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CONFLICT OF LAWS IN AIR CRASH CASES: REMARKS FROM A EUROPEAN'S PERSPECTIVE

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I. INTRODUCTION

ON MARCH 3, 1974, a Douglas DC-10 passenger airplane owned and operated by Turkish Air Lines crashed in France, killing all 333 passengers and thirteen crew members.¹ The United States District Court for the Central District of California had to deal with 203 suits arising from the crash, including ten suits transferred to it from other district courts.² The total number of dependents claiming damages was estimated at about one thousand.³ The defendants were the manufacturers of the aircraft, the airline and the United States government.⁴ The victims accused the United States of wrongfully certifying and negligently inspecting the plane.⁵ The victims of the crash were from Argentina, Australia, Belgium, Brazil, Canada, Cyprus, Denmark, England, France, India, Northern Ireland, Republic of Ireland, Italy, Japan, Morocco, New Zealand, North Korea, Pakistan, Senegal, South Vietnam, Switzerland, Turkey, United States and West Germany.⁶ Claimants came from all of these coun-

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¹ *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732, 735 (C.D. Cal. 1975).

² *Id.* at 736.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 737.

⁶ *Id.* at 741-42.

tries plus Israel and Sweden.⁷ The American claimants were from the states of California, Indiana, Kansas, Maryland, New Jersey, New York, Pennsylvania, South Carolina, Texas, Utah, Virginia and Washington.⁸

All these suits were consolidated and resulted in a single judgment.⁹ The court admitted that neither it nor its staff had found the time to tabulate the number of countries or states actually involved.¹⁰ The lawyers representing the parties differed as to which law should govern the issue of damages.¹¹ Their suggestions included the law of California, the law of France, the law of California with French "moral" damages, the law of Japan, the law of the domicile of each particular decedent and the law of the domicile of each particular claimant.¹² The court characterized the "judicial nightmare known as Conflicts of Laws"¹³ as "a veritable jungle, which, if the law can be found out, leads not to a 'rule of action' but a reign of chaos."¹⁴ One commentator called the whole litigation an "international legal dogs' dinner."

A complicated situation such as the one described above may be one conflicts lawyer's nightmare, or perhaps another's dream case. These complex conflicts issues, however, are not at all unusual in lawsuits arising from air accidents. Since air travel is especially suited for long-distance transportation, the point of departure and the scheduled destination lie often in different jurisdictions. Between these two places, the aircraft often passes through the air space of a varying number of additional jurisdictions. A crash may occur in a country having no relationship whatsoever to either the carrier or the passengers. Moreover, the aircraft, or a crucial component,

⁷ *Id.* at 742.

⁸ *Id.*

⁹ *Id.* at 736.

¹⁰ *Id.* at 742.

¹¹ *Id.* at 739.

¹² *Id.*

¹³ *Id.* at 740.

¹⁴ *Id.* at 739.

may well have been manufactured in still another country, with repair or servicing done elsewhere. The passengers may be citizens, residents or domiciliaries of countries around the globe; they may have purchased their tickets (i.e. entered into contracts of carriage) in other jurisdictions; and they may leave survivors having ties to still other nations or states. The place of incorporation and the principal place of business of the carrier or manufacturer, as well as the place of the aircraft's registration, increase this embarrassing heap of connecting factors. Other conceivably relevant points of contact could be added to the list.

In international carriage by air, a carrier's liability is usually limited by the Warsaw Convention.¹⁵ Since the carrier is normally willing to pay these limited damages, there is seldom any reason to bring a lawsuit. Therefore, a plaintiff seeking compensation in excess of the Warsaw limits must focus his efforts on someone else. Potential targets include everybody in any way involved in the design, manufacture, sale, installation, maintenance, or inspection of the aircraft or of a critical malfunctioning component which may have caused or at least contributed to the accident. Those who trained the aircraft's crew, supplied the navigational charts and weather forecasts used by the pilot, or supervised the air-control tower's activities are all potential defendants. The government is also a potential defendant for its negligence in permitting the use of unreliable aircraft or in supervising the airlines and airports.

The existing case law in this field consists almost exclusively of decisions rendered by various courts in the United States. Almost no European decisions deal with the private international law aspects of an air crash. The concentration of litigation in American courts is no coincidence.

¹⁵ Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.T.N.S. 11 [hereinafter Warsaw Convention].

The United States has the most developed air transportation system, due both to that country's size and technological development. American air carriers perform an important part of air carriage in the world today, including flights totally outside the United States. Americans travel very often, and there is at least one American passenger on most scheduled international flights. Moreover, American companies design and manufacture many of the world's commercial aircraft. Since the United States consists of more than fifty different jurisdictions, even American *domestic* air transportation may give rise to complicated issues of conflict of laws. Domestic carriage is not subject to the Warsaw Convention and the substantive rules governing the carrier's liability differ among the various states, as do the rules on the product liability of aircraft manufacturers. Naturally, these factors increase the number of American air crash cases where the rules on jurisdiction and on conflict of laws are of crucial importance.

Liberal American jurisdiction rules are a significant contributing cause of the concentration of air crash litigation in the United States. Most foreign plaintiffs prefer to sue in the United States even when they could easily utilize the courts in their own countries or elsewhere. This preference is mainly due to the extremely high — some would even say astronomical — damages that American courts commonly award plaintiffs. A foreign lawyer, confronted with the figures of American damage awards, is reduced to a state of incredulity. Many plaintiffs are particularly tempted by the prospect of steep punitive damages allowed under the laws of many American states. American law, in addition, often allows generous compensation to the victim or his survivors for not readily quantifiable injuries such as pain and suffering or the loss of love and companionship. The American courts' extensive use of the concept of strict liability in tort (liability without negligence) also encourages the choice of an American forum.

While adjudication in an American court does not automatically mean application of American substantive law, the strong homeward tread of many American judges substantially increases the plaintiff's chances of the court applying American law. Besides, a court accustomed to high monetary awards can be expected to be generous when applying foreign law and it may even find foreign limitations of liability or damages to be contrary to the public policy of the forum. All this may, however, change within the foreseeable future. Since high awards have made liability insurance too expensive or even totally unavailable in some fields, a number of state legislatures in the United States have adopted various tort reform statutes restricting liability and the size of awards. Within eighteen months between the years 1986 and 1987, forty-two states have enacted tort reform legislation of this type.¹⁶ States still differ on tort reform legislation; however, the states are remarkably similar in their approach to such legislation. One commentator notes that tort reform legislation is "the most extraordinary state law development having national impact" since the states adopted the Uniform Commercial Code.¹⁷

The structure of legal fees in the United States also encourages foreign plaintiffs to sue in American courts. American attorneys in tort cases operate on the basis of a contingent fee (i.e. instead of fixed fees, they receive a certain percentage, typically around thirty percent, of the damages they recover for their clients). In many other countries, including most of Western Europe, this system

¹⁶ Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1523 (1987). See generally NATIONAL CONFERENCE OF STATE LEGISLATURES, SELECTED STATE LEGISLATIVE ACTION RE: AFFORDABILITY AND AVAILABILITY OF LIABILITY INSURANCE (Aug. 4, 1986). The Justice Department attributes the insurance crisis to modern tort law's expansion of corporate liability exposure. Priest, *supra*, at 1523. Forty-two states have enacted tort reform or insurance legislation on the basis of the Department's attribution of the crises to tort law. *Id.*

¹⁷ Priest, *supra* note 16, at 1523-24. Mr. Priest writes, "[T]he general similarity in approach and the sudden spontaneity of the response represent the most extraordinary state law development having national impact since the states' unanimous adoption of the Uniform Commercial Code." *Id.*

is illegal or at least considered contrary to the bar association's professional code of ethics. The partisans of the contingent fee system maintain that it gives even a poor person the chance to have a top lawyer in a country where legal aid is extremely limited.

While a discussion of the advantages and disadvantages of the contingent fee system is beyond the scope of this paper, the presence of this system in the United States is of great importance in air crash cases because the defendant's liability may be remote and the risk of costly and uncertain litigation would undoubtedly otherwise deter many plaintiffs. Many American lawyers, furthermore, actively promote litigation by offering their services to prospective clients. In cases of air crashes with large numbers of victims and extensive publicity, it is common that the victims or their survivors, including those outside the United States, are quickly contacted by American lawyers eager to represent them. This contributes, of course, to the concentration of litigation in American courts.

Since American procedural law normally does not require the losing party to pay the winning party's costs, a plaintiff can sue without the risk of significant financial exposure. The defendant, on the other hand, faces the prospect of non-reimbursable litigation costs and may be willing to settle the plaintiff's claim by offering some compensation even if he is convinced that the claim is totally unfounded. Many foreign plaintiffs, who might not dare to initiate a lawsuit in their own countries, thus can sue in the United States with no actual risk and with good prospects of at least some recovery.

Plaintiffs reap still another benefit from tort litigation under American procedural law. Trial by jury, rarely available in other countries, is a constitutionally protected right in the United States.¹⁸ It is generally believed that a jury will arrive at a more generous verdict for an injured

¹⁸ U.S. CONST. amend. VII. The Seventh Amendment provides:
In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no

victim or a deceased victim's survivors seeking damages from a large, faceless corporation than will a court sitting without a jury.

Finally, the extensive American rules on pre-trial discovery of evidence are very advantageous for the plaintiff who can demand that the defendants, or even third persons, disclose all kinds of information and produce documents, including documents situated in other countries. This type of "fishing expedition" sometimes leads to the discovery of valuable admissible evidence favorable to the plaintiff which otherwise might have remained hidden.

The wealth of American case law consisting of hundreds of reported decisions, coupled with the extreme scarcity of related decisions from other countries, gives American material a dominant role in any comparative study in this field. When studying the American materials one must, nevertheless, keep in mind that they are not representative of the private international law of most other countries. Most countries, after all, have relevant jurisdictional and conflict rules, although the opportunity to apply them to an air crash case may never have arisen.

II. JURISDICTION

A. *The Warsaw Convention*

Almost all international carriage by air is governed by the provisions of the Warsaw Convention (the Convention).¹⁹ The Convention was amended by The Hague Protocol in 1955.²⁰ The United States, however, has ratified only the original wording of the Convention.²¹ Today, few countries remain totally outside the Warsaw

fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Id.

¹⁹ Warsaw Convention, *supra* note 15.

²⁰ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* Sept. 28, 1955, 478 U.N.T.S. 371, ICAO Doc. 7686 - LC/140, *reprinted in* A. LOWENFELD, AVIATION LAW 955 (2d ed. Doc. Supp. 1981) [hereinafter *Hague Protocol*].

