AIRLINE LABOUR LAW
—A STUDY OF CERTAIN LABOUR LAW RULES IN INTERNATIONAL AIR TRANSPORT

by

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Abstract

This thesis examines problems related to particular labor laws currently applied in international air transport. This analysis is framed within the context of scholarly theory and judicial practice arising from various regimes of labor law governing industrial injury, the individual contract of employment, labor-management relations, and fair treatment in the civil aviation industry.

A critical survey of labor regulations operating in the international air transport industry is provided through commentary on the principles formulated by judicial decisions and the theories which underlie their reasoning, helping to clarify both substantive and procedural labor laws affecting international air transport.

A critical analysis of different categories of statutory labor law governing international air transport is also provided to assess the validity of commonly-erected conflict of labor law rules, thereby revealing the inadequacy of the single rule principle in view of the unique and perplexing regulatory interests which are inherent in aviation activity. The divergence between domestic labor statutes and Treaties of Friendship, Commerce and Navigation or bilateral air transport agreements also adds a more subtle aspect to the problems explored.

Résumé

Cette thèse vise une analyse des problèmes de certaines règles de loi de travail actuellement adoptées dans le domaine du transport aérien international. L'analyse se port essentiellement sur le théorie érudite et pratique judiciaire, surtout par rapport aux régimes de lois de travail gouvernant la blessure industrielle, le contrat individuel d'emploi, les relations de gestion de travail, et la traitement juste dans l'industrie d'aviation civile.

Une sondage plus pragmatique des règles de travail appliquées dans l'industrie internationale de transport aérien est réalisée par des commentaires formulées sur principe et sur des théories et décisions judiciaires provenant de celui-ci, qui aide à clarifier les lois de travail, en procédure et substance, opérées dans le transport aérien international.

L'analyse critique des différentes catégories de lois de travail appliqués dans le transport aérien international fournissaient aussi un moyen de vérifier la validité des règles du conflit de loi de travail, qui révèle l'insuffisance du règle simple à cause des intérêts régulateurs uniques et confondus dans l'aviation. Les divergences entre des statuts de travail domestique et des traités d'amitié, de commerce et de navigation ou des accords bilatéraux de transport aérien créent, elles aussi, des circonstances subtile.

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Abbreviations

BGHZ	Entscheidungen des Bundesgerichtschofes in Zivilsachen
CALP	Commission d'Appel en Matière de Lésions Professionelles
Gaz.Pal.	Gazette du Palais
IPRspr	Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts
JDI	Journal du droit international (Clunet)
NJW	Neue Juristische Wochenschrift
Pasicrisie Bel.	Pasicrisie Belge
RCDIP	Revue critique de droit international privé
RDIP	Revue de droit international privé
RFDA	Revue française de droit aérien
RGAE	Revue générale de droit aérien et spatial
RGDA	Revue générale de droit aérien
ZFL	Zeitschrift für Luftrecht
ZLW	Zeitschrift für Luft und Weltraumrecht
WCAT	Workers' Compensation Appeals Tribunal (in Ontario)

Other abbreviations used in this thesis have followed the citation rules prescribed by both *Canadian Guide to Uniform Legal Citation*, 2d ed (Toronto: Carswell, 1988) and *The Blue Book — A Uniform System of Citation*, 6th ed (Cambridge: Harv. L.Rev. Ass'n, 1996)

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Chapter 1.
Introduction

CONTENTS

1.1 Subject of the Study
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1.1 Subject of the Study

The international air transport industry is labor-intensive in both content and scale. To maintain a smooth commercial operation, airlines must retain an efficient and considerably large labor force comprised of employees from various sectors - such as flight deck, ground handling, and technical service personnel, mechanics and sales representatives, plus many more. The diversity of tasks to be designated undoubtedly creates a wide spectrum of social labor relationships covering performance of work, liability for industrial injuries, collective bargaining, and fair treatment in employment, all of which inevitably lead this industry into the limelight of employment regulations.

International air transport is saturated with regulatory schemes; state intervention in the employment relationship between private parties, aiming at a balance between their interests, is commonly justified by a perceived need to maintain minimal industrial order. This justification is especially relevant to the air transport industry, since its daily operation depends upon employees of specialized professional skill and discipline which can be optimized by satisfactory working conditions, and also because air traffic is an essential public utility of serious concern to the common demands of society, *i.e.*, the provision of safe, regular transportation. Stable and healthy industrial relations help guarantee swift and safe traffic services to customers as well as indirectly generate more reasonable capacities and fares.

Two elements of air transport serve to distinguish its labor process. One of

these elements is the highly-technical character of aviation activity. Though no longer classified as an "ultrahazardous activity," air transportation continues to be a social activity that exacts a high toll on human life and property when accidents occur, and it is nearly impossible for a victim who has very limited knowledge of the aircraft's perplexing technical nature to prove fault from a gigantic pile of carcass and wreckage. Therefore, a unique regime of liability has been created for this activity in the unified aviation accident laws of the Warsaw-Hague pact (*res ipsa loquitur*) and the Rome series (strict liability); even in national regimes of tort liability, legal mechanisms relating to negligence *per se* and *res ipsa loquitur* - which are not necessarily available to the injured employee in another industries - are at the ready disposal of aircraft personnel. Peculiarities of time and locality in the labor process of the airline industry also obscure the scope of operation for workers' compensation statutes, especially in cases that hinge on such statutory language as, *inter alia*, "in the course of employment."

A second distinguishing element of labor relations in air transport is its transnational character. Not only does the principal *locus laboris* of aircraft personnel, *i.e.*, the aircraft, fly over and land in different countries, international airlines are also required to maintain foreign operation bases and sales offices, as well as recruit foreign employees to conduct their daily business, creating a natural arena for competing connecting factors in employment disputes - such as the domicile of the employer, the place of registration and nationality of the aircraft, the *locus laboris*, the *locus contractus*, the *locus delicti*, the domicile of employee, party autonomy - and consequently, for competing regulatory interests of the different states concerned. Due to *jus gentium*, a national airline cannot operate abroad without prior permission; these transnational operations are thus governed by diplomatic instruments such as bilateral air transport agreements and Treaties of Friendship, Commerce, and Navigation, sometimes containing preferential provisions which contradict local labor regulations.

When in conflict, the regulatory interests of states in the labor process of airlines are more than general. In the case of industrial injury, extended application of local compensation schemes for workers performing their duties "abroad" (in

airspace over foreign soil) could be justified. In labor-management relations, the prosperous operation and expansion of an international airline's business will certainly benefit the national balance of payment, but to facilitate and protect such an operation and expansion, a fair competitive market for international air transport is needed. Unfair competition could be prevented by extraterritorial application of national labor standards to ensure that the operating (labor) costs of other international airliners, flying within the same market, are maintained at a reasonable level. Meanwhile, extending the scope of representation of municipal trade unions over employees working abroad for national airlines could also prevent labor shopping and the resulting deterioration of significant functions in the labor-management operation which substantially affect local employees' vested rights and, *inter alia*, employment opportunities.

Evidently, there are yet other regulatory interests affecting labor law which are not necessarily based on economic consideration. For example, applying local regulations for fair treatment at work to a transnational setting like international air transport "would ...achieve the optimum use of [national] ... labor resources, and more importantly, would enable individuals to develop as individuals."[1] Implementation of fundamental values could even prevail over the privileges conferred by diplomatic instruments.

This study begins with an evaluation of whether the Warsaw-Hague pact and Rome Convention of 1952 apply to employees in the international airline industry, followed by a critical analysis of peculiar features of national worker's compensation and employer liability in the sphere of international air transport. These discussions cover the substantive aspect of airline labor law. The conflict of laws is also covered by a close examination of competing interests in each category of labor regulations, revealing the existence of any "definite, fixed choice of law rules."[2]

The purpose of the ensuing discussion is to survey certain rules of labor law

[1] *Diaz* v. *Pan American World Airways,Inc.* 442 F.2d 385 (5th Cir.1971) *cert.denied*, 404 U.S.950 (1971), at 442 F.2d 386-7.

[2] A. J. E. Jaffey,"The Foundations of Rules for the Choice of Law" (1982) 2 Oxford J. Legal Stud. 368, at p.387.

operating in the sphere of international air transport. General problems of international labor law and the conflict of labor laws, namely, their categorization, the divergence between civil law and common law on the nature of labor regulations, and the law concerning alien workers such as, *inter alia*, the principle of equal treatment, are not fully explored in this study. In addition, although an employee's civil liability towards third parties in the course of employment gravely affects his personal interests as a laborer, and arouses even more attention among researchers on the legal status of airline employees, this issue belongs to the area of carrier liability and consequently lies beyond the ambit of labor law; only the vicarious liability of carriers (employers) for the negligence of employees towards an injured worker will be addressed in this thesis.

1.2 Framework of the Study

The analysis of particular rules of labor law in international air transport will be divided into the following categories, each of them focusing on an individual aspect of employment regulation.

Labor laws governing industrial injury: This thesis conceives of the Warsaw Convention of 1929 and its subsequent amendments as the primary and unique example of unification of law regarding the international air carrier's liability for injury to a passenger or consignor/consignee. The Convention's coverage could easily be extended to govern an employer's liability toward aircraft employees within the same infrastructure, thus smoothly resolving the perplexing conflict problems inherent in transnational employment, either by simply amending or supplementing certain articles, or by a change of mentality towards the coexistence of contracts of employment and of carriage. A critical study of doctrine and judicial precedent in light of this approach helps to support the legitimacy and feasibility of this proposition.

The Rome Convention of 1952 is the only unified regime specially designed to standardize the rights of persons who suffer damages on the ground caused by foreign aircraft. The Rome Convention envisages industrial hazards to ground

personnel in the international air transport industry. Propitious mechanisms, such as the no-fault (strict) liability of aircraft operators, provide a better recourse for injured employees than any applicable civil tort system. The rarely-invoked features of the Rome Convention will be examined as a special scheme of the employer's delictual liability, while the exclusion clause prescribed in Article 25 is inspected and criticized in an effort to show that the system operates as a functional set of labor law rules for international airline workers.

In the international air transport industry, the workers' compensation scheme was once proclaimed as a set of uniform and exclusive rules governing the airline's liability for industrial injuries sustained by its employees, though this declaration would be false even if both the Warsaw and Rome systems were unavailable to the injured airline worker. Nonetheless, an efficient compensation scheme does indeed occupy most claims for recovery under the two-tier remedial system. Hence, this thesis will further address the theory and nature of this area of labor law with respect to its application in the international air transport industry. Meanwhile, the inevitable procedural problem of conflict of workers' compensation laws will also be examined.

Most work injury claims are covered by the above-mentioned legal institutions, though national tort liability systems can still provide a bottom-line *tabula in naufragio* for victims of modern industrial life, especially when an airline employee slips through the loophole between the Warsaw-Rome regime and the applicable workers' compensation scheme. This study tries to rebuild a systematic regime of employer's liability from a thorough reading of the relevant and fragmentary national jurisprudence, as a special application of the law of tort to international airline employees.

Labor laws governing the individual contract of employment: The contract of employment is not only the foundation of the master and servant relationship with respect to terms of performance, but also an instrument from which a wider spectrum of legal consequences are derived, transcending beyond the considerations reached by mutual consent. Yet currently most of the functions of the individual contract of employment in the international airline industry are

prescribed by collective agreement, including the standard of existing and future terms such as working hours, minimum pay, cause for termination, *etc.* In fact, the individual employee has no other real choice but to accept or refuse employment according to certain predetermined contractual provisions, which leaves only those problems that cannot be solved through collective agreement - such as the conflict of contracts, especially with respect to contract formation and termination - to be explored in this study; nevertheless, the richness of judicial precedent on this subject provides an abundant source for further examination of current theories related to the conflict of airline labor law.

Labor laws governing labor-management relations: Since the international air transport industry has become highly unionized, aside from the above-mentioned standard contract terms, many other substantive or procedural matters regarding labor's relations with management are determined by way of the collective bargaining process: examples include securing better terms of employment, laying down guidelines and conditions for workers' rights, setting up mechanisms to enforce these rights such as joint management of the labor process, and rules for institutional conflicts such as strike or lockout. For the purposes of this study, however, it would be of little interest to undertake comparative research of the regulations governing labor-management relations due to their public law nature, as they may vary sharply between sovereign jurisdictions for non-legal reasons. This thesis, then, will focus on the peculiar problems of labor-management relations within the context of the international airline industry, namely whether local labor-management relations legislation could be applied extraterritorially, including the issue of whether the guarantee of an employee's right to organize or join a labor union could be extended to foreign undertakings, and whether the national labor union could act as a bargaining representative in the labor process for workers performing their duties abroad. The United States (US) *Railway Labor Act* acts as one example of the few labor-management relations laws specially designed for the airline industry, and provides a considerable number of judicial decisions on the issues of its extraterritorial construction and application in transnational settings; furthermore,

it is undeniable that the importance of the US in the international air transport market makes the judicial opinion of its courts on this subject influential.

Labor laws governing equal treatment at work: Due to the highly-regulatory nature of international air transport, the equal treatment laws of different states may contravene each other. Moreover, other conflicts may arise between the applicable equal treatment laws and diplomatic instruments designed to enable the operation of international airline businesses, namely bilateral air transport agreements (hereinafter "ATAs") and Treaties of Friendship, Commerce, and Navigation. The legal rules designed to solve this conflict differ from those ordinarily provided in private international law and constitute a distinct aspect of airline labor law. Among the plethora of national laws on equal treatment at work, two US models - Title VII of the *Civil Rights Act* of 1964 and the *Age Discrimination in Employment Act* of 1967 - will again form the main focus of this study. Their judicial interpretation provides a wealth of examples on the conflict issues occurring in the international air transport industry, and help to draw a clearer picture of the current regulatory scheme, hopefully providing a point of reference from which harmonization of conflict or a prototype of unified rules might be inferred.

Draft conventions and scholarly proposals: Currently, there is no regime of unified labor laws specifically designed for the international air transport industry, though scholars have constantly endeavored to standardize certain substantive and procedural employment regulations for airline laborers, namely regarding conditions of the individual contract of employment, workers' compensation for industrial injury and the employer's on-board delictual liability. These scholastic efforts include three preliminary drafts of the Convention Relative to the Legal Status of Aeronautical Flying Personnel prepared by the CITEJA, the Draft Convention for the Unification of Rules Relating to Liability of the Carrier in International Carriage by Air prepared by the ICAO Subcommittee on Warsaw (hereinafter "the Warsaw Subcommittee"), as well as the Resolutions on Conflicts of Laws in the Law of the Air and Delictual Obligations in Private International Law adopted by the Institut de Droit International. This thesis explores the

legislative intent, designated scope, and principles erected by these unofficial proposals; it will further compare their merits and deficiencies with data derived from each of the above categories, aiding to bridge the gap between judicial practice and academic theory for the future harmonization and unification of certain labor rules in international air transport.

1.3 Contribution of the Study

Most studies on labor law within the scheme of international air transport, which are actually very few in number, base their argument on preconceived conclusions or simple analogies with the character of employment in other transnational industries. The venerable treatises and tautologies erected ever since are rendered relatively outdated by the increasing weight of judicial precedent on a much wider spectrum of employment disputes, provoked by fluctuation in the air transportation market over recent decades, the swift change in management techniques for business operations, as well as the gradual transformation in sociopolitical climate. A pragmatic review of current substantive and procedural labor laws affecting the international air transport industry is therefore imperative.

Critical analysis of the conflict of laws arising from labor disputes in international air transport occupies a considerable part of this study and helps to validate commonly-erected conflict of labor law rules which tend to be based on more general assumptions. The unique and perplexing regulatory interests inherent in aviation activity clearly demonstrate that the single rule principle is neither feasible nor desirable.

To the greatest possible extent, this study also attempts to fill certain loopholes intentionally left in employment matters by the drafters of private international air law since the first International Air Conference on Private Air Law, though labor laws governing international air transport activities are a quantum-leap ahead of other regulatory schemes in the current Warsaw system. Parallel endeavors which appear in draft conventions and proposals are examined in Chapter 6 of this thesis. Nonetheless, this thesis is not intended to provide any

conclusive rules for integration. It aspires only to serve as an exegesis of current theory and practice, on which the future harmonization or unification of certain rules of labor law in international air transport might be founded.

Chapter 2.
Industrial Injury in International Air Transport

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2.0 Introduction

The current regime of liability governing industrial injury suffered by employees of the international air transport industry has been partially unified in the Warsaw Convention of 1929 and the Rome Convention of 1952. The Warsaw liability regime is intended to cover carrier liability towards all persons on-board, including cabin crew, while the Rome Convention is intended to cover ground personnel. However, the scope of both instruments is currently exclusive: the prevailing interpretation in treatise and jurisprudence dictates that the Warsaw regime precludes on-board personnel flying without any contract of carriage, and a strict construction of Article 25 of the 1952 Rome Convention excludes liability toward ground employees who are able to access collateral systems of compensation directly. The following study will cure the wounds left by these prevailing perspectives and reconstruct both instruments of private international air law as possible regimes of liability covering all airline workers seeking compensation for injuries sustained in the course of employment. The author suggests that this reconstruction represents a feasible method of unifying certain labor laws in international air transport with respect to industrial injury, in contrast to drafting an independently comprehensive liability convention. On the other hand, should the majority opinion prevail, *i.e.*, if there is no hope of administering the appropriate areas of employer liability according to Warsaw and Rome, then the basic features and problems inherent in both major systems of indemnity - which currently fill a gap left by national workers' compensation laws and general tort liability - should be further explored, for these regulations would form the best possible foundation upon which any future unified rules of liability of the international airline employer could be formulated.

2.1 The 1929 Warsaw Convention and its Subsequent Amendments[1]

[1]The Warsaw Convention of 1929 has been subsequently amended and supplemented

2.1.1 General introduction

The "Convention for the Unification of Certain Rules relating to International Carriage by Air" (hereinafter "Warsaw Convention")[2] was adopted at the second International Conference on Private Air Law, held at Warsaw in October 1929, after almost four years of preparation.[3] The unification of certain regulations on air carrier liability - appearing in the major features of the Convention dealing with limitation of carrier liability, uniformity of traffic documents, notification of damage and jurisdiction - was one of the major purposes of the Conference. Other initial goals included studying the desirability of "the international unification of private law with regard to aeronautics," possibly implicating all other spheres of private law related to air transport, *e.g.* labor laws,[4] though this

by the "Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 Oct.1929 Done at the Hague, 28 Oct. 1955" (the Hague Protocol) ICAO Doc. 7632, and the "Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, Signed at Guadalajara on 18 Sept. 1961" (the Guadalajara Convention), both of which have already entered into force. However, since no amendment provision affects carrier liability towards employees on-board, no special concern will be given to these two legal instruments. As there are already many examples of treatise and articles dealing generally with this most widely-adopted, and consequently most problematic, private law treaty, the following sections of this chapter will concentrate on the articles directly related to the Warsaw carrier's liability as an employer.

[2]137 LNTS11, ICAO Doc.601, 1947 CTS 15.

[3]Date from the first International Conference on Private Air Law on 26th October 1925. For more detailed descriptions of the history related to the Warsaw Conference, see D. Goedhuis, *National Air Legislations and the Warsaw Convention*, 1st ed (The Hague: Martinus Nijhoff, 1937) at pp. 4-6, J. J. Ide, "The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.), (1932) 3 J. Air L. 27, and S. Latchfford, "The Warsaw Convention and the C.I.T.E.J.A." (1935) 6 J.Air L. 79.

[4] In a circular letter sent by M. Poincaré to French diplomatic representatives, requesting them to invite the world's air powers to attend the International Conference of Private Air Law on 1923, the then-Premier of France mistakenly categorized the rights of States with respect to aircraft and their crew as "entirely unrelated to" the question of air carrier liability: for the original text of the letter, see J. J. Ide, *id.* at p.28. Such a rigid point of view has been revised by D. Goedhuis, *id.*, at p.4, J. J. Ide, *id.* at pp. 28-9, and also in the two Opening Session addresses by Pierre-Etienne Flandin (Head of the French Delegation) and Karol Lutostanski (Head of the Polish Delegation), in R. C. Horner & D. Legrez, trans. *Second International Conference on Private Aeronautical Law Minute*, (South Hackenack: Fred B. Rothman & Co. 1975), at p. 12&14.

deliberation was evidently in vain. One can still spot traces of this effort in the broad language of the preamble to the 1929 Convention, a source of particular ambiguity in its failure to clarify that carrier liability towards passengers or consignors (consignees) would be the only rules unified under the Convention.[5]

Unlike the Rome Convention, which expressly provides that its liability regime does not cover damages governed by the contract of employment or workers' compensation[6] (though the real function of this exclusion remains doubtful), the Warsaw Convention and its subsequent amendments are relatively obscure on their scope of protection for persons transported internationally by air. Thus, questions remain as to whether personal injury sustained on-board or in the course of embarking or disembarking by the carrier's employee is covered by the Convention, and these must be answered by the courts. Due to this fundamental ambiguity, the legal challenges to the majority opinion on the scope of the Convention - that the Warsaw regime applies only to passengers or consignors or their goods which are transported according to a narrow construction of the contract of carriage - continue to flourish.

2.1.2 The Scope of the Warsaw Regime in Employment Relations

A. Introduction

According to Article 1 of the Warsaw Convention, the unified regime of liability applies to "all international transportation of *persons*, baggage, or goods performed by aircraft for hire [emphasis added]" and "gratuitous transportation by aircraft performed by an air transportation enterprise." At first glance, there does not seem to be any intention of precluding the application of the Convention to on-board flying personnel; however, circumspection on several key elements

[5] "[H]aving recognized the utility of providing *in an uniform manner for the conditions of international air carriage, regarding the documents utilized for this carriage and the liability of the carrier* [emphasis added]:" see *supra* note 2.

[6] "Convention for the Unification of Certain Rules relating to Damage Caused by Aircraft to Third Parties on the Surface Signed at Rome, May 29, 1933 " see *infra* note 203, and "Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface Signed at Rome on October 7, 1952", *infra* note 78.

of Article 1 has created a majority juridical opinion which virtually disqualifies the injured airline worker from invoking the regime.

B. Transportation and Contract

Like all other forms of commercial carriage, transportation under Warsaw is interpreted as a "voyage to be undertaken for the principle purpose of moving the individual" from one point to another.[7] Though fairly unconventional, it would be useful to consider the voyage as a mere physical activity performed by the air carrier, especially for any unauthorized person - such as a stowaway - who is later found on-board the aircraft in flight and who technically cannot be refused the opportunity to complete the journey.[8] First, there is no requirement in the articles of the Convention that such an undertaking be based upon mutual consent between the carrier and the transportee, *i.e.* upon a contract of carriage. Second, it is desirable to encourage the nature of action contemplated by the Convention[9] — envisaging that even when the unauthorized person is subject to applicable national laws on trespassing,[10] objectively, the owner of the estate (aircraft) becomes the physical controller of the trespasser, and is therefore under obligation to refrain from any wilful, wanton, or reckless negligence;[11] the owner owes a reasonable duty of care to the trespasser as much as to the regular

[7]*In Re Mexico City Aircrash of October 31, 1979*, 708 F.2d 400 (9th Cir. 1983) at 417. See also K. Grönfors, *Air Charter and the Warsaw Convention*, 1st ed (The Hague: Martinus Nijhoff, 1956), at p.60.

[8]See *contra* D. Goedhuis, *supra* note 3, at p.131, N.M. Matte, *Treatise on Air-Aeronautical Law*, (Montréal: McGill University, 1981) at p.385, and C. N. Shawcross & K. M. Beaumont, *Shawcross& Beaumont on Air Law*, 4th ed (London: Butterworth, 1977), para.414; G. Miller, *Liability in International Air Transport*, 1st ed (Deventer: Kluwer Publisher, 1977), at p.8.

[9]While the nature of the Warsaw action is still under serious debate, there is no reason to exclude transportation with no contract of carriage in litigation against the carrier for tort liability, nor the possibility of an implied contract between the carrier and transportee. See J. Ridley, *The Law of the Carriage of Goods by Land, Sea & Air*, G. Whitehead ed. 5th ed (London: Shaw & Sons Ltd., 1978), at p.111, and R. W. M. Dias & B. S. Markesinis, *Tort Law*, 2d ed (Oxford: Clarendon Press, 1989), at p.8.

[10]See O. Riese, *Luftrecht — Das internationale Recht der zivilen Luftfahrt unter besonderer Berücksichtigung des schweizerischen Rechts*, (Stuttgart: K.F.Koehler Verlag, 1949), at pp.406-7.

[11]See *e.g.*, *Briney* v. *Illinos Cent. R.Co.*, 81 N.E.2d 866 (Sup.Ct.Ill. 1948).

"passenger."[12] However, the majority point of view still insists that the "sale and purchase of transportation of persons and goods" is a requisite condition to the application of the Warsaw regime,[13] based on several propositions inferred from the infrastructure of the Convention.[14]

The most notorious argument used to justify this majority opinion is that Article 1(2) of the Convention describes the application of the regime "according to the contract made by the parties," implying that a contract of carriage is necessary to the institution of carrier liability.[15] Yet one must bear in mind that the overall purpose of Article 1(2) is to determine the international character of the carriage, in case there is any discrepancy between the physical performance of carriage and the true intent of the parties. For example, suppose the passenger ticket covers a single carriage from Paris to Tokyo, yet during the trip the carrier is forced to stop in Bangkok due to mechanical breakdown, or the passenger suddenly decides to end his journey in Bangkok, or the aircraft disappears on the high seas and never reaches its destination. In all such cases, the carrier is still

[12]"It is true that, unless and until the property owner, or the operator of the instrumentality involved, becomes apprised of his presence, no duty with regard to the trespasser's safety arises..., *but when the owner or operator is put on guard as to the presence of the trespasser, the latter immediately acquires the right to proper protection under the circumstance* [emphasis added]:" see *Frederick* v. *Philadelphia Rapid Transit Co.*, 10 A.2d 576 (Sup. Ct. Pa. 1940) at 578 (subway train); "if, after the employees in charge ... become aware of danger to a trespasser..., they can, by the exercise of such care as a reasonably prudent person would exercise under the circumstance — that is, *the highest possible degree of care in view of the fact that human life is involved...*, it is their duty to do so; and the company will be liable for their failure in this respect, which failure will be attributed to the company as negligence [emphasis added]:" see *Mann* v. *Des Moines Ry. Co.*, 7 N.W.2d 45 (Sup. Ct. Iowa, 1942), at 52 (Railway), also *Torres* v. *Southern Pac. Transp. Co.*, 584 F.2d 900 (9th Cir. 1978) (hitching a ride on an open car).

[13]*Block* v. *Compagnie Nationale Air France*, 386 F. 2d 323, 333 (5th Cir.1967), *cert.denied*, 392 U.S. 905 (1968), at 334.

[14]In Article 2 (5)(e) of the "Draft Convention for the Unification of Rules Relating to Liability of the Carrier in International Carriage by Air" (ICAO Doc. LC/Working Draft #391 30/1/52) prepared by the Sub-Committee on the Revision of the Warsaw Convention, the unauthorized person is covered by the (Draft) Convention insofar as this person does not possess rights superior to those of a passenger under the (Draft) Convention. The article, as interpreted by the drafters, is (a concession?) intended to avoid the possibility that unauthorized persons, including stowaways, might under a number of jurisdictions have a right to recover an unlimited amount of damages and thus be in a better position than the passenger travelling in the same aircraft (Note 6), which more or less shows that the pre-existing contract of carriage or agreement with the carrier is not necessarily a requisite condition for the application of the Convention.

liable under the Warsaw regime, based on the original contract of carriage (Paris-Tokyo). But when the parties do not address the question of how to characterize the international carriage, especially in the transportation of the airline's own employees, or if no contract of carriage exists, then the factual situation inevitably becomes the sole indicator of the Convention's applicability and may ultimately disqualify the transportation from Warsaw coverage, as the majority suggests.

Moreover, unlike the extreme case of the stowaway, the presence of employees on-board the aircraft is usually based upon some type of agreement, express or implied. Is it necessary or legitimate to categorize the basis of this mutual consent as either a contract of carriage or a contract of employment, without considering the true or at least probable intent of the parties, who might have contemplated expectations far more complex than the physical transportation?

Even if we accept the majority's proposition that a contract of carriage is required for the application of the Warsaw Convention, it does not necessarily lead to the conclusion that most learned Warsaw authors[16] and judgments have reached:[17] that a contract of employment exists between on-board cabin crew and the carrier, but no contract of carriage. Why would the existence of a contract of

[15]*Sulewski* v. *Federal Express*, 23 Avi 17, 685 (2d Cir. 1990), at 17, 688.

[16]See L. B. Goldhirsch, *infra* note 35, at pp.57-8: "One should recall that Article 1 provides that the Convention is only applicable to transportation of persons for reward or gratuitously by air transport enterprise. Thus, a flight attendant working on board the aircraft could not bring an action under the Warsaw Convention;" R. H. Mankiewicz, *The Liability Regime of The International Air Carrier*, (Deventer: Kluwer Law & Taxation Publisher, 1981), p.37: "The Convention does not apply if the carriage is not performed in execution of a contract of carriage. Consequently, it does not cover...relief flight and cabin personnel on board to take over duties en route or at an intermediate stop, as they are travelling in execution of their contract of employment;" E. Giemulla & R. Schmid, *infra* note 105, at Art.1 WC 26-7: "Crew members on duty during the flight are not considered passengers because they take part in the carriage solely by virtue of their employment contracts;" Shawcross & Beaumont, *Air Law*, P. Martin, J. D. McClean, E.de. M. Martin, ed. 4th ed. *infra* note 105, at VII 104-5: "There appears to be a general agreement that where the employee is a member of the operating or cabin or supernumerary crew of the aircraft, or is otherwise employed on the aircraft during the flight, he or she is not a passenger and his or her carriage is not within the convention;" and H. Achtnich, "Luftrechtliche Betrachtungen anläßlich des Absturzes eines Flugzeuges der Königlich Niederländischen Luftverkehrsgesellschaft (KLM) am 22. März 1952 bei Frankfurt a. M." (1952) ZLR 323, at p.344: "daß diese Angestellten, die in Ausübung einer dienstlichen Tätigkeit das Luftfahrzeug benutzen, nicht auf Grund eines Beförderungsvertrages, sondern auf Grund des mit der Luftverkehrsgesellschaft bestehenden Dienstvertrages mitfliegen. Sie benötigen auch keinen Flugschein."

[17]See *In Re Mexico City Aircrash of October 31, 1979*, *supra* note 7, *Sulewski* v. *Federal*

employment between the master and on-board servant extinguish or even preclude the possible formation of a contract of carriage between them? The standard answer to this question is that the on-duty cabin crew is present on-board only to perform services based on their contract of employment, which does not include terms such as the transportation of individuals from one place to another gratuitously or for reward, *i.e.*, as in a contract of carriage.[18] This apparently simple logic is full of loopholes.

Could an airline stewardess who enjoys travelling during each layover not envisage her on-board service as part of the consideration for the airline's willingness to transport her and her luggage to various flight destinations when she is on-duty, *i.e.*, can she not travel on-board for both official and private purposes? There are surely many contracts of employment with airlines which contain such an implied intention,[19] especially since the employer is not allowed to exclude himself from the coverage of Convention through the terms of the employment contract, according to Article 23 of the Convention.[20]

The best example of such a dual *animus* of the parties can be found in *Sulewski* v. *Federal Express*,[21] where the employee was an aircraft mechanic for an airliner (employer). His duties, according to the contract of employment, were "1. ... [to] supervise the aircraft ground handling and fueling; 2. the responsibility for clearance of all log book items; 3. the pre-flight and post-flight inspections on the aircraft for the flight he was assigned to; 4. the communication to [the airline] maintenance control of any change in the airworthiness of the aircraft upon arrival at any location,"[22] all of which are evidently related to ground maintenance and repair. The district court found that his duties also required him to "perform

Express, *infra* note 21.

[18]See the quotations in *supra* note 16.

[19]See H. Drion "Kritische Bemerkungen zum Anwendungsbereich des Warschauer Abkommens" (1953) ZLR 303 at p. 309.

[20]"Toute clause tendant à exonérer le transporteur de sa responsabilité ou à établir une limite inférieure à celle qui est fixée dans la présente Convention est nulle et de nul effet (Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void)," *supra* note 2.

[21]*Supra* note 15 and 22 Avi 18, 497 (SDNY, 1990).

necessary safety and maintenance work as the plane *was on the ground*."[23] He was assigned to fly specific routes scheduled to land at airports where the airline did not have an aircraft mechanic, at which point he would undertake to perform his contractual duties on the landed aircraft. However, the employee's widow was refused the right to make a Warsaw claim for his death on-board, caused by a crashlanding, because the employee "was conceived as on board the flight primarily to perform ... [his] employment obligations, so that [he] was not a 'passenger.'"[24] This proposition was based upon the following facts: first, the employee had not been issued any passenger ticket for the flight; second, the employee's name was put in the "crew" rather than the "passenger" column on a customs declaration document prepared by the employer; third, the employee was still obliged to give his professional advice on-board the flight if asked to do so during an air emergency, even though his contractual duties were to be performed on the ground; fourth, there was no alternative way for the employee to carry out his duties other than flying in the aircraft, nor was he commuting from home to work at the time of the flight.

It is evident that the court has, again, embraced a presupposition created with *In Re Mexico City Aircrash*[25] that if there is an on-board employment relationship, no contract of carriage may exist concurrently. The whole of the Second Circuit court's reasoning followed this line of thinking while emphasizing the existence of employment on-board. Notwithstanding that the judgment erred on the issuing of documents as evidence of a contract of carriage (see discussion, below, in this thesis), and overemphasized the importance of a purely administrative procedure (*i.e.*, the customs documents) which represents no more than a conventional practice for commercial convenience, the court in its eagerness to proclaim this dichotomy neglected the *animus* of the parties - clearly indicated in the contract of employment - that it was ground maintenance and repair the employee was obliged to provide.

[22]23 Avi 17, 686.

[23]22 Avi 18, 497 [emphasis added].

[24]*Id.*, at 18,500; the following "facts" can be found at 18,498-500 and 23 Avi 17,688-691.

[25]*Supra* note 7.

The court is correct in asserting that "a refusal [by the on-board employee] to give professional advice when asked during emergency would constitute an abandonment of the safety of the crew and aircraft,"[26] but the obligation of an on-board employee to offer his counsel in the event of emergency does not emanate from any implied terms in the contract of employment. Rather, it originates with the "relationship of proximity or neighborhood"[27] created by the contract of employment; if the employee owes a duty of rescue, it is merely because preventing and repairing accidents goes to his advantage in such a special relation, and the endangered victims are correspondingly relying on this help.

Furthermore, to establish that the employee owes such a duty of reasonable care to his co-workers in times of emergency, several preconditions must be satisfied: first, the emergency must be created by the fault of the employee,[28] or it must be created by his interference with or control over the affairs of others.[29] In the instant case, had the emergency been related to mechanical problems caused by his faulty maintenance or which are at least within the scope of his authority and responsibility, then the employee would have been contractually bound to render any available means of assistance, even though they might not belong to his ordinary duties under the contract of employment. Otherwise, he was under no duty to secure the safety of his fellow employees.[30] Second, the rescue must be within the scope of his authority and responsibility. Thus, when emergency occurs, if the employee is no longer within the course of his employment, he is not obliged to take any action.

A good example fitting the above description can be found in *Pridgen* v.

[26]22 Avi 18, 498.

[27]*Anns* v. *Merton L.B.C.* [1978] A.C. 1004, at 1027 (Wilberforce, L.J.).

[28]See *Horsley* v. *Maclaren* [1972] S.C.R. 441, and *Videan* v. *British Transport Commission* [1963] 2 Q.B. 650: "[I]f a person by his fault creates a situation of peril, he must answer for it to any person who attempts to rescue the person who is in danger. He owes a duty to such a person above all others."

[29]See *Miller* v. *Muscarelle*, 170 A.2d 437 (N.J.Super. 1961) at 450.

[30]See *Galicich* v. *Oregon Short Line R.R.* 87 P.2d 27 (Sup.Ct. Wyo. 1939): "An employee of a railroad is under no duty to warn a fellow servant of impending danger from the negligent operation of an automobile by a third person" at 33.

Boston Housing Authority.[31] In *Pridgen*, a trespasser slipped and was trapped on a metal bracket extending out from the shaft wall of an elevator in the building he had illegally entered. The janitor on-duty, who knew that the trespasser was trapped somewhere inside the elevator shaft, also knew how to cut off the electric power so as to prevent the elevator from crushing this trespasser but failed to do so. He was found guilty of negligence, since cutting off the power was considered to be within the scope of his authority and responsibility while engaged in the performance of his employment duties.

In *Sulewski* , the crashlanding was due to poor piloting, rather than any mechanical failure, and the ground mechanic was under no duty to provide any consultation; furthermore, even if rendering on-board assistance could be construed as within the employee's scope of authority and responsibility (though not listed in the contract of employment as part of his ordinary duties as a ground mechanic), it must be determined that the employee was on-duty before he assumes any such duty of care. The logic adopted by the *Sulewski* court that because the employee is supposed to undertake the duty, he must be acting in the course of employment, is vested in an inaccurate view of the employment-carriage contract dichotomy.

Many examples can be found in the common practice of airlines where the offer of free rides for commuting crew members and managerial staff is expressly stipulated or implicitly promised in the contract of employment. Since Sulewski's assignment was nothing more than to maintain and repair the aircraft as it reached certain points, the airline (employer) undertook to "move [him] from one point to another"[32] in order for him to carry out this job function. The nature of this undertaking is a contract of carriage, even under the most stringent definition, no different from transporting non-employee passengers on-board (should there be any) to fulfill their various purposes of traveling (which might include commuting for their own kinds of work); it is irrelevant whether or not the trip is destined to or dispatched from their homes.

[31]308 N.E.2d 467 (Sup.Ct.Mass. 1974).

[32]See *supra* note 7.

Finally, the common argument seen in US jurisprudence since *In re Mexico City Aircrash* - that the employee does not fly under a contract of carriage if he has no choice in the method of transport to his job site but to take the carriage offered by his employer - is equally invalid. If the employee has the right to choose his mode of transport and still elects to travel with the employer's airline, would the contract of employment between the parties then abrogate their contract of carriage? If not, then what is the difference between the existence and the absence of this choice?

So why could an implied contract of carriage not coexist with a contract of employment in cases like *Sulewski*? The orthodoxy underlying this proposition must to a certain extent be framed by the idea that the employment relation should be regulated by a specific sphere of labor and social security laws, which are presumably offered as exclusive remedies substituting for the cumbersome tort claim.[33] However, this notion ignores that in the modern realm of workers' compensation, the abrogation of the employer's tort liability is not absolute; the employee is either allowed to elect his remedy before or after the industrial accident occurs or to accumulate remedies from both institutions under certain conditions. In some states, even where the amount of social security benefits has attained a level which is comparable or higher than tort damages, recourse to the latter has not yet been discarded. Furthermore, as H. Drion noted long ago,[34] there is no valid reason to discriminate against the on-board airline employee when employees of other industries on the same flight, who are also in the course of their employment, have a cause of action under the Warsaw Convention in the case of accident.

C. Passenger

Article 17 of the Convention does not expressly delimit who qualifies as a Warsaw passenger, yet most authors and courts have agreed that a passenger who is eligible for a Warsaw claim against the carrier must be transported by the

[33]See H. Achtnich, *supra* note 16, at p.345.

[34]See H. Drion, *infra* note 199, at p. 54.

carrier pursuant to a contract of carriage,[35] though Article 1(1) of the Warsaw Convention contains a more neutral phrase ("person") circumscribing its scope of application.[36]

As mentioned in the above section, there is little weight to the argument that the contract of carriage is a prerequisite for the application of the Convention, and even the existence of a contract of carriage does not guarantee that a transported person would be considered a Warsaw passenger. A further restriction is imposed on the content of the contract of carriage. Most American authorities hold that any contract involved in the employment relationship cannot be a contract of carriage with a "passenger" within the meaning of the Warsaw Convention. Accordingly, members of the cabin crew, on-board and on-duty at the time of accident, are precluded from the category of passengers under the Convention because they are "aboard the flight primarily to perform ... [their] employment obligation;"[37] nor are relief flights provided by the employer (*i.e.*, the airline) for commuting employees "going to and coming from" work necessarily conceived as "voyage[s] ... undertaken for the principle purpose of moving the individual from point A to point B".[38]

In *re Mexico City Aircrash of October 31, 1979*,[39] the Ninth Circuit Court proposed several criteria to determine if the commuting employee qualifies as a passenger under the Convention. The plaintiff was a Los Angeles-based flight attendant

[35] I. H. Ph. Diederiks-Verschoor, *An Introduction to Air Law*, 5th ed (Denventer: Kluwer Publisher, 1993), at p.59; L. B. Goldhirsch, *The Warsaw Convention Annotated — A Legal Handbook*, (Dordrecht: Martinus Nijhoff Publisher, 1988), at pp.57-8; *Block* v. *Compagnie Nationale Air France*, *supra* note 8; *In Re Mexico City Aircrash of October 31, 1979*, *supra* note 13, at 417; *Sulewski* v. *Federal Express*, 22 Avi 18, 497 (S.D.N.Y. 1990) at 18, 500.

[36] "This convention shall apply to all international transportation of *persons*, ... *performed* by aircraft for hire [emphasis added]." D. Goedhuis regards the word "person" in Article 1 as a mere technical inconsistency with the "passenger" which appears in the following Articles, and argues that the former should be remedied in light of the latter. See D. Goedhuis, *supra* note 3, at pp. 130-1.

[37] For American decisions, see: *In Re Mexico City Aircrash of October 31, 1979*, *supra* note 7; *Sulewski* v. *Federal Express*, *supra* note 15 at 18,500. For German authorities, see R. Schleicher, F. Reymann & H.J.Abraham, *infra* note 246, at p.19. For British authorities, see Shawcross & Beaumont, *Air Law*, *infra* note 105.

[38] *In Re Mexico City Aircrash of October 31, 1979*, *supra* note 7. at 417.

[39] *Supra* note 7.

scheduled to work a shift on a flight departing from Mexico City; to get to work, she boarded another flight offered by the same employer from L.A. to Mexico City, but this commuter flight crashed while attempting to land at its destination. The Ninth Circuit noted that several questions were raised as to the deceased employee's actual "identity" on board the ill-fated flight. First, was the employee commuting from her home to her job assignment? Second, did the employee have the option to choose her method of transportation to get to her job location? Finally, what was the employee's primary purpose aboard the aircraft: to perform her employment obligations, or simply to travel from one place to another?

The first question is closely connected to the scope of collateral workers' compensation benefits. Evidently, the judgment was underlined by the common "going and coming rule" of workers' compensation, which generally denies compensation for injury arising from travel by the employee between home and the regular work site. This approach is conspicuously revealed in *Demanes* v. *United Air Lines* .[40] In *Demanes*, four pilots were killed in an aircrash while commuting aboard their employer's flight between L.A. and Denver. Each of them were passengers returning home from their employer's post — according to the common notion, only when employees are transported from one assignment (workplace) to another (workplace) to perform their duties are they still "in the course or scope of employment."[41]

The second question is based on an exception to the "going and coming rule;" some statutes and decisions recognize that when the employer furnishes or provides for transportation to or from work as a service incidental to employment on a frequent and regular basis, any injuries sustained by the employee while being thus transported are recoverable under the compensation system,[42] for the provision of transportation itself indicates that the employer has implicitly assumed responsibility for transporting his employees to and from work,[43] and the

[40]348 F.Supp. 13 (C.D.Cal. 1972).

[41]See also the British Social Security Commissioner decisions: R(I) 11/57; R(I) 4/59; R(I) 39/59.

[42]See *infra* note 69.

[43]See *Holcomb* v. *Daily News*, 384 N.E.2d 665 (N.Y.App. 1978).

employer's exclusive control of the flight also implies a substantial extension of the scope of employment. Thus, if the flight attendant clearly has no choice but to take the flight provided by her employer to the workplace, she is presumably in the course of her employment while on-board the commuting plane, even if the latter is at the same time used for another purpose,[44] since commuter planes commonly offer carriage for hire to regular passengers.

The third question also highlights another exception to the "going and coming rule"— if the employee is under a specific work assignment for the employer's benefit, then the injury incurred while she is going to or returning from the regular place of employment outside regular hours will be deemed to happen in the course of employment.[45] The trouble and time involved in making the journey constitute integral parts of the employment. So even when, at the airline's request, the flight attendant is on her way to report to a specific assignment outside of working hours, she should still be within the scope of employment with respect to the benefit.

Nevertheless, serious logical conundrums might be encountered in applying this troika of tests to a Warsaw case, for all these hurdles concern only the workers' compensation system, rather than the Warsaw Convention. Even if an employee is found to be injured in the course of employment and is entitled to the applicable workers' compensation benefit, this fact does not mean that he must be deprived of his status as a passenger under the Warsaw regime, or vice versa. The legislative intent and scope of application differ drastically between these two systems, and each serves as a collateral yet independent system of recovery for the potential victim. An analogy could be drawn from the relationship between workers' compensation and the civil tort claim — an injured employee may still bring the civil tort action against his employer on the same account unless it is expressly prohibited by the compensation statute.

[44]See *Gay* v. *American Janitor Service* , 504 N.Y.Supp.2d 808 (Sup.Ct.N.Y.app.div. 1986).

[45]See *Southern California Rapid Transit Dist., Inc.* v. *Workers' Compensation Appeals Board,* 588 P.2d 806 (Sup.Ct.Cal, 1979); *Eady* v. *Medical Personnel Pool,* 377 So.2d 693 (Sup.Ct.Fla, 1979); *Director of Finance* v. *Alford,* 311 A.2d 412 (Md.App. 1973); *Oklahoma Natural Gas. Co.* v. *Williams,* 639 P.2d 1222 (Sup.Ct.Okla, 1981); *Bruck* v. *Glen Johnson, Inc.,* 418 So. 2d 1209(Fla.App.1982).

D. Gratuitous & For Reward (Hire)

The question of whether on-board employees receive full pay and full flight-time credit is commonly considered to be important evidence supporting the allegation that they are flying as employees.[46] In fact, these issues belong to the workers' compensation system rather than the Warsaw claim; ironically, however, in some Warsaw cases it has been raised by both parties as a defence.[47]

Under the common law of carriage, a person who is carried gratuitously cannot claim damages for breach of contract, for no contract exists without consideration. Yet the carrier is still under obligation to observe the requisite standard of care toward the person being physically carried, and the negligence claim based on breach of this duty flows from the sphere of tort, not contract.[48] No similar idea exists in the civil law system, where the differences and exclusiveness of these two types of claim have practically disappeared. The Warsaw Convention of 1929 was evidently designed to meet both ends, including all international carriage of persons, luggage, and goods performed by an aircraft for reward (hire) or, alternatively, any carriage which is performed gratuitously, as long as the carrier is an *entreprise de transport aérien*,[49] or a commercial operation whose purpose is to draw profits from air transport activities. Such an all-encompassing regulatory structure undercuts the emphasis on the contract of carriage as a prerequisite condition for waging a Warsaw claim. From a pragmatic point of view,[50] it is suggested that such a requirement is primarily intended to subject all international air transportation bearing a commercial character to a regime of unified liability, especially for gratuitous carriages performed in the

[46]See *Demanes* v. *United Air Lines*, *supra* note 40, at 14.

[47]In *Mexico City Aircrash*, the flight attendants argued that they should be covered under the Warsaw Convention because they were receiving "gratuitous transportation" by the employer at the time of the accident. See *supra* note 7, at 417.

[48]See O.Kahn-Freund, *The Law of Carriage by Inland Transport*, 4th ed(London: Stevens & Sons, 1965), at pp.450-1.

[49]Art.1, sec.1 of the Warsaw Convention of 1929, *supra* note 2.

[50]For the theory and drafting history of this provision, see G. Miller, *supra* note 8, at pp.12-4.

name of promotion, *i.e. au bénéfice de titres de faveur*, which seems entirely unrelated to the inclusion or exclusion of certain categories of on-board employees. Furthermore, the modern commercial airline offering international transportation can hardly fail to qualify as an *entreprise de transport aérien*, so regardless of whether the payment or flight-time credit received by the cabin crew or other employees constitutes evidence of *"rémunération," i.e.*, whether the transport is gratuitous or for reward, the on-board employee of this *entreprise de transport aérien* will have no problem complying with the applicability requirement prescribed in Article 1, Section 1 of the Convention.

The role of payment and flight-time credit received by the on-board employee for carriage in Warsaw disputes also reveals a subconscious desire to intertwine the workers' compensation system and the Convention. As pointed out above, employees are excepted from the "going and coming rule" whenever their employer furnishes or provides for transportation to or from work, as well as whenever they receive additional payment for the transportation or time spent in transit to and from work. Thus, payment and flight-time credits received by on-board employees can serve as a fairly useful reference in determining whether they should be covered by the compensation system.

Applying the Warsaw interpretations,[51] though logically we hesitate to do so, a *rémunération* or reward need not be pecuniary. It may be given in terms of work or service. Accordingly, if the on-board flight attendant receives full pay and full flight-time credit she is not necessarily assumed to be on-duty, but if the employer provided for her journey without charge, or even if she was paid half or more in flight-duty pay and flight credits for this trip, she may be excepted from the "going and coming rule" and covered by the compensation system in the event of injury on-board.[52]

[51]G. Miller, *supra* note 8, at p.15; Giemulla & R. Schmid, *infra* note 105, at WC Art.1 20; L. B. Goldhirsch, *supra* note 35, at p.9; see also: *Consorts Beylier* c. *Caisse Premiére d'Association Maladie du Grenoble*, Cour d'Appel de Grenoble, 26 Nov. 1969: 1970 RFDA 204; Bundesgerichtshof, 2, Apr. 1974: Euro.Trans.L. 777; *Vandenberg* v. *French Sardine Co.*, 1953 U.S.Av. Rptr. 423 (Sup.Ct.Cal, 1953).

[52]However, some US courts have reached the opposite result, such as in*Demanes* v. *United Air Lines*, *supra* note 40, at 14.

E. Document of carriage

The document of carriage in the Warsaw regime is merely evidence of a contract of carriage; since it is unnecessary for the agreement to be in written form, the delivery of a document, the mode of delivery, and its composition do not affect the existence or the validity of the contract of transportation.[53] Therefore, just like other persons on-board who have no employment relationship with the carrier, whether an on-board employee is considered a passenger under the Convention should have nothing to do with the existence of a document of carriage. In most free-ride situations, the employer would often issue tickets or other documents of carriage to on-board employees in the interest of restricting his liability in the event that a court might conceive of the employees as passengers.[54] Unfortunately, however, there are still some references in the jurisprudence[55] and doctrinal authorities[56] to the existence of a passenger ticket as a requisite element to granting the on-board employee Warsaw coverage.

2.1.3 Remarks on Current Interpretation

The Warsaw liability regime is the most widely-accepted treaty on private international air law. The Convention and its series of protocols are unprecedented in their unification of certain rules of air carrier liability in international air transport. Later attempts to overhaul the Warsaw system with a new convention have been

[53]See Article 3, section 2, Article 4, section 2 and Article 5, section 2 of the Warsaw Convention, *supra* note 2, and *In re Air Crash in Bali*, 15, Avi 17, 406 (C.D.Cal. 1978).

[54]See *Demanes* v. *United Air Lines*, *supra* note 40 at 14: "before each decedent boarded the plane, United issued to him a ticket bearing the caption 'UA Crew Member-Passenger.' The ticket referred to the decedent as a 'passenger' in at least three other places. The ticket also directed the decedent's attention to the Warsaw Convention." In fact, the flight was not a Warsaw carriage, and this last point also reveals that the major purpose of issuing this document of carriage was to escape from possibly unlimited liability.

[55]For American decisions, see: *Demanes* v. *United Air Lines*, *supra* note 40, *In Re Mexico City Aircrash of October 31, 1979*, *supra* note 7; for a Belgian decision see: *Delaby* c. *Sotramat*, Cour d'Appel de Bruxelles, 12 Nov. 1965: 1969 RGAE 66.

[56]See H. Drion, *infra* note 199, at p.60 and H. Achtnich, *supra* note 16, at p. 344.

consistently defeated because the current Warsaw regime has developed into a universal infrastructure.[57] The mechanisms under Warsaw are convenient and acceptable from the employee's point of view when compared with those of the national civil tort system. Some authorities have argued that the drafters had no intention of linking Chapter III of the Warsaw Convention with the carrier's liability towards personnel,[58] but there is no evidence in the conference records to support this contention. As D. Goedhuis has pointed out,[59] the Warsaw regime should be designed to apply in all cases of carriage, and there is nothing to confirm that there exists a special category of carriage to which the Convention cannot apply.

It seems that whenever Warsaw courts would preclude certain on-board employees from coverage under the Convention, it was assumed that workers' compensation would indemnify those employee for their injuries. Yet ironically, this alternate source of compensation may equally prove inaccessible to the injured party, based upon the same reasoning with antithetical premises, especially for flight personnel who are transported as "passengers."

Almost every workers' compensation statute provides compensation only for the accident which arises "during (or in) the course of employment," a logical inference from the nature of the system.[60] Not every accident, however, occurring objectively in the course of employment is covered; generally, the risk which leads to the accident must in some way be related to the nature of employment. One conservative decision holds that the danger of an employee slipping upon ice in a public street is not peculiar to his work, because it is a hazard assumed by "persons engaged in any employment who had occasion to travel along the

[57]On ICAO's attempts to replace the Warsaw Convention of 1929, see Section 6.6, Chapter 6 of this thesis.

[58]See O. Riese, "Observations sur la Convention de Varsovie relative au droit privé aérien" (1930) RGDA 216.

[59]See D. Goedhuis, *supra* note 3, at p. 130.

[60]For the nature and theory of the national workers' compensation system, see Section 2.3 in this chapter, below.

street."[61] According to this reasoning, a plane crash that kills the employee on a business assignment requiring him to travel widely will not be peculiar to his employment either, for every other worker engaged in different kinds of employment on-board the same aircraft faced the same risk. Such absurd results have gradually been eliminated with the evolving "street risk" or "position risk" theory,[62] which emphasizes causation between the accident and the employment through consideration of the nature and character of both the business activities and the contract of employment, and also the space and time in which the accident occurred. Thus, the jurisprudence has begun to recognize that an employee who is injured[63] or killed[64] in an airplane accident when flying on authorized missions will be entitled to the compensation benefit, even if the plane crash was caused by a felonious act or other unusual risk.[65]

When an accident falls upon the employee who is going to or coming from work, however, the law has virtually crawled back to the old track. Many courts have found that if the injury suffered while going to or coming from work is not caused by a risk to which the employee is regularly and peculiarly exposed by reason of his employment, nor by one to which the general public is usually exposed, then it is not covered under the compensation system.[66] The theoretical spectrum on this "going and coming rule" has never been wider, due to administrative considerations: flexible jurists may adopt a more compromising "threshold theory,"[67] which prescribes that only the accident occurring after an

[61] *Donahue* v. *Maryland Casualty Co.*, 116 N.E. 226 (Sup.Ct. Mass. 1917), at 227.

[62] See *Kern* v. *Southport Mill, Ltd.*, 141 So. 19 (Sup. Ct. La. 1932).

[63] See *Schnell* v. *Nat'l Air Transport Corp.*, 296 Ill 641 (abstract only published).

[64] See *Constitution Indemnity Co.* v. *Shytles et al.* 1 Avi 263 (5th Cir. 1931) and *Powers* v. *Powers*, 7Avi 18, 060 (Sup.Ct. S. Ca. 1962)

[65] See *C. A. Dunham Co.* v. *Industrial Com.*, 6 Avi 17, 254 (Sup.Ct. Ill., 1959). For a detailed discussion of the various theories concerning the qualification of "during (or in) the course of employment " see Section 2.3 in this chapter, below.

[66] See *Voehl* v. *Indemnity Ins. Co.*, 288 U.S. 162 (U.S.Sup. Ct. 1933); *Templet* v. *Intracoastal Truck Line, Inc.*, 230 So. 2d 74 (Sup. Ct. La. 1969); *Gardner* v. *United States Fidelity & Guaranty C.*, 574 S.W. 2d 636 (Tex. civ. div. 1979). For more related cases, see Section 2.3 in this chapter, below.

[67] See *Lavier* v. *Maclellan*, 247 So. 2d 921 (La. app. 1971)(injured during lunch hour); *Trent* v. *Employers Liability Assur. Corp.*, 178 So. 2d 470 (La. app. 1965)(killed in a highway accident

employee "first places his foot upon the work premises" will be eligible for relief, while more obdurate jurists might arbitrarily exclude from coverage any injury sustained by employees "when going to or returning from their regular place of work."[68] It would be difficult to determine on-board time and space for commuting employees in "the course of employment" under either theory. An exception to these "going and coming" rules appears in certain statutes or jurisprudence on road traffic accidents: if the employer furnishes or provides for transportation to and from work as a service incidental to employment, then injuries sustained by the employee who is thus transported are compensable.[69] For aviation accidents, the US Fifth Circuit has refused to extend coverage to an employee killed in the crash of a company aircraft which was used to transport him to a job site, because the deceased is deemed to be a "passenger" at the time of the accident: "the transportation provided on the day of the accident was furnished as a convenience to the employee."[70]

Thus the commuting airline employee is sometimes placed in the same position as a bat — which is not considered a bird or a mammal - for in Warsaw cases they might be treated as employees, and in workers' compensation claims they can instead be viewed as passengers. Such an unexpected double deprivation of protection would appear more frequently in the US, however, due to the division of its judicial powers in the federal Constitution and its unique workers' compensation system. As a treaty, the Warsaw Convention represents the supreme law of the US, superseding all applicable state laws upon formal ratification.[71]

when driving to the work site)

[68]See *Fidelity & Casualty Co. of New York* v. *Moore*, 196 So. 495 (Sup.Ct. Fla. 1940).

[69]Minnesota's *Workmen's Compensation Act* explicitly provides that if an employer regularly furnishes transportation for his employees to or from the place of employment, such employees are subject to the *Act*, see Minn. St. 1941, § 176.01 subd.11; for the jurisprudence of other states, see: *Owen* v. *Southeast Ark. Trans.Co.*, 228 S.W.2d 646 (Sup.Ct. Ark. 1950); *Krause* v. *Western Casualty & Surety Co.*, 87 N.W.2d 875 (Sup.Ct. Wis. 1958) and *J.H. Tabb & Co.* v. *McAlister*, 138 So. 2d 285 (Sup.Ct. Miss. 1962).

[70]See *Allen* v. *Carman*, 12 Avi 18, 187 (5th Cir. 1973); the facts were shown in the lower court judgment at 281 So.2d 317, at 323, also *Demanes* v. *United Air Lines, supra* note 40. For a detailed analysis of other related cases, see Section 2.3 in this chapter, below.

[71]Regarding the constitutionality and applicability of the Warsaw Convention, see the following judgments: *Wyman & Bartlett* v. *Pan-American Airways, Inc.* , 1 Avi 1093 (Sup.Ct. N.Y.

Pursuant to the US federal constitution,[72] any cases arising under ratified treaties fall to the federal judicial power, *i.e.*, federal courts extend their jurisdiction to Warsaw cases, which has led to some authorities holding that the Convention itself creates a cause of action;[73] yet since there is no unified federal workers' compensation law for non-federal employees, and also because certain statutes are by nature inseparable from and united with the remedies provided such that enforcement through a particular method and in a particular tribunal is necessary,[74] jurisdiction over issues concerning worker's benefits belong to the sole authority of individual states unless otherwise stipulated in the respective statutes of these states.[75] This systemic judicial dichotomy aggravates the risk of double deprivation

1943), *Indemnity Insurance Co.* v. *Pan-American Airways, Inc.* et al., 1 Avi 1247 (SDNY, 1944) and *Garcia et al.* v. *Pan-American Airways, Inc.* et al., 1 Avi 1281 (Sup.Ct. N.Y. app.div. 1945).

[72]Article III, section 2 ("The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.")

[73]In *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U.S. 257 (U.S.Sup.Ct. 1916), Mr. Justice Holmes created the "cause of action test" to define the scope of federal jurisdiction; according to this test, if state law creates the cause of action, then the case could not be described as "arising under" federal law, so the federal court would be deprived of its judicial authority over such a case. Though the test has long been criticized, it indeed undermined the never-ending debate on whether the Warsaw Convention itself creates a cause of action overriding collateral actions under state law. See *Choy* v. *Pan American Airways, Co.*, 1 Avi 946 (SDNY, 1941) (in which the federal court based its jurisdiction on a maritime claim instead of the Warsaw Convention since the aircraft was a seaplane; 28 U.S.C.A. 41, para.3); *Wyman & Bartlett* v. *Pan-American Airways, Inc.* , *supra* note 71; *Salamon* v. *Koninklijke Luchtvaart Maatschappij*, 107 N.Y.Supp.2d 768 (Sup.Ct. N.Y. 1951), *aff'd*, 120 N.Y.Supp. 2d 917 (Sup.Ct. N.Y. app.div. 1953); *Komlos* v. *Compagnie Nationale Air France*, 111 F.Supp. 393 (SDNY, 1952) ; *Noel* v. *Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir. 1957), *Husserl* v. *Swiss Air Transport Co.*, 388 F.Supp. 1238 (SDNY, 1975); *Benjamins* v. *British European Airways*, 572 F.2d 913 (2d Cir. 1978). Today, the "cause of action test" has gradually been replaced by the principle that if the plaintiff's complaint is such that the right to relief depends on a construction or an application of federal law, then the federal court is vested with jurisdiction, see *Smith* v. *Kansas City Title &Trust Co.*, 225 U.S. 180 (U.S.Sup.Ct., 1921).

[74]See *Snook* v. *Indus. Com. of Ill.*, 9 F.Supp. 26 (D.C.Ill. 1934); *Texas Pipe Line Co.* v. *Ware*, *infra* note 166, *Tennessee Coal Co.* v. *George*, 233 U.S. 354 (U.S. Sup.Ct. 1914); *Galveston Ry* v. *Wallace*, 223 U.S. 481 (U.S. Sup.Ct. 1911); *Stewart* v. *B. & Co. Ry.*, 168 U.S. 445 (U.S. Sup.Ct. 1897).

[75]Such as § 25.031 Florida Statutes, F.S.A. or Rule 4.61 Florida Appellate Rules, 32 F.S.A., in the above-cited case of *Allen* v. *Carman* (the Fifth Circuit's assumption of jurisdiction over the issue arising from a state workers' compensation statute was aided by these two statutes). There are some state restrictions upon federal judicial review, such as Tex. Annotated. Rev. Civ. Stat. (Vernon, 1925) Art. 8307a, which confines federal jurisdiction to injuries occurring in counties containing the twenty-five division points of the four districts constituting the Texas federal court. For a general discussion of the division of judicial power over compensation statutes in the

since either source of authority might consider the problem uniquely under its jurisdiction.

Moreover, workers' compensation usually indemnifies for personal damages only, and pain and suffering are excluded from consideration for the purpose of achieving rapid, no-fault compensation. Property damages sustained by the on-board employee, meanwhile, are not covered under the compensation scheme,[76] *i.e.*, the employee must seek recourse through other available legal instruments. For example, if an airline stewardess loses her diamond ring during evacuation, she cannot recover damages from the compensation system; and if she is subsequently deprived of any remedy under the Warsaw regime (according to current interpretation), then she will have to tour the legal labyrinth of civil tort claims if she wants her money back. Can such a miserable result truly be within the contemplation of advocates for the majority opinion?

2.2 The Rome Convention of 1952

2.2.1 General introduction

A. Industrial Injury of Personnel on the Ground[77]

Only a few people are in the air during the daily operation of aviation transport; most employees working in this high-tech industry remain on the ground. Aside from flight personnel, who perform the transit from airport to airport, air traffic and ground personnel are equally necessary to facilitating the trouble-free operation and smooth flow of international air transport. Air traffic personnel (also known as air traffic controllers) may include employees responsible for meteorology, aviation aids, and communication, whereas ground personnel

US, see C. B. Wallace, "Are Workmen's Compensation Cases Triable in Federal District Courts?" (1947) 7 La. L. Rev. 350.

[76]For a detailed description on compensable injuries under the workers' compensation system, see *infra*, Section **2.3.2.E** of this Chapter.

[77]All of the technical terms used by the ILO (International Labour Office, Geneva) on conditions of employment in civil aviation are followed in this thesis. See ILO, *Social and Labour Problems in Civil Aviation*, Report, (Geneva: Int'l Labour Office, 1974).

may include employees who staff the ticket offices or airport counters, airport management authorities or organizations, agencies responsible for police and customs control, or organizations authorized to operate at airports in areas directly affecting traffic movement, like passenger handling (*e.g.*, shuttle service drivers or luggage-handling crew) and aircraft maintenance and repair.

Industrial injuries or fatalities may arise not only from hazards inherent in the daily work of these ground workers, *e.g.*, car accidents for shuttle bus drivers, hearing problems suffered by aircraft handlers, or gas tank explosions for overhaul technicians. Debris which falls unexpectedly from midair collisions, aircraft explosions, or unexpected crashes into the terminal building by taxiing aircraft, is a constant risk assumed within the course of employment. The employee's risk of being injured by in-flight aircraft, or persons or things falling therefrom, is no less than that borne by residents who live and own property in the vicinity of flight routes.

The question arises, then, regarding which legal instrument is available for an airline stewardess who seeks recourse for injury caused by the explosion of another aircraft owned by her employer when embarking at a foreign terminus; or for a local technician hired by a foreign airline who is knocked down stairs and killed by his employer's taxiing aircraft while the employee worked on another aircraft. Are these employees entitled to bring an action against their employer under the Rome Convention of 1952?

The Rome Convention of 1952 (hereinafter the "Rome Convention")[78] was specially designed to standardize the rights of persons who suffer damages on the ground caused by foreign aircraft, with regard for the reasonable economic interests of aircraft operators.[79] It entered into force in 1958 with relatively few

[78]"Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface Signed at Rome on October 7, 1952." The official English text was cited from ICAO Doc 7364; 310 U.N.T.S. 181., and can also be found in (1952) 19 J.Air L. & Com. 446.

[79]The Preamble of the Rome Convention of 1952. For a detailed exploration of the general principles in the Rome Convention of 1952, see G. N. Calkins, "Principles and Extent of Liability under the Revision of the Rome Convention Proposed by the ICAO Legal Committee" (1950) 17 J. Air L.& Com. 151; F.B. Davis, "Surface Damage by Foreign Aircraft: The United States and the New Rome Convention" (1953) 38 Cornell L.Q. 570, at p. 571, and J. Koval, *Liability to Third Parties on the Surface in Air Law*, (Montréal: McGill University LL.M. Thesis, 1954), at p.89.

ratifying parties.[80] The Rome Convention has since been amended by the Montreal Protocol of 1978.[81] Under this Protocol, the operator of an aircraft is strictly liable for damage caused to third parties on the surface and the limit on his liability was increased, although the Convention's technical aspects were mostly left untouched.

B. Basic Features of the Rome Convention of 1952[82]

i.) Strict Liability

The Rome Convention provides a regime of no-fault (strict) liability for the aircraft operator;[83] unlike the Warsaw carrier, the liability of the Rome operator cannot be wholly or partly exonerated by proof that the latter or its agents took all necessary measures to prevent the damage, or that it was impossible to take such measures. Therefore, the Rome plaintiff can easily recover if he simply proves the existence of actual damages sustained, without proving negligence or

On the legislative history of the Rome Convention of 1952, see G. F. FitzGerald, "The International Civil Aviation Organization and the Development of Conventions on International Air Law (1947-1978)", (1978) III Annals Air & Space L. 51, at pp. 69-70, 89.

[80]In 1993, thirty-eight countries had ratified the Convention, and very few of these were major aviation states. See M. Evans, *infra* note 203, at Air I/C/Ratifications 13 and (1993) XVIII:II Annals Air & Space L. at p.573

[81]"The Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface Signed at Rome on October 7, 1952, Montréal, 1978", ICAO Doc 9527. The Montréal Protocol of 1978 is not yet in force. In 1993, only three countries (Brazil, Niger, and Burkina Faso) had ratified the Protocol. See M. Evans, *infra* note 203, at Air I/C/Ratifications 26 and (1993) XVIII:II Annals Air & Space L. at p.597. For an article-by-article comparison of the original Convention and the Montréal Protocol, see G. F. FitzGerald, "The Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 1952) Signed at Montréal, September 23, 1978", *infra* note 132.

[82]Relatively few articles on the features of the Rome Convention of 1952 have been published - see W. P. Heere, *International Bibliography on Air Law* 1900-1971, supplement 1972-1976, 1977-1980, 1981-1984 and 1985-1990, (Denverter: Kluwer Law & Taxation Publishers, 1972, 1975, 1981, 1985, 1991) - compared with those on the Warsaw regime. Only one article was published between 1985 and 1995. Therefore, a more detailed description of the regulations with regard to the application of the Convention to employees of the operator is desirable in the following sub-sections.

[83]The author has no intention of further discussing the adequacy of strict liability adopted by the Rome Convention of 1952 in this section. A detailed study was done by J. Koval in his dissertation: see *supra* note 79, at pp. 94-99.

fault by the operator, which would be considered a near-impossible burden for workers on the ground. Nevertheless, if a victim's fault is shown to be the sole or partial cause of damages sustained, it will reduce or eliminate the operator's liability.[84]

ii.) Defence Against Strict Liability

In the Rome regime, the court determines what kinds of fault by the victim constitute a cause of ground damages and thus exonerate the operator from strict liability. In some countries, like France, the defence is limited: only fault by the plaintiff which is unforeseeable and inevitable from the tortfeasor's point of view can constitute a cause of damage;[85] the courts of other countries, meanwhile, simply compare the relative negligence of the parties who contributed to the harm.[86] Problems may arise in countries like Spain, where the civil code expressly prescribes that fault by either side constitutes a complete, unqualified defence, such that even fairly slight negligence by the victim would likely deprive him of any compensation.[87]

In summary, it is generally admitted that intentional fault by the victim would provide a typical example of this defence[88] - as in when the injured employee intended to inflict harm on himself by diving into a post-crash fire caused by

[84]See Article 6(1) of the Rome Convention of 1952. It seems evident that the operator can escape "all" liability only when he can prove that the damage was caused "solely through the negligence or other wrongful act or omission of the victim;" otherwise, he is still liable even when he is not at fault. But it has been argued that if the victim is also under an absolute or statutory duty when the damage occurs, and no fault is found on either side, then the operator could be exonerated by referring to the Article 6(1) defence: see N. E. Hesse, *infra* note 133, at p. 141. However, such circumstances might be relatively rare in the employment situation.

[85]*Vve Cassagnères c. la Standard française des Pétroles*, Cass. civ. 13 March 1957, Gaz. Pal. 1957. 2.228. Foreseeability is purely a matter of fact, which could vary from different points of view on the same subject. For a similar case in the US, see *Mickle* v. *Blackmon*, 166 S.E. 2d 173 (Sup. Ct. S.C. 1969).

[86]See the judgment of the court of West Germany: BGH (Bundesgerichtshofes in Zivilsachen) 20 Jan. 1954, BGHZ 12, 124.

[87] CC art. 1907.

[88] A. M. Honoré, *infra* note 103, at p.110. For a similar approach adopted in the case law of a contracting state to the Rome Convention, see the decision of the civil court of Italy: Cass. 15 Oct. 1960, no. 2764. Giust. civ.Mass. 1960, 655, 1113.

falling debris.[89] Reckless and gross negligence by the victim could also serve as a defence in certain countries[90] - as in when the vehicle driven by a technician runs out of control, due to his failure to observe a routine check-up, and smashes into an aircraft ready for take off on the runway.[91]

A more problematic defence for the operator against the claim of an injured employee is voluntary assumption of risk.[92] According to this doctrine, exposing oneself to known risks - like driving a truck onto a busy traffic apron, or working for the rescue team of an airline company[93] - may conceivably be construed as consent by the employee to accept a lower standard of care from the employer, who is thus exonerated from liability. However, this defense has ultimately faded away, owing to modern evolution in the distribution of industrial risk, whether by the express assumption of risk which often appears in contracts of adhesion,[94] or by implied agreement which is inferred from the inherent dangers

[89]Though Article 1 of the Rome Convention of 1952 requires that the damage must be a "direct consequence of the incident giving rise thereto," considering the bombardment effect on the ground caused by falling wreckage which could possibly weigh over a hundred tons, a stringent interpretation of the consequences of the Rome accident would be unimaginable. Therefore, the post-crash fire should certainly be considered as a direct consequence of the incident, no matter how far it spreads. For a similar opinion, see H. Drion, *infra* note 199, at p.19. For a detailed discussion on compensable damages under the Rome Convention, see Section 2.2.1.B. v) of this chapter.

[90]See the British case *Rushton* v. *Turner*, [1960] 1 W.L.R. 96 (C.A.), and the Canadian court decision: *Sigurdson* v. *British Columbia Railways*, *infra*. Some US courts have held that the wilful and wanton negligence of an employee is solely responsible for the harm, as in *Kasanovich* v. *George*, 34 A. 2d 523 (Sup. Ct. Pa. 1943), and *Mesher* v. *Brogan*, 272 N.W.645 (Sup. Ct. Iowa, 1937), *Billingsley* v. *Westrac Co.* 365 F. 2d 619 (8th Cir. 1966), but other courts do not agree: see *Taylor* v. *Volfi*, (3d. App. Cal. 1927), *Sorensen* v. *Estate of McDonald*, 470 P.2d 206 (Sup.Ct. Wah. 1970), *Willams* v. *Ford Motor Co.*, 454 S. W. 2d 611 (App. Mo. 1970). In France, only the intentional fault or consent of an injured party could lead to sole responsibility, and a similar approach can be found in the Air Law of the USSR, *infra* note 104.

[91]Case in which the tram driver ran into a jammed car could be assimilated: see *Sigurdson* v. *British Columbia Railways*, [1935] A.C. 291(P.C.).

[92]*Smith* v. *Baker*, [1891] A.C. 325, see also J. G. Fleming, *The Law of Torts*, *infra* note 274, at pp.512-5.

[93]See the following Section 2.4.3.B in this chapter.

[94]Some civil law countries now prohibit exemption clauses in the contract of employment, which are generally rendered as void. See Civil Code of Hungary, CC art. 81 par.2, art 87, 342.

of the work.[95] The nature of work undertaken, and the plain fact that the victim continues with this work, no longer deprives him of Rome remedies.

