the adoption of uniform substantive legislation pertaining to aircraft

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[544] A.I. Mendelsohn, "A Conflict of Laws Approach to the Warsaw Convention" (1967) 33 JALC 624 at 628-631.

[545] Ibid., at 632.

[546] Reese, supra, note 494 at 1314-1316.

[547] Ibid., at 1310-1313.

[548] Ibid., at 1313-1314 and 1317-1318.

[549] Supra, note 140 at 346.

[550] Ibid., at 347.

accidents within the U.S., as there are already e.g. a Uniform Commercial Code and a Federal Bankruptcy Act.[551]

6.4 Actions for Damages Resulting from Collision between Aircraft

Many different actions can be anticipated under this heading: actions between the involved air carriers, actions by the passengers of one involved air carrier against the operator of another involved air carrier and actions by passengers and air carriers against the responsible air traffic control operator. It is also probable that an aircraft collision results in damage to third parties on the surface (see *infra*). The application of conflict of laws rules pertaining to tort can be extremely complicated depending on the parties involved, their nationalities, domicile etc and on the place of the accident, over the territory of a third state, the territory of the state of nationality of one or of all the involved or the high seas.

An attempt for unification of substantive rules on aerial collision was undertaken by CITEJA as early as in 1932, without result. And the ICAO established, in 1953, a Legal Sub-Committee which elaborated a draft, the terms of which were adopted at the 15th session of the Legal Committee in Montreal 1964, but no further development has occured since then.[552]

L'Institut de Droit International, in Article 6, of its 1963 resolution adopted the following conflict of laws rule:[553]

"In case of an aerial collision which occurs in an area subject to State sovereignty, the law of the place where the collision has occured shall apply.
In case of an aerial collision which has occured in a place not subject to state sovereignty, the national law of the aircraft, if it is common to both parties, shall apply. In the absence of such a law, the law of the court seized shall apply."

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551 Lowenfeld, supra, note 484 at 172-174.

552 Matte, supra, note 99 at 581.

553 (1963) 50-II *Annuaire de l'Institut de Droit International* at 375.

The *lex loci delicti* is still to apply in the case of an accident taking place over a territory subject to state sovereignty. In other cases the common nationality of the involved aircraft or, if no such nationality exist, the *lex fori* is to apply. Taking into consideration the modern approaches, especially in the U.S.,[554] to the conflict of laws rule of tort,[555] both these rules will be unnecessary. But countries still applying the *lex loci delicti* need a subsidiary rule for collision taking place over the high seas.[556] It is submitted, however, that a common nationality[557] will seldom be found and that a general reference to the *lex fori* without giving rules on jurisdiction is bound to lead to extensive forum shopping.[558] But what law shall apply? Bentivoglio has made the following proposal:[559]

"(1) [W]henever one of the colliding aircraft carries the flag of the State of the forum, then the forum's law should apply, due to its major connection with the case; (2) when either one of the colliding aircraft has a different foreign nationality, the forum's court will have to establish first, according to its own law: (i) whether the accident has occured as a result of unlawful conduct by one of the aircraft, therefore generating liability, (ii) the existence, if any of joint liability, as an effect of contributory negligence, (iii) the lack, on the contrary, of any legally significant causation, because of the unavoidable and unforeseeable circumstances of the accident. Hence, it would seem reasonable for the court to apply: *sub* (i) the national law

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[554] See S.K. Rush, "Conflicts of Law—Federal Preemption—Aviation Law—Federal Common Law of Indemnity and Contribution on a Comparative Negligence Basis Will Govern in Mid-Air Collisions" (1975) 28 JALC 621, on the use of federal common law to eliminate inconsisten results arising out of the adjudication of the same or similar accidents because of the application of conflicting choice of law rules.

[555] See M. Davidovitz, "Aviation Deaths on the Seas: The Flight into Maritime Law" (1986) 10 Hastings Int'l & Comp L Rev 57, for both conflict rules and the substantive rules of U.S. law pertaining to accidents over the high seas.

[556] Dicey & Morris, supra, note 259 at 1415-1417, state that the English common law or the general maritime law of England is to govern. But this does not give a solution to the problem of conflict of laws.

[557] Lord McNair, supra, note 373 at 289, rejects altogether the use of the law of the flag.

[558] Milde, supra, note 2 at 250-251.