²¹ See L. KREINDLER, 1 AVIATION ACCIDENT LAW § 12.02 (1987).

system.²²

The Convention provides for certain uniform substantive and procedural rules regarding the liability of the carrier vis-a-vis the passengers or their survivors. The Convention does not regulate the liability of the aircraft manufacturer, the manufacturer of fuel, the airport operator, etc. As to the jurisdiction of courts, article 28(1) of the original text provides that:

An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made or before the Court at the place of destination.²³

The Hague Protocol did not change the wording of article 28.²⁴ The Guatemala Protocol of 1971,²⁵ which is not yet effective, inserted a new paragraph 2 providing that:

In respect of damage resulting from the death, injury or delay of a passenger or the destruction, loss, damage or delay of baggage, the action may be brought before one of the Courts mentioned in paragraph 1 of this article, or in the territory of one of the High Contracting Parties, before the Court within the jurisdiction of which the carrier has an establishment if the passenger has his domicile or permanent residence in the territory of the same High Contracting Party.²⁶

This amendment was proposed in order to make the Protocol more attractive to the United States. It enables almost all American passengers or their survivors to sue

²² Silets, *Something Special in the Air and on the Ground: The Potential for Unlimited Liability of International Air Carriers for Terrorist Attacks under the Warsaw Convention and Its Revisions*, 53 J. AIR L. & COM. 321, 329 n.27 (1987).

²³ Warsaw Convention, *supra* note 15, at art. 28(1).

²⁴ Hague Protocol, *supra* note 20, at art. 28(1).

²⁵ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, *done* Mar. 8, 1971, ICAO Doc. 8932 (1971), *reprinted in* A. LOWENFELD, *supra* note 20, at 975, 978 [hereinafter *Guatemala Protocol*].

²⁶ *Id.* at art. XII.

the carrier in the United States since most international air carriers have some kind of an establishment there. This is not a question of mere convenience considering that American proceedings are usually extremely favorable to the plaintiff. It is hardly surprising that some authors find the new article 28(2) to be excessively generous to Americans.²⁷

None of the versions of the Convention grant jurisdiction to the courts of the country where the air crash occurred. The Convention seeks to avoid judicial proceedings in the overflown countries because they may be underdeveloped nations with inadequate judicial resources.

The jurisdiction of courts is strictly defined by article 28 and must neither be extended nor restricted by the parties to the Convention.²⁸ This means that the courts of a country having jurisdiction under the Convention must not refuse to adjudicate a case on the ground that there is a forum that is more convenient elsewhere. Article 32 invalidates attempts by the parties to alter by agreement the Convention's jurisdiction rules prior to an accident.²⁹ In addition, the parties are not permitted, in the case of carriage of passengers, to replace these rules with an arbitration agreement.³⁰

Thus, where the Convention is applicable, it is usually

²⁷ See, e.g., Matte, *International Air Transport*, 12 INT'L ENCYCLOPEDIA OF COMP. L. 6-1, 6-168-69 (1982).

²⁸ Warsaw Convention, *supra* note 15, at art. 28(1). Article 28 provides that the plaintiff "must" bring an action for damages in one of the enumerated jurisdictions. *Id.*

²⁹ *Id.* at art. 32. Article 32 provides:

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

Id.

³⁰ *Id.* Article 32 further provides: "Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of Article 28." *Id.*

clear whether the forum has jurisdiction. There may be, however, different views as to the proper venue within the forum country. The prevailing, albeit not unanimous, opinion is that venue is a problem beyond the purview of article 28 because this article deals only with the jurisdiction of the courts of a contracting state as a whole. Article 28 leaves it to the law of that country to decide which particular court can or must adjudicate the dispute.

There are, however, several areas of controversy regarding the interpretation of article 28(1). One such area concerns the meaning of the provision allowing an action to be brought against a carrier "where he has a place of business through which the contract has been made. . . ."³¹ Many tickets are sold by airlines through independent travel agencies or through other airlines on the basis of an interline arrangement. The French courts have held that the office of an independent travel agent or of another airline issuing the ticket is not a place of business of the air carrier.³² On the other hand, the West German *Bundesgerichtshof* held that the entry into an air cargo contract by a regular I.A.T.A. agent in Hamburg acting on behalf of the defendant Saudi-Arabian airline was sufficient to give jurisdiction to German courts in accordance with article 28.³³ The American courts seem to use a similar approach.³⁴ The liberal interpretation of the concept of a carrier's place of business by American and German courts is reasonable with regard to the purpose of article 28(1). The same liberal interpretation of the Guatemala Protocol, however, would be inappropriate since it would allow passengers domiciled or permanently

³¹ *Id.* at art. 28(1); see *supra* note 23 and accompanying text for the complete text of article 28(1).

³² Judgment of March 25, 1986, Cour d'appel, Paris, Fr., *reprinted in* 157 *REVUE FRANCAISE DE DROIT AÉRIEN* 544 (1986).

³³ Judgment of June 16, 1982, Bundesgerichtshof, Senate, W. Ger., 84 Bundesgerichtshof in Zivilsachen [BGHZ] 339, *reprinted in* 1982 *RIW - RECHT DER INTERNATIONALEN WIRTSCHAFT* 910.

³⁴ See, e.g., *Berner v. United Airlines, Inc.*, 3 A.D.2d 9, 157 N.Y.S.2d 884 (App. Div. 1956), *aff'd*, 3 N.Y.2d 1003, 170 N.Y.S.2d 340 (1957) (New York court has jurisdiction over Australian corporation under the Warsaw Convention).

residing in large and important countries such as the United States to always sue in their own country because practically all air carriers have some kind of representation there.

Another disputed point is the interpretation of the expression "place of destination",³⁵ especially in cases involving round-trip tickets. The prevailing view is that the "place of destination" is the starting point of the trip for round-trip tickets or the place of final destination for flight other than round-trip.³⁶ An intermediate stop such as the point of turnaround does not constitute the "place of destination" within the meaning of article 28. This view is confirmed not only by European case law,³⁷ but more importantly by American case law in spite of the well-known tendency of American courts to extend their jurisdiction.³⁸ Thus, the Court of Appeals of New York affirmed the judgment of the Appellate Division in *Rinck v. Deutsche Lufthansa A.G.*, holding that where Nuremberg was listed as both the place of origin and destination, New York could not be the place of destination within the meaning of article 28.³⁹ The fact that the passenger's return flight was left open did not persuade the court.⁴⁰ One dissenting judge objected to the holding because a

³⁵ Warsaw Convention, *supra* note 15, at art. 28(1); see *supra* note 23 and accompanying text for the complete text of article 28(i).

³⁶ See, e.g., *Rinck v. Deutsche Lufthansa A.G.*, 57 A.D.2d 370, 371-72, 395 N.Y.S.2d 7, 8-9 (App. Div. 1977), *aff'd*, 44 N.Y.2d 714, 405 N.Y.S.2d 456 (1978) (passenger injured on a roundtrip flight not allowed to bring suit in jurisdiction of intermediate stop).

³⁷ Judgment of March 23, 1976, Bundesgerichtshof, Senate, W. Ger., reprinted in 29 NEUE JURISTISCHE WOCHENSCHRIFT 1586 (1976); Judgment of June 28, 1973, Landgericht Berlin, W. Ger., reprinted in 22 ZEITSCHRIFT FÜR LUFTRECHT UND WELTRAUMECHTSFRAGEN 304 (1973); Judgment of April 28, 1978, Tribunaux de grande instance, Fr., reprinted in 129 Revue Francaise de Droit Aérien 80 (1979).

³⁸ See *Rinck*, 57 A.D.2d at 370, 395 N.Y.S.2d at 7. But see *Hurley v. KLM Royal Dutch Airlines*, 562 F. Supp. 260, 261 (C.D. Cal.), vacated, 602 F. Supp. 1249 (C.D. Cal. 1985) ("place of destination" of a round-trip ticket could be either the place of final destination or intermediate stops along flight route); *Aanestad v. Air Canada, Inc.*, 390 F. Supp. 1165, 1168 (C.D. Cal. 1975), dismissed, 549 F. Supp. 806 (C.D. Cal. 1977) ("place of destination" means either the intermediate stop or the final destination of a round-trip flight).

³⁹ *Rinck*, 57 A.D.2d at 372, 395 N.Y.S.2d at 9.

⁴⁰ *Id.* at 371-72, 395 N.Y.S.2d at 8-9.

passenger would not have had to take the flight at all if the objective was only to depart and arrive at the same location.⁴¹

Similarly, the United States Court of Appeals for the Second Circuit dismissed the cases of *Gayda v. LOT Polish Airlines*⁴² and *Petrire v. Spantax, S.A.*,⁴³ for lack of jurisdiction. In both cases the survivors of passengers killed in air crashes sued the carrier in the United States, asserting that American courts had jurisdiction because the passengers purchased tickets for a round-trip in a foreign country with an intermediate stop in the United States.⁴⁴ The *Petrire* case is of particular interest, since the decedent, who arranged for round-trip air travel between Madrid and New York, received two separate (albeit consecutively numbered) ticket booklets, apparently because of the limited supply on the particular day of booklets with more than two ticket coupons.⁴⁵ The court, considering the time and place of issuance of the booklets and the contemplated degree of continuity of the journey, held that there was a single contract of carriage according to which the place of destination was Madrid.⁴⁶

B. *Western Europe*

The EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (as amended),⁴⁷ concluded in Brussels on September 27, 1968 (the "Brussels Convention"), is of importance for non-Warsaw disputes arising in the EEC countries. The Brussels Convention is limited, however, to cases where

⁴¹ *Id.* at 372-73, 395 N.Y.S.2d at 9-10. (Silverman, J., dissenting). Justice Silverman stated, "In modern air travel . . . the purchase of a round-trip ticket is merely a matter of convenience . . . [T]he fact that one intends to return home does not mean that that is where one is going when one sets out on a voyage." *Id.* at 10.

⁴² 702 F.2d 424 (2d Cir. 1983).

⁴³ 756 F.2d 263 (2d Cir.), *cert. denied*, 474 U.S. 846 (1985).

⁴⁴ *Petrire*, 756 F.2d at 265; *Gayda*, 702 F.2d at 425.

⁴⁵ *Petrire*, 756 F.2d at 265.

⁴⁶ *Id.* at 266-67.

⁴⁷ 26 O.J. EUR. COMM. (No. C 97) 2 (1983) [hereinafter Brussels Convention].

the defendant is domiciled in one of the contracting states (for legal persons, the seat is treated as domicile).⁴⁸ Furthermore, the Brussels Convention is subordinate to other conventions to which the contracting states are or will be parties and which govern jurisdiction in relation to particular matters.⁴⁹ As a consequence, the jurisdiction rules of the Warsaw Convention are to be applied notwithstanding the Brussels Convention.