At the Montreal Conference of 1978, the IATA tried but failed to introduce into Article 6 of the Rome Convention a provision similar to that of Article IV in the 1971 Guatemala City Protocol,[96] which exonerates the operator from liability for damages resulting solely from the pre-existing physical condition of persons or property on the ground.[97] Under objective responsibility regimes like the Rome Convention, this question is resolved through causation and remoteness, without any queries into contributory negligence.[98] Analogies could easily be drawn with cases which apply strict liability under the Montreal Agreement of 1966,[99] whereby an "accident" - defined as an "unexpected or unusual event or happening that is external to the passenger" - must first occur;[100] perhaps such a

[95]Some US state laws even expressly forbid the defense of voluntary assumption of risk as between employer and employee. See generally *infra*, Section **2.4.3.B**.

[96]"Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air Signed at Warsaw on October 1929 as Amended by the Protocol done at the Hague on 28 September 1955", ICAO Doc 8932. (The Guatemala City Protocol had been ratified by only eleven countries in 1993 and is not yet in force: see (1993) XVIII:II Annals Air & Space L. at p.433) The latter part of paragraph 1 of Article IV (which replaces Article 17 of the original Warsaw Convention of 1929) of the Protocol reads as follows: "However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger;" and the second sentence in paragraph 2 prescribes that: "However, the carrier is not liable if the damage resulted solely from the inherent defect, quality or vice of the baggage." A history of the revised draft prepared by the ICAO Legal Committee in Feb-Mar. 1970 on Article IV can be found in G. F. FitzGerald, "The Revision of the Warsaw Convention" (1970) 8 Can. Yearbook Int'l L.284 , at p. 293, and Y. Kose, *Liability for Death or Personal Injury under the Guatemala City Protocol*, (Montréal: McGill Univ. LL.M. thesis, 1973) at pp.32-4.

[97]Rome Doc No.19, in ICAO Doc 9238 LC/180- 2 Legal Committee, 23rd Session, Montreal, February 8-27, 1978, Vol. II-Documents & Rome Doc Nos. 1-50.

[98]The theory of causation was proposed by the delegate of Italy to the 1971 International Conference on Air Law at Guatemala City, who pointed out that the current version of Article IV should be replaced with "[n]evertheless, the carrier is not liable if death or injury *resulted from an event unrelated to* air transport operation," yet the proposal failed by a vote of 32 to 9: see G. F. FitzGerald, "The Guatemala City Protocol to Amend the Warsaw Convention" (1971) 9 Can. Yearbook Int'l L. 217, at p.221. In fact, the Italian proposal has been adopted in several court decisions on the pre-existing physical condition of the injured passenger, see *Morris* v. *Boeing Corp. et al.* 15 Avi 17,241 (SDNY.1978), *Hernandez* v. *Air France*, 14 Avi 17, 421 (1st Cir. 1976), and *Scherer* v. *Pan Am*, 14 Avi 17, 410 (N.Y.Sup.Ct. 1976).

[99]CAB No. 18900.

[100]See *Metz* v. *KLM Royal Dutch Airlines*, 15 Avi 17, 843 (Dist.Ma. 1979)*Air France* v. *Saks*,

precondition could explain why the IATA proposal was not even posted on the schedule of the 1978 Conference.

Unlike Article 21 of the 1929 Warsaw Convention, under which the assessment of damages is left to the *lex fori*,[101] a compulsory principle of apportionment for damages (according to the degree of fault by the respective parties) is applied by the courts of every jurisdiction in cases of contributory negligence, as specifically promulgated in Article 6(1) of the Rome Convention. Therefore, if the victim's fault has contributed to the damaged sustained, then "compensation [to the victim] shall be reduced to the extent to which such negligence or other wrongful act or omission contributed to the damage." The conference records fail to reveal the rationale underlying this compulsory regulation of assessing fault. The earliest draft on the subject - the draft Convention relating to the liability for damages caused to third parties on the surface - proposed at the Second International Conference for Private Air Law, followed the Warsaw model in allowing "the law of the court seized of the case" to decide the effects of contributory negligence.[102] The subsequent change may have been made to protect the surface victim from *lex fori* which provide contributory negligence as a complete defence, completely defeating the possibility of recovery for the victim,[103] or to protect the operator

18 Avi 18, 538 (U.S.Sup.Ct. 1985), at 18, 543. For similar cases, see: *Abramson* v. *Japan Airlines Co., Ltd.*, 18 Avi 18, 064 (3d Cir. 1984), *Walker* v. *Eastern Airlines*, 23 Avi 17, 903 (SDNY, 1991).

[101] "If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person *the court may, in accordance with the provisions of its own law,* exonerate the carrier wholly or partly from his liability [emphasis added]:" see the "Convention for the Unification of Certain Rules relating to International Carriage by Air" *supra* note 2.

[102] See D. Goedhuis, *supra* note 3, at pp.254-5.

[103] This speculation arises partly from a suggestion of the British delegate to preserve the *lex fori* clause in the seventh session of the Second International Conference on Private Aeronautical Law, 10 Oct. 1929, who insisted that because there exists no system to reduce shared liability in English Law, the effect of joint fault by the victim should be left to the decision of the forum according to its own law. See R. C. Horner & D. Legrez, *supra* note 4, at pp.208-210. Today, most civil law countries have already abandoned the *Pomponian* rule ("if anyone suffers damages through his own fault he is not regarded as suffering damage") and adopted the fault theory under the apportionment rule. One can find the principle of apportionment in most of the civil codes of current contracting states to the 1952 Rome Convention, though with slight differences between the regulatory scheme and technical terms, such as CC Art.IIII of Argentine, CC Art. 1304 of Australia, CC Art. 216 of Egypt, CC Art. 2081 of El Salvador, CC Art. 1227, par.1 of Italy, Law of 18, Aug. 1965 (Law no.117 of 1965) Art 108 of Niger. See A. M. Honoré, "Causation and Remoteness of Damage" in A. Tunc, ed. *International Encyclopedia of Comparative*

from those laws which provide recovery only for gross negligence, *i.e.* intentional or inexcusable fault by the injured person which leads to reduction or extinction of the compensable damages,[104] or perhaps to resolve the possible problems of *renvoi* created by the Warsaw model.[105]

Article 6(1) mentions only that "compensation shall be reduced" in cases of contributory negligence, but the amount of this reduction is unclear. Can the reduction completely extinguish the compensation which would otherwise be awarded, supposing that the victim's fault is conceived to be the sole cause of damages sustained, and the defendant is not found to have been negligent? Two opposite answers are possible from the text of the Convention. Since the first part of Article 6(1) indicates that the operator shall not be liable if the surface victim's negligence or other wrongful act or omission is the sole cause of damages

Law, (Tübingen: J.C.B.Mohr, 1975) Vol. XI, Ch.7, at pp. 94-6. In common law countries, the complete defence rule established in *Butterfield* v. *Forrester* ((1809) 11 East 60; 103 E.R.926) still applies unless otherwise provided in special legislation, but statutes of general application providing for the apportionment of damages are presently popular, such as the *Law Reform (Contributory Negligence) Act 1945* (8 & 9 Geo. 6, c.28) of Great Britain, or the *Law Reform (Tortfeasors Contribution) Act 1952* (1 Elz.2 no.42) of Queensland. By 1981, even in the US - "virtually the last stronghold of contributory negligence" - 37 states had passed special laws to adopt the rule. See V. E. Schwartz, *Comparative Negligence*, Cumulative Supplement, (Indianapolis: The Allen Smith Company, 1981), at p.1. It may be for this reason that Article VII of the Guatemala City Protocol of 1971, which was intended to replace the original Article 21, was not cut from the coarse cloth of the 1929 version (as it was in the ICAO legal Committee).

[104]Like the following laws of contracting states of the 1952 Rome Convention: USSR Vozdushnyi Kodeks (Air Code) of 26 Dec. 1961 , VVS SSSR 1961 no. 52 pos. 538, art 101 par. 2; Law of 18, Aug. 1965 (Law no.117 of 1965) Art 108 of Niger. See A. M. Honoré, *id.* at p.96.

[105]During the discussion period before voting on the Warsaw final text in the seventh session of the Second International Conference on Private Aeronautical Law, 10 Oct. 1929, no delegate ever questioned the probability of *renvoi* in Article 21; the opinion of the Switzerland delegate might reveal this common approach of the drafters: "[n]ever will a judge apply other than his law." See R. C. Horner & D. Legrez, *supra* note 4, at p.209. Therefore, most writers on the Warsaw Convention suggest that the *lex fori* in Article 21 does not refer to the conflict of laws but to substantive laws only, and that there should not be any situation of *renvoi* created under the setting. See Shawcross & Beaumont, *Air Law*, P. Martin, J. D. McClean, E.de. M. Martin, ed. 4th ed.(London: Butterworth, 1993), at VII/117F, E. Giemulla & R. Schmid, *Warsaw Convention*, (The Hague: Kluwer Law International, 1995), at WC Art.21, 3,4. Jurisprudence could also be found in the German court case of OLG Frankfurt/Main, 14 July 1977, in (1978) ZLW 53. However, writers like H. Drion, *infra* note 199, at p.123, did not exclude the possibility of choice of law; and one US court held that the *lex fori* in Article 21 includes the conflict of laws rules of the forum, which might refer to the laws of the plaintiff's residence or those of where the accident has happened. See *Feibelmann* v. *Cie Compagnie Nationale Air France*, 334 N.Y.S. 2d 492 (N.Y.Civ. Ct. 1972).

sustained, it seems logical that if the victim's fault was not the sole cause of damage - and even if in fact it accounts for 99 percent of the total negligence - the operator should not completely escape responsibility. Yet this interpretation evidently contradicts the provision in the second part of Article 6(1) for situations where no negligence by the operator is proved, generating a controversy typically encountered upon trying to apply the principle of comparative negligence into a regime of strict liability: whether the victim's fault is assessed at 10 per cent (with the other 90 per cent resulting from third parties) or 100 percent, a comparison with the operator's fault (if lower) would result in total extinction of the compensable damages.[106] Hence, a more plausible argument is needed to reconstruct these two oversimplified interpretations. We must first grasp the theory underlying strict liability for operators as it appears in the Rome Convention.[107]

Logically, if the tortfeasor's strict liability constitutes a limited exception to the central principle of fault-based liability simply because of the social risk he creates, then contributory fault by the injured party is legally relevant and must inevitably lead to a reduction or even extinction of the tortfeasor's liability. Conversely, if the tortfeasor's liability is intended to guarantee or insure against loss sustained by the injured party, such that the loss would fall wholly on the tortfeasor, then the injured party should be compensated whatever the proportion of his own fault. In this instance, the victim's fault need not even be taken into account.[108]

Aviation is undoubtedly a social activity, beneficial and necessary in the modern economy, yet one which exacts a high toll on human life and property when accidents occur. It is a "lawful and not reprehensible activity" with inherent risks which can result in extraordinary disaster to others.[109] In such circumstances, strict liability is needed to allocate the bulk of these accident costs to the industry

[106]For a court decision, see: *Williams* v. *Brown Mfg. Co., infra* note 115.

[107]See W. L. Prosser, *Handbook of the Law of Torts*, 4th ed.(St. Paul: West Publishing Co. 1971), at pp. 494-6.

[108]A. M. Honoré, *supra* note 103 at p.119.

[109] J. G. Fleming, *The Law of Torts, infra* note 274, at p. 329.

itself, which is best able to insure against them. Of course, this dangerous activity theory is subject to challenge because the safety of aviation has been drastically enhanced over past decades,[110] inviting comparison with road traffic activities, for which strict liability is not required. However, the inherent risk which justifies strict liability is not reflected merely in the seriousness or frequency of potential harm, but also includes the danger that the impact of the hazard would infringe on social justice —the sense of fairness - as Fleming indicates,[111] "considering the inequality between the parties where one [the person on the ground] is wholly at the mercy of the other [the operator], has not voluntarily exposed himself to the risk, and does not benefit ... from the activity." Furthermore, this inequality exists not only with respect to the economic benefits derived from the activity, but also from the social position assumed in potential legal actions.[112] Consider the preamble to the Rome Convention of 1952, which vigorously asserts the need to ensure adequate compensation for persons who suffer damages on the surface; without strict liability of the operator, it would be impossible to ensure adequate compensation for the victim, who has very little knowledge of the perplexing technical nature of the aircraft and would nonetheless be obliged to prove fault from a gigantic pile of carcass and wreckage. These elements of inequality would prevail even if civil aviation were no longer classified as an "ultrahazardous activity," or no matter how safe it may eventually become.[113]

[110]See D. Schoner, "Die Internationale Rechsprechung zum Warschauer Abkommen in den Jahren 1974 bis 1976" (1977) 26 ZLW 256, at p.275, and G. F. FitzGerald, "Aviation-Liability Rules Governing Damage Caused by Foreign Aircraft to Third Parties on the Surface-Rome Convention of 1952" (1953) 31 Can. Bar Rev. 90, at p.92.

[111] J. G. Fleming, *The Law of Torts, infra*note 274. at p.331. See also O. Riese & J. T. Lacour, *Precis de Droit Aerien— International et Suisse,* (Paris: Libairie Générale de Droit et de Jurisprudence, 1951), at pp. 200-4.

[112]A similar opinion can be found in A. Adelfio, *Particular Aspects of the Rome Convention 1952 on Damages at the Surface,* (Montréal: McGill Univ. LL.M. thesis, 1955), at p.74.

[113]As Prosser has argued, "flying was of course regarded at first as a questionable and highly dangerous enterprise, the province exclusively of venturesome tools, and so properly subject to strict liability for any harm to person and property beneath; ... aviation had not reached such a stage of safety as to justify treating by analogy to the railroads, and classified it as an 'ultra hazardous activity' upon which strict liability for ground damage was to be imposed," yet "with the further development of the industry, and an improved safety record, later years have witnessed a considerable amount of hesitancy over the strict liability:" see W. L. Prosser, *supra*

Accordingly, in theory it seems fairly clear that the original intention to impose strict liability on the aircraft operator in the Rome Convention was based on the inherent risks, rather than any desire to institute a system of insurance for ground loss sustained. Therefore, a casual contribution by the injured party will reduce or totally extinguish compensation; due to the varying methods of apportionment adopted by respective fori, notwithstanding the abstract term "caused solely through the negligence... of the person who suffers the damage" in Article 6(1), compensation for the plaintiff could possibly be reduced to the level of total extinction. Technically, then, the insertion of an escape clause in the first part of Article 6(1) was unnecessary, as evidenced by the apportionment provisions in certain civil codes - providing only for a "reduction" of compensation[114] - and common law jurisprudence.[115]

If, however, the faultless operator is still held responsible for damages suffered by a negligent victim, as prescribed in the first part of Article 6(1), then one must conclude that the Convention is more likely to create a general regime of insurance, and therefore the calculation of contributory fault by the injured party would in theory become meaningless.

This paradox is evidently created by the inconsistency between the two theories underlining Article 6(1),[116] which unfortunately reappeared in Article IV of the 1971 Guatemala City Protocol,[117] the provision which prescribes that the carrier can escape liability only if "the death or injury resulted *solely* from the state of health of the passenger," leaving little room for apportionment unless the

note 107, at pp. 514-5. But all these 'rapid technological changes' serve as a weak reason to abruptly conclude that '"normal' aviation, including all common commercial flights, might require proof of negligence."

[114]Civil Code of Poland: CC art. 362; Italy: CC art. 1227 par. 1; El Salvador: CC art. 2081. See A. M. Honoré, *supra* note 103 at p.124.

[115]For the US, see: *Magee* v. *Wyeth Laboratories, Inc.*, 214 Cal. App. 2d 340, 29 Cal Rptr. 322 (1963); *Williams* v. *Brown Mfg. Co.*, 261 N.E.2d 305 (Ill 2d, 1970) at 310.

[116]The paradox was also mentioned in the Annex to Delegation Report of the chairman of the US delegation to the Rome Conference of 1952: see E. T. Nunneley, "Summary Analysis of Convention on Damage Caused by Foreign Aircraft to Third Persons on the Surface — Annex to Delegation Report" (1953) 20 J. Air L. & Com. 92, at pp. 94-5.

[117]*Supra* note 96.

passenger's state of health contributes only part of the damages sustained.[118]

Further to the pragmatic aspect of apportionment under such schemes, which mode of comparative negligence should be adopted by the forum when implementing compulsory apportionment under Article 6(1)? Though there are many variants, two model methods of apportionment are generally adopted for contributory negligence.[119] One is the "pure" form of comparative negligence:[120] the contribution of the victim's fault is weighed against that of the defendant to yield an equitable division of damages in direct proportion to the fault of each of the parties. According to this method, the recoverable damages are reduced in proportion to the victim's part in causing them, rather than to the extent of the difference between the parties. So if the plaintiff is found to be responsible for 65 percent of the negligence, then he could recover 35 percent - as opposed to only (65-35=) 30 percent - of his loss. The other method applies apportionment based on fault up to the point at which the victim's negligence is equal to or greater than that of the tortfeasor; when this point is reached, *i.e.*, 50 percent or more, the victim is necessarily barred from any recovery.[121]

The rationale of this 50% System is that it is morally improper to allow a party who is more at fault for an accident to recover from one who is less blameworthy.[122] In a Rome Convention case, for example, a victim who suffers $100,000 in damages was charged with responsibility for 90% of the negligence. Following the "pure" form of apportionment, he could still recover $10,000 from the operator whose fault might have contributed only 5% of the damage. Alternatively, if in the same case the victim contributed only 51% fault, then he

[118]A strict interpretation of the revised provision in Article IV can also be found in R. H. Mankiewicz, "The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention" (1972) 38 J. Air L. & Com. 519, at pp. 526-7, and "Warsaw Convention: The 1971 Protocol of Guatemala City" (1972) 20Am. J. Com.L. 335, at p. 338.

[119]*Li* v. *Yellow Cab Company of California*, 533 P. 2d 1226 (Sup.Ct.Cal. 1975), at 1242.

[120]See W. L. Prosser, "Comparative Negligence" (1953) 41 Cal. L.Rev. 1, at pp. 15, 21-5.

[121]This method is also called the "50% System." By 1981, twenty-five of the thirty-seven states adopting comparative negligence in the US selected this "50% System" with little variation. See V. E. Schwartz, *supra* note 103, at pp. 30-1(1981 Cumulative Supplement)

[122]See V. E. Schwartz, *id*, at pp. 344-5.

would get nothing back, due to the additional 2% fault (over 49%) when the 50% System is applied, even though a large amount of the damage ($49,000) was attributable to the negligence of the other party or parties.

On the surface, the method of apportionment adopted in Article 6(1) of the Rome Convention should clearly translate into the "pure" form of comparative negligence, for it is the only way through which the victim's recoverable damages could be "reduced to the extent to which such negligence or wrongful act or omission [by the victim] contributed to the damage." Even if the victim's fault caused 99% of the damages, he should still be able to recover 1%. The 50% System, on the other hand, is evidently unable to distribute responsibility according to the fault of the respective parties once the victim's contribution surpasses a certain point.

If setoffs were allowed in the Rome Convention case, perhaps the "pure" form of apportionment would not be so preferable to the injured party. For example, suppose an INS (inertial navigation system) engineer *A* has negligently downloaded a faulty program into the flight computer which results in the mechanical failure of his employer *B*'s aircraft when combined with subsequent piloting errors. The aircraft later crashes and its post-crash fire destroys *A*'s house nearby the airport. In his Rome Convention action, *A* was found to be 55% negligent, while *B* is responsible for the other 45%; but *A*'s total damage is valued at only $90,000 whereas *B*'s damage is an egregious $1,000,000. If the "pure" form of apportionment was adopted, then after the setoff *A* would still owe $505,000 to *B*. So even if, fortunately, A does not have to pay back the difference, the final result would still be the same as if the 50% System was applied.

iii.) Limitation of Operator's Liability — Double Ceilings

The limitation of the operator's liability towards the victim was an inevitable *quid pro quo* for the former's strict liability. Though its relatively antiquated foundation - not to hinder the development of international civil air transport - is inscribed within the preamble, the Convention has long been criticized as

incompatible with the current financial situation of the civil aviation industry,[123] and victims on the ground are still far better served by the Rome Convention then passengers under the Warsaw Convention and its subsequent amendments. The calculation of limits for the Rome plaintiff, however, is somewhat more complicated. The recovery ceiling in the Rome Convention has two folds — one is set at a global limit in proportion to the maximum take-off weight of the aircraft involved,[124] qualified by another special limit at a maximum amount of 500,000 francs per person killed or injured (approximately US $33,162.50 in 1952). Therefore, even though the personal damages of ten persons on the ground do not individually exceed the personal injury limit and amount to a grand total of 3,800,000 francs, if the take-off weight of the aircraft concerned is only 2,000 kilograms, the maximum compensation available to these victims from the operator will yet be limited to (500,000 + 400 x 1000 =) 900,000 francs, and each individual claim shall then be reduced in proportion to their respective amounts. This example is oversimplified; when property damage is involved, the global ceiling can be reserved to one-half for personal damages if the compensation contemplated by each injured person does not exceed 200,000 francs, and any unpaid part of these personal damages would still be shared in proportion to the property damage claims for the other part. Complications abound, notwithstanding that there is two possible calculating formulae, depending on which ceiling is first applied.[125] One wonders why double ceilings are desirable in light of these auxiliary permutations. A deeper understanding of the legitimacy of this system of gradation by weight might help establish the connection between the nature of ground damages and the design of its liability limits, thereby enhancing the future unification of the relevant rules of labor law.

This global limit for the aircraft operator's liability towards persons on the

[123]For a detailed analysis on the economic situation of civil aviation with regard to the burden of liability towards third parties on the ground, see B. G. Nilsson, "Liability and Insurance for Damage Caused by Foreign Aircraft to Third Parties on the Surface — A Possible New Approach to an Old Problem" in A. Kean ed. *Essays in Air Law*, (The Hague: Martinus Nijhoff Publishers, 1982) 180, at pp. 184-5, also H. Drion, *infra* not 199. at pp. 16-7.

[124]See Article 11 of the Rome Convention of 1952, *supra* note 78.

[125]For a detailed discussion see H. Drion, *infra* note 199, at pp.175-81.

ground is believed to be very similar to the limitation on the shipowner's liability for all debts arising from the venture, in comparing common features such as the calculation of limits by reference to the tonnage, or death and injury claims which are given priority for a certain portion of the limited fund.[126] This maritime practice is based simply on the inescapable economic fact of the time: the "aggrieved third party claimants would not recover their losses where the shipowner's adjudged liabilities far exceeded his assets."[127] Arguments supporting the system of graduation according to weight for ground damages, therefore, seemed to justify it as a direct indicator of the operator's financial capacity to indemnify for the consequences of the accident. This justification may be theoretically convincing for private fliers or small and financially-vulnerable commercial operators who might possess nothing more than their flying "assets," but it definitely does not reflect the financial capability of most operators in the civil aviation industry currently engaging in international carriage; their economic scale cannot be measured solely by reference to the size of a single aircraft which it operates, especially considering the filter effect created by government review (in bilaterals) and market rules for international commercial flight. Even these larger air transport businesses could find their financial capability has dropped to zero, or some negative integer, plus some scattered pieces of wreckage after an accident. The risk-sharing theory, commonly-used in marine cargo claims, does not compare either. No comparison can be drawn with the liability limit of the Warsaw Convention and its amendments, which have no double ceiling for the passenger or goods on-board. The raw model of a modern shipowner's liability limit according to a ship's tonnage - which was mainly followed in the Rome Convention - was created no later than 1894,[128] so why did an air carriage convention adopted in

[126]H. Drion, *infra* note 199, at p.180 and C. Hill, *Maritime Law*, 3d ed.(London: Lloyd's of London Press Ltd. 1989), at pp.242-58. Many authors have shared this speculation on the limitation of liability in the aviation industry; see A. W. Knauth, "Aviation and Admiralty — An Investigation of the Applicability of the Maritime Policy of Limitation of Liability to Aviation" (1935) 6 Air L. Rev. 308.

[127]C. Hill, *id.* at p.242.

[128]The *Merchant Shipping Act, 1894* (57 & 58 Vict. c. 60) of Great Britain was the first to calculate the amount of the shipowner's limited liability by reference to the ship's tonnage at section 503(i)-(ii).

1929 (Warsaw) not avail itself of this preconstructed mold? The Rome Convention already excludes on-board personnel, who are presumed to share a common risk with the operator, from its coverage.

The liability limit in the Rome Convention is not unbreakable; if the victim can prove that the damage was caused by a deliberate act or omission of the operator, his servants, or his agents, with intent to cause damage, then the operator's liability is unlimited. To the injured employee of the aircraft operator, the most substantial effect of this limitation is to encourage a comparison with expected benefits from the applicable workers' compensation system; a fairly precise calculation might help him decide if it is worthwhile to bring the Rome action, but this exercise will never be easy since the actual amount of other potential plaintiffs' claims could hardly be accurately measured before the action is initiated. Facing the probability of much lower but quick and definitive benefits, the employee seems to have little freedom of choice, making the Rome option less attractive with respect to industrial injury claims. As for challenging the constitutionality of the Convention's provisions within the internal legal structure, one should recall similar attempts regarding Article 22 of the Warsaw Convention[129] — the chances of success are slim.

iv.) Requisite Plaintiff and Defendant

Because the Rome Convention is intended only to protect the interests of persons on ground,[130] flight personnel (*e.g.*, pilots, flight engineers, or commercial personnel) of the operator on-board the ill-fated aircraft when it crashes or collides

[129]For US court cases, see: *Burdell* v. *Canadian Pacific Airlines*, Ltd., 10 Avi 18, 151 (Ill.Cook County, 1968), at 18, 160-1 and *In re Air Crash at Bali, Indonesia on April 22, 1974*, 15 Avi 17, 406 (Dist. Ct. 1978), *rev'd* 684 F. 2d 1301 (9th Cir. 1982); for Lebanon court cases, see: Cour d'Appel de Beyrouth, 8 Nov. 1973: 1973 RFDA 204. The Italian Constitutional Court held that the limitation of carrier's liability provided in Article 22 of the Warsaw Convention infringes on the guarantee in Article 2 of the Italian Constitution which safeguards the injured person's right to recover compensation for personal injuries, and therefore declared the Warsaw article unconstitutional. See *Coccia* v. *Turkish Airline*, Ct. 132/1985, 2 May 1985, cited from G. Guerreri, "The Warsaw System Italian Style: Convention Without Limits" (1985) 10:6 Air L. 294. This judgment eventually rekindled hope for the potential Rome plaintiff in Italy (which is a contracting state of the Rome Convention of 1952).

[130]See G. N. Calkins, *supra* note 79, at pp.152-3.

with others,[131] even before it actually takes off or has touched down on the runway,[132] are restrained from invoking its provisions.

A spatial category is circumscribed by Article 1, which requires that the aircraft of the liable operator must be "in flight." The time "in flight" ranges from the moment when the aircraft's power is mobilized for the purpose of actual take-off to the moment when its landing run ends (see Article 1(2)). The current "in flight" stage of Article 1(2) certainly does not include the time when the aircraft has docked for embarking and loading, and the engine has started heating up in order to provide the energy necessary for on-board system functioning, nor the time when the aircraft is taxiing to a terminal bridge from the touched-off runway. Such exclusive parameters may be inferred by reference to painstaking discussions in the minutes of the International Conference at Rome,[133] and from the rejection of the following provision, which was suggested by a U.S.S.R. delegate to the 1978 International Conference of Private Air Law to replace the original Article 1(2):

> For the purpose of this Convention, an aircraft is considered to be in flight from the

[131] Article 24 of the Rome Convention of 1952, *supra* note 78: "This Convention shall not apply to damage caused to an *aircraft in flight*, or to persons or goods *on board such aircraft* [emphasis added]."

[132] In addition to the following argument in this section, see also H. W. Poulton, *The Convention of Rome 1952 on Damage Caused by foreign Aircraft to Third Parties on the Surface*, (New Haven: Yale University JSD Thesis, 1956), at p.71, and G. F. FitzGerald, "The Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 1952) Signed at Montréal, September 23, 1978" (1979) IV Annals Air & Space L. 29, at pp.38-9.

[133] The four proposed versions of Article1(2) were drafted as follows in the International Conference at Rome of 1952: i) to include in the application of the Convention any damage caused by an aircraft in movement, even when such movement is not connected with the flight; ii) to restrict the application of the Convention to the period from the beginning of take-off to the end of the landing run; iii) to include in the draft the definition of "flight time" as found in Annex 6 of the Chicago Convention; iv) to have "flight" begin from the moment when power is applied for the purpose of actual take-off and continue until the moment when the landing run ends. This last proposal, the most restrictive, was accepted by the delegates. See ICAO, Conference on Private International Air Law, Rome, September-October, 1952, *Minutes and Documents*, (1953) IV: pp. 51, 54, 241, V: pp. 14-23, 176. As for the definition provided in Chapter 1, Annex 6 of the Convention on International Civil Aviation, it is much wider than the current version ("The total time from the moment an aircraft first moves under its own power for the purpose of taking off until the moment it comes to rest at the end of the flight"). However, it is alleged to better ensure passenger safety than that of third parties on the surface: see N. E. Hesse, *The Aircraft Operator's Liability*, (Montréal: McGill Univ. LL.M. thesis, 1953), at p.55.

moment when power is applied before the take-off until the moment when the landing is completed, i.e., when the aircraft is at rest and power has been switched off,

on the ground that it would make an unwarranted extension in the scope of the Convention to aircraft while taxing.[134] The operator, then, may completely escape from liability for damage caused by sonic boom and ancillary noise claims under the Rome Convention, a side benefit created by combining this stringent interpretation with the final line of Article 1, section 1 of the Convention.[135] If the aircraft in flight means that the aircraft has reached the dispatching board and applied its full take-off power, or has not yet lowered its nose wheels to the ground and started to leave the main runway, then the damage caused by a sonic boom which it produces by merely passing through airspace is not covered under the Convention. Further, the high-pitched noise damage which occurs while the aircraft is held up at the extension apron, awaiting permission from air traffic control to enter the take-off or docking position, is ultimately excluded from protection under the Rome Convention although it is generally compensable under domestic law.[136]

This relatively rigid interpretation, compared with Article 2 of the 1933 Convention,[137] as well as with current national legislation, judicial decisions, and theories adopted in Germany[138] and France,[139] proves too narrow for members of

[134]G. F. FitzGerald, "The Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 1952) Signed at Montréal, September 23, 1978", *supra* note 132, at pp. 38-9.

[135]For a detailed discussion on the sonic boom caused by in-flight aircraft with respect to the Rome Convention of 1952, see the following Section 2.2.1.(v), and *infra* note 194.

[136]See *Ferguson* v. *City of Keene*, *infra* note 193.

[137]Article 2, Section 3 of the 1933 Convention (*infra* note 203) provides that: "The aircraft is considered as in flight from the beginning of the operations of departure until the end of the operations of arrival."

[138]It is commonly conceived in German law that the tort liability of an aircraft operator towards third parties on the surface is not limited to the accident happening between the actual take-off and landing times, nor has anything to do with whether the engine's power is on or off. Thus, the incident that happens when the aircraft is taxiing to the take-off or docking position is included, as are damages caused by a stationary aircraft which is moved by other forces - *i.e.*, injury from propellers which are blown by a strong breeze would be considered compensable. See R. Schleicher, F. Reymann & H.J.Abraham, *infra* note 240, at p.199.

[139]A French court has adopted an approach similar to the above German theories, in a

the general public who might find themselves in areas where they would commonly be conceived to be at higher risk of injury from taxiing aircraft or by an explosion from aircraft leaving the docking bridge - such as when walking in the airport terminal or taking the transit shuttle along a busy traffic apron - and it is certainly too narrow for most ground personnel who must work around the aircraft in these areas. Evidently, ground personnel would rarely stay on the runway during take-off or landing only.

Furthermore, the legislative intent behind the Rome Convention - expressed in the preamble as the "desire to ensure adequate compensation for persons who suffer damage caused on the surface by foreign aircraft" - permits but two logical conclusions regarding the scope of application; the objects are limited to the person on the surface and the foreign aircraft. Thus, the existence and operating nature of the aircraft create potential risk, whereas the ways in which or the stage where that foreign aircraft maneuvers its engines (according to the wording in Annex 6 of the Chicago Convention: when it "first moves under its own power" or when "power is applied for actual take-off") has no bearing on the fact that the person on the ground is endangered by such activity. One can hardly understand why we must legally differentiate the effect caused by a sudden crash thirty seconds after the aircraft takes-off or the tragic collision of an out-of-control taxiing aircraft, when the nature of both hazards is shown to be the same to persons on the ground. Even more absurd is the possibility that comity with the *lex loci* jurisdiction of the contracting state was the reason for which this difference was accepted in the Rome Convention.[140]

A geographic limitation on the scope of the Rome Convention is prescribed by Article 23(1) to ensure that each case bear an international character, since the

case where the aircraft was powered by its propellers while taxiing on grounds accessible to the general public. See Cour de Cassation, 6 Mars 1931: 1931 Gaz.Pal. 532 (a criminal case); see also M. de Juglart, *Traité élémentaire de droit aérien*, (Paris: Librairie Générale de Droit et de Jurisprudence, 1952) p.99. Interestingly, however, the French representative of the ICAO Legal Committee at its Seventh Session did not challenge this "in flight" definition provided in the Mexico City Draft, proposing only to amend the phrases as "an aircraft is considered to be in flight from the moment when the power is applied for the purpose of actual take-off, until the moment, *etc.*:" see ICAO, "Comments of France" in *Conference of Rome Documentation, infra* note 205, at p.280.

[140]A suggestion of Koval, *supra* note 79, at p.94.

Convention was intended to unify applicable laws in the international setting, rather than the domestic one. Under Article 23(1), the Rome Convention can only be applied to damages suffered by a person on the surface territory of one Contracting State, caused by an aircraft registered in the territory of another Contracting State., *i.e.*, a foreign aircraft. For example, an Australian resident on the ground would not be eligible to bring an action under the Rome Convention unless he or she is damaged by a foreign aircraft in flight which is registered in another Contracting State, such as Spain for example.

A serious theoretical problem may arise when the damage is jointly caused by two or more aircraft of a Contracting State and a Non-Contracting State, respectively. Could the victim bring the Rome action against the operator of the Non-Contracting State aircraft on the basis that "each of the aircraft concerned shall be considered to have caused the damage and the operator of each aircraft shall be liable?"[141] M. Drion addresses this question in detail but provides no definitive answer. Of concern is the morass of hierarchical relationships that might arise between the Rome Convention and the workers' compensation laws of a Non-Contracting State if the Rome Convention was applied to damages suffered by an employee of some aircraft operator attached to that Non-Contracting State. For example, suppose employee *K* of an airline registered in Non-Contracting State *A* was injured by the mid-air collision of *A* aircraft and an aircraft registered in Contracting State *B* while working at the airport of Contracting State *C*. If *K* is allowed to bring an action under Rome against the airline of state *A* in the courts of *C*, then those courts might have to apply both the Convention (which has become part of *lex tort fori*) and the workers' compensation laws of state *A*. As mentioned above, the legitimacy of Article 25 of the Convention rests upon the theory that the workers' compensation benefit will completely or at least partially substitute for the function of a civil law tort action. Presently, the problem is that no such logical consequence validly justifies the preemptive effect of Article 25 of the Convention in these situations, because in theory the workers' compensation system of state *A* could not displace a tort action which is based on a Convention

[141]Article 7 of the Rome Convention of 1952, *supra* note 78.

never ratified by that state.[142]

A similar problem was encountered in the U. K. court decision of *Coupland* v. *Arabian Gulf Petroleum Co.*,[143] which might provide a useful point of reference. In *Coupland*, the plaintiff, who was domiciled and resident in Scotland, instituted a civil tort action under English law against the defendant, a nationalized oil company of Libya, for industrial injuries sustained during his work abroad for the latter which were allegedly due to the foreign employer's negligence. The Queen's Bench ultimately decided that the claim was actionable both under the English common law of torts and the Civil Code of Libya; however, if it is true (as asserted by the defendant) that in Libya, civil tort liability had been repealed or substituted by social security and labor legislation, then the plaintiff would be required to seek his remedy in Libya instead.[144] The court's language is conservatively interpreted by commentators as saying that if the plaintiff is entitled only to workers' compensation benefits from the *locus injuriae*, then "such rights will be insufficient to render the defendant's conduct actionable by the *lex loci deliciti commissi*,"[145] but would it be actionable under the *lex forum*? Using the second branch of the two-tier conflict of torts rule established in *Philips* v. *Eyre* - *i.e.*, in order to found a suit in England for a wrong committed abroad, the tortious act must have been unjustifiable by the law of the place where it was committed[146] - it would be nearly certain that the court must reject the forum tort action under these circumstances, since the court held that when the tort action is substituted by the compensation institutions of the *locus injuriae*, "the plaintiff could not bring himself within the second part of the rule."[147] Once the tort is found to be not actionable in the *locus delicti*, even if it has simply been substituted

[142]For elaboration on this logical consequence, see *infra* Section **2.2.3. e)** in this chapter.

[143][1983] All E.R. 434 (Q.B.).

[144]*Id.*, at 441.

[145]See C. G. J. Morse, "Tort, Employment Contracts and the Conflict of Laws" (1984) 33 Int'l & Comp. L. Q. 449, at pp. 452-3.

[146](1870) L. R. 6 Q.B. 1 at 28-9 (per Willes, C.J.); see also, 4 Q. B. 225, at 238-9 (per Cockburn, C. J.). For treatise on the second branch of this rule, see J. H. C. Morris, *The Conflict of Laws*, 3d ed(London: Stevens & Sons, 1984), at pp.308-23.

[147]*Coupland* v. *Arabian Gulf Petroleum Co. supra* note 143, at 441.

by other institutions, *e.g.*, the duty of an employer to pay compensation awarded by an administrative board for an industrial accident, it is no longer "justifiable" under the *lex loci deliciti*.[148] Nevertheless, some writers on this subject do not seem to agree with the approach.[149]

According to the reasoning in *Coupland*, then, the courts of C in the above-mentioned Rome Convention case could probably refer to this principle of choice of tort laws to preempt the statutes of *A* state once it determined that the Convention action is not justifiable at the domestic level. But since the decision in *Coupland* established that both English common law and the civil code of Libya could operate as the governing substantive law, and furthermore, that collateral benefits are deemed to be allowed in Libya, no straight answer to this conundrum could be expected from the judgment.

v.) Compensable Damage

Article 1 of the Rome Convention limits compensable damages to those which arise as a "direct consequence of the incident." Since there is no express supplement provided in subsequent provisions regarding which damage could qualify as a direct consequence of the Rome incident, this connection is left to the adjudicating court. The ground damages which were strictly prescribed by the Taormina Draft[150] — those caused through contact, fire, or explosion — should

[148]A similar interpretation is found in *Machado* v. *Fontes*, [1897] 2 Q.B. 231 (C.A.). Two judgments adopted the same reasoning and excluded the compensation benefit from civil liability, accordingly striking out the Saskatchewan common law tort actions when the injured employees were entitled to receive workers' compensation from British Columbia and Ontario: *Walpole* v. *Canadian Northern Railway Co.*, [1923] A. C. 113, and *McMillan* v. *Canadian Northern Railway Co.*, [1923] A. C. 120.

[149]It is suggested that even if the defendant's liability for damage is contractual, quasi-contractual, quasi-delictual, proprietary or *sui generis* under *lex loci deliciti*, it is justifiable. See J. H. C. Morris, *supra* note 146, at p.315, also *Boys* v. *Chaplin*, [1971] A.C.356, at 377B (Lord Hodson) and 389D (Lord Wilberforce).

[150]Article 1, Section 1 of the Taormina Draft provides that "[a]ny person who suffers damage on the surface shall be entitled to compensation as provided in this Convention upon proof only that *the damage was caused, through contact, fire or explosion*, by an aircraft in flight or by any person or thing falling therefrom [emphasis added]." The Taormina Draft is the result of the Fifth Session of the ICAO Legal Committee, convened at Taormina on 5 January 1950, which modified certain provisions of the 1933 Rome Convention; the Draft was further revised throughout the drafting proceedings for the Montréal Draft, Mexico City Draft, and the current

certainly be included, but the later substitution of a much more obscure standard in the current Convention implies that a broader interpretation of the compensable range could be allowed.[151]

From the point of view of legislative policy, the Rome Convention is commonly conceived as a special regime replacing the conventional tort with no-fault liability of aircraft operators toward third parties on the surface; thus the operator need not to be culpable to bear objective responsibility, and accordingly, the requirement of foreseeability of the compensable consequence which is logically linked with the duty of care (*i.e.*, culpable fault) of the operator, is unlikely to be considered relevant. However, the scope of causation is yet limited; one must consider further the statutory confinement of the compensable range from those accidents of "direct consequence" based upon the "practical politics"[152] employed by the drafters, who intended to draw a balance between the burden of strict liability and the recognition of limited kind of losses which are incidental to the operation of aircraft. It seems reasonable to conclude that compensable damages under the Rome Convention should be assessed according to the theory of "proximate causation," which has long been used in national tort laws as a compromise between the fault inherent in the act and its consequences.[153]

Although the phrase "direct consequence (*conséquence directe*)" can be found

Rome Convention of 1952. The text of the Draft may be found at (1950) 17 J.Air L. & Comm. 194-99.

[151]See the "Note on the Development of the Draft Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Submitted to the Rome Convention" in ICAO, *Conference of Rome Documentation*, infra note 205, at p.138: "[T]o define the damage as 'damage arising from contact between an aircraft or anything falling therefrom and any persons or object on the surface;' the word 'contact' was, however, considered as too narrow."

[152]See *Palsgraf* v. *Long Island R. Co.*, 248 N.Y.339, 162 N.E. 99 (N.Y.App.1928) with respect to the notion of proximate cause: "because of convenience, of public policy, or a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."

[153]However, it has been suggested by one writer that "[s]ince the scope of the ...Convention covers the field of quasidelicts no changes were implied of the law of delict by omission of the word (direct). Besides, there may be the concrete occasion ... to replace the test of 'forseeability' by the test of typicality which serves as a limitation of liability. The inclusion of the word 'direct' has in our view not provided much of a break to the scope of damages recoverable:" see N. E. Hesse, *supra* note 133.

in the civil code of certain civil law states,[154] there is very little evidence to show that the drafters of the Convention ever intended to be bound by the interpretations adopted in the jurisprudence of these countries. Taken literally, the "direct consequence" theory in these bodies of jurisprudence simply exclude recovery for any indirect consequences, *i.e.*, any consequences which result from acts or events other than those of the tortfeasor, which in practice functions only as a mechanism for interpreting a very limited scope of causation.[155] Strictly following this theory, even some damages caused by "fire" (as prescribed in the Taormina Draft) could be excluded, unless the damage was caused during the first seconds of direct fire from the plane crash without the assistance of any flammable catalyst. Since almost no disaster is created by a single cause in modern life (see examples in the following sections), the result would be too harsh for the Rome victim and would operate against the legislative intent of the Rome Convention. Nevertheless, as indicated above, since only limited kinds of damages are compensable under the regime as a matter of policy, the "direct consequence" theory could still serve as a reminder that some limits must be placed on the operator's liability,[156] especially

[154] French Civil Code, Art. 1151: "Dans le cas même où l'inexécution de la convention résulte dû dol du débiteur, les dommages et intérêts ne doivent comprendre, à l'égard de la perte éprouvée par le créancier et du gain dont il a été privé, que ce qui est une suite immédiate et directe de l'inexécution de la convention. (Even in the case where the inexecution of the agreement results from the wilfullness of the debtor, damages are to include, with regard to the loss incurred by the creditor and the gain of which he has deprived, only what is an immediate and direct consequence of the inexecution of the agreement.)" For the English version, see J. H. Crabb, *The French Civil Code*, (South Hackensack: F.B. Roth man & Co., 1977) p.223); Belgium Civil Code, Art. 1151 (as above), Italian CIvil Code Art. 1223: "Il risarcimento del danno per l'inadempimento o per il ritardo deve comprendere cosi la perdita subita dal creditore come il mancato gradagno, in quanto ne siano conseguenza immediata e diretta (The measure of damages arising from non-performance or delay shall include the loss sustained by the creditor and the lost profits insofar as they are a direct and immediate consequence of the non-performance or delay)." For the English version, see M. Beltramo, G. E. Longo, J. H. Merryman, *The Italian Civil Code*, (N.Y.: Oceana Publications, Inc. 1969), p.323).

[155] See the following French decisions: Cons. d'Et, 21 May 1948: 1948 2 Gaz.Pal.48 (aggravation of damage); *Veuve S...c. C^ie française de Produits pétrolifères et C^ie d'assur La Paternelle*, Trib. com. Seine, 22 June 1949: 1949 Recueil Dalloz 471 (suicide); *Vve de C...et C^ie d'assur Le Nord c. Facon*, Cour Amiens, 24 Nov. 1953: 1953 2 Gaz. Pal. som.25 (aggravation due to untimely medical treatment); Cons. d'Et. 15 June 1955: 1955 Recueil Dalloz 790 (aggravation of health); *Cons. Pineaud c. Lasfargue*, Cour d'Appel de Bordeaux, 3 July 1956: 1957 Recueil Dalloz 156 (suicide).

[156] See A. M. Honoré, *supra* note 103, at p.43.

when causation is interrupted by other new events.[157] For example, suppose a victim who was seriously burned by a post-crash fire was later killed in a highway accident while being rushed to the hospital; since the chain of causation between the plane crash and the death of victim in this case was broken by a highway accident, the damages incident to death are indirectly related to the Rome accident.

There is little doubt about relatively evident consequences of falling aircraft, things, or persons under the basic "proximate cause" formula of modern torts causation. Not only would the damage created by the aircraft itself, *e.g.*, upon being hit by its debris, be a direct consequence of the incident, but injuries caused by shattering window glass or falling walls resulting from contact with the ground, or those suffered by the cabin crew on a commuting bus when the latter tries making an emergency turn to avoid hitting the surrounding wreckage, should also positively be treated as outcomes of the Rome accident, for such harms are incident to the hazardous nature of plane crashes. No matter how fragile the structure of the relevant architecture or how clumsy the driving technique, the operator must take his victims as he finds them.[158] The same reasoning is applied to post-crash fires spreading to an adjoining area and ignited by the aircraft's blaze: the operator must assume liability regardless of how far the fire spread and how severe the damages caused,[159] *e.g.*, even if the fire spreads from the crash site to neighboring gasoline tanks or gas storage reservoirs and eventually results in a blistering explosion. Since the crash blaze is a *causa sine qua non*, it is irrelevant that the injury is greater than expected or even wholly unexpected.[160]

[157]See R. Schleicher, F. Reymann & H.J.Abraham, *infra* note 240, at p.201, and Y. Yamazaki, *infra* note 240, at p. 89.

[158]See *Dulieu* v. *White* [1901] 2 K.B. 669 at 679 (Kennedy, J.), and *Bourhill* v. *Young* [1943] A.C. 92 (H.L.Sc.) at 109 (Lord Wright).

[159]Similar facts can be found in *Re Polemis*, [1921] 3 K.B. 560 (C.A.) at 568.; For an Australian court decision, see *Haileybury College* v. *Emanuelli*, [1983] V.R. 323.

[160]See *contra* G. N. Calkins, *supra* note 79, at p.161, also A. W. Knauth, "Comments on Taormina Revision of the Rome Convention on Damage Done by Foreign Aircraft to Persons and Property on the Surface" (1950) 17 J.Air L. & Comm. 200, at p.205 ("The text should cut off causation at some point—indirect damage—consequential, loss of profits damage, serial damages, damages different in time—there are numerous reasonable stopping places in the chain of causation").

Accordingly, even when the personal injury sustained comes as the result of certain latent physical disabilities aggravated by the accident[161] - such as the sudden heart attack suffered by a ground worker with a pre-existing cardiac disorder while running away from the crash site - it should still be subsumed as a direct consequence of the plane crash. The same conclusion is reached for the thin-skull plaintiff who maintains a weak, "eggshell" physical condition (*e.g.*, congenital haemophilia) or personality (*e.g.*, a pre-existing nervous disorder).[162]

As for the more contentious compensation categories of mental distress or nervous shock, since Article 1 of the Rome Convention simply provides that "damage" sustained on the ground is recoverable, in the absence of phrases like "*lésion corporelle*" or "bodily damage" which appear in the Warsaw Convention of 1929 and its amendments, there is no occasion to take painstaking measures to exclude mental injury from the compensation scheme.[163] Furthermore, there seems to be no reason for precluding any kind of mental injury through various theories;

[161]See *Love* v. *Port of London* [1959] 2 Lloyd's Rep. 541(weak heart) and *Bishop* v. *Arts & Letters Club* (1978) 83 D.L.R. (3d) 107 (plaintiff was a congenital haemophiliac). However, the famous decision of Reichsgericht, Germany on 4 July 1938, which refused the damage claim made by a breeder of the fragile silver fox, could underline diverse points of view: see the case brief in (1952) ZFL 370.

[162]See *Malcolm* v. *Broadhurst* [1970] 3All E.R. 508 (Q.B.) (plaintiff with a pre-existing nervous disorder which was exacerbated by co-injured spouse).

[163]It is commonly argued in doctrine and jurisprudence that the Warsaw Convention is an international treaty and must be interpreted without reference to any national jurisdiction; therefore, the only correct answer to the definition of "lésion corporelle" would be in the authentic text, *i.e.*, the official French language version. See E. Giemulla & R. Schmid, *supra* note 105 and *Herman* v. *TWA*, 12 Avi 17, 634 (Sup.Ct.N.Y.1972); *Corocraft et al* v. *Pan American World Airways*, [1968] All E.R. 871 (Q.B.) *revd.* in *Fothergill* v. *Monarch Airlines*, [1980] 2 All E.R. 696 (C.A.); *Cie Air France* v. *Consorts Teichner*, Cour Supreme d'Israel, 22 Oct. 1984: 1988 33 Euro.Trans.L. 87 at 94-6. The US Federal Supreme Court therefore found that pure mental injury is not recoverable under the Warsaw Convention, relying chiefly on the reason that the French legal meaning of the phrase "lésion corporelle" does not seem to cover psychological injury, nor had the latter ever been recognized in the relevant French judicial practice. It is true that the intent of the drafters has also been mentioned by the court, but no definite support could be derived from the minutes: see *Eastern Airlines, Inc.* v. *Floyd*, 111 S. Ct. 1555, 469 U.S. 904 (1991). Thus far, the argument is only partially convincing, because there are still many loopholes left in the Warsaw articles that must necessarily be interpreted by the national law of the forum; following this reasoning, the reference should not be circumscribed solely by the French legal meaning and judicial practice, as the choice of French as an official language for the text was based mostly on the fact that it was the common diplomatic language at that time. Referring to the Minutes of the Warsaw Conference, one realizes that the legal implications of many different legal systems were moderated and used in the drafting of the Convention.

while recognizing that mental injury is compensable under the Rome regime, the statutory "direct consequence" requirement can always limit damages according to causation.

In practice, the parasitic psychic trauma which is ancillary to the actual impact of bodily injury - like the post-traumatic shock caused by aesthetic damage from the fire[164] - or which is revealed in the substantial and objective form of physical symptoms, *i.e.*, in its physical impact or consequences, such as the miscarriage by an on-site pregnant ticket agent due to nervous shock suffered in the crash,[165] is no different from any other regular physical injury and shall undoubtedly be conceived as a direct consequence of the incident.[166] Purely mental injury, on the other hand, is more likely to undergo circumspection due to its imaginary and proliferating nature;[167] it is subject to the "proximity of the impact risk" test derived from the theory of foreseeability (which is no longer requisite in the Rome case), in order to fulfill the legislative intent behind the

[164]See *Enge* v. *Trerise*, (1960) 26 D.L.R. (2d) 529; for a German court decision see Bundesgerichtshof, 11 May 1971: 1971 NJW 1883; 1971 VersR 905, 1140 ("[O]ur law consciously rejects any claim for harm due to psychical pain unless it results from injury to the plaintiff's own body and health"). For the English version of this decision see B. S. Markesinis, *infra*, at 109. A similar theory is adopted in French and Belgium treatise: see H. McGregor, *infra* note 165, at p.60.

[165]Similar facts can be found in *Dulieu* v. *White*, *supra* note 158. For a German decision along the same line, see Bundesgerichtshof, 4 April 1989: 1989 NJW 2317, which rendered that mental pain, in the medical sense, is always linked to disturbances in the victim's physiological make-up and can be directly relevant to his bodily state. Therefore, psychological and mental effects which exceed by some degree the considerable detriment caused by the painful trauma to a person's general state of health, and which can therefore be regarded in accordance with the general view as injury to the body or to the health of the victim, should be compensable. For an English version of the judgment, see B. S. Markesinis, *A Comparative Introduction to the German Law of Torts*, 3d ed (Oxford: Clarendon Press, 1994), at p.114.

[166]For a similar opinion, see H. McGregor, "Personal Injury and Death" in A. Tunc, ed. *International Encyclopedia of Comparative Law*, (Tübingen: J.C.B.Mohr, 1986) Vol. XI Torts, Ch.9, at p.40.

[167]See *Victorian Rly* v. *Coultas*, (1888) 12 A.C. 222 (H.L.), at 226. Hereinafter, purely mental injuries refer only to those allegedly sustained by living victims and do not include the "pre-death pain and suffering" allegedly sustained by the deceased, because the latter is undoubtedly a "direct consequence" of the accident if proven. See, *e.g.*, *In re Air Crash Disaster at New Orleans, Louisiana on July 9, 1982*, 767 F.2d 1151 (5th Cir. 1985) (The victim who was killed by falling aircraft debris was found in a crawling position and died from third degree burns over her entire body). The only remaining question for the court is whether the deceased truly suffered pre-death pain.

"direct consequence" requirement. Accordingly, nervous shock resulting from fear of injury to oneself, which could be objectively measured by the distance between the victim and the crash site or the zone of physical risk so as to fall within the standard of a "direct consequence,"[168] along with proof that its aggravation was serious and genuine, is compensable;[169] similarly, nervous shock resulting from fear of injury to a close relative[170] is compensable if the bystander himself was physically within the area of impact.[171] Damage awards for mental

[168]An interesting example can be found in *Rehm* v. *United States*, 196 F. Supp. 428 (EDNY, 1961), in which the victim's automobile collided with a carrier plane forced to land on the highway. The victim was conceived as suffering "an appalling experience when she saw the large airplane land on the Parkway and approach the car in which she was riding. She undoubtedly sustained a shock to her nervous system as a result thereof" (at 430). Another good example is found in *Di Costa* v. *Aeronaves de Mexico, S.A.*, 24 Avi 17, 139 (9th Cir. 1992): though the plaintiffs in *Di Costa* were not physically damaged by the planes crash in their neighborhood, their claims for mental distress thus sustained were justified because they were based upon the victims' reasonable fear for their own safety at the time of the incident.

[169]An additional requirement on pure mental injuries sustained is fear for one's own safety, advocated by W. L. Prosser & W. P. Keeton, in *Prosser and Keeton on the Law of Torts*, W.P.Keeton, et al. ed. 5th (St. Paul: West Publishing Co., 1984), at p.362 and supported by US jurisprudence (see note 32). However, no aviation cases were included, revealing the fact as asserted by McGregor that "the USA has been notoriously slow in recognizing liability for physical injury resulting from nervous shock:" see H. McGregor, *supra* note 166, at p. 40.

[170]"Near relatives" include spouses, parents and children, or partners of *de facto* relationships: see J. G. Fleming, *The Law of Torts*, *infra* note 274, at p. 164. One Commonwealth court was not as stringent on the definition of "near relatives:" sometimes siblings, other remote relatives, or even fellow employees could qualify. See, *e.g.*, *Mount Isa Mines* v. *Pusey*, (1970) 125 C.L.R. 383.

[171]*Bourhill* v. *Young*, *supra* note 158, *Sinn* v. *Burd*, 404 A.2d 672 (Sup.Ct.Pa. 1979) and *Cassidy* v. *Aerovias Nacionales de Columbia, S.A.*, 24 Avi 18, 240 (EDNY, 1994). Some US cases, however, simply refused recovery for mental anguish suffered as a result of injury to another person unless otherwise expressly provided by statute, regardless of whether the bystander is within the zone of impact. See *LeConte* v. *Pan American World Airways*, 18 Avi 18, 096 (5th Cir. 1984) (law enforcement officers were mentally disturbed in photographing and handling bodies of those who died in an airplane crash), and *Tudela* v. *Pan American World Airways*, 19 Avi 17, 458 (5th Cir. 1985) (persons who witnessed the crash from three blocks away suffered post-traumatic stress disorder; the judgement reflected the reasoning in *LeConte*.) German jurisprudence, on the contrary, has dispelled the proximity restriction for the near relative who suffers pure mental distress upon learning of the accident much later. According to the decision of Reichsgericht, 21 Sept. 1931: 133 RGZ 270, a mother who suffers nervous breakdown while receiving the news of the accidental death of her son will be granted compensation even if she was not present at the scene. The damage sustained is not indirect, since there exists adequate causality between the accident and the mother's nervous breakdown. This relatively liberal interpretation of causation has since been followed in subsequent German court decisions: see 1971 BGH NJW 1883 and 1985 NJW 1390. An English version of the judgment 133 RGZ 270 can be found in B. S. Markesinis, *supra* note 108.

anguish has also been allowed to the owner who witnesses his property being destroyed by an incident,[172] though the victimized owner must also be present within the zone of danger when the ordeal occurs before the trauma is considered to be a direct result of the crash.[173] Shock caused by the death of an individual, as seen in a television broadcast or newspaper report while absent from the crash scene, is not recoverable.[174]

Some difficulties might be encountered when defining phrases like "at the time of the incident" or "when the ordeal occurred," even if the mentally-distressed victim was indeed geographically present, since a plane crash may result in explosions and post-crash fires which continue for hours or days, and since the scattering of a huge amount of wreckage and human remains might also require time-consuming rescue and clean-up efforts. The time span covering the entire incident would therefore be inevitably prolonged, and consequently the amount of possible damages might proliferate. Certain decisions in US jurisprudence have tried to close this floodgate in prescribing that mental distress caused by witnessing the demolition of the victim's house four days after the impact, due to serious contamination of the jet fuel, is not a direct consequence created "at the time of the crash,"[175] any more than the post-traumatic nervous shock suffered by plaintiffs who witnessed their house near a crash site turned into an evacuation

[172]See *Attia* v. *British Gas Plc.*, [1988] 1 Q.B. 304 (C.A.) (the plaintiff suffered psychiatric illness caused by witnessing the burning of her own house and possessions); *Davies* v. *Bennison* (1927) 22 Tas.L.R. 52. But the common law of some US states, like New York, prescribes that unless the tortfeasor owes a specific duty to the victim, rather than a mere general duty to society, the victim's mental injury caused by witnessing his property destroyed in the incident cannot be recovered. See *Tissenbaum* v. *Aerovias Nacionales de Columbia, S.A.*, 24 Avi 18, 428 (EDNY, 1995). In *Tissenbaum*, the court held that the direct duty owed by an air carrier to its passengers and crew, to provide them with safe passage on the flight, could not be extended to all non-passengers: "[t]o hold the airline responsible for the possible emotional injury for such a large and indeterminate group of people would be to expose airline to 'virtually limitless ... tort liability' and to create untold economic and social burden." However, this impugned duty toward non-passengers is necessarily legitimized in the Rome Convention of 1952.

[173]In *Mergen* v. *Piper Aircraft Co.*, 19 Avi 18, 349 (Dist.Ct. La. 1986) the owner whose house was destroyed by a plane crash was refused compensation for her mental injuries because for she was not within or nearby the impact zone when the incident happened.

[174]See *Alcock* v. *Chief Constable of South Yorkshire* [1991] 3 W.L.R. 1057 (H.L.) (shock caused upon hearing a radio broadcast).

[175]See *Turgeau* v. *Pan American World Airways, et al.*, 19 Avi 17, 452 (5th Cir. 1985).

center and eventually a temporary storage space for cadavers.[176]

An interesting problem arises concerning rescuers who suffer injury at the crash scene. When a person suffers injury while trying to rescue another in a situation of danger, a dichotomy is always interposed in the assessment of liability: the rescuer who knowingly exposes himself to danger is charged with a voluntary assumption of risk, though his heroic action, which is morally praiseworthy in terms of public policy, should be encouraged. Thus, the establishment of proximate causation between the rescuer's injury and the wrongdoing depends entirely upon whether the latter outweighs the former. A lenient approach towards the rescuer is generally adopted by most of systems which advocate Good Samaritanism.[177]

Under the common law system, physical injuries sustained by those persons who take steps to rescue imperiled victims will be treated as a direct consequence of the plane crash; pursuant to the commonly-recognized "danger invites rescue" doctrine, the same risk that jeopardized the rescued victim affects the rescuer,[178] so the aircraft operator owes an independent duty of care to that rescuer who reasonably believes that his act is necessary,[179] whether or not the incident actually requires spontaneous or instinctive action from the rescuer[180] or whether or not the rescue effort is successful. Though no similar doctrine exists in the civil law of torts, and liability towards the rescuer therefore generally refers to causation, the final outcome is almost the same as that of the common law, which treats the self-sacrificing rescuer's intervention as "nearly always automatic, so that the injuries suffered in doing so [are] ... undoubtedly adequate consequences of the

[176]See *Tissenbaum* v. *Aerovias Nacionales de Columbia, S.A., supra* note 172, at 18, 429.

[177]See also A. M. Honoré, *supra* note 103.

[178]See the immortal phrase by Cardozo J. in *Wagner* v. *International Ry. Co.*, 133 N.E. 437 (N.Y.Ct.App. 1921): "Danger invites rescue. The cry of distress is the summons to relief....*The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescurer* [emphasis added]."

[179]See *Ellmaker* v. *Goodyear Tire & Rubber Co.*, 372 S.W.2d 650 (Mo.App.1963).

[180]In *Parks* v. *Starks*, 70 N.W.2d 805 (Sup.Ct.Mich. 1955), a time lapse of nine hours occurred before the rescue was started, and in *Cassidy* v. *Aerovias Nacionales de Columbia, S.A., supra* note 171, it was one hour after the crash.

wrongful act."[181] The risk arising from rescue is assumed to be subjectively and objectively foreseeable to the tortfeasor, due to the notion that the accident caused by him has generated the rescue, evidencing an adequate causal connection between the accident and injuries sustained by the rescuer.[182]

Nevertheless, as for purely emotional trauma sustained during rescue efforts, the Good Samaritan is treated as no more than a bystander due to policy considerations, and the above-mentioned bystander rules would therefore apply.[183]

If it was an employee of the aircraft operator who voluntarily joined the rescue and subsequently injured himself, would he fall under the exclusion clause provided in Article 25 of the Rome Convention?[184] This question is resolved by determining whether the rescue efforts which led to his injury or death were within or beyond the scope of his authority. Generally, it is the duty of the airport's firefighting and rescue services - or those of other on-site administrative authorities - to extinguish the fire ignited by a plane crash and to effect rescue efforts. Unless operating under the express or tacit direct command of the operator,[185] a rescue by employees such as ground personnel will inevitably constitute an act whereby they voluntarily expose themselves to peril which is not necessarily inherent in or reasonably incident to his work,[186] *i.e.*, an act outside

[181]See Judgment of the Court of Appeal of Stuttgart, 24 November 1964: 1965 NJW 112. For an English version of this judgment, see B. S. Markesinis, *supra* note 165, at pp.629-30.

[182]*Id*, at p.631. See also H.L.A. Hart & T.Honoré, *Causation in the Law*, 2d ed (Oxford: Clarendon Press, 1985), at p.147.

[183]See *Cassidy* v. *Aerovias Nacionales de Columbia, S.A., supra* note 171. In*Cassidy* , the court rejected the rescuer's pure mental injury claim based on a stringent bystander test, proclaiming that the rescuer who entered the crash site an hour after the impact occurred was not within the zone of danger.

[184]For a detailed discussion on the exclusion clause, see the following Section 2.2.2 of this chapter.

[185]See *Nashville, C.,& ST.L.Ry.Co.* v. *Cleaver*, 118 S.W.2d. 748 (Ky.App. 1938): "Generally, a worker acting under his employer's ... command or treat does not assume risk incident to his task, unless he certainly knows or appreciates danger, or it is so obvious or imminent that ordinarily prudent man would not be willing to encounter it even under orders of one in authority over him."

[186]See *Bugh et al.* v. *Employers' Reinsurance Corp.*, 63 F.2d 36 (5th Cir. 1933), and *Sheboygan Airways Inc.* v. *Ind. Comm. infra* note 226.

the scope of their employment, and thus the damages resulting therefrom are not covered by the applicable workers' compensation system. Consequently, an employee rescuer who suffers injury due to his voluntary acts involving his employer's falling plane ironically escapes from the exclusion clause in Article 25 of the Convention and is eligible to lay a Rome claim against the operator.

Another question relates to airport firefighters or other personnel who have a contractual duty to rescue. It has long been recognized in the tort law of some US states that negligence in causing a fire furnishes no basis for liability toward a professional fireman injured in fighting the fire,[187] for "it is the fireman's business to deal with that very hazard and hence, perhaps by analogy to the contractor engaged as an expert to remedy dangerous situations, he cannot complain of negligence in the creation of the very occasion for his engagement;" following the emergence of new social hazards which may be more dangerous than fire, the "firefighter" in this rule consequently embraces the broad categories of police officer,[188] firefighters or other professional rescuers who sustain injury during the discharge of duties for which they are called to the accident scene.[189] The public policy underlining this "firefighter rule" conceives that "it will be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable, although negligently created, occurrences."[190] Accordingly, firefighters or other professional rescuers such as police officers, ambulance drivers, or medical personnel who are injured in performing their rescue service at the relevant site will be prohibited from claiming common law tort remedies against the negligent householder or

[187]See *Walters* v. *Sloan*, 571 P.2d 609 (Sup.Ct.Cal. 1977), at 610, *Solgaard* v. *Guy F. Atkinson Co.*, 491 P.2d 821 (Cal. 3d, 1971), *Maltman* v. *Sauer*, 530 P.2d 254 (Wash. 2d, 1975), *Erickson* v. *Toledo, Peoria & Western Railrad*, 315 N.E.2d 912 (Ill.App. 1974), *Spencer* v. *B.P.John Furniture Co.*, 467 P.2d 429 (Sup.Ct. Or. 1970), *Chesapeake & Ohio Railway Co.* v. *Crouch*, 159 S.E.2d 650 (Sup.Ct.Va. 1968), *McGee* v. *Adams Paper & Twine Co.*, 271 N.Y.S 2d 698 (N.Y.App.div. 1966), *Aravanis* v. *Eisenberg*, 206 A.2d 148 (Sup.Ct. Md. 1965), *Buren* v. *Midwest Industries, Inc.*, 380 S.W.2d 96 (Sup.Ct. Ky. 1964), *Jackson* v. *Velveray Corp.*, 198 A.2d 115 (N.J.Super. 1964).

[188]*E.g.*, in *Walters* v. *Sloan, supra* note 187.

[189]See also *Price* v. *Morgan*, 436 So.2d 1116 (Fla. 5th DCA. 1983), *review denied*, 447 So 2d 887 (Fla.App.1984)

[190]See *Krauth* v. *Geller*, 157 A.2d 129 (Sup.Ct.N.J. 1960), at 130-1.

landowner, and by analogy, from bringing a Rome action which belongs by nature to a special branch of tort law against the operator of an imperiled aircraft, whether the injury is sustained within the wreckage or merely in its vicinity.[191] Any damages sustained will be redeemed exclusively through the applicable state workers' compensation statutes or other special employment benefit systems.

However, this "firefighter rule" has never been popular in British and other Commonwealth courts.[192] It is usually conceived in these bodies of jurisprudence that since the firefighter or other professional rescuer is under a general duty to intervene - protecting life and property, extinguishing the fire, or performing other rescue efforts - the possibility of injury to them by flame, heat, explosion or other hazards is foreseeable by the person who negligently causes peril to the life or safety of others. Even if the rescuers exercise all due skill and caution, the peril is a proximate cause of their injury; thus there is no valid reason to subject the firefighter or other professional rescuer to some peculiar categorization with respect to compensation. Following the above reasoning, the Rome operator is presumed to bear in mind that if the aircraft crashes on the ground, firefighters and other professional rescuers may be required to save lives and extinguish fires or explosions, and if they are consequently injured, their injuries are a direct consequence of the crash, constituting due cause to raise the Rome action.

The final line of Article 1, section 1 of the Rome Convention is chiefly intended to safeguard operators from the expected countless actions in trespass and nuisance[193] due to sonic boom,[194] which could still be conceived as a direct

[191]A good example is found in *Rishel* v. *Eastern Air Lines, Inc.*, 19 Avi 17, 859 (3d Cir. 1985). In *Rishel*, a police officer was injured when summoned to escort an intoxicated passenger out of an airplane. The court dismissed the police officer's common law tort action against the airline, asserting that absent willful or wanton misconduct, neither a fireman nor a policeman may recover from a property owner for injury arising out of the discharge of professional duties, "even though the injury have not occurred on the premises" (in 17, 860).

[192]For decisions of Great Britain see: *Haynes* v. *Harwood*, [1934] 2 K.B. 240 (police officer), and *Ogwo* v. *Taylor*, [1988] 1A.C. 431 (H.L.)(fireman); for New Zealand, see: *Russell* v. *McCabe*, [1962] N.Z.L.R. 392 (C.A.)(fire fighter).

[193]See *Ferguson* v. *City of Keene*, 11 Avi 18, 244 (Sup.Ct. N.H. 1971).

[194]The sonic boom is a phenomenon produced by an aircraft flying at or in excess of the speed of sound. At such speeds, the aircraft pushes the air aside and produces both pressure and sound waves that descend to the ground in a conical configuration, wider at the bottom than at

consequence of the flight operation.[195] If the aircraft in flight has followed existing air traffic regulations[196] and operated normally, damage resulting from the mere fact of its passage through airspace will not be compensated. Accordingly, a freight handler who suffers hearing impairment due to his long-term exposure to sonic boom while working near the traffic apron cannot lay a Rome claim against his employer or other airlines, unless certain evidence of traffic regulations violated by the latter is provided, such as a manifestly low-altitude flight due to the pilot's malpractice. Nevertheless, the employee might still be eligible for collateral workers' compensation relief on the same account, since the compensation system usually provides for a much more broader scheme of benefits.[197]

2.2.2 Restrictions on the Plaintiff: Article 25 of the Rome Convention of 1952

the top. This rapid change of pressure is relatively small and commonly conceived to be harmless to both people and physical structures on the ground, but the shock-wave subsequently generated might produce detrimental effects under certain circumstances: see *Cunliffe* v. *County of Monroe*, 12 Avi 17, 217 (Sup.Ct. N.Y. 1970) ("[T]his court must find that the noise levels, while annoying, were insufficient to render the subject properties substantially uninhabitable and compensable as such as so-called de facto taking" at 17, 221); *United States* v. *Gravelle*, 10 Avi 18, 257 (10th·Cir. 1969). For a detailed description of the technical aspects of the sonic boom, see W. F. Baxter, "The SST: Form Watts to Harlem in Two Hours", (1968) 21 Stan. L.Rev. 1, T. P. Keenan, "*Nelms* v. *Laird*: Absolute Liability Shattered by Sonic Boom" (1974) 16 Air Force L. Rev. (No.4) 29, at p.30 and G. F. FitzGerald, "Aircraft Noise in the Vincinity of Aerodromes and Sonic Boom" (1971) 21 U.of T. L.J. 226, at pp.230.

[195]In an earlier case (*United States* v. *Causby*, 328 U.S. 256 (U.S..Sup.Ct. 1946)), the US court rejected the claim in trespass made by parties on the ground against operators of the aircraft flying overhead at high altitude, because "[t]he air is a public highway ...every transcontinental flight would subject the operator to countless trespass suit. ...To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest:" at 260-1. In *Laird* v. *Nelms* 406 U.S.797 (1972), however, the Federal Supreme Court began to analogize "the pressure wave of air characterizing a sonic boom to the concussion that on occasion accompanies blasting," and treat the air wave striking the land of a property owner as a "*direct intrusion* caused by the pilot of the plane in the mold of the classical common law theory of trespass [emphasis added]:" at 800. The German Reichsgericht also held that there exists insufficient causation between the overflight and ground damage: see *Sprenger* v. *Lufthansa*, 4 July 1938: 1938 RGDA186.

[196]As FitzGerald pointed out, unfortunately, most air traffic regulations make no provision for permissible noise levels: see G. F. FitzGerald, "Aircraft Noise in the Vicinity of Aerodromes and Sonic Boom", *supra* note 194, at p.233. Yet there are other regulations, such as those requiring safe levels of flight altitude over land, which could be used by potential victims.

[197]See the following Sections **2.2.3.B.** and **2.3.2** of this chapter.

It would not be extraordinary for the ground crew of an Australian airline to be hit and damaged by debris from a crashed aircraft, operated by their employer, while driving passengers from the transit hotel to the parking lot at the Cairo airdrome where they worked.[198] Unfortunately, restrictions contained in the Convention itself would leave these employees with only the slimmest chance of recovery for their industrial injuries through Rome litigation.

Pursuant to its Article 25, the Rome Convention does not apply to surface damage if liability for such damage is regulated either by contract between the victim and the operator (or person entitled to use the aircraft at the time the damage occurred), or by the workers' compensation laws applicable to the contract of employment between such persons.

It would be curious for persons to indemnify themselves for potential surface damages in a contract with the aircraft operator before the accident. Airport operators who are not in any employment relationship with the operator of the aircraft are often erected as possible candidates,[199] but even if airport operators enter into a contract to cover their ground damages, it is unclear whether this contractual waiver of the Rome Convention could extend to their employees, who are the actual focus of the contract.

For damages sustained by the ground employee at the fault of an aircraft operator, the applicable national workers' compensation laws apply "without interference"[200] from the Convention. Koval has convincingly argued that the persons prescribed in Article 25[201] are validly excluded from coverage under the Convention because its major purpose is to protect the interests of third parties who suffer prejudice as a result of an aircraft accident but have no direct connection

[198]Australia and Egypt have both ratified the Rome Convention of 1952. For more on the history of the 1933 Convention, see A. Vamvoukos, "The Rome Conventions of 1933 and 1952: A Comparative Analysis" in Vol.X (1981) Thesaurus Acroasium 731, at pp.758-(some errors exist in the quotations).