[559] Supra, note 2 at 169.

of the negligent aircraft, *sub* (ii) also the law of the other aircraft, as to the effects of its contributory negligence, *sub* (iii) the law most favourable to both parties, i e., either one of the two competing national laws, or even the *lex fori* itself."

Whether this highly complex conflict of laws rule represents the best solution is hard to tell, but it evidences the difficulties raised by aircraft collision over the high seas and shows the need for adoption of substantive rules in the field.

6.5 Actions for Damages Sustained by Third Parties on the Surface (High Seas or the Ground)

Already in 1926, at the First Conference on Private Air Law held in Paris on October 26, the need to study the problem of unification of the rules of the aircraft operators' liability towards persons suffering damage on the surface of the earth caused by aircraft was expressed.[560] The first Convention on the subject, *the Convention for the Unification of Certain Rules Relating to Damage Caused to Third Parties on the Surface,* was adopted at the Third International Conference on Private Air Law on May 29, 1933.[561] It was not, however, widely accepted and was to be annuled by the entry into force of *the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface.*[562] This latter Convention was signed in Rome on October 7, 1952 under the auspices of the ICAO.[563] A protocol to amend the said Convention was signed in Montreal on September 23, 1978.[564] The Convention was set up to ensure adequate compensation to the victims while limiting in a reasonable manner the extent of the liabilities incurred through unification

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[560] Milde, supra, note 2 at 254.

[561] Matte, supra, note 99 at 504

[562] ICAO Doc. 7364. See, supra, Chapter 3.2, and Matte, supra, note 99 at 513.

[563] For a short comment on the Convention from a Canadian point of view see G.F. FitzGerald, "Aviation—Liability Rules Governing Damage Caused by Foreign Aircraft to Third Parties on the Surface—Rome Convention of 1952 (1953) 31 JALC 90.

[564] ICAO Doc. 9257.

of the substantive rules on liability of the contracting states.[565] The Convention has been heavily crticized[566] and has not been any great success[567] and, therefore, we will not go into any details. "In consequence, the problem of choice of law in these relations cannot be considered as a matter settled by the unification of substantive law and the problems of conflicts of law continue to be open problems."[568]

The damages that may be caused by an aircraft to third parties on the surface are of different kinds. Damages may be caused by the aircraft itself if it crashes on the ground, by objects falling from the aircraft, by excessive noise or by the investigation and recovery efforts taking place after an air crash.[569] The dominant rule of tort in this field is that of strict liability[570] because; "a. the eminent position of the aircraft regarding third parties on the surface; b. the impossibility for the victim, in the great majority of cases, to offer proof of fault by the operator of the aircraft; c. the use of an instrument which creates certain unique risks towards third parties puts the operator under the obligation of a duty of guarantee towards persons who have nothing to do with the operation of that instrument".[571]

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565 Ibid., the preamble paras. 1 and 2.

566 P. Pluchon, "La responsabilité de l'exploitant de l'aéronef dans la Convention internationale de Rome du 7 octobre 1952" [1961] *RGA* 123.

567 Milde, supra, note 2 at 255.

568 Id.

569 Ibid., at 254.

570 Bentivoglio, supra, note 2 at 165.

571 D. Goedhuis, "Conflicts of Laws and Divergencies in the Legal Regimes of Air Space and Outer Space" (1963) 109 *Recueil des cours* 263 at 309-310.

L'Institut de Droit International adopted the following rule (Article 8) in its 1963 resolution:[572]

"Damage caused by aircraft to third parties on the ground shall be governed by the law of the place where it has been caused.
If damage has been caused in an area not subject to State sovereignty, the national law of the aircraft shall apply."

1. Consequently, in the view held by *l'Institut* the *lex loci delicti* is to govern in the case of an accident on the territory of a sovereign state. However, as we have seen above, the application of the *lex loci* is no longer the only unequivocal conflict of laws rule pertaining to tort. Nevertheless, taking into account the considerations put forward for the application of the notion of strict liability to these matters (the protection of a weaker third party), it would seem that "one should admit the prominent interest of each legal order to secure the protection of persons and goods on its territory".[573] And thereby we are admitting the application of the traditional *lex loci delicti* rule, as proposed by *l'Institut*.[574]

Another matter is the question of liability limits. If, for example, in an action that is brought in the state of the principal place of business of a carrier, the aircraft of which has crashed on the surface of another state damaging the property of a national of that state, it is disclosed that this latter state limits the liability of the operator, it would seem possible that the court seized could refuse to apply the liability limits on public policy grounds. This refusal would even be more probable if it was the property of a national of the country in which the court sits that had been damaged abroad.