Article 2 of the Brussels Convention provides that persons domiciled in a contracting state, regardless of their nationality, can be sued in the courts of that state.⁵⁰ According to article 5, a defendant domiciled in a contracting state may, instead, be sued in another contracting state, *inter alia*

- in matters relating to a contract, in the courts for the place of performance [forum solutionis];⁵¹
- in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred [forum delicti];⁵²
- as regards a civil claim for damages which is based on an act giving rise to criminal proceedings, in the court seized of those proceedings;⁵³
- as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establish-

⁴⁸ *Id.* at art. 2. The Brussels Convention provides: "persons domiciled in a contracting state shall . . . be sued in the courts of that state." *Id.*

⁴⁹ *Id.* at art. 57. Article 57 of the Brussels Convention provides: "This Convention shall not affect any Conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments." *Id.*

⁵⁰ *Id.* at art. 2. Article 2 of the Brussels Convention provides: "Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State." *Id.*

⁵¹ *Id.* at art. 5(1).

⁵² *Id.* at art. 5(3). The Court of Justice of the European Communities, which is entrusted with the interpretation of the Brussels Convention, has held that both the country of the tortious conduct and the country of the resulting injury or damage have jurisdiction in accordance with this provision. See *Handelskwerkerij G.J. Bier B.V. v. Mines de Potasse d'Alsace S.A.*, Recueil 1735, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8378 (1976).

⁵³ Brussels Convention, *supra* note 47, at art. 5(4).

ment is situated.⁵⁴

According to article 6(1), a person domiciled in a contracting state may also be sued in the courts of the domicile of a co-defendant.⁵⁵ This is of great importance in air crash cases where a plaintiff commonly joins the carrier, the aircraft manufacturer and a number of other defendants.

When the forum or the domicile of the defendants does not lie in a contracting state, the Brussels Convention rules governing jurisdiction do not apply. One must therefore consider the many rules relating to jurisdiction that vary from country to country. While the domicile or permanent residence of the defendant almost always provides a sufficient basis for jurisdiction, a number of other grounds are available as well. Only a few examples will be mentioned here.

A non-resident can normally be brought to court in England *inter alia* if the action is founded on a tort or breach of contract committed within England or Wales. In fact, there is jurisdiction even when the dispute is totally unrelated to England, provided that the defendant is served with the writ in England or Wales. This is true even if the defendant's visit entails only a couple of minutes in transit at an English airport.⁵⁶ However, the theory of forum non conveniens has now become accepted in England, although not to the extent it is applied in the United States.⁵⁷

Forum delicti is also recognized in France,⁵⁸ Germany⁵⁹

⁵⁴ *Id.* at art. 5(5).

⁵⁵ *Id.* at art. 6(1). Article 6(1) of the Brussels Convention provides: "A person domiciled in a Contracting State may also be sued . . . where he is one of a number of defendants, in the courts for the place where any one of them is domiciled." *Id.*

⁵⁶ C. SHAWCROSS & K. BEAUMONT, 1 AIR LAW I(79)-(81) (4th ed. 1987).

⁵⁷ See, e.g., *The Abidin Dayer*, 1 All E.R. 470; 2 W.L.R. 196 (H.L. 1984) (English proceeding stayed because Turkey was the country with the closest connection to the matter litigated).

⁵⁸ See Y. LOUSSOUARN & P. BOUREL, DROIT INTERNATIONAL PRIVÉ 567-68 (2d ed. 1980); Code de procédure civile [c. pr. vi.] art. 46 (Fr.); see also F. GRIVANT DE KERSTRAT & W. CRAWFORD, NEW CODE OF CIVIL PROCEDURE IN FRANCE 10, art. 46 (1978). Article 46 states: "The claimant has the choice to empower, in addition to

and Sweden.⁶⁰ The French citizenship of the plaintiff or of the defendant is alone sufficient for French jurisdiction in accordance with articles 14 and 15 of the French Civil Code.⁶¹ In Germany, as well as in Sweden, a non-domiciliary owning assets within the jurisdiction can be sued for payment of money debts, including debts totally unrelated to the forum country and the assets in question (*forum patrimonii*).⁶² Dismissal of a case on the ground of *forum non conveniens* is impossible, or rarely possible, in the countries of continental Europe. This, however, has played little role in air crash cases, since most of these cases are litigated in American courts.

C. *United States*

Each state within the United States has in principle its own rules pertaining to jurisdiction. The federal trial courts apply the jurisdictional rules of the state in which they sit, provided the case is adjudicated in a federal court because the parties are citizens of different states. Such diversity cases constitute the vast majority of air crash disputes in American federal courts.⁶³ The jurisdictional rules of the different states, while not identical, are very similar. It is not uncommon, however, that they fail to provide clear guidelines. Thus it is extremely difficult for the parties and their lawyers to predict whether a court

the court of the place where the defendant lives . . . in delictual matters, the court of the place where the delictual act was committed, or of the place where the damage was suffered" *Id.*

⁵⁹ See Zivilprozess Ordnung [ZPO] art. 32 (W. Ger.).

⁶⁰ See SWEDISH PROC. CODE ch. 10, § 8 (Swed.); see also R. GINSBURG & A. BRUZELIUS, CIVIL PROCEDURE IN SWEDEN 165 (1965) (interpreting Chapter 10, section 8 of the Swedish Procedural Code). "[T]he plaintiff has the option to commence suit against the tortfeasor . . . in the court of the place in which the tortious act occurred or had its impact." *Id.*

⁶¹ See C. CIV. arts. 14-15 (Fr.).

⁶² Cf. ZIVILPROZESS BORDNUNG [ZPO] art. 23 (W. Ger.); SWEDISH PROC. CODE ch. 10, § 3 (Swed.). "[A]ny action against a non-resident defendant involving personal property situated in Sweden may be brought in the court for the place in which the property is located." R. GINSBURG & A. BURZELIUS, *supra* note 60, at 160 (interpreting Chapter 10).

⁶³ See Kennelly, *Litigation of Foreign Aircraft Accidents — Advantages (Pro and Con) From Suits in Foreign Countries*, 16 FORUM 488, 521 (1981).

has jurisdiction. Predicting what courts will rule in respect to jurisdictional issues can be compared to "trying to tattoo soap bubbles."⁶⁴ Some authors speak in favor of creating "a set of concrete, objective standards, . . . however arbitrary they might seem in individual cases, that would enable litigants to determine whether jurisdiction was present without taking the question to a reviewing court."⁶⁵

A basic jurisdictional principle is that the courts of a state have jurisdiction if the defendant is a domiciliary.⁶⁶ When the defendant is a corporation, which is practically always the case in air crash disputes, the domiciliary of a corporation is where it is registered.⁶⁷ However, no state within the United States limits its jurisdiction to such domestic corporations and in all states there are ample grounds for jurisdiction over non-consenting foreign corporations as well. For example, a foreign corporation which is carrying on substantial business activities on a regular and continuous basis in the forum state may be held to be "present" in that state. The corporation can be sued for claims that neither arose in connection with the local activity of the corporation, nor have any other relationship to the forum state.⁶⁸

If a "non-present" foreign corporation has had some contact with the forum state and the disputed claim arose out of this contact, the forum state will often have jurisdiction under the terms of its "long-arm statute", even if the contact is neither systematic nor continuous but merely a single transaction.⁶⁹ Long-arm statutes vary to some ex-

⁶⁴ *Id.* at 492.

⁶⁵ *Id.* (quoting *Wisconsin Elec. Mfg. Co. v. Pennant Prod., Inc.*, 619 F.2d 676, 679 (7th Cir. 1980)).

⁶⁶ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 29 (1971).

⁶⁷ See R. LEFLAR, L. McDOUGAL, & R. FELIX, *AMERICAN CONFLICTS LAWS* 29-31 (1986); E. SCOLES & P. HAY, *CONFLICT OF LAWS* 323-25 (1982); RESTATEMENT (SECOND) CONFLICT OF LAWS § 41 (1971).

⁶⁸ See *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 47(2) comment b (1971).

⁶⁹ See R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 165 (1986).

tent from state to state; however, they usually authorize jurisdiction over claims arising from "transaction of business" or "commission of a tortious act" within the boundaries of the forum state.⁷⁰ The American courts are inclined to interpret these jurisdictional grounds very extensively. It is conceivable, for example, that a court may base jurisdiction over a foreign airline on a business transaction within the forum state even if that transaction consisted of a purchase by the passenger of his ticket there through a local travel agent or through a local office of another airline acting under an interline arrangement.⁷¹

An example of a broad interpretation of another common ground of jurisdiction under a long-arm statute occurs when a tort is committed within the jurisdiction of the forum. In *Roberts v. Piper Aircraft Corporation*,⁷² the plaintiff brought a wrongful death action arising out of a plane crash in New Mexico and directed against two allegedly negligent repair shops and the supplier of allegedly defective fuel.⁷³ The fuel supplier resided in Nevada and the repair shops were in Oklahoma and Kansas.⁷⁴ While the defendants committed the allegedly wrongful acts in Nevada, Oklahoma and Kansas respectively, the court held that negligent acts caused injury within New Mexico and were considered a "tortious act" committed in New Mexico within the meaning of the state's long-arm statute.⁷⁵

There is, however, a limit imposed on the long-arm jurisdiction by the requirement of "due process of law" in the Fifth and Fourteenth Amendments of the Constitution of the United States.⁷⁶ In *International Shoe Co. v. Washington*,⁷⁷ the United States Supreme Court held that due pro-

⁷⁰ *Id.*

⁷¹ See, e.g., *Mohler v. Dorado Wings, Inc.*, 675 S.W.2d 404 (Ky. Ct. App. 1984).

⁷² 100 N.M. 363, 670 P.2d 974 (N.M. Ct. App. 1983).

⁷³ *Id.* 670 P.2d at 976.

⁷⁴ *Id.*

⁷⁵ *Id.* 670 P.2d at 977.

⁷⁶ U.S. CONST. amends. V, XIV.

⁷⁷ 326 U.S. 310 (1945).

cess requires that the defendant should have certain minimum contacts with the forum such "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"⁷⁸ A criterion of this type is naturally difficult to translate into specific and clear-cut rules. As a result, the long-arm statutes of some states do not require any specific contacts between the defendant (or his activities) and the forum state, but simply declare that the courts may exercise jurisdiction on any basis not inconsistent with the Constitution of the United States or of the state in question.⁷⁹ Generally, American jurisdictional rules, even allowing for the due process limitations, are on their face much more liberal than the jurisdictional rules in most other comparable countries.