[199]H. Drion, *Limitation of Liabilities in International Air Law*, (The Hague: Martinus Nijhoff, 1954) at p.83; J. Koval, *supra* note 79, at p.201; L. I. Shelley, *infra* note 208,

[200]J. Koval, *id.*

[201] J. Koval, *id.*, at pp. 200-.

with the flight which caused the damage. Those persons who are engaged by the flight operator, on the other hand, are expected to share the risks of the enterprise and are accordingly afforded no special treatment under the Convention. The airport operator is therefore presented as a typical example; he is presumed to have the expert knowledge and position to calculate the risks of doing business in the industry before he enters into the surface vicinity, and therefore, no additional measures of protection, like that provided in the Convention, are necessary. This explanation would also suit the airline maintenance crew who work mainly on the traffic apron.

2.2.3 Criticisms of the Restrictions on the Plaintiff[202]

A. Introduction

Article 22 of the unsuccessful 1933 Rome Convention provides only that "[t]he present Convention shall not apply to damages caused on the surface, *the compensation for which is governed by... a labour contract entered into between the injured party and the one* upon whom liability falls under the terms of the Convention."[203] As with the similar Article 24 of the Mexico City Draft,[204] this

[202]This problematic article did not arouse any interest within the ICAO Legal Committee during its preparatory work from 1965 to 1978, nor at the International Conference on Private Air Law in 1978, which adopted the Montréal Protocol as an amendment to the Rome Convention of 1952. See G. F. FitzGerald, "The Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 1952) Signed at Montréal, September 23, 1978", *supra* note 132.

[203]"Convention for the Unification of Certain Rules relating to Damage Caused by Aircraft to Third Parties on the Surface Signed at Rome, May 29, 1933 [emphasis added]." For the official text, see: U.S. Dep. of State, Foreign Relations of the United States: 1933, I: 968-977 (1950), also in M. Evans, ed. *Transport Laws of the World*, (Dobbs Ferry: Oceana Publications, Inc., 1992), *Vol.* 3, Air I/C/2 1. The Rome Convention of 1933 was adopted by the Third International Conference on Private Air Law at Rome on 29 May 1933 - by 38 delegates from 21 countries - full of vague articles which arose from pervasive disagreement and dissatisfaction. The Convention was signed by delegates of twenty states, but has only been ratified by six (Belgium, Brazil, Guatemala, Italy, Roumania and Spain; later joined by Haiti and Rwanda through accession and succession); though it entered into force on 11 February 1942, it was eventually delivered into the document graveyard, provoking the ICAO Legal Committee to erect the revised 1952 Convention. For a detailed description of the drafting history and a comparison between the 1933 and 1952 versions, see E. G. Brown, "The Rome Conventions of 1933 and 1952: Do They Point a Moral?" (1961-2) 28 J. Air L. & Com. 418, at pp. 418-423.

[204]The Draft was prepared by the Seventh Session of the ICAO Legal Committee, held at

provision fails to specify that the excluded damage shall be regulated by "the law relating to the workers' compensation applicable to a contract of employment between such persons," as stipulated in Article 25 of the 1952 version. This major alteration is the brainchild of the US delegate who initiated the proposal through a representative of the International Air Transport Association (IATA) in the International Conference at Rome.[205] In its proposal, the IATA asserted that most workers' compensation laws applicable to ground employee who have suffered damages, at least in the US, are not simply of a contractual nature. Therefore, the original wording could create serious issues for the forum.[206]

The insertion of these phrases might not serve any useful purpose, as Drion has pointed out,[207] since it did not resolve the problems originating with the 1933 version or the Mexico City Draft, and its application creates even more frustration than its predecessors.

B. The Artificial "Connection with Aviation"

Potential plaintiffs who are excluded from coverage by either Article 22 of the 1933 Convention or Article 25 of the 1952 version have been roughly categorized

Mexico City in 1951. Article 24 of the Mexico City Draft reads: "This Convention shall not apply to damage on the surface if liability for *such damage is regulated* either by a contract of carriage between the person who suffers such damage and the operator or the person entitled to use the aircraft at the time the damage occurred, or *by a contract of employment between such persons* [emphasis added]." See ICAO, *Conference of Rome Documentation, infra*, at p.19, also (1951) 18 J. Air L. & Com. 98-108 .

[205]See the "Addendum to Synthesis of Comments and Proposals received from States and International Organizations on the Mexico City Draft Convention and on the Concil's Proposals in respect of the Economic Aspects thereof" in ICAO, *Conference of Rome Documentation,* (Montréal: September 1952), pp. 251 & 263.

[206]See the "Addendum to Synthesis of Comments and Proposals received from States and International Organizations on the Mexico City Draft Convention and on the Council's Proposals in respect of the Economic Aspects thereof" *id*. at p.274. The IATA offered the following comments: "that the exception should cover not only cases where damage is regulated 'by a contract of employment,' but also 'by the law relating to workmen's compensation applicable to a contract of employment.' Otherwise, serious questions would arise as to whether the exclusion covers cases in many of the United States where Workmen's Compensation laws are not a matter of contract." See also H. W. Poulton, *supra* note 132, at p.72.

[207]H. Drion, *supra* note 199, at p. 83.

as those who have a "connection with aviation,"[208] but such a categorization cannot envisage any substantive legal consequence other than the exclusion of all employees of the aircraft operator from the Convention's protection.

How does a labor contract or a contract of employment, serving as a basis for the application of workers' compensation systems, create a "connection with aviation" which consequently prevents employees of the culpable aircraft operator from attacking the latter through the Rome Convention? The most plausible explanation to this presupposition is the exclusivity of national workers' compensation systems, with which the Convention is not supposed to interfere.[209] The rationale of this explanation, however, would depend upon certain causation between the employment and the risk of injury by falling aircraft or other debris, especially those of the employer. In accordance with this orthodox justification for the exclusivity the compensation system, such damage constitutes an inevitable "cost" of this "accident prone"[210] activity which simultaneously benefits the employer and the employee and is best covered under a program of social insurance; the employee is thus deprived of the civil tort remedy. However, the basic foundation of the compensation system — that the accident must be connected with the employment, generally according to the notorious "during (or in or out of) the course of employment" test[211] - represents the first step in exploring the validity of such a Rome "connection:" namely, whether or not the damages caused by "an aircraft in flight" or by "any person or thing falling therefrom" is necessarily an accident arising out of, during, or in the course of employment. Furthermore, because the Rome Convention requires that the damage sustained must be "a direct consequence of the incident,"[212] closely related to the original cause of the

[208]L. I. Shelley, "The Draft Rome Convention from the Standpoint of Residents and Other Persions in This Country", (1952) 19 J.Air L. & Com. 289, at p.292.

[209]*Supra* note 200.

[210]See F. James & J. J. Dickinson, "Accident Proneness and Accident Law" (1950) 63 Harv.L.Rev. 769, at pp. 781-2.

[211]With respect to the application of the "in the course of employment" test in aviation cases, see below at Section **2.3.2.** of this Chapter.

[212]See *supra* note 78, Art.1, Section 1, and Section **2.2.1.B. v)** of this chapter.

accident, the following discussion will thus separate accidents into two categories. One type befalls an employee "during (or in) the course of employment" and has a direct connection with the space, time, and circumstances of the accident; the other occurs "out of the employment," referring to those which originate from the nature of work and require further interpretation with respect to causation, such as industrial disease, especially when latent physical conditions are aggravated by the accident.

i) In the Course of Employment

When the employment takes place simply within a fixed place and time, the Rome accident is undoubtedly treated as an accident occurring in the course of employment by British and other Commonwealth judicial authorities; a classical precedent can be found in *Thom* v. *Sinclair*,[213] where the employee was injured by a falling wall, built on the property of an adjacent owner, while she was working in a shed belonging to her employer. The court held that since the employee was present by reason of her work, the accident was work-related, whether the wall fell due to human power or the process of nature.[214] Therefore, by analogy, an airport supervisor would also be "in the course of his employment" if injured by falling debris while on the runway observing aircraft traffic patterns during working hours,[215] as would a mechanical technician who is working in the airport maintenance factory, *etc.*

However, the application of this "locality (or position) risk" theory is circumscribed by the nature of the employment concerned, while the strict two-tier statutory formula generally used may prove to be somewhat harsher for ground injuries to employees leading a much more perplexing and variously-patterned industrial life in aviation.[216] The "supervision test" is out of question, except for

[213][1917] A.C. 127 (H.L.Sc.).

[214]A similar reasoning was found in *Lawrance* v. *George Matthews Ltd.*, [1929] 1 K. B. 1(C.A.), in which the employee was hit by a falling tree at the regular place of employment.

[215]See the facts from *Lange, etc.* v. *Minneapolis-St. Paul Met. Airports Comm.*, 6 Avi 17,797 (Sup.Ct. Minn. 1959).

[216]See below at Section **2.3.2.** of this Chapter.

security guards and other airline employees whose freedom of movement is limited.[217] Major problems emerge from the notorious "public zone" test, which requires that the employee be within an area excluded from public access at the time of accident, so as to distinguish him from an ordinary member of the public;[218] if members of the public are able to make substantial use of the area, then the damages sustained therein would be excluded from coverage. Accordingly, for example, an airline stewardess injured by falling debris while she escorts descending passengers through the airport terminal may not seek recourse in damages from the compensation system because she was not within an area excluded from public access; the airport terminal is undeniably a place that could be substantially used by the general public. This rationale could be followed if the employee was engaged in recreational activities,[219] or if a commuting employee was injured on his way to or from work - unless transportation was provided by the employer[220] - for in either scenario the employee's position is no different from that of other members of the public engaged in recreation or travel and the employer exercises no control over him. However, this doctrine seems to be too rigid for those airline employees who cannot work at regular hours and in a fixed place; for example, on certain occasions the cabin crew are forced to stand by at a transit hotel, waiting for a delayed aircraft or unscheduled repairs, and it would be too restrictive to say that the accident occurring while they are subsequently transported to the terminal is not one which arises in the course of employment, for the employment relationship has in fact been expanded or extended to the period when they are on-call at the hotel;[221] the employment relationship has thus

[217]See *R.* v. *National Insurance Comr., ex parte Reed*, (1980) Appendix *R(I)* 7/80.

[218]See *Dennis* v. *White*, [1917] A.C. 479 (H.L.E.) and see also the Social Security Commissioner decisions: R(I) 84/51, 72/51, 7/62, *Northumbrian Shipping Co. Ltd.* v. *McCullum* (1932) 25 BWCC 284.

[219]See *R.* v. *Industrial Injuries Comr., es parte Michael*, [1977] 2 All E.R. 420 (C.A.).

[220]Some Canadian decisions awarded compensation when the employee was injured on a highway, but only if during working hours; ordinary commuting was generally excluded. See *Decision No. 536*, Ont., 1987, WCAT, *Decision No. 733/87*, Ont., 1988, WCAT.

[221]For US court decisions concerning the expansion or extension of the scope of employment, see: *Pasko* v. *Beecher Co.*, 221 N.W.2d 127 (Sup.Ct. Minn.1974), *Dahmen* v. *River Towers Corp.*, 218 N.W.2d 702 (Sup.Ct. Minn.1974).

never been suspended for these commuting employees. Furthermore, they are still presumably under the control of their employer while staying in temporary lodgings and transport vehicles provided by the latter.[222] However, a Canadian court fiercely refused to grant coverage to employees who regularly assume an ancillary presence in the territory— including those staying in a hotel, traveling to and from the airport, or leaving or entering the aircraft — because "any injury suffered during [a cabin crew's] actual presence in the province... [c]ould not be an injury 'in the course of employment.'"[223]

Coverage in parking lots is generally limited to those which belong to the employer,[224] meaning that airport parking lots are excluded, since they are almost all public utilities. Some compromises have been attempted in applying the "public zone" test, *e.g.*, if the work itself involves exposure to the inherent perils of a public area, as in the highway accident of a truck driver,[225] then it is irrelevant that the same peril is also encountered by other members of the public,[226] though

[222]For US court decisions concerning transportation provided for or remunerated by the employer, see: *Krause* v. *Western Casualty & Surety Co.*, 87 N.W.2d 875 (Sup.Ct.Wis. 1958), *Lucas* v. *Biller*, 130 S.E. 2d 582 (Va App. 1963), *Stillwell* v. *Iowa Natl. Mut. Ins. Co.*, 139 S.E.2d 72 (Va App. 1964), *Boyd* v. *Francis Ford,Inc.*, 504 P.2d 1387 (Or. App. 1973), *Perry* v. *American Bakeries Co.*, 136 S.E.2d 643 (Sup.Ct.N.C. 1964), *J.H.Tabb& Co.* v. *McAlister*, 138 So.2d 285(Sup.Ct.Miss. 1962), *Lee* v. *Florida Pine & Cypress*, 157 So.2d 513 (Sup.Ct.Fla. 1963), *Sherwood* v. *Lowe*, 628 S.W.2d 610 (Ark.App. 1982), *Owens* v. *Southeast Ark.Transp. Co.*, 228 S.W.2d 646 (Sup.Ct.Ark. 1950), *Reed* v. *Arthur*, 556 So.2d 937 (La. App. 1990).

[223]See *British Airways Board* v. *Workers' Compensation Board.* 7 D.L.R. (4th) 706 (Sup.Ct.B.C. 1983); see also *infra* note 503. This opinion by the B. C. Supreme Court was appealed, and strong discrepancies between the opinions of the Court of Appeal judges led the case to the Supreme Court of Canada, where it was ultimately refused. Even in his judgment, which upheld the lower court decision, Mr. Justice Macfarlane of the Court of Appeal admitted that "such incidental activities [by the cabin crew] may well occur 'in the course of employment:'" see 17 D.L.R. (4th) 36, at 57.

[224]See the following Canadian decisions: *Decision No.150*, Ont., 1986, WCAT; *Decision No. 879/87*, Ont., 1987., WCAT; *Matériaux de Construction Domtar et Paradis* [1986] CALP 98; *Centre Hospitalier Charles-Lemoyne et Duquette*, [1987] CALP 305.

[225]It was explicit in *Beaudry* v. *Watkins, et al*, 158 N.W. 16 (Sup.Ct. Mich. 1916) that a messenger who was struck down by a truck on the highway "was exposed by reason of the peculiar nature of his employment to the particular hazard which caused the injury." For similar decisions, see: *State* v. *Industrial Commission*, 195 N.W. 766 (Sup.Ct.Minn. 1923) (driver of a delivery truck), and *Chandler* v. *Industrial Comm. of Utah*, 184 P.1020 (Sup.Ct. 1919)(delivery man).

[226]For a British case, see *Dennis* v. *White, supra* note 218; for Australian cases, see *Campbell*

it is still difficult to identify employment which yields an inherent risk of accident under the Rome Convention. The airport, its vicinity, or the land beneath regular air routes are generally conceived to be accident-prone,[227] though the nature of international aviation activities which depend heavily on sophisticated flying components could result in the occurrence of a Rome accident within a much wider area and inevitably obscure the margin of risk. Unlike the highway accident, which will almost always happen on a certain portion of the highway or at least nearby, falling debris from a midair explosion could be scattered over a fairly wide area. The risk of direct injury from falling aircraft, then, is unlikely to be higher or more peculiar for airport supervisory personnel than for other members of the general public who are, at the same time, also found at the same spot or on neighboring land. If it is presumed to be higher, then how can one explain the general exclusion of highway hazards encountered by employees, even when the accident occurs on a high-risk highway immediately beneath the aerial route or in the vicinity of the airport? In fact, a straight answer to this puzzle might have been provided long ago in the British judgment of *Allcock* v. *Rogers*.[228] In *Allcock*, the House of Lords held that a bomb dropped from an air raid will not expose people on the street to a higher degree of risk than those in a house.[229] Thus it may be said that the same reasoning could be used for any object falling from the sky — a falling aircraft will not expose the ground employees to higher risk than members of the general public in the vicinity.

Since the ground employee's risk is no higher than that of the general public, the minimum "public zone" requirement that "but for the employment, the worker

v. *Blackburn*, [1965] Tas.S.R. 77 (S.C.), *Cosgrove* v. *Executor Cosgrove* (1937) 11 W.C.R.(N.S.W.) 385, and *Davis* v. *Commonwealth* (1968) 13 F.L.R. 312 (Q.Dist.Ct.)

[227] A recent Rome accident would serve as an example of the higher risk of being in the vicinity of an airport. On 9 October 1996, a Russian cargo plane crashed in a town outside Turin's Caselle airport, Italy, to which it was destined. The aircraft hit a farmhouse and killed two persons inside: see *The Gazette*, 10/Oct./1996 at B5; see also "Chartered An-124 Crashes On Approach to Turin Airport" Av. Wk & Space Tech., 14 October 1996, at p.36. Both Russia and Italy are contracting parties of the Rome Convention of 1952.

[228] 34 T.L.R. 324 (H.L. 1918).

[229] *Id.* at 325.

would not have been in the place where the accident happened" is not met,[230] and the Rome accident fails to constitute an inherent risk of employment unless some other accompanying risks from the work environment are consequently aroused. Accordingly, in judicial practice, airport supervisory personnel have recovered when they were injured by glass flying from the windows of the terminal building and shattered by falling debris, for at least there was some element of intervention from the employment environment (the building and its windows), but ironically they cannot claim compensation if they are hit directly by aircraft debris.[231]

The tests and standards employed in US jurisprudence is similar (though some carry different names) to judicial practice in the Commonwealth at large.[232] Some US courts might take a more liberal view of the "public zone" test (also known as the "street risks" doctrine in US jurisprudence) by awarding compensation to the employee who was injured in a public area, notwithstanding that others engaged in their own affairs at the same spot are more or less exposed to the same risk.[233] Even under such a broad construction, however, the compensable accident is still restricted to perils that are likely to arise under local conditions, rather than those of a more general character which are likely to happen elsewhere, and which are not included in the Rome accident pursuant to the above analysis.

When the employee is injured by falling debris during his lunch-break or other recess, the damage thus sustained is usually regarded as recoverable if the break was spent on the employer's premises[234] - such as when loading personnel

[230]See *Thom* v. *Sinclair, supra* note 213 at 133-4.

[231]See *Lawrence* v. *George Matthews, supra* note 214 at 14, and *Brooker* v. *Borthwick & Sons Ltd.*, [1933] A.C. 669 (J.C.). In the latter case, recovery was granted only to employees who were injured by a toppled building and denied to those killed directly by the earth tremors.

[232]See the US court decisions *supra* and *infra* .

[233]See *Katz* v. *A. Kadans & Co.*, 134 N.E.330 (N.Y.Ct.App. 1922) and *Roth* v. *Hudson Oil Co.*, 345 P.2d 627 (Sup.Ct. Kan. 1959).

[234]For Great Britain, see: *Brice* v. *Edward Lloyd Ltd.*, [1909] 2K.B. 804 (C.A.); for Social Security Commissioner decisions, see: *R(I) 11/53* .; for Ausrtalia, see: *Davidson* v. *Mould* (1944) 69 C.L.R. 96 (H.C. of A.), *Commonwealth* v. *Oliver*, (1962) 107 C.L.R. 353 (H.C. of A.) and *Commisioner for Railways* v. *Collins*, [1961] N.S.W.R. 771; for Canada, see: *Consolidated Bathurst et Ostrom*,[1986]

take their lunch on the traffic apron - but not if the employee leaves the work premises and freely does as he likes, for in the latter case the employee actually merges with the general public and retains no connection with his employment.[235]

ii) Out of Employment

Could a ticket agent recover if she suffers from a heart attack while running away from a post-crash fire in the airport office? It is possible that the employee's latent health defect was seriously aggravated, or even reached the final breaking point, by the impact of the accident in the course of work, though not by any direct physical contact. A principle of causation which materializes into two controlling tests, *i.e.*, either the activity which aggravated the latent disability was done for the purpose of employment, or the place where the employee was situated at the time of the accident forms a sufficient association between the accident and the employment,[236] is generally employed by US, British, and other Commonwealth judicial authorities to resolve this problem. Pursuant to these tests, the ticket agent could recover because the place where she was found when the accident happened is her regular place of employment, and the accident did, at least partially, originate therein; furthermore, she might not have suffered the heart attack in the absence of the fire.[237] Under a more liberal interpretation of US jurisprudence, even if the heart attack occurred later (at home), when she has already left the scene of the crash, or days or months after the occurrence, she

CALP 306; for US court decisions, see: *Bator's case*, 153 N.E.2d 765 (Sup.J.Ct.Mass, 1958), *Dyer* v. *Sears, Roebuck & Co.*, 85 N.W.2d 152 (Sup.Ct. Mich. 1957).

[235]For Great Britain, see: *Parker* v. *Black Rock (Owners)*, [1915] A.C. 59 (H.L.); for Social Security Commissioner decisions, see: *R(I) 84/52; R(I) 24/53; R(I) 4/79, R(I) 10/81.*; for Ausrtalia, see: *Humphrey Earl Ltd.* v. *Speechley*, (1951) 84 C.L.R. 126 (H.C. of A.), *Rohweder* v. *Insurance Commissioner*, [1940] Q.W.N. 4; for Canada, see: *Decision No. 485*, Ont., 1986, WCAT; for US court decisions, see: *McFadden* v. *Workers' Comp. Appeals Bd.*, 249 Cal Rptr 778 (4th Dist Cal. 1988), *Mission Ins. Co.* v. *Worker's Comp.Appeals Bd.*, 148 Cal Rptr 292 (1st Dist Cal. 1978).

[236]See *Brooker* v. *Thomas Borthwick & Sons (Australia) Ltd. supra* note 231; see also for Australia: *Kavanagh* v. *The Commonwealth*, (1960) 104 C.L.R. 32 (H.C.of A.).

[237]See the Canadian court decision in *Re Arsenault*, (1983) 48 NBR (2d) 348.

could recover.[238] This view is shared by Australian courts,[239] though the German theories and decisions have adopted an opposing point of view, excluding successive personal damages which emerge gradually in the circumstances.[240]

Thus briefly, the latent physical defect which contributes to the employee's subsequent injury or death does not necessarily deprive him of compensation,[241] yet meanwhile, the accident which occurs in the course of employment must, at least to some extent, cause the final result as well. One must go still further in considering claims with the "public zone" test — if an office worker suffers a thrombosis while being crushed by people running away from the crash site at the terminal, he might be unable to claim the right to compensation.

Until now, it was fairly clear that there is a serious intrinsic discrepancy between the legislative intent of this regulatory scheme and its application in fact. Not every employee of the aircraft operator, who presumably has a "connection with aviation," will be covered by workers' compensation laws. Only those who suffer ground damage at the right time (*e.g.*, during working hours) and the right place (*e.g.*, outside a public zone) as well as under the right circumstances (*e.g.*, actually engaged in labor) are eligible for benefits. Those employees who are not thus covered would logically be capable of bringing a Convention action, no matter how close their connection to the aviation industry, an inevitable result which is, regrettably, completely contrary to the legislative intent of Article 25 of the Rome Convention.

Interestingly but not surprisingly, there are relatively more potential victims

[238]See *Follese* v. *Eastern Airlines*, *infra* note 516 (back injuries); *Lujan* v. *Houston General Ins. Co.*, 756 S.W.2d 295 (Sup.Ct. Tex. 1988)(Heart Attack).

[239]See *Davis* v. *The Commonwealth*, [1968] 13 F.L.R. 312 (Q.Dist.Ct.) (Airman contracted unknown virus infection when working abroad and gradually lost all hearing in his left ear).

[240]See R. Schleicher, F. Reymann & H.J.Abraham, *Das Recht der Luftfahrt*, 2nd ed (Kôln: Carl Heymanns Verlag KG, 1966), at p.203. See also Y. Yamazaki, "Damage caused by Aircraft to Third Parties on the Surface (1), (1968) 12 KUHO 55 (山崎悠基 航空機が地上第三者に対して加えた損害の賠償責任に関する研究ーその一 空法 第12号), at p.78.

[241]See the following court decisions: U.S.: *Maher* v. *Worker's Comp. Appeals Bd.* 661 P.2d 1058 (Sup. Ct. Cal. 1983), *Big "2" Engine Rebuilders* v. *Freeman*, 379 So.2d 888 (Sup.Ct.Miss. 1980); Great Britain: *Wicks* v. *Dowell & Co. Ltd.*, [1905] 2 K.B. 225 (C.A.); Australia: *Smith* v. *Australian Woollen Mills Ltd.*, (1933) 50 C.L.R. 504 (H.C. of A.).

of ground damages who do not have any such connection with aviation, yet are covered by workers' compensation laws. If an aircraft crashed into a textile factory beneath an air route full of employees during working hours, almost all the injured persons are eligible for compensation even under the strictest tests, except those with a connection to aviation. This instant fact again challenges the necessity and validity of the employment clause in Article 25 of the Convention.

Furthermore, if the Rome Convention is to be categorized as a legal regime of tort-based liability, the elements in assessing its legal effect are mainly those which are based upon the time and space surrounding the cause of accident, *i.e.*, the factual situation in a social context, providing a foundation to measure the pertinent activity[242] rather than the pre-existing relationship, contractual or otherwise, between the victim and the tortfeasor. Though in most tort cases the tortfeasor can escape liability by taking advantage of a duty of care defence, based on proximity between the tortfeasor and his victim, in reference to certain pre-existing relationships. In the contract of carriage, for example, a duty of care is cast upon the carrier because under the mutual consent of the parties (recorded mostly in the collective agreement) he assumes control over the passenger during transport.[243] Yet not every obligation of affirmative action arises from these special relationships, especially since under strict liability regimes like Rome, proximity between the operator and ground personnel has already been statutorily presumed due to policy considerations. There is no need to further explore the basis of the operator's duty of care towards the persons over which its aircraft fly; the only problem left to judicial authority is the existence of causation. Theoretically, aside from geographic limitations which do not have any substantive relation to liability, no class of persons who are in fact under the same risk contemplated by the Convention should be excluded.

C. Definition and Categorization of the "Laws of Workers' Compensation"

Unlike the laws of torts or contract, which do not create significant problems

[242]See *Donoghue* v. *Stevenson*, [1932] A.C. 562.

[243]See *Air India Flight Claimants* v. *Air India*, (1987) 44 D.L.R. (4th) 317.

of specific legal categorization in any system, the "laws of workers' compensation" remains a rather obscure phrase, since not every system employs the same title or prescribes the same regulatory scheme, even though the "laws of workers' compensation" under Article 25 of the Convention is intended to encompass all statutes relevant to compensation of industrial injury. In India, for example, the *Employees State Insurance Act* of 1948 and the *Workers' Compensation Act* of 1923 collaterally cover industrial accidents arising out of or in the course of employment in different scales of enterprises;[244] the former law, according to its substantive function, should also be categorized as a "law of workers' compensation." Furthermore, workers' compensation statutes in some systems have lost their individuality and merged into a broader social insurance scheme.[245] If they are entitled "Social Security Act"[246] or "Law of Social Insurance,"[247] will they be construed as "laws of workers' compensation?" In other systems, free health care service is offered not only for "workers" but for the whole population; will this institution also be categorized as a part of the "laws of workers' compensation?"

The lack of uniformity regarding compensable injuries between systems also underlines the diversity of output. For example, in some countries, protection against occupational disease as an industrial injury is governed under the compensation system,[248] though it developed much later. In other countries it

[244]The *Employees State Insurance Act* of 1948 covers only the work-related injury in enterprises employing 20 or more persons; otherwise, the injuey is governed by the *Workmen's Compensation Act* of 1923. See J. G. Fleming, "Tort Liability for Work Injury", *infra* note 273, at p.5.

[245]In the Great Britain, the distinct Industrial Injuries Fund was abolished in 1975 and merged into a general scheme which includes both social insurance and industrial injury (now named the *Social Security Act* of 1975). See R.F.V. Heuston & R.A.Buckley, *infra* note 410, at p.252.

[246]*Id.*

[247] (Ley del seguro social) of Venezuela, on 11 July 1966. See G. Perrin, "Occupational Risk and Social Security" in B. A. Hepple ed. *International Encyclopedia of Comparative Law,* (Tübingen: J.C.B. Mohr, 1994) Vol. XV (Labour Law), Ch. 8, at p.7, n. 26.

[248]Such as the Swiss federal law of 23 March 1877 on factory work (*Bundesgesetz betreffend die Arbeit in den Fabriken*), BBI.1877 II 483, and the laws of Argentina (11 Oct. 1915), Ecuador (30 Sept. 1921) and Brazil (Decree on 15 Jan. 1919), cited in G. Perrin, *id.*, at p.5, n.15.

was strictly restricted[249] or not even recognized,[250] so if an employee of the operator suffers an unexpected industrial disease which is alleged to be the direct consequence of a crash, *e.g.*, if he was suffocated by the dioxin smoke of a post-crash fire, his damages may not necessarily be regulated by the "laws of workers' compensation" and could be subject to the Rome claim.

The inherent difficulties of this ambiguous phrase could be attributed to the US-oriented approach favored by the IATA proposal in the International Conference at Rome[251] (though ironically the US has never intended to ratified its own problematic contributions) because "in many of the United States ... workers' compensation laws are not a matter of contract." No alternate reason is provided in the conference records for replacing the "contract of employment" in previous drafts (and in the 1933 Convention) with the current version and no other evidence is available to help trace the real intent of the drafters on the meaning of "laws of workers' compensation." Following the definition and scope adopted by US jurisprudence, then, it will generally refer to a special branch of social insurance to protect workers against the occupational hazards of a particular class. The system modifies or replaces the employer's civil tort liability and provides employees with prompt compensation for injuries sustained,[252] including automatic recovery of benefits with minimum procedural requirements, little to no inquiry into the victim's negligence or fault, and a ceiling for maximum benefits granted. The employees' common law tort actions against employers are restricted, though the right to sue responsible third parties is usually retained, and the procedure is generally handled by public, non-judicial administrations. However, there is no ultimate standard delineating the scope of "laws of workers' compensation," since there is no similar foundation for the method of problematic treaty interpretation adopted by Warsaw authorities in the Rome scenario to justify

[249]In Great Britain, for example, there is s. 76(2) of the *Social Security Act* of 1975, which provides compensation only for those persons specifically listed and in certain categories of employment. For a detailed discussion on compensation for industrial disease in Great Britain, see R.F.V. Heuston & R.A.Buckley, *infra* note 410, at p.252.

[250]In Guatemala, Liberia and Vietnam; cited from G. Perrin, *supra* note 247, at. p. 5, n.16.

[251]See *supra* note 205.

[252]See S. A. Riesenfeld & R. C. Maxwell, *infra* note 309, at pp.137-140.

circumscription of the US definition.[253]

D. Conflict of Workers' Compensation Laws

When the IATA proposed to replace the original provision in the Mexico Draft with the current Article 25 of the Rome Convention,[254] it is unclear whether the possible choice of labor law problems were envisaged. The *lex fori* will not necessarily apply its laws of workers' compensation in the Rome case; a US court, as hypothesized by the IATA, might have to refer to the workers' compensation system of another country to determine if the plaintiff is entitled to bring the action.

The existence of an applicable workers' compensation system derogates from the application of the Rome Convention. To confirm whether the damage suffered by an employee is regulated by laws of workers' compensation, and whether the applicable workers' compensation system would allow the employee to bring a collateral tort action, is a preliminary question encountered by the court before possibly dismissing a case;[255] therefore, the court inevitably faces a choice of workers' compensation laws scenario. This scenario is equally created by the single forum provision in Article 20 of the Convention, which confers exclusive jurisdiction to the courts of the Contracting State where the damage occurred, and geographical limits to the scope of the Rome Convention.[256] The following hypothetical examples may help highlight the inevitability of these conflicts. The theoretical adequacy of applicable conflict of workers' compensation laws will be examined in the following section (2.3.3).

Situation I:

Employee *K*, a national of *A* country, was hit by his employer's aircraft registered in *A* country (*i.e.*, an airline of *A* country) while working at *B* country's airport. The injured employee *K* must bring his Rome action before the courts of *B* country, as a foreign plaintiff from *A* against a foreign defendant also from *A*.

[253]See *supra* note 163.

[254]See *supra* note 204.

[255]See Section 2.2.3.E. of this Chapter.

[256]Article 23 of the Rome Convention of 1952, *supra* note 78.

Situation II:

Employee *K*, a national of *B* country, was hit by his employer's aircraft registered in *A* country (*i.e.*, an airline of *A* country) while working at *B* country's airport. The injured employee K must bring his Rome action before the courts of *B* country, as a national plaintiff against a foreign defendant.

Situation III:

Employee *K*, a national of *C* country, was hit by his employer's aircraft registered in *A* country (*i.e.*, an airline of *A* country) while working at *B* country's airport. The injured employee *K* must bring his Rome action before the courts of *B* country, as a foreign plaintiff from *C* against a foreign defendant from *A*.

In the above situations, if the forum elects to follow tort theory, based either on the principle of *lex loci delictum*,[257] which applies workers' compensation laws only when the injury occurs within its jurisdiction, or on the principle of *securité et police*,[258] which necessarily applies workers' compensation laws to all professional activities operating on forum soil, then the workers' compensation laws of *B* country will apply.

If the forum adopts the *lex loci contractus* from contract theory,[259] the compensation laws of the place where the contract of employment was made shall govern - which in situations I and II could translate into the compensation laws of either *A* or *B*, whereas in situation III the laws of *C* might apply - irrespective of the nationality of injured employee *K*, of the location of the employer's principle place of business, or of where the damage occurred;[260] yet if the law of the place

[257]See the following US decisions: *Utley* v. *States Industrial Commission*, 55 P.2d 762 (Sup.Ct.Okla. 1936), and § 399, Restatement of the Law of Conflict of Laws, (St.Paul: American Law Institute Publishers, 1934).

[258]See the French decisions in *Antipoul* c. *Hersant frères*, Cour d'Appel de Amiens, 10 December, 1913: 1914 RDIP 425.

[259] § 398, Restatement of Conflict of Laws, *supra* note 257.

[260]See the following US decisions: *Alaska Packers Asso.* v. *Ind. Acc. Comm.*, 34 P. 2d 716 (Cal. 2d, 1934). *aff'd.*, 294 U.S. 532 (U.S.Sup. Ct. 1935) (the employee who worked and injured in Alaska was regularly paid in California); *Benguet Consol. Min. Co.* v. *Ind. Acc. Comm.*, 97 P. 2d 267 (Cal. App. 2d, 1939) (employee hired in California but injured while working in the Philippines) ; *Haverley* v. *Union Const. Co.*, 18 N.W. 2d 629 (Sup.Ct. Iowa, 1945) (employment contract was formed in Iowa but the fatal injury was sustained by the employee in Oklahoma); *Gatton* v. *Sline Co. et al.*, 87 A 2d 524 (Sup.Ct. Md, 1952) (the employee cannot recover benefits under Maryland's

of performance of the employment contract is adopted, then in all three situations the court must decide whether *K* has worked regularly in *B* country or has only a transitory connection with *B*.[261] Generally, if *K* is regularly working for the aircraft maintenance section located at the airport in *B* country, then the workers' compensation statutes of *B* might apply, but if *K* is a member of the flight deck personnel whose stay in *B* is merely adjunctive to or in furtherance of carrying out the next flight, then the laws of *A* might govern instead of *B*. In some cases, even, the law which is stipulated in the contract of employment or presumed to be chosen by the parties - which could be the laws of *A*, *B*, or *C* - will apply in all three situations, if the forum is receptive to party autonomy, though this reception is very rare and subject to strict circumscription.[262] Some workers' compensation laws expressly require that both the residence of the employer/employee and the place where the contract of employment was made must be in within its jurisdiction as a precondition of application.[263] If *K* has set up residence in *B* and the contract of employment was also made in *B*, the court must next decide if the airline registered in *A* country has a principle place of business in *B* as well. More

statute, even though he is resident in that state, because his contract of employment was made in West Virginia); *De Rosier et al* . v. *Jay W. Craig Co. et al.*, 14 N.W.2d 286 (Sup.Ct. Minn. 1944) (the law of domicile will not govern if the contract of employment was made elsewhere); *Marrier* v. *National Painting Corp.*, 82 N.W.2d 356 (Sup. Ct .Minn. 1957) (the contract of employment was made in Minn. but the employee was injured and killed while working in another state, and the employer's principle place of business is in a third state); *State ex rel. Morgan* v. *Industrial Accident Board*, 300 P.2d 954 (Sup.Ct. Monn. 1956) (temporary work outside the place of contract could not deprive the worker of benefits therefrom); *Miller* v. *National Chair Co*. 22 A.2d 804 (Sup.Ct. N.J. 1941) (the laws of the place of contract governed even though the employer's principle place of business was elsewhere). For an Italian decision, see: App. Milano, 12 December 1930: 1932 Rivista 438.

[261]See the US decision in: *Elkhart Sawmill Co*. v. *Skinner*, 42 N.E. 2d 412 (Ind. App. 1942).

[262]See the US decision in: *McKane* v. *New Amsterdam Casualty Co. et al.*, 199 So. 175 (La.App. 1941) (the court found that "the rights and obligations of employer and employee under a workmen's compensation act which is elective arise solely out of the contract of employment;" and therefore "[a]n award under the Workmen's Compensation Act is not made on the theory that a tort has been committed but on the theory that the act is read into and become a part of contract of employment."); see also *Hunt* v. *Magnolia Petroleum*, 10 So.2d 109 (La. App, 1942), *Duskin* v. *Pennsylvania-Central Airlines Corp.* 167 F.2d 727(C.C.A.6th 1948), and for further proceedings, see 2 Avi 14, 594 (6th Cir. 1948).

[263]See the workers' compensation statutes of California, Florida , Georgia and Michigan(either employee or employer); North Carolina, South Carolina and Virginia (both employee and employer), cited from A. Larson, *infra*note 314, at 376 f. § 87.11.

complications arise in situation III, when *K* is domiciled in *C* country.

If the court finds that the compensation laws of the place where work for the employer is regularly performed is the applicable law, two elements must be further investigated: the place of employment and the performance of regular services. As for the place of employment, a US court has held that if *K* is the pilot or copilot of the airline, then the employer's place of business is that in which "all runs were started, business offices maintained, mechanical work done, payrolls distributed, and pilots and copilots lived and received all instructions."[264] A clear picture emerges for situations I and III, when *K* is staying in *B* country temporarily or as a transitory measure, such that the laws of *B* country will not apply; but in situation II other elements must be considered, like residence and the place where payrolls are distributed, as possible connecting factors. Some, but not all, workers' compensation statutes expressly regulate the time limit for transitory works in order to determine the exact regular place of employment,[265] so the adjudicating court must look into the nature of the work for which the employee contracted.

Since the tests and approaches adopted by courts on the conflict of compensation laws can vary widely (see below at section 2.3.3.B.), divergent results might be expected for the above hypothetical situations.

The impact of choice of workers' compensation laws on the interests of parties will be even more substantial where the applicable compensation systems are not provided as exclusive remedies, allowing the employee to either accumulate or to supplement his damage claims, or to proceed with a civil tort action rather than under the applicable workers' compensation system.[266] If there exists more than one applicable workers' compensation law, the injured employee possesses more opportunities to wage a Rome claim.

E. Coexistence of Workers' Compensation Laws and Tort Liability

[264] *Severson v. Hanford Tri-State Airlines*, 105 F.2d 622 (8th Cir. 1939) at 623.

[265] See workers' compensation stautes of Delaware, Pennsylvania (limiting the period of employment abroad to 90 days); Colorado, New Mexico, and Utah (the injury cannot occur after six months or more within leaving the state), cited from A. Larson, *infra* note 314, at 378 f. § 87.12.

[266] Regarding the three models of concurrent remedies provided in workers' compensation laws, see the following Section 2.2.3.E. of this Chapter.

Many countries have abandoned the employer's tort liability in exchange for the more efficient protection of a workers' compensation system. An example can be found in the workers' compensation statute of the state of Kansas:[267]

> [S]ave as herein provided, no such employer shall be liable for any injury for which compensation is recoverable under this act.

or the even more explicit language in the workers' compensation statute of Alaska:[268]

> *Exclusiveness of Liability.* The liability of an employer prescribed [in the Act]... is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee.

This exclusion at the domestic level may constitute one of the reasons underlying the exclusion of the operator's liability towards its employees in the Rome Convention,[269] since the regulatory scheme of the latter is designed primarily as an international regime for the tort liability of aircraft operators toward third persons on the surface, inevitably including ground employees.[270] However, some countries have decided not to abolish the employee's delictual action against the employer even when workers' compensation applies preemptively, based on the idea of retaining the civil institution of tort as a necessary precaution against future accident and intentional fault,[271] and also on the sense that the compensation benefit is usually far from satisfactory in comparison with the full amount of damages genuinely suffered.[272] If this two-tier or dual compensation system is indicated as the applicable law for a damage claim made by the ground employee, is the court bound to apply the Rome Convention in that case?

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[267]Laws 1911, c. 218. See also *Shade* v. *Ash Grove Lime & Portland Cement Co.*, 92 Kan 146, 139 P. 1193 (Sup. Ct. Kan. 1914).

[268]AS 23.30.055. For a case concerning employees of the aviation industry, see:*Van Biene* v. *ERA Helicopters, Inc.*, 23 Avi 17, 339 (Sup. Ct. As, 1989).

[269]However, there is nothing in the records of the 1952 Rome Conference to support this speculation.

[270]See G. N. Calkins, *supra* note79, at p.153.

[271] J. G. Fleming, *The Law of Torts*, *infra* note 274, at p.522.

[272]See the following Section2.3.2.E of this Chapter.

The solutions to this puzzle could differ according to three models of coexistence:[273] (i) cumulation of claims under both tort liability and workers' compensation; (ii) election for one of these two benefits; and (iii) supplementation of the workers' compensation benefit up to the full amount of tort damages available.

i.) Cumulation

Most legal systems reject cumulation, not only because this kind of double recovery infringes upon the basic principles of remedies,[274] but also due to the implied notion of private insurance which would allow injured persons to heap the benefits of an insurance policy upon the damages paid by the tortfeasor. In Great Britain, Eire,[275] and two states of the US, however, there are still instances of cumulation.

The archetypal cumulation legislation is the British *National Insurance (Industrial Injuries) Act of 1946*,[276] modified by the *Law Reform (Personal Injuries)*

[273]See J. G. Fleming, "Tort Liability for Work Injury", in Otto Kahn-Freund, ed. *International Encyclopedia of Comparative Law*, (Tübingen: J.C.B.Mohr, 1975) Vol. XV (Labour Law), Chap.9, at pp.25-30.

[274]The author cannot agree with dicta that "an injured person should not have the same need met twice over," based on an understanding that there exists drastic differences in the nature of workers' compensation benefits and tort remedies. See J. G. Fleming, *The Law of Torts*, 8th ed. (North Ryde: The Law Book Co. Ltd., 1992) , at pp. 520-1: "[T]he benefits [of workers's compensation] are not designed to provide anything like full compensation for all injurious consequences of a work accident expressible in monetary terms;" see also R. E. Goodin, "Theories of Compensation" in R.G. Frey & C. W. Morris, ed. *Liability and Responsibility*, (Cambridge: Cambirdge Univ. Press, 1991) 257, at pp.262-65. The argument that there exists no difference between injuries suffered during the course of employment and the prejudice resulting from general tortious acts, and therefore the former category should not escape from the "double recovery" rule, neglects the divergence between the social value of damages and the economic loss of different classes. Its weakness is demonstrated in the methods adopted by courts to measure damages sustained by the general public — if economic loss differs between individual victims according to their expected level of productivity, surely it must differ between each group of individual victims identified within a particular social context. For wage-labour, the idea of double recovery must be measured in light of a thorough exploration of the beneficiary's productivity in the economic and social contexts, if the compensation is to fully restore the injured party to his original condition before the accident.

[275]See the *Social Welfare (Occupational Injuries) Act* of 1966, s. 39.

[276]See the *National Insurance (Industrial Injuries) Act, 1946*, 9 & 10 Geo. 6, c. 62, as modified by the *National Insurance (Industrial Injuries) Act, 1948* with an increase for disablement benefits,

Act of 1948,[277] which provides that only half of the industrial benefits received by the plaintiff over the first five years may be deducted from his tort damages for personal injury against the employer:[278]

> In an action for damages for personal injuries (including any such action arising out of contract), there shall in assessing those damages be taken into account, against any loss of earnings or profits which has accrued or probably will accrue to the injured person from the injuries, *one half of the value of any rights which have accrued or probably will accrue to him therefrom in respect of industrial injury benefit, industrial disablement benefit or sickness benefit for the five years beginning with the time when the cause of action accrued.... This* subsection shall not be taken as requiring both the gross amount of damages before taking into account the said rights and the net amount after taking them into account to be found separately.

There is no deduction of workers' compensation benefits even in the case of fatal accidents.[279]

The same result may be reached when the provisions of a workers' compensation law simply fail to mention reimbursement of benefits received by the plaintiff in parallel tort actions, and there is no judicial authority which denies such a right by drawing negative inferences from the absence of a statutory mandate for subrogation.[280]

When the cumulation model of workers' compensation regimes is accessible by the injured ground employee in a Rome Convention case, there seems to be no reason for the court to exclude the employee by referring solely to Article 25, or because his injury is (also) regulated by the laws of workers' compensation.

As mentioned above, the Rome Convention is an international version of

11 & 12 Geo. 6, c. 42, also cited as the *National Insurance (Industrial Injuries) Act, 1946 and 1948.*

[277] "The *Law Reform (Personal Injuries) Act, 1948*" 11 & 12 Geo. 6, c. 41. This *Act* was intended to resolve the problem of adjusting alternative remedies by way of actions in damages for personal injury and in national insurance benefits. For the legislative history and a complete discussion of the *Act*, see W. G. Friedmann, "Social Insurance and the Principle of Tort Liability", (1949) 63 Harv. L. Rev. 241, at pp. 254-56.

[278] 2(1) of the *Law Reform (Personal Injuries) Act, 1948, id* [emphasis added].

[279] 2(5) of the *Law Reform (Personal Injuries) Act, 1948, id.*: "In assessing damages in respect of a person's death in any action under the Fatal Accident Act, 1846, as amended by any subsequent enactment, or under the Carriage by Air Act , 1932, there shall not be taken into account any right to benefits resulting from the person's death."

consolidated institutions of tort liability for the foreign aircraft operator towards persons on the ground. It becomes a special branch of national tort law in the Contracting State upon ratification and enactment. Following this reasoning, if the applicable national workers' compensation law is offered as an exclusive remedy which displaces any form of tort action against the employer, then the remedy claim against employers based on the Rome Convention as internal tort law could consequently be barred even without the exclusion clause. This result would prevail in the above-mentioned hypothetical situations I and II without question, for in both scenarios, the applicable workers' compensation law will always be the national law of the Contracting State to the Rome Convention. Hence it seems fair to say that the second half of Article 25 merely serves as a *proclamatio*: its main function is simply to declare that the unified liability regime is not intended to contravene or interfere with the possible exclusivity of national benefits. In light of the exact position accorded to Article 25, it would be absurd for a court to apply this provision in dismissing a collateral civil tort claim, if the applicable law of workers' compensation normally allows such civil actions to proceed.

ii.) Election

Some workers' compensation regimes allow the employee, employer, or both an option of choosing between compensation benefits or a civil tort action.[281] Generally, this right of election of the parties is expressly regulated in the statutory provisions. In most US legislation, election by the employer is presumed.[282] For those which are not expressly regulated, the courts have held that the workers' compensation system is compulsory unless otherwise stipulated.[283] Civil procedure

[280]Such as those of Ohio and West Virginia: see A. Larson, *infra* note 314, at § 71.30.

[281]In most US workers' compensation statutes, election is granted only when the employer has failed to comply with the statutes, yet the scenario is likely different in other countries such as Great Britain, Spain, or Sweden. See also P. H. Behrendt, "The Rationale of the Election of Remedies under Workmen's Compensation Acts", (1945) 12 U. Chi. L. Rev. 231, at pp.236-7.

[282]See United States Bureau of Labour Statistics, *Workmen's Compensation Legislation of the United States and Canada as of July 1, 1926*, Bulletin No. 423, pp.9-10.

would be less complicated for the courts hearing Rome actions against the employer if it was elaborated accordingly.

For those parties to the employment contract who are forced to choose before the accident, fewer contentions arise, since the chosen regime becomes exclusive. So if the ground employee chooses to accept compensation,[284] then the court must surely dismiss any Convention action subsequent brought by himself or his survivors. Likewise, if the victim has already opted out of the social benefits system, then any injuries sustained are not regulated by the laws of workers' compensation, and the Rome Convention applies.

As for election after the accident,[285] the court adjudicating the Rome action must first investigate whether the injured employee has exercised this option. If he has chosen to sue his employer instead of accepting benefits, the Rome action can proceed; on the contrary, if he has already accepted compensation, then the court must decide if this factual situation constitutes the choice of an "option,"[286] and also if this "option" is irrevocable under the applicable workers' compensation laws. Fortunately, most workers' compensation laws which contain the election

[283]See *City of Butte* v. *State Industrial Accident Board*, 156 P. 130 (Sup. Ct. Mont. 1916), at 131.

[284]Generally, election by the employee is designed as a negative one; once the employer has elected to come under the system, the worker automatically comes under its operation unless he gives notice that he will not be bound by the regime - as in the majority of workers' compensation regulations in the US: see *Guarantee Trust & S.D.Co.* v. *Philadelphia, R&N E.R.Co.*, 38 A 792 (Sup.Ct.E.Conn. 1897).

[285] In Great Britain, prior to the advent of national insurance in 1948, s. 29, sub-s. 1 of the *Workmen's Compensation Act, 1925* prescribed that the worker may, at his option, either claim compensation under the system or undertake proceedings independently of the statute after the accident. See also *Young* v. *Bristol Aeroplane Co., Ltd.*, [1946] A.C. 163 (H.L.). The Arizona Constitution, for example, provides that the employee has the option either to accept the compensation system or to sue his employer, *i.e.*, he cannot be compelled to elect in advance of an injury. See *Consolidated Arizona Smelting Co.* v. *Ujack*, 139 P. 465 (Sup. Ct. Ariz. 1914); *Bradford Electric Light Co.* v. *Clapper*, *infra* note 434.

[286]See the Australian decisions of *Gaede* v. *Central Automatic Sprinklers Pty. Ltd.*, [1963] V.R. 631(S.C.Vr.); *Dey* v. *Victorian Railway Commissioners* (1949) 78 C.L.R. 62 (H.C.of A.) at 76, 78, *Latter* v. *Muswellbrook Shire Council* (1936) 56 C.L.R. 422 (H.C. of A) and also E. I. Sykes & H. J. Glasbeek, *Labour Law in Australia*, *infra* note 332; for a U.K. case see *Young* v. *Bristol Aeroplane Co., Ltd.*, *id*; see also the jurisprudence of Argentina, which rendered that a mere receipt of medical assistance or money from an employer will not displace the action against the latter, in J. G. Fleming, "Tort Liability for Work Injury", *supra* note 273, at p.26, n. 160.

model of collateral benefits have expressly prescribed the conditions of election,[287] such that if the employee has already begun to receive compensation benefits, any tort proceedings against the employer must be brought within a specified period of time thereafter, so potential procedural inconveniences will not be inflicted upon the forum invested with the collateral claim.

iii.) Supplementation

The supplementation model permits the victim to tap into both systems but not in excess of recovering full indemnity for his injury. Upon first accepting workers' compensation benefits, the injured employee can still recover in tort against the employer for any difference in value between the expected compensation benefits and the full amount of his real damages. This difference will depend on whether the system terminates the payment of compensation after tort recovery or still allows entitlement to the benefits but set against tort damages for the value of past and future benefits. Nevertheless, in either system, the workers' compensation benefits coexist with the tort action.

The supplementation model is, in fact, an evolutionary variant of the election model, which not only prevents the injured employee from making the "Hobson's Choice"[288] but also ensures that the employee receives the fullest benefit from both the compensation system and the tort action, while at the same time precluding the possibility of any dreaded "double recovery." Aside from Great Britain, some Commonwealth countries,[289] Scandinavia,[290] the Netherlands,[291] Israel,[292]

[287]In Australia, see the workers' compensation statutes of Victoria (Vic. s. 79(1)), New South Wales (N.S.W. s. 63 (3))(tort action against employer must be brought within three years after the date of receipt of benefits or of the first payment if more than one), South Australia (S.A. s. 69(2)) (common law action against employer cannot be brought unless written notice of intention to bring action is given within six months of the receipt of the payment of compensation).

[288] J. G. Fleming, "Collateral Benefits", in André Tunc, ed. *International Encyclopedia of Comparative Law*, (Tübingen: J.C.B.Mohr, 1975) Vol. XI (Torts), Chap.11, at p.6.

[289]Australia (see *supra* note 111), New Zealand, Eire and India, see J. G. Fleming,"Tort Liability for Work Injury", *supra* note 273, at p.29.

[290] J. G. Fleming, *id.*

[291]*Accident Insurance Act* in1966, s. 89-91.

Japan,[293] and Taiwan,[294] as well as current Contracting States to the Rome Convention of 1952 like Australia, Spain,[295] Ecuador,[296] and the USSR[297] also adhere to this dual system. It is suggested that under these circumstances, the court should apply the Rome Convention rather than the local law governing damage caused by aircraft to such unrecovered damages;[298] in fact, the reasoning parallels that of the cumulation model, yet the court must thoroughly investigate if the applicable workers' compensation law provides any special exceptions to certain claims, such as non-material injury,[299] for in the Rome action, each individual claim must first be established (after accounting for any special limits) before it can accommodate a fixed amount of liability.

F. Restricted Action Against the Non-Employer and Questions of Mid-Air Collision or Interference

In cases where the ground employee is injured by aircraft belonging to a non-employer, or is jointly injured by two or more aircraft which belong to his employer and other operators, complicated problems could arise if there are collateral workers' compensation benefits available to the victim, and not all of them can be solved through the operation of the exclusion clause in Article 25.

When the ground employee is injured solely by the aircraft in flight operated by a non-employer in the course of employment, his Rome claim should be allowed unless it is prohibited by applicable workers' compensation laws, for the issue of privity would reflect that of operators and any other persons on the

[292] *National Insurance Act* s. 70(k).

[293] *Labour Standards Law* (Rodokijunho; 労働基準法) s. 84.

[294] *Labour Standards Law* (Laodonghijunfa; 勞動基準法) art. 60, and judgment of the Supreme Court, civ. div., 49 TaiShang No. 406 (四九台上四零六號判決).

[295] *Workmen's Compensation Act* art. 53; *Social Security Act* art. 84 par. 4; *Workmen's Compensation Regulation* art. 189.

[296] Labour Code art 297, 298.

[297] Fundamentals art. 90; RSFSR Civil Code of 1964, art. 454.

[298] H. Drion, *supra* note 199, at pp.97-8, yet he provided no reason to support his argument.

[299] Such as Poland, see J. G. Fleming, *supra* note 273, at p.54.

ground without an "aviation connection." This situation usually arises when the employee is damaged by a collision upon the territory of his own country. Of course, if he has elected to be covered by the applicable compensation system, and if the system provides an exclusive remedy precluding the receiver of benefits from waging any civil tort action (including the Rome claim) against the tortfeasor,[300] then he could still be divested of his right to recourse under the Rome Convention without the operation of Article 25. An analogy could be inferred if the system allows cumulation or supplementation.

Another intricate situation created by Article 25 of the Rome Convention involves the ground employee of one aircraft operator who is damaged by falling debris but cannot determine which aircraft caused the injury, *i.e.*, the accident is jointly caused by aircraft operated by his employer and other operators.[301] In such cases, each of the aircraft concerned shall be considered to have caused the damage, and each respective operator shall be liable according to Article 7 of the Convention as a protective measure for the victim; in other words, when the cause of damage is indivisible there is no division of liability into equal shares, as provided in Article 4 of the (Brussels) Collision Convention of 1910.[302] The aircraft

[300]Such as the compensation law of Washington state, which provides that "[t]he rights and remedies herein granted to the employee shall exclude all other rights and remedies of such employee ... at common law or otherwise", Wash.Laws, c. 74, § 1 (1911);

[301]One commentator has asserted that Article 7 could be fairly unimportant since, "in over forty years since aircraft had flown one country to another, there had not been a single case which would have come under the scope of this Article" (cited from J. Koval, *supra* note 79, at p. 138). Yet midair collisions are not novel; they have really happened, and their debris indeed created certain disasters: see Av. Week 74 (23 Jan. 1961) 49 (United Air Lines DC-8 collided with TWA's Super Constellation over New York, killed 6 residents of Brooklyn and created extensive damage on the ground property).

[302]"International Convention for the Unification of Certain Rules of Law in regard to Collisions Between Vessels." The Convention is a fault-based liability regime for collision between vessels. Section 1 of Art. 4 provides that "[i]f two or more vessels are in fault the liability of each vessel is in proportion to the degree of the faults respectively committed. *Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability is apportioned equally* [emphasis added]." The Collision Convention entered into force on 1 Mar. 1913. A full English text of the Convention can also be found in K.C. McGuffie, *British Shipping Laws*, Vol.4 (The Law of Collision at Sea), (London: Stevens & Sons Ltd, 1961) at P.891.

operators are jointly and severally liable,[303] and the victim damaged as a "direct consequence" of these incidents would have the right to sue one or both of them.[304] How would this injured employee bring his Convention action into court if there exists an explosive employment relationship?

If the employee choose to bring the Rome action against the joint operator(s) implicated in the collision other than his employer, then the result will be the same as when he is injured only by a non-employer. If the injured employee decided to sue his employer only, then his action could still be barred if the damage suffered is regulated by workers' compensation laws. As outlined above, however, unless the employer's aircraft is registered in another Contracting State, the scenario in such cases will always include either a foreign employee or a local employee verses a foreign airline; the question to be resolved will then be the choice of workers' compensation law, or even whether there exists an applicable workers' compensation law for such personnel.

A more complex situation arises if employee *K* of *A* nationality was jointly damaged by the aircraft of his employer (*A* airline) and by that of a non-employer (a *C* flag carrier) while working at *B* country's airport, and he brings the Rome action against *C* operator in the courts of *B*, while claiming the applicable workers' compensation on the damages attributable to *A*. What is the location of his employer's headquarters and how would the adjudicating court render judgment? A strange result would be *B*'s court deciding that the workers' compensation law of the *locus laboris* (*i.e., locus fori*) will apply, and since it allows for collateral remedies, then *K*'s Rome action would be sustained, although the compensation system of *A* to which *K* has simultaneous recourse provides an exclusive remedy prohibiting the receiver of benefits from bringing any civil action.

A further procedural puzzle is presented when the injured employee decides to sue them both for joint liability. It seems that rather than denying the action as a whole, the court should dismiss only that part which implicates the employer based on Article 25 and proceed with the action against the non-employer in

[303] J. Koval, *supra* note 79, at pp. 136-7.

[304] See the second half of Article 1(1) of the Rome Convention of 1952, *supra* note 78.

accordance with Article 7, for "each of the aircraft concerned shall be considered to have caused the damage and the operator of each aircraft shall be liable" individually. However, no matter which scenario is adopted, one of the tortfeasors shall unfairly escape from his Rome liability. If the victim eventually accepts the benefits and spares both operators, the jointly-liable employer might even be able to subrogate (in full or in part) the worker's injury by waging a Rome claim against the non-employer if permitted by the applicable compensation statute.

G. Procedural Difficulties

The basic formulae of procedural reasoning in a Rome claim respecting the employment relationship could function in the following manner: due to the language of Article 25 of the Convention, before the court invested with the Rome claim examines the substantive provisions, it must first determine whether the damage on the surface "is regulated ... by the law relating to workers' compensation applicable to a contract of employment between such persons," so as to determine if the case should be dismissed for falling outside the scope of the Convention. The court must explore the substance of the applicable workers' compensation laws and ascertain whether the victim is eligible for recovery as an employee under the statutes, as well as whether the compensable damage arose in the course or out of his employment.

As a preliminary exercise, the court must find which workers' compensation law governs collaterally, since almost every compensation statute is unique, and no benefits will be granted if the requisite conditions are not met. However, no straight answer comes easily from an inherently transnational Rome claim. As mentioned in the above section 2.2.3.D., in situations I and II, the applicable laws could be those of the forum, of the place where the contract of employment was made, or of the employer's principle place of business. Meanwhile, in situation III, the compensation laws of the victim's domicile could also apply. A pivotal situation will then inevitably arise: before the court can choose between applicable compensation laws, it must first characterize or classify the claim as governed by a compensation system, but it must have previously determined which

compensation system should govern.

It is true that this paradox does not usually appear in the tort action against an employer, since plaintiffs tend to show their preference for any available benefits and will therefore have no motive to argue the conflict issue. The procedural problem is then simplified; the court initially examines whether the workers' compensation law, introduced by the employer as a defence which obstructs the plaintiff's civil tort claim, is applicable and provides for an exclusive remedy, such that it may be unnecessary for the civil tort claim to proceed. The same preliminary analysis results from special tort claims as in the Rome action against an employer, independent of the exclusion clause provided in Article 25.

Should the parties dispute the governing compensation laws, the US Sixth Circuit has provided a unique solution in *Duskin* v. *Pennsylvania-Central Airlines Corp.*[305] In *Duskin*, the deceased had signed an agreement with the employer stipulating that the rights and obligations of the parties should be governed by the laws (including workers' compensation) of the state of Pennsylvania. After the aircraft served by this employee crashed in Alabama, his widow refused to accept the Pennsylvania benefit and brought a tort action against the employer under the *lex loci delicti*, contending that the deceased did not qualify as an employee under the stipulated compensation law. A peculiar sequence was followed by the Sixth Circuit court to deal with the case: it first found that the law stipulated by the parties (the law of Pennsylvania), under which the workers' compensation benefits are preemptive, shall govern. However, in holding that the deceased does not meet the compulsory requirement of the governing compensation law, the court then referred to Pennsylvania's conflict of laws rule which instructs that the *lex loci delicti* (the law of Alabama) shall govern. The *Duskin* court evidently considered that the duties and liabilities incident to the relation between master and servant, including those under the tort regime, were imposed by the contract of employment. Therefore, the compensation law operated merely as an alternative remedy, and the law stipulated in the contract was conceived to be controlling. Yet a major pitfall in the *Duskin* formulae is that the

[305] *Supra* note 262, at 2 Avi 14, 594.

pivotal problem has not been solved: if the victim does not qualify for benefits under the compensation system, will the court therefore conclude that the Rome damage is not regulated by the laws of workers' compensation which apply to a contract of employment between such persons?

This problem persists even if we adopt the antiquated approach of *Alabama Great Southern R.R. Co.* v. *Carroll*,[306] in which the court found that the duties and liabilities of master and servant are imposed by statute "wholly regardless of the stipulations of the contract as to the rights of the parties under it, and, it may be, in the teeth of such stipulations,"[307] such that the employer is liable for failing to perform any of these duties under the law of the country where injury subsequently occurs. This approach simply characterizes the duties and liabilities incident to the relation of master and servant in tort, applying the *lex loci delicti* directly, but if the victim fails to qualify as an employee under the compensation system of the locus, the same result is achieved as through the *Duskin* formulae.

A practical solution to this pivoting puzzle might be to further refer to the available choice of law rules, such as those stipulated by the parties (*Duskin*), or those of the forum, but considering that the exclusion clause in Article 25 is provided only as a defence for the defendant, it would be neither necessary nor legitimate for the court to apply any other available compensation statutes which are not pleaded by the parties.

2.3 The National Workers' Compensation System

2.3.1 Theory and Nature of Workers' Compensation

The workers' compensation system could be described as a by-product of industrial development from the nineteenth century. On the practical side, the traditional institutions of liability required the employee who suffered injury in the course of employment to prove negligence on the part of his employer, imposing an effectively impossible undertaking on people working among incalculable

[306] 11 So. 803 (Sup.Ct. Ala. 1892).

[307] *Id.*., at 808.

perils with nearly indiscernible causes. Statistical evidence also suggested that civil law remedies could hardly accord injured workers and their families adequate and prompt protection against losses accompanying the frequent inevitable hazards of modern industrial life.[308] Therefore, an overarching system was introduced with the intention of improving upon the ordinary tort remedy, based upon the employer's responsibility to assume a professional risk of common liability for all employers of a district or industry (often with employee contributions and public subsidies), and providing cash-wage benefits to victims of employment-related injury.[309]

As for the moral basis underlying this revolutionary creation, J. Chamberlain noted that the system is "based on the principle of relieving the workmen and not of punishing the employer."[310] The principle is based on a contentious but popular economic rule, emerging from modern capitalism, that those persons who enjoy the profits of a business should ultimately bear the cost of injury or death incident to the manufacture, preparation, and distribution of its product.[311] A similar theory has also been concisely asserted in certain judicial decisions: "[t]he Workmen's Compensation Act was adopted to protect industrial workers against the hazards of their employment, and to cast upon the industry in which

[308]See "The Report to the Legislature of the State of New York by the Omission to Inquire into the Question of Employers' Liability and other Matters"(1910), *cited* in S. A. Riesenfeld & R. C. Maxwell, *infra*, at p. 137, also A. B. Honnold, 'Theory of Workmen's Compensation," (1918) 3 Cornell L. Q. (No. 3) 264, at p. 267.

[309]S. A. Riesenfeld & R. C. Maxwell, *Modern Social Legislation*, (Brooklyn: The Foundation Press, 1950), at pp. 127-9, A. H. Ruegg, *Ruegg' Employer's Liability and Workmen's Compensation*, 7th ed (London: Butterworth & Co., 1907), at pp. 217-9, P. Cane, *Atiyah's Accidents, Compansation and the Law*, 5th ed. (London: Butterworths, 1993) at pp.270-2; E. Rabel, *The Conflict of Laws—A Comparative Study*, Vol. 3, 2d ed. (Ann Arbor: Univ. Mich. Press, 1964) at p. 212; for a general description of the legislative history of workers' compensation systems in the major countries of the world since its original introduction by Bismarck in 1884, see H. B. Bradbury, *Bradbury's Workmen's Compensation and State Insurance Law of the United States*, (New York: The Banks Law Publishing Co. 1912), at pp. xii-xxxii.

[310]The Times, May 4th and 19th, 1897; see also F. P. Walton, "Workmen's Compensation and the Theory of Professional Risk" (1911) 11 Col. L. Rev. 36, at pp. 40-1.

[311]H. A. Johnson III, *Worker's Compensation Law and Practice, Louisana Civil Law Treatise, Vol.* 13, (St. Paul: West Publishing Co. 1994), at p. 37.

they are employed a share of the burden resulting from industrial accidents."[312] In fact, even from a purely cost-effective point of view, the preservation of the labor force through non-litigated benefits might reduce the expense of production which will eventually be passed onto the general public.

By nature, modern workers' compensation should be characterized as a special branch of social insurance, since it has evolved from a special regime of tort liability erected upon the presumed fault and financial capability of the employer[313] to a system which provides expeditious remedies for injury *per se* - without the cumbersome proof of fault by the employer and absence of negligence by the employee - through a stable public authority (*i.e.*, Workers' Compensation Commission/Board or Industrial Court, *etc.*).

Notwithstanding the minor differences between national or provincial workers' compensation laws, the common features of the institution include automatic recovery of benefits with minimum procedural requirements, limited inquiry into the victim's negligence or fault, monetary ceilings on benefits, restriction of common-law actions by employees against employers, a right to sue responsible third parties, administration by government agencies, and provisions for insurance of employers against losses.[314]

The abolishment or restriction of the employer's civil tort liability in exchange for the more efficient protection of the workers' compensation system has become an overwhelming trend in most welfare states,[315] such that this benefit system has become a major institution of redemption for industrial injury. In the international air transport industry, it has even been boldly declared that the airline's liability toward its employees is uniformly governed by workers' compensation statutes,[316] which of course is not necessarily true, as we have seen in the above sections.

[312]*Walters* v. *Eagle Indemnity Co.*, 166 Tenn. 383, at 386, 61 S.W. 2d 666, at 667 (Sup. Ct. Tenn. 1933).

[313]See, *e.g.*, *infra* Section **2.4.1** of this chapter.

[314]See A. Larson, *The Law of Workmen's Compensation*, Vol. 2 rev. ed(1978), at §§ 1.00, 1.10.

[315]S. A. Flax, Forth Circuit Review, "Conflict of Laws" (1980) 37 Wash.& Lee L. Rev. 464.

[316]See L. S. Kreindler, *Aviation Accident Law*, cum.& revd. (New York: Matthew Bender, 1974), at § 3.14.

The two-tier remedial system for the international air transport industry will probably not change, even though more countries in the world are trying to accommodate the workers' compensation system as an element of the social security benefits for victims in the course of employment which can match or exceed the compensation levels of civil tort actions. Furthermore, since employment relations in the international transportation industry have always implicated certain foreign elements, which may entail extraterritorial application of the national workers' compensation system, the coexistence of dual sources of compensation is inevitable.

There are two problematic aspects regarding the application of national workers' compensation systems to the international air transport industry. One is the theory and nature of the national workers' compensation system serving as the basis of application for the statutes, while the other is the procedural aspect of the conflict of workers' compensation laws.

2.3.2 Basic Features of Workers' Compensation in International Aviation

A. Introduction

A trilogy of events must unfold to activate the workers' compensation system: first, the injury must fall within the jurisdiction of the compensation regime; second, there must be an employment relationship basis for the servant (employee) to seek recovery from the master (employer) or the public administration; finally, the compensable industrial injury must arise from a work-related accident, or in the course or out of employment. There is no major difference between the aviation industry and other business enterprises with respect to these basic features. However, the special character inherent in aviation activities might create certain variants deserving further exploration.

B. Injuries to Employees

Whether the work-related injury falls within the jurisdiction of the workers' compensation system depends upon the legal structure of the country concerned. Some countries, like the US, have adopted special social security regimes for

government employees (*i.e.*, the *Defense Base Compensation Act*)[317] or peculiar trades (*i.e.*, the *Longshoremen's and Harbor Workers' Compensation Act*),[318] and for industrial accidents occurring on the High Seas or navigable water.[319] These special regimes may provide exclusive remedies precluding the application of the regular workers' compensation system,[320] though sometimes both types of benefits may coexist.

As mentioned in Section 2.2.3.E., above, some countries do not extinguish the employee's delictual action against his employer upon preemptive application of workers' compensation, resulting in several possible models of collateral benefits. Basically, there is no problem in applying workers' compensation statutes to the cumulation and supplementation models, because in both models the civil tort claims are ancillary; in the election model, when the parties to an employment contract are forced to choose before the accident, the chosen regime becomes exclusive and either claim will therefore bar the other. Thus, if the employee has expressly given up his benefits before the work-related injury, then it will not be covered under the compensation system. If he elects after the accident, since most of the relevant statutes expressly prescribe the conditions of election, the adjudicating court will only have to determine whether all the requisite conditions of election have been fulfilled by the parties in deciding the applicability of the workers' compensation system.

C. The Employer-Employee Relationship

Since the workers' compensation system is designed to provide an efficient mechanism of remedies for employees who suffer work-related injuries, its benefits are granted only on the basis of an existing master and servant relationship, *i.e.*,

[317]Act Aug. 16, 1941, c. 357, amended, Act Dec. 2, 1942, Title III § 301, 42 U.S.C.A. §§ 1651-1654.

[318]Act Mar.4, 1927, c.509, §§ 1-50, amended, Act Sept.28, 1984, P.L. 98-426, 33 U.S.C.A.§§ 901-950.

[319]See *Reinhardt* v. *Newport Flying Service Corp.*, 133 N.E. 371 (N.Y.App. 1921) (employee injured by the hydroaeroplane floating on navigable water was found to be an employee on a "vessel" and was thus subject to admiralty jurisdiction; but if the hydroaeroplane is in the air, then it will not be treated as a vessel).

[320]*E.g.*, 42 U.S.C.A. §§ 1651, subsection(c).

the injured person must be an employee of the person against whom the recovery is sought.[321] Whether such a relationship exists or not depends on the factual situation and its compatibility with the requirements of the relevant statutes, a determination which belongs mostly to the function of administrative entities.

Unlike domestic or private aviation activities which, due to economic reasons, may provisionally recruit personnel to perform non-scheduled or non-routine flight duties - sometimes giving rise to the question of whether these casual on-board personnel are employees with respect to a certain workers' compensation scheme[322] - few problems of a similar nature would occur in the international air transport industry with its larger economic scale and sophisticated operations. The only controversy that arises is when the contracts of employment were made through a national airline, while the flight personnel are to perform duties on-board for a foreign air carrier. Whether the national airline in such situations is an employer or an agent is, however, a problem of fact which is left to the court; in US practice the issue is generally solved by referring to the contract of employment rather than the *locus laboris* or other elements. In *Hallock* v. *Trans World Airlines, Inc.*,[323] an American flag carrier (TWA) was found to be acting only as an agent of employment, hiring the deceased pilot on behalf of Ethiopian Air Lines (EAL), rather than as an employer. Yet under the "crew interchange agreement" as found in *McMains* v. *Trans World Airlines, Inc.*,[324] even though the deceased pilot

[321] 8 Am Jur 2d, Aviation § 98.

[322] See *Ritter* v. *Lehigh Aircraft Co.*, 3 Avi 17, 906 (Ct. C.P.Pa. 1951) (The pilot who was lent the airplane by his employer to transport the latter on a trip is conceived to be the employee of the owner); *Beswick* v. *State Industrial Accident Commission* 10 Avi 17, 668 (Sup.Ct. Or. 1967) (An employer engaged in the business of furnishing aircraft for hire was held to be ineligible to claim compensation when killed in transporting a Forest Service observer on a fire-fighting mission); *Lambert* v. *Heath Aircraft Corp.*, (1932) U.S.Av. Rptr. 238 (Mich. Dept.of Labor & Industry) (A test pilot who was regularly employed by an aircraft manufacturer to test the latter's aircraft is an employee of the latter); *Famous Players Lasky Corp.* v. *Industrial Accident Commission*, 228 P.5 (Sup.Ct.Cal. 1924) (A pilot who operated the airplane for hire on a daily basis is the employee of both the owner of the plane and the hirer); *Schonberg* v. *Zinsmaster Baking Co.*, 217 N.W.491 (Sup.Ct.Minn.1928)(Aviator hired by a baking company to do advertising work is an employee of the latter); *Murrray* v. *Industrial Accident Commission*, 14 P.2d 301 (SupCt. Cal. 1932) (Pilot hired by the purchaser of the plane to deliver it is the employee of the purchaser) .

[323] 8 Avi 17, 448 (Miss App. 1963).