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572 (1963) 50-II *Annuaire de l'Institut de Droit International* at 375.

573 Bentivoglio, supra, note 2 at 166.

574 This is the view of Bentivoglio, ibid., at 166-167, but Milde, supra, note 2 at 256-257, holds that the *lex loci* is "too axiomatic and does not reflect the trends of legislation, practice and doctrine".

2. *L'Institut* holds that the law of nationality of the aircraft is to govern in other cases of surface damages such as on the high seas or on territories not subject to state sovereignt, e.g. the Antarctic region. To apply the law of the tortfeasor in these cases is, however, hardly convincing . The other drafts of *l'Institut* all contained a reference to the *lex fori* for these cases, but in view of, *inter alia*, the extensive forum shopping that that would bring about this rule can hardly be accepted.[575] Milde holds that in the name of substantial justice there would be a strong argument for the law of the victim, *lex personalis*, if it was a person who suffered damages and the law of the flag of a ship that had been damaged by an aircraft.[576]

6.6 Assistance and Rescue between Aircraft

Attempts to unify sustantive laws also in this field has been undertaken in the past, but without success.[577] The issue here, from a conflict of laws perspective, is what law shall govern the relation between the owner of an aircraft, that is in some kind of distress, and the persons or entities that has undertaken measures for assissting and rescueing the aircraft. (The public international law perspective is different.[578]) These latter persons are of course interested in remuneration to cover the risk and expenses they have incurred. It is important to note that we will only deal with the issue of assistance and rescue between aircraft and not with mixed issues such as assistance between aircraft and ships and vice versa.

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[575] Milde, supra, note 2 at 256-257.

[576] Ibid., at 257.

[577] The CITEJA drafts of 1938; the Convention for the Unification of Certain Rules Relating to Assistance and Salvage of Aircraft or by Aircraft on the Sea and the Convention for the Unification of Certain Rules Relating to Assistance to Aircraft and by Aircraft on Land. Milde, supra, note 2 at 252.

[578] See the Chicago Convention, supra, note 332 Article 25 and Annex 12 to that Convention.

The issue is often titled unjust enrichment[579] or, on the other side of the same coin, *negotiorum gestio*.[580] [581] [582]Unjust enrichment often occur in the case of a contract that for some reason is a nullity. The *Contract Convention*,[583] in Article 10 (e), states that the proper law of the contract shall govern the consequences of nullity of the contract. The inclusion of this rule was contested by some states on the ground that within their respective legal systems this issue is not one of contract but one of tort.[584]

The *Swiss* Federal Statute adopts a similar principle in Article 128 (1).[585] In the absence of a pre-existing legal relationship the *Swiss* Federal Statute[586] holds that "these claims are governed by the law of the state in which the enrichment occured", and that the parties can always agree on the application of the *lex fori*.[587] In these cases clearly an extracontractual relation arises,[588] and therefore the application of the *lex loci* comes into question.

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[579] Milde, supra, note 2 at 252.

[580] Bentivoglio, supra, note 2 at 169 note 89.

[581] On the notion of quasi contract see Batiffol and Lagarde, supra, note 4 at 249-250.

[582] "A choice of law rule applicable to enrichment claims has two main problems to contend with: the characterization of the cause of action and the localization of the enrichment." T.W. Bennett, "Choice of Law Rules in Claims of Unjust Enrichmnent" (1990) 39 Int'l Comp L Q 136 at 166.

[583] Supra, note 22.

[584] Report on the Contract Convention, supra, note 10 at 33.

[585] "Claims for unjust enrichment are governed by the law that governs the actual or assumed legal relationship by virtue of which the enrichment occured."

[586] Supra, note 20.

[587] Ibid., Article 128 (2).

[588] Milde, supra, note 2 at 251, and Bentivoglio, supra, note 2 at 169. Batiffol and Lagarde, supra, note 4 at 249-250 and 253-255.

The *Geneva Convention*[589] in Article IV (1) provides that in the event that any claims, in respect of compensation due for salvage or any other extraordinary expenses incurred for the preservation of aircraft, give rise, under the law of the contracting state where the operations of salvage or preservation were terminated, to a right conferring a charge against the aircraft, the right shall be recognized and take priority over all other rights in the aircraft. *L'Institut de Droit International* adopted the following rule (Article 7) in its 1963 resolution:[590]

"Obligations arising from any assistance or rescue carried out between aircraft in areas subject to a single State sovereignty shall be governed by the law of the place where it has been rendered.