Such liberal, often exorbitantly liberal, jurisdictional rules need some corrective counter-balancing, which is achieved in the United States by means of the doctrine of *forum non conveniens*.⁸⁰ According to this doctrine the court may, at its discretion, refuse to exercise its jurisdiction if the forum is seriously inconvenient and a more appropriate forum is available elsewhere.⁸¹ The precedent usually relied on is *Gulf Oil Corp. v. Gilbert*, decided in 1947 by the United States Supreme Court.⁸² In this case, which did not concern aviation, the Court defined the factors to be considered:

An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be

⁷⁸ *Id.* at 316 (quoting *Milliken v. Meyer*, 511 U.S. 457, 468 (1940)).

⁷⁹ See, e.g., CAL. CIV. PROC. CODE § 410.10 (West 1973); TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041-.045 (Vernon 1986). In *Helicopteros* the Court recognized that the "limits of the Texas [long-arm statute] are coextensive with the Due Process Clause." *Helicopteros*, 466 U.S. at 413 n.7.

⁸⁰ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) (non-aviation case applying the doctrine of *forum non conveniens*).

⁸¹ *Id.* at 507-08.

⁸² *Id.* at 501.

appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability [sic] of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. . . . There is an appropriateness, too, in having the trial . . . in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.⁸³

Courts have subsequently followed this line of reasoning in a large number of air crash cases.⁸⁴

One of the most important cases in the area is undoubt-

⁸³ *Id.* at 508-09.

⁸⁴ See, e.g., *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602 (D.C. Cir. 1983) (court denied dismissal on *forum non conveniens* ground due to ease in accessing sources of proof and United States interest in retaining jurisdiction because of its involvement in the project); *Pain v. United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981) (court granted motion to dismiss on *forum non conveniens* grounds because the United States was not a convenient forum for a helicopter owner and necessary documents were in Norway); *Diaz v. Mexicana de Avion, S.A.*, 20 Av. CAS. (CCH) ¶ 17,981 (W.D. Tex. 1987) (court granted motion for *forum non conveniens* to move case to Mexico because the crash occurred there, the original plaintiffs lived there, and the airline was incorporated there); *In re Disaster at Riyadh Airport, Saudia Arabia*, on Aug. 19, 1980, 540 F. Supp. 1141 (D.D.C. 1982) (court granted motion to dismiss on *forum non conveniens* grounds due to ease in accessing proof in the foreign forum, prohibitive cost of obtaining willing witnesses, and public interest factors). *But cf. In re Air Crash Disaster Near Bombay, India* on Jan. 1, 1978, 531 F. Supp. 1175 (W.D. Wash. 1982) (court refused to dismiss on *forum non conveniens* grounds because lack of alternative forum outweighed reasons for bringing suit in India).

edly *Piper Aircraft Co. v. Reyno*.⁸⁵ A small commercial aircraft, registered in Great Britain and owned and operated by British companies, crashed in Scotland during a local charter flight, killing the pilot and all five passengers.⁸⁶ All decedents, their heirs and next of kin were British nationals and residents of Scotland.⁸⁷ Nevertheless, the representatives of the estates of the five passengers instituted wrongful-death litigation in the United States against the company that had manufactured the plane in Pennsylvania and the company that had manufactured the plane's propellers in Ohio.⁸⁸ The plaintiff admitted that she filed the action in the United States because American laws regarding liability, capacity to sue and damages were more favorable to the plaintiff than the corresponding laws of Scotland.⁸⁹

The United States District Court granted the defendants' motion to dismiss the action on the ground of *forum non conveniens*, finding that Scotland was the appropriate forum.⁹⁰ The Third Circuit reversed, however, holding that dismissal is automatically barred where the law of the alternative forum is less favorable to the plaintiff than the law of the forum of his choice.⁹¹ The Supreme Court, rejecting this contention, observed that a refusal to dismiss merely because dismissal might be unfavorable to the plaintiff would make the crowded American courts, already attractive to foreign plaintiffs, even more attractive and congested.⁹² The Court went on to uphold the view of the district court that the usual strong presumption in favor of the plaintiff's choice of forum applies with less force when the plaintiffs or the real parties in interest are foreign (*i.e.* neither residents nor citizens of the forum).⁹³

⁸⁵ 454 U.S. 235 (1981).

⁸⁶ *Id.* at 238-39.

⁸⁷ *Id.* at 239.

⁸⁸ *Id.*

⁸⁹ *Id.* at 240.

⁹⁰ *Reyno v. Piper Aircraft Co.*, 479 F. Supp. 727, 738 (M.D. Pa. 1979).

⁹¹ *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 163-64 (3d Cir. 1980).

⁹² *Piper Aircraft Co.*, 454 U.S. at 251-52.

⁹³ *Id.* at 255.

Furthermore, the Court stated that the *forum non conveniens* determination is committed to the sound discretion of the trial court and that an appellate court may reverse only if there is a clear abuse of discretion.⁹⁴ The Court did not consider the district court's review of the private and public factors to be unreasonable.⁹⁵

The United States District Court in *Boskoff v. Transportes Aereos Portugueses*⁹⁶ refused to accept the Portuguese plaintiffs' argument that they could not afford to sue at home because of the compulsory prepayment of trial costs and the lack of contingent fee arrangements in Portugal.⁹⁷ The actions of the defendant may also influence the outcome of the court's *forum non conveniens* analysis. Promises to submit to the jurisdiction of the alternative forum, to waive possible time limitation objections there, to make all evidence available to the alternative forum, to finance the translation of all documentary evidence into the language of that forum and even to cover the extra expense incurred by the plaintiff, may well encourage the court to dismiss the case.⁹⁸ The courts sometime condition dismissal on these promises being kept.

Tactics may play a great role in *forum non conveniens* cases. Sometimes, for example, the defendant may find it advantageous to concede liability, so that the remaining issue deals only with the amount of damages.⁹⁹ Similarly, where there are plaintiffs from both the United States and foreign countries, the defendant who wishes to have the case dismissed may settle the claims of American plain-

⁹⁴ *Id.* at 257.

⁹⁵ *Id.* at 257-61.

⁹⁶ 17 Av. CAS. (CCH) ¶ 18,613 (N.D. Ill. 1983).

⁹⁷ *Id.* at 18,616-17.

⁹⁸ See *Dahl v. United Technologies Corp.*, 632 F.2d 1027, 1031 (3d Cir. 1980); *Rubenstein v. Piper Aircraft Corp.*, 587 F. Supp. 460, 461 (S.D. Fla. 1984); *Boskoff*, 17 Av. CAS. at 18,613; *Dasi v. Air India*, 16 Av. CAS. (CCH) ¶ 17,308 (S.D.N.Y. 1981); *Fosen v. United Technologies Corp.*, 484 F. Supp. 490, 503-04 (S.D.N.Y.), *aff'd*, 633 F.2d 203 (2d Cir. 1980).

⁹⁹ See, e.g., *Bouvy-Loggers v. Pan Am. World Airways, Inc.*, 15 Av. CAS. (CCH) ¶ 17,153 (S.D.N.Y. 1978) (airline conceded liability and agreed to appear voluntarily in foreign jurisdiction for assessment of damages).

tiffs, since the *forum non conveniens* doctrine is applied more readily when all of the plaintiffs are foreigners.¹⁰⁰

III. APPLICABLE LAW

A. Conventions

One of the main purposes of the Warsaw Convention¹⁰¹ is to avoid conflicts of law regarding the liability of the carrier vis-a-vis the passenger and his survivors. In order to achieve this aim, the Convention unifies some of the substantive provisions of law in this field, including certain limitations of the amounts of damages.¹⁰² However, the unification is not, and was never intended to be, total.¹⁰³ Moreover, some passengers are not covered by the convention system at all, for example because their journey is purely domestic or is from or to a state that is not bound by any of the versions of the Convention.¹⁰⁴ It has been reported that one prominent American aircraft litigation attorney, when travelling to Europe, regularly used to buy a ticket with a non-Warsaw destination (in those days, Turkey), in order to avoid the Warsaw limits should an accident occur. We may assume that upon successful landing at his real destination such as London or Paris he simply turned in the remaining flight coupon indicating Turkey as a last stop and obtained a refund.¹⁰⁵

Regarding some of the questions unregulated by the Convention's substantive provisions, the Convention contains a conflict rule, prescribing the application of *lex*

¹⁰⁰ See Barrett, *US Courts and forum non conveniens*, 10 AIR LAW 58, 64-65 (1985). It seems that a tactical settlement of this type took place in the case *In re Disaster at Riyadh Airport*, 540 F. Supp. at 1144.

¹⁰¹ Warsaw Convention, *supra* note 15.

¹⁰² *Id.* at ch. III, arts. 20-22.

¹⁰³ The title of the Warsaw Convention states that it is the Convention for Unification of *Certain Rules Relating to International Transportation by Air*. *Id.* (emphasis added).

¹⁰⁴ *Id.* at ch. I, art. 1(2).

¹⁰⁵ See R. ARNOLD, DIE PRODUKTHAFTUNG IN DER LUFT - UND RAUMFAHRT, DOKUMENTATION EINES INTERNATIONALEN KOLLOQUIUMS IN KÖLN 282 (Böcksteigel ed. 1978).

fori.¹⁰⁶ Article 21 of the original Warsaw text, which remained unchanged by the Hague amendments, provides that the court may, "in accordance with the provisions of its own law," exonerate the carrier wholly or partly of his liability if the carrier proves that the negligence of the injured person caused or contributed to the damage.¹⁰⁷ According to article 22(1), the law of the forum decides whether damages may be awarded in the form of periodic payments.¹⁰⁸ Pursuant to article 29(2), the period of limitation, which the countries of the European continent deem a question of substantive law, shall be determined by the law of the court seized of the case.¹⁰⁹ Finally, article 25(1) of the original Warsaw text stipulates that the carrier shall not be entitled to avail himself of the provisions of the Convention limiting or excluding his liability "if the damage was caused by his willful misconduct or by such default on his part as, in accordance with the law of the court seized of the case, is considered to be equivalent to willful misconduct."¹¹⁰

Nevertheless, there remain a number of important issues that are neither regulated by the Convention's substantive rules nor covered by any of the Convention's above mentioned 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*,¹¹¹ others maintain that the legal

¹⁰⁶ Warsaw Convention, *supra* note 15, at ch. III, art. 21.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at art. 22(1).

¹⁰⁹ *Id.* at art. 29(2).