[324] 8 Avi 17, 511 (Sup. Ct. N.Y. 1963).

had also performed his duties mainly for a foreign air carrier, he was held to be only under special assignment and thus remained continuously employed by the national flag carrier. Such a drastic contrast can be explained by the fact that Hallock's contract of employment had precisely identified EAL as the master of the relationship which undertook all related obligations including the payment of regular salary, notwithstanding that in fact TWA had also provided the pilot with certain benefits (which were considered to be on a voluntary basis) and, even more curiously, deducted social security premiums from his pay.[325] But in *McMains*, the victim performed his duties for the foreign airline only under a special arrangement with his original employer, not with the former.[326] Briefly, there are generally two levels of contract in the crew exchange program,[327] and the existence of an employer-employee relationship with respect to workers' compensation will be determined by the terms of contract of employment between the employee and employer, instead of the agreement between two airliners. When the contract of employment is made through an agency which in most cases does not control the day-to-day conditions of the employee's work duties, that agency is consequently not conceived to be the relevant employer. British jurisprudence has, however, at times adopted a different point of view in non-aviation cases.[328]

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[325]*Supra* note 323, at 17, 449.

[326]A typical example of the "crew interchange agreement" is found in *Handler* v. *ALM Dutch Antillean Airlines, Inc.*, 14 Avi 17, 415 (EDNY, 1976). In *Handler*, ALM (Dutch Antillean Airlines) contracted to assign its employee to service certain KLM flights pursuant to a "crew interchange agreement;" the assigned ALM crew was still paid, selected, and dischargeable by ALM, but KLM had exclusive control over these assigned ALM crew members, who performed their duties in accordance with KLM standards and procedures, including reporting to a KLM station manager, wearing KLM uniforms and following KLM-approved flight plans.

[327]See I.H.Ph. Diederiks-Verschoor, W.P.Heere & A.Moll, "Die Rechtsstellung des Personals der Zivilluftfahrt" (1972) ZLW 107, at p.116.

[328]See *Johnson* v. *Coventry Churchill International Ltd* [1992] 3 All E.R. 14 (Q.B.). The plaintiff was hired under a contract which referred to him as a 'sub-contractor' for the defendant, an employment agency, to work abroad for the defendant's client; according to the contract, the defendant would pay the plaintiff his 'remuneration' provided that he was at all times to work as and where directed by the defendant, but during his service abroad the plaintiff must subject himself to the control and management of the foreign client, as well as receive the lawful orders given therefrom. The court rendered that since the plaintiff "was at all times to work as and where directed by the defendants and their clients," the contract between the plaintiff and the

D. Work Accidents Arising During (or in) the Course of Employment or Out of Employment

i.) In the Course of and Out of Employment at Common Law

a. Introduction

Not every injury sustained by employees will be covered by workers' compensation statutes. Only the injury caused by a work-related accident is eligible for claim under this system of protection, because the workers' compensation system is adopted to protect industrial workers specifically against the hazards incidental to their employment, thereby casting a share of the burden resulting from these industrial accidents upon the industry in which they occur.[329] Thus logically, only injuries which can be attributed to the employment, *i.e.*, the injury which occurs during the period of employment or in the place where the worker is normally expected to perform his duties, can be recovered.

Crystallizing the above factual nexus, the compensation schemes of most common law states generally follow the British prototype — the *Workmen's Compensation Act* of 1897[330] and the *Workmen's Compensation Act* of 1906[331] - which defines the work-related accident as "arising out of and in the course of employment,"[332] though their statutory forms might exhibit certain variances, such as replacing the "and" with "or" as well as substantially extending coverage in order to cope with the expanding magnitude of employment in modern industrial

agency is characterized as a 'contract of service,' rather a 'contract for services,' which instituted a regular employer-employee relationship between the parties, notwithstanding that the defendant did not factually supervise the daily work of the plaintiff while he was abroad.

[329]See *Walters* v. *Eagle Indemnity Co., supra* note 312.

[330]60-61 Vict. c.37.

[331]6 Edw. 7, c. 58.

[332]See T. G. Ison, *Workers' Compensation in Canada*, 2d ed(Toronto: Butterworths, 1989), at pp. 26-7 on the Canadian formulae; E. I. Sykes & H. J. Glasbeek, *Labour Law in Australia*, (Sydney: Butterworths, 1972), at p.163 on the Australian mode; and S. A. Riesenfeld & R. C. Maxwell, *supra* note 309, at p.234 on the US system.

life.[333]

The US jurisprudence generally relates "in the course of" to time and place, and "arising out of" to cause or origin; so briefly, an injury that occurs "in the course of" employment happens while the employee is engaged in the performance of his duties, and the injury that is caused by a risk incident to his employment arises "out of ... employment."[334] Pragmatically, the former often refers to immediate and external industrial injury, whereas the latter refers to occupational disease resulting from harm to the internal structure of the body. British case law usually adopts a two-tier statutory formula to assess the connection between the employment and the accident. The first concerns whether the accident happened while the employee was under the authority, supervision, or control of his employer, and the other considers whether the activities of the employee at the time of accident were such as to distinguish him from an ordinary member of the public.[335] This formula substantially reflects the above US reasoning, which requires that all the elements of space and time relate to the cause and origin of the accident in determining whether the accident arises in the course or out of employment, instead of remaining strictly bound by the surface meaning of these statutory phrases. A similar approach has also been adopted by Canadian and Australian courts.[336]

Most of the basic principles and tests employed by adjudicating courts to assess whether accidents arise "in the course of" employment (mentioned in sections 2.1.3. and 2.2.3.B., above) adapt readily to employees of an air carrier. Nevertheless, there are certain special characteristics of industrial life in the international air transport business which demand further interpretation and revision from these principles and tests.

[333]In Australia, every province has replaced the "and" with "or" except Tasmania: see E. I. Sykes & H. J. Glasbeek, *supra.*; the same is true with all provincial statutes of Canada, see T. G. Ison, *supra*, p.332.

[334]See *Shubert* v. *Steelman*, *infra* note 370, at 942-3.

[335]See A. I. Ogus & E.M. Barendt, *The Law of Social Security*, 3d ed (London: Butterworth, 1988) at p 264.

[336]See *Kavanagh* v. *The Commonwealth*, (1960) 103 C.L.R. 547, at 556-7.

b. The Going and Coming Rule

Neither the "going and coming" rule nor its exception has ever been clear for flight deck personnel with respect to the applicability of the workers' compensation scheme. It has commonly been suggested in other industries that if transportation is provided by the employer,[337] or a specific amount of payment made by the employer for transportation or time spent in transit,[338] then the injury sustained by the commuting employee during the going and coming will be an accident which arises in the course of employment. The case of the free ride forms an exception to the "going and coming" rule: the employer who provides transportation for his commuting employee, based on the terms of their contract of employment (*i.e.*, the collective bargaining agreement),[339] is generally regarded to be following a frequent and regular practice, so the injury sustained during such transportation is undeniably incident to employment. Furthermore, when the commuting employee receives such free rides, his employer indeed exercises exclusive control over the conveyance - for generally the aircraft performing the carriage will belong to the employer - substantially extending the scope of employment to the en route period. It is irrelevant if the aircraft is, at the same time, used to transport other passengers for reward.

A Californian court has held that "[w]here the employer paid his employee a specific amount to cover time required to travel to and from work, it is a permissible inference that the employer had agreed that the employment relationship should commence at the time the employee left his home and continue

[337]See the US cases cited in *supra* note 222. The *British Social Security Act* of 1975, *infra* note 361, has also provided that "an accident happening while an employed earner is, with the express or implied permission of his employer, traveling as a passenger by any vehicle to or from his place of work, shall, notwithstanding that he is under no obligation to his employer to travel by that vehicle, be deemed to arise out of and in the course of his employment if — (b) at the time of the accident, the vehicle — (i) is being operated by or on behalf of his employer or some other person by whom it is provided in pursuance of arrangements made with his employer," in s. 53.

[338]See *Kobe* v. *Industrial Accident Com.* 215 P.2d 736 (Sup.Ct.Cal. 1950).

[339]See *Demanes* v. *United Air Lines*, *supra* note 40, at 14: "[T]hese provisions were included in the collective bargaining agreement to induce [the carrier] ... to make more efficient use of pilot's time — i.e., to minimize the amount of time that pilots would have to spend away from home while not actually on flight duty."

until his return."[340] It affirmed that the risks of such an excursion are regarded as incident to the employment. However, in two US aviation cases concerning free carriage provided by an employer, the commuting employees were treated as "passengers" of the flight only and precluded from the coverage of the compensation system,[341] notwithstanding that in one of the cases the employees were also entitled to receive remuneration under the collective agreement (half-pay and half-flight time credit) with the airline employer for their commuting time.[342]

There is no clear reason why the court adopts a totally opposite attitude towards flight deck personnel. Considering that both judgments were obsessed with the word "passenger," which in fact bears no significant consequence on the applicability of the compensation scheme per the *ratio decidendii* cited above, it seems that the reason may relate to a proposition long advocated by most Warsaw authors that the contract of employment and the contract of carriage cannot coexist with respect to Warsaw or the other conventions regulating passenger carriage by air. Thus, on-board personnel can fall under only one of these relationships.[343] According to this immortalized dichotomy, the voyage undertaken by an employee is conceived to be solely for the purpose of performing his employment duties, rather than for moving from one place to another; yet once the employee receives documents of transportation, he is then no longer an employee but a passenger, and thus his injury sustained on-board does not (though it possibly should be considered to) arise out of his employment. Such a contract-of-carriage oriented approach may have enjoyed applause within the Warsaw spectrum, but it should never even form a factor for the judicial authorities to exclude commuting employees from the coverage of the compensation system.

[340] *Kobe* v. *Industrial Accident Com.* *supra* note 338, at 737.

[341] See *Allen* v. *Carman*, *supra* note 70, and *Demanes* v. *United Air Lines*, *supra* note 40.

[342] *Demanes* v. *United Air Lines*, *supra*, at 40; see also *InRe Mexico City Aircrash of October 31, 1979*, *supra* note 7 ("The affidavit maintains that [the employee] ... was receiving full pay and half flight time credit for her time aboard the aircraft. Even though uncontroverted, we do not find these allegations sufficient to negative the existence of genuine issues of material fact concerning the question whether [the employee] was receiving 'transportation' as a 'passenger' aboard the flight.")

[343] For a detailed discussion on this proposition, see the above Section **2.1.2.B.** of this chapter.

In this system, it does not matter if collateral remedial institutions coexist, such as the Warsaw Convention, Rome Convention, or national tort law, and that is why various models of coexisting remedies are found in almost all systems around the world.[344] According to either model, the compensation system always enjoys priority in application, so the existence of other civil remedies would never interfere with the exclusivity of the former. From the policy point of view, the coverage of the compensation system should be interpreted as broadly as possible, in order to reduce the potential for civil litigation between the servant and master on controversies arising from this grey area.

Contrary to the conservative and ironic approach adopted in US jurisprudence, the British *Social Security (Industrial Injuries) (Airmen's Benefits) Regulations* of 1975 expressly extended the coverage of compensation benefits to accidents befalling pilots, commanders, navigators, and other crew members whenever they are "acting in an emergency [or] traveling to and from work in any aircraft."[345] Even though the on-board airline employees are not flying "for the purpose of the aircraft," especially those commuting members of the cabin crew who receive a free ride provided by the carrier, the injuries sustained during their journey going to and coming from work will be covered by the system.

c. Hijacking and Other Assault

Are the injuries caused by midair hijacking, by the plane crash following a bomb explosion, or even by a missile attack accidents arising "in the course of" employment? It is generally conceived in almost all systems that if the employee is assaulted by a third person while engaged in the performance of his employment duties, and there exists a causal connection between the assault and his employment, then any injuries resulting therefrom are compensable. The key element of eligibility to claim for such injuries is that the assault or the assailant must be part of or related to the work environment,[346] as when the nature of the

[344]See the above Section **2.2.3.E.** of this chapter.

[345]SI 1975/469, reg 3(c).

[346]See T. G. Ison, *supra* note 332, at pp.34-5, and E. I. Sykes & H. J. Glasbeek, *supra* note 332.

employment - its conditions and obligations - is such that it invites assault (*i.e.*, working as a technician in the mental health center),[347] or when the employee is exposed to a greater risk of assault than the general public by the character of his work (*i.e.*, a police officer who is prone to assault by a suspect).[348] For flight deck personnel, it is unquestionable that their conditions of employment (including possible air traffic congestion, wake turbulence, and narrow aisle-ways, *etc.*) create higher risks of being smashed by a rolling beverage cart while preparing to serve drinks to passengers,[349] thrown about the passenger cabin,[350] or even killed in a crash due to mechanical failure or pilot error[351] than those faced by the general public; but are on-board activities themselves prone to hijacking or bombing? And does working in the cabin expose flight deck personnel to a greater risk of assault by the hijacker or bomber than the passenger (or other members of the general public)?

Aerial piracy, or what is officially termed the unlawful seizure of aircraft,[352]

[347]See *Masek* v. *St. Vincent's Medical Center*, 467 N.Y.S.2d 925 (N.Y.app.div. 1983), and *Commercial Standard Insurance Co.* v. *Marin*, 488 S.W.2d 861(Tex.civ.app. 1972).

[348]See *Haynes* v. *Harwood*, *supra* note 192.

[349]See *Wong* v. *Stanley, et al.*, 21 Avi 17, 677 (4th Cir. 1987).

[350]See *Follese* v. *Eastern Airlines*, *infra* note 516.

[351]E.g., *Kahle* v. *McDonnel Douglas*, 23 Avi 17, 388 (E.D.Mich. 1990), and *Stites* v. *Universal Film Mfg. Co.*, [1928] U.S.Av. Rptr 312 (Cal.Industrial Accident Com.)

[352]See the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed in Tokyo, September 14, 1963 (the title of Chapter IV is "Unlawful Seizure of Aircraft" which is defined in Article 11 as "a person on board has unlawfully committed by force or other threat thereof an act of interference, seizure, or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed"), and the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague, December 16, 1970 (defined as "person and his accomplice who on board an aircraft in flight unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act" in Article 1). In the later Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal, September 23, 1971, the scope of these felonious acts on board has been further widened, encompassing any person and his accomplice who unlawfully and intentionally "performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft, or destroys an aircraft in service or cause damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight, or place or causes to be place on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight or which is likely to endanger its safety in flight, or destroy or damages air navigation facilities or interferes with their operation, if any such acts is likely to

enjoys a short but sanguinary history which is underlined by diverse modern human motifs and could be described as a phenomenon arising from the background of perplexing political, psychological, and economic controversies of the post-World War II environment.[353] Yet it is certain that objectively, all these acts of hijacking, armed attack, or bombing (and bomb threat) in international air transport are aiming to forcibly divert an aircraft in flight against the will of the cabin crew,[354] however polycentric the eventual purposes to which these acts are attributed.[355] The reasons and the quotient of their occurrence have inevitably developed into a stage where, as long as air transport operates, there will always be potential actors trying to seize or interrupt it through violent ways. It could therefore be said that these felonious acts have become risks inherent to civil aviation activities, as evidenced by the endeavor to suppress these specific felonies through a series of international conventions since 1963.[356] Because the cabin crew is required to perform their duties on-board the aircraft, the hazard of being subjected to these instances of human mischief in that milieu necessarily becomes an inherent risk of their employment, like the road traffic accident for a bus driver, which is incidental to the performance of their contractual duties. In practice, a US court judgment has held that the death of a business traveler caused by an on-board bomb explosion is an accident that arises in the course of that passenger's employment when his work requires him to travel by airplane: "the plane [thus] became the milieu of his employment, and the hazard of a plane crash became a risk of that employment, to which [the passenger] ... was subjected because of the fact that he was directed to travel by plane .... There

endanger the safety of aircraft in flight, or communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight, or any attempts to commit the above acts" (Article 1).

[353]Several categories, though a little coarse from the sociological or political point of view, of aerial hijacking since the end of World War II are defined in E. McWhinney, *infra*, pp.8-15.

[354]See E. McWhinney, *Aerial Piracy and International Terrorism—The Illegal Diversion of Aircraft and International Law*, 2d ed (Dordrecht: Martinus Nijhoff Publisher, 1987), at pp. 7-8.

[355]See M. Milde, "The International Fight Against Terrorism in the Air", in *The Use of Airspace and Outer Space for all Mankind in the 21st Century*, (The Hague: Kluwer Law International, 1995), at p.143.

[356]See *supra* note 352.

should be no distinction as to whether the explosion and crash were induced by mechanical failure, or by human error, or by human mischief directed against another — they are all possible risks of the transportation [the passenger] ... was required by his employment to take."[357] An analogy could surely be drawn from this case for the cabin crew employee who is mostly confined to working within the fuselage.

Factually, aside from certain incidents, such as hijacking or bombing, where the direct cause of injury is evident, the cause may remain obscured in most air crashes over the high seas or elsewhere,[358] such that there is nothing in the known circumstances from which it might reasonably be inferred that the accident did arise in the course of the employment;[359] yet vice versa, it would also be too "speculative" to conclude that the injury did not arise in the course of employment.[360] In order to protect the economically-inferior employee, a presumption already adopted in some compensation statutes[361] can be applied to such situations: in the absence of evidence to the contrary, an accident shall be deemed to have arisen in the course of the employment. This approach has been adopted in US jurisprudence to form a liberal construction of the air crash case.[362]

[357]See *C.A. Dunham Co.* v. *Industrial Com, et al.*, 6 Avi 17, 254 (Sup.Ct. Ill. 1959), at 17, 259, similar decision see *Hammer* v. *General Electric X-Ray Corp.*, [1932] U.S.Av. Rptr. 242 (Minn.Industrial Com.).

[358]See "Lost in the Heavens" TIME, 14 Oct. 1996, p.34: "But it is not clear how much the plane can be salvaged. The day after the crash, the strong Humboldt Current that flows up the Pacific coast of South America washed away the fuselage of the downed aircraft. Whether the black boxes disappeared with it is not known."

[359]See "TWA Probe Advances, But No Cause Found" Av. Wk & Space Tech., 29 July 1996, pp. 26-28, "Mosaic of Clues, But Still No Answers"Av. Wk & Space Tech., 5 Aug.1996, pp.28-33, and "A Theory Gone to the Dogs—The TWA focus looks elsewhere as the bomb angle is short-circuited by a startling revelation" TIME, 30 Sept. 1996, p.30.

[360] A. I. Ogus & E.M. Barendt, *supra* note 335, at p.273.

[361]*E.g.*, the British *Social Security Act 1975*, c.14, s.50(3) ("For the purpose of this Chapter, an accident arising in the course of an employed earner's employment shall be deemed, in the absence of evidence to the contrary, also to have arisen out of that employment.")

[362]See *Ritter* v. *Lehigh Aircraft Co.*, *supra* note 322 (The aircraft had disappeared before reaching its destination, yet the Compensation Board still granted benefits to the wife of the deceased pilot, on the conviction that the pilot met his death while in the employ of the company).

d. Work-Related Disease

For accidents arising "out of" employment, the key controversy revolves around the work-related disease. An air crew member who contracted a fever caused by some unidentified virus while working abroad, gradually resulting in total deafness in his right ear, was granted coverage because the court considered that the nature of his employment required him to remain for a continuous period of time in a foreign area which was more hazardous to his health than his homeland.[363] Even though the place where he was detained belonged to a "public zone,"[364] the disease which he contracted there was found to be an accident arising out of his employment. This decision is inspiring for flight deck personnel who may at times perform their service on scheduled flights to certain destinations with climates where epidemic disease is rampant; an overnight stay or even a shorter period of transit therein will inevitably expose the cabin crew employee to potential medical peril which is surely incident to employment. Furthermore, it has also been found that if an illness is proximately caused by or results from the nature of the pertinent employment, then it shall be treated as an injury occurring in the course and out of employment, no matter how vague our understanding of the transmission of the disease or how absolute the lack of medical verification, because "the broad humanitarian purpose of the workers' compensation statute read as a whole requires that all reasonable doubts be solved in favor of the claimant."[365] Thus influenza, for example, contracted by a flight attendant due to extreme coldness in the aircraft galley where she must perform her on-board duties, and faulty heating and air-conditioning in the hotel provided by the airline for transitory lodging, is conceived to be a compensable injury arising out of her employment.[366]

The heart attack or stroke which results from sudden and unexpected injury

[363]*Davis* v. *The Commonwealth, supra* note 239. Some civil law countries, like Norway, also adopt the same approach: see A. Kjønstad, *infra* note 377, at p.177.

[364]See the above Section **2.2.3. B. ii)** in this chapter.

[365]*DeFries* v. *Ass'n of Owners*, 555 P.2d 855 (Sup.Ct. Hawaii, 1976) at 860.

[366]See *Lawhead* v. *United Air Lines*, 584 P.2d 119 (Sup.Ct. Hawaii, 1978) at 124-6.

to the internal structure of the body will sometimes occur while the employee is engaged in the performance of his duties, especially in the Byzantine aviation industry where the stringent requirements of on-time scheduled flight, optimum safety conditions, relatively long or irregular working hours, or even noise, vibration and other physical agents,[367] can always create some emotional or nervous strain triggering a heart attack or stroke. Though not every heart attack or stroke sustained by the employee is compensable, if the employee can prove that the sudden breakdown is caused by his work - such as when a director of aircraft engineering was held accountable by his employer for the plane's condition and the reduction of repair bills, and the eventual incompleteness of both assignments pushed his anxiety to climax[368] - or by an accident arising in the course of employment (*i.e.*, while running away from a plane crash), then it is generally covered by the compensation system. Nevertheless, a stringent but questionable US decision held that the heart attack suffered by an airline ramp agent who physically overexerted himself, trying to deliver a receipt, by chasing after the airplane prior to its departure is not an injury arising out of his employment,[369] partly due to the reason that the heart attack is not assumed to be a "hazard incident to the employment"[370] of a ramp agent whose duties generally involve doing paper work in the office.[371] This judgment evidently ignores the nature of employment in the aviation industry, which usually demands a sudden shift in

[367]See ILO, *Social and Labour Problems in Civil Aviation*, Report, *supra* note 77, at pp.40-51.

[368]See *Klimas* v. *Trans Caribbean Airways, Inc.*, 7 Avi 17, 631 (N.Y.App. 1961), and *Hayes* v. *Revere Copper and Brass, Inc.*, 204 N.W.2d 695 (Mich. App. 1972) (the work aggravated the employee's hypertensive condition and accelerated his death — a non-aviation case)

[369]See *Brandon* v. *American Airlines, Inc.*, 9 Avi 18, 269 (Sup.Ct. Tenn. 1966). The judgment was not followed in *King* v. *Forsyth County*, 263 S.E. 2d 283 (N.C.App. 1980), *Baird* v. *Texas Employer's Ins. Assn.*, 495 S.W. 2d 207 (Sup.Ct. Tex. 1973), *Hartford Acci & Indem. Co.* v. *Thurmond*, 527 S.W. 2d 180 (Tex. App. 1975), *Spino* v. *Dept. Labor and Industries*, 463 P.2d 256 (Wash. App. 1970).

[370]Citing the precedent in *Shubert* v. *Steelman*, 377 S.W. 2d 940 (Sup.Ct. Tenn. 1964) at 942.

[371]In fact, it is generally conceived to be compensable in US jurisprudence if the heart attack is sustained by the employee while he was subject to unusual strain or overexertion, which is not routine to the type of work he was accustomed to performing: see 82 Am Jur 2d, Worker' Compensation § 337, and *Victor Wine & Liquor, Inc.* v. *Beasley*, 141 So. 2d 581 (Sup.Ct. Fla. 1962), *Evans* v. *Fla. Industrial Commission*, 196 So. 2d 748 (Sup.Ct. Fla. 1967).

duties and provisional supporting work, in the instant case factually bringing the employee to the point of physical breakdown. A more appropriate interpretation would be that if the injury occurs while the employee is performing an act reasonably incident to the execution of his master's business (as is the delivery of a receipt by the ramp agent in the above case) though not expressly authorized, and for the benefit of the airline, then regardless of whether the act is performed outside the nature of the employee's work, it shall be considered an accident arising out of employment.[372] This rule would especially serve low-ranking employees who are at times forced to do extra assignments, under threat or harassment, for fear of losing their position.

The chain of causation is conceived as unbroken when the physical affliction was incident to the employment, even if the latter is the result of an aggravated pre-existing or latent disease from which the employee has long been suffering. A good example might be found in the airplane engine packer who suffered serious harm to his body when the dolly he was operating struck a crevice in the floor and threw him backwards. This instant physical injury later accelerated the growth of a pre-existing tumor, eventually causing his death,[373] which was held to be compensable. An analogy could thus be drawn to other latent diseases of airline employee such as diabetes,[374] heart conditions,[375] arthritis,[376] *etc.*

ii) The Work Accident at Civil Law

Nothing similar to "in the course of or out of employment" exists in the compensation scheme of civil law states, which generally prescribe with simple language in the pertinent statutes that work-related injuries shall be redeemed,[377]

[372]A similar opinion can be found in C. Zollmann, "Workmen's Compensation Acts and Aircraft Accident" (1935) 6 J.Air L. 70, at p.74.

[373]See *Russo* v. *Wright Aeronautical Corp.*, 2 Avi 14, 691 (Sup.Ct. N.J. 1948).

[374]See *Smith* v. *Australian Woollen Mills*, (1933) C.L.R. 504. (non-aviation case)

[375]See *Hewett* v. *Standard Concrete Block & Supply Co.*, 186 A 2d 265 (Sup.Ct.N.J. 1962)(non-aviation case)

[376]See *Gales* v. *Great Atlantic & Pacific Tea Co.*, 342 So. 2d 241(La.App. 1977)(non-aviation case)

[377]See J. G. Fleming, "Tort Liability for Work Injury", *supra* note 273, at p.9. For instance,

so the causal connection established between the accident and the employment in time and place plays a relatively more important role in assessing compensable accidents.[378] In German and Austrian legislation,[379] for example, any injury sustained by the employee working in the "general traffic (allgemeiner Verkehr)" field is excluded from coverage under the workers' compensation scheme but is regulated under regular traffic insurance plans.[380] However, if travel is specifically provided for the employee, then the injury will be covered under compensation benefits for the same reason provided in common law.[381]

An employee who is assaulted by third persons while engaged in the performance of his duties is generally covered under the compensation system of most civil law states,[382] so the above-mentioned hijacking theory might also apply in these countries with very little problem.

In some civil law countries, unfortunately, serious injuries arising out of employment as a result of cumulative deleterious effects of minor accidents are not recognized as work-related injuries.[383] Therefore, coverage may be refused for many occupational diseases - including chronic backpain, chemical poisoning, or gradual loss of hearing - which might not even reveal their symptoms during

the Swedish *Act on Work-Related Injuries* of 1976, which covers not only injuries arising in the course of employment, but also diseases caused by work: see C. Oldertz & E. Tidefelt, *Compensation for Personal Injury in Sweden and other Countries*, (Stockholm: Jurisförlaget, 1988), at p.33. But there are also very stringent regulations, such as articles in Chapter 11 of the *National Insurance Act* of Norway, which strictly prescribes that only the injury sustained when employee is "at work at his place of work during working hours" will be covered. See A. Kjønstad, *Norwegian Social Law*, (Oslo: Universitetsforlaget AS, 1987), at p.175.

[378]See G. Perrin, "Occupational Risk and Social Secuity" *supra* note 247, at p.9.

[379]Germany: RVO § 636; Austria: ASVG § 333, par.3. Generally, see J. G. Fleming, "Tort Liability for Work Injury", *supra* note 273, at p.9.

[380]Chapter 11 of the *National Insurance Act* of Norway seems to exclude from coverage all accidents occuring while the employee is on his way to or from work. See A. Kjønstad, *supra* note 311; G. Perrin asserts that Denmark, Mauritius, Philippines and Seychelles also refuse to cover commuting injuries: see G. Perrin, *supra* note 247, at p.10.

[381]See *supra* note 316, also adopted by Italy, Malta, Pottugal and Turkey: see G. Perrin, *supra* note 247, at p.10, n.37.

[382]Such as in Norway, see A. Kjønstad, *supra* note 377, at p. 176.

[383]*E.g.*, Chapter 11 of the *National Insurance Act* of Norway: see A. Kjønstad, *supra* note 377, at p.176.

employment though they are easily aroused in the aviation industry.[384]

iii) Employee's Contributory Negligence

a. Introduction

Mere negligence or carelessness on the part of the employee which causes or contributes to her work-related injury or death does not necessarily deprive her of the right to claim benefits unless it is expressly excluded in the compensation statutes. It would rarely be so excluded,[385] however, since the compensation system is designed to replace burdensome litigation and is mainly remedial in nature. Generally, no proof of fault by either party is required.

Further, only negligent acts serious enough to constitute willful misconduct or gross negligence will affect the employee's eligibility for compensation, a category restricted to willful disobedience to a prohibition which is known and understood: such as the pilot's willful or deliberate failure to follow safety regulations. Another typical example would be suicide,[386] but sometimes even self-inflicted injury and suicide is compensable upon proof that such willful behavior is a direct result of work-related mental illness.[387]

Inattention, imprudence, or error of judgment in emergency situations which arise during the performance of duties will usually not bar a claim for compensation in aviation activities, irrespective of how high the degree of professional skill required with respect to the disastrous consequences of this neglect or mistake.[388] This rule offers substantive protection to the employee working with increasingly

[384]See ILO, *Social and Labour Problems in Civil Aviation*, Report, *supra* note 77, at pp.49-51.

[385]See: (Great Britain) *Harris* v. *Associated Portland Cement Manufacturers Ltd.*, [1939] A.C. 71; (Canada) *Decision No. 114*, B.C., (1975) 2 Worker's Compensation Reporter 85; (US) *United Employers Casualty Co.* v. *Barker*, 148 S.W.2d 260 (Tex.civ.app., 1941), *Kasari* v. *Industrial Com. of Ohio*, 181 N.E. 809 (Sup.Ct.Ohio, 1932), *Webb* v. *New Mexico Pub.Co.*, 141 P.2d 333 (Sup.Ct.NM. 1943), *Radermacher* v. *St. Paul C.R.Co.*, 8 N.W.2d 466 (Sup.Ct.Minn.,1943), *Union Colliery Co.* v. *Industrial Com.*, 132 N.E. 200 (Sup.Ct.Ill.,1921).

[386]See *McDonald* v. *Atlantic Steel Co.*, 210 S.E.2d 344 (Ga. App. 1974).

[387]See *Delaware Tire Center* v. *Fox*, 401 A.2d 97 (Sup.Ct.Del. 1979) (the employee committed suicide because of the pain he suffered from a disabling injury at work.)

[388]See *Taylor* v. *Alidair Limited.*, (1976) IRLR 420 (Bristow, J.), *aff'd* (1978) IRLR 82 (C.A.).

perplexing and mammoth industrial mechanisms. In modern civil aviation, poor piloting is likely to be jointly caused by inadequate training, faulty judgment under anxiety or pressure, and even aircraft design, such as the ergonomic defects inherent in the operational character of an aircraft, *etc.*, which are intertwined in a chain of causation; thus, it would be unfair to cast the burden wholly upon the final link in this chain. A fatal crash could initially arise from the employee's gross negligence - an inadvertent activation of the autopilot takeoff/go-around lever beneath the throttle - which ultimately results in disaster because the pilot never received the proper training to disengage this (negligently-activated) TOGA mode, or because an error in judgment is made impulsively.[389] Surely the pilot's own negligence contributes to the accident, but since the accident results from the cumulative effects of many other convoluted elements which are out of the pilot's control, it would be unfair to thus deprive the pilot of his right to a claim; and even according to an apportionment mode, the economic efficiency of the compensation system will suffer, for the cost of investigating the amount of contribution from each related cause would far exceed the amount of the claim.

b. Intoxication

According to a study conducted by the US National Transportation Safety Board,[390] a major proportion of aviation accidents are caused at least partially by the "alcohol impairment of pilot[s]."[391] Undoubtedly, intoxication generates greater obstacles in piloting an aircraft than in maneuvering other transport vehicles, for the aircraft's complexity and vulnerability requires sharper motor coordination

[389]See "Pilot, A300 Systems Cited in Nagoya Crash", Av.Wk.& Space Tech. July 29, 1996, at pp. 36-7.

[390]Comptroller General 's Report to the Congress, *Stronger FAA Requirements Needed to Identify and Reduce Alcohol Use Among Civilian Pilots*, cited from D. U. Scofield, "Knowing When to Say When: Federal Regulation of Alcohol Consumption by Air Pilots" (1992) 57 J.Air L. & Comm. 937, at pp.941-2.

[391]*Id.* The National Transportation Safety Board found in its report that between 1965 and 1975, there are 485 aviation accidents caused at least partially by the pilot's intoxication, and 430 of them are fatal.

and mental reaction time; almost all aviation regulations around the world prohibit piloting while intoxicated,[392] and some have even criminalized the act of drinking and flying.[393] Would the injury caused by intoxication of a pilot or another crew member be barred from workers' compensation? There is some judicial support for the proposition that since the employee is intoxicated, he is incapable of performing his duties and is in fact outside the scope of employment, thus injuries sustained therefrom shall not be conceived as arising out of employment.[394] Yet in other jurisdictions, the claim for compensation is not barred due to the mere fact of the employee's intoxication, unless such is the proximate[395] or sole[396] cause of subsequent injuries. From the latter point of view, if the intoxication did not

[392]*E.g.*, § 91.17 (a) of the US Federal Aviation Regulations provides that "[n]o person may act or attempt to act as a crewmember of a civil aircraft — (1) Within 8 hours after the consumption of any alcohol beverage; (2) While under the influence of alcohol; (3) While using any drug that affects the person's faculties in any way contrary to safety; or (4) While having .04 percent by weight or more alcohol in the blood." See 14 C.F.R. § 91.17 (1990).

[393]*E.g.*, 18 U.S.C. § 342: "Whoever operates or directs the operation of a common carrier while under the influence of alcohol or any controlled substance... shall be imprisoned not more than fifteen years or fined under this title."

[394]See *Svoboda* v. *Wyoming State Treasurer, etc.*, 599 P.2d 1342 (Sup.Ct. Wyo. 1979) ("[T]he claimants ...have been outside the scope of their employment at the time of the accident in that they were either intoxicated or were not in pursuit of the duties of their employment"); *Richard* v. *George Noland Drilling Co.*, 331 P.2d 836 (SupCt. Wyo. 1958)("[A] claimant in an advanced state of intoxication may abandon his employment by making himself incapable of engaging his duties."); *Smith Brothers* v. *Dependents of Bob Cleveland*, 126 So. 2d 519 (Sup.Ct.Miss. 1961) ("[I]ntoxication is an affirmative defense with the burden of proof upon the employer pleading it"); *Hopkins* v. *Diversified Steel Services*, 452 So.2d 144 (Fla.App. 1984); for a Canadian decision, see Decision No. 169/87, Ont. 1987, WCAT.

[395]See *Beauchesne* v. *David London & Co.*, 375 A.2d 920 (Sup.Ct.R.I. 1977) ("Where claimant sustained disabling injuries as a result of fall from plant window after he became intoxicated at plant Christmas party held during period usually reserved for work and for which employees were usually paid...could find a nexus between injury and employment"); *Smith* v. *Workers' Compensation Appeals Bd.*, 176 Cal.Rptr 843 (Cal.App.1981) ("[E]mployer is required to establish that intoxication is a proximate cause or substantial factor in bringing about an accident resulting in death in order to meet burden of proof necessary to establish an intoxication defense.")

[396]See *Opdyke* v. *Automobile Club of New York, Inc.*, 460 N.Y.S.2d 192 (N.Y.app.div.1983) ("[The] automobile accident which caused employee's death ... may have been occasioned by multiple factors, conclusion that intoxication was not sole cause of accident was supported by substantial evidence and, therefore, employer could not avoid liability on theory that employee's intoxication was sole cause of injury"), *Harvey* v. *Allied Chemical Corp.*, 380 N.Y.2d 809 (N.Y.app.div.1976) and *Mikolajczyk* v. *N.Y.State Dept.of Transp.*, 380 N.Y.2d 809 (N.Y.app.div.1976); for a Canadian court decision, see Decison No.124, B.C., (1975) 2Workers' Compensation Reporter 118.

render the pilot incapable of working, then his recovery will be granted,[397] even though this self-destructive behavior did to a certain extent contribute to the injury.

Before we can identify the best answer to this question, one must first bear in mind that it involves a claim based on workers' compensation statutes, rather than on civil tort, so fault or negligence by the employee will not deprive him of eligibility unless it has reached the extent of willful misconduct; the fact that a certain blood-alcohol level is excessive under criminal law should not in itself constitute a forfeiture of benefits, even though it might be conceived as negligence *per se* under tort law as well.[398] Following the reasoning of civil torts, it is still only harm that falls within the scope of risk contemplated by the statutes for which a tortfeasor is liable, and it would be hard to argue that the statutory prohibition on drinking and flying is intended to protect the interests of the employer or the public authorities who are in control of the industrial accident.[399] The only relevant consideration is whether such a blood-alcohol level is sufficiently elevated to practically hinder the pilot from engaging in his duties, and consequently bring him outside the scope of employment. According to medical specialists,[400] a level as low as .25% BAC (blood-alcohol content) will impair the

[397] *E.g.*, in *Mikolajczyk* v. *N.Y.State Dept.of Transp.*, *supra*, even though the claimant's body contained .19% of blood alcohol, he still drove three miles to his place of employment and worked a full eight hour day after sleeping for three hours during the morning of the day he died in a car accident, so it is conceived that the fatal accident was not caused solely by his intoxication.

[398] Logically, an illegal act committed by the employee which contributes to the work-related accident is no different in nature from other kinds of fault, though it has been criminalized because of certain policy considerations, which should not, in itself, bar recovery of compensation. See also T. G. Ison, *supra* note 332, at p. 67, on the contrary, some US decisions have adopted a more stringent proposition asserting that compensation recovery will be barred where the injury was caused by the employee's violation of the law, see *Carey* v. *Electric Mut. Liability Ins. Co.*, 500 F.Supp. 1227 (W.D.Pa 1980)(the employee who violated traffic rules when performing his delivery duty was held to be outside the course of his employment), and *Reynolds* v. *Masick*, 453 N.Y.S.2d 165 (N.Y.App. 1982) (violation of traffic rules). Other courts have held that any type of misconduct, including violations of the law, must be the proximate cause of harm before it will bar recovery: see *Dane Trucking Co.* v. *Elkins*, 529 N.E.2d 117 (Ind.App. 1988).

[399] *E.g.*, *Gorris* v. *Scott*, (1874) L.R. 9Ex. 125.

[400] See J.G.Modell & J.M.Mountz, "Drinking and flying—The Problem of Alcohol Use by Pilots", (1990) 323 NewEng.J.Med. 455, at p.456, also D. U. Scofield, *supra* note 390, at pp.945-6.

exercise of "recently-learned, complex, and finely-tuned skills" as well as visual perception. A moderate dose of alcohol may be tolerable when found in the ordinary person, but in sharp contrast it creates serious defects in the pilot's ability to work: in the cockpit, his ability to perceive the aircraft's actual attitude and tracking is flawed, and a low BAC in the pilot may eventually result in loss of the skills necessary to maintain control in flight, such as reading instruments and navigational charts, or maintaining awareness of traffic on the air route.[401] From a clinical point of view, it seems that a very low BAC suffices to render the pilot technically incapable of engaging in his duties; however, if in fact an intoxicated pilot is still able to (and does) perform his work as usual,[402] then objectively, he is also exposed to the usual potential risks of his employment. In this case, it would be hard to justify the deprivation of his right to claim by asserting that he is (clinically) outside the ambit of employment when the accident occurs, and it would be even harder to ever say that under the circumstances the pilot's intoxication was the sole cause of the accident, notwithstanding that it might have really contributed to the extent of impairing vision or the central nervous system.

c. Effects of Contributory Negligence

Unlike tort law, there is no principle of apportionment for contributory negligence in the workers' compensation scheme.[403] In this latter system, once the employee is found to be in willful misconduct, he is barred from receiving any benefit; conversely, if a claim is not barred, he is paid in full irrespective of whether his negligence in fact contributed to the cause of injury. However, the employee's contributory negligence might reduce the tort liability of a non-employer tortfeasor, which will deteriorate in different ways the compensation

[401] J.G.Modell & J.M.Mountz, *id.*

[402] For a Canadian decision, see: Decision No.124, B.C., *supra* note 396; see also the US decision in *Harvey* v. *Allied Chemical Corp.*, *supra* note 396. The *Civil Aeronautics Law* of Japan adopts similar approach, prescribing in Article 70 that "[n]o flight crew of an aircraft shall engage in the air navigation service while he is under the influence of drink or drugs or other chemicals *to such an extent as to make him unable to maintain normal aircraft operation* [emphasis added]."

[403] T. G. Ison, *supra* note 332, at p. 65.

generally paid by the carrier (*e.g.*, employer or industrial administration)[404] and eventually affect any reimbursement he could have expected from the subrogator.

Most doctrinal writings tend not to premise that the employee performs work that is beyond the scope of employment if he negligently deviates from the relevant instructions, authorization, or safety regulations, unless his acts truly created or contributed a risk which is remote in nature to the employment. For example, if an oil-filling mechanic attempted to light a cigarette near his filling station and consequently ignited gas escaping from an unlit blow-pipe, he has probably violated safety regulations although he did not create a risk which is remote to his employment, for a gas explosion near the filling unit is always a potential risk.[405] In some cases of plane crash, when the pilot intentionally departed from the usual and customary method of operating aircraft while transporting passengers - voluntarily engaging in stunt or acrobatic flying to gratify his desire for extraordinary thrill - or when he has neither a piloting or aircraft licence, evidently violating compulsory statutes, that pilot is considered to have subjected himself to great and needless peril which is not incidental to employment;[406] yet such situations are more likely to arise in private or local aviation activities and are expected to be relatively rare in modern international civil aviation.

E. Injuries Covered

[404]There are three solutions to this problem: first, once the benefit which the employee received has exceeded his expected recovery in tort claim after apportionment, then he cannot claim any reimbursement from the subrogator, which is called the "absolute theory;" under the second model, the "differential theory," the employee can still recover his damage in full: in his reimbursement from the compensating carrier he simply subtracts the benefits he has received, and leaves the subrogator with only the residue. The final "relative theory" model is to further apportion between the employee and the subrogator for the tort claim, which has already been apportioned in accordance with the employee's negligence. See J. G. Fleming, "Tort Liability for Work Injury", *supra* note 273, at pp.21-2. Briefly, in both the "absolute theory" and "relative theory" models, contributory negligence will eventually affect the remedies received by the employee.

[405]See the British Social Security Commissioner decision R(I) 2/63.

[406]*Sheboygan Airways Inc.* v. *Ind. Comm. infra* note 425, at 180-1, *Datin* v. *Vale*, [1931] U.S.Av.Rptr 175 (Pa.Dept.of Labor & Industry) (stunt or acrobatic flying), and *Bugh* v. *Employers' Reinsurance Corp.*, 63 F.2d 36 (5th Cir.1933)(oil-well manager without pilot's licence driving unlicenced plane).

There is no significant difference between injuries recoverable in international air transport and those in other industries which employ wage-laborers with respect to workers' compensation. Furthermore, since detailed methods of granting compensation benefits might vary widely between jurisdictions, it seems useless or unnecessary to embark upon a thorough survey of them. Of immediate interest is the common nature and principles underlying the scale of benefits under workers' compensation laws, providing a useful reference for a future unified regime of airline labor law and helping to elucidate its differences with respect to other remedial systems.

Originally, when the workers' compensation system was merely a special type of accident-compensation regime emerging from civil tort law to spare workers from the burden of proving fault or breach of duty by the employer, its allowance for compensable amounts was sometimes limited to no more than one-half of an employee's average earnings.[407] This result appears inevitably from the presumed *quid pro quo* for a less cumbersome and cheaper compensation process created by political compromise, or in more "positive" parlance, for the sharing of industrial risk between employers and employees.[408] Though modern workers' compensation systems have been integrated into social insurance schemes, thereby abolishing almost every trace of civil liability and becoming jointly-financed and operated by public authorities, the applicable levels of compensation remain somewhat unsatisfactory,[409] compared to those found in tort or alternative tort-based regimes

[407] *E.g.* s.1(1) the *Workmen's Compensation Act 1897* of Great Britain, 60-1 Vict. c.37; and this amount was still subject to a statutory maximum of £ 300 a year. So generally, under the *WCA* 1897, apart from the case of death (the dependents could claim a small lump sum), the employer undertook the compensation at a lump sum of three years annual earnings in the form of weekly payment, not exceeding the statutory maximum amount to the victim. For a short history of the transformation of the British industrial benefits see A. I. Ogus & E.M. Barendt, *supra* note 335, at pp.250-53.

[408] "A prime purpose of the [Workers' Compensation] Act is to provide residents of the [jurisdiction]... with a *practical and expeditious remedy* for their industrial accidents and to place on [the jurisdiction's] ...employers a *limited and determinate liability* [emphasis added]:" see *Cardillo* v. *Liberty Mutual Co.*, 330 U.S.469 (1947) at 476, also P. Cane, *supra* note 309, at p.271.

[409] According to the *Social Insurance and Allied Services Report* by Sir William Beveridge (Beveridge Report), in Great Britain the maximum limit of compensation benefit had only reached seven-eighths of lost earnings in some cases by 1940; cited from P. Cane, *id.*, n.6.

of liability which are basically intended to allocate or redistribute loss by compensating the victim as fully (appropriately) as possible.[410] Due to the overall purpose of the system as identified in the above section, compensation benefits are usually confined to personal injuries[411] and exclude property damage.

Workers' compensation benefits are commonly divided into two main categories, *viz.* monetary payments as indemnity and medical aid. In cases of non-fatal injury, a monetary payment as indemnity is designed to compensate the victim for wages lost due to the disability sustained. As in the tort claim, these wage earnings are measured by referring to the victim's current rate of employment income. However, unless otherwise provided by statute,[412] there is no compensation for expectation losses, such as the loss of opportunity for future promotion, and the benefits do not take into account the actual earnings that a victim might have been able to accumulate at the time of accident (as tort remedies generally do).[413] Therefore, if the victim held more than one job, only the wage rate for the employment in which he was engaged while the injury occurred is used as a basis in calculating benefits. Furthermore, it is common for compensation laws to prescribe a maximum amount for the rate of gross average earnings as a reference to calculate periodic payments of compensation,[414] so unlike the remedy provided in civil tort actions, there is often a ceiling for the benefit claim. In fatal injury cases, this restriction is even more severe: aside from a prescribed maximum

[410]R.F.V. Heuston & R.A.Buckley, *Salmond and Heuston on the Law of Torts*, 12th ed(London:Sweet & Maxwell, 1992), at p.9.

[411]See J. G. Fleming, "Tort Liability for Work Injury", *supra* note 273, at p.10.

[412]Such statutory stipulations are rare, though they may generally exist when the victim is a learner or apprentice at the time of the accident. An adjustment of his wage rate would be necessary to reflect his actual loss of earning capacity and to promote overall social policy in the protection of minors. A good example can be found in the *Industrial Accidents and Occupational Diseases Act* of Québec (RSQ, c. A-3.003, s. 80), which refers to the loss of anticipated employment income for student workers at the end of their studies and over the age of 21 to upgrade the monetary payment.

[413]*E.g.*, the *Worker's Compensation Act* of Ontario, RSO 1980, c. 539, s. 43(3).

[414]A graphic example, in New Brunswick, is that if the worker suffers a total loss of earnings for more than two years from the date of injury, the level of compensation will be limited to less than 50% of the gross average earnings. See the *Workers' Compensation Act* of New Brunswick, RSNB 1973, C.W-13, s. 38.2(3). As for US compensation laws, see S. A. Riesenfeld & R. C. Maxwell, *supra* note 309.

on the rate of gross average wage losses suffered by the worker,[415] there can also be a maximum payment period.[416] Compensation for death will of course include the costs of the funeral (burial or cremation),[417] payable to the victim's estate; however, like other heads of monetary payment, it might be subject to statutory limitation.

Medical aid could be provided wholly through institutional medical and nursing services[418] or, when such is unavailable or inaccessible, through financial support of the victim's medical expenses.[419] In general, though there might exist

[415]A good example is found in Section 17(3) of the *Workers' Compensation Act* of British Columbia, which provides that: "(a) where the dependents are widow or widower and one child, a monthly payment of a sum that, when combined with federal benefits payable to or for those dependents, *would equal 85% of the monthly rate of compensation under this Part that would have been payable* if the deceased worker had, at the date of death, sustained a permanent total disability, subject to the minimum set out in paragraph (g); ... (c) where the dependent is a widow or widower who, at the date of death of the worker, is 50 years of age or over, or is an invalid spouse, a monthly payment of a sum that, when combined with federal benefits payable to or for that dependent, *would equal 60% of the monthly rate of compensation under this Part that would have been payable* if the deceased worker had, at the date of death, sustained a permanent total disability, but the monthly payments shall not be less than $ 234.36; (d) where the dependent at the date of death is a widow or widower who is not an invalid and is under the age of 40 years, and there are no dependent children, *a capital sum of $ 10,000, of which ¢1,000 shall be payable immediately and the remaining $ 9,000 shall be payable at the time the board determines;* but the payment shall not, except at the request of the dependent, be delayed beyond 6 months after the date of death of the worker [emphasis added]." See Worker's Compensation Board of British Columbia, *Workers' Compensation Reporter*, Vol. 10 No.1-3 Jan-Jun 1994, at pp.54-5.

[416]According to A. H. Reede, after six or seven years the payments will cease in thirty-one US states: see A. H. Reede, *infra* note 423.

[417]*E.g.*, in most of the Commonwealth countries. See T. G. Ison, *supra* note 332, at pp.115-6 and E. I. Sykes & H. J. Glasbeek, *supra* note 332, at p. 227. Funeral benefits usually include the transportation cost or other incidental expenses.

[418]In countries where the medical service or health care system is well-developed, for example, in Canada, the institutional medical aid generally includes hospital services, operative treatments and convalescence, office visits to doctors, and the provision of drugs and medical appliances or apparatus that may assist the treatment. For details on the methods of provision of medical aid in Canada, see T. G. Ison, *supra* note 332, at pp.73-4. Even under the institutional type of medical aid, there could still be additional expenses accompanying the treatment, such as traveling expenses, or the hiring of personal assistance which is required by serious injury, or even the unusual requirement of clothing due to the nature of disablement; in such cases allowance or reimbursement in monetary form is permitted.

[419]Such as in New South Wales and Queensland, Australia, where the compensation laws provide that benefits are payable in monetary form when the worker is injured and medical treatment is reasonably necessary and appropriate. See N.S.W. s. 10(1) and Qld. s. 14D(1) and *Hutton* v. *Dorman Long & Co. Ltd.* (1932), 32 S.R.(N.S.W.) 321; detail in E. I. Sykes & H. J.

differences in the amounts recovered, monetary payments in any system are similar in nature. Yet the medical aid provision, which distinguishes workers' compensation from all other sources of redemption, is independent from other forms of benefits (*e.g.*, monetary payments), especially in those countries where it has already been merged into the national social insurance system, such that medical aid is only one of the institutions delivering social services directly to the victim.

In principle, therefore, workers' compensation will redeem material losses only, not including special personal damages such as pain and suffering or other non-material injuries which are generally recognized in civil tort law.[420] It has been suggested that this result flows naturally from the overall purpose of establishing a system of compensation, *i.e.*, the pursuit of industrial peace.[421] The exclusion of personal non-material damages is thus exchanged for an efficient, no-fault based indemnity; following the same rationale, unlike property damage which is conceived to be outside the scope of this compromise,[422] personal non-material damage is excluded from recoverable benefits and also immune from additional tort claims. In calculating the amount of benefits paid only, those received under the compensation system will undoubtedly be lower than the compensation granted in civil tort actions. For example, recoverable benefits for death will usually encompass only the estimated loss of the victim's productive capacity during a certain (statutorily-prescribed) period when he would otherwise have continued working and will bear solely upon the dependents of the deceased,[423] so there is at least one major difference in compensation for the pain

Glasbeek, *supra* note 332, at pp.245-252.

[420]See: France: art. 466 of Code Sécureté Sociale; Germany: judgment of BVerfG, 7Nov. 1972: 1973 NJW 502; Japan: 最高裁昭和五八年四月一九日第三小法廷判決：民集三七巻三号三二一頁(Judgment of the Saiko Saibansho (Supreme Court), 3d div.: 19 Apr. 1983: 37 3 minji 321); U.S.: *Landry* v. *Acme Flour Mills*, 211 P.2d 512 (Sup.Ct.Okl.1949)

[421] J. G. Fleming, *supra* note 273, at p.10.

[422] Most of the compensation statutes in the world speak only of personal injuries, disablement, death, or *dommage corporel*. See J. G. Fleming, *id.*, at p.11, n.46.

[423]See A. H. Reede, *Adequacy of Workmen's Compensation*, (Cambridge: Harvard University Press, 1947), pp.66-7; a very detailed calculation table on death benefits is also provided at pp.68-72.

and suffering of near relatives compared with the tort claim; moreover, under certain laws, actual wage losses are not entirely recoverable, the duration of benefits may even be limited to a shorter period, or the payment may be subject to a statutory-prescribed maximum amount, regardless of the actual need or duration of dependency for the survivors.

2.3.3 Conflict of National Workers' Compensation Laws

A. Introduction

A variety of theories in the conflict of workers' compensation laws arises from various approaches toward the characterization of the system itself. As mentioned above, some jurisprudence suggests that the system is mainly a convenient and efficient substitute for the general regime of civil tort liability covering industrial injury, and it is therefore characterized as a special branch of tort law. Considering the basis on which the employment status is created and the elective institutions provided in other systems, however, one can hardly deny that the benefits belong to a part of the employer's contractual obligation. Yet another view emphasizes the *ordre public* character of the system, which is thus deemed to have an unbreakable relationship with obligatory social insurance regulations of the state's public law statutes; some writers have even presumed the system to be a peculiar legal scheme of social insurance. The conflict theories discussed below are products of the dispute over characterization of the compensation institution.

The conflict of compensation laws is generally prescribed by certain conditions due to the nature of workers' compensation statutes. First, because it is practically impossible for the competent court to execute foreign workers' compensation laws in the forum, nearly every plaintiff is actually seeking an application of the *lex fori*, notwithstanding the connecting factor which is nominally argued; therefore, the gravity of the *lex fori* inevitably influences the judicial state of mind. Second, since each compensation law has its own conditions of entitlement which are

compulsory and not subject to contractual terms,[424] the ambit of the parties' autonomy is also seriously circumscribed.

B. Theories of the Conflict of National Workers' Compensation Laws

i) Theories Adopted in US Courts

Conflict scenarios are created not only by air travel between US and foreign soil, but also by the injury or death of an airline crew member which occurs during the course of employment spanning over two or more US states, as in most interstate transport industries, because there is no federal legislation on the subject of compensating airline employees for injuries sustained in the course of employment.[425] In addition, the applicable state legislation on workers' compensation varies in procedure as well as in substance,[426] resulting in the possibility that two or more statutes may purport to govern a particular incident.

[424]"Workmen's compensation legislation rests upon the idea of status, not upon that of implied contract; that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operation he contributes his work as the owner contributes his capital... The Liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment (per Sutherland, J.)." See *Cudahy Co.* v. *Parramore*, 263 U.S. 418 (1923), at 423.

[425]See *Sheboygan Airways Inc.* v. *Ind. Comm.* 245 N.W. 178 (Sup.Ct. Wis. 1932) at 182 ("It does not appear that *either Congress or the Department of Commerce has adopted any rule as to the compensation of injured employees, or the relative rights and obligations of employees and employers in cases of injury to the former while engaged in the employment.* As those subjects do not necessary require a general system or uniformity of regulation, the power of Congress in relation to them is not exclusive, and consequently *the states may act within their respective jurisdictions until Congress does act and thus by the exercise of its authority overrides all conflicting state legislation.* Consequently, the state Workmens's Compensation Act is applicable to employees and employers who are engaged merely in intrastate aircraft navigation, if they are otherwise subject to its provisions. There is no reason to hold the state Workmen's Compensation Act inapplicable to such an employee unless at the time of the injury he was engaged in interstate commerce or in work so closely related thereto as to be a part thereof [emphasis added]"); R. E. Roos, "The Problem of Workmen's Compensation in Air Transportation" (1935) 6:1 J.Air L.1, at 2.

[426]The workers' compensation laws of various states may differ in procedural matters, as some are mandatory and others are elective (see Section 2.2.3 E of this chapter), and in substantial matters such as the scope of coverage and the content of benefits.

True choice of law problems might not exist in the stricter institutional sense,[427] because the relevant quasi-judicial administrative agencies must always determine compensation according to the *lex fori*, and because there exists no unified federal workers' compensation law;[428] from the employee's point of view, if his situation comes within the terms of the available statutes, he can choose to ground his action on either one.[429] Nevertheless, at the pragmatic level, there are still many judicial precedents in which compensation was enforced under the statutes of a foreign state.[430]

Excepting Delaware, where the relevant legislation is expressly limited to accidents occurring within state territory,[431] virtually every state provides for more than one connecting factor in determining compensation for out-of-state injuries, or exempts certain injuries occurring within the jurisdiction from compensation, whereas some states simply fail to include any provisions in their legislation regarding extraterritorial applicability. Various principles of the conflict of workers' compensation laws, adopted in statutes or by the courts, were briefly

[427]S. A. Riesenfeld & R. C. Maxwell, *supra* note 309, at pp. 439-40.

[428]Unlike the maritime industry (*Jones Act*) or interstate railroad transport (*Federal Employers' Liability Act*), in which the employee's claim is governed by federal legislation superseding the state workers' compensation law, and consequently federal courts are able to operate the choice of law function when encountering settings with foreign elements. See *Rivadeneira* v. *SKIB A/S Snefonn, Skip A/S Bergehus*, 353 F.Supp. 1382 (SDNY, 1973) (choice between the *Jones Act* and the Norwegian *Seaman's Act* of 1953, *Health Insurance Act* of 1956 and *Occupational Injuries Insurance Act* of 1958); *So. Pac.* v. *Ind. Acc. Comm.*(1942) 120 P.2d 880 (Cal. 2d 1942).

[429]H. F. Goodrich, *Handbook of the Conflict of Laws*, 4th ed by E. F. Scoles (St. Paul: West Publishing Co. 1964) at p.185.

[430]See *Franzen* v. *E. I. DuPont De Nemours & Co.*, 146 F.2d 837 (3d Cir. 1944); *Texas Pipe Line Co.* v. *Ware*, 15 F. 2d 171 (8th Cir. 1926); *Stepp* v. *Employers' Liability Assur. Corp.*, 30 F.Supp. 558 (N.D.Tex. 1939); *Lindberg* v. *Southern Casualty Co.*, 15 F.2d 54 (S.D.Tex. 1926); *Oleans Dredging Co.* v. *Frazie, 161 So.* 699 (Sup.Ct. Miss. 1935); for a general discussion of the enforcement of foreign compensation statutes, see J. L. Boren, Jr. , "Enforcement in One Jurisdiction of Right to Compensation under Workmen's Compensation Act of Another Jurisdiciton" (1953) 6 Vand. L. Rev. 744. For a decision concerning aviation accidents, see *Kahle* v. *McDonnell Douglas*, *supra* note 351.

[431]Rev. Code of Delaware, Ch.90, Art.5, § 3193a ("This Act ...shall apply to all accidents, occurring within this State, irrespective of the place where the contract of hiring was made, renewed or extended, and shall not apply to any accident occurring outside of this State").

summarized in Section 181 of the Restatement (Second) of the Conflict of Laws,[432] which described the scope of application for state workers' compensation statutes:

> A State of the United States may consistently with the requirement of due process award relief to a person under its workmen's compensation statute if
>
> (a) the person is injured in the State, or
>
> (b) the employment is principally located in the State, or
>
> (c) the employer supervised the employee's activities from a place of business in the State, or
>
> (d) the State is that of the most significant relationship to the contract of employment with respect to issue of workmen's compensation under the rules of Section 187-188 and 196, or
>
> (e) the parties have agreed in the contract of employment or otherwise that the right should be determined under the workmen's compensation act of the State, or
>
> (f) the State has some other reasonable relationship to the occurrence, the parties and the employment.

For those who work on-board international flights over other sovereign jurisdictions, the courts might be further confronted with the conflict of workers' compensation regulations or of civil tort laws between US states and foreign territories, and the jurisprudence provided by Section 181 of the Restatement may also be applied in such cases with international elements. We will hereinafter explore the theories underlining each principle upheld by the jurisprudence with special regard to international air transport.

Some workers' compensation statutes were designed primarily as regimes of quasi-tortious liability replacing the institution of common law torts, imposing presumed fault onto the employer, and therefore the principle of *lex loci delicti* which has dominated the conflict of employer's tort liability for employee injuries[433] will necessarily apply.[434] Though a few judgments,[435] reflecting their British

[432]Restatement of the Law (Second): Conflict of Laws, (St.Paul: American Law Institute Publishers, 1971).

[433]See *Black Diamond Lumber Co.* v. *Smith*, 76 S.W.2d 975 (Sup.Ct. 1934); *Kansas City, Ft.S.&M.R.R.Co.* v. *Becker*, 53 S.W. 406 (Sup.Ct. Ark. 1899); *Alabama, G.S.R.R.Co.* v. *Carroll*, 11 So. 803 (Sup.Ct. Ala. 1892).

[434]"We believe that an indemnification action, such ... [as the workmen's compensation action] ... must be considered in the light of the basic *tort action* from which it springs, and its

predecessor,[436] applied this theory restrictively, it was subsequently extended by legislative amendment and jurisprudence to the point where it might even cover any industrial injury occurring within the state. Most statutes prescribe that the occurrence of injury in the state constitutes sufficient grounds for their application,[437] since Section 181 of the Restatement asserts that it is based upon state interests — otherwise the state itself may have to care for the injured employee within its jurisdiction.[438] This theory has long been criticized as alien to the operation of enterprise,[439] especially the transport industry. Its employees might traverse many states in the course of their employment, and accidents might occur in many jurisdictions, thus creating great difficulties for the employer calculating his business costs.[440]

Lex loci contractus rules were erected in certain jurisdictions which conceived

prosecution is to be determined by the law found to be applicable to the original tort action:" *Kabak* v. *Thor Power Tool Co.*, 245 N.E.2d 596 (Ill Ct.App. 1969) at 598; see also *Miller* v. *Hirschbach Motor Lines, Inc.*, 714 S.W.2d 652 (Mo. App. 1986), *Powell* v. *Sappington*, 495 So.2d 569 (Sup.Ct. Ala. 1986) *Nadeau* v. *Power Plant Eng. Co.*, 337 P.2d 313 (Sup.Ct. Ore. 1959); *Union Bridge & Construction Co.* v. *Industrial Comm.*, 122 N.E. 609 (Sup.Ct. Ill. 1919). However, not all statutes which expressly purport to substitute for tort liability adopt this principle; at least not in Louisiana, where the mere fact that the injury occurred in its jurisdiction does not constitute a valid reason to justify its applicability. See *Bradford ElectricLight Co.* v. *Jennie M. Clapper*, 286 U.S. 145 (U.S.Sup.Ct. 1932)

[435]See *In re American Mut. Liability Ins. Co.*, 102 N.E. 693 (Sup.J.Ct. Mass. 1913) and *Lemieux* v. *Boston & Maine R. R.*, 106 N.E. 992 (Sup.J.Ct. Mass. 1914).

[436]See *infra* note 492.

[437]See A. Larson, *The Law of Workmen's Compensation, supra* note 314, at pp.368-75.

[438]Echoing the Privity Council judgment in *Krzus* v. *Crow's Nest Pass Coal Co, Ltd.*, *infra* note 492, in which the court cynically held that "as the defendant ... [is] dead she never could become a burden on the public or private charity of this country," at 598.

[439]See F. E. Cowan, Jr., "Extraterritorial Application of Workmen's Compensation Law — A Suggested Solution, (1955) 33 Tex. L.Rev. 917, at p.918.

[440]Yet such a managerial difficulty seems to be outweighed by the protection of the employee and administrative considerations: see *Livermore, Admx* v. *Northwest Airlines, Inc.*, *infra* note 515 ("The contention of the [airline] ... that to apply the Washington statute would compel outside employers to comply with the compensation act of every state in which there might be residents in its employ, or to take a chance on compliance with one in the gamble that it was the right one, must be met with the answer that to do otherwise would compel [the employee] ... to try to relief first in the jurisdiction of Minnesota and upon failure there to try Illinois and finally be forced back it might be on the State of Washington .... Furthermore, it would be no greater hardship on the [airline] ... to comply with the compensation acts of the various states than the hardship imposed on the State of Washington of enforcing the liabilities of foreign jurisdictions upon them," at 816)

of workers' compensation as part of contractual liability,[441] such that the domain of the national workers' compensation law covers accidents occurring anywhere to employees hired under contract within the state;[442] as for the doctrine of *autonomie de la volonté*, or party autonomy, it is simply asserted that there is no reason why the parties' rights should not be fairly determined under the designated law if they have agreed in the contract of employment or through other forms of consent that their rights should be governed under the workers' compensation statutes of a particular state.[443] These variations from the conflict of contract theory bear logical consequences on the available "election" feature of a compensation system,[444] since the exercise of this optional function, containing the consent of the parties in various forms, represents "an agreement implied by the law, of a class now coming to be called in the more modern nomenclature of the books 'quasi-contract.'"[445] The recognition of the parties' contractual stipulation also depends upon this elaboration; the jurisprudence has refuted the argument that this principle of free choice should be limited to the extent that it does not infringe on the state's fundamental public policy, *e.g.*, that it should never deprive

[441]Such as the *Workers' Compensation Act* of Louisiana State, which expressly prescribes that the law is contractual in nature, and hence does not apply to any employer or employee unless, prior to the injury, they have expressly or implicitly elected it by agreement: La. Act 85 of 1926, § 1 [Dart's Stats. (1939) § 4393]. The jurisdiction therefore tends to assume that most contracts of employment executed in the state accept the provisions of the statutes. See *McKane* v. *New Amsterdam Casualty Co.*, *supra* note 262 .

[442]The acts of Alabama (Code, 1928, Ch. 287, § 7540), Idaho (Code Anno., 1932, Vol. 3, § 43-1003, 43-1415, 43-1087), Illinois (Smith-Hurd Rev. St., 1933, Ch. 48, § 142), Kansas (1931 Suppl. to Rev. Stat., Ch.44, Act. 5, § 44-506), Kentucky (Carroll's Kentucky Stat., 1930, Ch. 137, § 4888), Maine (Rev. Stat. 1930, Ch. 55, § 2, II), Missouri (Stat. Anno. Vol. 12, Ch.28, § 3310(b)), Tennessee (Code, 1932, Ch. 43, § 6870), Utah (Rev. Stat. 1933, Tit. 42, § 42-1-52; the statutes has been partially updated in 1941) and Vermont (Gen. Laws, 1917, §§ 5770, 5774) all provide that the formation of the contract of employment within the state is the only qualification for their application. See also R. E. Roos, *supra* note 425.

[443]See Rationale for § 181 of the Restatement of the Law (Second): Conflict of Laws, *supra* note 432, at p. 538, and *Duskin* v. *Pennsylvania-Central Airlines Corp.*, 167 F.2d 727 (C.C.A. 6th, 1948) at 730, also *supra* note 262.

[444]The methods of election have been described in the above Section **2.2.3.E** of this chapter.

[445]See *American Radiator Co.* v. *Rogge*, 92 Atl. 85 (Sup.Ct. N.J. 1914), at 86, also, *Sheehan Pipe Line Const. Co.* v. *State Industrial Comm'n.* 3 P. 2d 199 (Sup.Ct. Okla. 1931).

the employee of legitimate minimum state protection, though one can assume that the practice may differ for the applicability of compensation systems of foreign sovereignties:[446] "no violation of a right of contract can arise out of this [election], since it is by his own election that the Act and subsequent amendments are incorporated in his contract."[447] Some connecting factors, like the place of contract performance or *locus executionis*, were imported along with the contracts theory but only as mutants of the proper law theory, so there is no merit to discussing them separately.

At first glance, it seems that either the *lex loci contractus* or party autonomy is more likely than other connecting factors to establish a genuine link between the injured employee and the applicable workers' compensation statute, because the contract of employment is an essential core from which all rights and obligations of the parties arise (as between the parties), yet there are several weaknesses to this argument. First, judicial precedent has already shown that the actual intent of the parties as to which workers' compensation law shall apply is generally not ascertainable from the contractual provision alone.[448] In *Duskin* v. *Pennsylvania-Central Airlines Corporation*,[449] the contract of employment provided that all rights and obligations of the parties should be governed by Pennsylvania's law, including its *Workers' Compensation Act*. However, according to the designated compensation statutes, the employee was barred from claiming benefits because he was not a resident of that state. Under such circumstances, the court could only substitute the vague language of the parties with their own interpretation of what the

[446]See *Urda* v. *Pan American World Airways*, 4 Avi 17, 293 (5th Cir. 1954). This case will be analysed in the following Section 2.3.3.C.

[447]See *Hopkins* v. *Matchless Metal Polish Co.*, *infra*. at 830.

[448]Aside from the *Duskin* case, *infra*, see *Banks* v. *Howlett Co.*, 102 Atl. 822 (Sup.Ct. E. Con. 1918) ("Although the contract ...was made in New York, it was one made with specific reference to the rendition of service in Connecticut. It was made subsequent to the time of his original employment by the employer ... and while he was engaged in work thereunder .... Here was a substitution of a new contract for the old, ...it had incorporated in it automatically the provisions for compensation in the case of injuries prescribed by our law," at 822-3); *Hopkins* v. *Matchless Metal Polish Co.*, 121 Alt. 828 (Sup.Ct. E. Con. 1923), which adopted the same method of interpretation but resulted in the opposite conclusion.

[449]*Supra* note 262, see also 2 Avi 14, 594.

parties might have intended to prescribe, and held that the parties' intention was to include the conflict of laws rules of Pennsylvania, according to which the common law of the *locus delicti* shall apply. This result was, however, considered a contravention of the parties' autonomy by the employer, who insisted that the stipulation was merely a measuring stick of liability and should be treated as such. Indeed, the Sixth Circuit conceded that in all probability the employee "did not notice the difference between the contracts and may not even have read them."[450]

Another problem with the contracts theory is that in some situations the contract of employment is made through an employment agency, or by correspondence;[451] under these circumstances the *lex loci contractus* or even the *locus executionis* will have a very weak link with the employee,[452] especially when the latter is sent to work abroad, which is often the case for airlines recruiting their flying personnel from foreign bases of operations. It has been argued that in such situations the law of the state where the worker reports for duty should govern instead.[453]

The law of the place where the worker is regularly employed has gradually been adopted by US jurisprudence as an auxiliary[454] or even unique connecting factor[455] to national workers' compensation statutes, under the influence of the overwhelming trend of "proper law" theory, which struggles to establish the

[450] *Id.*, at 14, 598.

[451] See *Leader Specialty Co.* v. *Chapman*, 152 N.E. 872 (Ind. App, 1926), in which the offer of an employment contract was sent from Indiana, the acceptance mailed from South Carolina, but the occupation performed in Georgia.

[452] A radical decision has held that when the contract of employment was made over the phone between parties located in different states, the contract is deemed to be made at the place where acceptance was manifest, and in the case of an employment contract, the contract is made where the employee was found at that time of formation. See *Bundsen* v. *W.C.A.B. of State of Cal.*, 195 Cal. Rptr. 10, at 12.

[453] E. Rabel, *supra* note 309, at p.219.

[454] *Workers' Compensation Acts* of Delaware, Maryland and Pennsylvania: see A. Larson, *infra.*

[455] *Workers' Compensation Acts* of Arizona, Colorado, New Mexico, Oregon, Utah, and West Virginia: see A. Larson, *supra* note 314, at p.377 § 87.11.

"most significant relationship"[456] or "most substantial connection" between a factual situation, *i.e.* the status of employment, and the applicable law. The rationale of this "proper law" theory is that the forum should no longer be bound by "idealistic" conflict of laws rules, but instead be vested with full judicial discretion in weighing national and foreign interests, especially in deciding the applicability of a statute which "rests upon the police power to regulate the status of employer and employee within the state."[457]

To determine if the employee is regularly employed within the state, various factors are measured, such as: (1) the employer's place of business where the work is performed; (2) the employee's domicile, where domestic administrative bodies allegedly have the greatest interest in providing relief, or where the employer supervised the employee's activities from a place of business localized within the (domicile) state, on the grounds that the cost of injury to the employee should be borne by the business which employs him there;[458] and (3) for the transport industry, the jurisdiction in which the employee performed the longest working hours can also serve as a useful reference.[459] In some cases, the local employer who has already made installment payments to the national Commission for future funding of benefits can legitimately expect an interest in its administration, whereas foreign employers who have not regularly paid into the national

[456]See the Rationale for § 181 of the Restatement of the Law (Second): Conflict of Laws: "Workmen's compensation regulates the employment status. Therefore, relief should be obtainable under the workmen's compensation statutes of the State which has the most significant relationship to the employment... The state which has the most significant relationship to the contract of employment with the respect to the issue of workmen's compensation ... will, of necessity, have a close relationship to the contract and therefore a reasonable basis for giving the injured employee relief under its workmen's compensation statutes," *supra* note 432, at p. 538-9.

[457]*Ocean Accident & Guarantee Corp.* v. *Industrial Com.*, 257 P. 644 (Sup.Ct. Ariz. 1927), at 282-3.

[458]"When a business is localized in a state there is nothing inconsistent with the principle of the compensation Act in requiring the employer to compensate for injuries in a service incident to its conduct sustained beyond the borders of the state," in *State ex rel. Lena Chambers* v. *District Court*, 166 N.W. 185 (Sup.Ct. Minn. 1918)

[459]See *Cleveland* v. *U.S.Printing Ink, Inc.*, 575 A.2d 257 (Conn. App. 1990), *aff'd.*, 588 A. 2d 194 (Sup.Ct. Conn. 1991) ("The nexus with [the jurisdiction] ... is based upon the circumstance that...*35 to 40 percent of his employment time* was spent in making deliveries within or in driving through this state [emphasis added]," at 202.)

Commission should not be entitled to benefit from that state's law.[460] This measurement has proved to be even more substantial for flight personnel who as a matter of fact regularly spend most of their working time on-board an aircraft flying swiftly over several different geographical locations at the time of the industrial accident; under these circumstances the state of registry of the aircraft, or the state above which the aircraft flew over, would be too remote or superficial to establish a significant attachment to specific compensation laws. Furthermore, the employment must be performed regularly rather than transitorily; occasional or temporary out-of-state performance does not appear to constitute the most significant relationship with the working place.