When assistance or salvage has been effected in an area not subject to State sovereignty, the national law of the assisted aircraft shall apply."

The resolution uses the word "obligations" wherefore we need not consider the delictual or contractual nature of the issue for classification purposes. The application of the *lex loci*, the place of assistance, is "practically the only acceptable solution"[591] and it is "only the law of the country where such assistance or rescue was rendered or carried out, [that] has sufficient authority to establish whether any legal obligations have arisen".[592]

But in the case of assistance and salvage in an area not subject to state sovereignty the application of the law of the nationality of the *assisted* aircraft can be questioned.[593] It is to be noticed, moreover, that Article 2 para. 2 of the 1963 resolution,[594] almost reiterating Article IV (1) of the Geneva

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589 Supra note 430.

590 (1963) 50-II *Annuaire de l'Istitut de Droit International* at 375.

591 Milde, supra, note 2 at 253.

592 Bentivoglio, supra, note 2 at 170.

593 Milde, supra, note 2 at 253. However, Bentivoglio, supra, note 2 at 170, accepts the principle.

594 (1963) 50-II *Annuaire de l'Institut de Droit International* at 375.

Convention, calls for the application of the law of the place where the rescue or maintenance operations were terminated to the issues of preferences and order of priority. Also the obligations arising from such operations should be governed by that law, not only their order of priority, at least for the sake of uniformity. Finally, also the law of the *assisting* aircraft has been proposed.[595]

6.7 Concluding Remarks

The brief initial survey of the present status of the *lex loci delicti* rule showed that today there are exceptions to the rule and in e.g. the U S. new rules have developed. The application of the conflict of laws rule of tort—be it the *lex loci delicti* or another rule—in actions brought against an aircraft operator is dependant on whether the Warsaw system is applicable or not (see, supra, Chapter 3.1.1.2). That system provides uniform rules, *inter alia*, concerning the air carrier's liability. In the instances where the Warsaw system is not applicable, the liablity of the air carrier will, in the common law courts, be determined by the conflict of laws rule of tort, at least as far as death of a passenger is concerned, while the courts of the civil law countries probably will classify any action brought by a passenger or his *ayants-droit* against an aircraft operator as contractual and therefore apply the conflict of laws rule of contract.

Product liability actions brought against aircraft manufacturers will almost invariably be governed by either the general conflict of laws rule of tort or by a special rule pertaining to products liability—even though the doctrine of implied warranty may be invoked. As to the liability of the government for negligent certification of aircraft or operation of air traffic control the *lex loci delicti*—i.e. the law of the state in which the governmental agency acts or acted—should be applied at least to the issue whether its actions amounted to negligence or not.

Collision between aircraft should be governed by the conflict of laws rule of tort at least if the accident occured over a territory subject to state

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[595] Milde, supra, note 2 at 253.

sovereignty. If the accident occured over the high seas the *lex loci delicti* is practically unworkable and special solutions have been proposed but there seems to be no general consensus. Nevertheless, states adhering to other conflict of laws rules of tort will probably not encounter any special problems in relation to accidents taking place over the high seas.

In relation to actions for damages sustained by third parties on the surface it would seem that the *lex loci delicti* and not any modern approach should apply, at least as far as the damage occured on the surface of a territory subject to state sovereignty. This is because it is in the interest of every nation to protect, by enacting laws and regulations, its territory and the persons and property there present from the hazards of air transport. Under any modern approach, weighing different interests, this would probably also be the solution. As to accidents occuring over the high seas or over any other part of the earth not subject to state sovereignty, the application of the *lex loci delicti* is also practically unworkable, while an answer would probably be found under any modern approach. Failing such an approach the law of the person suffering damages or the law of the flag of a damaged ship might apply.

Finally, we dealt with the law appplicable to obligations arising from the assistance and rescue between aircraft. In view of the extra-contractual nature of these obligations the *lex loci* of the operations should govern. But if the operations were carried out over the high seas, either the law of the place where the operations were terminated or the law of the assiting aircraft should find application.

7. Summary and Conclusion

Before reaching any final conclusions we shall briefly recapitulate some of the main points.