¹¹⁰ *Id.* at art. 25(1).

¹¹¹ See, e.g., Lukoschek, *Das anwendbare Deliktsrecht bei Flugzeugunglücken*, 27 VERÖFFENTLICHUNGEN DES INSTITUTS FÜR VERSICHERUNGSWISSENSCHAFT DER UNIVERSITÄT MANNHEIM 16-17, 25-26 (1984).

system designated by conflict rules of the forum country should control.¹¹²

Those who advocate *lex fori* assert that it leads to a greater degree of uniformity of results since it avoids the hazards of the various national conflict rules. A general application of the forum's own substantive rules, however, would not achieve uniformity since the applicable rules and the result would, in such a case, depend on the country where the lawsuit is initiated. 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.

Products liability, rather than the Convention, governs the liability of the aircraft manufacturer. Important efforts have been made to unify the substantive rules of the Western European countries in this area. On January 27, 1977, the *European Convention on Products Liability in Regard to Personal Injury and Death* (the "European Convention") was concluded in Strasbourg under the auspices of the Council of Europe.¹¹³ The European Convention contains no conflict rules, but it contains a few elementary substantive provisions on the liability of the manufacturer.¹¹⁴ The *Council Directive on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products*, adopted by the EEC Council on July 25, 1985, is of greater practical im-

¹¹² See, e.g., W. GULDIMANN, *INTERNATIONALES LUFTTRANSPORTRECHT* 16, 144 (1965); Sadikov, *Conflicts of Laws in International Transport Law*, 190 *RECUEIL DES COURS* 188, 242-243 (1985 I); C. SHAWCROSS & K. BEAUMONT, 1 *AIR LAW* I(92) (4th ed. 1986); P. URWANTSCHKY, *FLUGZEUGUNFÄLLE MIT AUSLANDSBERÜHRUNG UND AUFLOCKERUNG DES DELIKTSTATUTS* 103 (1986).

¹¹³ Eur. T.S. No. 91. No country has ratified the European Convention.

¹¹⁴ *Id.*

portance.¹¹⁵ This rather complex directive aims at the inclusion of almost identical substantive provisions in the legal systems of the member states on producer's liability for damage caused by a defect in his product.¹¹⁶ Certain enumerated circumstances release the manufacturer from liability. The most important defense in air crash cases is when the manufacturer proves that the state of scientific and technical knowledge when he put the product into circulation was not such as to enable the existence of the defect to be discovered.¹¹⁷

Since there is no universally followed convention providing uniform substantive rules on products liability, conflict rules will continue to play an extremely important role in this field. While the *Hague Convention on the Law Applicable to Product Liability*, elaborated at the Twelfth Session of the Hague Conference for Private International Law in 1972,¹¹⁸ represents an attempt towards uniform conflict rules, it has been ratified by very few countries (France, Yugoslavia, Luxembourg, the Netherlands and Norway). This convention is based on the so-called "grouping of contacts" and its effect in typical air crash situations 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.

B. *Conflict Rules on Tortious Liability in Western Europe*

The rule of *lex loci delicti* (the law of the place of the harm) plays a very important role in Western Europe, although most of the statutory provisions, precedents and legal writings do not relate specifically to air crash cases.

¹¹⁵ 28 O.J. EUR. COMM. (No. L. 210) 29 (1985) [hereinafter EEC Directive]; see *Die Produkthaftungs - Richtlinie der Europäischen Gemeinschaft und der Luftverkehr*, 36 ZEITSCHRIFT FÜR LUFT-UND DER WELTRAUMRECHT 170-79 (1987).

¹¹⁶ EEC Directive, *supra* note 115, at 29.

¹¹⁷ *Id.* at art. 7(e).

¹¹⁸ See Conference de La Haye de droit international privé, October 21, 1972, Actes et documents de la Douzième session, 246-250 for the text of the Convention. For a critical analysis of the Convention, see H. TEBBENS, *INTERNATIONAL PRODUCT LIABILITY*, 333-360 (1979).

In England, liability for torts committed in England is governed exclusively by English law, even if both parties come from the same foreign country.¹¹⁹ The state of law regarding torts committed abroad is somewhat more complicated. The traditional rule concerning such torts was enunciated in 1870 in *Phillips v. Eyre*.¹²⁰ A tort committed abroad generally entitles the victim to damages only to the extent the case is actionable under *both* the rule of *lex loci delicti* and English law.¹²¹ The meaning and relevance of two other precedents in this field, *Machado v. Fontes*¹²² and *Chaplin v. Boys*,¹²³ is disputed. A peculiar feature of English air law is Article 3 of the Carriage by Air Act (Application of Provisions) Order 1967,¹²⁴ which applies English substantive law to all air carriage cases outside the Warsaw Convention, regardless of whether they have any connection with England. Thus, in *Holmes v. Bangladesh Biman Corp.*,¹²⁵ the court applied English law concerning the maximum amount of the carrier's liability in the case of a fatal accident on a purely domestic flight in Bangladesh. The court held that the 1967 Order applied to all cases on non-international carriage before an English court.¹²⁶

In German private international law, tortious liability is basically governed by the *lex loci delicti*.¹²⁷ The recent legislative reform of German private international law in

¹¹⁹ See *Szalatnay-Stacho v. Fink*, 1947 K.B. 1 (C.A. 1946).

¹²⁰ 6 L.R.-Q.B. 1 (1870).

¹²¹ See G. CHESHIRE & P. NORTH, *PRIVATE INTERNATIONAL LAW* 532 (11th ed. 1987); J. MORRIS, *THE CONFLICT OF LAWS* 314-15 (3d ed. 1984); Comment, *The Role of Choice of Law in Determining Damages for International Aviation Accidents*, 51 J. AIR L. & COM. 953, 981 (1986); C. SHAWCROSS & K. BEAUMONT, 1 AIR LAW I(93) (4th ed. 1987).

¹²² [1897] 2 Q.B. 231 (C.A.) (where an act is not authorized, innocent, or excusable where it is committed, an English court may apply English law).

¹²³ 1971 App. Cas. 356 (H.L. 1969) (court granted damages in accordance with English law over Maltese law).

¹²⁴ Carriage by Air Act, S.I. 1967, No. 480, art. 3; see 2 HALSBURY'S LAWS OF ENGLAND 808 n.1 (L. Hailsham 4th ed. 1973).

¹²⁵ 2 Lloyd's Rep. 192 (1987); see Kean, *Non-international carriage: Holmes v. Bangladesh Biman Corp.*, 12 AIR LAW 145 (1987) for a discussion of the case.

¹²⁶ 2 Lloyd's Rep. at 192.

¹²⁷ See Judgment of March 8, 1983, Bundesgerichtshof, Senate, W. Ger., 87

1986 has not affected this established rule. In those cases where the tortious act has not been committed in the country where the resulting injury has occurred, the German conflict rule applies the law more favorable to the victim or chosen by him (the so-called *Gunstigkeitssprinzip*).¹²⁸ There are, however, two statutory exceptions to the rule of *lex loci delicti*. Article 38 (corresponding to article 12 before 1986) of the Introductory Act to the German Civil Code shields a German wrongdoer from greater liability for torts committed abroad than he would be subject to under German law.¹²⁹ A war-time decree of 1942, which is still in force, provides that tortious claims between Germans shall be governed by German law even if the tort has been committed abroad.¹³⁰

There appear to be additional, judge-made, exceptions contributing to the *Auflockerung der Tatortregel*, i.e. to the loosening of the traditional rule of *lex loci delicti*. If the victim and the wrongdoer are permanent residents of the same country, the law of their country of residence shall normally apply rather than the law of the place of the tort, provided that neither of them is a citizen of the country where the tort occurred¹³¹ or that there was some relevant relationship between them before the injury.¹³² This relationship can be permanent, created by operation of law

BGHZ 95, reprinted in 36 NEUE JURISTISCHE WOCHENSCHRIFT 1972 (1983); Lukoschek, *supra* note 111, at 29; P. URWANTSCHKY, *supra* note 112, at 6-7.

¹²⁸ See Judgment of November 12, 1932, Reichsgericht, Senate, W. Ger., 138 Reichsgericht in Zivilsachen [RGZ] 243; Judgment of June 23, 1964, Bundesgerichtshof, Senate, W. Ger., reprinted in 17 NEUE JURISTISCHE WOCHENSCHRIFT 2012 (1964); Sonnenberger, *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, EINFÜHRUNGSGESETZ ZUM BÜRGERLICHEN GESETZBUCH INTERNATIONALES PRIVATRECHT 675-76 (1983).

¹²⁹ EINFÜHRUNGSGESETZ ZUM BÜRGERLICHEN GESETZBUCH [EGBGB] § 38 (W. Ger.).

¹³⁰ Verordnung über die Rechtsanwendung bei Schädigungen deutscher Staatsangehöriger ausserhalb des Reichsgebietes, Reichsgesetzblatt [RGBl] I 706 (W. Ger.).

¹³¹ Judgment of Oct. 5, 1976, Bundesgerichtshof, Senate, W. Ger., reprinted in 30 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 496 (1977); Judgment of Jan. 8, 1985, Bundesgerichtshof, Senate, W. Ger., 93 BGHZ 214.

¹³² Judgment of Mar. 13, 1984, Bundesgerichtshof, Senate, W. Ger., 90 BGHZ 294, reprinted in 37 NEUE JURISTISCHE WOCHENSCHRIFT 2032 (1984).

(such as marriage), or purely temporary and factual (e.g. the parties travelled together as members of the same group).¹³³

The Austrian Act on Private International Law of June 15, 1978,¹³⁴ provides in section 48(1) that non-contractual damage claims shall be judged according to the law of the state in which the damage-causing conduct occurred.¹³⁵ However, section 48(1) also provides that if the parties "have a stronger connection to the law of one and the same other state, that law shall be determinative."¹³⁶

In France, as in many other countries, the traditional conflict rule for torts is that of *lex loci delicti*.¹³⁷ The rule is not embodied in any statute, but was developed by case law, finally proclaimed in 1948 by the French *Cour de Cassation* in the case of *Lautour c. Veuve Guiraut*,¹³⁸ and confirmed thereafter.¹³⁹ If the wrongful act and the resulting injury have not occurred in the same country, French private international law tends to prefer the law of the place of injury.¹⁴⁰

The leading Swedish conflict case in the field of torts is *Cronsjoe v. Forsikringsaktieselskabet National*, decided by the Swedish Supreme Court in 1969.¹⁴¹ The decision rests on the traditional rule of *lex loci delicti*, making no exception where the parties are domiciliaries and citizens of the same foreign country.¹⁴²

¹³³ *Id.*

¹³⁴ Bundesgesetz vom 15 Juni 1978 über das internationale Privatrecht (IPR-Gesetz), BUNDESGESETZBLATT [BGBL] 304 (Aus.). An English translation of the Act can be found in Palmer, *The Austrian Codification of Conflicts Law*, 28 AM. J. COMP. L. 197, 222-34 (1980).