Employees of international airlines might be deprived of their right to claim under certain US statutes containing provisions that discriminate against non-resident alien dependents[461] or exclude foreign accidents from coverage. However, if the non-resident alien employee is covered under a Treaty of Friendship, Commerce, and Navigation (hereinafter "FCN Treaty") between his native country and the US,[462] which accords "national treatment in the application of laws and

[460]See the *Workers' Compensation Act* of Utah, U.C.A. 1943, § 42-1-64, and *United Airlines Transp. Corp. et al.* v. *Utah Industrial Com. et al.*, 2 Avi 14, 268 (Sup. Ct. Utah, 1946) at 14, 271-2.

[461]According to Larsen, only five US states expressly include non-resident alien dependents in their workers' compensation benefits, ten US states have no provisions which make mention of them, though they are generally construed as giving full and equal benefits to non-resident alien dependents in the absence of any specific restrictions. See A. Larson, *supra* note 314 at 552-3 and *Madera Sugar Pine Co.* v. *Industrial Acc. Comm'n.*, 262 U.S. 499 (U.S. Sup. Ct. 1923). Five other US states expressly exclude non-resident alien dependents from any benefits, while the remaining states may decrease the level of benefits by arbitrarily cutting ordinary awards, restricting possible beneficiaries, or allowing commutation to reduce lump sums. For a general discussion of the historical foundation for discriminatory treatment in US compensation laws, see J.H. Daffer, "The Effect of Federal Treaties on State Workmen's Compensation Laws" (1959) 107 U. Pan. L. Rev. 363 at pp. 366-7.

[462]Such treaties are often referred to as "commercial treaties" and may not necessarily be known as Treaties of Friendship, Commerce, and Navigation (hereinafter "FCN Treaties"). The contents of an FCN Treaty might vary from one to the other, but its pervading theme is the provision of national treatment to nationals of either state party. This remains the modern preoccupation of FCN Treaties: permitting the national of either party to enter the territories of other state parties to carry on trade and engage in activities related to their investment; granting the right to nationals of either party of uninhibited travel within the territory of other state parties; guaranteeing fair treatment and safety; *etc.* For a general discussion of the FCN Treaties signed by the US, see R. Wilson, "Postwar Commercial Treaties of the United States" (1949) 43 Am. J. Int'l L. 262; Hynning, "Treaty Law for the Private Practitioner" (1955) 23 U. Chi. L. Rev. 36; and H. Walker, "Treaties for the Encouragement and Protection of Foreign

regulations within the territories of the other party that establish a pecuniary compensation or other benefit or service, on account of disease, injury or death arising out of and in the course of employment or due to the nature of employment,"[463] the discriminatory provision in a national compensation law would be unconstitutional in some jurisdictions[464] and the employee's beneficiaries who are non-residents of the forum would therefore remain eligible to claim the benefits.

ii) Theories Adopted in the Courts of Other Countries

Tort theory, combined with the public interest underlying the workers' compensation system, creates a basis for the principle of *lex loci deliciti* or *lex loci injuriae*.[465] The courts of some civil law countries like France, Belgium, and Italy accordingly apply the statutes of the place where industrial injury occurs,[466] and

Investment: Present United States Practice" (1956) 5 Am. J. Comp. L. 229 at pp. 230-1; as well as *infra* Chapter 5 of this thesis.

[463]This example is borrowed from Article IV, Section 1 of the FCN Treaty between the US and Germany, 29 October 1954, 7 U.S.T. & O.I.A. 1839, T.I.A.S. No. 3593.

[464]See *Antosz* v. *State Compensation Com'r*, 43 S.E.2d 397 (W. Vir. App. 1947), in which the workers' compensation scheme of West Virginia (§ 15(a), Art. 4, Ch. 131, Act. W. Va. Leg.) providing that non-resident alien beneficiaries shall not be compensated and that the commutation of period was unconstitutional because it violated a treaty between the US and Poland; see also *Iannone* v. *Radory Construction Corp.*, 141 N.Y. Supp. 2d 311 (N.Y. App. Div. 1955), which rendered that the discriminatory provision in the New York workers' compensation law was inconsistent with the federal FCN Treaty with Italy (63 Stat. 2255, T.I.A.S. No. 1965) and must give way to the superior national policy.

[465]The principle of *lex loci delicti* or *lex loci injuriae* has been codified in many civil law countries and currently applies as a major conflict of torts rule, such as in Italy (Introductory Law to the Civil Code art.25(2)), Portugal (Civil Code art. 45), Thailand (Law of March 10, 1939, § 15) , Taiwan(Law Governing the Applicable Law to Civil Matters with Foreign Elements; 涉外民事法律適用法 art.9), and Japan(Horei; 法例 art.11(1)); it is also the dominant principle of the conflict of torts in the Netherlands since 1938: see the judgment of the Supreme Court of the Netherlands, HR, March 18, 1938: 1939 NJ 69, also in R. v. Rooij & M. V. Polak, *infra* note 469, at pp.138-9, and in Switzerland, though with some exceptions provided in other statutes, see P. Tercier & D. Dreyer, "Torts" in F. Dessemontet & T.Ansay, ed., *Introduction to Swiss Law*, (Deventer: Kluwer Law & Taxation Publishers, 1983), at p.127. .

[466]See the French court decision of *Lautour* c. *Guiraud*, Cour de Cass. 25 May 1948: 1948 Recueil Dalloz 357, however, which applied the *lex loci* (Spanish law) irrespective of whether its requirement of proof of the employer's negligence is against the public policy of the forum; also, see the Belgian court decisions of *Derissen* c. *Thiry et Société Lothringer Bergbauverein*, Cour de Cass. Belg. 21 Feb. 1907: 1909 RDIP 952; *Société Gérard et Cie* c. *V. Monseur et consorts*, Cour de Cass. Belg. 26 Nov. 1908: 1909 RDIP 953; Italian court decisions: App. Roma. 18 Aug. 1935: 1936

this approach has also been suggested by the International Labour Office,[467] but the trend has gradually undergone a reversal, at least in France, where a recent case abandoned this approach.[468]

The tendency to construct national compensation statutes as laws of *securité et police* in order to exercise jurisdiction over all industrial injuries caused on domestic soil would be understandable,[469] considering that in the past tort remedies served as a private law supplement to criminal law, and only strict support of the territorial jurisdiction could guarantee the application of *lex fori* gravely concerned with the forum's public policy. Yet with respect to the private parties of an employment contract, this rationale could fail to offer them any procedural interest;[470] for the occurrence of modern industrial injuries, such as bodily injury sustained by flight deck personnel (cabin crew) in an emergency landing, is not necessarily or directly linked to the fault of their employer, nor could the employer adjust his conduct under the circumstances to the law of the country in which he acts.[471] How could it be possible for an airliner to predict where its aircraft will

Foro Ital. 1.159, cited from E. Rabel, *supra* note 309, at p. 217, n.14.

[467]See the Answer to the Japanese Government (10th Session, Int'l Labour Conference (1927) Report of the Directors, Vol.2, 99) Decennial Report (1937) 27; also E. Rabel, *supra* note 309, at p. 229, n.60 and *infra* chapter 6..

[468]*Carrière-Durisol* c. *La Protectrice at autres.*, Cour Cass.sec.sociale, 11 May 1962: 1963 JDI 772. A French employee was injured in Algeria when working for an Moroccan company, and the French law of industrial accident (1898) applied.

[469]See the French court decision of *Antipoul* c. *Hersent frères*, Cour de Cass. 26 May 1921: 1921 RDIP 501, and the general principle of private international law of the Netherlands ("Dutch courts apply certain Dutch rules 'autonomously', mainly in the field of social-economic law, such as...labour laws."); see R. v. Rooij & M. V. Polak, *Private International Law in the Netherlands*, (Deventer: Kluwer Law and Taxation Publishers, 1987), at p.237. The approach is advocated also by I. Szászy, *Conflict of Laws in the Western, Socialist and Developing Countries*, (Leiden: A.W.Sijthoff, 1974), at p.143.

[470]As Professor Ehrenzweig points out, "the creation of a general place of wrong rule which supported not only the defendant's excuse, but also the plaintiff's claim, was decisively promoted by this development," in A. A. Ehrenzweig, *Conflicts in a Nutshell*, 3rd ed.(St.Paul: West Publishing Co. 1974), at p.215.

[471]Dicey and Morris, *The Conflict of Laws*, J. H. C. Morris, ed. 10 th ed.(London:Steve & Sons Ltd., 1980) *Vol.* 2 at p.932, and A. A. Ehrenzweig, "Enterprise Liability" *infra* note, at p.38. This argument appeared in *Kuchinic* v. *McCrory*, 222 Atl. 2d (Sup.Ct.Pa. 1967)regarding the accidental crash.

crash? Furthermore, under most compensation systems, the employer cannot exonerate himself from redeeming the injured employee with justified expectations at the time of his tortious act, as in the ordinary tort claim.[472]

The adoption of the *lex loci contractus* in the choice of workers' compensation laws of many civil law courts reflects an approach which could be described as the "homeward-trend," *i.e.*, a visible preference over the *lex fori*. This approach is partly due to the continental interpretation of labor laws as both private and public in nature, as well as the fact that the majority opinion only recently abandoned total objectivity and began to accept party autonomy in the sphere of choice of labor laws.[473] The decisions of French courts referred to a repealed statute of 1898,[474] while Belgian[475] and some Italian courts[476] have held that the *lex fori* was applicable if the contract of employment was made within the domestic jurisdiction, irrespective of the parties' nationality, the *locus injuriae*, or the place of contract performance. French and Belgian decisions even explicitly point out that it is in the forum's public interest to impose its own compensation laws to

[472]See *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (U.S.Sup.Ct. 1909) ("[T]he character of an act as lawful or unlawful *must be detrmined wholly by the law of the country where the act is done*....[F]or another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than *those of the place where he did the act ... would* be unjust [emphasis added]," at 356); A. A. Ehrenzweig, "Enterprise Liability" in Kurt Lipstein, ed. *International Encyclopedia of Comparative Law*, (Tübingen: J.C.B.Mohr, 1980) Vol.III (Private International Law) Ch.32, at p.18.

[473]Regarding the historical development in Germany, see Franz Gamillscheg, "Labour Contracts" in Kurt Lipstein, ed. *International Encyclopedia of Comparative Law*, (Tübingen: J.C.B.Mohr, 1980) Vol. III (Private International Law), Chap.28, at p.7, n.37, 38; see generally P. E. Nygh, "The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort", (1995) 251 Recueil de Cours 269, at pp.298-300.

[474]See*Soc. des Bois africains* c. *Legrand*, Cour d'Appel de Paris, 16 Mar. 1925: 19 RDIP 348. Even in a subsequent decision, the Cour de Cassation held that since the contract of employment was concluded with a French enterprise in France, French law shall apply, although the work was to be carried out in several foreign countries: see *Société Lautier fils* c. *Jean Carton*, Cour de Cass., 9 Nov. 1959: 1960 JDI 1064, *Etablissements Maillard* c. *Hakenberg*, Cour de Cass., 1 Jul. 1964: 1965 JDI 128; also *S.A. Expand Afrique Noire* c. *Delle Thuillier*, Cour d'Appel de Paris, 15 Mar. 1971: 1972 JDI 312.

[475]See *Paul,*— c. *Société la Zurich*, Tribunal civ. de Mons, 30 May 1925: 1925 3 Pasicrisie Bel. 121, in which the contract of employment was made in Belgium with a Belgian citizen who later suffered industrial injuries when working in France.

[476]App. Milano, 12 Dec. 1930: 1932 Rivista 438.

employment contracts made and executed within the domestic jurisdiction,[477] or simply that a compensation law is by nature a "loi de police et de sûreté."[478] This effect can be traced from the French decision of *Soc. Ayra* c. *Libmann*, in which the Cour de Cassation disregarded the parties' express choice of (Czechoslovakia's) law to govern the contract performed in France.[479] A more explicit example can be found in the Austrian civil code,[480] which prescribes that party autonomy is excluded if the contract is concluded in Austria and (at least) one of the parties is Austrian, regardless of where the work is to be performed. In Germany, though a more liberal attitude is adopted, the forum's public order still acts as a notorious goaltender for the home team.[481]

Deviations from the connecting factors of the contracts theory, like the place of contract performance, is generally interwoven with more important connecting factors, or overwhelmed by the *loi de police et de sûreté*.[482] They can hardly stand

[477]See *Antipoul* c. *Hersent frères*, Cour de Cass. 26 May 1921: 1921 RDIP 501: "dans un intérét d'ordre public, impose aux chefs d'entreprise, d' indemniser, dans la mesure qu'elle détermine, les ouvriers et employés victimes d'un accident du travail...est la conséquence nécessaire du contrat de louage de services, et, partout où s'exésute ce contrat."

[478]See the Belgian court decision of *Reis* c. C^ie^ *des Chemins de fer Prince-Henri*, Trib. civ. d'Arlon, 13 July 1904: 1905 RDIP 539.

[479]Cour de Cass., 9 Dec. 1960: 1961 Gaz.Pal. 154.

[480]CC (ABGB) § 36 & § 37. Before 1978, the Austrian conflict of contracts was based on this General Civil Code, which was repealed by IPR-Gesetz (Bundesgesetz vom 15, Jun.1978 über das internationale Privatrecht). The latter took effect on 1 Jan. 1979. The new provision on the law applicable to the employment contract was prescribed in § 44, whereby the law of the place where the employee usually carries out his work generally prevails even if it is within a foreign state. Party autonomy is strictly circumscribed to stipulations expressly made and could not deprive the employee of mandatory protection offered by the *lex laboris* or law of residence. The full German text and English translation of the IPR-G can be found in (1980) 28 Am. J.Comp.L. 222.

[481]Judgment of Bundesarbeitsgericht, 10 Apr. 1975: 1984 JDI 169. But there are still some continental countries advocating the absolute principle of party autonomy in the choice of labour laws, like Argentina. See *Affaire Leonardo Eiras Perez* v. *Techint Engineering Co.*, Tribunal du Travail de Zarate, 9 Dec. 1970: 1972 JDI 643: "The contract of employment made in the Argentina Republic for the execution of a work in Venezuela and stipulating the application of Venezuelian law is legally valid and it shall be applied according to the principles of private international law, even if, for some of its dispositions, Venezuelian law is in contradiction with Argentine law, and one of the parties is an Argentine national."

[482]*Reis* c. C^ie^ *des Chemins de fer Prince-Henri, supra* note 478.

alone as major factors and are often rendered inapplicable.[483]

The proper law theory has long been adopted in certain civil law countries, like France and Belgium, under the dignified bearing of public policy or social interests, rendering the individuality of this measurement somewhat weaker. For example, in the outdated decision of *Soc. des Bois africains* c. *Legrand*,[484] the French Cour de Cassation applied the forum's compensation statutes mainly because it was the place where the contract of employment was made, but also based on other attachments like the employer's principal place of business (located in the forum), and the payment of salaries in francs, *etc.*,[485] yet one can certainly notice that these proper law connections play a supporting role only. However, these measurements have gradually been changing. In *André Ribleur* c. *Caisse primaire d'assurance maladie des Alpes maritimes*,[486] a French employee was assigned by his French employer to perform management duties at a hotel in Iran for the duration of one (renewable) year. He was later injured during the course of employment and forced to return to France. The employee alleged that French workers' compensation laws should apply because the contract of employment was made in France, whereas his original employer and his stay in Iran was transitory, but the Cour de Cassation rejected this argument and found that Iranian workers' compensation laws governed, because it was the Iranian employer who benefited from his employment and made installment payments for the future funding of the employee's compensation benefit; on the contrary, the French company bore no interests in this foreign employment. The decision speciously reasoned that in construing the place where work is regularly performed, it is the employer for whose interests the service is provided that matters, rather than the

[483]See *Cruzel* c. *Massip*, *infra* note 485.

[484]*Supra* note 474.

[485]See *Cruzel* c. *Massip*, Cour de Cass, cham. civ., 22 Mars 1960: J.C.P.60 IV, éd. G. 66.

[486]Cour de Caasation, Chambre sociale, 7 Jan. 1971: 1972 JDI 77; see also *Sté Bordeaux Interim Express* c. *Caisse primaire d'assurance maladie de la Gironde*, Cour de Cass. Chambre sociale, 2 June 1976: 1978 JDI 106. (The French company which enjoys brokerage interests from the hiring and placement of foreign workers shall be deemed as the sole employer and is obliged to undertake responsibility according to the social legislation of the forum when the latter suffers injuries within the jurisdiction.)

location of the employer's principal place of business. A similar approach was adopted in a Belgian decision[487] which held that it is the place of execution of the employment benefit that determines the applicable law.

Austrian jurisprudence has asserted that the localization of the employment depends on where the assigned and other preponderant activities of the injured employee were centered, rather than the place from where instructions and directions were given.[488] On one hand, this proposition seems practically inspiring for on-board employees, like pilots or mechanics, who receive their instruction and supervision from operation bases distant to their work sites; on the other hand, it still leaves unanswered the impending pivotal question as to the validity of the connection created by their center of activities, which is mostly found within the cabin or provisionally at foreign airports.

Each common law country has its own unique approach. In Great Britain, workers' compensation is more likely to be treated as delictual than contractual in nature,[489] as evidenced by the fact that the *lex loci deliciti* has long been abandoned as a major principle of the conflict of civil torts,[490] yet the doctrine still dominates its workers' compensation laws.[491] In the latter system, the *lex loci deliciti* restricts itself to a strict territorial limit of applicability; in *Kruzs* v. *Crow's Nest Pass Coal*

[487]See *S. A. Belgroma* c. *Van Caeter*, Conseil de Prud'hommes d'appel de Bruxeles, Chambre pour employés, 25 Nov. 1966: 1971 JDI 888, in which the contract of employment was concluded in Belgium between a Belgian company and a Belgian national for the latter's work in Madagascar.

[488]See Verwaltungsgerichtshof, 17 Dec. 1991: 1992 OJZ 523, n° 214: 1993 JDI 380.

[489]See O. Kahn-Freund, "Notes on the Conflict of Laws in Relation to Employment in English and Scottish Law" in *Otto Kahn-Freund: Selected Writings*, (London: Stevens & Sons, 1978) 259, at p.267.

[490]A mitigated and relatively restricted proper law theory has been adopted by the Law Commission: if the torts are "related to, or the consequences of, any conduct the most significant elements of which took place in a part of the United Kingdom," then the law of that jurisdiction shall apply. See Law Com. No. 193 (1990), in P.M.North & J.J.Fawcett, *Cheshire and North's Private International Law*, 12 th ed (London: Butterworths, 1992), at p.551 and O.Kahn-Freund, "Delictual Liability and the Conflict of Laws", *infra* note 672, at pp. 32-34.

[491]The *Workmen's Compensation Act, 1906* (6 Edw. 7, c. 58) and the *Workmen's Compensation Act, 1897* (60-1 Vict. c.37), applied in the following U.K. court case, were both abolished by the *Act of 1946*. For a history of the transition of workers' compensation laws, see A. I. Ogus & E.M. Barendt, *supra* note 335, at pp. 250-3.

Co, Ltd.,[492] Lord Atkinson stated that "[i]n the absence of an intention clearly expressed or to be inferred from its language, or from the object or subject matter, or history of the enactment, the presumption is that Parliament does not design its [workers' compensation] statutes to operate beyond the territorial limits of the United Kingdom." Traces of this territorial limitation principle can still be found in the recently-adopted *National Insurance (Industrial Injuries) Act* of 1946,[493] which covers "employment in Great Britain under any contract of service or apprenticeship."

Special rules in the 1946 *Act* apply to persons (including pilots, commanders, navigators, members of the crew, and others whose employment is related to the purpose of the aircraft) employed on-board aircraft, even those which are registered abroad and owned by residents of or persons with their principal place of business outside Great Britain,[494] but the performance of their contract of employment "entered into in the United Kingdom" was confined to the period that "the aircraft is in flight."[495] This provision, however, should not be interpreted as a logical result of the territorial principle: British judicial authorities do not yet treat national aircraft as an extension of territory with respect to the choice of tort laws.[496] In a decision based on the repealed *Act* of 1906,[497] the court refused to extend coverage to workers other than the master, sailors, and apprentices who were injured on-board a British ship, because with respect to the applicability of workers' compensation statutes, a British ship is not in itself within the territorial

[492][1912] A.C. 590 (P.C.) at 597; see also *Schwartz* v. *India Rubber, Gutta Percha and Telegraph Works Co., Ltd.* [1912] 2 K.B. 299 (C.A.)("[A]lthough a British ship may for many purposes be British territory, and for many purposes British legislation would apply to what is done on a British ship, yet, ...the Act [of 1906] did not extend to the ship"); and the pioneering case of *Tomalin* v. *S. Pearson andSon, Ltd.*, [1909] 2 K. B. 61(C.A.).

[493]The *National Insurance (Industrial Injuries) Act*, 1946", 9 & 10 Geo. 6, c. 62, see also *infra* note 134.

[494]*Id*, at Sched. 1, Part I, sec. 5.

[495]*Id.* at Sched. 1, Part I, sec. 5(b).

[496]See Dicey and Morris, *supra* note 472, at p.978, and in the current edition, see L. Collins, ed. 12th ed *Vol*.2 (London: Sweet & Maxwell, 1993), at p.1542.

[497]See *Schwartz* v. *India Rubber. Gutta Percha & Telegraph Works Co. Ltd., supra* note 492.

limits of the United Kingdom.[498] An analogy with British-registered aircraft could, therefore, be easily employed.

Though the coverage of the *Act* of 1946 has already been extended, it is still applied only to workers who perform their service "for the purpose of the aircraft" which, following the above *ratio decidendi,* would include neither those employees who travel for the purpose of employment but as passengers on-board the aircraft nor the carrier's commuting employees. To fill this loophole, the British *Social Security (Industrial Injuries) (Airmen's Benefits) Regulations* of 1975 extended its coverage of benefits to injuries sustained by pilots, commanders, navigators, as well as other crew members who are nationals acting in an emergency and traveling to and from work "in any aircraft."[499] This provision secures some benefits for airline employees who are not flying "for the purpose of the aircraft," especially those who suffer damages during their journey going to and coming from work. Nonetheless, the 1975 *Regulations* fail to resolve the problem for those employees who for certain periods of their employment are not confined to the aircraft "in flight," since ground contacts are inevitably incidental to their employment, *i.e.,* when they perform pre- or post-flight clean up within a stationary cabin, or are forced to remain at a foreign stopover on-call in a hotel or travel to and from the airport for transitory purposes. If an accident occurs during these times, it does not occur in any aircraft. Perhaps it is for this reason that such employees have started to seek foreign recourse (see the following *British Airways* case in Canadian courts) for the potential risk that arises at those stages.

In Canada, each province and territory has its own workers' compensation statutes in force, and they are all substantially similar.[500] Though most of these statutes contain express provisions with respect to extraterritorial application, the determination of certain connecting factors for the location of employment is still governed by the facts of particular cases, and will ultimately be determined

[498]Id. at 302 (per F. Moulton, L.J.).

[499]SI 1975/469, reg 3(c).

[500]For the list of particular statutes, see J. G. Castel, *Canadian Conflict of Laws*, 2d.ed(Toronto: Butterworth, 1986), at § 483, pp. 619-70.

through conflict theories. In *Scott* v. *American Airlines Inc.*,[501] an Ontario court adopted a *lex contractus* rule for the choice of workers' compensation laws, evidently presuming the compensation system to be purely contractual: "[t]he validity and construction of a[n] [employment] contract are determined by the law of the place where the contract was made."[502] It was based on the facts that a benefit option was offered to and has been executed by the parties.

This strong contractual approach has been mitigated with the proper law theory in two judgments of British Columbia. In *British Airways Board* v. *Workers' Compensation Board*,[503] the flight and cabin crew of British Airways, a U.K. airline company, were represented by the B.C. Workers' Compensation Board against their employer because the latter occasionally operated aircraft in the province. The trial court held that since the contracts of employment were not made within the province, the cabin crew of the British airline did not qualify as "workers" under the forum's compensation statutes. In order to determine if the cabin crew was working "in the province," the trial court separated their performance into two stages. The first stage is reached while they are on-board over the airspace of the jurisdiction; the trial court cited the Canadian Supreme Court judgment in *The Queen in Right of Manitoba* v. *Air Canada* [504] (a tax case), which asserted that "merely going through the airspace over [a province]... does not give the aircraft a *situs* ... '*within* the province.'" Therefore, such a situs will not be given to the cabin crew of an aircraft. Meanwhile, the regular stopover in an airport is conceived as temporary, rather than for the extended period of time needed to establish a sufficient presence in the territory. The second stage reflects an "ancillary presence" when the cabin crew are on the ground, confined to the aircraft or staying in a hotel, *etc.*, for transitory purposes, and during the period of coming and going to work, *etc.* For activities within a stationary cabin, the court found that the employee "never is within the province" (though the court failed to provide any reason!),[505]

[501][1944] 3 D.L.R. 27 (On.H.C.).

[502]*Id.*, at 29.

[503]7 D.L.R. (4th) 706 (B.C.Sup.Ct. 1983), 17 D.L.R. (4th) 36 (B.C.Ct.App. 1985).

[504]See 111 D.L.R. (3d) 513 (Sup.Ct. Ca. 1980), at 521.

[505]The judgment is definitely in error on this point, for under the present received

and all other ancillary activities on the ground were also arbitrarily categorized as not "in the course of employment." Accordingly, the trial court concluded that since no connection exists between the crew and the province, the forum's compensation statutes are not the proper law to grant benefits.

Aside from incorporating quantitative figures, such as the number of hours that the flights would usually have contact with the province,[506] in support of the lower court's findings, the Court of Appeal moved forward to prescribe that a "sufficient connection" between the employee and the compensating institution will arise only when the work is performed within the relevant jurisdiction, a necessary condition to bring the former within the constitutional reach of the benefits scheme, although the statutory language may not expressly prescribe specific criteria or restrictions on the eligible subject. The place from which paychecks were sent, where the contract of employment was made, or where employment was usually rendered, would all become auxiliary evidence proving that the work was performed in the province.[507] For the foreign-flight cabin crew who were non-residents of the province, the place of their employment was deemed to be within a foreign aircraft which was only temporarily connected with the land due to a necessary stopover or other technical reasons, and their presence on the ground was merely transitory in nature; at neither stage, in the higher court's opinion, was any "real and substantial connection" established with the domestic regime.

Finally, some workers' compensation statutes in civil law countries provide reciprocity clauses, preventing the foreign employee from receiving the full allowance unless the foreigner's country offers similar benefits to the national of

doctrine of international air law, unless the aircraft is above the High Seas or *territorium nullius*, it is always within the territorial jurisdiction of the state over which it is flying or physically present. See Lord McNair, *The Law of the Air*, M.R.E. Keer & A.H.M. Evans, ed. 3d ed (London: Stevens & Sons, 1964), pp.6-9, 266-271 ("If the aircraft is on or over the territory of any country, the locus of events occurring in the aircraft will be that country, and not the country in which the aircraft is registered"), and Article 1 of the Convention on International Civil Aviation, signed at Chicago on 7 December 1944 (the Chicago Convention), ICAO Doc 7300/6.

[506]The Court of Appeal found that each respective airline's on-duty flight and cabin crew and aircraft are on British Columbian territory for two hours and thirty minutes and over the province's airspace for an average of seventy-five minutes; these average periods of time might be extended due to weather conditions or non-scheduled repair. See 17 D.L.R. (4th) 45.

the relevant civil law state.[508] Yet in contrast to federal states, such as the US, this problem has already been partially resolved by FCN treaties.

C. Practice of the Conflict of National Workers' Compensation Laws[509]

In aviation cases, the supremacy of the parties' contractual stipulation over contending connecting factors was unquestionably established in the *Duskin* decision.[510] This precedent was followed in *Willingham* v. *Eastern Airlines*:[511] the court held that the compensation statutes of the employer's principal place of operation (Georgia) governed because the deceased employee had already made the corresponding selection in his agreement with the employer before the accident; the court even noted that under the circumstances, there was no need to further measure other connecting factors like the *locus delicti*. A similar approach was adopted in *Garcia* v. *American Airlines, Inc.*:[512] once the airline voluntarily assumed liability under a certain system and the victim had received benefits therefrom, the *locus delicti, locus contractus,* and even the employee's residence became irrelevant.

The permissive scope of the contractual stipulation in the workers' compensation system is also clearly revealed in the *Duskin* decision. From the

[507]See 17 D.L.R. (4th) 57.

[508]See, *e.g.*, the Kranken und Unfallversicherungsgesetz/loi sur l'assurance maladie et accidents (*Health and Accident Insurance Statute*) of Switzerland, 1912; P. Reymond, "Labour Law and Social Insurance Law" in F. Dessemontet & T.Ansay, ed., *Introduction to Swiss Law*, *supra* note 465, at p.210.

[509]In theory, since the specific legal category of facts is undetermined, the court must first deal with this preliminary question of characterization of the issue in order to properly dispose of the available conflict of law rules, namely, the conflict of torts or other rules. This method has been closely followed in the US jurisprudence, where "[t]he first step in choice of law analysis is to ascertain the nature of the problem involved, *i.e.*, is the specific issue at hand a problem of law of contracts, torts, property, etc.:" see *Acme Circus Operating Co. Inc.* v. *Kuperstock*, 711 F.2d 1588 (11th Cir. 1983)). Several approaches had been raised for different reasons: see W. E. Beckett, "The Question of Classification (Qualification) in Private International Law" (1934) 15 Brit. Yearbook Int'l L. 46, at pp.46-60. However, these complicated theories do not seem to trouble US courts, which usually adopt the *lex fori* in characterizing factual situations.

[510]*Supra* note 262.

[511]3 Avi 18, 026 (2d Cir. 1952).

[512]*Infra* note 523.

all-or-nothing attitude adopted by the court, one can conclude that under the contracts theory, the parties are still not allowed to modify the content of the chosen statutes, the provisions of which are mostly administrative and procedural by nature, and thus closely-tied to the interests of national public policy. The parties could not take advantage of only parts of a certain compensation statute by limiting its application to the amount of benefits provided in the legislative act, nor proclaim themselves as subjects of the statutes based merely on mutual consent without factually qualifying as such under the compulsory requirements.

The place where the contract of employment was made is rarely vested with the same controlling importance as the parties' explicit stipulation in aviation, probably due to the nature of this industry. Airline companies must often recruit their flight personnel nationwide or even worldwide due to the relative scarcity of airborne professionals or the necessity of operating foreign bases. Therefore, the contract of employment would commonly be made through an employment agency, or by correspondence such as mail, telephone, or facsimile at the company's headquarters, which could be thousands of miles away from the place where the employee reports to work.[513] Very few substantial links could be drawn through the *locus contractus* under these circumstances, so aside from a few cases in which it overrides inferior elements like the *locus delicti*,[514] it rarely defeats competing connecting factors such as the place of regular employment.[515] At times, however, the *locus contractus* seems to bear major governmental interests in granting the benefits if no other major connecting factors exist. A clear picture was drawn in

[513]See *Lawhead* v. *United Air Lines, supra* note 366, in which forms with respect to the hiring process were completed in both California and Illinois (the place of the employer's corporate headquarters), though the actual place of performance was in Hawaii.

[514]See *Biddy, Admx.* v. *Blue Bird Air Service et al.*, 1 Avi 918 (Sup.Ct. Ill. 1940) (The contract of employment was made in Michigan, and the fatal accident happened in Illinois, and the compensation statutes of Michigan applied).

[515]See *Livermore, Admx* v. *Northwest Airlines, Inc.*, 1 Avi 814 (County Spokane, Wa. 1939) (The contract of employment was made in Minnesota, and the principal place of business of the employer was located in Illinois, yet the statutes of the regular place of employment (Washington) governed); also *Severson* v. *Hanford Tri-State Airlines*, supra note 264, and *McMains* v. *Trans World Airlines, Inc. supra* note 324.

Follese v. *Eastern Airlines*,[516] when the injured airline stewardess was unable to maintain any permanent residence because of several out-of-state assignments, yet was granted relief from the state in which the employment agreement was signed and accepted because "her lack of permanent residence outside this state by reason of the nature of employer's business and employee's duties requiring extensive travel outside of any location to which she might be assigned ... [create] the likelihood that if this state refuses to afford her a forum in which to adjudicate the merits of her ... work-related claim she will be precluded from seeking any relief."[517]

International or interstate airlines will necessarily have more than one operations center, as they are required to maintain several offices in airports where the transport business is undertaken. Considering the nature of employment for flying personnel as indicated in *Follese*, any business center that has routine professional interaction with the injured employee, *e.g.*, from which the employee regularly receives instructions, should qualify as a connecting factor with regard to compensation issues, whether or not it is a major part of the employer's executive or managerial machinery; therefore, the dominant opinion in the Warsaw realm that a carrier can have only one principal place of business,[518] *i.e.*, "le siège principal" or the domicile, would probably be incompatible with the choice of law method preferred in compensation cases. The transitory nature of employment in the airline industry makes the "home base" of employment even less exclusive.

Judicial interpretation of the principal place of employment has reflected the above argument. In the classic 1939 case of *Severson* v. *Hanford Tri-State*

[516] 271 N.W.2d 824 (Sup.Ct. Minn. 1978).

[517] *Id.* at 832. The *Follese* court, unfortunately, tried to reinforce its jurisdiction by misreading the mere existence of the employer's local business as the "localization" of business, although in fact there was no routine professional interaction with the injured employee when she performed her on-board duties out-of-state.

[518] See *Nudo* v. *Societe Anonyme Belge D'Exploitation etc.*, 7 Avi 18, 295 (E.D.Pa. 1962), *Eck* v. *United Arab Airlines Inc.*, 9Avi 18, 146 (2nd Cir. 1966), *Recumar* v. *KLM Royal Dutch Airlines*, 19 Avi 17, 292 (SDNY, 1985), *Stanford* v. *Kuwait Airways Corp.*, 20 Avi 17, 393 (SDNY, 1986) and G. Miller, *supra* note 8, at p.302; C. N. Shawcross & K. M. Beaumont, *supra* note 105, at VII-140, Giemulla & R. Schmid, *supra* note 105, at Art. 28 WC 5.

Airlines,[519] the injured copilot was performing his flight service regularly from St. Paul through Minneapolis to Chicago. The statutes of Minnesota, where he reported to work, where he received instructions delivered by the dispatcher or pilot, and where paychecks were distributed, governed because the employer's business was localized in Minnesota and the employee was wholly associated with the work performed there. The fact that the employee was originally hired at the airline's business headquarters under oral contract in Iowa was deemed to be of lesser controlling importance.

Similar but even fewer controlling elements were considered in *McMains* v. *Trans World Airlines, Inc.*[520] In *McMains*, the contract of employment was made at the employer's operations division headquarters in Missouri, yet the employee pilot was later assigned to various bases over eighteen years of employment. When the fatal accident occurred in Brazil, he was on assignment under a joint-operation program with a Hamburg-based German airline as the supervising pilot on-board a flight between New York and Rio de Janeiro. The court finally decided that the place (New York) where he regularly reported to work, received flight schedules and plans, and began almost each flight was his "home base" of employment, and thus its workers' compensation laws shall govern. The connection to the place (Missouri) where he was hired and paychecks were regularly sent was insufficient.

In the airline industry, then, the principal office of the employer is relevant only when it is the place in which professional interaction between the employer and the injured employee was normally engaged, especially in comparison with competing foreign *loci deliciti*.[521] The place where the designated on-board work generally commences,[522] on the other hand, will generally serve as circumstantial

[519]See *supra* note 264 at 623-5.

[520]8 Avi 17, 511 (Sup.Ct. N.Y. app. div. 1963), also *supra* note 324.

[521]See *Matter of Tallman v. Colonial Air Transport, Inc.*, 259 N.Y. 512; *United Airlines Transp. Corp. et al.* v. *Utah Industrial Com. et al.*, 2 Avi 14, 268 (Sup.Ct.Utah, 1946);*Spelar, Admx.* v. *American Overseas Airlines*, 2 Avi 14, 479 (SDNY, 1947).

[522]See *United Airlines Transp. Corp. et al.* v. *Utah Industrial Com. et al.*, id., *Severson* v. *Hanford Tri-State Airlines,*, *supra* note 264, and*McMains* v. *Trans World Airlines, Inc.*, *supra* note 324.

evidence of the principal place of employment, but still provide no conclusive answer. In the more recent judgment of *Garcia* v. *American Airlines, Inc.*,[523] the First Circuit admitted that it is hard to compare competing interests due to the inherently mobile nature of the flight attendant's job and the airline's business - "[t]he airline has 21,000 flight attendants spread across the country, and no single state has a substantial relationship with all of them."[524]

We have already mentioned above that under most statutes, the occurrence of injury in the state itself suffices to grant the benefit based on the state's interests in balancing potential medical or other related costs, but this rule has gradually lost its absolute character in aviation tort actions involving conflict questions. In *Kahle* v. *McDonnell Douglas*,[525] a Michigan federal district preferred the "proper law" to its own law for compensation claims arising from an airline accident in the state, because "the employer has the substantial right to look to the... [workers' compensation] law [with which it has complied] to determine whether it has any further obligation on account of the work-connected injury,"[526] and such an expectation is strong enough to justify the displacement of the *lex forum* (which is also the *lex loci deliciti*).

Nevertheless, the *lex loci deliciti* can seldom stand alone as a major controlling factor when the forum identifies with neither the *locus actus* or the *locus injuriae*. Two landmark decisions reveal this situation. In *Urda* v. *Pan American World Airways, Inc.*,[527] an aircraft perished in Brazil en route from Argentina to the British West Indies while the deceased employee was serving as a steward on-board. The plaintiff invoked the *lex loci delicti, i.e.*, the law of the Republic of Brazil, to govern the right of recovery for the deceased's wrongful death; the employer moved to strike out the civil tort action, alleging that the Florida *Workers' Compensation Act* should provide the sole remedy for the situation.[528] The Fifth

[523] 12 F.3d 308 (1st Cir. 1993).

[524] *Id.*, at 311.

[525] 23 Avi 17, 388 (E.D.Mich. 1990).

[526] *Id*, at 17, 391 [emphasis added].

[527] 4 Avi 17,293 (5th Cir. 1954).

[528] Under § 440.09(1) of the Florida *Workers' Compensation Act* (§§ 440-440.57, Fla. Statutes

Circuit agreed with the employer. In *Urda*, it is evident that the *locus delicti* may not be able to displace more substantial contacts with the forum, such as the deceased's residence, the place where the contract of employment was made and where service was regularly (though partially) performed. Yet the court showed little interest in comparing the controlling importance of all the various elements, for none of the contacts raised by the parties was mentioned in the written judgment. The only reason provided for discarding the *lex loci delicti* is that it was a foreign law and any alternative remedy provided by foreign law would contradict the forum's policy and interest in applying its own workers' compensation statutes as an exclusive remedy, which is "to assure to an employee the full benefits provided by the Act, and to the employer that the benefits so prescribed shall mark the limit of his liability."

In *King* v. *Pan American World Airways, Inc.*,[529] the employee was an on-board Flight Service Supervisor stationed in the employer's base at the San Francisco International Airport. He was killed when his aircraft crashed on the High Seas between the territorial waterline of California and Hawaii. The deceased's administratrix alleged that the federal *Death on the High Sea Act* of 1920,[530] which offered better benefits, governed the remedy, while the employer counterclaimed that the California *Workers' Compensation Act* should prevail.[531] Again, the Ninth Circuit Court ruled in favor of the employer. No significant foreign elements were involved in this case, but the judgment explicitly underlined that domestic workers' compensation laws are intended to provide the dominant legal sources

Annotated), if an accident occurs while the employee is employed out-of-state, several elements could still entitle the employee or his dependents to the compensation, *viz.*, (1) if the accident happened within the state, (2) if the contract of employment was made in the state, (3) if the employer's place of business or the residence of the employee is within the state, unless the service is expressly prescribed as "[e]xclusively outside of the State" pursuant to the employment contract.

[529] 6 Avi 17,666 (9th Cir. 1959), *cert.denied*. Sup.Ct.,March 28,1960.

[530] 46 U.S.C.A. §§ 761-767.

[531] "(a) If an employee who *has been hired or is regularly employed in this State* receives personal injury by accident arising out of and in the course of such employment outside of this State, he, or his dependents in case of his death, shall be entitled to compensation according to the law of this State [emphasis added]." See § 3600.5 of the California *Workers' Compensation Act* and *King*, supra note 529, at 17,668.

for tort liability in US airline employment; under the American jurisprudence, domestic workers' compensation statute have been uniformly held to govern industrial injuries sustained by airline employees in the course of their employment, whether the accident occurs in the US or on foreign soil (or the High Seas). Meanwhile, its coverage extends to both American and foreign employees unless restrictions are set on the definition of an employee. The court further held that the applicable state workers' compensation statutes excluded the operation of the otherwise applicable federal *Death Act*, for it is the law of the former which is related to the employment contract and offers a certain and efficient remedy to the injured employee or his family in the case of death. Once again, public policy considerations and the contracts theory outweighed the *lex loci deliciti*.

Conversely, in the 1985 decision of *Johnson* v. *Pischke*,[532] the employee (a student pilot) was injured in a plane crash on the mountains of Idaho. Both the employee and the employer, a fixed-base flying service owner, were residents of Saskatchewan, Canada. The employee and his wife brought personal injury and loss of consortium claims against the employer in Idaho's District Court and asserted that Idaho law should apply, but the court found that the Saskatchewan *Workers' Compensation Act* prevailed instead,[533] and this judgment was later affirmed by the Idaho Supreme Court.

In the judgment, the court found that the province of Saskatchewan "has significant interest in controlling the rights of injured employees to be compensated for their work related injuries and in allocating the resulting cost among the various employers who are believed to bear the responsibility for those injuries;"[534] if the court applied the laws of Idaho, the Canadian employer's expected waiver of liability which was granted under the Saskatchewan workers' compensation

[532]19 Avi 17, 758 (Sup.Ct. Ida, 1985).

[533]Under the Saskatchewan *Workers' Compensation Act*, all employers who make payments into the compensation fund would be insulated from tort liability claims made by a third party, and if the injury occurred outside of the jurisdiction, then the employee must elect between proceeding under and accepting the benefits of the *Act*, or seeking relief under the *lex loci delicti*. If the former option is chosen, then the worker is barred from making a civil tort claim against the employer. See *id.*, at 17, 761.

[534]19 Avi 17, 761.

regime would be subverted.

Apparently, the *Johnson* court adopted the proposition that if an applicable compensation statute has barred collateral remedies based on common law tort liability, then the forum must also decline to award a tort claim to the employee on the same account, even if it is permitted by the *lex fori*. This proposition is based upon the presumptions that the workers' compensation scheme comprises strict liability, thus increasing the predictability of compensation for industrial injury, and that the employer should not be sued or pay twice for a single fault; however, for the latter part, it has been mentioned in the above section that due to the nature and formal design of the benefits, the total recoverable damages will rarely be exceeded even if collateral remedies are claimed through different institutions. Furthermore, if we adopt the *ratio decidendi* of *Urda* or *King*, which viewed the prevailing state interest of *lex constituendi* (even in justifying public policy) as based upon the ideology of preserving the national labor force capital, then the competing *lex loci delicti* would only create a "false conflict,"[535] since the vital interests of the forum state were not affected by the application of its tort law in the instant case. The same line of thinking has long been adopted by Canadian courts, specifically regarding a tort action filed on behalf of an American employee killed in a fatal crash within Ontario.[536] In its judgment, the Ontario High Court simply asserted that once employees accept the workers' compensation benefit (from whichever state), they waive their "common law remedy to sue in tort" in either that state which granted the workers' compensation or in the forum state (Canada).[537] Yet a silver lining still surrounds the judgment — the implication that if the applicable compensation statute recognizes collateral remedies, then the forum shall have no reason to dismiss the tort claim.

However, another judgment on a similar scenario has again overshadowed

[535]A "false conflict" means that there exists no real conflict at all despite the ostensible clash of presumably competing laws which are initially indicated. See D. D. Siegel, *Conflicts in a Nutshell*, (St.Paul:Westing Publishing Co., 1982) at 269. For details of this notion in the conflict of laws, see B. Currie, "Notes on Methods and Objectives in the Conflict of Laws" in *Selected Essays on the Conflict of Laws*, (Durham: Duke University Press, 1963) 183-4.

[536]*Scott* v. *American Airlines Inc., supra* note 501.

[537]*Id.*, at 29.

the darkening sky, proving that when the *locus delicti* is also the forum, the *lex loci delicti* will govern, suggesting that the conflict rules for compensation claims serve only as strategic tools to safeguard the prevailing interest of the forum. In *Garcia* v. *Public Health Trust of Dade County*,[538] a Spanish flight attendant was mugged and beaten, sustaining injury while on layover in Miami, Florida. After receiving medical treatment, the victim returned to Spain, but the injury deteriorated. He then brought a civil action in Florida against his employer, a Spanish airline, and the doctor, an employee of the latter, for damages caused by improper treatment. The victim contended that though he had received the full amount of compensation benefits under Spanish workers' compensation laws, they did not prohibit the beneficiary from seeking collateral remedies, including redemption through civil tort actions in foreign countries. However, the Eleventh Circuit found that the *lex loci delicti, i.e.*, the Florida *Workers' Compensation Act*, would prevail, which inevitably led to the dismissal of the victim's civil tort claim because the Florida *Act* is provided as an exclusive remedy.

Interestingly, though the Eleventh Circuit boldly asserted that the traditional *lex loci delicti* rule has been abandoned in favor of the "most significant relationship" test set forth in Section 145 of the Restatement,[539] the old spirit still haunted the courthouse. The dominant contacts which prevailed - over the residence of the plaintiff, the operating center of the airline, and even the place where the flight attendant was regularly employed - are all kin of the *locus delicti* lineage: the alleged medical malpractice for which the foreign employer was vicariously liable "occurred in Florida," and the accident (being mugged and beaten) or original injury "happened in Florida," *etc.* Nevertheless, the court also held that the

[538]841 F.2d 1062 (11th Cir. 1988).

[539]Section 145 of the Restatement (Second) of Conflict of Laws provides: "1. The rights and liability of the parties with respect to an issue to tort are determined by the local law of the state which, with respect to that issue, *has the most significant relationship to the occurrence and the parties* under the principles state in § 6. 2. Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered [emphasis added]." See Restatement of the Law (Second): Conflict of Laws, *supra* note 432.

above approach is in fact employed to safeguard the state's interest in maintaining compliance with the exclusivity of the forum compensation system, which has already struck a balance between the interests of worker and employer. Allowing collateral benefits would inevitably infringe upon this paramount policy of the forum.

Notwithstanding the obvious error that the *Garcia* court made in extending the scope of the forum compensation system to foreign parties, who never intended to subject themselves to the alleged *quid pro quo* deal designed by the forum's legislative body (if the victim had applied for the forum benefit first he would certainly have been refused),[540] the US jurisprudence obviously conceives of forum workers' compensation laws as mandatory and maneuvers them as tools to execute forum public policy, by rejecting foreign laws (of tort) which are presumed to be repugnant to the forum's sense of morality and decency.[541] Otherwise, the court would have explored more deeply the competing interests in designating the applicable law, as the *lex fori* only pertains to the significant governmental interest in maintaining a balance between private parties who have or should have expected that the system would apply, rather than interfere with every private controversy which is litigated. In *Garcia*, especially, it is evident that the plaintiff did not request the operation of the forum's compensating institution, nor did the defendant qualify for forum protection.[542] There would have been no economic

[540]An interesting British case (*Johnson* v. *Coventry Churchill Ltd, supra* note 328) could be cited to reveal the fundamental error of the *Garcia* court: "[The exclusiveness of the remedy] was introduced as a part of social security legislation to improve benefit payable to injured workmen whilst avoiding the need to inquire into question of fault in such circumstance. Doubtless the contributions made by German employers towards state benefits reflect such a policy and the fact that they are freed of the responsibility to compensate employees for injury arising from fault on their part. *It would seem therefore that there is nothing in the policy underlying the foreign rule that was ever intended to have any application to the case of an English citizen working for an English employer* [emphasis added]," at 24.

[541]See also K. Murphy, "The Traditional View of PublicPolicy and Ordre Public in Private International Law" (1981) 11 Ga. J.Int'l & Comp.L. 591, at p.607.

[542]Unfortunately the victim did not argue this part in the first instance, and though it was later raised on appeal, the 11th Circuit refused to consider the argument because it is "purely a factual question:" see 841 F.2d 1066.

loss borne by the forum if either party was defeated in the civil tort action.[543] The US courts' conservative approach is further highlighted by the total absence of cases decided under foreign workers' compensation laws, although there are five jurisdictions which expressly permit an employee from abroad to enforce rights acquired under foreign law.[544] If this approach is the main current, for better or for worse, then at least it helps establish a precise rule of excluding the application of foreign *lex loci delicti*; however, the divergence created by the *Johnson* decision has further blurred the clarity of this methodology, and fails to support the predictability of controlling workers' compensation laws in the international airline industry.

D. Remarks on Current Theory and Practice

In determining the proper connecting factor to indicate the applicable workers' compensation statute, one must always envisage the nature of the benefit conferred and whether the interests concerned will be adequately protected. Workers' compensation is instituted to protect the injured employee, who is presumed to be less capable of seeking his own recourse before the bench, and who therefore requires the benefits for medical expenses and to support his basic cost of living while he is unable to trade his labor on the industrial market. An applicable law, then, should satisfy these functions. The administrative authority of the *locus delicti* might bear a public interest in balancing medical expenses if it subsidizes the rehabilitation of injured employees, and the employer may also have a substantial interest in identifying applicable compensation laws as a way of predicting and insuring his obligation for work-related injuries, though neither of these interests can compete with those of the injured worker.

Tort theory would be practical only if applied to ground employees in the international airline industry who perform their duties at a fixed place of work and within a fixed period of time, such as in airports or maintenance shops, for in such a situation the controlling foreign elements — the *locus delicti* or *locus injuriae*

[543]See *e.g.*, *Ohio* v. *Chatanooga Boiler & Tank Co.*, 289 U.S. 439 (1933).

[544]Arizona, Idaho, Utah, Vermont and Hawaii: see E. Rabel, *supra* note 309, at p. 215, n.7.

- could be easily determined by reference to simple facts.

For other employees, like the airline cabin crew, the nature of their employment makes it relatively difficult to identify the actual place of performance: though during most of their employment they are confined to the aircraft in flight, they may cross over the High Seas or the borders of several countries, dock upon foreign soil, or have to leave the fuselage and travel to and from home or foreign hotels along the highway; at these points the *locus delicti* or *locus injuriae* could become contentious because the territoril status of aircraft is not yet settled in the conflict of laws.

Furthermore, if the industrial accident happens at more than one point - unlike the plane crash or serious burn caused by coffee spilled accidentally during sudden turbulence - arising as a result of cumulative deleterious effects of a minor accident, *e.g.*, an occupational disease like chronic backpain or gradual loss of hearing[545] which might not even be revealed during employment, the tort theory proves even more helpless. Such post-impact or successive industrial injuries arising out of employment might be underlined by a series of minor causes over an extended period,[546] and their actual contribution to the resulting injury cannot be definitely fixed, making it impossible to trace the exact *locus delicti* or *locus injuriae.* This difficulty is accentuated for occupational diseases sustained by flight deck personnel, as the actual spot over which the aircraft was flying could never be determined. Under these circumstances, the victim's current domicile,[547] which could be described as the situs of factual consequences flowing from the industrial injury, has significant controlling interests because it would generally be the place where the victim receives medical treatment. If the employee lacks a domicile, a common status for cabin crew, then the employer's principal

[545]See *Davis* v. *The Commonwealth, supra* note 226.

[546]See *e.g. BethleheM Steel Co.* v. *Traylor,* 148 A. 246 (Md. App. 1930) (pneumonia and severe hemorrhage caused by continuous gas poisoning)

[547]See the Dutch Supreme Court judgment of Hoge Raad, 16 Mar. 1979: 1979 NJ 540, cited from Th.M.de Boer & R. Kotting, "Private International Law" in J.Chorus, P.H. Gerver, E. Hondius & A. Koekkoek, ed. *Introduction to Dutch Law,* (Deventer: Kluwer Law & Taxation Publisher, 1993), at p.234.

place of business or the place where the contract of employment was made[548] could serve as useful points of contact, though no preference should be given to either of these two factors, since both are merely indications of the employer's center of managerial interests.

2.4 The National Tort Liability System

2.4.1. General introduction

When the workers' compensation system is not provided as an exclusive remedy,[549] when the employee chooses not to be covered under the compensation scheme,[550] when the claim is based on property damages,[551] and when other tort-based legal institutions for international air transport such as the Warsaw or Rome regimes are inapplicable, then the employee is entitled to bring a civil law tort claim against his employer for recovery of work-related damage. The default tort claim, as reflected in the above various conditions, still provides a bottom-line *tabula in naufragio* for victims of modern industrial life; yet by the same token, tort actions against the employer are relatively rare today, since most work-injury claims are covered by the above preemptive legal institutions.

The employer's tort liability towards the employee is a special application of liability for negligence,[552] based upon a master and servant relationship in the contract of employment, from which particular duties of care are derived and imposed on the employer. Before the dawn of the industrial revolution at the end of eighteenth century, there was no employer tort liability for work safety; one can find no trace in Roman law suggesting a related regulatory regime,

[548]See *Follese* v. *Eastern Airlines, supra* note 373.

[549]See the cumulation and supplementation methods (i & iii), *supra*, in Section 2.2.3.E. of this chapter.

[550]See the election method (ii),*supra*, Section 2.2.3.E. of this chapter.

[551]See *supra*, Section 2.3.3.E. of this chapter.

[552]See J. Munkman, *Employer's Liability*, 10th ed.(London; Butterworths, 1985), p.27,

though labor has been commodified for at least two million years,[553] because it was considered unnecessary to regulate social relations through private law institutions in feudal society's mode of production. The notion of an employer's duty of care eventually arose due to the expansion of production and extension of working time - *i.e.*, the creation of a harsher working environment which was beyond the capacities of human endurance - and also due to the accompanying political individualism which grew from an emerging capitalist bourgeoisie and the consequent collapse of the aristocracy. However, under the influence of laissez-faire liberalism and the market economy, the protection offered to the employee was immediately and severely circumscribed by party autonomy in the guise of supremacy of freedom of contract: for if employee is a free agent in the labor market, then he undertakes the risks inherent his trade, and consequently, the employer neither insures his safety nor assumes responsibility for the negligence of fellow-servants under the prevailing doctrine of common employment or rejection of vicarious liability. Such "deregulation" eventually left the employee's basic interests solely dependent on the financial capability of the relevant employer, but considering the inequality in bargaining power that exists between the parties in the absence of any intervention from public authorities, one can imagine that very few tort claims against the employer would succeed. Fortunately, these deficiencies have gradually disappeared since the birth of the welfare state, which provides social insurance programs like workers' compensation to mitigate capitalist nihilism; meanwhile, the public policy originating with these innovative welfare institutions import a stricter form of employer's liability[554] (*e.g.*, a broader application of *res ipsa loquitur*), the abolition or limitation of common employment,[555]

[553]On the history of labor regulations, see J. Hendy & M. Ford, *Munkman on Employer's Liability*, 12th ed (London: Butterworths, 1995) at pp.1-3, and J. G. Fleming, "Tort Liability for Work Injury", *supra* note 273, at p.33.

[554]See W. G. Friedmann, "Social Insurance and the Principles of Tort Liability" (1949) 63 Harv. L.Rev. 241, at pp. 250-3.

[555]Such as the *Employers' Liability Act 1880* of Great Britain, which precluded the scope of common employment if the employee proved that the accident resulted from a defect in the ways, works, or machinery of the plant, or from the negligence of the person who supervises the worker or whose orders the worker must obey, as well as in certain railway labor cases.

and the recognition of vicarious liability,[556] shaping a modern landscape of employer's tort liability that still plays an important role in supplementing the unsatisfactory gaps left in the overarching workers' compensation system.

2.4.2. The Employer's Duties of Care

A. Introduction

A duty of care, created by the social relationship between tortfeasor and victim, is essential to instituting an action of negligence against the former in the modern regime of tort liability.[557] Without a specific duty of care, there can be no negligence. By the same token, to prove the employer's tort liability, the employee must show that his injury was sustained due to breach of the employer's duty of care. The employer's duty of care arises through the parties' interaction (management-labor) in the process of production; without reasonable contemplation of this duty, employees are more likely to be injured while working.[558] In the common law of torts, the employer's duties of care have been systematically formulated, whereas most civil law countries have adopted statutory instruments to supplement the basic provisions on contract of service or delicts in their civil codes.

B. Common Law Negligence

Though it is generally expressed as a duty of reasonable care, a threefold obligation is cast upon the employer towards his employee under the common

[556]Such as the 1872 Reichshaftpflichtgesetz adopted in Prussia, which limited its application to factories and other hazardous working environments. See J. G. Fleming, "Tort Liability for Work Injury"*supra* note 273, at p.34. n.208.

[557]"A relationship of proximity...must exist before any duty of care can arise, but the scope of the duty must depend on all the circumstances of the care"(per Keith of Kinkel, L.J.): see *Peabody Donation Fund (Governors)* v. *Sir Lindsay Parkinson & Co. Ltd.* [1984] 3All E.R. 529 (H.L.) at 534.

[558]"It is ... well known to employers ... that their work-people are very frequently, if not habitually, careless about the risks which their work may involve. It is ... for that very reason that the common law demands that employers should take reasonable care" (per Oaksey, L.J.): see *General Cleaning Contractor Ltd.*, v. *Christmas*, [1952] 2 All E.R. 1110 (H.L.), at 1114-5.

law of Great Britain and other Commonwealth countries: including the obligation to provide a competent labor force, adequate materials, *i.e.*, proper and safe appliances for the work, and a proper system of operation and efficient supervision.[559] A similar rationale is adopted in US common law,[560] which requires the employer to provide a safe place of work,[561] safe appliances, tools, and equipment for the work,[562] to give warning of danger which the employee might reasonably be expected to disregard,[563] to provide a sufficient number of competent

[559]See *Black* v. *Fife Coal Co.*, [1912] A.C. 149 (H.L.), at 173 (Shaw, Lord), and *Wilson and Clyde Coal Co.* v. *English*, [1938] A.C. 57 (H.L.Sc.), at 78 (Wright. Lord); and generally, M. J. Goodman, *Health and Safety at Work: Law and Practice*, (London: Sweet & Maxwell, 1988), at p.9.

[560]See the principles classified in W. P. Keeton, D. B. Dobbs, R. E. Keeton & D. G. Owen, *Prosser and Keeton on The Law of Torts*, 5th ed. *supra* note 169 at p.569.

[561]See *Burns* v. *Delaware & Atlantic Telegraph & Telephone Co.*, 59 A. 220 (N.J.App. 1904) ("It is one of the duties of an employer to exercise reasonable care that the place in which he sets his servant to work and the system or method adopted by the employer for the doing of the work shall be reasonably safe for the servant, and free from latent danger known to the master."); *McGuire* v. *Bell Telephone Co. of Buffalo*, 60 N.E. 433 (N.Y.App. 1901) ("The master personally owes to his servants the duty of using ordinary care and diligence to provide for them a reasonably safe place to work... and is bound to inspect and examine these things from time to time, and to use ordinary care to discover and repair defects in them."); *Butterman* v. *McClintic-Marshall Construction Co.*, 55 A. 839 (Sup.Ct. Pa. 1903) ("[T]he absolute duty rests upon [the employer] to provide suitable machinery and a suitable place to work."); *White* v. *Consolidated Freight Lines*, 73 P.2d 358 (Sup.Ct. Wash. 1937) ("Owner of truck, employing driver, had duty to exercise reasonable to furnish driver reasonably safe place in which to work, which is a positive nondelagable duty and carries with it the duty of reasonable inspection.")

[562]See *Petrol Corp.* v. *Curtis*, 59 A.2d 329 (Md. App. 1948) ("[The master] is not required to provide the most modern mechanical appliances, but only to use ordinary care to provide reasonably adequate and safe appliances and to keep them in a reasonably safe condition."); *Toy* v. *United States Cartridge Co.*, 34 N.E. 461 (Sup.Ct.Mass. 1893); *Chicago Union Traction Co.*v. *Sawusch*, 75 N.E. 797 (Sup.Ct.Ill. 1905) ("[T]hat the [employer] furnish to such fellow servant an improper, unsafe and defective motor...and the injury was occasioned by such failure for the [employer] ... to discharge its duty as master."); *Daniels* v. *Luechtefeld*, 155 S.W.2d 307 (Mo.App. 1941) ("An employer owes a nondelegable duty to furnish the employee with tools and appliances reasonably safe for their intended purposes.")

[563]See *Engelking* v. *City of Spokane*, 110 P.25 (Sup.Ct.Wash. 1910) ("[I]t is the ordinary danger, and not an extraordinary one arising from violation of some rule of science or mechanics not likely to be appreciated by the man of ordinary prudence, which binds the servant to the law of assumption of risk .... The weight of the raft, the heavy rope with which it was being lowered, the currents of the stream, and the proximity of the falls below, made it the duty of the master to furnish superintendence to common labours directed to make a raft."); *Baumgartner* v. *Pennsylvania Rly. Co.*, 140 A. 622 (Sup.Ct. Pa. 1928) ("Master is presumed to know the nature and qualities of the materials he places in the hands of his servants .... Master is presumed to have such knowledge of matters pertaining to his business as is possessed by those having special acquaintance with subjects involved .... An employer is presumed to be familiar with the dangers,

fellow servants,[564] and to promulgate and enforce rules of conduct necessary for work safety.[565] We will explore the employer's duty of care with respect to international air transport according to the Commonwealth categories, which in substance encompass all the specific duties indicated by US jurisprudence.

i) Competent Staff

The employer must exercise reasonable care in the selection and supervision of fellow servants. These working mates must be technically-competent and encouraged by the employer to engage in their job duties with prudent concern for the safety of coworkers. In the international air transport industry, an airline recruiting its crew members according to the statutory standard is *prima facie* in conformity with this requirement.[566] Of course, the statutory conditions constitute only a minimum standard, so the airline is still under a duty of care to supervise and regularly examine the competence of air crew or other employees. When the employee is found to act recklessly, the employer is obliged to intervene;[567] *e.g.*, to prohibit or remove an intoxicated pilot from flying. Hiring employees with prior criminal records is not necessarily negligent *per se*, unless this employee causes

latent as well as patent, ordinarily accompanying the business in which he is engaged.")

[564]See *Alyman* v. *Lehigh Valley Rly.Co.*, 158 F.957 (2d. Cir. 1908) ("It is a master's duty to furnish his servant suitable, safe and sufficient machinery,... and sufficient and competent helpmates, the master being liable for an injury occurring by reason of ... the incompetency of a fellow servant of which he know or by the exercise of reasonable diligence should have known."); *Peterson* v. *American Grass Twine Co.*, 96 N.W. 913 (Sup.Ct. Minn. 1903) ("The obligation of a master to exercise reasonable care to provide his servants with reasonable safe instrumentalities with which to perform their work embraces the obligation to provide a sufficient number of servants to perform the work safely.")

[565]See *Southern Package Corp.* v. *Mitchell*, 109 F.2d 609 (5th Cir. 1940)("It being duty of master who promulgates rules to see to it that they are enforced"); *Tremblay* v. *J. Rudnick & Sons*, ("A master must provide such reasonable rules and regulations as will enable his servants to do their work in safety, and if ordinary care requires that a warning of dangers arising from the work should from time to time be given to the servants as the work progresses, it is the master's duty to provide for such warning.")

[566]Such as the FAA regulations with respect to certification of air crew (*e.g.*, 14 CFR Part 61—commercial pilots, airline transport pilots, and 14 CFR Part 63—flight engineers and flight navigators, *etc.*)

[567]"If ... a fellow-workman ... by his habitual conduct is likely to prove a source of danger to his fellow-employees, *a duty lies fairly and squarely on the employer to remove the source of danger* [emphasis added]:" see *Hudson* v. *Ridge Manufacturing Co. Ltd* [1957] 2 Q.B. 348.

injury to his fellow servants which has a close connection to the crime he had previously committed - imposing a foreseeable risk upon the employer[568] - such as sexual harassment committed by an employee with a record as a sex offender.[569]

Moreover, if the master's delegate (who could be an agent or a fellow servant) assumes the employer's duty to take reasonable care for the safety of employees and fails to do so, the employer is liable.[570] This effect has become an integral part of vicarious liability upon the abolition of common employment (discussed in the following sections). For example, the airline would be liable for its management and ground maintenance personnel who negligently allow pilots to land in a thundershower without updating them concerning the weather conditions - without telling the pilots that a severe thunderstorm was in the area[571] - causing the plane to crash and the death of its employees. As for flight deck personnel, the pilot undertakes the employer's duty to take reasonable care for safety on-board the aircraft, not only because this transfer of responsibility is expressly prescribed in Annex 6 to the Chicago Convention or other national air laws,[572] but also because in civil tort claims the pilot is presumed to have total

[568]*E.g., Bland City Flying Service* v. *General Elec. Credit Corp.*, 23 Avi 17, 959 (Sup.Ct.Fla. 1991) (Prior drug abuse record of the employee did not entail forseeability of the later theft).

[569]Similar facts are found in *Veness* v. *Dyson* (1965) Times L.R.,25 May (harassment and bullying).

[570]"[T]he employer may delegate the performance of his obligations in this sphere to someone..., but this does not affect the liability of the employer, he will be just as much liable for his negligence as for that of his servant. Such a [delegate]... is entrusted by the employer with teh performance of the employer's personal duty:" see *Davie* v. *New Merton Board Mills, Ltd*, [1959] A.C. 604 (H.L.) (per Lord Tucker).

[571]See *e.g., In Re Air Crash Disaster at JFK International Airport on June 24, 1975*, 15 Avi 18, 455 (2d. Cir, 1980).

[572]Para 4.5.1. of Annex 6 provides: "The pilot-in-command shall be responsible for the operation and safety of the aeroplane and for the safety of all persons on board, during flight time:"see the Convention on International CIvil Aviation, ICAO Doc 7300/6. Other national air laws include Article 9 of the French Law of March 25, 1936 (*Loi fixant le statut du personnel navigant de l'aéronautique civile*), which specifies that the air commander is empowered as a representative of the airline; and the *Swedish Aviation Act*, which grants the commander similar powers in Chapter 5. On the public law side, see generally J.W.F. Sundberg, "The Aircraft Commander in Legal Turbulence" in J.W.E.Storm van's Gravesande & A. van der Veen Vonk, ed. *Air Worthy*, (Deventer: Kluwer Law & Taxation Publisher, 1985) 169, at pp.175-6; for a chronological study, see A. A. van Wijk, "The Legal Status of the Aircraft Commander" in A. Kean, ed. *supra* note 123, at pp.311-.

control of the aircraft in flight and final authority for its operation, as well as familiarity with all available information concerning the flight.[573] Aside from strict adherence to safety regulations, a pilot is required to maintain the proper standard of professional expertise reasonably expected in his trade.[574] When the pilot breaches this duty of care, failing to maintain aircraft safety and creating hazards which cause injury to his fellow servants, his employer is vicariously liable. In practice,[575] a pilot is required to exercise "vigilance" so as to see and avoid other aircraft in the sky, but such vigilance is less stringent as it becomes physically impossible to exercise; in other words, he is only required to exercise the highest degree of care that a reasonably prudent (or "ordinarily competent," in British parlance) pilot would offer under the same circumstances. It is unnecessary for injured servants, in establishing willful misconduct by the employer, to prove that the pilot intended to cause the harm which resulted from his acts or omissions;[576] if they can prove that the pilot intentionally performed or failed to perform some act or a series of acts with the knowledge that such act or omission would probably result in injury or damage, or in a manner from which reckless disregard of the probable consequences of this act or omission could be inferred, his behavior is characterized as willful misconduct. For example, if the pilot neglected to follow his normal practice of crosschecking the aircraft's heading (as shown by the cockpit's directional instruments) against the runway heading while lining up for takeoff, resulting in the aircraft taking-off down the wrong runway and crashing into other aircraft lined up for takeoff in the opposite direction, his behavior is interpreted as willful misconduct.[577] Under some statutes, willful misconduct can constitute an exception to the exclusive application of workers' compensation.

Furthermore, since it is not only the employer's designated servant who has a duty to take reasonable care for the safety of employees, the employer

[573]See *Foss* v. *United States*, 623 F.2d 104 (9th Cir. 1980) at 106.

[574]See *e.g.*, *Bolam* v. *Friern Hospital Management Committee* (1957) 2 All E.R. 118.

[575]*Steering Committee, et al.* v. *U.S.A.*, 24 Avi 17, 707 (9th Cir. 1993), at 17, 710.

[576]See *Korean AirLines* v. *Alaska*, 22 Avi 17, 388 (Sup.Ct.Alaska, 1989), at 17, 391.

[577]*Id.*

could also be liable for the negligence of an independent contractor, including the failure by a contracting maintenance shop to complete a cooling and lubricating oil change, which would normally prevent excessive wearing and deformation of the aircraft's ball-bearings,[578] resulting in a plane crash and employee death.

ii) Safe Workplace and Appliances

The employer is obliged to ensure that the premises where his employees perform their service are reasonably safe, and to provide and maintain proper tools for them to use. In the international air transport industry, the phrase "plant" encompasses not only the aircraft and its compartments,[579] but also other facilities "within the province of the master" which are conceived to be necessary for the operation of the enterprise.[580] These workplaces may include the terminal bridge, the hangar, or the transit bus. Maintenance is conceived to be a continuous obligation; for aircraft especially, periodic inspection and examination according to a regular schedule is absolutely necessary, as is the discovery and repair of defects.[581]

For ordinary enterprises, the employer is only required to use "ordinary care and diligence" to maintain the plant in good order;[582] he is not required to absolutely guarantee its safety, nor is he liable for latent defects which could not have been discovered upon reasonable inspection. This principle applies to the airline industry at large, though for an operator of sophisticated, ultra-hazardous, and vulnerable aircraft, a higher degree of professional care is required.[583] Fortunately, these standards of care are not prescribed as abstract rules, but are often prescribed in national safety regulations or international standards and

[578]See *Various Underwriters at Lloyds* v. *Page Airmotive, Inc.*, 13 Avi 17, 715 (W.D.La.1975).

[579]Such as the door to a cargo hold. See *DiMarzo* v. *AerLingus Irish Airlines, infra* note 581.

[580]*Toronto Power Co. Ltd.* v. *Paskwan* [1915] A.C. 734 (H.L.).

[581]See *DiMarzo* v. *AerLingus Irish Airlines*, 18 Avi 17, 711 (D. Mass. 1984), at 17, 712.

[582]See *Wilson and Clyde Coal Co.* v. *English,, supra* note 559, at 84, and *McGuire* v. *Bell Telephone Co. of Buffalo, supra* note 561.

[583]"[The airline] is responsible for any, even the slightest , negligence and is required to do all the human care, vigilance and foresight reasonably can do under given circumstances:" see *Irwin* v. *Pacific Southwest Airlines*, 184 Cal. Rptr. 228 (Cal. 4th D. 1982).

recommendations. For example, when transporting hazardous materials (like nitric acid) as cargo, the airline is usually required to pack them in fire-safe metal containers cushioned by incombustible material, as well as properly mark and label them to reflect the dangerous nature of their contents under national aviation regulations and IATA-recommended procedures.[584] If this acid ignites due to ill-packaging which violated safety regulations, causing the plane to crash and the death of its pilots,[585] then the airline probably failed to exercise the due care required to provide a safe workplace for its employees.

However, the prudent employer must do more than fulfill uniform statutory standards, for under the fast pace of environmental change which constantly obsolesces the technology intended to deal with it, superficial compliance with all of the current safety regulations might barely suffice to meet the minimum standards of safety. Even though the employer is not obliged to provide the latest generation of technology available,[586] it would only be reasonable for him to exercise additional care by updating the machinery to a minimum standard that helps eliminate unnecessary risks arising from newly-developed hazards. Unfortunately, most of the jurisprudence does not seem to share this point of view: a dogmatic proposition is commonly rendered that once the employer has completely followed the statutory requirements, he is not negligent. If aviation regulations do not require the owner or operator to install bird-resistant windshields to prevent the aircraft from colliding with birds, the owner or operator is not considered negligent even if the risk of hitting birds has actually increased and subsequently caused work-related injuries to air crews.[587]

Due to the long working-hours and enclaved nature of international air transportation, adequate medical equipment and basic emergency treatment are necessary to maintain the aircraft as a safe place of work. It has been found that in the situation of heart attack, a lack of sufficient medical equipment on-board

[584]Such as 49 C.F.R. § 173.268(i)(packaging material) and 49 C.F.R. § 173.25 (b)(3)(mark).

[585]See *Pan American World Airways, Inc.* v. *Boeing*, 16 Avi 17, 312 (SDNY, 1980), at 17, 313.

[586]See *Petrol Corp.* v. *Curtis, supra* note 562.

[587]See *e.g., Woodworth* v. *Gates Learjet Corp.*, 21 Avi 18, 049 (Mich. App. 1988), at 18, 050.

the aircraft constitutes negligence by the airline under the common law of tort.[588]

iii) Proper System or Method of Operation and Efficient Supervision

A proper system or method of work operations is revealed in a reasonably safe production process and a pre-planned performance procedure, including proper safety instruction[589] and warnings of inherent danger.[590] The employer or his delegate must design or instruct an adequate sequence in which the work can be safely carried out. An instruction by the captain asking the flight attendant to begin offering beverage services while the aircraft is still taxiing around before takeoff during heavy traffic congestion, though intended to alleviate the boredom and frustration of passengers, would violate safety regulations prohibiting in-flight service while the aircraft remains on an active runway;[591] if the flight attendant was injured while performing the service, then the employer will be liable for failing to provide a proper system of operation. Other instructions and warnings may equally be required; in the above-cited case regarding the carriage of hazardous material,[592] the airline would also be responsible for failing to offer adequate instruction with respect to the arrangement of the package in the cargo compartment. In addition, the management and ground maintenance departments are obliged to provide information updates on the weather and alert the crew of foreseeable thunderstorms or turbulence which would endanger the aircraft;[593] the airline is held to be negligent for dispatching an aircraft into turbulent weather, resulting in its crashlanding, when it possessed knowledge or means of obtaining knowledge regarding the existence of such weather conditions.[594]

Sustaining a proper system of work in the air also includes the duty to

[588]See *Fischer* v. *Northwest Airlines, Inc.*, 19 Avi 18, 362 (N.D.Ill. 1985).

[589]See *General Cleaning Contractors Ltd* v. *Christmas*, *supra* note 558, (Oaksey, Lord).