1. The contractual relations connected with air transport are numerous and very often international in character. We therefore started out by investigating the principles of conflict of laws applicable to contracts. According to these principles a contract is primarily governed by the law chosen by the parties in the contract. Failing such a choice the court will use a subsidiary method, subjective or objective, to establish the applicable law. To this end the court might also use presumptions, often pointing to the law of the habitual residence or principal place of business of the party who has to effect the characteristic performance of the contract.

a) As far as *the contract of air transport* is concerned, the Warsaw system has unified only certain rules of a contractual nature leaving other issues to be solved through the rules of conflict of laws. Even though the proper law of the contract governs most of these issues there are specific issues governed by other laws such as the law of the habitual residence of the acting parties (concerning the exitence of consent), the national law of the party acting (concerning the legal capacity), the proper law of the contract or the *lex loci actus* (concerning the formal validity) and the law of the place of performance (concerning the manner of performance).

In the event that the Warsaw system is not applicable, the proper law of the contract might also govern all other issues—otherwise dealt with by that system. Nevertheless, the liability regime might be subject to the conflict of laws rules of tort. This depends on the issue of classification.

The proper law of the contract is subject to the public policy of the forum and to mandatory provisions of the applicable law. In this context it is especially important to take into consideration that the contract of air transport is an adhesion contract, and often also a consumer adhesion contract.

b) The determination of the law applicable to *insurance contracts* show some special features. Since there is no convention unifying the rules of insurance contracts, the law applicable is the proper law of the contract. Contracts of insurance are, however, because of the risk of abuse of dominant position, often regulated by mandatory rules. This is especially true about consumer insurance contracts, but not necessarily limited to these, why the parties freedom to choose the law applicable might be limited. In the absence of choice, the law of the insurance company's principal place of business, often being also the place of the location of the risk due to government regulations, is to govern the contract. If the risk is located in another country the law of this country shall govern. In strictly commercial relations the reasons for limiting the parties' freedom of choice are less salient. In this case the law of the insurance company's principal place of business might be governing in the absence of a choice of law clause in the contract.

c) *Agency* relations show special features as well. We are here confronted with two contractual relations; the contract between the agent and his principal and the contract between this principal and the third party negotiated and concluded through the agent. What has been said above about the law applicable to contracts apply to both these contracts. The agents authority to bind his principal vis-à-vis third persons, on the other hand, might be subject to the law of the place of the agents principal place of business or the law of the place where he acted.

d) The general principles regarding the law applicable to contracts also applies to *contracts of employment*. The parties' possibility to choose the law applicable to their contract might however be limited. These contracts are also subject to public policy or *ordre public* considerations. In the absence of choice the law of the place where the work is carried out is to govern the contract. If, however, the work is carried out in many territories, as is the case with the crew of an aircraft, the law of the employer's principal place of business is to govern the contract.

e) The *contract for the purchase of an aircraft* is, as far as the *inter partes* obligations are concerned, governed by the law made applicable through the general principles of conflict of laws applicable to contracts. The creation and

contents of real rights affected by such a contract are, however, to be governed by the law applicable to real rights, i.e. the *lex rei sitae* or, as far as aircraft are concerned, the law of the nationality of the aircraft. The same could in principle be said about the law applicable to the *charter contract*. When the contract involves the transfer of real rights in the aircraft, as for example a dry lease agreement, the law applicable to these rights shall be the law of the nationality of the aircraft. Wet lease agreements and the part of the dry lease agreement which does not affect real rights, are to be governed by the law made applicable through the general principles of conflict of laws applicable to contracts.

2. As to *acts and facts* taking place on board an aircraft in flight we have found that conflict of laws rules attaching special significance to the *locus* of an act or a fact are ill suited when the *locus* is an aircraft in flight. Therefore the law of the nationality of the aircraft is to be substituted for the *lex loci actus* in the case where no *situs* in the legal sense exist or the *situs* can not be determined with accuracy.

3. *Security rights* in aircraft are to be governed by the law of the nationality of the aircraft since, *inter alia*, the Geneva Convention is implicitly prejudicial in favour of the application of this law.