¹³⁵ Palmer, *supra* note 134, at 234.

¹³⁶ *Id.*

¹³⁷ See Y. LOUSSOUARN & P. BOUREL, *supra* note 58, at 235-36.

¹³⁸ Judgment of May 25, 1948, Cass. Civ. Ire, Fr., 1948 Recueil Dalloz, *Jurisprudence* [D.S. Jur.] 357, reprinted in 38 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [R.C.D.I.P.] 91 (1949).

¹³⁹ See, e.g., Judgment of May 30, 1967, Cass. Civ. Ire., Fr., 1967 Recueil Dalloz, Sirey, *Jurisprudence* [D.S. Jur.] 629.

¹⁴⁰ See Y. LOUSSOUARN & P. BOUREL, *supra* note 58, at 508-10; cf. Judgment of Mar. 12, 1957, Fr., reprinted in 1957 REVUE FRANCAISE DE DROIT AÉRIEN 276.

¹⁴¹ 31 NYTT JURIDISKT ARKIV 163 (1969).

¹⁴² *Id.*

C. *Conflict Rules on Tortious Liability in the United States*

Each of the more than fifty states and territories within the United States has its own set of conflict rules, although there are important similarities that make it possible to discuss these sets of rules together as one "family." While these rules have been developed mainly for conflicts between the laws of the different states, they are also used in international conflict situations. Although there are no special conflict rules regarding air crashes, the case law concerning aircraft accidents is so voluminous that there are cases dealing with nearly every conflicts issue.

Almost all air crash disputes of consequence are adjudicated by federal courts, which are usually considered better qualified to deal with cases of this type. Most air crash lawsuits in federal courts are cases involving diversity jurisdiction.¹⁴³ In diversity cases, the federal district courts are obliged to follow the conflict rules of the particular state where they sit.¹⁴⁴ If diversity lawsuits relating to the same accident are initiated in different states but are eventually heard in one federal district court, that court must follow the conflict rules of the state where each particular action was originally filed.

The conflict rules of many states are unclear, which means that the federal courts often get involved in guesswork as to which law the courts of a particular state would apply under the circumstances. Even if the substantive rules of the applicable law are unclear, a federal court can easily find itself in a situation similar to that of the United States Court of Appeals for the Second Circuit in the air crash case of *Nolan v. Transocean Air Lines*, where the court's principal task was "to determine what the New York courts would think the California courts would think

¹⁴³ 28 U.S.C. § 1332 (1982). Section 1332 states that "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between —(1) citizens of different states;" *Id.* § 1332(a).

¹⁴⁴ *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941).

on an issue about which neither has thought."¹⁴⁵ On the other hand, federal conflict rules may be applied by the federal courts in those cases where their jurisdiction is based not upon diversity of citizenship but upon federal law such as admiralty¹⁴⁶ or on the Foreign Sovereign Immunities Act.¹⁴⁷

The traditional approach in practically all states to conflicts of law regarding torts was based on the application of *lex loci delicti*.¹⁴⁸ In American conflict of laws, this concept means the law of the place where the last event necessary for the tortious liability occurred.¹⁴⁹ In reality this usually means the application of the law of the place where the injury occurred, since there can be no liability without injury.

This approach, however, has received severe criticism for being inflexible and for leading to fortuitous results.¹⁵⁰ Over the last few decades, the American conflict rules have undergone radical changes in the field of torts. The famous case of *Babcock v. Jackson*,¹⁵¹ being one of the first steps in the direction away from the traditional approach of *lex loci delicti*, which is now followed in fewer than twenty American jurisdictions, a group which generally does not include the more important states.¹⁵² This development has taken place with the support of many American conflict writers who have contributed to the discussion with a number of ingenious conflict theories that are sometimes called "the American conflict

¹⁴⁵ 276 F.2d 280, 281 (2d Cir. 1960), *vacated per curiam*, 365 U.S. 293 (1961).

¹⁴⁶ See, e.g., *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

¹⁴⁷ See, e.g., *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000 (9th Cir. 1987).

¹⁴⁸ See RESTATEMENT OF CONFLICT OF LAWS § 377 (1934); *Sestito v. Knop*, 297 F.2d 33, 34 (7th Cir. 1961).

¹⁴⁹ RESTATEMENT OF CONFLICT OF LAWS § 377 (1934).

¹⁵⁰ *Id.* § 145 comment e. In practice, however, courts have often found it possible to arrive at the results they wanted without disassociating themselves openly from the principle of *lex loci delicti*. See, e.g., *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (court avoided application of *lex loci delicti* by using public policy to characterize the measure of damages as a procedural issue).

¹⁵¹ 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

¹⁵² See L. KREINDLER, 1 AVIATION ACCIDENT LAW § 2.03[1] (1987).

revolution.”¹⁵³

While this “revolution” is not limited to the area of torts, torts are clearly the field which has been most influenced by it.¹⁵⁴ These new theories generally abandon the concept of clear-cut and fixed conflict rules, which are disparagingly described as “mechanical” and “blind.” Rather, they determine the applicable law by viewing the circumstances of each particular case, including the substantive contents of the legal systems involved. At this point, however, the unity stops and various authors and courts have their own approaches, attributing different weight to various circumstances. The common core of most of the new theories is that each theory constitutes a “maze” with unpredictable results and total lack of legal security. That the American “conflicts revolution” has made private international law untidy and disorderly has been conceded by American authors, many of whom, however, appear to like it that way.¹⁵⁵ Analyzing some recent American theories and judgments is like peeling an onion: under each leaf there is another, with no real core to be found. The conflict rules have been replaced by vague “approaches” and “processes,”¹⁵⁶ and the conflict of laws has “dissolved into a marshy delta with hundreds of rivulets and canals and no clear central channel.”¹⁵⁷

One of the main “modern” American approaches to the problem of conflicts of law in the field of torts is that of “governmental interest analysis”, developed originally by Professor Brainerd Currie.¹⁵⁸ As applied today, this theory advocates that the law of the state having the strongest legitimate interest in advancing its policies in a

¹⁵³ See Reese, *American Choice of Law*, 30 AM. J. COMP. L. 135 (1982).

¹⁵⁴ *Id.*

¹⁵⁵ See Juenger, *American and European Conflicts Law*, 30 AM. J. COMP. L. 117, 133 (1982); Lowenfeld, *Renvoi Among the Law Professors: An American's View of the European View of American Conflict of Laws*, 30 AM. J. COMP. L. 99, 114-15 (1982).

¹⁵⁶ See Kegel, *Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers*, 27 AM. J. COMP. L. 615, 617 (1979).

¹⁵⁷ Lowenfeld, *supra* note 155, at 99.

¹⁵⁸ See Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, in SELECT ESSAYS ON THE CONFLICT OF LAWS 188, 259-66 (1963).

particular case should prevail.¹⁵⁹ This means, inter alia, that different legal systems may often be applied to the same claim for damages, depending on the issue in dispute. Such a situation may, for example, result in the basis of liability being subject to one law and the amount of compensation being subject to another law. This result may occur since it can be argued that the country where the wrongful act was committed has a great interest in the regulation of behavior in its territory (including issues such as the definition of negligence, the imposition of strict liability for certain acts, or the imposition of punitive damages), whereas it is less interested in the amount of compensatory damages if the parties are foreign. This latter issue may be more important to the state or the states of the permanent residence of the parties.

An example of this approach is *In re Paris Air Crash of March 3, 1974*,¹⁶⁰ the introductory example at the beginning of this paper. This case concerned an American-manufactured aircraft, owned and operated by a Turkish airline, which crashed in France, killing a large number of people from many different countries and states.¹⁶¹ The United States District Court for the Central District of California declared that California was interested in protecting resident defendants and "would not allow enhanced recovery to plaintiffs because of the fortuitous place of the crash or residence of the litigants."¹⁶² California would not allow non-residents a greater recovery than allowed its own resident plaintiffs.¹⁶³ The court felt sure that countries or states where recovery would be less than under California law "had no interest in limiting recovery of their resident plaintiffs as against a nonresident" ¹⁶⁴

In addition, California, as "the state of residence of de-

¹⁵⁹ See *id.* at 280-81.

¹⁶⁰ 399 F. Supp. 732 (C.D. Cal. 1975).

¹⁶¹ *Id.* at 735.

¹⁶² *Id.* at 744.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 745.

signers and manufacturers," had a most significant interest in applying its measure of damages to achieve uniformity of decisions relating to a product distributed throughout the world.¹⁶⁵ The court concluded that the United States and the State of California clearly had governmental interests in applying California law, which were significantly greater than the interests of the other countries involved.¹⁶⁶ Strangely enough, this meant the application of California law¹⁶⁷ (*lex fori*) even as to the liability of the Turkish air carrier!

The second modern approach is the theory of the "most significant relationship," "center of gravity" or "grouping of contacts," which the court relied upon in *Babcock*¹⁶⁸ and which is supported by the Second Restatement.¹⁶⁹ Regarding personal injuries and wrongful death, the Second Restatement's sections 146 and 175 explain that:

[T]he local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.¹⁷⁰

In order to understand this provision, it is naturally necessary to present section 6:

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 749.

¹⁶⁷ *Id.*

¹⁶⁸ *Babcock*, 12 N.Y.2d at 473, 191 N.E.2d at 279, 240 N.Y.S.2d at 743.

¹⁶⁹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 146, 175 (1971). The various volumes of the Restatement are presentations, in a systematic manner, of common law in different fields of law in the United States. The Restatement enjoys great persuasive authority, but is, nevertheless, a private compilation, adopted and promulgated by the American Law Institute, a private association.

¹⁷⁰ *Id.* § 146.

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.¹⁷¹

The comment in the Second Restatement points out that the list of factors in section 6(2) is not exhaustive, that the factors mentioned are not listed in the order of their relative importance and that at least some of the mentioned factors will normally point in different directions.¹⁷² Consequently, the method provides only partial guidance to the correct approach to choice of law and furnishes no precise answers. The courts in each case are expected to look to the underlying factors themselves in order to arrive at a decision that will best accommodate them.¹⁷³

Since the site of an air crash is generally fortuitous, the references in sections 146 and 175 to the law of the state of the injury will often have to yield to the factors listed in section 6(2). Thus, in *Proprietors Insurance Co. v. Valsecchi*,¹⁷⁴ the court applied Florida law as a result of the "most significant relationship" test to the question of liability and damages arising out of an air crash in North Carolina, since the decedents were residents of Florida, the plane had been rented in Florida from the defendants who were Florida residents, and the flight had begun and was to end in Florida.¹⁷⁵ Federal courts in admiralty cases

¹⁷¹ *Id.* § 6.