[590]See *e.g.*, *Baumgartner* v. *Pennsylvania Rly. Co.*, *supra* note 563, and *Sword* v. *Cameron*, (1839) 1 D 493., *Smith* v. *Baker & Sons* [1891] A.C. 325 (H.L.).

[591]See *Wong* v. *Stanley*, *supra* note 349.

[592]See *Pan American World Airways, Inc.* v. *Boeing*, *supra* note 585.

[593]See *In Re Air Crash Disaster at JFK International Airport on June 24, 1975*, *supra* note 571.

[594]See *Stiles* v. *National Airlines*, 5 Avi 18, 028 (E.D.La. 1958).

provide adequate medical supervision and emergency support for sick or injured employees on-board, regardless of whether the accident is caused by a pre-existing physical condition or the victim's negligence. Having sufficient medical equipment on-board will fulfill only the basic requirements of this duty of care, as has long been the case in maritime labor law,[595] and more recently airline labor law as well.[596] The airline is further required to adopt certain reasonable yet positive treatments of injury or sudden sickness, like the heart attack sustained on-board, such that it may have to land its aircraft at the nearest available airport and contact its ground personnel to obtain medical assistance.[597]

C. Statutory Duties of Care

For a long period of time, the tort liability of employers in civil law countries has followed a relatively awkward development, mostly due to oversimplified delictual provisions in the civil codes of the German-Romanic legal family[598] which treat employees no differently from other tort victims, although the former are subjected to a much more cumbersome duty of proving willful misconduct or negligence by the employer. This development was also plagued by the lack of vicarious liability for employers in most of these legal systems, so if the accident was caused by the fault of fellow employees, as it could very often be in the

[595]See *Smith* v. *Howdens Ltd.*, [1953] NI 131, and *Kasapis* v. *Laimos Bros., Ltd., et al.* [1959] 2 Lloyd's Rep. 378 (Q.B.).

[596]See *Fisher* v. *Northwest Airlines, Inc.*, 19 Avi 18, 362 (N.D.Ill. 1985).

[597]*Id.*, at 18, 364.

[598]Article 823 of BGB provides: "A person who wilfully or negligently injures the life, body, health, freedom, property or other right of another contrary to law is bound to compensate him for any damage arising therefrom (Sec.1). The same obligation attaches to a person who infringe a statutory provision intended for the protection of others, If according to the perview of the statute infringement is possible even without fault, the duty to make compensation arises only if some fault can be imputed to the wrongdoer (Sec.2)." (An English version of the Article can also be found in B. S. Markesinis, *supra* note 165, at p.12 and S. L. Goren, The German CIvil Code, rev. ed.(Littleton: Rothman & Co., 1992), at p.153). A typical type of BGB torts provision can be found in Article 184 of the Civil Law of Taiwan, which provides: "A person who wilfully or negligently injures the right of another contrary to law is bound to compensate him for any damage arising therefrom. The same obligation attaches to a person who wilfully injures another by the method against public policy. (Sec.1). A person who infringes a statutory provision intended for the protection of others is negligent *per se* (Sec.2)."

airline industry, the employer is easily exonerated from liability.[599] Some doctrinal writings interpreted the work-related injury as a breach of the contractual duty of protection towards employees,[600] thereby invoking the employer's vicarious liability in the performance of contract,[601] but this argument has failed in practice,[602] for the courts generally conceive that the employer's duty of protection under the civil law of obligations does not involve a warranty for the negligence of fellow employees. Nevertheless, the introduction of statutory safety standards into the industrial world has gradually improved this miserable situation, although the statutes which prescribe specific regulations for the safe operation of a relevant industry are generally criminal or administrative in nature; since most of them could be interpreted as "statutory provisions intended for the protection of others,"[603] the employer who infringes upon these provisions will be considered

[599]Though Article 831 of BGB provides that the employer is bound to compensate for damage which his employee unlawfully causes to a third party in the performance of his work, if the employer could prove that he has exercised reasonable care in the choice of the employee, and, where he has to supply appliances or implements or to supervise the work, has also exercised reasonable care as regards to such supply or supervision, or if the damage would have arisen notwithstanding the exercise of such care, then he would not be liable. These exceptions are in fact fairly easy to institute when the actual performance of work is under the control of the employee who is to be blamed, such as the pilot of an aircraft.

[600]Such a duty is inferred from the Contract of Service in the civil law of obligations, such as Article 618 of BGB, which provides that an employer has to provide and maintain rooms, equipment and apparatus for the performance of work, and to regulate services which are to be performed under his order or his direction, such that the employee is protected against danger to life and health as far as the nature of the work permits (Sec.1). If the employer does not fulfill the obligations imposed upon him with regard to the safety and health of the employee, the provisions of Article 842-846 applicable to delict apply *mutatis mutandis* to his obligation to make compensation (Sec.2). (An English version of the Article can also be found in S. L. Goren, *supra* note 598, at p.116). But in some Civil Codes, no similar obligation is prescribed upon employers, such as the provisions under Title VII of the Civil Code of Taiwan (Hire of Service,僱傭契約 from Article 482 to 489).

[601]Article 278 of BGB provides the basic rule of employer's vicarious liability towards a third party; according to this provision, a debtor is responsible for the fault of persons whom he employs to perform his obligation, to the same extent as for his own fault (An English version of the Article can also be found in B. S. Markesinis, *supra* note 165, at p.19, and S. L. Goren, *supra* note 598, at p.46).

[602]But the decision of Japanese Court seems to adopt the former reasoning from the judgment of the Supreme Court, 7 May 1921; see J. G. Fleming, "Tort Liability for Work Injury"*supra* note 273, at pp.33, 37.

[603]Article 823 of BGB, see *supra* note 598.

negligent *per se*,[604] consequently exonerating the victim from the burden of proof. Thus, in civil law countries, safety regulations at least offer industrial victims a broader source of civil recovery from the employer. It is also fashionable to impose detailed statutory duties upon the employer to provide a safer working environment in common law countries, where they are given even greater effect in civil tort claims.

In *Walker* v. *Bignell*, the following definition was proffered: "A safety statute is a legislative enactment designed to protect a specific class of persons from a particular type of harm."[605] Industrial safety statutes generally contain detailed regulations for the safe operation and maintenance of mechanisms, and as mentioned above, the violation of these statutes is generally attached to criminal or administrative, or in some cases only directive, consequences rather than civil liability; the act of violating them does not in itself, therefore, constitute a valid cause of action. Yet under the common law,[606] a breach of statutory duties or violation of safety statutes is treated as a peremptory source of civil liability, based upon the consideration that safety statutes have by nature crystallized particular standards of care toward a certain class of people. Thus, the person who violates these statutes evidently fails to exercise the standard of care which society (as represented by the legislature) might reasonably expect or desire from a person of ordinary prudence under similar circumstances, and he is presumed negligent in tort. The effect is that the victim may recover damages without any proof of fault.

Not every act which violates aviation regulations translates into negligence *per se* toward every victim. The relevant legislative intent must be presumed before "statutory negligence" can be instituted. If the harm inflicted is among

[604]Such as Sec. 2 of Article 184 of the Civil Code of Taiwan, *supra* note 600, and also in Sweden (See J. G. Fleming, "Tort Liability for Work Injury" *supra* note 273, at p.39, n.245.). But under the BGB, the fact of infringement or violation of safety regulation by an employer could only be treated as potential evidence of negligence, rather then a presumption of negligence, due to the insistence of fault by the employer in Sec. 2, Article 823 of the BGB .

[605]*Walker* v. *Bignell*, 301 N.W. 2d 447 (Wis. 2d 1981).

[606]In most civil law countries, violation of criminal or administrative statutes would serve only as a partial evidence in determining civil negligence, not to establish a presumption. See also J. G. Fleming, "Tort Liability for Work Injury"*supra* note 273, at p.39.

the types which the regulations are designed to prevent, and if the person injured is within the class of persons sought to be protected, then the act of violating such "an absolute duty" will necessarily constitute negligence *per se*.[607] Yet generally, the scope of protection offered in safety statutes is broadly interpreted due to policy considerations. A typical safety statute is the "Right-of-Way" rule which was promulgated in the US Federal Aviation Regulations:[608]

> Landing Aircraft, while on final approach to land, or while landing, have the right-of-way over other aircraft in flight or operating on the surface. When two or more aircraft are approaching an airport for the purpose of landing, the aircraft of the lower altitude has the right-of-way, but it shall not take advantage of this rule to cut in front of another which is on final approach to land, or to overtake that aircraft.

The purpose of this rule is to protect not only persons and property on-board, but also those on the ground, from injury and damage by preventing collisions between aircraft during landing; the on-board employees and ground personnel who are injured or damaged due to the pilot's failure to yield, *i.e.*, to follow the right-of-way rule, belong to the classes of persons that the regulations seek to cover and will benefit from the presumption of negligence by the employer.[609] Another, less visible rule concerns the maintenance of records. Pursuant to the US Federal Aviation Regulations,[610] the aircraft operator is required to maintain records of its limited-life parts. Such a rule is "designed for the protection and safety of pilots, passengers, and persons on the ground,"[611] and would surely be interpreted as intended to protect employees, either on-board or on the ground. Naturally, the violation must evince a causal connection with the occurrence of

[607] See *United States Aviation Underwriters, Inc.* v. *National Insurance Underwriters*, 18 Avi 18, 345 (Wis. App. 1984), at 18, 347.

[608] 14 C.F.R. § 91.173 (a)(2)(ii).

[609] *United States Aviation Underwriters, Inc.* v. *National Insurance Underwriters*, *supra* note 607.

[610] 14 C.F.R. § 91.67 (f).

[611] *Erikson Air-Crane* v. *United Technologies*, 20 Avi 18, 352 (Ore. App. 1987).

injury to trigger the presumption of negligence.

D. *Res ipsa loquitur*

In most airline accidents, the recovery of positive evidence of negligence is usually a difficult task for the plaintiff, because the causes of the modern aviation accident can be extremely diverse and perplexing. It is beyond the financial and technical capacity of an average plaintiff (usually a layman, with the possible exception of surviving pilots) to retrieve a reasonable amount of evidence from the wreckage - and as a matter of fact sometimes even those experts who possess professional skills in the field of aeronautical science are unable to tell exactly how and why an accident took place. Legal actions against the airline are, therefore, almost doomed to fail. Contemplating the possible social costs in this scenario and the general trend toward protection for ordinary victims of modern hazards, some common law courts apply *res ipsa loquitur* as a leading rule of evidence on these occasions. Pragmatically, *res ipsa loquitur* means that the occurrence of the accident itself will serve as peremptory evidence of the defendant's negligence. Its rationale is based on the proposition that if a certain harmful event is not conceived to ordinarily occur in the current stage of knowledge, then it is legitimate to infer that there was negligence on the part of the person in control of that event. The direct effect of *res ipsa loquitur*, as shown by its surface meaning, is to alleviate the plaintiff's burden of proof in a tort claim; on the other hand, the application of this maxim also serves to compel the defendant, in charge of the event and presumably more familiar with all the available relevant information, to prove the precise cause of accident and thereby rebut the presumption.[612] Accordingly, the plaintiff establishes his case with the slightest evidence of negligence (generally circumstantial evidence), but the defendant may still displace the resulting presumption by providing alternative evidence or explanations,

[612] "[I]t is not sufficient to show that there are several hypothetical causes of accident consistent with an absence of negligence. *A defendant must go further and must show either that there was no negligence or must give an explanation of the cause of the accident which did not connote negligence* [emphasis added]:" see *Zerka* v. *Lau-Goma Airways*, 23 D.L.R. (2d) 145, at 146.

effectively bridging the division between fault and strict liability.[613]

Two inferences must be raised to apply *res ipsa loquitur*. First, the accident must be such that it does not happen in the ordinary course of events without the presence of negligence.[614] Second, this event must be solely under the control or exclusive management of the defendant when the accident happened. With respect to the first inference, the rapid evolution and maturity of today's aeronautic technology, the comparatively impressive safety record of modern aviation instruments, and the frequency and regularity of carriage which qualifies it as a common method of transport, have together created a general consensus that if the proper degree of care is observed, an airline accident should not ordinary occur.[615] In practice, the aircraft which crashes shortly after its takeoff and before it could have attained a normal flying altitude, or which crashes in a field adjacent to the airport during a normal landing, are conceived as accidents that ought not to have happened.[616] Additionally, the following situations have evoked the application of *res ipsa loquitur*: when an aircraft departs from the runway while landing and the relevant records are silent as to what caused this departure;[617] when two aircraft collide in mid-air;[618] when an aircraft crashes into mountains, cities, or the like;[619] or when an aircraft disappears over the High Seas[620] or Great

[613]See J. G. Fleming, *The Law of Torts, supra* note 274, at p.321.

[614]See *Scott* v. *London and St Katherine Docks Co., infra.* note 625.

[615]See *Smith* v. *O'Donnell*, 12 P.2d 933 (Sup.Ct.Cal. 1932). Until the mid-50's, some US courts still conceived of aviation activity as fairly esoteric, confessing insufficient knowledge as to what might cause an airplane to explode in flight ("there is a wide element of chance which the ingenuity of man has not yet overcome"); therefore the doctrine of *res ipsa loquitur* did not apply: see *Deojay* v. *Lyford*, 29 A.2d 111 (Sup.Ct.Me. 1942), also *Allison, Adm'r* v. *Standard Air Lines, Inc.*, (1930) U.S.Av. Rptr 292 (S.D.Cal.); interestingly, in some cases (such as *Fosbroke-Hobbes* v. *Airwork, Ltd, infra*), a totally contrary view was adopted as much as ten years earlier.

[616]See *Fosbroke-Hobbes* v. *Airwork, Ltd*, [1937] 1 All E.R. 108 (K.B.) at 109, and *Capital Airlines, Inc.* v. *Barger*, 6 Avi 18, 147 (Tenn. App. 1960).

[617]See *Farina* v. *Pan American World Airways, Inc.*, 19 Avi 18, 199 (N.Y.App. 1985), at 18, 200 ("upon these facts, there is a sufficient evidentiary basis for invoking the doctrine of *res ipsa loquitur*, which creates a permissible inference of negligence which may be rebutted").

[618]*E.g., United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (9th Cir. 1964) and *Colditz* v. *Eastern Airlines, Inc.* 329 F.Supp. 691 (SDNY, 1971).

[619]*E.g., Abbott* v. *Page Airways, Inc.*, 10 Avi 18, 267 (N.Y.App. 1969).

Lakes. For sudden turbulence, however, the doctrine is not well-suited,[621] for in many decisions atmospheric disturbances or turbulence, or wing-tip vortices caused by other passing aircraft, were held to be neither foreseeable nor avoidable. Therefore, they remain unexpected risks in employment and are not categorized as causes of accidents which generally occur only due to negligence by the airline.[622]

For airline employees, the second inference may merit further exploration, because if the operation or equipment which causes the accident is not under the sole control of the employer, then the maxim does not apply. Logically, if the employee himself took any controlling part in the operation, his own negligence could very possibly be one of the causes of accident,[623] creating some difficulty for pilots or other personnel working in the cockpit (such as the navigator), who are involved in the operation of the aircraft, to take advantage of the maxim, especially since in practice it is often asserted that poor piloting could be the major or even the only cause of accident.[624] Nonetheless, if the evidence clearly demonstrates that piloting error must be excluded from the possible causes, then *res ipsa loquitur* will still be available for pilots or navigators. As for other on-board cabin crew or even ground personnel, their situation is no different from that of passengers, because to them, the whole operation of airborne activities is, as Erle CJ described in *Scott* v. *London and St. Katherine Docks Co*,[625] "shown to be under the management of the defendant or his servants [pilots]." There should thus be

[620]*E.g. Cox* v. *Northwest Airlines, Inc.* 10 Avi 17, 250 (7th Cir. 1967).

[621]See: *Kelly* v. *American Airlines, Inc.* 13 Avi 17, 583 (5th Cir. 1975), *Sanchez* v. *American Airlines, Inc.* 16, Avi 17, 615 (N.Y.2d. 1981), and *Kohler* v. *Aspen Airways, Inc.* 19 Avi 18, 051 (Cal. App. 1985).

[622]The same is true with a bomb hidden among scrap metal, or a flood by an exceptionally torrid storm: see *Latimer* v. *A.E.C.* [1953] A.C. 643, and *A.C.I. Metal* v. *Boczulik* (1964) 110 C.L.R. 372. In some of the jurisprudence, however, it was noted that if the wake turbulence was weather-produced, then it is foreseeable and the accident caused thereby could be attributed to the possible negligence of the pilot. See *Kelly* v. *American Airlines, Inc. supra.*

[623]J. Hendy & M. Ford, *Munkman on Employer's Liability*, 12th ed *supra* note 553, at p. 62.

[624]"The negligence, if there was negligence, on the part of the pilot, consisted in getting his aeroplane into a position of danger from which he could not extricate it:" see *Malone* v. *Trans-Canada Airlines, Moss* v. *Trans-Canada Airlines*, [1942] 3 D.L.R.369 at 378. "[T]he pilot is always negligent when an air crash occurs," in *Foss* v. *United States, supra* note 573.

[625](1865) 3 H & C 596.

no difficulty in applying the maxim in their favor.

2.4.3. Defences

A.Introduction

As in all other tort claims, unless expressly prohibited by statute, the employer may use every defence against the victim in a tort action, such as voluntary assumption of risk, contributory negligence, act of God, and the doctrine of sudden emergency. There are also special defences available to the employer, such as the doctrine of common employment or fellow servant rule. Though some of these defences have gradually lost their effectiveness, others still play a redoubtable role in beleaguering the employee's tort claim.

B.Voluntary Assumption of Risk

The defence of voluntary assumption of risk (*volenti non fit injuria*) has almost disappeared from the scheme of the employer's tort liability along with the corresponding erosion of the doctrine of common employment,[626] partially because the former defence had always served as a theoretical foundation for the latter doctrine. According to the voluntary assumption defence, an employee is presumed to have full knowledge of the inherent risks of the work which he contracts to perform. Since he voluntarily accedes to the terms of employment, he expressly or implicitly signifies his willingness to waive his right of redress for any injury caused by those risks. This presumption is a fruit of the ideological tree of laissez-faire, dominant during the industrial 19th century, which flatly assumes the idea of "free" labor and seriously ignores the hard fact that under sharp contrasts in economic status, the employee has little choice but to adhere to the contract terms offered him: there exists no true willingness in such cases because his freedom of will is constrained by an imperfect dichotomy of choice

[626]See the British judgments in *Imperial Chemical Industries Ltd.* v. *Shatwell,* [1965] A.C. 656 (H.L.); *Bowater* v. *Rowley Regis Corporation,* [1944] K.B. 476 (C.A.) and the earlier *Smith* v. *Baker & Sons,* [1891] A.C. 325 (H.L.).

between loss of job and loss of possible redemption,[627] even if he possesses full knowledge of the inherent risks of the employment. Following the subsequent change in social climate, this deceptive premise has finally been rejected in most of the jurisprudence.

Presently, the defence of voluntary assumption of risk is strictly limited to situations where the victim's injury is caused by his fellow servant due to wilful disobedience of the relevant safety rules on both their parts, for which the employer is vicariously liable.[628] The employee is not permitted to voluntarily contract out his right to rely on the employer's compliance with statutory prescriptions[629] (*i.e.*, safety regulations), which is often attempted when the employee voluntarily engages in ultra-hazardous assignments that would violate safety regulations for extra payment. For example, physically-unfit flight crew who are still allowed to board the aircraft could not be said to have assumed the risk of consequent deterioration of their health, since safety statutes prohibit the boarding of flight crews with physical deficiencies, partly with a view to protect the crew from their inability to protect themselves;[630] this mandatory legislative policy could not be disregarded at the option of the parties. A different result may be reached for passenger carriage: when a passenger with a pre-existing fractured ankle voluntarily accepts accommodations provided by the air carrier and consequently aggravates her physical condition, due to lack of ambulance transportation to the plane and stretch chairs on-board, she has voluntarily assumed the risk of such a

[627]See *Bowater* v. *Rowley Regis Corporation*, *supra* at 479 ("[A] man cannot be said to be truly 'willing' unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will" (per Scott L.J.)).

[628]See *Imperial Chemical Industries Ltd.* v. *Shatwell*, *supra* note 626; M. Brazier, *Street on Torts*, 8th ed. (London: Butterworths, 1988), at pp.251-2.

[629]See J. G. Fleming, *The Law of Torts*, *supra* note 274, at p. 303 and *Wheeler* v. *New Merton Board Mills Ltd.* [1933] 2 K.B. 669 (C.A.).

[630]*E.g.*, Article 71 of the *Civil Aeronautics Law* of Japan ("No flight crew of an aircraft shall, in the event that they become physically unfit relative to the medical examination requirements under Article 31, paragraph 3, engage in air transport service even if their medical certificate issued under Article 33 is still valid").

result[631] because the passenger does not belong to any particular class which employment safety regulations are intended to protect.

Evidently, air transport has long since passed the stage of categorization as a highly-dangerous activity. Since it is currently a popular mode of travel, the airplane "holds out to the fare-paying passenger the same assurance of proper conveyance as the railroad, the steamship or the bus,"[632] and the defence of assumption of risk based on the activity itself is therefore obsolete as against the passenger; but are the crash, mid-air collision, or hijacking, *etc.*, inherent risks for the on-board employee, as is a hit by the puck to a professional ice-hockey player,[633] or explosives to the member of a bombsquad, such that the airline employee cannot claim the damages arising from the activity in which he consented to engage?[634] Since the common risks of air transport borne by the cabin crew are no different from those borne by other passengers on-board, the former could hardly be characterized as persons who "insist upon taking abnormal and completely unnecessary risks" and therefore "cannot complain of the consequences inherent in the very risk" of the activity.[635] As in the case of the road traffic accident to a bus driver, the answer should be negative.

C. Common Employment

Since the common employment defence has been totally abolished and strictly limited by most Commonwealth countries and the US, the purpose in describing the doctrine in this thesis is mainly to restate the current scope of the employer's vicarious liability at common law.

The doctrine of common employment was introduced to the Commonwealth

[631]See *Barash* v. *KLM Royal Dutch Airlines, Inc.*, 315 F.Supp. 389 (EDNY, 1970).

[632]*Lopez* v. *Resort Airlines, Inc.*, 4 Avi 17, 758 (SDNY, 1955).

[633]See *Condon* v. *Basi* [1985] 1 WLR 866 (C.A.) (professional football player).

[634]Suggested by O. Riese as one of the reasons to exclude on-board employees from the coverage of the Warsaw Convention, see O. Riese, *supra* note 10, at p. 407.

[635]Per Cardozo, C.J. in his judgment of *Murphy* v. *Steeplechase Amusement Co., Inc.* 166 N.E. 173 (N.Y.App. 1929),at 174.

in the 1837 case of *Priestley* v. *Fowler*.[636] In *Priestley*, the employer's van collapsed and injured an employee who riding in it. The accident was caused by the victim's fellow employees who negligently overloaded the van. The employer was not held to be vicariously liable for the negligence of these fellow servants since the victim was unable to prove that these employees, with whom he was commonly employed, were incompetent and the employer was thus negligent in engaging them. This decision established the principle that if the employer has selected persons of competent care and skill, he is not liable for negligence by the victim's fellow workers, insofar as he is not personally implicated.[637] The rationale for this doctrine of common employment is that the victim who is engaged in employment should have known and contracted on the terms that he will be exposed to risk of injury caused by the negligence of his working mates engaged in a common service with him.[638]

Throughout almost half a century of struggling with statutory restrictions[639] and judicial interpretation,[640] the doctrine of common employment was finally repealed in Great Britain under the social climate attendant to the *Law Reform (Personal Injury) Acts* in 1948,[641] which was mirrored in most Commonwealth countries.[642] Without the availability of this notorious defence, the employer must answer not only for his own managerial faults (recall the above section

[636](1837) 3 M & W 1.

[637]*Hutchinson* v. *York, Newcastle and Berwick Rly Co.*, (1850) 5 Exch 343 (Anderson B.)

[638]See *id.*

[639]The statutory restriction on the application of common employment began with the *Employer's Liability Act 1880*, under which the defence was waived if the employee could prove that the injury was caused by the negligence of some person placed in a position of supervision, or by a fellow worker who is empowered with authority over him. For a history of the evolution of British labor legislation since 1837, see J. Hendy & M. Ford, *Munkman on Employer's Liability*, 12th ed *supra* note 553, at pp. 4-14.

[640]See *Wilson and Clyde Coal Co.* v. *English*,, *supra* note 559.

[641]11 & 12 Geo. 6, c. 41 (s.1, (1): "It shall not be a defence to an employer who is sued in respect of personal injuries caused by the negligence of a person employed by him, that person was at the time the injuries were caused in common employment with the person injured").

[642]In Australia, the defence has been abolished through various provincial statutes such as the *Law Reform (Common Employment) Act, 1951* of West Australia , see E. I. Sykes & H. J. Glasbeek, *supra* note 332, at p. 121, n.2.

2.4.2.B), but also for the negligence of every employee toward the others.

In the US, the "fellow servant rule" (similar to the common employment defence) had also eroded the employer's vicarious liability since 1849.[643] According to the US jurisprudence, the employer is not liable for injury caused solely by the negligence of a fellow servant because the victim assumed the risk of negligence by his working mates upon entering into employment with them. Nevertheless, this fellow servant rule has also lost its bite through strict interpretation. With respect to employment in air transport, the most important divergence would be the growing rejection of the "vice-principal" rule, which prescribes that only negligence by the vice-principal or the employer's delegate - who holds an equivalent position of direct authority over the victim - escapes the fellow servant rule.[644] The scope of the waiver has since been extended to include any servant who is charged by the employer with the performance of the latter's common law duties (as mentioned above) toward the victim. Therefore, the employer is vicariously liable not only for the negligence of an aircraft commander, who is undoubtedly qualified as an on-board foreman,[645] but also for that of a senior flight attendant who is empowered with authority over the rest of the cabin crew - directing them in the discharge of their duties, supervising them, keeping their time, *etc.*[646]

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[643]*Farwell* v. *Boston & Worcester Railway*, 1949, 45 Mass. (4 Metc.) 49.

[644]See *Lamb* v. *Littman*, 44 S.E.646 (Sup.Ct.N.C. 1903) (Even if the supervisor lacks the authority to hire or discharge an employee, it does not necessarily render him a mere fellow servant); *Chap-Tan Drilling Co.* v. *Myers*, 225 P.2d 373 (Sup.Ct. Okl. 1950) ("A vice principal is the representative and alter ego of the principal, his master [who] must confer upon him the entire and absolute management of the entire business, or of an entire department thereof, retaining no oversight or exercise no discretion of his own as to the conduct of such business. Even if an employee has the power to employ and discharge other employees and to oversee the men and direct the work he is not a vice principal unless his authority is entire and absolute," at 375); *May* v. *Sharp*, 89 S.W.2d 735 (Sup.Ct. Ark. 1936) (Employee who directs other workers in the discharge their duties, supervises them, and keeps their time was held to be a vice-principal and not a "fellow servant," though he may at times assist in actual performance of work); *McDonald* v. *Louisville & Nashville Railroad Co.*, 24 S.W.2d 585 (Ky. App. 1930) (Foreman who is empowered to issue orders to and direct the operation of employees and assist them in performing their duties is not a "fellow servant").

[645]Regarding the duties and authorities of the aircraft commander, see *supra* note 572.

[646]*E.g.*, in *Wong* v. *Stanley*, *supra* note 349.

D. Contributory Negligence

The rationale and effect of contributory negligence has already been largely dealt with in the above section **2.2.1.B. ii)**. Therefore, the ambit of this discussion will be limited to the application of this defence in aviation torts. Whether or not the victim's act, *i.e.*, the gravity of the victim's fault, constitutes contributory negligence remains a problem of fact to be resolved generally through judicial discretion.[647] Nevertheless, several typical examples may serve as a convenient reference. Aside from negligence by the pilot or copilot, a slip-and-fall represents the greatest proportion of accidents in which the airline may claim contributory negligence as a defence.[648] A ground worker who negligently places freight on the far left corner of a three-sided pallet, causing it to tip and fall with him to the ground, was found guilty of contributory negligence,[649] as was the janitorial employee who stumbled over a suitcase left unattended on the floor of a "restricted" area, located behind a check-in counter in the airline terminal.[650]

The employees who may suffer most from the contributory negligence defence would be the pilot and copilot, due to the nature of their employment.[651] The pilots who failed to check their gas supply before takeoff,[652] who failed to anticipate possible icy conditions, who failed to inquire with the weather provider about cloud conditions and temperature and therefore formulate an alternative flight plan in the event of emergency,[653] who failed to take a check ride for familiarization, who engaged in flight while physically or mentally fatigued, who failed to comply

[647]For example, in the judgment of *Davies* v. *Adelaide Chemical and Fertilizer Co. Ltd.*, (1946) 74 C.L.R. 541, it was held that only an act which was done in conscious or foolhardy defiance of a known danger will constitute contributory negligence by the employee. However, such a strict standard has not been widely shared in other cases; see the cases cited *infra*, in this section.

[648]*E.g.*, *Weller* v. *Northwest Airlines*, 4 Avi 17, 463 (Sup.Ct. Minn. 1953), *Kletter* v. *Northeast Airlines*, 10 Avi 18, 123 (Sup.Ct. Co. 1968), and *Kopaczski* v. *Eastern Air Lines, Inc.*, 12 Avi 18, 112 (Mass.App. 1973).

[649]*Regan* v. *Compagnie Nationale Air France*, 240 F.Supp.679 (EDNY, 1965).

[650]*Camacho* v. *Trans World Airlines*, 19 Avi 18, 517 (N.Y.App. 1985).

[651]See *supra* note 572.

[652]*Kenty* v. *Spartan Aircraft Co.*, 4 Avi 17, 463 (Sup.Ct. Okla, 1954)

[653]*Estate of Largent* v. *U.S.*, 22 Avi 18, 282 (8th Cir. 1990) and *Capital Management & Trust Co.* v. *U.S.*, 20 Avi 18, 298 (S.D.Cal. 1987).

with the safety procedures set forth in the operator's manual,[654] who misinterpreted the air traffic controller's clearance for a runway approach as permission for the aircraft to descend, and who ignored the radio altimeter warning horn after it sounded,[655] were all rendered guilty of contributory negligence.

E. Act of God

An act of God refers to an act, event, happening, or occurrence which is exclusively due to natural causes and operates without any interference or aid from human agency. An act of God is the inevitable result of natural forces beyond the power of persons; any manifestation of nature, including weather phenomena — tornadoes, turbulence or thunderstorms - may fall within the ambit of this defence. To constitute a valid defence in tort liability, an act of God must be an event that could not have been prevented by the exercise of reasonable care, *i.e.*, human prudence and foresight,[656] thus proving no negligence by the defendant.

The foreseeability of a natural occurrence depends on the development of human knowledge; following the rapid evolution of science and technology, the predictability of certain physical movements in the environment has gradually increased, and consequently, the ambit of the act of God defence has shrunk daily. This trend is especially visible in the aviation industry, where meteorology and related air sciences are prerequisite to navigational safety, and their advancement is thus pursued enthusiastically, such that weather phenomena hardly qualify as acts of God anymore in aviation accidents.

In practice, a sudden change in air currents,[657] "downdrafts,"[658] or other sources of turbulence[659] are held to be predicable or foreseeable with reasonable

[654] *Mooney Aircraft Corp.* v. *Altman*, 22 Avi 17, 509 (Tex. App. 1989).

[655] *Brock* v. *U.S.*, 15 Avi 17, 583 (Va. App. 1979).

[656] See *Tennent* v. *Earl of Glasgow* (1864) 2 Macph (H.L.) 22 at 26-7, *Nichols* v. *Marsland*, (1876) 2 Ex D 1, and *Middaugh* v. *U.S.* 293 F.Supp. 977 (D.C.Wyo. 1968) at 980.

[657] *Arrow Aviation, Inc.* v. *Moore et al.*, 6 Avi 17, 387 (8th Cir. 1959) at 17, 388-9.

[658] *Small* v. *Transcontinental & Western Air*, 216 P.2d 36 (Cal App.2d. 1950) at 37.

[659] *Cudney* v. *Baniff Airways, Inc.*, 5Avi 17, 282 (Sup.Ct. Miso, 1957), at 17, 286.

care and are not considered acts of God. For these natural hazards, the airline is obliged to "anticipate and take the commensurate precaution reasonably available to guard against [them]..., and when the means or precautions, in given circumstances, of avoiding the hazard ... are known or are pointed out in the evidence to have been available,... the failure to take such specific commensurate precaution or precautions... [will] constitute negligence."[660]

F. Emergency

An emergency is a sudden or unexpected happening or occasion calling for immediate action,[661] and if the tortfeasor can prove that an emergency forced him to take the action resulting in injury to the victim without any opportunity for mature deliberation,[662] he may be relieved of liability. However, as with the act of God, this "sudden emergency" or "unavoidable accident" itself proves nothing in aviation tort law, for in the causal sequence there must be a final link which leads to injury upon the emergency or accident; it is not the emergency but this final link which should be used to measure the airline's negligence. For example, though a sudden encounter with a downdraft created the emergency which caused the pilot to make a non-scheduled landing, ultimately resulting in total crash,[663] there should be further investigation as to whether the pilot could have reasonably anticipated or foreseen this natural occurrence, or whether the ground crew could have properly provided the appropriate weather information to the aircraft before it entered into these wind conditions. The very few cases where this sudden emergency defence successfully relieved the airline from tort liability must be attributed to relatively underdeveloped techniques of post-crash investigation at the time and a limited application of *res ipsa loquitur*.[664] Recent decisions have shown that the sudden emergency defence has become obsolete

[660] *Id.*

[661] *Horton Motor Lines* v. *Currie*, 92 F.2d 164 (4th Cir, 1937).

[662] *Id.*

[663] See *Johnson* v. *Eastern Air Lines*, 177 F.2d 713 (2d Cir, 1949).

[664] See *Merrill, Exr. etc.* v. *United Air Lines, Inc.*, 6 Avi 17, 841 (SDNY, 1960).

with the evolution of human knowledge in aeronautic science.[665]

2.4.4. Compensable Damages

Generally, the employee's compensable damages are identical to those recoverable by victims of other torts, including not only material heads of damage that can objectively be measured in pecuniary units, but also non-material heads such as pain and suffering, loss of amenities, *etc.*, which make the scope of compensation much wider than that offered under the workers' compensation system. Furthermore, the award in a tort claim is mostly payable in lump sums, as opposed to the periodic payments which predominate in the compensation system.

In practice, material damages sustained by employees usually include wage losses, costs of medical and nursing services, and property damages (for example, the loss of or damages to jewelry, luggage, or other personal belongings during an evacuation). Non-material damages may encompass anything from the tangible psychiatric injury[666] to pure mental distress. Under British jurisprudence, compensable non-material damages must amount to recognizable physical symptoms; mere sensations of distress or shock are unrecoverable.[667] Therefore, any sexual harassment which does not amount to tangible psychiatric injury is exempt from recovery unless otherwise provided by special legislation.[668] Mental distress which accompanies serious physical harm, however, such as aesthetic damage or loss of a limb, is always admitted, as is the loss of amenity or enjoyment of life caused accordingly.[669]

[665] *E.g.*, *Oban* v. *Bossard*, 267 N.W.2d 507 (Sup.Ct. Neb. 1978) and *Chritton* v. *National Transportation Safety Bd.*, 22 Avi 17, 513 (D.C.App. 1989).

[666] See *Page* v. *Smith* [1995] 2 All E.R. (H.L.) and *Brice* v. *Brown* [1984] 1 All E.R. 997.

[667] See *e.g.*, *Nicholls* v. *Rushton* (1992) Times L.R.19, June. See generally J. Hendy & M. Ford, *Munkman on Employer's Liability*, 12th ed *supra* note 553, at pp. 123-4.

[668] *E.g.*, s 41 of the *Sex Discrimination Act 1975*, and *Wadman* v. *Carpenter Farrer Partnership* [1993] IRLR 374.

[669] J. Hendy & M. Ford, *Munkman on Employer's Liability*, 12th ed *supra* note 553, at p. 125.

2.4.5. The Conflict of Laws Problem

The aviation tort claim represents a typical source of the conflict of laws; however, the conflict of torts in actions against the employer in international air transport has not attracted equal significance. This ostensible neglect is mostly due to the exclusivity of remedies offered by the workers' compensation system, which allows very few tort claims to actually reach the substantive stage of choice of law,[670] and consequently leaves nearly inaccessible footages for writers to climb. Hence the following discussion on the conflict of torts against the employer will be more theoretical (and hypothetical) in nature.

Though still a traditional and dominant conflict of torts rule adopted in most jurisprudence, the application of *lex loci delicti* presents more problems when applied in the tort action against airlines than the workers' compensation claim, because in the tort claim the *locus delicti* does not affect substantial public interests in the same way as its compensation laws, which can at least be justified as instances of *lois de police et de sûreté,* but also because of the "accidental" nature of this connecting factor[671] — the total lack of expectation by the parties with respect to their regulatory and private interests in submitting to an incidental law,[672] especially when the connection with the *locus delicti* results from a mid-air

[670]Such as *Urda* v. *Pan American World Airways, Inc., supra* note 527, in which the *lex loci delicti* was never considered with respect to the conflict of laws; see also *supra* Section 2.3.3.i) in this chapter.

[671]O.Kahn-Freund, "Delictual Liability and the Conflict of Laws" (1968) 124 II Recueil de Cours 1, at p.27.

[672]For the employer, it is impossible to expect an aircraft operator to adjust his conduct to the law of the country he flies over (for example, if according to the *lex loci delicti* the pilot is required to exercise vigilance beyond a reasonable level unless it is physically impossible to do so), and the same is true for the employee, unless the *locus delicti* coincides with his domicile, or the place of employment. For a prominent example of the importance of expectation, see *Alabama Great Southern R.R. Co.* v. *Carroll,* 11 So. 803 (Sup.Ct. Ala. 1892): in *Alabama* the employee who was domiciled in Alabama and employed by an Alabama railway company was injured in Mississippi, due to the negligence of his fellow servant, while the freight train on which he was working ran through this *locus delicti.* The court held that the *lex loci delicti* (the law of Mississippi) applied to the victim's negligence claim against the employer, yet since the doctrine of fellow servant rule had not been abolished in Mississippi, the victim's claim was therefore denied. To sum up, the victim resided and signed his contract of employment in Alabama, and

collision or crash, such that it happens to be the law of any absolutely fortuitous jurisdiction to which the airspace belongs, though the employer and the on-board employee are more aware of the diverse jurisdictions over which the aircraft flies than the passenger. The same context appears with the variants of *lex loci deliciti,* such as *lex actus* or *lex injuriae,* which only prove to be even more chimerical, since the airline crash or mid-air collision almost always happens abruptly during high-speed travel over the surface, and it is truly impracticable to pinpoint at any given moment the exact position where the employee was injured or killed. Some victims may be killed instantly at the first moment of a mid-air explosion (in the sky), others may be blown out of the fuselage and propelled into another state from the final crash, while yet others may die later en route to the hospital. None of these questionable divergences seem substantive enough to justify the application of different substantive laws. Ultimately, in the cases of plane crash or collision, the place where the most wreckage falls will inevitably become the *locus delicti,* in the absence of known fact.

Meanwhile, two more problems emerge from the *lex loci* rule when the accident happens over the High Seas or *territorium nulius,* such as the North Pole, or when it happens on-board the aircraft in flight. A strict interpretation of the loci rule would render the tort law of the state to which the airspace then belongs dominant in the latter situation, though this result is very artificial and may not be accepted by the court.[673] Therefore, it is submitted by most leading authors and many state legislatures that the law of the flag (of the aircraft) — the law of the registering state - governs the delict committed on-board an aircraft.[674]

had the greatest interest in expecting to be covered by the law of Alabama which had already abolished the fellow-servant rule; in the meantime, the employer who had set up his principle place of business in Alabama should also have expected his vicarious liability to be prescribed by the law of that state; the "accidental" law of Mississippi, on the contrary, was not in the expectations of the parties. See the case commentary in J. H. C. Morris, "The Proper Law of a Tort" (1950-1) 64 Harv. L.Rev. 881, at p.888-9.

[673] See the US court judgment in *Noel and Frantz Exrs.* v. *Airponents, Inc.*, 169 F. Supp. 348 (D.N.J. 1958); see also Lord McNair, *supra* note 505, at p.267.

[674] See Lord McNair, *supra* note 505, at p.270; Dicey and Morris, L. Collins, ed. 12th ed *Vol.2, supra* note 496, at p.1542; E. Rabel, *Vol. 2, supra* note 309, at p.347; and O. Riese, "Internationalrechtliche Probleme auf dem Gebeit des Luftrechts" (1958) 7 ZL 271, at p. 273. See also the legislation of Italy: Article 4 & 5 of Codice della Navigazione (Navigation code) 1942

Identifying an aircraft with the nationality of the registering state is undoubtedly an established notion of public international law,[675] and the focus on the nationality of aircraft as a peculiar character distinguishing it from other terrestrial vehicles, such as automobiles or railway trains, inevitably leads to an analogy with the maritime ship; but all these facts do not necessarily lead to the conclusion that an aircraft in flight will be treated as part of the territory of the registering state with respect to civil wrongs committed on-board.[676] The analogy breaks down, in particular, in trying to compare the aircraft flying over the territories of other sovereign states and the ship carrying its national flag over the High Seas (the "floating territory"), thus entering into a conceptual contradiction with another well-recognized *jus gentium* of public international air law that "every State has complete and exclusive sovereignty over the airspace above its territory."[677] The registration of aircraft is an administrative process intended to verify the existence of substantive connections between the aircraft and the registering state.[678] Therefore, the latter state has a legitimate interest based on these connections in exercising its public authority over the aircraft and,

(Commentary see L. M. Bentivoglio, "Conflicts Problems in Air Law" (1966) 119 III Recueil des Cours 71, at pp.80, 154), France: Law of May 31, 1924, art.10, par.1, Belgium: Law on Air Navigation of June 27, 1937, art. 10 par. 1, see E. Rabel, at p. 347, n.52a. This approach was also adopted by the *Institut de Droit International* in 1969 in its "Resolution on Delictual Obligations in Private International Law" (s. 2, art.3: "With the same intent the law of the flag may be applied to delicts on board a ship in foreign territorial waters, and *the law of the place of registration to delicts committed on board an aircraft* [emphasis added]"); for an English version of the text of the Resolution, see (1969) 53 II Annuaire de L'Institut de Droit International 386; for a detailed discussion, see Chapter 6.

[675]"Aircraft have the nationality of the State in which they are registered:" Article 17 of the Convention on International Civil Aviation, ICAO Doc 7300/6; in fact, such was the general practice of most aviation countries even before the adoption of the Chicago Convention.

[676]As for the criminal act on-board, the Tokyo Convention (the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed in Tokyo, September 14, 1963. see *supra* note 352) has adopted the law of the flag.

[677]See Article 1 of the Convention on International Civil Aviation, *supra* note 675.

[678]For example, according to the art. 10 of the *Civil Aviation Law* of Taiwan (of 19 Nov. 1984) (民用航空法), only the "Taiwanese aircraft" which is owned by the citizen(s), the Government, or the juridical person of Taiwan, is entitled to register with the Civil Aviation Administration of Taiwan; in other words, the aircraft is not invested with nationality through registration, but nationality is a precondition of registration. The same requirement is adopted in Arts. 3. & 4 of the *Civil Aeronautics Law* of Japan.

consequently, fulfilling certain international responsibilities for it.[679] Unlike the nationality of persons, which serves to verify an existing fact - that the person is an integral part of the political entity to which he owes allegiance - the nationality of aircraft is "mais de pure technique juridique."[680] The stamp of identification does not by nature make the aircraft a part of the territory or an extension of the registering state. Furthermore, with respect to the conflict of laws, there are only weak connections between the aircraft and its nationality or flag, founded mostly in public law considerations of registration, such as the ownership of the aircraft belonging to its national.[681] Contrasted with the *locus delicti*, such connections may be more predictable or consistent if the aircraft does not disintegrate before landing on the surface of the High Seas,[682] yet the applicable law which they indicate could still be remote to the parties on-board with respect to their regulatory or protective interests. A typical example might be the service performed under a "crew interchange agreement,"[683] whereby the cabin crew works on-board the aircraft belonging to the trainer; since the trainer is only a delegate of the actual employer and would eventually trigger the latter's vicarious liability if a cause of action in tort arises on-board,[684] the most genuine and meaningful connecting factor could possibly be the principle place of business of this actual employer or the victim's domicile, rather than the nationality of the aircraft, especially when it

[679]Such as those listed in Article 12 of the Convention on International Civil Aviaiton, *supra* note 675.

[680] F. de Visscher, *infra* note 690, at p.296.

[681]In fact, even the substantive connection, like national ownership, is sometimes displaced when granting national registration, so as to cope with the evolution of modern financing instruments in the airline business. See, *e.g.*, Art. 9 of the *Registration of Civil Aircraft Regulation* (19 Apr. 1985)(航空器登記規則) of Taiwan, which has raised the requirement of national ownership when granting national registration if the foreign-owned aircraft is leased by a Taiwanese national and operated by the crew of the latter for more than six months.

[682]It is suggested that when aircraft "are on the surface of the water or immediately above it," the law of the sea should be applied to tort cases since "locality is the test of jurisdiction in such case:" see I. S. Rosenberg & M. Rosenblum, "Note on Aircraft — Legal Nature" (1934) 5 Air L.Rev. 356, at p. 363; however, even if the aircraft lands on the surface of the High Seas, it is still subject to the condition that every accident (death or injury) must occur upon impact.

[683]See *supra* note 326.

[684]See *supra* section **2.4.2.B. i)** of this chapter.

differs from that of the actual employer. Another problem arises with the joint operation of air transport, or the international air transport consortium, for in either case the relevant aircraft is still registered in only one country.[685] As under the "crew interchange agreement," the state of registry does not necessarily possess any overwhelming regulatory interests in governing the delictual act on-board.

De Visscher has suggested that since the Warsaw Convention - which creates a special regime for torts on-board the aircraft - is confined to either the carrier's principle place of business or the place of destination, at the election of the victim,[686] and further confers procedural issues[687] as well as the effects of the victim's contributory negligence[688] (even if the fault of the carrier amounts to wilful misconduct)[689] to the application of the *lex fori* by the competent court, the *lex fori* should govern torts in the air.[690] These "concessions" made in the Warsaw regime are, of course, closely-related to the compromise struck at the international

[685]In the determination made by the Council of ICAO in the case of ARAB AIR CARGO (C-Min. 110/11, 2/12/83), the joint-operating group is required to maintain the joint-register in one country (Jordan) only, which is bestowed with the function of the state of registry under the Chicago Convention of 1944; as for the international consortium like Scandinavian Airline System (SAS), the aircraft are registered separately in proportion to each country forming the consortium. For the joint air transport corporation, like Air Afrique, aircraft could even be registered in a third state (which has leased the aircraft). For a detailed discussion on the registration of jointly-operated aircraft, see M. Milde, "Nationality and Registration of Aircraft Operated by Joint Air Transport Operating Organizations or International Operating Agencies" (1985) 10 Annals Air & Space L. 133, at pp. 138, 148-9, and B. Cheng, "Nationality of Aircraft Operated by Joint or International Agencies" (1966) Yearbook Air & Space L. 1, at p.15.

[686]"L'action en responsibilité devra être portée, au choix du demandeur, dans le territoire d'une des Hautes Parties Contractantes soit devant le tribunal du domicile du transporteur, du siège principal de son exploitation ou du lieu ou il possède un établissement par le soin duquel le contrat a été conclu, soit devant le tribunal du lieu de destination:" Section 1, Article 28 of the Warsaw Convention, *supra* note 2.

[687]*I.e.*, le mode du calcul du délai, which is conferred by Section 2, Article 29 of the Warsaw Convention, *supra* note 1, to the court seized of the case must apply its own law ("Le mode du calcul de délai est déterminé par la loi de tribunal saisi").

[688]"[L]e tribunal pourra, conformément aux dispositions de sa propre loi, écarter ou atténuer la responsabilité du transporteur," Article 21 of the Warsaw Convention, *supra* note 2.

[689]"[D]'une faute qui, d'après la loi du tribunal saisi, est considéré comme équivalente au dol:" Section 1, Article 25 of the Warsaw Convention, *supra* note 2.

[690]See F. de Visscher, "Les Conflits de Loi en Matière de Droit Aérien" (1934) 48 III Recueil de Cours 285, at p.335.

conference[691] and mostly to the idea, deeply-rooted in the civil law tradition, of treating laws governing delictual liability as *lois de police et de sûreté* of the forum.[692] Yet according to this line of thinking, the places which evince close connections with the socioeconomic activities of the parties, such as the employee's domicile, the place where the contract of employment was made, or the employer's principle place of business (the seat of the airline), which are presumably connected with the forum,[693] may also trigger the application of *lex fori* to the on-board tort.

Another mode of reasoning can be inferred from the Warsaw spirit: since in effect it is the law of the carrier's principle place of business, or the place of business through which the contract of carriage was made, or the agreed place of destination in the contract of carriage that eventually governs, and since all these connecting factors are closely related or even originate from the contract of carriage, one can hardly doubt that the contract of carriage plays an indispensable role in determining the legal effects of on-board activities which are based upon it. Similar factors in the contract of employment, such as the place where the contract of employment was made,[694] the place where the worker is regularly employed,[695]

[691]It is well-known that the provision with respect to the effect of contributory negligence was proposed by the representative of Great Britain to the Warsaw Conference due to its absolute defence character in English common law.

[692]The judgment by the French Cour d'Appel de Paris in *Le Guern* c. *Vieulle et Brelet* could serve as a typical format of the idea: "que les modalités de la loi française en matière de responsabilité civile extracontractuelle, si elles correspondent aux conceptions françaises de la justice sociale et sont ainsi impératives en droit interne, n'ont aucun caractère d'universalité (the modalities of French law concerning extra-contractual civil responsibility have no universal character if they correspond to French concepts of social justice and are thus internally imperative):" see 13, Mar. 1963: (1964) 91 JDI 103.

[693]See the Belgian court decision of *Van Grunderbeek* c. *Legrand*, Tribunal de paix d'Anvers, 7, April 1909: 1911 RDIP 123, at 124-5. (In which the contract of employment made in the forum indicates the law of Belgium shall apply, though the employment was mainly performed in France for the French employer)

[694]The judgment in *Griffith* v. *United Air Lines Inc.*, (1964) U.S.Av. Rptr 649 (Sup.Ct. Pa.) provides a good example: "[t]he relationship between the [victim]... and the [airline] ... was entered into in [the forum].... Our commonwealth, the domicile of [the victim] ... and his family, is vitally concerned with the administration of [the victim's]...estate and the well-being of the surviving dependents to the extent of granting full recovery, including expected earnings," at 665.

[695]See *supra*, Section **2.3.3.B.i)** of this chapter.

or the airline's principal place of business, which have close territorial links with the contract of employment shall also be treated as major connecting factors indicating the law applicable to the employer's on-board tort liability.[696] Such a construction could also be supported by the common notion that the employer's duty of care, under common law or by statutory prescription, is delictual in consequence but contractual in origin.[697]

2.5 Conclusion

The liability limit set by the Warsaw-Hague pact must clearly be unsatisfactory if measured against today's living standard,[698] or there would not be so many choirs eager to sing its requiem. The Rome ceiling has also been criticized as "unrealistically low" by one reviewer,[699] and it is undeniably the principal reason for its unpopularity among the major air powers. However, the benefits for

[696]A trace of similar reasoning is found in A. Rudolf, "Die neuen IATA-Beförderungsbedingungen für Fluggäste und Gepäck" (1971) ZLW 153, at p. 164 ("Soweit das Kollisionsrecht des Gerichtsstaates für Schuldverhältnisse in Ermangelung einer ausdrücklichen oder stillschweigenden Rechtswahl hierzu den hypothetischen Parteiwillen maßgebend sein läßt, wird die Wahl meist auf das Heimatrecht des Luftfraitführers fallen.... Mangels Parteivereinbarung ist das Recht desjenigen Landes anzuwenden, mit welchem das Vertragsverhältnis den engsten räumlichen Zusammenhang aufweist; als solches wird heute das Recht am Wohnsitz derjenigen Partei angesehen.")

[697]It has long been argued by H. Batiffol that the law governing damage claims for injury occurring in employment should be conceived "dans le cadre du contrat de travail ou, tout au moins, de la relation de travail," *i.e.*, be construed within the framework of a contract of employment, which is the foundation of the employment relation. See H. Batiffol, *Droit International Privé*, 4th ed (Paris: Librairie Générale de Droit et de Jurisprudence, 1967) at p. 664; the same opinion was also proposed by M. Simon-Depitre ("dans les systèmes qui trouvent dans le contrat de travail l'élément de rattachement des accidents du travail, c'est à l'occation de ceux-ci que le problème été résolu"): see M. Simon-Depitre, "Droit du Travail et Conflits de Lois — devant le deuxième Congrès international de droit du travail" (1958) RCDIP 285, at p.291; also O.Kahn-Freund, "Delictual Liability and the Conflict of Laws", *supra* note 671, at p. 141.

[698]The monetary limit provided by the Warsaw-Hague pact is 125,500 francs (Warsaw only, in Art.22, see *supra* note 2, which equals to about USD$ 8,300 if converted with the final official price adopted by CAB in 1974, see CAB-information (Order) 74-1-16 of 1974, DKt. 26274, adopted in 3 Jan 1974, 39 Fed. Reg. 1526 (1974) and *Franklin Mint* v. *TWA*, 16 Avi 18, 024 (SDNY, 1981), 17 Avi 17, 491 (2d Cir. 1982), 18 Avi 17, 778 (Sup.Ct. 1984)) and 250,000 francs (Warsaw-Hague, see *supra* note 1).

[699]See A. Tobolewski, *Monetary Limitations of Liability in Air Law* (Montréal: DeDaro Publishing, 1986), at p.44.

potential claimants provided by these uniform liability regimes - such as presumed negligence or strict liability, specific jurisdiction and predictable conflict rules - are not deteriorated by such single defects; for example, Article 23 of the Warsaw Convention of 1929 prohibits any incorporation of an exemption clause to relieve the carrier's liability, which helps prevent a reoccurrence of the perplexing scenario in *Sayers* v. *International Drilling Co. N.V.* [700] in the international air transport industry. Furthermore, the insufficiency of compensation amounts has never stifled the employee's right to sue. Before the workers' compensation system or other social insurance institutions could overcome the enticements offered by the civil tort action, namely, by granting a damage award far more generous or at least equal to that of the latter,[701] there was no reason to deprive the victim of his right to choose between collateral recourses the one which better fits his needs: especially when there exists visible evidence that the occurrence is wholly or partly caused by the carrier's wilful misconduct or gross negligence,[702] as occurs in a significant ratio of aviation accidents (recall the above section **2.4.2**), an efficient but inadequate remedy may not satisfy the sense of justice. On-board employees or ground personnel who share the same professional risk with regular passengers or the general public, then, should not be left with only a general civil tort procedure and prevented from taking advantage of *res ipsa loquitur*, strict liability, or other facilitating tools of litigation provided by these two Conventions.

If the ultimate purpose of the workers' compensation system is to eliminate all employer's liability claims based upon the Warsaw and Rome regimes or other national tort laws, then aside from increasing the available benefits to a more competitive level, the compensation scheme must also extend the scope of its coverage, as illustrated by the cases of Sweden or New Zealand.[703] The character

[700]On the problem of exemption clause as a defence in tort as well as a case comment, see Section 3.1.1 of chapter 3.

[701]As in Denmark and Norway: see J. G. Fleming, "Tort Liability for Work Injury" *supra* note 273, at p.3.

[702]See Art. 25 of the Warsaw Convention of 1929, *supra* note 2, and Art.12(1) of the Rome Convention of 1952, *supra* note 78.

[703]On the Swedish system, see C. Oldertz & E. Tidefelt, *supra* note 377, at p.54; *The Accident Compensation Act 1972* of New Zealand replaces both common law tort and workers'

of the labor process of the international airline industry is unique in place and time, and a restrictive interpretation of "in the course (out) of employment," combined with the exclusivity of Warsaw and Rome protection, creates another kind of industrial risk for the injured employee, who can only seek recourse through a cumbersome system of tort liability. Nevertheless, the above question is addressed only at the internal level; in the transnational setting, currently, the workers' compensation system is far from uniform between countries, and the standardization of its contents with respect to injuries covered and amounts compensable in closer connection with respective national product levels is even harder to achieve than unification of the carrier's liability regime. Therefore, conflict rules helping to indicate the proper compensation law is particularly important. As Lord Wilberforce noted in *Boys* v. *Chaplin*,[704] when deciding the applicable law, a court shall "identify the policy of the rule, to enquire to what situations, with what contact it was intended to apply; whether or not to apply it, in the circumstance of the instant case, would serve any interest which the rule was devised to meet." If this pronouncement was used to crystallize a concrete conflict rule for workers' compensation statutes in international air transport, the rule which satisfactorily protects the injured employee - fulfilling the premiere purpose of the compensation system, *e.g.*, to provide convenient access to medical aid and adequate benefits to support basic costs of living while disabled - will be adequate. The primary factors, then, are the victim's residence or the regular place of employment; secondary considerations should include the public interest possessed by the administrative authorities of the *locus delicti* in balancing possible medical expenses, the expected interests in party autonomy for predictable and insurable liability, or the employer's headquarters.

National tort liability is the last *front de bataille* to protect workers' rights in the event of industrial disaster. Compared with special liability regimes like Warsaw or Rome, or the workers' compensation system, the tort claim is inefficient

compensation with an all-encompassing compulsory insurance scheme; see G. W. R. Palmer, "Compensation for Personal Injury: A Requiem for the Common Law in New Zealand" (1973) 21 Am. J. Comp.L. 1.

[704] *Supra* note 149, at 389D.

in both time and cost. However, it provides for an unlimited amount of compensation and sometimes even punitive damages.[705] The impediments to the employer's liability at common law with respect to air transport have already begun to loosen by the gradual removal of major defences such as common employment and voluntarily assumption of risk; procedural benefits similar to those provided in the Warsaw regime, like negligence *per se* and *res ipsa loquitur*, have also been systematically introduced, making the civil tort claim more accessible to vulnerable airline employees. Nevertheless, at civil law, the lack of similar developments in the still-infantile area of employer's tort liability may overshadow the future unification of certain principles of labor torts in international air transport.

[705] *E..g., Coloca* v. *B. P. Australia* (1992) A.T.R. 81-153 (Vic.).

Chapter 3.
The Individual Contract of Employment in International Air Transport

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3.0 Introduction

The contract of employment, through which an individual obliges himself to perform services with a certain continuity for another person according to the latter's directives in exchange for salary,[1] is the foundation of the master and servant relationship. It is the relationship on which the application of labor law is based. Yet the modern legal consequences derived from this relationship pertain to an even wider spectrum, transcending beyond the considerations reached by mutual consent between private parties.

However, the institution of law only minimally affects the content of the individual contract of employment in a market economy. As O. Kahn-Freund argues,[2] fundamental issues such as the level of wages and nominal or real conditions of service can only be marginally influenced by legal rules and

[1]For a general definition, see R. Rideout, *Rideout's Principles of Labour Law*, 5th ed. (London: Sweet & Maxwell, 1989) or E. Rabel, *The Conflict of Laws — A Comparative Study*, Vol.3 2d ed. (AnnArbor: Univ. Mich. Press, 1964) at p.188.

[2]See O. Kahn-Freund, P. Davis & M. Freedland, ed. *Labour and the Law*, 3d ed (London:Stevens & Sons, 1983) at p.13.

institutions. Symbols of governmental intervention, such as minimum wage or working hours legislation, do no more than prevent excessive exploitation of the labor force at a fairly superficial level. Guarantees of hiring and job-preservation, on the other hand, are the responsibility of a social security system, somewhere beyond the regulatory function of labor law with respect to the contract of employment. Moreover, the collective agreement reached between organized labor and management plays a vital role in formulating the major substance of the contract of employment, including the standard of existing and future terms such as working hours, minimum payroll, cause for termination, *etc.*; thus the individual himself bargains for very little. As Jackson J. commented in *J.I. Case Co.* v. *Labour Board*: "[a]fter the collective trade agreement is made the individuals who shall benefit by it are identified by individual hiring. The employer, except as restricted by the collective agreement itself [and by labor protection provisions like fair employment laws], ... is free to select those he will employ or discharge. But the terms of employment have already been traded out. There is little left to agreement except the act of hiring ...."[3]

Currently there are no universal labor standards providing a certain minimum level of protection and specifically designed for the international air transport industry as compulsory supplements to the individual contract of employment. The CITEJA once proposed a series of standard conditions for the labor contracts of flying personnel in several preliminary draft conventions relating to the legal status of flying personnel (see *infra*, Chapter 6 of this thesis); these draft proposals represent the most systematic model of contracts for on-board employment ever designed, although these efforts were ultimately in vain. In any case, since the individual contract has been mostly supplanted by collective agreements which emerged as a dynamic response to the rapid transformation of airline management and global fluctuation in the air transportation market, there no longer seems to be any urgent need to introduce unified contractual terms or propose minimum

[3]321 U.S. 332 (1944) at 335. A similar openion was delivered by Browne-Wilkinson J. in *Pawley* v. *A.C.A.S.* [1978] I.C.R. 123 at 135: "It is therefore clear that as a result of the statutory machinery an individual can have a substantial measure of control over his own working life compulsorily delegated to an agent, or trade union, which he has not selected and may even have his own contract of service varied without his consent. These are very large powers..."

standards which would easily be rendered obsolete and face the same fate as most other pieces of minimum standard labor legislation. Deeper questions such as those related to the conflict of employment contracts, however, cannot be resolved by collective agreement because they involve critical public interests which are beyond the power of private parties to confer or circumvent by consent. Regarding the individual contract of employment in international air transport, outstanding legal disputes continue to flourish and demand further exploration.

3.1 The Conflict of Laws Problem

3.1.1 Introduction

Since the functions of the individual contract with respect to the rights and obligations of employees have been severely curtailed - minimum wages, working hours, holidays, and other matters of employee welfare are controlled by collective agreement or municipal public law - the major issue concerning the conflict of individual employment contracts is limited to hiring and firing, which is yet left in private hands, though even in many commonly-arising issues, like wrongful dismissal, encroachment by mandatory rules or municipal public policy considerations is inescapable.

Contrary to domestic or private aviation activities, where financial capabilities might limit recruitment to a provisional labor force only and thereby inspire the inevitable question of whether a contract of employment exists,[4] characterization of the contract of employment is never a significant problem in the international air transport industry, where airlines are required to follow a certain business scale in operating scheduled trunklines under bilateral agreements. Though disputes can arise regarding the basis of the relationship - a contract for service (agency, *etc.*) versus a contract of employment - especially when national flying personnel are recruited by the national airliner for its foreign alliance partners,

[4]For cases on the existence of the employment relationship in private or domestic aviation sectors, see note 322 in Chapter 2 of this thesis.

the courts will usually exclusively to the contractual terms, express or implied, as evidence of the circumstances.[5]

A more serious problem of characterization relates to the exemption clause which often appears in the transnational contract of employment. For example, a Japanese flight attendant working on-board for a British airliner flying between Tokyo and London might expressly agree in the contract to accept an employer's compensation scheme, thereby giving up any right to compensation under English law. If this flight attendant later suffers an industrial injury while landing at Narida and files a delictual liability claim against her employer in the English court, how shall we characterize the issue? Is this an issue raised in relation to contract or tort? Following Lord Denning's reasoning in *Sayers* v. *International Drilling Co. N.V.*,[6] it is characterized as a claim in tort which implicates a contractual defence. Therefore, the claim is properly governed by the law of tort, and if Japanese law applies (the *lex loci delicti*), the exemption clause is considered valid and the claim dismissed. In fact, even if English tort law were applied, the delict must be actionable under both English and Japanese law (according to the conflict rule in *Phillips* v. *Eyre*[7]), and thus the claim would fail because the tort would be blocked by the exemption clause under Japanese law. Lord Denning's approach has been criticized for incorrectly subjugating the contractual clause to tort law.[8] Critics have suggested that a better approach would be for the court to first explore if the claim is actionable under the *lex fori*, and if the exemption clause is considered void - in contravention of municipal law (*e.g.*, s. 1(3) of the 1948 *Law Reform Act*) or public policy - then the court may resort to the civil law of Japan as the *locus delicti* to determine whether the conduct is actionable, in compliance

[5]See, *e.g.*, *Hallock* v. *TWA*, 8 Avi 17, 448 (Miss. App. 1963). The British court, in *Johnson* v. *Coventry Churchill International Ltd.* [1992] 3 All E.R. 14 (Q.B.), has reached a different conclusion: see note 328 in Chapter 2 of this thesis.

[6] [1971] 1 W.L.R. 1176 (C.A.) at 1181.

[7] (1870) L.R. 6 Q.B. 1.

[8]See L. Collins, "Exemption Clauses, Employment Contracts and the Conflict of Laws" (1972) 21 Int'l & Comp. L.Q. 320 at pp. 328-9; P. M. North, "Contract as a Tort Defence in the Conflict of Laws" (1977) 26 Int'l & Comp.L.Q. 914 at p. 925; and C. G. J. Morse, "Contracts of Employment and the E.E.C.Contractual Obligations Convention," *infra*, note 29 at pp. 168-9.

with the rule in *Phillips* v. *Eyre*. In the latter case, the validity of the exemption clause would not be re-examined under the Japanese law of contract.[9] In summary, the proposed method characterizes the validity of an exemption clause as an issue of conflict of contract law, which is thus governed by the proper law - either *lex loci contractus* or *lex loci laboris, etc.* - but the validity of the contractual exemption is determined by the *lex fori* rather than this proper law. There is no need to further examine the clause under the *lex loci delicti*. The Scottish Court of Appeal adopted this approach in *Brodin* v. *A/R Seljan and Another*.[10]

A similar line of reasoning could apply to a more complex situation. Suppose that flight attendants occupy the fuselage while landing at a foreign airport to protest their forced retirement; the employer alleges that their refusal to leave the aircraft is a breach of contract and consequently constitutes a trespass.[11] Following the rule in *Brodin*, the court should decide the issue as a breach of employment contract according to the proper law, but if the law of the forum prohibits forced retirement, then no trespass has occurred.

Another related dispute sometimes arises when the employee suffers an industrial injury at a foreign site. For example, suppose a flight attendant of nationality *A* is injured during a stopover in country *B* and is maltreated by his employer (a national airline of *A*), resulting in aggravation of his injury. The employee might then bring an action for compensation against the airline in the courts of *B* for breach of employment contract under the law of *A*.[12] Is this a claim in contract or tort? The latter approach would be preferred in the US, since the complaint is based on the employer's negligence in failing to render proper medical attention, a duty of care grounded in tort rather than contract; therefore, the *lex loci delicti*, rather than the proper law of contract, would govern the claim.

[9]See L. Collins, *supra*, at p. 115; P. M. North, *supra* , at p. 925.

[10]1973 S.C. 213. For a case comment, see J. M. Thomson, "International Employment Contract — The Scottish Approach" (1974) 23 Int'l & Comp.L.Q. 458.

[11] A similar scenario was seen in the maritime case of *Galaxios S. S. Co.* v. *Pangos Christofis*, (1948) 81 Lloyd's L. R. 499, where it was held that the proper law of contract shall govern.

[12]See *Garcia* v. *Public Health Trust of Dade County*, 841 F.2d 1062 (11th Cir. 1988) at 1063.

This approach may best resolve such a case since, as mentioned in Chapter 2 of this thesis, the employer's duty of care is usually irrelevant to the law of contract for hire under civil law. However, if the employer's guarantee to care for the injured worker is indeed promised as a contractual term, then the result would not be so clear.

3.1.2 Theory and Practice of the Conflict of Contract

A. Party Autonomy

Since the individual contract of employment is, like all other kinds of contract, a series of terms achieved by mutual consent based primarily on the free will of the parties, it is proposed that party autonomy should govern when conflict arises, for there is no reason to displace those legal consequences which the parties voluntarily promised to accept.[13] Though party autonomy is a current trend in the conflict of contract law, it may be inappropriate if there is a clear inequality in bargaining power between the parties, for under these circumstances the existence of free will is questionable. In fact, such cases are the norm between individual employees and employers, especially with respect to transnational employment, where labor-management relations may be beyond the reach of any local collective agreement.

Therefore, in relation to the contract of employment, *l'autonomie de la volonté* is generally discarded or subject to the statutory restrictions of municipal public policy which afford maximum protection to the weaker party. A good example is found at Article 6(1) of the EEC 's Rome Convention on the Law Applicable to Contractual Obligations (hereinafter "EEC Contracts Convention"),[14] which

[13]See the supporting opinions in, *e.g.*, K. Buure-Hägglund, "Codification of Private International Law Rules on Employment Contract" (1980) Scandinavian Stud. in L. 133 at pp. 140-1; S. Cohen, "The EEC Convention and U.S. Law Governing Choice of Law for Contracts, with particular Emphasis on the Restatement Second: A Comparative Study" (1989) 13 Md. J.Int'l L. & Trade 223 at pp. 230-238; and M. Forde, "The Conflict of Individual Labour Laws and the EEC's Rules" (1979) 1 Legal Issue Euro. Integration 85 at pp. 90-1.

[14]See the 1980 Rome Convention on the Law Applicable to Contractual Obligations, 19th June 1980, O.J. 1980, L 266/1. Various translations can be found in P. Kaye, *The New Private*

circumscribes party autonomy within limits that does not deprive the employee of any legal protection provided in the absence of choice, while admitting the application of the principle of free choice provided at Article 3.[15] A similar reasoning is also adopted in the US Second Restatement.[16]

A further restriction on party autonomy is found in the Second Restatement,[17] which requires that the chosen law has a substantial connection to the parties or the transaction, or at least some other reasonable basis for application. Although the court's discretion in deciding whether the relationship is substantial might be so wide that it undermines predictability, it can prevent the employer from choosing a law which is relatively primitive or unknown to the weaker party in an adhesive contract,[18] even if that law evinces certain geographical contacts with the employment: *e.g.*, the law of the destination for a flight on which service is performed.

B. *Lex loci contractus*

International Law of Contract of the European Community, (Aldershot: Dartmouth Publishing Co., 1993), Appendix B. Article 6(1) provides that "[n]otwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice."

[15]Article 3(1) of the EEC Contracts Convention provides that "[a] contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with reasonable certainty by the terms of the contract and the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract."

[16]§187 (2)(b), Restatement of the Law (Second): Conflict of Laws, *infra*: "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of section 188, would be the state of applicable law in the absence of an effective choice of law by the parties."

[17]§ 187 (2)(a), Restatement of the Law (Second): Conflict of Laws, (St.Paul: American Law Institute Publishers, 1971): "(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either: (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice...."

[18]See note 13, § 187 comment (f.) of Restatement of the Law (Second): Conflict of Laws, *supra*.

The law of the place of contract is suggested as a convenient rule when both parties to the employment contract are domiciled in the same state but the relevant service is to be performed abroad.[19] For example, when a French manager is sent by his French employer to work at a South American branch office, it makes more sense to apply the *lex loci contractus* (in this case, French law) rather than any foreign law.[20] However, this rule has never been considered conclusive in practice.

One major problem with the theory arises from the complexity of modern managerial systems which render the basis for the rule obsolete; in some situations, the contract of employment is not made instantly or personally between parties at a certain location, but rather through an employment agency or, due to the evolution of communications technology, by way of various modes of correspondence.[21] Under these circumstances, the *lex loci contractus* or even the *locus executionis* may hardly bear any substantial link to the employee, especially when the latter could later be sent elsewhere to execute his occupation,[22] a common practice of airline companies when recruiting flight personnel from foreign operations bases.

In practice, a prevailing application of *lex loci contractus* often operates alongside additional territorial contacts, such as when the flight on which the employee performs his service departs from or lands at the *locus contractus*. In an action respecting the termination of contract for a pilot flying a charter airline between Berlin and various US cities for an US company headquartered in Washington, D.C., the Bundesarbeitsgericht of former West Germany held that if

[19]E. Rabel, *supra* note 1, at p.192.

[20]See, *e.g.*, *Cruzel* c. *Massip*, (Cour de Cass, cham. civ., 22 Mars 1960: J.C.P.60 IV, éd. G. 66: 1961 JDI 1064), in which the court held that since both parties are French and the contract of employment had also been made in France, although the service was performed in several different countries, "ce qui rendait impossible l'application d'une loi étrangère plutôt que d'une autre," the *lex loci contractus* shall govern. For a similar judgment, see *Etabs. Maillard* c. *Hakenberg*, Cour de Cass. soc. 1 July 1964: 1965 RCDIP 47.

[21]See note 452 of Chapter 2 of this thesis (the offer of employment was sent from Indiana, and the acceptance mailed from South Carolina, but the occupation was performed in Georgia).

[22]See e.g., *Follese* v. *Eastern Airlines*, 271 N.W.2d 824 (Sup.Ct. Minn. 1978). For a related discussion on this decision see Section 2.3.3.C of Chapter 2 of this thesis.

the contract of employment was made in the *locus fori*, then the termination of this contract is void insofar as it contravenes local public policy,[23] although the pilot is a US citizen and the disputed termination would be considered legal under applicable US laws. On the contrary, in the absence of such contacts, then the *locus contractus* does not by itself preempt other competing factors. In *A. Noireaux et Syndicat national des pilotes de ligne* c. *Compagnie Air Afrique*,[24] the French Cour de Cassation held that the *lex portitoris* (the law of the Ivory-Coast), rather than the law of the *lex loci contractus*, shall govern the terms of performance; although the contract of employment was signed in France with a French agency located in Paris, the flights on which the French pilot regularly performed his service did not have any territorial contact with France. A similar result was reached in an action for wrongful dismissal brought by a French flight attendant working on-board an African aircraft, which the Cour de Cassation found "n'exerçait aucune fonction au sol [française] (exercised no function on French soil),"[25] in spite of the *locus contractus*.

C. Law of the Seat of the Employer

The seat of the employer, or the "master's" headquarters, is the center of industrial management where decisions are made respecting hiring, the principal directives of production, as well as the discipline (promotion or termination), benefits, and duties of employees. The seat of the employer is not only an "excellent connecting factor" to which the travelling employee has a close professional attachment,[26] it can also provide for increased predictability and a

[23]Bundesarbeitsgericht, 10 Apr. 1975: 1984 JDI 168.