4. *Aircraft accidents* give rise to many big tragedies and many big law suits. Actions brought by an injured passenger or others deriving their rights from a deceased passenger against the operator of a crashed aircraft, engaged in international air transport, are often governed by the Warsaw system. When the Warsaw system does not apply the law to govern the case must be chosen through the rules of conflict of laws. The applicable law will then be either the law applicable to the contract of air transport of the law applicable to tort, depending on the issue of classification. The law applicable to tort has traditionally been the *lex loci delicti*, but in recent years new rules have emerged especially in the different states of the US. Actions against the manufacturer of a crashed aircraft are often based on product liability rules. These rules can either be of a tortiuos or of a contractual nature why the issue of classification might be of relevance also in this case. Actions against the government responsible for the air traffic control or for the certification

of the aircraft are tortious in nature, but there is a strong argument for applying the law of the state of this government, being the *lex loci delicti,* instead of any new conflict of laws rule, since the acts of a government should only be judged against the background of the rules which it follows in executing its responsibilities.

To find the law applicable to cases involving *collision* between aircraft over a territory not subject to state sovereignty might not be a problem for jurisdictions that have left the *lex loci delict* rule. But jurisdictions still adhering to this rule are bound to encounter problems. The law applicable to actions for damages sustained by third parties on the surface, being in a territory subject to state sovereignty, should be the *lex loci delicti* even if the jurisdiction in question adheres to another rule of conflict of laws. But in actions for damages sustained on the surface, not being a territory subject to state sovereignty, states adhering to any of the new rules are not in need of any special rule while a special rule is needed for countries not so adhering. This rule could be the application of the law of the flag of a damaged ship.

The law applicable to the extra-contractual obligations arising out of *assistance and rescue* between aircraft should be the *lex loci* of the operations. But if the operations are carried out in an area not subject to state sovereignty either the law of the place where the operations are terminated or the law of the assisting aircraft should govern.

The purpose of this study is to bring up to date the solutions to conflict of laws problems posed by international air commerce. Even though the conflict of laws as a legal discipline has been described in many negative ways it provides a very interesting field of study, making it necessary to look closely at every underlaying legal relationship and the applicable international conventions before ascertaining what law to apply and the scope of applicability of that law. In the main part of this study we have looked at contracts and much of our attention has been devoted to recent development in Europe.

In the field of international air transport private law conventions, aimed at unification of substantive laws, have been enacted to overcome problems caused by differences in the substantive laws of different states and the unpredictable results of the conflict of laws game. The most widely ratified is the Warsaw Convention and even if we have found that this Convention does not encompass all legal issues related to the contract of air transport it certainly contains rules pertaining to the most important of these issues. The Convention, being more than 70 years old, is still workable and resort to conflict of laws rules is seldom needed. Nevertheless, dissatisfaction with the Convention's low liability limits have created a new era for the conflict of laws in relation to the liability of the air carrier. Legal councel often argue that for one reason or another the Convention is inapplicable or at least that the liabilty limits are inapplicable, leaving the floor for the conflict of laws, unequal treatment and unpredictability of results—one of the reasons for adopting the Warsaw Convention. The unpredictability of results, in air carrier liability cases, is increased by the new conflict of laws rules of tort involving the weighing of different interests. This development must be characterized as highly unfortunate and different attempts aimed at increasing the liability limits in the Warsaw Convention internationally have been undertaken, but has so far not been successful. It is submitted that it is essential to hold on to the unification of substantive law achieved by the Warsaw Convention, thus the international legal community should try to reach consensus for revising the issues which are unacceptable under modern day conditions. This study shows that the risk for unpredictable results and unequal treatment of passengers on the same flight due to differences between jurisdictions is increased failing uniform substantive

laws. In this context we can mention the issue of classification (tortious liability or contractual?) and conflict of laws rules involving the weighing of different interests. To this we could add forum shopping, even though we have not touched upon this issue.

The legal issues raised by the other contracts we have looked upon are not, it is submitted, in need of unification, at least not from the point of view of private international air law alone. To regulate legal matters in a unifom manner is of course beneficial from many points of view but have in many cases proven to be hard to achieve.

As to acts and facts taking place on board an aircraft in flight there is little need for unification because of the relatively small importance and low frequency of these acts and facts. Nevertheless, the international adoption of a conflict of laws rule of the kind described in this study would certainly enhance predictability of results and equality of treatment.

Finally, we found that even if the Geneva Convention did not aim at creating new security devices custom made for aircraft, it did provide a strong impetus for conforming with the rules regarding security devices of the country of nationality of the aircraft, thus providing, we might say, a conflict of laws rule pertaining to security devices. Thereby ensuring predictability of results.

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