¹⁷² *Id.* § 6 comment c.

¹⁷³ *Id.*

¹⁷⁴ 435 So. 2d 290 (Fla. Dist. Ct. App. 1983).

¹⁷⁵ *Id.* at 293-97.

apply an approach based on significant contacts or significant relationships in maritime air crash cases.¹⁷⁶

The two modern theories described are the principal ones and the only ones that courts in air crash cases use on a large scale. There are a number of other theories suggested by leading American scholars, such as the "principles of preference" formulated by David Cavers.¹⁷⁷ An interesting approach is the theory of "choice-influencing considerations," advocated primarily by Robert Leflar¹⁷⁸ and followed in at least some court decisions.¹⁷⁹ Under this approach, the court should take into account the following five factors:

- (a) the predictability of results,
- (b) the maintenance of interstate and international order,
- (c) the simplification of the judicial task,
- (d) the advancement of the forum's governmental interests, and
- (e) the application of the better rule of law.¹⁸⁰

Factors (c), (d) and (e) obviously favor the application of *lex fori*, and an analysis of the cases decided on the basis of Leflar's methodology demonstrates that a large majority of cases have been decided solely on the basis of considerations (d) and (e).¹⁸¹ Professor Leflar's last-mentioned factor, *i.e.* the application of the better law, is considered by another American professor, Friedreich K. Juenger, to be the only relevant one. Juenger's principal idea is that the court should apply the legal system which leads to the best substantive result in the particular case.¹⁸² There can be no doubt that many courts, without

¹⁷⁶ See, *e.g.*, *In re Air Crash Disaster Near Bombay, India* on Jan. 1, 1978, 531 F. Supp. 1175 (W.D. Wash. 1982).

¹⁷⁷ See generally D. CAVERS, *THE CHOICE-OF-LAW PROCESS* (1965).

¹⁷⁸ R. LEFLAR, *AMERICAN CONFLICTS LAW* §§ 105-11 (2d ed. 1968).

¹⁷⁹ See *In re Air Crash Disaster at Boston, Mass.*, on July 31, 1973, 399 F. Supp. 1106, 1113 (D. Mass. 1975) (concerning New Hampshire's conflict rules).

¹⁸⁰ R. LEFLAR, *supra* note 178, §§ 105-11.

¹⁸¹ See Hanotiau, *The American Conflicts Revolution and European Tort Choice-of-Law Thinking*, 30 AM. J. COMP. L. 73, 82 (1982).

¹⁸² See generally F. JUENGER, *ZUM WANDEL DES INTERNATIONALEN PRIVATRECHTS* (1974).

admitting it openly, follow this approach.

In utilizing the new theories, American courts often indiscriminately combine the various methods and approaches even when applying the conflict rules of the same state.¹⁸³ The courts frequently pay lip service to one method, when in fact they use another.¹⁸⁴ It seems that the courts too often refer to the formulas of the governmental interest approach or of the Second Restatement, without making any actual analysis of the real effects of the formula on the particular case. The judiciary has emphasized that the various approaches are basically the same, that they are consistent with each other and they will likely produce about the same result on a given set of facts.¹⁸⁵ Most of the modern theories normally seem to lead to the same result, namely the application of *lex fori*.¹⁸⁶ Indeed, many cases can be interpreted simply to mean that the courts will give plaintiffs the benefit of *lex fori* when it is more favorable than the foreign *lex loci delicti*, provided that there is a fair basis for doing so.¹⁸⁷ Some courts apply *lex fori* without bothering to support it by any particular theory.¹⁸⁸

Paradoxically, the Court of Appeals of New York, the very court that marked the beginning of the new era in

¹⁸³ See E. SCOLES & P. HAY, *supra* note 67, at 551.

¹⁸⁴ See Hanotiau, *supra* note 181, at 84.

¹⁸⁵ See *In re Air Crash Disaster Near Chicago, Ill.*, on May 25, 1979, 644 F.2d 594, 610 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981). A federal district court, in a diversity case, concluded that each test used the same analytical inquiry, reflecting the underlying consistency between the tests and producing approximately the same results. The court quoted Professor Leflar:

[I]t appears that the various scholarly views concerning choice of law, developed during the last couple of decades, are being accepted by the courts as though they constituted one somewhat multi-faceted approach to the subject. Essentially, they are consistent with each other. Any one of them is likely to produce about the same results on a given set of facts as will another

Id.

¹⁸⁶ See, e.g., *id.* at 613-16.

¹⁸⁷ See *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194, 205 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978); see also Lowenfeld, *supra* note 155, at 102 n.67.

¹⁸⁸ See, e.g., *Sexton v. Ryder Truck Rental, Inc.*, 413 Mich. 406, 320 N.W.2d 843 (1982) (adopting no exact methodology but applying *lex fori*).

Babcock, now seems to miss the old rule of *lex loci delicti*. In *Cousins v. Instrument Flyers, Inc.*,¹⁸⁹ decided in 1978, the court of appeals confirmed that “*lex loci delicti* remains the general rule in tort cases to be displaced only in extraordinary circumstances,” although it added that “it has been acknowledged that in airplane crash cases, the place of the wrong, if it can be ascertained, is most often fortuitous.”¹⁹⁰

There are signs of increasing disenchantment with the new theories, even among American legal scholars. There is much truth in the disparaging remarks made about the new approaches by one of their critics, Professor Ehrenzweig, who spoke about “the Second Restatement’s nonrule” and called the modern formulas “the Desperanto of conflicts law.”¹⁹¹ Professor Willis L. M. Reese, the very reporter of the Second Restatement of Conflict of Laws, has, in an article published in 1982, proposed certain conflict rules for aircraft accident cases which look as if the American “conflict revolution” never happened.¹⁹² In fact, Reese introduces his proposal with the following statement:

First, the suggested formulations should consist of actual rules of choice of law which would afford some predictability of result and would be relatively easy for the courts to apply. If possible, it would be desirable to avoid such vague criteria as application of the law of the state with the most significant relationship or of the state which has the greatest interest in the decision of the issue at hand or of the state whose interests would be most impaired if its law were not applied. Formulations of this sort are hard for the courts to apply and afford little predictability except in

¹⁸⁹ 44 N.Y.2d 698, 376 N.E.2d 914, 405 N.Y.S.2d 441 (1978).

¹⁹⁰ *Id.* at 699, 376 N.E.2d at 915, 405 N.Y.S.2d at 442.; *cf.* *O'Rourke v. Eastern Air Lines, Inc.*, 730 F.2d 842 (2d Cir. 1984) (*lex loci delicti* will not be applied when *lexi fori* will provide substantially the same remedy).

¹⁹¹ See Ehrenzweig, *Specific Principles of Private International Law*, 124 RECUEIL DES COURS 254, 325 (1968 II).

¹⁹² Reese, *The Law Governing Airplane Accidents*, 39 WASH. & LEE L. REV. 1303 (1982).

the clearest of cases.¹⁹³

The main weakness of most of the modern American theories is that they permit the court to arrive at virtually any solution it happens to prefer in the particular case; they make every result possible without actually leading to any of them.¹⁹⁴ Furthermore, it appears that the reported judgments do not give the real reasons behind the particular decisions. The judges loyally invoke the formulas of "most significant relationship," "governmental interest analysis" and the like but use them as mere cover-up for their real reasons, such as their concern for the passenger or his survivors, which have resulted in the application of a particular legal system.¹⁹⁵

It has been hinted that European lawyers, more than their American colleagues, like rules, if only to be able to deviate from them.¹⁹⁶ The popularity of the "non-rule approach" in the United States may, indeed, have something to do with recruitment and status of American judges, who are normally appointed from the ranks of practicing attorneys with substantial experience. Such judges can perhaps be expected to possess an amount of "judicial intuition" that will lead them to reasonable conclusions even when the rule in a particular case is that there is not and should not be any fixed rule. In countries of the continental Europe, the judges, at least in trial courts, are very often young lawyers in their late twenties who have joined the judiciary directly after graduation and who need more guidance than do their American colleagues.

Even in the United States, however, the modern theories cause difficulties since they lead to a total lack of foreseeability and legal security. Much of the excessive American litigation in this field is probably due to this lack of predictability, which makes it difficult for the lawyers to advise their clients and to negotiate a settlement. While

¹⁹³ *Id.* at 1304 (citations omitted).

¹⁹⁴ See Hanotiau, *supra* note 181, at 84.

¹⁹⁵ See Reese, *supra* note 192, at 1304-05.

¹⁹⁶ See H. TEBBENS, *supra* note 118, at 193.

some maintain that the application of the new American conflict theories by the courts will through normal operation of stare decisis in time result in the development of a system of more detailed choice-of-law norms,¹⁹⁷ the fundamental philosophy of the new theories militates against the existence of any precise conflict rules at all.

D. *Contractual Liability of the Carrier*

The passenger does not usually have a contractual relationship with the manufacturer or repairer of the aircraft, the supplier of fuel, the operator of the air control and other similar defendants. According to some legal systems, however, these defendants can be liable for breach of an implied warranty *vis-a-vis* the passenger, despite the lack of privity of contract.¹⁹⁸ Liability for implied warranty, in contrast to liability for express warranty, is normally subject to the conflict rules pertaining to torts. Indeed, liability for breach of implied warranty does not arise because of the intentions of the parties when they enter into the contract, but because the law imposes it in the furtherance of social policies similar to those furthered by the law of torts. In fact, strict liability in tort and liability under implied warranty without privity of contract might be merely two different ways of describing the very same cause of action.¹⁹⁹ The same can be said of

¹⁹⁷ See, e.g., E. SCOLES & P. HAY, *supra* note 67, at 606.

¹⁹⁸ See, e.g., *Hinton v. Republic Aviation Corp.*, 180 F. Supp. 31 (S.D.N.Y. 1959) (holding that under applicable California law privity was not essential for recovery from the defendant aircraft manufacturer on the ground of breach of implied warranty).