[24]See *A. Noireaux et Syndicat national des pilotes de ligne* c. *Compagnie Air Afrique*, Cour de Cass. mixte 28, Feb. 1986: 1986 JDI 699, *Compagnie Air Afrique* c. *Syndicat national des pilotes de ligne, A. Meyrieux, Ch. Julie et R. Peltre*, Cour de Cass. mixte 28, Feb. 1986: 1986 JDI 699; *Compagnie Air Afrique* c. *D. Sordel et Syndicat national des Officiers mécaniciens de l'Aviation civile (SNOMAC)*, Cour de Cass. civ. 28, Feb. 1986: 1986 JDI 699.

[25]*Compagnie Air Afrique* c. *Mme Gueye*, Cour de Cass. 10 July 1992 : 1994 RCDIP 69; and *Compagnie Air Afrique* c. *Mme Joncheray*.

[26]See E. Rabel, *supra* note 1, at p. 192.

more substantial link than the *locus contractus* (the "place of business through which [the employee] ... was engaged:" see Article 6(2)(b) of the EEC Contracts Convention) due to the development of communications technology and the swift transformation of managerial systems. Furthermore, interpreting a "place of business" through which employment is engaged in a loose manner may operate against the expectations of the weaker party and promote the practice of labor shopping. For example, when an international airliner establishes foreign branches as recruiting centers to employ flight attendants, such foreign offices act in substance as messengers, handling correspondence for the company headquarters, and thus employees hired at these locations are more likely to expect their rights and obligations to be governed by the law of the seat of their employer (*i.e.*, the headquarters) than by the law of their own domicile, even if the recruiting branch maintains a character of permanency on the foreign soil.

D. Law of the Place of Service (Workplace)

The *locus laboris* been erected as a connecting factor based on a presumption that workers' rights and obligations are attached to the place where they regularly performs their service. This proposition is valid mostly if the employee maintains professional interaction with the employer or the latter's representative at the place of employment, *e.g.*, at the place where he receives his daily directives and supervision, such as a national airline's foreign sales office, or a foreign subsidiary controlled by the airline. Judicial practice has confirmed that under these circumstances, the *locus laboris* preempts other connecting factors like the common nationality of the parties and the *locus contractus*;[27] but in cases where the employee is working on offshore oilrigs or on-board an aircraft, the existence of this attachment is questionable, especially if indirectly contemplated by standard

[27]See the decision of the Spanish court in Constitutional Court, 1st ch. Decision 36, 8 Feb. 1993: (1995) 13 Int'l Lab. L. Rev. 442. In this case, a French national filed a wrongful dismissal charge against his French employer while working in Madrid for the latter's branch office; though the contract of employment was concluded in France, the Spanish Civil Code governed; see also the decision of the French court in *Stover* c. *Continental Illinois National Bank* , Cour d'Appel de Paris, 5 Jan. 1989: 1990 RCDIP 700.

contractual terms such as "though the work is expected to be carried out in location *A*, the employee could be sent elsewhere by the company."[28]

According to doctrinal writing on Article 6(2) of the EEC Contracts Convention,[29] if the employee habitually performs his contractual duties in more than one country and no single country hosts a prevailing degree of employment, then applying the law of any country in which the employee happens to be habitually working under contract at the time of the dispute would be preferable to presuming no habitual *locus laboris* and automatically referring back to the employer's place of business. It is true that competing governing interests are hard to compare in international air transport due to the inherently mobile nature of the flight attendant's job and the airline's business,[30] yet flying personnel can hardly benefit from this "final *locus laboris*" or "fact" rule, for "in fact" there would still be no habitual place of employment at the time of the dispute.

However, the French Cour de Cassation has confirmed that the aircraft on which flying personnel perform their service can be treated as the place where the contract of employment is executed;[31] that court held that even though the contract of employment between a French pilot and an African airliner was concluded in France at the latter's branch office, the law of Africa (*lex loci laboris*) should apply, since the pilot regularly performs his service on-board the African aircraft and "n'assumait aucune fonction au sol sur le territoire français;" the court further emphasized that the benefit of the pilot's work "was exclusively provided on board the aircraft having [African] nationality." Another French

[28]See *Affaire Air Afrique, infra* note 31; *Sayers* v. *International Drilling Co., supra* note 6; and *Soc. Carrefour et autre* c. *M. de Marchi*, Cour de Cass soc. 30 June 1993: 1994 RCDIP 323. In this case, the employee was later sent from the original *locus laboris* (France) to a new site (Brazil), but the law chosen by the parties prevailed over the *lex loci laboris*.

[29]See P. Kaye, *supra* note 14, at pp. 233-5; and C. G. J. Morse, "Contracts of Employment and the E.E.C.Contractual Obligations Convention," in P. M. North (ed.), *Contract Conflicts* (Amsterdam: North Holland Publishing Company,1982) 143, at p.161.

[30]See *Garcia* v. *American Airlines, Inc.*, 12 F.3d 308 (1th Cir. 1993): "[t]he airline has 21,000 flight attendants spread across the country, and no single state has a substantial relationship with all of them."

[31] *Compagnie francaise de l'Afrique occidentale* c. *Garnier-Chèvreville*, Cour de Cass. soc. 6 Nov.1985: (1986) RCDIP 501.

court also held that the pilot performs his service "exclusively on board the aircraft," and the aircraft presents itself as a prevailing place of attachment (the *lex loci laboris*), although the contract of employment expressly indicated the *locus contractus* as the "lieu d'emploi."[32] Evidently, these theories are contradictory, for if the French pilot "n'assumait aucune fonction au sol sur le territoire français" because he carries out his work exclusively within the cabin, then he cannot assume any function on African soil either in the course of his employment, given that the flying aircraft is never conceived as a part of the territory of the state of registration. Furthermore, the court's reasoning inherits exactly the same drawbacks as those of the *lex portitoris*: a significant example could be drawn from *McMains* v. *Trans World Airlines, Inc.*,[33] in which the pilot of a US airliner was habitually flying with a German aircraft as a supervisor under a joint program between the two companies. An accident occurred while the flight was en route from New York to Rio de Janeiro; following the French jurisprudence, the contract of employment between the pilot and his American employer would unexpectedly be governed by the civil law of Germany.

E. *Lex portitoris*

In international air transport, unless otherwise expressly provided by municipal statute,[34] the *lex portitoris* is used only to generalize various interests considered by the court if it coincides with the social seat of the employer, or the *locus contractus*.[35] The place of registration itself does not have any logical connection with the contract of employment between flying personnel and their employer, especially in the cases of dry lease or crew interchange agreement, where the

[32] *Affaire Air Afrique*, Cour d'appel d'Abidjan soc. 18 Jan. 1985: 1991 JDI 1033.

[33] 8 Avi 17, 511 (Sup.Ct. N.Y. app.div. 1963).

[34] *E.g.*, the Italian Codice della Navigazione of 1942, art. 9 prescribes that contracts of employment for flying personnel are governed by the national law of the aircraft: cited from M. Milde, "Conflicts of Laws in the Law of the Air" (1965) 11 McGill L. J. 220, at p 240.

[35] See *Compagnie francaise de l'Afrique occidentale* c. *Garnier-Chèvreville*,, *supra* note 31 and *Affaire Air Afrique*,, *supra* note 32.

registry of the aircraft may have nothing to do with the rights and obligations of flight attendants toward their employer.

F. Mandatory rules

Mandatory rules affecting the conflict of contract are those laws or ordinances from which a private agreement cannot derogate, serving not only as a protective mechanism for the weaker bargaining party, but also as a safeguard for executing the overall policy of a forum state. Mandatory rules prevail over any competing laws flowing from other connections. In *Soc. Minéo* c. *Albert*,[36] though the parties had expressly excluded the application of French law in their contract of employment, which was executed in Saudi Arabia, French mandatory rules still applied because "l'ordre public français impose l'application des règles, protectrices des salariés, relatives aux conditions de formation et de rupture des contrats de travail à durée déterminée."[37] Indeed, the encroachment on party autonomy by the mandatory rules provided in Article 6(1) of the EEC Contracts Convention simply echoes this common approach.

Mandatory rules, in relation to the individual labor contract, refer mostly to substantive domestic employee protection laws and regulations, from which the parties may not derogate by agreement. As previously mentioned,[38] industrial safety and hygiene regulations of a criminal or administrative character are "statutory provisions intended for the protection of others" and are not subject to derogation by mutual consent, even with the benefit of consideration. Other examples of mandatory rules include wage regulations - minimum, equal, deductions from or other adjustment to,[39] - and ordinances freezing wage-levels;[40]

[36]Cour d'appel d'Angers, 18 May 1989: 1990 RCDIP 501.

[37]*Id.*, at 503.

[38] See Sections 2.4.2.C. and 2.4.3.B of Chapter 2, *supra*. See also the Report on the Convention on the Law Applicable to Contractual Obligations by Giuliano and Lagard, O.J. 1980 C.82 p.25.

[39]For commentary on statutes, like the 1986 *Wages Act* of Great Britain, see P. Kaye, *supra* note 14, at p. 226; for an example of a decision, see *Société Thoresen Car Ferries L.T.D.* c. *Fasquel et autre*, Cour de Cass. soc. 3, Mar. 1988: 1989 RCDIP 63.

equal treatment at work and anti-discrimination laws;[41] as well as regulations prohibiting unfair contractual terms.

The scope of application for local mandatory rules may at times limit their effect, for reasons of extraterritoriality: hence certain people working under the transnational contract of employment are not protected.[42]

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[40]See F. Gamillscheg, "Labour Contract" in K. Lipstein ed. *International Encyclopedia of Comparative Law* (Tübingen: J.H.C.Mohr, 1980) Vol. III (Contract), Ch. 28, at p.18.

[41]See generally Chapter 5 of this thesis.

[42]For a complete discussion of this type of conflicts issue, see Chapters 4 and 5 of this thesis, *infra*.

Chapter 4.
Labor-Management Relations in International Air Transport

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4.0 Introduction

Apart from the social relation between an airline corporation and an employee based upon the individual employment contract, another relation exists simultaneously between representatives of airline employee consolidations — trade unions, workers' councils and other agencies - and employers or their associations based on the collective agreement.[1] The collective agreement is that bitter-sweet fruit borne of the collective bargaining process. Through such communal conflict,[2] the collective force of management seeks to preclude any interruption of business operations at minimum cost, at the same time that organized labor seeks to secure adequate wage levels and better working conditions. In practical terms, many substantive and procedural matters with respect to labor-management relations are determined by way of this process:

[1]For a general discussion on the rationale of collective labor law, see I. Szászy, *International labour Law*, (Leyden: A.W.Sijthoff, 1968), at pp.328-9.

[2]According to L. A. Coser, social conflict can be classified as communal and non-communal. The former implies a community of interests which could be functional to the social system; the latter, however, can be disruptive because compromise of the counterforce could not be expected. Collective bargaining, which is categorized as industrial conflict, is presumed to be communal, for eventually a compromise between the various aims of the parties can be reached. See L. A. Coser, *The Functions of Social Conflict*, (London:Routledge & Kegan Paul, 1956).

securing better terms of employment,[3] laying down the guidelines and conditions for workers' rights,[4] setting up mechanisms to enforce these rights through, for example, joint-management of the labor process,[5] and establishing the rules of institutional conflicts such as strikes or lockouts. The collective bargaining process is one of the political institutions conceived to be essential to sustaining modern capitalist democracy,[6] finding a balance between industrial peace over a given area and period, on one hand, and the interests of employees on the other.[7] Though "industrial self-government" can be strongly inferred from the process, since collective bargaining is generally based on the parties' mutual consent,[8] even in pluralist democracies the legislator does not hesitate to introduce legal instruments that institutionalize the bargaining process based on a belief in equality of the individual; such intrusions commonly include legal definition of the mutual rights and obligations of the bargaining parties, rules for the creation, modification, termination, and content of the individual employment contract, and most importantly, conditions for governmental intervention. Differences between these devices might lie only in their level of coercion.[9] A typical example is the US

[3]Collective bargaining is undoubtedly preferable to individual bargaining with the employer on the contractual terms, and is more likely to secure better terms of employment by controlling internal competition. See A. Flander, "Collective Bargaining: A Theoretical Analysis" (1968) 6 Brit. J. Indus. Rel. 1, at p. 3.

[4]See M.P.Jackson, *An Introduction to Industrial Relations*, (London: Routledge, 1991) at p.139.

[5]See, *e.g.*, the regulations provided in the US *Railway Labour Act* of 1926 (45 U.S.C.A. § 181) [hereinafter "*RLA*"], which require that all changes in existing employment conditions and practices must be negotiated before implementation; the consolidation is thus substantially granted the right to join in the industrial management process.

[6]"Collective bargaining is ... [a] means of establishing industrial democracy as the essential condition of political democracy:" see H. Schulman, "Reason, Contract and Law in labour Relations" (1955) 68 Harv. L. Rev. 999, at p.1002.

[7]See O. Kahn-Freund, (P. Davis & M. Freedland, ed.) *labour and the Law*, 3d ed (London: Stevens & Sons, 1983), at p.69.

[8]*United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) at 580 (per Douglas, J.).

[9]See A. Pankert, "Introduction to the Discussions" in ILO, *Current Approaches to Collective Bargaining — An ILO Symposium on Collective Bargaining in Industrial Market Economy Countries*, (Geneva: International labour Office, 1989) at p. 19; and I. Szászy, *supra* note 1, at p.345.

National Labor Relations Act,[10] which authorizes a public administrative body - the National Labor Relations Board - to certify employees' representative bodies for the purpose of collective bargaining and also to prevent or restrain certain unfair labor practices by either bargaining party.

Special labor-management relations laws have been enacted to govern the airline industry, which is conceptualized as a public utility bearing major consequences upon the social interest and therefore requiring intense supervision by government,[11] but the content of specific labor-management relations laws affecting international labor do not merit special concern. In spite of the public law nature of such statutes, the unification or even harmonization of substantive laws which are mainly operated by government is near-impossible. Current issues in international airline labor law might be expected to concentrate on the conflict between labor-management regulations emanating from distinct sovereign states and the resulting clash in the collective bargaining process within the international airline industry, wherein the workers' consolidations (*e.g.*, trade unions or workers' councils), the place of employment, as well as the nationality or domicile of the airliner and the employees might pertain to different countries. Another issue involves the identification of which law — *lex constituendi, lex locus laboris* or *lex obligationis*, and so on — should properly apply to the dispute in accordance with various connecting factors (and also in accordance with various state interests), or in other words, which conflict rules should govern. Not even a provisional resolution of these issues can obviate the possibility of distortion or

[10]29 U.S.C.A. § 151 *et seq.* The original *National Labour Relations Act* of 1935 has been amended by the *Labour-Management Relations Act* of 1947, also known as the Taft-Hartley Act.

[11]Eight reasons are provided by W. E. Thoms & F. J. Dooley to explain the necessity of specific regulation, including the collective bargaining process of the airline industry, though some are not very convincing. Briefly, they are as follows: 1.) international air transportation is still subject to bilateral agreement which is solely under the control of the DOT; 2.) domestic cabotage is still reserved for nationals or citizens of the state; 3.) certification of commercial piloting is strictly regulated by government; 4.) airworthiness must also be certified by government; 5.) the civilian ATC sector is completely directed and supervised by government; 6.) access to airports is under government administration; 7.) government is still responsible for consumer protection with respect to the contract of carriage by air; 8.) airline labour-management relations are subject to government administration. See W. E. Thoms & F. J. Dooley, *Airline labour Law — The Railway labour Law and Aviation After Deregulation*, (New York: Quorum Books, 1990), at pp. 1-2.

competition between national and foreign undertakings, nor that of deterioration of the interests of international workers.[12]

The scope of this study is limited by the following considerations. The conflict rule which assumes no distinguishable character with respect to the international air transport industry should be left to treatises discussing the general principles of international labor law. Furthermore, due to strong governmental intervention in the process, the field of international labor law is laden with a pronounced public law nature, especially with respect to collective dispute activities such as strike, boycott, or lockout.[13] Consequently, the public interest inevitably prevails over locus disputes, and in practice the question of whether the forum's labor-management relations legislation should be applied extraterritorially may be entirely avoided. Meanwhile, disputes arising from whether a guarantee of the employee's right to organize or join a labor union can be extended to foreign undertakings,[14] or whether the national labor consolidation can act as a bargaining representative for workers performing their service abroad (the issue of extraterritorial recognition of the union), are rendered equally moot.[15]

This thesis will focus mainly on the application of the *RLA*, one of the few examples of labor-management relations legislation specially designed for application to the airline industry engaging in "interstate or foreign commerce,"

[12]See B. Bercusson, "Collective Bargaining and the Protection of Social Rights in Europe" in K.D.Ewing, C.A. Gearty & B.A.Hepple, ed. *Human Rights and labour Law — Essays for Paul O'Higgins*, (London: Mansell Publishing Ltd. 1994) 106, at p.119.

[13]Since it is well beyond the reach of local authority and has close connections to foreign public policy, the employee's right to strike, boycott, or lockout are generally conceived as part of the internal law of the place of employment. See the French decision in *Soc. Spie Batignolles* c. *Henri Mattiesen*, Cour de Cass. soc. 16 June 1983: 1985 RCDIP 85, in which the termination of contract was justified because the striking employee was deported from the workplace upon violation of local restrictions on freedom. Though no aviation case exists on the subject, one could expect the same result even if the collective disputes take place while the aircraft is docking at a foreign airport or in a foreign terminal.

[14]A typical case concerning the employee's right to join, organize, or assist in organizing the labour organization is *Air Line Pilot Association* v. *United Air Lines, Inc.*, 802 F.2d 886 (7th Cir. 1986), though no foreign elements were involved in the case.

[15]See the cases provided*infra* in Section **4.2** of this Chapter. See also F. Morgenstern, *International Conflict of labour Law — A Survey of the Law Applicable to the International Employment Relation*, (Geneva: International labour Office, 1984), at p.95. Domestic level see K. D. Ewing, "Trade Union Recognition — A Framework for Discussion" (1990) 19 Indus. L. J. 209.

as an ample source of judicial practice on issues in the transnational setting,[16] from which a helpful lesson might be drawn to enlighten the relevant issues.

4.1 Overview of Labor-Management Relations: the *RLA*

Originally, the *RLA* of 1926 was promulgated solely to deal with the labor disputes of interstate railway companies, which were then experiencing the turmoil of industrial strife. Its application was subsequently extended by the US Congress to cover employees of air carriers engaged in interstate commerce. After 1936, the *RLA*, rather than the *National Labor Relation Act* (hereinafter the "*NLRA*") which governs the labor-management relations of most workplaces in the US, has became the exclusive legal institution directing collective bargaining in commercial airline enterprises.[17] In an era of regulation, the *RLA* is an indispensable regulatory instrument evincing the ideology of "privatization tempered by strong governmental control;"[18] like the interstate railway transport industry, airlines are perceived as a "public utility" enterprise. In order to prevent industrial conflict, a higher degree of governmental intervention is thus required, relative to that for other types of enterprise.[19] The purposes of this intervention are, among others, to guarantee the employee's right to organize or join a labor

[16]Until now, no country other than the US has provided any case law on the subject for reference.

[17]However, the motor carrier, water carrier, and other aviation businesses which do not operate interstate (see *Bullock* v. *Capitol Airways, Inc.*, 176 F.Supp.449 (E.D.N.Y. 1959)), *e.g.*, fixed-based operators, air-taxi and ambulance services, flying school and catering companies that provide meals for commercial airliners, will still be governed by the *NLRA*. Furthermore, subsidiaries of airlines which operate interstate commerce would not be subject to the jurisdiction of the *RLA* if they are not engaged in transportation. See also W. E. Thoms & F. J. Dooley, *supra* note 11, at p. 146.

[18]The legislative history of the *RLA* shows that the *Act* was a compromise between the pleas for private ownership and nationalisation of interstate railways after World War II. See als o K. V. W. Stone, "Labour Relations on the Airlines: The Railway Labour Act in the Era of Deregulation" (1990) 42 Stan. L. Rev.1485, and W. E. Thoms & F. J. Dooley, *id.*, at p.3.

[19]See also P. S. Dempsey, "The Rise and Fall of the Civil Aeronautics Board — Opening Wide the Floodgates of Entry" (1979) 11 Transp. L. J. 91, at pp. 95-108, and F. A. Nachman, "Hiring, Firing, and Retiring: Recent Developments in Airline labour and Employment Law" (1987) 53 J. Air L .& Com. 31, at pp. 62-63.

union, to authorize the power of unions to represent their respective employees, and "to provide for prompt and orderly settlement of major and minor disputes."[20] The legislative history of the *RLA* of 1936 also reveals that its overall purpose was to enhance economic stability and to institute sound economic growth and development for the air transportation industry in its infancy.[21] Finally, it assured the highest industrial standards of safety to satisfy the converging needs of commerce, public interest, and national defense.

US jurisprudence has since established that the *RLA* cannot apply extraterritorially in the transnational setting, based on a presumption that the *RLA*'s enactment during the regulation era was intended only to preserve the airlines' national monetary capital by diminishing the potential for disorder and instability in the collective bargaining process. Thus, no substantial state interest could justify the risk of "interference in such a delicate field of international relations"[22] by applying domestic labor-management regulations to purely foreign flights.

The economic environment of the airline industry, however, has drastically changed subsequent to the adoption of the 1978 *Airline Deregulation Act*[23] which marked the end of the regulation era. The harsher financial conditions created by increased competition from new entrants to the market, as well as higher operating costs stemming from the rise in fuel prices, accumulated debt, and

[20]See *O'Donnell* v. *Wien Air Alaska, Inc.*, 551 F.2d 1141 (9th Cir. 1977); also F. Schmidt & A. C. Neal, "Collective Agreement & Collective Bargaining" in B. A. Hepple, ed. *International Encyclopedia of Comparative Law* (Tübingen: J.H.C.Mohr, 1984) Vol. XV (labour Law), Ch. 12, at p. 73. According to the *RLA*, the National Mediation Board could mediate "major disputes" or "interest disputes" and certain "nonadjusted minor disputes" per the orderly procedure on a voluntary basis, and any decision which is in compliance with the dispute settlement procedures of the *RLA* can be legally-enforced, though these Board decisions are subject to judicial review by federal courts of appeal.

[21]Before 1938, the US airline industry was plagued by its inability to attract sufficient investment capital, so it was argued that government intervention aimed at maintaining industrial order and stability might prevent economic uncertainty and consequent high fatalities. See W. E. Thoms & F. J. Dooley, *supra* note 11, at p. 8.

[22]*McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), at 21-22.

[23]92 Stat. 1705 (1978) (which amended the *Federal Aviation Act* of 1958, 49 U.S.C. §§ 1301-1542)

consequently, the burden of interest accrued, forced airline companies to cut their operating costs. Labor costs were among the list of priorities, but their circumscription must be effected marginally - without violating the orderly procedure prescribed in the *RLA* — to survive post-deregulation turbulence.[24] A typical technique would involve hiring foreign flight attendants in their fifth freedom trunklines,[25] who were traditionally considered non-union employees in administrative and judicial practice, helping the airliner to better cope with the needs of management and to effectively adjust its (non-union) labor costs without observing cumbersome bargaining procedures. Though the "balance of interests" reached in the original design has been substantially eroded, the practice does not seem to be serious enough to arouse judicial review of the cardinal presumption regarding restricted territorial application.[26] As a result, employers are in effect induced to adopt a labor-shopping strategy as a means of escaping the institutions of labor protection provided by the domestic collective bargaining framework. The national labor union thus loses its only useful weapon for protecting its workers from unfair competition, an unfortunate outcome demonstrating the serious impact that a conflict methodology could bring to labor-management relations legislation.

4.2 The Application of Labor-Management Relations Legislation in Transnational Settings

4.2.1 On National Flights Solely Between Foreign Termini

The *Air Line Dispatchers Association* v. *National Mediation Board*[27] case of 1951

[24]On the employer's strategy to face the post-deregulation crisis see M. C. Seham, "From Jerusalem to Dallas: The Impact of Labour Market on Airline Negotiations" in J. T. McKelvey ed. *Clear Before Takeoff: Airline labour Relations Since Deregulation*, (New York: ILR Press, 1988) 88-90; and W. E. Thoms & S. Clapp, "labour Protection in the Transportation Industry" 64 N. D. L. Rev. 379, at 406-7.

[25]*E.g.*, in *Independent Union of Flight Attendants* v. *Pan Am*, (hereinafter "*IUFA*") 23 Avi. 17,212 (9th Cir. 1991), the employer (Pan Am) operated its intra-European service from Berlin base with foreign flight attendants represented by a German trade union.

[26]See the dissenting opinion in *IUFA*, *id*, at 17, 218 (per Nelson J.).

[27]3 Avi 17,185 (D.D.C. 1950), *aff'd*, 3 Avi 17,603 (D.C. Cir. 1951).

is a landmark US judgement on the territorial coverage of the *RLA* with respect to air transportation involving foreign contacts. The plaintiff US dispatchers were employed exclusively outside US borders by a US airline company. The issue was whether the Air Line Dispatcher Association, a US trade union, could act as a bargaining representative under the *RLA* for those employees performing their service overseas. In affirming the lower court judgment, the Court of Appeal found that the scope of the *RLA* did not extend to "employees in foreign countries employed by [a] United States carrier by air."

The reasoning of *Air Line Dispatchers* flows directly from the presumption of territorial application, which was also the basis for decision in such maritime labor law cases as *Benz*,[28] *Lauritzen*,[29] and *McCulloch*,[30] which delimited the coverage of national labor legislation to domestic issues by referring to the language and legislative intent of the relevant statutes. After finding that the definition of "employee" in the *RLA* should mirror that which is provided in the *Interstate Commerce Act*,[31] thereby limiting its application to workers of a common carrier engaged in interstate or foreign transportation which "takes place within the United States," and determining that legislative debates over the *Interstate Commerce Act* support an analogous restriction upon employees in the international airline industry,[32] the court held that the *RLA* does not apply to employees working for US airlines abroad, unless otherwise expressly stipulated by Congress.

Eight years later, in *Air Line Stewards and Stewardesses Association, International* v. *Northwest Airlines, Inc.*[33] (hereinafter "*Northwest*"), a US trade union challenged

[28] *Benz* v. *Compania Haviera Hidalgo S.A.* 353 U.S. 138 (1957).

[29] *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953).

[30] *Supra* note 23.

[31] "'Employee' is defined as a person in the service of a carrier who performs any work as an employee or subordinate official *in the order of the Interstate Commerce Commission* [emphasis added]," 45 U.S.C. § 151 Fifth, and 3 Avi 17,606. Interstate Commerce Act, 49 U.S.C. §§ 1(1)(c), 1(2).

[32] *Hearings before a Subcommittee of the Senate Committee on Interstate Commerce on S. 2496, 74th Cong., 1st Sess.* (1935), pp.5,9,12, and 3 Avi 17,607.

[33] 5 Avi 18,017 (D.C.Minn. 1958), *aff'd* 6 Avi 17,467 (8th Cir. 1959), *cert. denied*, Sup.Ct., November 23, 1959. See the subsquent case of *Air Line Stewards and Stewardesses Association, International* v. *TWA*, 273 F.2d 69 (2d Cir. 1959), in which the US union tried to represent foreign

the *ratio* of *Air Line Dispatchers* by claiming a right to represent the entire class of flight service attendants, including those hired by Northwest Airlines (the employer, a US-flag airliner) to work on its flights between Tokyo, Seoul, Manila, Hong Kong, and other intermediate points, *i.e.* flights solely between foreign termini. The plaintiff sought an arbitration award for violation of the collective agreement by the defendant airliner which had hired foreign nationals to work on these routes. Again, however, the basic issue in *Northwest* was whether the *RLA* applied to employees who had been hired to perform their service entirely outside US territory. The challenge failed, as both the federal district and the Eighth Circuit courts upheld *Air Line Dispatchers*, noting that the *RLA* cannot apply to employees based exclusively abroad; the application of the *Act* "is strictly limited to the continental United States and its territories."[34] The judgment of the Eighth Circuit court also reiterated that any extension of the *RLA* to employees hired in foreign territory, for service between foreign points of destination or otherwise, would be made by the US Congress rather than the courts.[35]

4.2.2 On Foreign Flights Between National and Foreign Termini

The employer in *Rutas Aereas Nacionales,S.A.* v. *Edwards*[36] was a foreign flag carrier, engaged in aerial transportation between Miami and Venezuela, who sought US judicial review of the Transport Workers Union's certification as a trade union representing its employees; the real issue at stake was whether the *RLA* applies to foreign airlines flying regularly to or from a certain point within US territory. The validity of the US trade union's certification was confirmed, and therefore the *RLA* does indeed apply not only to domestic air carriers but also to foreign airlines regularly flying in US territory. A similar type of reasoning

flight attendants employed by a US flag carrier solely in connection with its flights abroad. The union's claim was rejected according to the reasoning in *Northwest*.

[34] 6 Avi 17, 473.

[35] *Id.*

[36] 244 F.2d 784 (D.C.Cir. 1957).

was adopted in the subsequent judgment of *Decker* v. *Venezolana*.[37] In *Decker*, a US employee of the Venezuelan flag carrier Linea Aeropostal Venezolana (LAV), who performed his service for the airline's US office, brought an action for declaration that the choice of representation and ensuing certification by the US Mediation Board were invalid because the *RLA* does not apply to the LAV. The court, citing *Rutas*, reaffirmed that the *RLA* covers the labor disputes of foreign airlines with US contacts, as when the relevant flights originate from or terminate within its territory.

Another level of conflict exists when applying national labor-management relations legislation to foreign airliners with local contacts, *i.e.*, operating flights to and from the forum under a bilateral air transport agreement. Some ATAs have incorporated the provisions on "settlement of disputes"[38] which provide that:

> (1) Any dispute arising under this Agreement which is not resolved by a first round of formal consultations, ... may be referred by agreement of the parties for decision to some person or body. If the parities do not so agree, the dispute shall at the request of either party be submitted to arbitration in accordance with the procedure set forth below.
>
> (2) Arbitration shall be by a tribunal of three arbitrators to be constituted as follows:
>
> ....

It could be argued that the above arbitration process prevails over the collective bargaining requirements of the *RLA* for the resolution of employment disputes between foreign airliners and local trade unions. In the meantime, the foreign airliner could also resort to foreign government policies or foreign constitutional law, as a basis of support for the act of state defense, to justify its breach of the collective agreement with the local trade union.

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[37] 258 F.2d 153, (D.C.Cir.1958).

[38] Such as the ATA of US-Belgium, Oct. 23, 1980 (Article 17), 32 U.S.T. 3515, T.I.A.S. No. 9903, ATA of US-Thailand, Dec.7, 1979 (Article 14), 32 U.S.T.335, T.I.A.S.No. 9704, ATA of US-Jordan, June 8, 1980 (Article 14), 32 U.S.T. 2652, T.I.A.S.No. 9868; and Aviation: Transport Service Agreement, April 2, 1982, United States-El Salvador, 34 U.S.T. 2285, T.I.A.S.No.10488. Similar provisions could be found in the ATA of US-Canada, 17, Jan, 1966 (Article XV) 17 U.S.T.201, T.I.A.S.No. 5972, ATA of US-Czechoslovakia 28 Feb. 1969 (Article XII) 20 U.S.T. 408, T.I.A.S.No.6644, and ATA of US-Finland, 12 May 1980 (Article 12) 32 U.S.T.2368, T.I.A.S.No.9845.

Such a scenario appeared in *Airline Pilot Association, International* v. *TACA* (hereinafter "*TACA*").[39] In *TACA*, the foreign employer (TACA International Airlines of El Salvador) intended to relocate its pilot base[40] from New Orleans back to El Salvador and, thereafter, to unilaterally impose a new labor contract on its employees, repealing the original collective agreement under the *RLA*, on the pretence that the application of US legislation was prohibited by the labor law of El Salvador. The certified trade union (Airline Pilot Association, International), which represented TACA's pilots in the US, filed an action for injunctive relief based upon the *RLA* to thwart this intentional abrogation of the collective agreement. The airliner counterclaimed that the managerial decision to relocate its operational base was authorized by the US-El Salvador ATA, and that disputes arising therefrom are subject to the arbitration mechanism set forth in Article 14 of that ATA.[41] The foreign flag carrier further maintained that since its relocation project was based upon a constitutional requirement and governmental order of El Salvador,[42] it was entitled to immunity under both the act of state doctrine[43] and the foreign state compulsion defence from any local legal intervention, such as the desired injunction based on breach of the collective agreement with the forum labor union. Both arguments were dismissed by the Fifth Circuit court and an injunction was issued against TACA's planned operation.

The Fifth Circuit court found that, although the US Constitution provides that an executive treaty like the ATA shall supersede any inconsistent domestic

[39] 748 F.2d 965 (5th Cir.1984). For commentary on the foreign state compulsion defence, see also M.A.Warner Jr, "Comments: Stranger in a Strange Land: Foreign Compulsion and the Extraterritorial Application of United States Employment Law" (1990) 11 Nw. J.Int'l L. &Bus. 371, at p. 394.

[40] 62% of the pilots were Salvadoran nationals, many were US citizens and more than one-half lived in the US. See 748 F.2d 967.

[41] See *supra* note 39.

[42] "Salvadoran public service companies will have their work center and base of operation in El Salvador:" Article 110, ¶ 4 of the Consititution of 20 Dec 1983.

[43] Under the act of state doctrine, the forum cannot question the validity of foreign government acts within their own territories. See also *Underhill* v. *Hernandez*, 168 U.S. 250 (1897) at 252. The defence is used to avoid judicial interference with the role of executive branches in international affairs: *Arango* v. *Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980) at 1380.

laws, it was not the intention of the contracting parties to this ATA to replace or suspend domestic labor law, especially since its "Commercial Opportunities" provision prescribes that the adoption and maintenance of an operating crew by foreign airliners in the territory of the host country shall be *"in accordance with the laws and regulations of the* ... [host country] relating to entry, residence and *employment* ."[44] Accordingly, the arbitration process promulgated in the provisions on "settlement of disputes" cannot supersede the collective bargaining process prescribed by the *RLA* for the resolution of an airliner's employment disputes.

Although the new 1983 constitution of El Salvador required all its public service companies (including the TACA) to set up their working centers and bases of operation in El Salvador, the court rejected the act of state defense because it was not the government of El Salvador but rather a private airline company which "voluntarily chose to engage in business within the territorial confinement of the United States." Thus, this private company should be subject to all relevant domestic regulations, including labor-management laws, especially when the intentional acts of the airliner "directly affect interests located within the [forum] ... and contravene fundamental principles of [the forum's] ...labor policy."[45]

The five factors listed in § 40 of the Second Restatement's Foreign Relations Law of the United States were also considered by the Fifth Circuit court in evaluating whether a foreign governmental order to move the foreign flag carrier's pilot base could constitute a foreign compulsion defence[46] and thereby justify abrogations of local law. These factors are: (1) the vital national interests of each state; (2) the extent and nature of the hardship that inconsistent enforcement actions would impose upon the person; (3) the extent to which the required conduct is to take place in the territory of the other state; (4) the nationality of the person affected; and (5) the extent to which enforcement actions by either state can reasonably be expected to achieve compliance with the rule prescribed by that state. Considering

[44]Article 8(2) of the ATA of US-El Salvador, *supra* note 39 [emphasis added].

[45]748 F.2d 971.

[46]*Id.*, at 971-2. For a detailed discussion on the foreign state compulsion defense, see Section 5.1.2.B, Chapter 5 of this thesis.

that "the collective bargaining agreement [is] a cornerstone of [the forum's] ... national policy,"[47] the court ultimately held that the foreign administrative order, as such, simply cannot outweigh the interests of the US government to execute its fundamental labor policy within its own territory.

4.3 US Methodology: Remarks and Comparison

Aside from the restrictive point of view adopted in the application of national labor-management relations legislation to employment with foreign contacts, certain interesting arguments were provided in the *Northwest* judgments which may help to further delineate the conflict principles of labor-management relations in international air transport.

In *Northwest,* the prevailing "law of the flag" doctrine of maritime labor law, under which the sailor is presumed to be governed by the laws of the nation of vessel registration, was for the first time held to be inapplicable by nature to employment relations of the airline industry.[48] The local trade union alleged that under treaties with the states concerned and under international law, the law of the flag should govern employment relations on-board the airplane for all members of the flight crew, irrespective of their citizenship or residence, and furthermore, for most legal purposes including labor relations, "the American-flag aeroplane is the territory of the United States."[49] The federal district rejected this contention, citing the opinion of Jackson J. in *C. & S. Air Lines* v. *Waterman Corp.*,[50] who held that revolutionary airborne commerce has soared into a different realm that cannot "be judicially circumscribed with the analogies taken over from two dimension transit."[51]

The district court's reasoning contains several technical flaws - the *ratio decidendi* in *C.& S. Air Lines,* for example, concerned the *Civil Aeronautics Act*

[47] *Id.*, at 972.

[48] *Supra* note 34, at 6 Avi 17, 471.

[49] *Id.*

[50] 333 U.S. 103 (1948) , at 107-8; also 2 Avi. 14,532.

[51] *Id.*, and 2 Avi. 14,533.

(CAA), rather than airline labor law; moreover, it is evident that the US Congress did not intend to distinguish airline labor-management statutes from those governing surface transportation merely by adopting separate legislative instruments. On the contrary, the coverage of statutes respecting surface transport was extended to the airline industry. Wary of the above defects, the Eighth Circuit court then turned directly to the issue of applying *lex portitoris* from its maritime law precedents, providing two reasons for repudiating the law of flag argument.[52] First, the territory on the maritime vessel, as well as on the aircraft, is only figurative and does not in any physical sense serve as a basis for the application of domestic law. Second, even if such a metaphorical stretch were admitted, it could only apply to ships on the high seas, where there is no territorial sovereign; above or in foreign territorial waters, the application of *lex portitoris* would no longer be permitted by the local sovereign. The facts in *Northwest* suggest that the flying crew must have rendered its service on several sovereign territories, making it impractical to treat its members as employees under the country of aircraft registry.

One is surprised by the sharp contrast in attitude regarding maritime labor-relations law adopted within the same body of jurisprudence. Consider, for example, the US Supreme Court judgment of *Lauritzen*,[53] in which the law of the flag was treated as that which "supersedes the territorial principle" and which was "not to lose its character when in navigable waters within the territorial limits of another sovereignty;"[54] in short, it prevailed over other competing statutes. This anomaly could be attributed mostly to misuse of *lex portitoris* in the international conflict of labor laws.

The *lex portitoris*, as a connecting factor applied to labor law in international air transport, has since been amply discussed in scholarly literature. It is well-known that the CITEJA's preliminary drafts on the Legal Status of Flying Personnel provided for the contract of employment of on-board personnel to be governed

[52] *Supra* note 34, at 6 Avi 17, 471-3.

[53] *Supra* note 30.

[54] *Id.* at 585.

by the law of the nationality of the aircraft.[55] Authorities like L. M. Bentivoglio also assert that Article 32 (a) of the Chicago Convention - which prescribes that *lex portitoris* governs the status of on-board aircrews - could provide a valid basis at international law for the application of the law of the flag to the airline employment contract.[56] However, this proposition has been fiercely attacked by other writers,[57] for reasons such as the absence of any legal link created in the contract of employment between the aircraft and its crew; the link, rather, is forged between the employee and the airliner, and consequently the nationality of the aircraft exists only as an accidental element in the choice of labor law.[58] Conversely, such a connecting factor might refer only to the operating crew of the aircraft (*i.e.*, the personnel engaged in navigating and piloting the aircraft), whereas other airline employees who do not work on-board the aircraft (*i.e.*, ground-handling personnel) would be excluded from this rule, a theory incompatible with the single-rule principle of conflict of labor laws.[59] Both sides of the debate enjoy an approving audience. The notion that the *lex portitoris* acts as the proper law governing the transnational collective agreement is generally based on presumptions that the relevant vessel or aircraft is wholly- or partly-owned by a legal subject (the employer) domiciled in the registering state, or that the employer has a decisive influence upon the management of the vessel or aircraft, such that issues related to the legal subject should be decided by the law of the registering state - the law of the flag - which should also exercise its

[55]See Section 6.5, Chapter 6 of this thesis.

[56]L.M.Bentivoglio, "Conflicts Problems in Air Law" (1966) 119 III Recueil des Cours 67, at p. 145.

[57]For a thorough discusion on the adequacy of *lex portitoris* with respect to the conflict of labour laws, see Section 6.4.6, Chapter 6 of this thesis.

[58]See M. Milde, "Conflicts of Laws in the Law of the Air" (1965) 11 McGill L. J. 220, at p.241.

[59]Of course, as mentioned in Chapter 2 of this thesis, there is no reason to support this "single rule" principle asserted by E. M. Lagerberg in his *Conflict of Laws in Private International Air Law*, (LL.M Thesis, McGill University, Montreal, 1991) at 67. Mr. Lagerberg also asserts that Article 32 of the Chicago Convention deals only with the public international requirement that the professional competence of the pilot and other flying crews should be certified by certain state, rather than with the contract of employment for aircrew.

jurisdiction and control over the vessel or aircraft domiciled therein.[60] Nevertheless, these over-simplified connections suggested by the *lex portitoris*, even if valid, do not lend themselves easily to the scheme of employment relations. In the transaction between an employer and a trade union, the interests concerned are far more perplexing than those raised by the individual contractual relationship, and this perplexity could not simply be accurately reflected by the connection underlying the application of *lex portitoris*.[61] A rigid adherence to this rule results in paradox for either the labor consolidation or the employer: if *lex portitoris* applies, then the trade union would have won the *Northwest* case, but would certainly have lost in the *Rutas , Decker*, and *TACA* cases, irrespective of how many local employees were hired by the foreign airliner. Meanwhile, the converse would be true for the employer.

In fact, in both lines of decision, the *lex portitoris* and its antithesis were used only to camouflage the government-interest analysis method. After all, the local government bears no prevailing public interest in applying its own law to labor disputes which occur between alien sailors and their foreign employers on-board foreign flag carriers which dock occasionally at the forum port (see *Lauritzen* and *McCulloch*), nor to those disputes involving foreign employees hired solely at foreign bases by a national employer (see *Northwest*). Compare the *Rutas , Decker*, and *TACA* series, in which the interests of the forum, in executing its labor policy within domestic borders, were held to be directly affected, thereby justifying the application of the *lex fori* to the foreign flag carrier. Like the proper law (most significant connection) theory, the above government-interest method, though theoretically flawless, is useless for the purposes of predictability.

The analysis adopted in the *Northwest* series is also far from infallible. In principle, each sovereign state enjoys the power to enforce domestic laws only within its territory; any direct state activity abroad would violate the sovereignty

[60]See the Swedish decision on the applicable law concerning transnational collective agreements: Supreme Court, 1987 NJA 885: (1990) VIII Int'l Lab. L. Rev. 9, at 11.

[61]A different opinion on the adequacy of *lex portitoris* in the conflict of labor-management regulations can be found in C. R. Gruny, "Conflict of Laws — Law of the Flag Held Inapplicable to Aircraft" (1958) L. Forum 649, at pp.650-1.

of other states. From this point of view, it is reasonable to limit the coverage of national labor-relations legislation to the physical boundaries of state territory, *i.e.*, to enterprises operating in the forum. A similar approach has been adopted by the majority of German writers.[62] It would be impractical for the forum to issue an injunction, based on the local collective agreement, against a strike or any other collective labor action which occurs at the foreign base of a national flag carrier. However, not every execution of state interest in the transnational setting will necessarily infringe on foreign sovereignty; a state is not prohibited at international law from intervening in labor relations beyond their borders by exercising their domestic judicial competence. In the *Northwest* series, the issue is whether the local union's scope of representation encompasses the airline's foreign-based employees; if so, it would not effectively breach any interests of a foreign sovereignty or government, as it applies only to the collective agreement between a US trade union and a US flag carrier; and even in future collective disputes, the US law will govern only those negotiations and strikes which occur within its jurisdiction. In this way, no substantial foreign interests are infringed. On the contrary, the forum's governmental interest would be seriously prejudiced if a significant part of the labor-management operation affecting the vested rights of local employees was beyond the control of the collective agreement. Without extended representation, local workers could easily be deprived of employment opportunities and other vested interests, where as employers could simply find non-union workers to substitute for the striking union worker, thus effectively depriving the union of its only legal weapon[63] and evidently undermining the institutional purpose of the domestic collective bargaining process. Moreover, the forum's interest in applying its own law in the *Northwest* series is no different than that in the *TACA* series.[64] Recently, the British judgment of *Dimskal Shipping*

[62]See F. Gamillscheg, "Labour Contract" in K. Lipstein ed. *International Encyclopedia of Comparative Law* (Tübingen: J.H.C.Mohr, 1970) Vol. III (Contract), Ch. 28, at p.20 n.168.

[63]A good illustration on such a maneuver by airlines in collective disputes can be found in *Air Line Pilot Association* v. *United Air Lines, Inc., supra* note 14.

[64]A contrary opinion, asserting that there is no interest which is equal to the "unique interest of the United States in protecting peace and health aboard its vessels," exist in *Northwest*, evidently neglecting that there are many other "public" interests which should be considered in

Co. S.A. v. *International Transport Workers Federation*[65] endorsed this approach, holding that even when collective pressure (industrial action) was undertaken at a foreign (Swedish) port against the employer, English law shall apply since the conflict was essentially domestic - the employer was forced to sign a new collective agreement with the London-based trade union which was remotely directing the blacking action: "[s]uppose a British ship owned by a British company, registered in England, and crewed exclusively by British seamen, is 'blacked' in Sweden. It is difficult to see what relevance Swedish law could have to claims based on duress in an English Court."[66]

No firm conclusion has been reached, in theory or practice, on the enforceability of party autonomy in the conflict of labor-management relations laws. In *Air Line Pilots Association, International* v. *Capitol Airways, Inc.*[67] (hereinafter "*Air Line Pilots*"), both the US trade union and the airliner agreed to extend the coverage of the *RLA* to pilots, based abroad and flying aircraft entirely outside the US, regarding issues growing out of grievances or out of interpretation or application of the collective agreement.[68] The court found that if the contract is lawful, then the employer must abide by the grievance procedures established therein. Based on a conviction that the *RLA*'s very purpose is to encourage the smooth function of the collective bargaining process, the court concluded that "although the parties may not be required to bargain with respect to foreign based employees, ... they are not forbidden to do so and, such negotiations are

the choice of law process besides imposing penalties for crimes on-board. See Comments "Application of Labour Legislation to Airline Employees Abroad" (1960) 12 Stan. L. Rev. 682, at p.685.

[65][1990] 1 Lloyd's L.R. 319 (C.A.). For earlier proceedings, see [1989] 1 Lloyd's L.R. 166. For commentary on the first instance judgment which upheld Swedish law (per Phillips, J.), see R. Kidner, "Jurisdiction and Choice of Law in International Trade Disputes" (1994) 23 Indus. L. J. 109, at p.123.

[66]*Id.* , at 329 (Ormrod, S.J.). For criticism of the judgment see E. McKendrick, "Industrial Conflict Laws" (1990) 19 Indus. L. J. 195.

[67]10 Avi 17,160 (M.D.Tenn.1966).

[68]The terms of the agreement provided as follows: "(e)The Board shall have jurisdiction over disputes *between any employee covered by the Pilots' Agreement and the Company*, growing out of grievances or out of interpretation or application of any of the terms of the Pilots' Agreement. The jurisdiction of the Board shall not extend to proposed changes in hours of employment, rates

entirely within the spirit and purpose of the Act."[69] The Ninth Circuit court, in *Independent Union of Flight Attendants* v. *Pan American World Airways, Inc.*[70] (hereinafter "*IUFA*"), simply adopted the contrary position, reasoning that "a [collective agreement] contract between private parties ordinarily does not provide a basis of federal jurisdiction [of the RLA],"[71] even if the employer has expressly agreed that the local union represents foreign workers. The territorial application of the *RLA* was then conceived as a statutory policy which the parties could not abrogate or confer by consent. Non-aviation decisions of the French Cour de Cassation[72] and a regional labor court of the former West Germany have since adopted an approach more closely resembling that of *Air Line Pilots* on at least one occasion, respectively.[73]

The reason for rejecting the *lex obligationis* or party autonomy as a general principle of the conflict of employment contracts is that the right or ability of the parties to actually choose an applicable law does not seem to exist,[74] based on the presumption that economically-weaker employees with inferior negotiating capability in a transaction do not (as a general rule) truly exercise free will at the bargaining table; statutory intervention is required. However, this proposition might not be equally valid in the collective bargaining process, since it is no longer the individual employee but the stronger labor consolidation, equipped with institutional support, bargaining with the corporate enterprise. Therefore, restrictions on the validity and scope of party autonomy should be loosened in the case of conflict of labor-management regulations, to avoid any unexpected effect such as that seen in *IUFA*.

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of compensation, or working conditions covered by existing agreements between the parties hereto [emphasis added]:" see *id.* at 17, 162.

[69] *Air Line Pilots*, at 17, 164.

[70] *Supra* note 26.

[71] *Id.*, at 17, 217.

[72] See *Jacquin* c. *S.A.R.L.*, Cour de Cass. soc. 29 May 1963: 1964 JDI 301, in which the court emphasizes the territorial application of local labor-management regulations, while implying that the parties could have expressly extended the scope of their collective agreement abroad.

[73] Regional labour Court of Lower Saxony, 5 Nov. 1975: 1975 IPRspr No. 31, cited from F.

4.4 Conclusion

Under strict territorial application, the national and foreign cabin crew working on-board flag carriers which operate entirely abroad will be deprived of membership in the national trade union and consequently excluded from its representation.[75] On the contrary, foreign pilots and other members of the flying crew, employed by either national or foreign flag carriers and working regularly on-board the fleet which originates or terminates at the forum state, will be granted the right to organize or join a local labor union and be thereby represented. Territorial application is conceived by its advocates to be a well-established compromise between international comity and forum labor policy. Critics allege that if a state could not limit its own jurisdiction to a certain degree, the result might be retaliation through foreign legislation.[76] However, the worst possible effect of such a balance does not seem to be so substantial regarding the conflict of laws, in comparison with the potential for sacrifice of forum interests: for the national trade union, the interest in representing foreign-based workers is no less substantial than that in the right to bargain for local workers of a foreign company throughout the labor-management process, while conferring exclusive representation prohibits employers from adopting a flexible labor-shopping strategy and escaping the protection of labor institutions provided within the domestic collective bargaining framework.

The dichotomy created by the *Northwest* and *TACA* series has shown that the nationality (flag) of the airline is not an appropriate connecting factor indicating the applicable labor-management relations regulation. The seat of the enterprise, or the social seat of the employer, on the contrary, could be used to meet both ends; it is usually the controlling centre of the relevant industry, where managerial decisions concerning the interests of employees - such as working hours, wage

Morgenstern, *supra* note 15, at p.98 n.9.

[74]I. Szászy, *supra* note 1, at p. 344.

[75]"Such exclusions are applicable to *anyone* employed and performing service outside the continental United States and its territories[emphasis added]:" see *Northwest*, at 6 Avi 17, 470-1.

[76]See also A. F. Lowenfeld, "Sovereignty, Jurisdiction, and Reasonableness: A Reply to A.

adjustment, *etc.* - are made. Therefore, it is also the place where collective bargaining, and even the strike and lockout, are held. A good example could be drawn from the *Act Concerning the Law Applicable to International Private, Family and Labour Law Relationships, as well as to International Commercial Contract* adopted by the former East Germany (German Democratic Republic, DDR) in 1975,[77] of which Article 27 (Law of Employment) prescribes:

> (1) Employment relationships are governed by *the law of the state of the employer's principle place of business.*
>
> (2) If the place of work is situated in the state of the employee's habitual residence, the law of that state shall govern the employment relationship.
>
> (3) The law applicable pursuant to paragraphs 1 and 2 hereof also governs the capacity to execute an employment contract and the form requirements.

According to Juenger,[78] this provision is based a differentiation between national employees sent abroad by a local employer (section 1) and national employees who work at home for a foreign enterprise (section 2).

Thus, under the *Northwest* scenario, a local trade union could refer to the law of the seat of the airline to govern managerial decisions which substantially influence its local policy, and the same would be true in the *TACA* situation. This method would equally cause few problems for foreign attendants based entirely on foreign soil who might prefer to seek coverage under the local collective agreement.

The principle of *lex obligationis* or party autonomy has been circumscribed by certain judgments which curiously refused to recognize the extension of regulatory coverage through private consent, *i.e.*, collective agreement or other contractual provisions. Though there may be a lesser public interest in equality of bargaining power, as pointed out by *Air Line Pilots*, the local law in its original context should not be applied extraterritorially, but there is no reason to restrain such applications if the parties are willing to accept them. The forum's public policy is presumably not impeded by such an extension and it should play only a

Lowe" (1981) 75 Am. J.Int'l L 629, and H. G. Maier, "Extraterritorial Jurisdiction at a Crossroad: An Intersection Between Public and Private International Law" (1982) 76 Am. J. Int'l L. 280.

[77][1975] DDR GB1. I 748 [emphasis added]. A full German text and English translation can be found in (1977) 25 Am. J. Comp. L. 354.

limited role under these circumstances.

[78]See F. K. Juenger, "The Conflicts Statute of the German Democratic Republic: An Introduction and Translation" (1977) 25 Am. J. Comp. L. 332, at p.350 n. 120.

Chapter 5. Equality of Treatment in International Air Transport

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5.0 Introduction

The concept of equality of treatment at work has made a quantum leap in the past decade, mainly due to the change in political climate effected by flourishing social movements[1] and the constant legal challenges which mobilized judicial authorities to become an institutional force of ideological reform. The reverberation is especially evident in the airline industry, in which gender, race, and age considerations have always played a distinct role in employment relations.

Equality of treatment at work is the elimination of inequality, *i.e.*, the barrier

[1]See also Lord Wedderburn, *The Worker and the Law*, 3d ed (London: Sweet & Maxwell, 1986), at pp. 447-8, and C. W. Jenks, *Human Rights and International Labour Standards*, (London: Stevens & Sons Ltd., 1960) at pp. 85-6.

that prevents a certain class of people from entering the profession.[2] Yet if not every system demonstrates a positive attitude toward implementing, or at least embracing, the general idea of prohibiting employment discrimination based on sex, race, religion or other non-professional skill-related factors, it is due to the causal roots and depths of discrimination which are deeply imbedded in ethnic, religious, cultural and even political infrastructures and which appear in various forms and in different states. For some countries, the total abolition of discrimination may represent a fundamental social change, the pace of which they would prefer to control themselves, rather than submit to the directives of international legislation. Thus, the establishment of a single, universally-acceptable standard of equality of treatment is a mere illusion. The international standards set out by the United Nations in instruments such as the Universal Declaration of Human Rights of 1948,[3] the International Covenant on Economic, Social and Cultural Rights of 1966 (Art. 2, par. 2),[4] the International Covenant on Civil and Political Rights of 1966 (Art.2, Par.1),[5] and other ILO conventions and declarations concerning equal access to employment,[6] serve only as non-binding proclamations

[2]See also K. O'Donovan & E. Szyszczak, *Equality and Sex Discrimination Law*, (Oxford: Basil Blackwell, 1988), at p.1.

[3]U.N.Doc. A/811, Art. 2. par.1 providesthat "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, *without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, both or other status* [emphasis added]."

[4]Annex to Resolution adopted by U.N. General Assembly on 16 Dec. 1966, Art. 2. par. 2 provides: "The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised *without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status* [emphasis added]." The full text of the Covenant can be found in I. Brownlie, ed. *Basic Documents on Human Rights*, 2d ed (Oxford: Clarendon Press, 1981) p.118, and R. Blanplain ed. *International Encyclopedia for Labour Law and Industrial Relations*, (Deventer: Kluwer Publisher, 1994) Codex 1.

[5]Annex to Resolution adopted by U.N. General Assembly on 16 Dec. 1966, Art. 2. par. 1 provides: "Each of the State Parties to the present Covenant undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, *without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status* [emphasis added]." The full text of the Covenant can be found in I. Brownlie, *id*, at p. 128 and R. Blanplain, Codex 1 *id*.

[6]There are many ILO instruments of relevance to the question of equal treatment at work. See Codex 1 *id*. and R. Blanplain, "Equality of Treatment in Employment" in *International*

addressed to its members or even contracting parties.[7] Their lack of implementing authority confers an excessively large margin of discretion, although the principle of non-discrimination is considered to be the most widely-accepted universal human right, one which states have confirmed most strongly. Only in an area where the effect of diversity in ethnic origin, language, religion, *etc.* on employment has been reduced to an negligible level - as in the EEC - could a single standard on equal treatment be effectively established,[8] and such cases are rare. Moreover, discrimination may continue to exist between peoples of the Community and other non-EEC states. The unification of labor laws relating to equal treatment is not therefore entirely irrelevant, for when the labor contains a foreign element, there will always be conflict of laws problems; for example, if the district sales manager of *A* nationality was fired by his employer, a *B* flag carrier, based on his age and nationality while working in *A* country, the first issue raised when he seeks recourse for damages caused by the alleged discriminatory termination is: which law shall apply, that of the place of work (*A*) or that of the seat of his foreign employer (*B*)? The current trends in international labor law could at least help to establish the acceptable rules for such a conflict.

The above scenario could appear in any transnational enterprise; however, due to the regulatory nature of international air transport, not only would equal treatment legislation be contravened, but other conflicts might exist between the applicable equal treatment law and the diplomatic instruments which enable the operation of international airlines - such as bilateral air transport agreements (hereinafter "ATAs") and Treaties of Friendship, Commerce, and Navigation (hereinafter "FCN Treaties"). Further, the rules for resolving these conflicts are not as mechanical as those adopted in private international law.

Encyclopedia of Comparative Law, (Tübingen: J.C.B.Mohr, 1990) Vol. XV (Labour law) Ch. 10, at pp.4-5.

[7]See F. Capotorti, "Human Rights: The Hard Road Towards Universality" in R. St. J. Macdonald & D. M. Johnson, ed. *The Structure and Process of International Law: Essay in Legal Philosophy Doctrine and Theory* (Dordrecht: Martinus Nijhoff Publisher, 1986) pp.985, 987.

[8]See the EEC Treaty Establishing the European Economic Community (Treaty of Rome), 25 Mar. 1957, 298 U.N.T.S. 11, Art. 7, 48 par.2 and 119. For other EEC Directives, see Codex 1 *id.* and R. Blanplain, "Equality of Treatment in Employment" *id.*, at p.6.

Though there are many examples of national legislation on equal treatment at work - such as those of Great Britain,[9] Australia,[10] and Japan[11] - the following study will, again, focus mainly on model laws on equal treatment at work adopted by the US, namely Title VII of the *Civil Rights Act* of 1964 (hereinafter "Title VII"), and the *Age Discrimination in Employment Act* of 1967 (hereinafter "*ADEA*"), which provide relatively more jurisprudence on conflict issues in the international air transport industry, therefore helping to draw a clearer picture of the current regulatory scheme from which a prototype of unified law might be inferred.

5.1 Title VII of the *Civil Rights Act* of 1964[12]

5.1.1 Introduction

Like all other equal treatment laws, the *Civil Rights Act* of 1964 is the product of this decade's overwhelming trend toward anti-discrimination, prohibiting discrimination on the basis of race, color, religion or national origin in public facilities - such as hotels, restaurants, theaters, *etc.* - and in employment relations.[13] Title VII of the *Act* guarantees equal protection for all persons from employment-related discrimination: by employers in hiring or setting any terms or conditions

[9] *E.g.*, the *Equal Pay Act 1970*, the *Sex Discriminationn Act 1975*, the *Race Relation Act 1976*. See also R. Blanplain, "Equality of Treatment in Employment" *id.* at p.9.

[10] *E.g.*, the (Commonwealth) *Racial Discrimination Act 1975* (s. 15), the *Huamn Rights Commission Act 1981*, and the *Sex Discrimination Act 1984*. See also R. Blanplain, "Equality of Treatment in Employment" *id.* at p. 6.

[11] *E.g.*, *Labour Standard Law* (労働基準法) of 1947, Art. 3, 4.

[12] Public Law 88-352, 2 July 1964, 42 U.S.C.A. § 2000e *et seq*. The full text can also be found in *Civil Rights Act of 1964 — with Explaination* (Chicago: Commerce Clearing House, Inc. 1964). Title VII is a segment of the *Civil Rights Act* of 1964; other titles deal separately with voting rights (Title I), equal access to public facilities and accommodations (Title II & III), discrimination in education (Title IV), and discrimination in federally assisted program (Title VI). Prior to the 1991 amendment, Title VII had been substantially amended by the *Equal Employment Opportunity Act* of 1972, and the *Pregnancy Disability Amendment* of 1978. Nevertheless, these amendments do not significantly affect the conflict of labour laws discussed in this Chapter.

[13] See N. Vieira, *Constitutional Civil Rights in a Nutshell*, 2d ed (St. Paul: West Publishing Co. 1990), at pp. 226-8.

of employment based on race, color, religion, sex or national origin; by the employer or the union in excluding or segregating membership or in causing discrimination; and by agencies in refusing to refer for employment.[14] While the main objective at the time of its enactment was to protect the US black minority from discrimination, Title VII has in practice received a broader application to fulfill its overall purpose of creating equal employment opportunities and removing barriers that favor an identifiable group of employees over other employees within industrial relations.[15] Title VII is the leading embodiment of current international labor policy as implemented at the local level, and one of few models of fair employment legislation in the world.

Title VII of the *Civil Rights Act* prescribes that it is unlawful for an employer: (1) to fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual in matters related to his compensation, terms, conditions, or privileges of employment, based on the individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify an employee or a job applicant in any way which deprives or would tend to deprive the individual of employment opportunities or otherwise adversely affect his status as an employee, based on his race, color, religion, sex, or national origin.[16] Nevertheless, Title VII is not an omnibus legal instrument dealing with every kind of employment discrimination, as it covers only discrimination "based on race, colour, national, sex and religion." Age discrimination in employment is, in turn, regulated by the *ADEA*, providing a similar regulatory scheme which will be discussed below. Discrimination against handicapped persons is regulated by its own special scheme.[17]

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[14]See A. J. Lauer, Comments, "Title VII, the Age Discrimination in Employment Act and the Friendship Commerce and Navigation Treaty- An Ongoing Conflict: An Analysis of MacNamara v. Korean Air Lines" (1991) 17 Brooklyn J. Int'l L. 423 at 426.

[15]See also J. L. Kroner, "Employment — Labour and the Emancipation Proclamation" in D. B. King & C. W. Quick, ed. *Legal Aspects of the Civil Rights Movenment* (Detroit: Wayne State Univ. Press, 1965), at p. 79 and C. S. Aronstein, ed. *International Handbook on Contracts of Employment*, (Deventer: Kluwer, 1976), at pp. XXIV-XXV..

[16]42 U.S.C. Sections 2000e-2(a).

[17]See also *Griggs* v. *Duke Power Company*, 401 U.S. 427 (1971) at 429-30, and M. A. Player,

There will be many foreign elements involved when the airline seek to maintain a smooth operation of its international transport business: the airline must set up foreign offices to promote ticket sales, hire national and foreign flight attendants to work on flights abroad, as well as hire other employees at foreign bases to accommodate clients' needs, all of which import conflict of labor laws situations. The jurisprudence has cleared the way for foreign employees performing their service "inside any State [of the US],"[18] owing to a negative inference from the exemption in §702 (see below). There will be no question of eligibility, therefore, regarding the coverage of foreign employees working in US territory under Title VII,[19] whether their employers are foreign or national flag carriers. As for employees performing their service at foreign bases, before the enactment of the 1991 amendment to the *Act*[20] and aside from the restricting provision in §702, which expressly excludes coverage for aliens employed outside the US,[21] there is no additional limit to the extraterritorial application of Title VII. The legitimacy of extending the application of the *Civil Rights Act* to American citizens working for US companies abroad has already been examined and confirmed in judicial practice with respect to other industries,[22] yet since the

Employment Discrimination Law, (St.Paul: West Publishing Co., 1988) , at 199-200.

[18]*Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86 (1973), at 95.

[19]See also M. A. Player, *supra* note 17, at p.216.

[20]See *infra* Section **5.1.2.A** of this Chapter.

[21]See 42 U.S.C. § 2000e-1, which is intended to restrain the enforcement of US employment standards to foreign nationals and avoid potential conflict with other sovereignties on legislative functions. See also J.M.Diller, "Note on Title VII and the Multinational Enterprise" (1985) 73 Geo. L.J. 1465, at p. 149.

[22]See *e.g.*, (all are non-aviation cases)*Bryant* v. *International Schools Service, Inc.* 675 F.2d 562, 3d Cir.1982 (the employee, who was hired to teach in an American school in Iran under a local contract, filed an action for sexual discrimination on the basis of the school's dual contract policy. The Third Circuit Court did not discuss the preliminarily question of the applicability of Title VII of the *Civil Rights Act*, but went directly to the substantive matter); *Lavrov* v. *NCR Corp.* 591 F.Supp. 102, S.D.Ohio,1984. (the employee, who was denied a position in the German foreign subsidiary of the employer, filed legal action for discrimination based on sex against the employer and its German subsidiary. Though dismissing the claim, the court did remark in*obiter* that Title VII of the *Civil Rights Act* covers extraterritorial discriminatory practices by American employers); *Abrams* v. *Baylor College of Medicine* 805 F.2d 528, 5th Cir.1986 (two anaesthesiologists, who were denied the opportunity to participate in a program in Saudi Arabia, brought an action against Baylor College for racial /religious discrimination, and were granted *certiorari*).

Federal Supreme Court expressed an opposite point of view[23] only the local company, located within the jurisdictional limits of the forum and engaged in foreign commerce, is covered by Title VII.[24]

If Title VII was not intended to apply to a US company's overseas operations - outside of the jurisdictional limits of the forum - then the issue raised with respect to international air transport will be as follows. When a national flight attendant on-board a national flag carrier, flying an international route, suffers discrimination based on sex, nationality or religion, is he covered by Title VII even though neither the place of departure nor the place of destination are within forum territory? Other questions for the international airline industry include situations where a national employee works for foreign airlines operating flights to and from forum territory, and where a foreign sales manager renders his service at the foreign termini of a national airline.

5.1.2 Application to Employees of National Airlines

A. The 1991 Amendment to the *Civil Rights Act*

Since FCN Treaties and ATAs offer reciprocal rights to both signatories, national airline companies are entitled to set up overseas subsidiaries to promote their air carriage services, thus making the conflict of laws on equal treatment at work inevitable when employment relations begin at these foreign termini. After almost sixteen years of constant legal struggle since the issue of Title VII's applicability to employees working abroad was first raised before the bench,[25] a

[23] See *EEOC* v. *Arabian American Oil Co.* 111 S. Ct. 1227, 499 U.S. 244, 113 L Ed 2d 274 (1991). The reasoning of the high court and further discussions will be analysed in the following Section 5.1.2.

[24] See also the case comment in R. K. Robinson, D. E. Terpstra & B. G. Malcolm, "EEOC v. Arabian American Oil Company: Are U.S. Expatriates Entitled to Title VII Protection?" (1991) 42 Lab. L. J.433 at p. 436.

[25] The first case concerning the extraterritorial application of Title VII to US citizens working abroad for a national employer was in 1976: *Love* v. *Pullman Co.* 569 F.2d 1074 (10th Cir.1978) (aff'g Colorado District Court decision of 1976). In *Love*, the court held that Title VII could be applied extraterritorially to all American citizens working for US employers abroad, yet some subsequent judgments have reached the completely opposite conclusion.

fairly clear conflict rule was finally established by legislation.

On 21 November 1991, a new *Civil Rights Act* was signed by the US President and entered into force as an amendment to the *Act* of 1964.[26] One purpose of the amendment was to overturn the Federal Supreme Court decisions in *EEOC* v. *Arabian American Oil Company (ARAMCO)*,[27] and *Boureslan* v. *ARAMCO*,[28] which held that Title VII could not apply extraterritorially (to national employers abroad).[29] Section 109 of the 1991 *Act* contains a "Protection of Extraterritorial Employment Amendment," supplementing the definition of "employees" under the *Act*: "with respect to employment in a foreign country, such term includes an individual who is a citizen of the United States."[30] Hence the protection of Title VII is extended to national employees working abroad for US employers. Section 109(b) further prescribes which employers are exempt from the extraterritorial

[26]Pub.L.No. 102-166, 105 Stat. 1071 (1991). The following purposes are listed in the new *Act* as justification for the amendment: (1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace; (2) to codify the concepts of "business necessity" and "job-related" enunciated by the Supreme Court in *Griggs* v. *Duke Power Co.* 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989); (3) to confirm statutory authority and provide statutory guidelines for the adjudication for the disparate impact suits under Title VII of the Civil Rights Act of 1964 [citation omitted]; and (4) *to respond recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination* [Emphasis added].

[27]*Supra* note 23.

[28]499 U.S. 244, 113 L Ed 2d 274 (1991), (on *certiorari* to the same court with *EEOC*); *Boureslan* was decided in conjunction with the *EEOC*, *id.*. In these cases, the plaintiff Boureslan, a naturalized US citizen born in Lebanon, originally served as an engineer in Aramco Service Company (ASC), a subsidiary of ARAMCO, and was subsequently transferred to the ARAMCO office in Saudi Arabia, where he suffered continuous harassment from his superior, including racial, religious and ethnic slurs, which finally led to his termination. Boureslan filed a discrimination charge against ARAMCO with the Equal Employment Opportunity Commission (EEOC) and federal district court; they dismissed his claim and were affirmed by the Fifth Circuit. A single *certiorari* granted to both *Boureslan* and *EEOC* was intended to solve the common issue on the coverage of Title VII.

[29]After release of the *EEOC* and *Boureslan* judgments, Senator Kennedy immediately urged the US Congress to overturn these decisions by adding provisions to the proposed civil rights law. For a brief legislative history of the 1991 amendment, see also J. R. Franke & M. Whittaker, "The Extraterritoriality Issue: A Title VII Case Study" (1992) 30 Am. Bus. L.J. 143, at p.167.

[30]Pub.L.No. 102-166, § 109(a) (1991).

application of Title VII,[31] in effect codifying the foreign compulsion defense which has long been upheld by *stare decisis*; accordingly, an overseas national company is exempt from the application of Title VII if it can prove that complying with the national equal treatment regulation would violate the laws of the host country. The 1991 amendment also stipulates that a foreign enterprise, wholly-owned or controlled by its US parent company, will be governed by Title VII.[32] In summary, these new statutory provisions simply crystallized most of the judicial pronouncements on the extraterritorial application of national fair employment legislation.[33]

As already mentioned, there is only one express limitation on Title VII's scope of application in the original 1964 *Act*. The "alien exemption provision" provides that "this title shall not apply to an employer with respect to the employment of an aliens outside of any state."[34] It is generally interpreted in such a way as to exclude only foreign workers performing their service abroad - national employees working abroad are still covered. However, judicial authorities have refused to follow this interpretation for fear of causing strife between sovereignties. Hence, "[since there was not] any specific language in the Act reflecting [a] congressional intent to" extend its coverage extraterritorially, the

[31] § 109(b) provides:"It *shall not be unlawful* under § 703 or §f 704 for an employer (or a corporation controlled by an employer), labour organization, employment agency or joint labour management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country *if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located* [emphasis added]," *id.*

[32] According to § 109(c)(1), "if an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by [the Act] engaged in by such corporation shall be presumed to be engaged in by such employer," *id.*

[33] The 1991 amendments reversed the following decisions: *EEOC* v. *Arabian Oil Co., supra* note 22; *West Virginia Univ. Hosps., Inc.* v. *Casey*, 111 S.Ct. 1138 (1991); *Loreance* v. *AT&T*, 490 U.S.900 (1989); *Martin* v. *Wilks*, 490 U.S. 755 (1989); *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989). See also, R. S. Orleans, "Extraterritorial Employment Protection Amendments of 1991: Congress Protects U.S. Citizens Who Work for U.S. Companies Abroad" (1992) 16 Md. J.of Int'l L.& Trade 147. However, the amendments were not applied retrospectively, and protected only against conduct occurring after its enactment. See Section 109 (c), *id.*

[34] 42 U.S.C.A. § 2000e-1, § 702.

courts refused to infer it.[35] Such a circumscription prevented foreseeable international disputes; however, national citizens employed outside the forum territory who suffered discrimination were left with legal recourse only if provided by the law of the host country, and national companies operating abroad were totally immune from Title VII, creating penalty-free zones for national employers and resulting in unfair treatment abroad.[36] The aggressive extension made by the 1991 amendment has filled this loophole and solved potential difficulties in determining exactly where national cabin crews or other flying personnel are working when they suffer discriminatory treatment in the course of their employment. Under the amendment, regardless of where the service base is located, employees of a national flag carrier are entitled to bring a charge of discrimination under Title VII against their employers in US federal courts. This capacity is especially advantageous to those who work under even more complicated situations, such as pursuant to terms of crew exchange in certain airline alliance agreements, whereby the flying personnel of *A* flag carrier might work on flights offered by *B* flag carrier.[37]

Can non-American employees hired by a US company's foreign subsidiaries invoke the protection of Title VII against their US employers in a US court? Since the 1991 amendment conspicuously indicates in Section 109(a) that an employee covered by the statute is "[a]n individual who is a citizen of the United States," foreign employees are expressly excluded. Furthermore, because the US Congress has clearly expressed its intent to expand the extraterritorial application of fair

[35]*EEOC*, *supra* note 23, at 499 U.S. 261. See also *Bryant* v. *International School Service, Inc.* *supra* note 22.

[36]*E.g.*, a US company could easily transfer a female employee who asked for maternity leave to its foreign subsidary and then fire her without concern for Title VII, and such unfair practices are alleged to happen often in international airline business, where most flight attendants are female and can be easily transferred to foreign bases owing to the special character of the transport industry. Furthermore, if a US female flight attendant was sexually harassed when working on a US flag carrier from Taipei to Tokyo, she might not have any legal recourse for damages sustained, because there is no similar fair employment regulations either in Taiwan or Japan (Article 3 of the Japanese *Labour Standard Law*, *supra* note 11, prohibits only discriminatory treatment in employment on the basis of nationality, religion, and social status).

[37]See also "US Air/BA Pact Faces New Fight" Av. Week & Space Tech. 1 Feb. 1993, at p.29.

treatment legislation only to national employees,[38] very little discretion is allowed for judicial interpretation. Accordingly, foreign subsidiaries of US airlines may, in employment relations, lawfully discriminate against their foreign workers, notwithstanding violations of fair employment legislation in the host country. However, a grey area exists for those non-fixed foreign employees, such as cabin crew employees who regularly work on-board to and from the US, for it is unclear whether the international flight which begins or terminates in the US would be conceived as "outside the United States;" no legislative interpretation is provided for the phrase "overseas employment." Following the principle in *Airline Pilot Association, International* v. *TACA*[39] (which, along with the *Northwest* series,[40] also supports the *EEOC* philosophy), only foreign employees whose place of employment is entirely outside US territory - mainly fixed employees, such as ground personnel hired in foreign termini - are excluded from coverage. The alien worker employed on national flights with territorial contacts within state territory is governed by national labor regulations.