¹⁹⁹ See, e.g., Feldman, *Actions in Contract Resulting from Aircraft Crashes*, 12 CLEV.-MARSHALL L. REV. 472, 479 (1963); Kinzy, *Current Aviation Decisions in Conflict of Laws*, 41 J. AIR L. & COM. 311, 319 (1975); H. TEBBENS, *supra* note 118, at 227-28. In the case of *Uppgren v. Executive Aviation Servs., Inc.*, 326 F. Supp. 709 (D. Md. 1971), the court interpreted the choice-of-law rules of Maryland in the following way:

It is believed by this court that the highest court of Maryland, if faced with the necessity to decide the question, would determine that an action based upon an implied warranty . . . bears such a close relationship to one based upon tort that it should be subject to the rule of *lex loci delicti* for the same reasons as is a tort action.

Id. at 716.

some European judge-made counterparts of implied warranty, such as the French doctrine of *action directe* and the Austrian theory of "contractual duty to protect a third party."²⁰⁰

The legal relationship between the carrier and the passenger, on the other hand, is essentially a contractual one, based on a contract for carriage by air. An air crash, killing or injuring a passenger, practically always is a violation of the carrier's contractual obligation to provide safe carriage. Death of or injury to a person is, at the same time, in most legal systems the classic example of a tort (*unerlaubte Handlung, dé lit*). Since the contractual and tortious liabilities are traditionally treated differently in the conflict of laws,²⁰¹ one may ask whether the carrier's liability for killing or injuring a passenger should be classified as contractual or tortious for the purposes of private international law. It is more proper, however, to avoid this question in air crash cases by applying the same conflict rule to both the contractual and tortious aspects of the carrier's liability. This does not necessarily mean that liability in tort should be governed by the proper law of the contract (the so-called *akzessorische Anknüpfung*) or that contractual liability should be governed by the law applicable to tort. In air crash cases, it appears preferable to follow a special conflict rule, different from those commonly used in the field of contracts and torts.

IV. CONCLUSIONS

The initial question to be answered is whether the courts should follow some fixed conflict rules or be free to choose the applicable law as they please, using one or another more-or-less sophisticated method of concealing

²⁰⁰ See Posch, *Issues in International Products Liability Cases*, LEGAL ASPECTS OF INTERNATIONAL BUSINESS TRANSACTIONS II 61, 67-69 (D. Campbell & C. Rohwer ed. 1985).

²⁰¹ The modern American conflict theories will, however, normally lead to the application of the same legal system regardless of whether the disputed liability is in tort or in contract.

this freedom behind various theories. While a more fixed set of rules is preferable, the general application of the over-simplified traditional rule of *lex loci delicti* is inappropriate. The principal advantages of the traditional rule, namely the ease of determining the applicable law with the resulting predictability of outcome, are not present in many air crash cases. In any case, they carry less weight than the rule's fundamental disadvantages arising from the fortuitous nature of the site of the crash. The modern American approaches are, on the other hand, hardly suitable for world-wide use, due to their inter-provincial background and their almost totally unpredictable results.

As to the liability of the *carrier*, some advocate that the law of the place of the passenger's permanent residence should govern. The American lawyer Allan I. Mendelsohn has even proposed that a special conflict rule to this effect should be introduced into the Warsaw Convention.²⁰² The generosity of the laws of many states within the United States would render such a rule, in most cases, advantageous to passengers or survivors of passengers who permanently reside in the United States. Mr. Mendelsohn points out that the place of the passenger's domicile or permanent residence is usually also the place of purchase of the ticket and also the place of the journey's destination or starting point.²⁰³ The law of this place is the law most familiar to the passenger and most suited to the economic conditions to which he was accustomed. It is, furthermore, the law under which the passenger's estate will be probated and under which his survivors most likely live.²⁰⁴ A generally accepted application of the law of the passenger's domicile would put an end to, or at least limit, the advantages of forum shopping.²⁰⁵

²⁰² See Mendelsohn, *A Conflict of Laws Approach to the Warsaw Convention*, 33 J. AIR L. & COM. 624, 628-31 (1967).

²⁰³ *Id.* at 628.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 630.

The main disadvantage, however, of Mendelsohn's proposal is its unequal treatment of passengers from different countries who suffered similar injuries as a result of the same accident.²⁰⁶ Damages are ultimately paid by the whole travelling public in the form of higher air fares. Therefore, unless the American passengers are made to pay more for their tickets than passengers residing in countries with less generous laws on damages, the high damages paid to Americans would actually be subsidized by travellers from other, often poorer, countries. In some extreme cases, one could even imagine that the carriers would be tempted to discriminate between passengers in order to protect the life and health of passengers from particularly "expensive" countries such as the United States. Last but not least, this approach could easily force a single court to apply the rules of dozens of legal systems in a single air crash case.

An interesting, but rather complicated, proposal has been submitted by another American, Professor Willis L.M. Reese.²⁰⁷ His basic guidelines are, *inter alia*, the equal treatment of all passengers and an opportunity for plaintiffs to choose, from a limited number of alternatives, the legal system most beneficial to their claims. This freedom of choice would free the court, at least in large part, from the task of determining the legal system to be applied and should not lead to any serious disparity of treatment among passengers on the same plane since one of the available alternatives should in almost every case prove to be the most favorable law to all passengers. Reese suggests that a plaintiff (the passenger or his survivors) suing a carrier should be allowed to choose among the law of any of the following: (1) the place of the carrier's principal place of business (2) 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 (3) the

²⁰⁶ Cf. *id.* at 631.

²⁰⁷ Reese, *supra* note 192, at 1303-23.

place of departure or (4) the place of intended destination.²⁰⁸

Punitive damages, however, could be governed by the first or second alternative only, since a defendant should only be held liable for punitive damages under the law of a state that has a substantial interest in regulating his activities and in deterring him from engaging in improper conduct. The third and fourth alternatives create problems if the flight has several scheduled stops and different passengers have boarded the plane and/or intended to disembark in different countries. In order not to sacrifice the principle of equal treatment of all passengers, Reese suggests that each passenger be allowed to choose the law of any scheduled stop even though it was neither his stop of departure nor his intended place of destination.²⁰⁹

While victims of the same air crash should rightfully have their claims adjudicated according to the same legal rules, total equality in this respect is often impossible to achieve, since, for example, two passengers on the same flight may very well be subject to different versions of the Warsaw Convention. This, however, is not an acceptable excuse for failing to attain equality of treatment whenever possible. The same legal system should thus normally apply regardless of the domicile of the passenger or his survivors and regardless of such factors as the place of the purchase of the ticket, the place of the boarding or the place of the intended disembarking of the individual passenger. Reese's proposal permitting the plaintiff to choose among the laws of all conceivable places of embarking or disembarking seems to me to be unrealistic and even inappropriate, since it can lead to the application of a legal system totally unrelated to the parties and the occurrence. Such an extensive right of choice would, furthermore, be excessively favorable to the plaintiffs.²¹⁰

²⁰⁸ *Id.* at 1313-16.

²⁰⁹ *Id.* at 1315.

²¹⁰ It is hardly surprising that the application of the law imposing the highest

If the requirement of uniform treatment is accepted, there remain in fact only two legal systems that can reasonably govern the liability of the carrier. These are the law of the carrier's principal place of business or that of the place of the registration of the aircraft. Both are usually, although not always, identical. The application of the law of the country of the aircraft's registration appears to be the most appropriate principal rule.²¹¹ Whereas the principal place of business of the carrier may sometimes be open to doubt, especially if it is not the statutory but the factual seat that is intended, the registration of the aircraft is unambiguous. The application of the law of the country where the crashed aircraft was registered subjects all passengers on the same flight to the same law and makes this law easy to establish and foresee for all parties involved, including the insurers of the carrier. If the plaintiff proves, however, that the factual principal place of business of the carrier was located in a country different from that of the registration of the aircraft involved, then the plaintiff should have the right to choose the law of the carrier's principal place of business instead of that of the country of the aircraft's registration. This alternative should avoid the risk of "flags of convenience," *i.e.* the registration of aircraft in countries with rules particularly favorable to carriers.

The liability of the aircraft *manufacturer* to the passenger or his survivor is basically non-contractual. The application of the traditional tort conflict rule of *lex loci delicti* would normally lead to the application of either the law of the place where the allegedly tortious act occurred (normally the law of the place where the aircraft had been manufactured) or the law of the place of injury (the place of the disaster). Reese's proposal for manufacturer's lia-

standard of care, stipulating the highest damages, is favored by air litigation lawyers. See, e.g., L. KREINDLER, *supra* note 152, § 2.07.

²¹¹ See, e.g., Lukoschek, *supra* note 111, at 98; E. von Caemmerer, VORSCHLAGE UND GUTACHTEN ZUR REFORM DES DEUTSCHEN INTERNATIONALEN PRIVATRECHTS DER AUSSENVERTRAGLICHEN SCHULDVERHALTNISSE, 446-47 (1983).

bility is very similar to his suggestions regarding the liability of the carrier. The main differences are that the law of the carrier's principal place of business is replaced with the law of the principal place of business of the producer and that the law of the place of manufacture or design replaces the law of the place of the navigational error or of the place where the carrier maintained, inspected or repaired the airplane.²¹²

It would be more appropriate, however, to give the injured party the right to choose between the law of the place where the tortious act had been committed (for example, the place of defective manufacture) and the law of the place of the aircraft's registration. Even in this situation, all passengers should thus be treated alike, regardless of their domicile, place of departure and other individual connecting factors. The option of applying the law of the place of manufacture is advantageous to the plaintiffs, since the industrialized countries where most aircraft are produced usually have rules on product liability that are relatively favorable to the injured party. Unlike the manufacturer's statutory seat or administrative headquarters, the manufacturing facilities are difficult to move abroad in order to avoid stringent product liability rules. The plaintiff's right to choose the law of the country of the aircraft's registration is not unfair to the manufacturer, since any manufacturer of commercial aircraft must in these days reasonably anticipate the possibility that his products may be used by carriers all over the world.

V. SUMMARY

The liability of the air carrier *vis-a-vis* the passenger or his survivors in the event of an air crash should be determined by the law of the aircraft's registration ("flag"). If the plaintiff shows that the defendant carrier's real principal place of business is in a country different from that of

²¹² Reese, *supra* note 192, at 1310.

the aircraft's registration, he should be entitled to choose the law of the carrier's principal place of business. The liability of the manufacturer of an aircraft (or of a part of an aircraft) should be governed by the law of the place of his act or omission causing the accident (normally the place of production) or by the law of the registration of the aircraft carrying the injured or killed passenger, at the option of the plaintiff. Similarly, the tortious liability of others (the air control, the instructors who have taught the crew, etc.) should be governed by the law of the place where they have or should have acted or by the law of the aircraft's registration, at the option of the plaintiff.