B. Foreign State Compulsion and Bona Fide Occupational Qualification Defence

i.) Foreign Compulsion Defence

Even these extraterritorial amendments do not guarantee equal treatment for all national workers employed by US companies abroad. Before the enactment of the new *Civil Rights Act* in 1991, judicial authorities had already deferred to foreign laws when the enforcement of local anti-discrimination regulations directly contravened foreign public policy. The foreign state compulsion defence and bona fide occupational qualification (hereinafter "BFOQ") were both recognized as effective defences which a national company, and its with foreign subsidiaries, could employ to justify any foreign discriminatory operations when charged with a violation of Title VII. The 1991 amendments also admit the *de facto* validity

[38]See Congress document, S.Rep. No. 98-467, 98th Cong., 2nd Sess. 27-8 (1984), also R. S. Orleans, *supra* note 32.

[39]748 F.2d 965 (5th Cir. 1984): for a detailed discussion of the judgment see Section 4.2.2 of Chapter 4.

[40]See Section 4.2.1 of Chapter 4.

of these defences in exempting national employers abroad. If compliance with Title VII would cause them to violate the laws of their host country, the discriminatory operations of national employers may be upheld.[41]

Thus far, the foreign state compulsion defence has only been successfully raised in a few US labor law decisions concerning the transnational context.[42] However, since it has now been statutorily acknowledged in the 1991 amendment, its application is expected to increase.[43] The conditions prescribed upon this defence by *stare decisis* prior to the amendment will likely prevail:[44] first, the relevant foreign law must truly compel the employer's discriminatory activity; second, the foreign nation's interest in compelling such activity must override any competing local interests. However, if there is genuine government action, the forum cannot go further in measuring whether this compulsion violates either US or international law, because it is beyond the forum's authority to review the

[41]§ 109(b), *supra* note 30.

[42]Several courts have acknowledged, in theory, the applicability of the defence in an employment law context, *e.g.*, in the judgment of *Bryant* v. *International School Service, Inc.*, *supra* note 22; see also D. I. W. Cohn, "Equal Employment Opportunity for American Abroad" (1987) 62 N.Y.U.L.Rev. 1288, at p. 1313.

[43]A definition of the foreign state compulsion defence is also provided in the Restatement (Third) of Foreign Relation Law of the United States, (Tent. Draft No. 6) (St. Paul: American Law Institute Publishers, 1987), § 441 as: "1) In general, a state may not require a person a) to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national; or b) to refrain from doing an act in another state that is required by the law of that state or by the law of the state of which he is a national. 2) In general, a state may require a person of foreign nationality a) to do an act in that state even if it is prohibited by the law of the state of which he is a national; or b) to refrain from doing an act in that state even if it is required by the law of the state of which he is a national." In the Reporters' Notes to this Section, only antitrust law cases were cited. See Reporters' Note at p. 344. Before the end of apartheid, US airline companies might have been exempted from Title VII even if they had adopted discriminatory treatment against colored flight attendants or sales managers on their South African trunkline or sales offices. The possibility had long been raised by the draft *Labour Standard Act* (H.R. 3231, 98th Cong. 1st Sess. 1983) which been introduced by the US Congress to require American companies operating in South Africa to adhere to fair labour standards. See also B. J. F. Clark, Note, "United States Labour Practices in South Africa: Will A Mandatory Fair Employment Code Succeed Where Sullivan Principles Have Failed?" (1984) 7 Fordham Int'l L. J. 358, at 360.

[44]See M. A. Warner Jr.,"Comments: Stranger in a Strange Land: Foreign Compulsion and the Extraterritorial Application of United States Employment Law" (1990) 11 Nw. J.Int'l L.& Bus. 371, at p.375-9.

legality of such acts.[45]

Before this "codification," the foreign compulsion defence was supposedly unavailable to the employer who located subsidiaries in a country which he knew would require a violation of US laws.[46] Thus, if a US airline company acknowledges that any personnel of Jewish origin would be subject to discrimination in a Moslem country, and nonetheless hires a Jewish sales manager for its subsidiary office in such a place, then the employer could not invoke the foreign compulsion defense in US courts against Title VII.[47] The 1991 amendment does not expressly prescribe this limitation - which restricts employers from terminating employees through relocation to a hostile host country and hence from abusing this defence; but this peril and others could be eliminated under the abstract language provided in § 109(b).

ii.) Bona Fide Occupational Qualification Defence

The BFOQ also acts a major statutory exemption to the extraterritorial application of Title VII[48] which is considered necessary for daily business operation. Notwithstanding that in many domestic cases concerning the discriminatory treatment of flight attendants, the BFOQ has been successfully used by airlines as a powerful barricade against charges of discrimination,[49] legislative history and

[45]See *Mannington Mills* v. *Congoleum*, 595 F.2d 1287 (3rd Cir. 1979) at 1292.

[46]See Restatement (Third), *supra* note 43, § 441: "[d]enial of opportunity for new arrangements would probably not ...[give rise to the foreign compulsion defense]," citing *United States* v. *First National City Bank*, 396 F.2d 897 (2nd Cir. 1968); P. Vogelenzang, Note, "Foreign Sovereign Compulsion in American Antitrust Law" (1980) 33 Stan. L. Rev. 131, at 147 (defense unavailable to companies establishing business in foreign country knowing that government will compel behaviour contrary to ...[U.S.] laws) and D. L. W. Cohn, supra note 42, at p. 1315.

[47]See *Abrams* v. *Baylor*, *supra* note 22.

[48]Title VII permits an employer to discriminate on the basis of religion, sex, or national origin in those certain instances where the above element is part of a "bona fide occupational qualification (BFOQ)" which is reasonably necessary to the normal operation of that particular business or enterprise. See § 42 U.S.C. Section 2000e-2(e)(1) (1982).

[49]See *Diaz* v. *Pan American World Airways* 442 F.2d 385, 5th Cir.1971 *cert.denied*, 404 U.S.950 (1971). The Fifth Circuit Court decided that the use of strictly female flight attendants for business convenience or based on the customers' preference could not justify the BFOQ defence. Aside from this monumental case, see also *Levin* v. *Delta Air Lines, Inc.* 730 F.2d 994 (5th Cir.1984). In *Levin*, the Fifth Circuit Court held that the airline's discriminatory policy of removing pregnant flight attendants from flight duty as soon as their pregnancy was discovered was justified by

the guidelines of the Equal Employment Opportunity Commission (EEOC) both indicate that the BFOQ is interpreted "very narrowly" as a "very limited exception."[50] As in the context of conflict of labor laws, the BFOQ operates only when a host country's laws requires the contravention of US anti-discrimination statutes.[51] Potential BFOQs, like the foreign customer preference[52] or other subjective reasons, do not belong to the conflict of laws regime.

The landmark case in international air transport on the BFOQ is *Kern* v. *Dynalectron Corporation*,[53] where a US employer required all its helicopter pilots flying over the holy area of Mecca, Saudi Arabia to convert to the Moslem religion as a condition of employment, because any non-Moslem caught entering into this area would be beheaded under Saudi Arabian law. The plaintiff refused to convert and alleged that the requirement violated Title VII, but the federal court decided that under such a situation, the requirement of converting to the Moslem religion was a valid BFOQ warranting the employer's religious discrimination; the requirement was not merely a preference for specific job performance, but protected the safety of the employee, since the employer envisaged that any non-Moslems pilots would be unable to perform the flight safely.[54]

business necessity and was a BFOQ; and also *Condit* v. *United Airlines, Inc* 558 F.2d 1176 (4th Cir.1977).

[50]See *Weeks* v. *Southern Bell Tel & Tel. Co.*, 408 F.2d 228 (5th Cir), at 232 & case note 3. Also, 29 C.F.R. Section 1604.2(a) (1987).

[51]The "host country law" does not necessary represent the mutable, statutory-based form of regulations. For example, the law in Saudi Arabia (as in *Kern*, see *infra* note) is based on the words of God as given in the Qur'an, promulgated by the prophets, and with supplemental regulations supplied by the King and his ministers, which is generally enforced by custom as much as by Government. See H. C. Swanson, "United States Corporations Operating in Saudi Arabia and Laws Affecting Discrimination in Employment: Which Law Shall Prevail?" (1985) 8 Loy. L. A. Int'l & Comp. L. J. 135, at p.143-4.

[52]See *e.g. Fernandez* v. *Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981). The judgment stated that the mere fact that it was an international case did not distinguish it from domestic cases, for the foreign customers' preference would not justify the use of BFOQ defence.

[53]577 F.Supp.1196 (N.D.Tex.1983) *aff'd mem*, 746 F.2d 810 (5th Cir.1984).

[54]One commentator thought that the district court erred in invoking the BFOQ defense in *Kern*, for the relevant religion (Moslem) does not determine the capacity of an individual to fly a helicopter. In other words, the focus of this case was a foreign compulsion defense, rather than a BFOQ dispute. See D. L. W. Cohn, *supra* note 42, at 1309.

Similar employment requirements in the international airline industry would be relatively rare, for few countries have such rigorous religious regulations concerning pilots or flight attendants on-board foreign aircraft. Yet it would not be impossible for a US sales manager or other employees to be based in countries with similar requirements, such as those which prescribe inequitable treatment toward female employees,[55] affecting job promotion and arousing equal treatment and BFOQ disputes.

5.1.3 Application to Employees of Foreign Airlines

Like all employees hired by foreign airlines who have a fixed base in the US,[56] employees of foreign or US nationality working on a foreign flight operating to and from the territorial jurisdiction of the US should nevertheless be protected under Title VII, by analogy with the decision in *TACA*[57] on the scope of the *RLA*.

Since the adoption of the 1991 amendment, even US nationals employed abroad by foreign corporations which are "controlled" by their US parent or partner companies are covered under Title VII, substantially expanding the scope of protection for employees.[58] The amendment allows the court to refer to various elements, such as "the interrelation of operations [between the employer and other company], the common management, the centralized control of labor relations, and the common ownership or financial control of the employer and the corporation," in deciding whether the foreign company which discriminates is "substantially controlled" by the national company and whether the latter

[55]In the 1979 decree of the Shari'a, women cannot travel alone, work with men or with non-Muslim foreigners, dress immodestly, *etc.*: see H. C. Swanson, *supra* note 51, at p.145-6.

[56]Due to the definition of the term "employer" under Title VII, which does not preclude foreign subsidaries from operating business within US territory: see *infra*, Section 5.1.4.A of this Chapter. See also,*e.g.*, *Kavanagh* v. *KLM Royal Dutch Airlines*, 566 F.Supp. 242 (N.D.Ill. 1983) ("KLM ... is an agency of the Kingdom of the Netherlands and ... its activities are closely regulated by the federal government and the State of Illinois. In the context of Section 1983 (of the Civil Rights Act), ...the term "state" is not intended to include foreign government; it clearly is a reference to a state of the United States." in 245-6.)

[57]*Supra* note 39.

[58]*Supra* note 30.

shall be held liable for this discrimination.[59] The same provision was inserted as a supplement to the *ADEA* subsequent to its 1984 amendments.[60]

Because each of these four elements are in fact crystallizations of the common law rules of agency,[61] the relevant jurisprudence provides an abundant source of interpretation for their application to complicated ventures like the international airline industry. According to judicial precedent, each of these elements must be "indicative of interrelation" to hold a US company responsible for the discriminatory acts of foreign employers:[62] "the presence of any single factor ... is not conclusive."[63] However, it is not necessary for all four criteria to be present in every case.[64] If there is strong evidence of common control over labor-management policy,[65] or if the national company and the foreign employer are "highly integrated with respect to ownership and operations,"[66] then they may be considered together as a single employer. Furthermore, the national controller need not have "total control or ultimate authority over the foreign employer's hiring decisions."[67] If the national controller's participation is sufficient and necessary for the employment process as a whole,[68] then it will be liable for the discriminatory practices exercised by its foreign subsidiaries.

Since no aviation case serves as a reference, a hypothetical scenario might

[59] *Id.* § 3(A), (B), (C), (D).

[60] 29 U.S.C. § 623(g)(3)(A),(B),(C),(D).

[61] See *e.g.*, *Lavrov* v. *NCR Corp.*, *supra* note 22, at 105-7, *Armbruster* v. *Quinn*, 711 F.2d 1332 (6th Cir. 1983) at 1335-9, *NLRB* v. *Borg Warner Corp.*, 663 F. 2d 666 (6th Cir.), *cert. denied*, 457 U.S.1105, 102 S.Ct. 2903, 73 L.Ed.2d 1313 (1982).

[62] *Sheeran* v. *American Commercial Lines*, 683 F.2d 970 (6th Cir. 1982), at 978.

[63] *Lavrov*, v. *NCR Corp.*, *supra* note 22, at 106.

[64] *Id.*

[65] *Sheeran* v. *American Commercial Lines*, *supra* note 61.

[66] *Fike* v. *Gold Kist, Inc.*, 514 F.Supp. 722 (N.D.Ala, 1981), at 726, *aff'd*, 664 F.2d 295 (11th Cir. 1982).

[67] *Rivas* v. *State Board for Community Colleges and Occupational Education*, 517 F.Supp. 467 (D.Colo. 1981), at 470.

[68] *Id.*

help to illustrate how these provisions might apply.[69] For example, suppose that a US flag carrier *A* has invested about $196 million in flag carrier *C* in return for a 33.3% share of its equity. This pact might include a twenty-year agreement for an airline management and data-processing service provided through *A*. Under this joint-operation agreement, *A* provides *C* with several instrumentalities, including certain international stations and training in passenger service outside the territory of state *C*. If implemented, however, the agreement will result the lay-off of 1200 to 1300 of *C*'s employee because the management policy of *A* requires fewer employees to be hired.

Under this hypothetical pact, could a US national who works abroad for *C* bring an action in US courts against *A* under Title VII for his termination, alleging that the latter is the "controller" of *C*? Under the joint venture, the ownership (33.3% versus 66.7%) and operation (*A* provides several key instruments of operational management, including managerial staff) of *A* and *C* are highly integrated. Suppose further that *A* is equally expected to participate in the daily management of *C*, in such areas as crew training; in controlling the labor-management policy of the latter company, *A* could easily be considered to share an "intercorporate relationship" with its new partner even if it has declared that it has no intention of or interest in controlling *C*, and even if *C* continues to make independent decisions with respect to pricing, scheduling, and route operation.

5.1.4 Conflicts of Treaties of Friendship, Commerce, and Navigation (FCN Treaties) and Title VII

A. Introduction

The definition of the term "employer" under Title VII prescribes only that it is a "[p]erson engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year."[70] Two exceptions expressly provided

[69]The following example is based on the international consortium deal factually projected by AMR and Canadian Airline in 1993: see "AMR, Canadian Strike Win-Win Deal" Av.Week & Space Tech.(4 Jan.1993) 29.

[70]42 U.S.C. § 2000e-2(b), *et seq*.

in this definition are the US government (including corporations which are wholly-owned by the US government) and aboriginal tribes within its territory.[71] An "employer" would, therefore, entail a foreign subsidiary within the US. Since most foreign (legal) persons operate businesses in the US on the basis of an FCN Treaty, conflicts may arise from discrepancies between the privileges offered under this FCN Treaty and the host country's fair employment regulations.

FCN Treaties are enacted principally to promote and secure foreign investment within the signatory's territories by eliminating certain domestic legal barriers.[72] Under this special scheme, a foreign investor generally controls its enterprises on the territory of the host country without interference. Since the right of either party's employers to hire their own nationals in high-level positions is conceived to be vital to the success of their investments, parties to FCN Treaties are apt to incorporate clauses permitting their respective companies to engage executive or other key personnel "of their choice." Naturally, mutual consent on this issue may not always be reached when there are significant differences between the parties with respect to economic development or legal culture.[73]

The employer-choice provision is generally drafted in this way:[74]

[71] *Id*, § 2000e-2(b)(1).

[72] The contents of each FCN Treaty might vary in detail owing to different diplomatic considerations, nor doesit necessarily carry the name of FCN Treaty. However, the basic content of this kind of treaty remains similar: permitting the nationals of either party to enter the territories of the other party to carry on trade and engage in activities related to their investment, granting the right of nationals of either party to travel freely within either party's territories and guarantee fair treatment and safety, furthermore, protecting the property of the nationals of either party, *etc.* Generally, the FCN Treaty is formulated to cope with mutual economic intercourse and investment needs. See also H. Walker, "Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice" (1956) 5 Am. J. Comp. L. 229 at p.230-1.

[73] See, *e.g.* Treaty of Amity & Economic Relations, May 29, 1966, United States-Thailand, 19 U.S.T. 5843, T.I.A.S. No.6540 (Article IV of the Treaty provides that: "[c]ompanies ... of either Party shall be permitted, *in accordance with the applicable laws*, to engage, within the territories of the other Party, accountants or other technical experts, executive personnel, attorneys, agents and other specialists of their choice [emphasis added]," which posts stricter limitations on the Parties' freedom of choice.)

[74] Article VIII(1) of the Treaty of Friendship, Commerce and Navigation, November 7, 1957, the United States-Republic of Korea, 8 U.S.T. 2217, T.I.A.S. No.3947. Similar articles exist in FCN Treaties between the US and many other countries: see, *e.g.*,Treaty of Friendship, Commerce and Navigation, April 2, 1953 United States-Japan, 4 U.S.T. 2063, T.I.A.S. No.2863; Treaty of

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists *of their own choice*. [Emphasis added]

This provision, which grants foreign investors unfettered discretion in filling certain positions at the professional and executive level, creates the possibility that the host country's anti-discrimination laws will be contravened. As there are over two dozen similar commercial treaties existing between the US and other countries,[75] and as most of the foreign international airline industries operating to and from the US are inevitably covered by FCN Treaties,[76] such conflict issues inevitably arise in international airline labor law.

B. Judicial practice

Foreign employers doing business in a host country are not necessarily immune from its local regulations on equal treatment at work. Immunities are subject to judicial interpretation of the relevant laws and international treaties, *i.e.*, FCN Treaties and ATAs.[77] In *Lavrov* v. *NCR Corp.*,[78] the federal district court

Friendship, Commerce and Navigation, August 3, 1951 United States-Greece, 5 U.S.T. 550, T.I.A.S. No.3057; Treaty of Friendship, Commerce and Navigation, October 29, 1954, United States-Federal Republic of Germany, 7 U.S.T.1839, T.I.A.S. No.3593; Treaty of Friendship, Commerce and Navigation, March 27, 1956, United States-The Netherlands, 8 U.S.T. 2043, T.I.A.S. No.3942, *etc.*

[75] For an updated list of the FCN Treaties signed by the US, see *e.g.*, 1 I.L.M. 92, 94 (1962)

[76] See, *e.g.*, Article VII of the Treaty of Friendship, Commerce and Navigation, November 7,1957, the United States-Republic of Korea , *supra* note 74, which permits nationals and companies of either signatory to engage in all types of commercial, industrial, financial and other activities for gain within the territories of the other signatory, and consequently, to establish and maintain branches, agencies, offices, factories and other establishment appropriate to the conduct of their business therein. This is the basic legal infrastructure for foreign international airlines operating their business in the US. Similar clauses might be included in the Air Transport Agreement, if there exists no FCN Treaty, or if the FCN Treaty is not an exclusive instrument regulating the related matters. See *infra*, Section **5.1.4. B** of this Chapter.

[77] According to Article 7 of the Chicago Convention of 1944, ICAO Doc 7300/6, signatories shall have the right to refuse permission to the aircraft of other states to operate within its territories, and shall undertake not to enter into any arrangement to grant any exclusive privilege of operating within its territories to any state. Except in several Commonwealth countries (see, B. Cheng, *The Law of International Air Transport*, (London: Steven & Sons, 1962) at p.341-7), this cabotage right to perform air carriage from one point in the territory of a state to another point in the same state is reserved currently in bilateral air transport agreements by most of the States in the world, see CAB: *Petition of Qantas Empire Airways, Ltd. for interpretative rule* (Docket No. 9240, April 6, 1959), Order E-13710, p.1-18. Such a limitation makes the definition of operating "within [the territories of] the United States' by foreign airlines" a little

followed the *Lauritzen* series, holding that in the absence of strong legislative intent, federal labor laws regulating the master-servant relation do not apply to foreign employers.[79] However, this decision was intended to resolve the dispute between a national worker and a foreign employer operating entirely abroad, and therefore it may not affect those workers who have territorial contacts with the *locus fori.*

The landmark case of *Sumitomo Shoji America, Inc.* v. *Avagliano* (hereinafter "*Sumitomo*")[80] delineates the margin of immunity from Title VII which is offered by FCN Treaties to foreign employers within US territory. The basic rules established in *Sumitomo* have generally been followed or reviewed by subsequent related aviation cases.

In *Sumitomo,* the defendant-appellant Sumitomo, a subsidiary wholly owned by a Japanese trading corporation, Sumitomo Shoji Kaisha Ltd., was a corporation organized under New York State law. Sumitomo was accused by its female US employees of violating Title VII due to its policy of filling executive, managerial, and sales positions with Japanese male workers only. The Japanese employer counterclaimed that Article VIII(1) of the FCN Treaty between the US and Japan provides a Japanese corporation with the unconditional right to hire only Japanese citizens for certain positions.[81] However, the court was not moved by this defence.[82]

obscure, yet following the above-mentioned *TACA* principle, this should not be limited as only referring to ground employees based in the host country. In recent alliance negotiations between USAir and British Airways, if both the US and U.K. governments could consummate a deal on the liberalization of domestic market, British Airways might operate flights "within the US" under the code-sharing project, notwithstanding that some technical details may be added, such as flight colours. See, "U.S.Set Litmus Test for Foreign Investment" Av.Week & Space Tech. (4 Jan. 1993) 30. After this semi- "Open Sky" policy is adopted, employees will certainly include flight attendants who work on-board foreign aircrafts to and from the host country.

[78]*Supra* note 22.

[79]The judgment cited *Benz* v.*Compania Naviera Hidalgo S.A.* 353 U.S.138 (1957), *Lauritzen* v. *Larsen,*345 U.S. 571 (1953) and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras* 372 U.S.10 (1963) as *stare decisis*, but in this case the issue of whether national labour law could be applied extraterritorially to foreign corporations was, as a matter of fact, not the major focus of the dispute. Hence this judgment will be of only marginal importance.

[80]457 U.S.176 (1982).

[81]Article VIII(1) of the FCN Treaty between the United States and Japan provides that "companies of either Party shall be permitted *to engage, within the territories of the other Party,* accountants and other technical experts, executive personnel, attorneys, agents and other

It considered that the primary purpose of Article VIII of the US-Japan FCN Treaty was "intended to exempt companies operating abroad from local legislation restricting the employment of noncitizens,"[83] but not to give Japanese corporations within the host country a "licence to violate American laws prohibiting discrimination in employment;"[84] thus, the prerogative in the FCN Treaty could not immunize a foreign employer from local requirements on equal treatment at work, though Sumitomo was still entitled to certain preferences in appointing workers under the BFOQ exception to Title VII.[85]

This judgment of the Second Circuit directly contradicts the precedent established by the Fifth Circuit in *Spiess* v. *C. Itoh & Co. (America), Inc.*,[86] which held that Article VIII of the US-Japan FCN Treaty grants Japanese companies full discretion in deciding which executives and technicians shall manage their investments in the host country without regard to the host country's equal employment laws,[87] *i.e.*, Title VII or other fair employment laws. A *certiorari* was therefore granted by the Federal Supreme Court to resolve the conflict. In its judgment, the Supreme Court did not attempt to draw a borderline between Title VII and Article VIII of the US-Japan FCN Treaty; on the contrary, it avoided the dilemma and concluded that since Sumitomo is a US corporation, although wholly-owned by a Japanese company, it is not covered by Article VIII of the US-Japan FCN Treaty and must observe local labor regulations, including Title VII.

Legal effects indirectly created by this judgment will seriously affect subsequent judicial decisions on the conflict between Title VII and FCN Treaties.

specialists *of their choice* [emphasis added]." See Treaty of Friendship, Commerce and Navigation, April 2, 1953 United States-Japan (hereinafter cited as the FCN Treaty of US-Japan), *supra* note 73.

[82] *Avigliano* v. *Sumitomo Shoji America, Inc.*, 638 F.2d at 555-6.

[83] *Id.*, at 559.

[84] *Id.*, at 558.

[85] On the BFOQ, see *supra*, Section **5.1.2.B** of this Chapter.

[86] 643 F.2d 353 (5th Cir.1981). Itoh is also a Japanese subsidiary established in New York; Itoh's US employees brought a class action under Title VII, alleging its managerial promotions and other benefits were available only to Japanese employees, constituting discrimination based on national origin.

[87] *Id.*, at 361.

First, the subsidiaries of foreign companies which are incorporated under the laws of a host country can no longer invoke privileges under FCN Treaties because they are conceived to be no different from local companies. Therefore, if a foreign Japanese airline sets up a subsidiary to promote its sales service according to New York laws, the latter becomes a local company subject to the requirements of Title VII. Moreover, the court held that the sole purpose of the FCN Treaty was to give corporations from each signatory country a legal status in the territory of the other, thereby allowing them to conduct business in that other country on a "comparable basis" with domestic firms,[88] rather than to give "foreign corporations" rights which do not exist for domestic companies.[89] In other words, even if the Japanese airline's New York branch remained a Japanese (foreign) corporation, its managerial policy for filling certain positions cannot violate Title VII due to this "national treatment" restriction.[90]

A new dilemma was created by the Supreme Court in *Sumitomo*: if its restrictive construction of Article VIII(1) of the US-Japan FCN Treaty is correct - notwithstanding that it is based on the drafting history or the rationale provided in the Guidelines for Activities of Multinationals by the Organization for Economic Corporation and Development (hereinafter "OECD Guidelines"), which are endorsed by the US government[91]— what is the real function of a provision like

[88]*Supra* note 80, at 186.

[89]*Id.* at 188.

[90]"National treatment," which is defined in Article XXII(1) of the FCN Treaty of US-Japan, refers to the treatment accorded within the territories of a Party upon terms no less favourable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party. Some reviewers have argued that the Supreme Court judgment left a loophole as to whether a branch operation of a Japanese company operating in the US could successfully assert the privilege in the employer choice provision on the FCN Treaty of US-Japan as a defence to Title VII, which seems to neglect that the analysis on national treatment in the judgment was referring to the Japanese branch operating within the US. See M. Orebic, "Japanese Companies on United States Soil: Treaty Privileges vs. Title VII Restraints" (1986) 9 Hastings Int'l & Comp. L. Rev. 377 at 379-80.

[91]Section 4 of the Title "Employment and Industrial Relations" in "Guidelines for Multinational Enterprises" provides that "[an enterprise should] observe standards of employment and industrial relations not less favorable than those observed by comparable employers in the host country." A full text of the OECD Guidelines can be found in R. Blanpain, *The OECD Guideline for Multinational Enterprises and Labour Relations 1976-1979 — Experience and Review* (Deventer: Kluwer, 1979) at p.279. See also B. I. Mellits, Note, "The Rights of a Foreign

Article VIII(1) of the US-Japan FCN Treaty if employers cannot assign persons to key positions "of their own choice?" It seems that if foreign employers are only entitled to do so under the BFOQ exception, which offers relatively limited preference interests,[92] it would be unnecessary for the State Parties to supplement their agreements with provisions like Article VIII(1). Further, since *Sumitomo* deals solely with foreign subsidiaries incorporated under local laws, foreign investors may be induced to retain pure foreign companies and thereby escape local labor regulations; the task of delineating the scope of privileges regarding labor-management policies adopted by foreign employers under FCN Treaties, then, will eventually be inescapable for judicial authorities.

Wickes v. *Olympics Airways* (hereinafter "*Wickes*")[93] was the first case to deal directly with the conflict between an FCN Treaty and domestic fair employment laws in the international air transport industry. In *Wickes*, a US employee working as a district sales manager for Olympic Airways in Michigan, alleged that his termination by the Greek-owned airliner constituted a violation of Michigan's civil rights laws prohibiting discrimination in employment on the basis of age and national origin. The court held that Michigan's *Civil Rights Act* does not preclude the foreign employer from exercising its privilege under the US-Greece FCN Treaty to prefer its own citizens for managerial and technical positions,[94] but this prerogative falls short of granting exclusive immunity from local labor laws in general, as counterclaimed by the foreign airline company — the foreign employer has no right to discriminate against or among non-Greek citizens, hired for positions "not covered" by the FCN Treaty, on the basis of sex, national

Corporation and Its Subsidary under Title VII of the Civil Rights Act of 1964 and Treaties of Friendship, Commerce and Navigation" (1983) 17 Geo. Wash. J. Int'l L. & Econ. 607 at 635.

[92]The BFOQ defense has long been held in the Equal Employment Commission and the courts to constitute an extremely narrow exception to Title VII. See also *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) at 334, and *supra* note 85.

[93]745 F.2d 363 (6th Cir. 1984).

[94]The Government of Greece and the US reached the FCN Treaty on 1951, Article XII(4) of which provides: " Nationals and companies of either party shall be permitted *to engage*, within the territories of the other Party, *accountants and other technical experts, executive personnel, attorneys, agents and other employees of their choice* among those legally in the country and eligible to work [emphasis added]." See Treaty of Friendship, Commerce and Navigation, Aug.3 & Dec.26, 1951, United States-Greece (hereinafter cited as FCN Treaty of US-Greece), *supra* note 74.

origin, or any other factors prohibited by Michigan law,[95] though it does have "a narrow privilege to discriminate" for positions which are covered by the Treaty.[96]

In *Wickes*, the employer was a foreign corporation owned by a foreign government, rather than a local subsidiary, which gave the court an opportunity to fill the gap from *Sumitomo*. Interpreting the phrase "of their choice" in the FCN Treaty to signify "the intent of both the United States and Greece to give the other's companies the freedom to fill designated critical positions *without interference*,"[97] the court held that the foreign flag carrier enjoys the freedom to favor its own foreign citizens for key positions listed in the FCN Treaty, without violating local equal employment regulations, because this policy may help to ensure the company's operational success in the host country. Accordingly, Olympic Airways would still be subject to the Title VII claim if the foreign airliner discriminated against employees for positions other than those listed in the Treaty, such as flight attendants or other ground personnel, who are hired to work for

[95]The applicable Elliott Larsen *Civil Rights Act* of 1976 of Michigan State in this case is the state implementation of the federal *Civil Rights Act* of 1964.

[96]*Supra* note 93, at 368-9.

[97]*Id.* at 367 [emphasis added]. The court cited H. J. Steiner & D. F. Vagts, *Transnational Legal Problems*, (Mineola: The Foundation Press, 1968) at pp.37-8 . Some reviewers have emphasized that the *Wickes* decision hinged on the phrase "regardless of nationality" in Article XII of the FCN Treaty of US-Greece ("[c]ompanies shall be permitted to engage, on a temporary basis, accountants and other technical experts, *regardless of nationality* and regardless to the extent they may possess the qualifications required by applicable laws for the exercise of their duties within the territory of such other Party, for the particular purpose of making examinations, audits and technical investigations for the exclusive account of their employers in connection with the planning and operation of enterprises controlled by the latter or in which they have a financial interest within such territories [emphasis added]"), which was intended to restrict the employer choice provision and limit its application to percentile legislation. See, G. D. Silver, "Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Branches of Foreign Companies to Hire Executives 'of Their Choice'" (1989) 57 Fordham L. Rev. 765 at 779. This is a false interpretation of Article XII, for the latter part of this Article was drafted to allow the Signatories to hire only accountants and other technical experts for temporary and technical purpose, without interference from the qualification requirements of the host country's regulations, so as to accelerate the initial operation of the enterprise. Hence, the foreign companies are free to choose these specialists without regard to their nationalities and local qualifications. The phrase "regardless of nationality," in fact, has no logical connection with whether the local equal employment law would apply. Therefore, although the FCN Treaty of US-Japan does not contain this phrase, there should not be any divergence in constructing the employer preference provision.

the airline's US branch.

The *Wickes* reasoning contains its own flaws. Following *Sumitomo,* the judgement noted that the employer choice provision in FCN Treaties is intended only to ensure the parties a right to consider their own nationals in hiring for certain important positions,[98] though the court neglected the existence of a clear divergence between the phrases appearing in the respective US-Japan and US-Greece FCN Treaties; the former provides that "companies of either Party shall be permitted to engage ... accountants and other technical experts, executive personnel, attorneys, agents and *other specialists of their choice,*"[99] whereas the US-Greece Treaty contemplates *prima facie* wider categories: "companies of either Party shall be permitted to engage ... accountants and other technical experts, executive personnel, attorneys, agents and *other employees of their choice.*"[100] It seems that the argument made by the Greek airline - that its employment prerogatives are unconditional - is more sound, because it is nearly impossible to determine which position is "covered by the Treaty" if no clear meaning is expressed for the words "and other employees." The latter phrase might refer to any employees other than those who are expressly listed.[101]

Nevertheless, the *Wickes* model does not guarantee protection from discrimination to employees of foreign airlines operating to and from the *locus fori,* for when the flag carrier is mostly owned or controlled by foreign governments, the adoption of a discriminatory employment policy might not be within the managerial discretion of the airliner itself, but under the ordinance or direction of the government owner,[102] and the above-mentioned foreign state compulsion

[98]See also G. D. Way, "Japanese Employer and Title VII: *Sumitomo Shoji America, Inc.* v. *Avagliano*" (1983) 15 N. Y. U. J. Int'l L. & Pol. 653, at p. 694.

[99] Article VIII(1) of the FCN Treaty of US-Japan, *supra* note 74 [emphasis added].

[100]Article XII of the FCN Treaty of US-Greece, *supra* note 74 [emphasis added].

[101]This was also seen in note 7 of the *Sumitomo* judgment, *supra* note 80, at 182, in which the Federal Supreme Court cited Article XII of the FCN Treaty of US-Greece ("and other employees of their choice ....") as an example of treaties "[c]ontaining even more broad language [than that of US-Japan]."

[102]See *e.g., South African Airways* v. *New York State Division of Human Rights* 315 N.Y.S.2d 651, 64 Misc.2d 707 (N,Y.Ct.,1970). In this case, South African Airways (hereinafter "SAA") was accused by the New York State Attorney General of violating human rights law (Executive Law,

defence could then be used to escape local regulations.

The language of *Wickes* also helps to clarify the coverage of local equal employment regulations over the foreign employee working for a foreign company in the host country; the Sixth Circuit held that the Greek flag carrier has no right to "discriminate against or among non-Greek citizens it hires," where the phrase "non-Greek citizens" encompasses US citizens and other alien employees from third-party countries. Could the Greek employer therefore lawfully discriminate against Greek employees imported to work in its US subsidiaries? The answer must be negative, for according to a strict interpretation of the US-Greece FCN Treaty, foreign corporations are only authorized to "favor their own citizens for ... positions with the company," not to discriminate against their own citizens on the basis of race, sex, *etc.*

In *MacNamara* v. *Korean Airlines* (hereinafter "*MacNamara*"),[103] the foreign airline discharged six local managers from its US branches and replaced them with four citizens of its own country. The discharged US employees brought an action against the foreign employer, alleging that their termination was based on national origin and age, thereby violating Title VII, *ADEA*, and the *Employment Retirement Income Security Act* of 1974. The motion was dismissed in the federal district court,[104] but was later reversed on appeal to the Third Circuit, and the appeal decision was eventually confirmed by the Federal Supreme Court.[105]

The phrase "of their choice" in the US-Korea FCN Treaty was once again the focus of the dispute.[106] The Third Circuit noted that the purpose of an employer

Section 296(e), subd.2) with respect to public accommodations, for the SAA refused to carry a passenger who had not been granted a visa to the Republic of South Africa. The Supreme Court of New York County rendered that the denial of visas was not within the power of carrier but rather was vested in counsel of South Africa, hence the air carrier was not a party to the racial discrimination. Though the case does not concern a labour law claim, it reveals some prospective restraints which might exist in the action brought against foreign airlines for discrimination in employment.

[103]863 F.2d 1135 (3rd Cir. 1988).

[104]*MacNamara* v. *Korean Air Lines*, 45 Fair Empl.Cas.(BNA) 384 (E.D.Pa.1987).

[105]*MacNamara, cert. denied*, 110 S.Ct. 349 (1989).

[106]"[C]ompanies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists *of their choice* [emphasis added]." See Article VIII of the FCN Treaty of US-Korea,

choice clause in the FCN Treaty is to "assure foreign corporations that they may have their business in the host country managed by their own nationals if they so desire,"[107] not to ensure that they can make employment decisions entirely free from the statutory prescriptions of the host country. Therefore, the foreign airliner may not choose its own citizen as a company executive for its US branch without being subjected to judicial review of its motives by local authorities.[108] Such a proposition effects an even stricter interpretation of the national treatment principle adopted in *Sumitomo*, which considered that the purpose of the employer preference provision in the FCN Treaty was not to give foreign corporations rights which are unavailable to domestic companies, but rather to guarantee them the opportunity to conduct business on an equal basis with local companies without suffering discrimination based on nationality. In *MacNamara*, the employer choice provision guarantees only the foreign employer's right to hire, rather than to prefer, its own citizens for certain positions. Any employment practice exercised by the foreign employer will be subject to scrutiny under Title VII and related local regulations, and the legal action could succeed under Title VII if the employment decision is based on considerations of race or national origin.[109]

The *MacNamara* decision, in effect, deprives the foreign airliner of the functional "employer choice" defence offered by FCN Treaty provisions; foreign flag carriers are thus subjected to all the requirements prescribed by local equal treatment laws regarding employment, whether it remains a foreign company or

supra note 74.

[107] *Supra* note 103, at 1140.

[108] In its judgment, the court urged the national employee to prove the foreign airline's subjective intent of discharging him in order to ensure it constitutes deliberate discrimination before he proceeds with the Title VII claim, meaning that the motivation of the foreign flag carrier in substituting its staff might be subject to judicial review under Title VII. See *id*. at 1148.

[109] Therefore, one case reviewer's interpretation that the judgment "[d]isagreed with KAL's argument that the term 'to engage foreign nationals' *included the right to replace persons such as MacNamara with a foreigner* [emphasis added]" (see A. J. Lauer, *supra* note 14, at p.434) is not correct. In fact, the Third Circuit court agreed with the foreign flag carrier's counterclaim, and concluded that "[t]he right of a foreign business under Article VIII(1) to engage the services of its own citizens as executives was intended to include the right to engage them as replacements for existing personnel [emphasis added]:" see *MacNamara, supra* note 103, at 1141. A contrary reading would seriously interfere with the daily managerial practice and obstruct the personnel reallocation project of a foreign industry in the host country.

becomes incorporated under local laws.[110] However, the rule in *MacNamara* does not seem to be conclusive, for in the more recent decision of *Fortino* v. *Quaser Co.*,[111] the Seventh Circuit reversed the lower court's decision that a wholly Japanese-owned US subsidiary violated Title VII when it discharged American managers first in its restructuring project. The appeal court confirmed that a Japanese subsidiary is not liable for discrimination on the basis of nationality, because "discrimination in favour of foreign executives given a special status by virtue of a [FCN] treaty and its implementing regulations is not equivalent to discrimination on the basis of national origin."[112]

In *Fortino*, meanwhile, since the defendant employer Quasar Co. did not raise the prerogative offered by the US-Japan FCN Treaty as a defence before the trial court, it is no surprise that the employer failed in the first instance; yet the defence was subsequently erected as a counterclaim on appeal:[113] "[f]or the sake of international comity, amity and commerce," the court could not "close [its] ... eyes to the treaty because [the defendant] ... failed to mention it to the district court."[114] Although the application for waiver of the defence was rejected, one must question why Quasar failed to mention such an important treaty defence in the trial court proceedings. One case reviewer suggested that the employer's lawyers paid excess attention to labor law issues and neglected the international

[110]For comments on *MacNamara*, see also N. Ishizuka, "Subsidiary Assertion of Foreign Parent Corporation Rights under Commercial Treaties to Hire Employees 'of Their Choice'" (1986) 86 Colum. L. Rev. 130, and S. M. Tapper, Notes, "Building on *MacNamara* v. *Korean Air Lines*: Extending Title VII Disparate Impact Liability to Foreign Employers Operating Under Treaties of Friendship, Commerce, and Navigation" (1991) 24 Vand. J. of Transnat'l. L. 757.

[111]950 F.2d 389 (7th Cir. 1991).

[112]*Id*, at 392. Quasar is a American subsidiary of Matsushita Electric Industrial Company, Ltd., of Japan, which markets the latter's products in the US. Matsushita assigns several of its own financial and marketing executives to Quasar on a temporary basis, and these Japanese citizens receive E-1 or E-2 visas when entering into the US. The firing policy was implemented by an executive sent by Matsushita, reducing the workforce of Quasar by half, and almost all of those terminated were American. However, only a few Japanese managers were relocated back to Japan; in fact, most of them received salary increases.

[113]For generally, the upper court would not consider a point that was missing in the district court.

[114]*Supra* note 111, at 391.

law issues.[115] Another explanation might be that the frustrating conflict rules established in *Sumitomo, Wickes* and *MacNamara* made the foreign corporations and its US subsidiaries fall into a putative treaty-phobia. Following *Sumitomo,* Quasar is not eligible to invoke the protection of the US-Japan FCN Treaty; even if it were conceived as a foreign firm, according to the subjective intent rule proposed by *MacNamara,* it is still only exempted from fair employment regulations upon proof that its reallocation of personnel was not based on any intention to discriminate, which does not seem likely to help under the circumstances.

Other novelties could be found in *Fortino,* which make the conflict rules even more perplexing. First, the Seventh Circuit discovered a loophole left by *Sumitomo;* insofar as the latter decision held only that an American subsidiary of foreign parents will not be protected by the FCN Treaty - but what if the subsidiary's discriminatory conduct was substantially dictated by its foreign parent? Could the subsidiary then assert its parent's treaty right? This question was apparently left open by *Sumitomo,* and the answer given in *Fortino* is affirmative.[116] Second, the *Fortino* court tried to separate the legal implication of the words "citizenship" and "national origin" in the treaty and Title VII; according to the judgment, Title VII protects only US employees "of non-Japanese origin" from discrimination in favor of those "of Japanese origin," rather than forbidding discrimination on the ground of "citizenship," so the preference of Japanese managers over American managers is definitely not discriminatory under Title VII.[117]

[115]See D. C. Dowling, "Preparing for the Internationalization of U.S. Employment Law Practice" (1992) 43 Lab. L. J. 350, at 350-1. The author presumed that the labor lawyers in *Fortino* missed the international law issue and wondered if they would face malpractice liability if this omission had caused a waiver of defence.

[116]*Supra* note 111, at 393.

[117]*Id.,* at 392-3. The *Fortino* judgment cited the case *Espinoza* v. *Farah Mfg. Co.* 414 U.S. 86 (1973), in which the Federal Supreme Court decided that Congress did not intend the term "national origin" in Title VII to embrace any citizenship requirement. Nevertheless, one must question the legitimacy of the Seventh Circuit's reference to this precedent as an indicator that Title VII does not forbid discrimination on grounds of citizenship. In *Espinoza,* the Mexican employee encountered a requirement of citizenship as a preliminary condition to entering into an employment relationship with a purely national manufacturer; this treatment on the basis of national origin, however, did not occur in *Fortino.* The "[h]istorical practice of requiring citizenship as a condition of employment" (*First National Bank* v. *Missouri,* 263 U.S. 640, 658 (1924)) *id,* at 91 is not applicable between a US corporation and a US job applicant. Moreover, Quasar appointed US as well as Japanese executives. Thus, in concluding that Quasar is

The *Fortino* judgment technically reverses *Sumitomo*, which had already expressly indicated that an American subsidiary of foreign parent corporations cannot invoke Title VII of the *Civil Rights Act*. In spite of the precedents in *Wickes* and *MacNamara*, the Seventh Circuit argued that *Sumitomo* never addressed whether a dummy US subsidiary, playing only a puppet role in employment decisions, could assert its foreign parent's treaty rights as a defence. The innovative decision reduced the rule in *Sumitomo* to an amphibological standard: if an US company is only a puppet, then it is endowed with the treaty right and will be exempted from local fair employment laws. Yet it is not quite clear how to measure whether a discriminatory reorganization of personnel by foreign subsidiaries flows from an order "dictated" by the parent. The only criterion suggested in *Fortino* is that the person in charge of the reorganization process (including the decision to fire US executives) was sent by Quasar's Japanese parent. However, compare *Sumitomo*, in which the subsidiary's role in formulating its Japanese-male-only promotion policy was subordinated to an even greater degree. A more precise standard is needed to make the waiver of local fair employment regulations under the FCN Treaty more predictable.

Writers on the subject argue that certain methods of reconciliation should be introduced which would entitle foreign corporations or subsidiaries operating within the host country to privileges over local equal employment requirements.[118] The first step would be to separate the management levels of the foreign company into upper, middle, and lower levels. Excepting the positions in the lower level, which have no necessary connection to the foreign parent and would be covered under Title VII protection, personnel appointments in the other two levels (to which the interest of foreign parent is more closely related) would be entirely at the discretion of the foreign employer. The second step would be to institute a time-frame which depends on the development of the foreign company. Employer preference in hiring should override domestic labor laws in the early stage of the subsidiary's operations due to the very nature of transnational business. Aside

absolutely free to prefer Japanese executives under Title VII and the FCN Treaty, the Seventh Circuit erred in relying on *stare decisis* that was in fact irrelevant.

[118]See N. Ishizuka, *supra* note 110, at pp. 155-62.

from the lack of statutory support, the major shortcomings of these two proposals is their hypothetical and excessively-flexible standards. The management structure of the company might vary, and owing to its individual character, a unified hierarchical system is not practical. In addition, the essence of conflict rules is to provide a predictable principle of practice for transnational social activities, whereas excessive flexibility is equivalent to having no rule at all, and will eventually result in the application of local protection laws to the employer's discretion, consequently eroding the possibility of its operation.

Nevertheless, a third suggestion which crystallizes the reasoning in *Fortino* is more appealing.[119] It has been suggested that host judicial authorities should consider the nature of the relevant foreign industry in determining its eligibility for anti-discrimination immunity. Therefore, if the company is "heavily communication- and human resources-oriented" operating in conjunction with a global network which is centrally linked to its parent corporation, then the development of personal contacts between expatriate personnel from a common culture and training background would be necessary to its operation. Industries such as international trade firms might satisfy these characteristics. Some operating phases of the international air transport industry, such as the sale of carriage services within foreign countries, might match these requirements as well. However, the classification of a foreign company's operating nature would be according to the court's broad magnitude of discretion, effectively leading back to an interest-analysis method in situations where the relevant operating necessities of a foreign industry might compete with a local interest in executing labor protection policies. Though a comprehensible outcome could more likely be expected from this proposal, the certainty and predictability of the conflict of labor laws might be further weakened.

5.1.5 Conflict of Air Transport Agreement (ATA) and Title VII

A. Introduction

[119] *Id.*, at pp.160-3.

No overall freedom of international air transport exists in the real world, as evidenced by Articles 1 and 6 of the Chicago Convention,[120] and by far no satisfactory multinational solution for scheduled international civil aviation has been reached. Bilateral arrangements between sovereign states, then, necessarily become the only type of instrument regulating the performance of air service between respective territories.[121] ATAs in their diplomatic form are the requisite basis through which international scheduled airlines can legally operate in foreign territories.[122]

The status of the ATA in national law varies among different countries according to their constitutional structure. In Great Britain, the ATA does not form part of municipal law: "it is [only] an useful illustration as to what the Governments have agreed between themselves,"[123] and the court will "take no notice of treaties [such as the ATA] until they are embodied in laws enacted by Parliament."[124] Therefore, before the relevant ATA obtains the status of domestic law, no conflict exists. But in countries like the US, the ATA automatically forms the "Supreme Law" of the country pursuant to Article VI of its Constitution,[125]

[120]"The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory (Article 1). No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization (Article 6)," ICAO Doc. 7300/6.

[121]It is suggested that a multilateral agreement would offer the signatories wider access to the markets of their co-parties, and pragmatically promote equal opportunities in international air transport markets: see H. A. Wassenbergh, "Aspects of the Exchange of International Air Transport Rights" (1981) [unpublished]; although the former has also been criticized as an unproductive attempt to solve the problem of scheduled international air service, bilateral agreements, on the contrary, were erected as the instruments to retain world aviation order. See also B. Cheng, *supra* note 77 at pp. 229-31.

[122]The Air Transport Agreement may be known by other names, such as "Air Service Agreement" or a "memorandum of understanding."

[123]Denning L.J. in *Pan American World Airways* v. *Department of Trade*, [1976] 1 Lloyd's L.R. 257 (C.A.), at 260. For a further discussion on the legal status of the ATA in Great Britain, see P. P. C. Haanappel, "Bilateral Air Transport Agreement" [unpublished].

[124]*Pan American World Airways* v. *Department of Trade*, id. 261 (Scarman, L.J.)

[125]See *United States* v. *Belmont*, (1937) 301 U.S. 324, and *United States* v. *Pink*, (1942) 315 U.S. 203. No definite opinion referring to ATA has yet been released. See also *TACA*, supra note 38, note 1: "Because we find that the Air Transport Agreement is not inconsistent with the Railway Labour Act, we do not reach the issue of whether the Air Transport Agreement, an

though it is concluded solely by the executive branch of government which is pre-authorized to ratify ATAs by the *Federal Aviation Act* as a "Congressional-executive agreement,"[126] rather than through a process of approval by the Senate as is the case with ordinary treaties.[127]

Several elements are considered when drafting an ATA, such as the air route, designating carriers, pricing, and frequencies or capacity of flights, which may vary between different negotiating partners depending on their geographic character, economic needs, or even their political approaches.[128] Among the miscellaneous clauses incorporated in the ATA, a particular provision called the "Commercial Opportunities" clause is closely-related to employment conditions:[129]

> (1) The airlines or airlines of one Party may, subject to the non discriminatory requirements of domestic laws and regulations of the other Party, *establish offices in the territory of the other Party for the promotion and sale of air transportation*
>
> (2) The designated airline or airlines of one party may, in accordance with the laws or regulations of the other Party relating to entry, residence and employment, *bring in and maintain in the territory of the other Party managerial, sales, technical, operational and other specialist staff required for the provision of air transportation.*
>
> (3) Each designated airlines *may perform its own ground handling in the territory of the other Party....* If the designated airline does not self-handle it may, subject to domestic laws and regulations of the other Party, select among competing agents for such services. Ground handling includes: the functions of checking in passengers and baggages, maintenance ... ramp ... services for cargo; flight planning; operations and

executive agreement, is a "treaty" which can supersede prior acts of Congress;" compare also O. J. Lissitzyn, "International Aspects of Air Transport in American Law" (1967) 33 J. Air L. & Com. 86, at 91 and "The Legal Status of Executive Agreements on Air Transportation" (1950) 17 J. Air L. & Com. 436 (pt.1), (1951) 18 J. Air L. & Com. 12 (pt.2).

[126]See P. P. C. Haanappel, *supra* note 123.

[127]However, the US Congress retains the power to prevent the US government from performing the obligations assumed in executive agreements like ATA: see J. Lissitzyn, "The Legal Status of Executive Agreements on Air Transportation" (1951) 18 J. Air L. & Com. 12 (pt.2), at pp. 28-30, 32.

[128]Not every element is included in a single ATA, sometimes the capacity or other related matters must be determined by other authorized inter-airlines agreements. See P. P. C. Haanappel, *Pricing and Capacity Determination in International Air Transport*, (Deventer: Kluwer Law & Taxation Publishers, 1984) at 35-6.

[129]Article 8 of the Air Transport Agreement, July 9, 1982, United States-Philippines, 34

dispatch ... cargo build-up and breakdown [emphasis added].

According to this clause, designated foreign airlines are entitled to "bring in" and maintain in the host country its own "managerial, sales, technical, operational and other specialist staff" to meet its air transportation needs. Thus, not only can the foreign flag carrier hire specific personnel "of its own choice," it is also permitted to appoint its own citizens as long as the official requirements of the host country's immigration regulations are fully respected.[130]

Like the "employer choice" clause in FCN Treaties, the "Commercial Opportunities" clause raises the question as to whether designated airlines are allowed to show preference for their own citizens in employing key personnel without violating local anti-discrimination regulations. One US federal court has rejected the charge of discrimination against a foreign airline based on the exemption conferred by the ATA, yet since some of its reasoning seems to contradict established precedent, this rule may not prove to be conclusive. Nonetheless, the basic reasoning adopted in subsequent decisions dealing with conflicts between FCN Treaties and Title VII - *i.e.*, envisaging the legal status of a treaty within an internal legislative structure, the language of the diplomatic instrument, and even the operational character of the designated airlines - was again used to describe the scope of the exemption provided by the "Commercial Opportunities" clause.

B. Judicial practice

In the landmark decision of *Lemnitzer* v. *Philippine Airlines*,[131] (hereinafter "*Lemnitzer*"), two former US managers of the Philippine Airlines' (hereinafter "PAL") American subsidiaries brought an action under Title VII against PAL for wrongful termination on the basis of national origin, after both of their positions were eliminated through a reorganization project of the foreign flag carrier undertaken to secure its operational losses in the US.[132] The court held that

U.S.T 1633, T.I.A.S. No.10443.

[130]Such as acquiring E-1 trader visas in the case of the US.

[131]783 F.Supp.1238 (N.D.Cal. 1991).

[132]The *Lemnitzer* claim also includes a discrimination charge on the basis of age (*ADEA*

according to the ATA between the US and the Philippines,[133] the signatories' designated airlines are authorized to prefer their own citizens with respect to hiring certain key personnel for their operations within the host country, without regard to local fair employment regulations.

Several key points were amply examined in the *Lemnitzer* judgment in the process of trying to fix a borderline between the ATA and Title VII. First, the legal status of the ATA, and its similarities or differences with the FCN Treaty, helped to clarify whether cases such as *Sumitomo* would apply in the instant case. Second, the treaty language of the "Commercial Opportunities" clause in the ATA and its consequent exemption of the foreign airliner from local fair employment laws were explored. The capital composition of the relevant airline was also used as a reference in interpreting the scope of immunity. Finally, the court analyzed the applicability of foreign sovereign immunity to a foreign government-owned airline corporation for the purpose of exempting the employer from domestic anti-discrimination charges.

i.) The Status of the ATA

In *Lemnitzer*, the employees alleged that since the ATA is not an FCN Treaty, its exemption clause does not have an effect equal to that of the latter instruments. The court rejected this argument, based on the notion that although the ATA is not formally designated as an FCN Treaty, "it functions as [an FCN] ... for all intents and purposes."[134] The federal district court further quoted the Provisional Agreement Concerning Friendly Relations and Diplomatic and Consular Representation between the same parties[135] to establish that both the US and the Philippines possessed a real intent to enter into a single, all-encompassing FCN Treaty. Although they never actually did so, the ATA substantially substituted for certain functions of the FCN Treaty, and the Filipinos further hired by PAL's US subsidiaries were treated as employees of an FCN Treaty-trader nation under

claim), and other pendent state claims. This section will focus on the Title VII claim only.

[133] *Supra* note 129.

[134] *Lemnitzer, supra* note 131, at 1243.

[135] Article IV (which was executed on July 4, 1946), see *id*, at 1244.

immigration law,[136] such that there was no doubt "the [US-Philippines] ATA has ... achieved [an FCN] Treaty status." The *Lemnitzer* decision is correct in its reasoning on the legal status of the US-Philippines ATA, for once the ATA has been judicially noticed as "the Supreme Law of the Land" along with other treaties, the designated functions of the ATA provide additional evidence of its assimilation with those of the FCN Treaty. Not every ATA includes the same problematic "Commercial Opportunities" clause as the US-Philippines ATA; in fact, only relatively few ATAs include similar provisions.[137] Before 1977, countries which had formal FCN Treaty relationships with the US would usually not incorporate a "Commercial Opportunities" clause into their respective ATAs,[138]

[136]The E-1 treaty trader visa is granted to "an alien entitled to enter the United States *under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and foreign state* of which he is a national [emphasis added]:" see 8 U.S.C. § 1101(a)(15)(E) and also *Lemnitzer, id.*, at 1244.

[137]Aside from the ATA of US-Philippines, there are Air Transport Service Agreement, July 23, 1977 US-United Kingdom, 28 U.S.T.5367, T.I.A.S. No.8641 (Article 8(2)), and Air Transport Service Agreement, December 7,1979 United States-Thailand 32 U.S.T. 335, T.I.A.S. No. 9704 (Article 8(2)), Air Transport Service Agreement, June 8, 1980 United States-Jordan 32 U.S.T. 2652, T.I.A.S. No. 9868 (Article 8(2)), Air Transport Service Protocol (amending the Agreement of Oct.2,1969), April 4,1979 United States-Jamaica 31 U.S.T. 308 T.I.A.S. No. 9612 (Article 10(2)), Air Transport Service Protocol (amending the Agreement of June 13,1950), August 16,1978 United States-Israel 29 U.S.T. 3144, T.I.A.S. No. 9002 (Article 10(2)), Air Transport Service Protocol, United States-Greece, T.I.A.S. No.-(Article V(1)), Air Transport Service Protocol (amending the Agreement of July 7, 1955), November 1,1978 United States-Germany 30 U.S.T. 7323 T.I.A.S. No. 9591 (Article 9(2)), Air Transport Service Protocol (relating to the Agreement of March 29,1949), May 12,1980 United States-Finland 32 U.S.T. 2368, T.I.A.S. No. 9845 (Article 10(2)), Air Transport Service Agreement, October 23,1980 United States-Belgium 32 U.S.T. 3515, T.I.A.S. No. 9903 (Article 8(2)) which include similar "Commercial Opportunities" clauses.

[138]See, *e.g.*, Civil Air Transport Agreement , August 11, 1952, United States-Japan, 4 U.S.T. 1949, T.I.A.S. No.2854. Air Transport Service Agreement, February 26, 1947, United States-Thailand, 21 U.S.T. 470, T.I.A.S. No.6837.(old) Air Transport Service Agreement, January 14, 1950, United States-Korea, 3 U.S.T. 2652, T.I.A.S. No.2432.8 U.S.T. 549, T.I.A.S. No.3807. Air Transport Service Agreement, July 7, 1955, United States-Germany, 7 U.S.T. 527, T.I.A.S. No.3536.(old) Air Transport Service Agreement, April 3, 1957, United States-Neatherland, 12 U.S.T. 837, T.I.A.S. No.4782. Some rare exceptions still exist, such as Spain's FCN relationship with the US, but their ATA incorporated a clause to regulate airline enterprises within the host country: "The rights conceded by either contracting party to the air carrier enterprises of the other contracting party *shall be subject to compliance with all applicable laws of the issuing government and all valid rules, regulations and orders issued thereunder*, including air traffic rules and customs and immigration requirements applicable to all foreign aircraft [emphasis added]."(Article VII) This clause may have been inserted due to the absence of any FCN Treaty between the parties while adopting the ATA. See Air Transport Services Exchange of Notes, December 2, 1944, United States-Spain, T.I.A.S. No.3482, post, p.693. Furthermore, a country like Iran which has an FCN relationship with the US may simply incorporate a provision in their ATA indicating that "[a] designated

since the purpose of the clause was already fulfilled — as the operation of civil airline enterprises within the host country is also regulated by the treaty scheme of FCN agreements, it is technically unnecessary to repeat the provision in other diplomatic instruments such as ATAs. Meanwhile, where a formal FCN Treaty is absent, as was the case between the US and the Philippines, it is surely necessary to supplement the ATA with clauses similar to the "entry of individuals" and "entry of capital" provisions of the FCN Treaty in the absence of other diplomatic instruments conferring the same rights,[139] because the daily operation of civil air transportation services within the territories of either signatory, like all other foreign corporations, requires a legal basis for the importation of key foreign personnel to promote and manage the business.[140]

The ATA could never fully replace the all-encompassing FCN Treaty, but functionally it retains a status similar to those provisions of FCN Treaties respecting

airline of one Contracting Party *shall have the right to maintain its own representation* in the territory of the other Contracting Party for the sale of air transportation [emphasis added]:" Article 5(c), Air Transport Service Agreement, February 1, 1973, United States-Iran, 26 U.S.T. 1929, T.I.A.S. No.8149, other employment-relations clauses were left to Article IV(4) of the Treaty of Amity, Economic Relations, and Consular Rights, August 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No.3853 ("[T]o engage attorneys, agents, accountants and other technical experts, executive personnel, interpreters and other specialized employees of their choice"). Moreover, some countries which have an FCN treaty relationship with the US added the clause later in their Protocol (Germany) or Interim Agreement of the ATAs with the US, see *id.*

[139]The "entry of individuals" provision concerns the domestic requirements of entry of either Party's citizen; the "entry of capital" provision, on the other hand, deals with the entry of investment capital and the establishment of corporations. Regarding other general functions of these two provisions in the FCN Treaty and their special drafting modes, see H. Walker, "Modern Treaties of Friendship, Commerce and Navigation" (1958) 42 Minn. L. Rev. 805, at 812-4.

[140]Nevertheless, it is not an absolute rule that countries with no FCN relationship must attach similar provisions in their ATA. For example, Canada has no FCN Treaty with the US, nor does their ATA incorporate this "Commercial Opportunities" or "doing business" clause. See Air Transport Service Agreement, January 17, 1966, United States-Canada, 17 U.S.T. 201, T.I.A.S. No.5972. Malaysia also has no FCN relationship with the US, whereas its ATA with the US provides only a sales of air transportation clause ("Each designated airline shall have the right to engage in the sale of air transportation in the territory of the other Contracting Party directly and, in its discretion, through its agent.") See Air Transport Service Agreement, February 2, 1970, United States-Malaysia, 21 U.S.T. 379, T.I.A.S. No.6822. See also the Air Transport Services Agreement, May 30, 1972, United States-Hungarian People's Republic, 24 U.S.T. 716, T.I.A.S.7577, and Air Transport Services Agreement, February 28, 1969, United States-Czechoslovakia, 20 U.S.T. 408, T.I.A.S. No.6644. As a statistical matter of fact, most ATAs with the US did not incorporate the language concerning airline representatives until 1977. See US standard post-1977 agreement, and J. Gertler, "Bilateral Air Transport Agreements: Technical, Administrative, 'Doing Business', Treaty Framework Provisions" (1987-8) [unpublished].

the legal basis of entry of foreign personnel and capital. Therefore, precedents such as *Sumitomo*, *Wickes* and *MacNamara*, analyzing the fair employment claims under FCN Treaties, should also apply even where they did not directly concern ATAs.

Moreover, the language used in the "Commercial Opportunities" clause of the US-Philippines ATA differed from the general usage adopted in employer preference clauses of FCN Treaties. The US-Philippines ATA authorized the signatory to "bring in and maintain in the territory of the other Party managerial, sales, technical, operational and other specialist staff required for the provision of air transportation *in accordance with the laws and regulations of the other Party relating to entry, residence and employment*"[141] - a provision which lacks the buzzwords "of their own choice" as seen in many FCN Treaties. Based on this divergence, the employees in *Lemnitzer* asserted that since this critical phrase ("of their choice") is absent from the US-Philippines ATA, PAL should not be exempted from the coverage of Title VII.[142]

The court did not accept this interpretation. It considered that the language "bring in and maintain" key employees necessary to the operation of PAL's business in the US, in Article 8(2) of the US-Philippines ATA, entitled PAL to the same rights as those provided under FCN Treaties. The court further found that since the determination of personnel required to "ensure efficient and effective administration of PAL's US operations," *i.e.*, of the key staff members of its US subsidiaries, undoubtedly "lies within the discretion of PAL itself,"[143] little could be left to argument about the scope of freedom conferred. The court's reasoning, though innovative, is not entirely accurate, for it obviously neglected to consider that there exists a precondition to the airline's discretion in Article 8(2).[144] Pursuant to this Article, the decision to "bring and maintain" personnel in the territory of the host country must be made "in accordance with the laws or regulations [thereof] ... relating to ... employment," and the "laws or regulations" relating to

[141] See, Article 8(3) of the ATA of US-Philippines, *supra* note 129 [emphasis added].

[142] *Lemnitzer*, *supra* note 131, at 1243-4.

[143] *Id.*, at 1244.

[144] ATA of US-Philippines, *supra* note 129.

employment in the US should evidently include fair employment laws such as Title VII. Accordingly, though PAL is entitled to bring and maintain Filipino workers of its own choice in the US, its discretion is more restricted than that of the employers in *Sumitomo, Wickes,* or even *Fortino;* that is to say, the hiring and firing decisions made by PAL's American subsidiaries would be subject to local fair employment laws in the same way as those of any local company. Furthermore, FCN Treaties which contain the same kind of provision, along with the above limitations, were construed differently from those which do not. For example, Article IV(6) of the Treaty of Amity and Economic Relations of US-Thailand, which provides that "companies of either Party shall be permitted, in accordance with the applicable laws, to engage, within the territories of the other Party ...[key personnel] of their choice,"[145] was construed as a contingent treaty clause that is intentionally singled out by its language, which is distinct from general usage.[146] Therefore, neither should the ATA which contains a similar provision be conceived as a non-contingent treaty clause.[147]

ii) The Capital Composition of a Designated Foreign Airliner

The capital composition of the relevant foreign airline was also envisaged in *Lemnitzer* as an important element in measuring whether the latter could be invested with "non-contingent" rights. Since PAL was found to be wholly-owned

[145]*Supra* note 74.

[146]See N. Ishizuka, *supra* note 110, at 142. A similar clause can be found in the Article VI of the Treaty of Friendship, Commerce and Navigation, January, 21, 1950, United States-Ireland, 1 U.S.T. 785, T.I.A.S. No. 2155. Basically, the "contingent" right means that the treatment is provided in relative terms; while "non-contingent" standards, on the other hand, refer to an absolute rule which allows no impediment. See H. Walker, "Modern Treaties of Friendship, Commerce and Navigation" *supra* note 139, at pp.810-1. However, the above category seems to be of little relevance with reviewers such as Ishizuka, whose definition of "contingent" definitely refers to those subjecting to the domestic regulations, and vice versa for the "non-contingent" ones. In fact, it would be better to adopt a comparable standard: *e.g., Wickes* standard, which allows that the "narrow privilege to discriminate for positions covered by the treaty" could be described as non-contingent when compared to the contingent *MacNamara* rules.

[147]J. Gertler also support this conclusion by indicating that under Article 8 of the standard post-1977 agreement (similar to the ATA of US-Philippines), the foreign airline's representatives are bound to respect all applicable laws and regulations of the host country. See *supra* note 140.

by the Philippine government,[148] and since it is necessary for a government to "demand full freedom to appoint its own citizens to any key position of its own overseas subsidiaries,"[149] PAL could legitimately expect to enjoy such a reciprocal right as a subsidiary of the Philippine government. In any case, it would be an unfair burden on the government Treasury of the Philippines to pay damages simply because the government considered "the placement of its own citizens in key positions in the US operations of its subsidiaries" to be necessary for the latter's successful operation.[150]

iii) Application of Foreign Sovereign Immunity

A provision intended to waive the claim of sovereign immunity by state-owned commercial organizations of either signatory operating within the host country is often included in the FCN Treaty.[151] Such a clause, however, does not exist in the US-Philippines ATA, and probably does not ever appear in current ATAs. The floodgates might be open for government-owned airlines, like PAL, to seek the shelter of the US *Foreign Sovereign Immunities Act* of 1976 (hereinafter "*FSIA*").[152] Although all national carriers operating to or from the US must first

[148]PAL is a subsidary of the Republic of Philippines and is headquartered in Manila. See, *Lemnitzer, supra* note 131, at 1239.

[149]*Lemnitzer, supra* note 131, at 1243.

[150]*Id.*

[151]*E.g.*, Article XVIII of the FCN Treaty of US-Japan provides (paragraph 2): "No enterprise of either Party, including *corporations*, associations, and government agencies and instrumentalities, which *is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other Party*, claim or enjoy, either for itself or for its property, *immunity* therein from taxation, *suit*, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein [emphasis added]," *supra* note 74. Other FCN Treaties include the Treaty of Friendship, Commerce and Navigation, Feb.2,1948, US-Italy, Stat.2255, T.I.A.S.No.1965 (Article XXIV), Treaty of Friendship, Commerce and Navigation, Jan.21,1950, US-Ireland, 1 U.S.T.785, T.I.A.S.No.2155 (Article XX(3)), FCN of US-Greece, supra note 79, Treaty of Friendship, Commerce and Navigation, March 27, 1956, US-Neatherland, 8 U.S.T.2043, T.I.A.S.No.3942 (Article XVIII), Treaty of Friendship, Commerce and Navigation, Oct.29,1954, US-Germany, 7 U.S.T.1839. T.I.A.S.No.3593 (Article XVIII), FCN of US-Korea, *supra* note 74.

[152]28 U.S.C. §§ 1330; 1332(a)(2)-(4),1391(f), 1441(d) and 1602-1611. The FSIA is intended to define the circumstances under which lawsuits can be maintained against a foreign government, its agency and its instrumentalities; three major concerns were addressed in the Act: the subject matter jurisdiction of the federal court, venue, and the proper method of obtaining service on the

obtain a foreign carrier permit from the Civil Aeronautic Board (hereinafter "CAB"),[153] the CAB has usually requested a waiver of sovereign immunity since 1951, based upon § 1605(a) of the *FSIA*, as a precondition for operating within the US under such permits.[154] This waiver of sovereign immunity specifically serves to offer "proper protection of shippers and the travelling public" - to ensure that the legal rights of passengers and shippers using the authorized international air route are not weaker than those being transported on domestic air carriages - it is circumscribed to "any claim arising out of operations under [the permit],"[155] *i.e.*, to claims arising out of the operation of international air routes. Therefore, the fair employment claim arising out of PAL's US subsidiaries, which also operated tourism and charter businesses not expressly covered by the CAB permit nor based upon the airline's commercial activities,[156] would apparently remain

prospective defendants. See also *Unidyne* v. *Aerolineas Argentinas*, 19 Avi. 18, 115 U.S.Dist.Ct. E.D.Va., Oct.30, 1985. (The defendant Aerolineas Argentinas was a commercial airline owned by the Argentine government and was treated as a foreign government instrumentality pursuant to 28 U.S.C. §1603(b).) The merit of FSIA for a foreign state as a defendant is, normally, immunity from the jurisdiction of US federal and state courts, subject to a set of exceptions specified in 28 U.S.C. §1605 and §1607. Even though in *Lemnitzer* the defendant PAL did not plead for FSIA protection, since the court strongly adumbrated this possibility in its judgment, *supra* note 131 at 1239, 1243, it will be of certain interests to explore the subject in the following paragraphs.

[153]See, *e.g.* Article 3(2) of the ATA of US-Philippines, *supra* note 129: "On receipt of ...applications in the form and manner prescribed from the designated airline for operating authorizations and technical permissions, the other Party shall grant appropriate authorizations and permissions." The US Department of Transportation issues foreign air carrier permits or exemptions according to the *Civil Aeronautic Board Sunset Act* of 1984, Pub.L.No.98-443, reprinted in 1984 U.S. Code Cong. & Ad.News.2857. See, also M.L.Hood, Note, "Foreign Sovereign Immunities Act", (1988) 54 J.Air L.& Com.251, at p.265.

[154]§ 1605(a) of the FSIA provides that the foreign state may not immune from the subject jurisdiction if there exists an express or implied waiver of immunity. See 28 U.S.C. § 1605(a). In the permit, the CAB prescribes that the foreign air carrier is required to waive sovereign immunity "[f]rom suit in any action or proceeding instituted against it in any court or other tribunal in the United States ... based upon *any claim arising out of operations under this [permit]* [emphasis added]." See *e.g.*, El Al Israel Air., Amendment of Permit, 14 C.A.B.962 (1951).

[155]*Id.*

[156] For example, in *re Disaster at Riyadh Airport*, 16 Avi. 17, 880 (D.D.C.1981), an aircraft of Saudi Arabian Airlines crashed en route from Riyadh to Jeddah. Although the airline had flight permits from the CAB (on which the airliner has necessarily waived its sovereign immunity), since the action was based upon a fire occurring while flying the domestic route instead of the US route, the government-owned flag carrier may invoke the FSIA defence when sued for the accident in US court.

unaffected by the waiver.

The sovereign immunity granted by the *FSIA* regarding the local judicial process is restricted to claims involving the *jure imperii* of a foreign state and its instrumentalities; it does not extend to claims based on the latter's *jure gestionis* within a host country.[157] Hence, although PAL is undoubtedly a distinct legal person - wholly-owned or controlled by the Philippines government - which qualifies as an "agency or instrumentality of a foreign state,"[158] it cannot escape from a charge under Title VII unless its termination of US employees is perceived as a governmental act by nature, rather than a commercial one, or unless it has no connection with a commercial activity falling under the exceptions to the immunity.

"Commercial activity" is defined in the *FSIA* as either "a regular course of commercial conduct or a particular commercial transaction or act," and the commercial character of an activity "shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[159] However, the drafters of the *FSIA* did not provide any concrete example of an activity which would be characterized as commercial, a task which is therefore left to the court's discretion. The "private party" test precludes any activity that "is one in which a private party could engage" and has been widely applied in cases related to foreign sovereign immunity.[160]

[157] § 1605(a)(2) of the FSIA provides: "(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case-(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere;" See also *LeDonne* v. *Gulf Air.Inc.*, 21 Avi.18,441 (E.D.Va.1988), at 18,443.

[158] 28 U.S.C. § 1603(b). If the majority ownership interest of the foregin airliner is held by the government, then the flag carrier will usually be conceived as an instrumentality of the latter: see e.g., *Bryne* v. *Thai Airways International Ltd.* 18 Avi. 18,363 (N.D.Ill. 1984) and *Alberti* v. *Empresa Nicaraguense De La Carne*, 705 F. 2d. 250, 253 (7th Cir. 1983), *Colgan* v. *Port Authority* 23 Avi. 17,956 (E.D.N.Y.1991) (Defendant Lufthansa is a separate corporation organized and existing under the laws of the Federal Republic of Germany; the government owns the majority of its shares.) On the contrary, entities organized under the laws of the US or a third country would not qualify as parts of a foreign state under the FSIA. See also M. B. Feldman, "Foreign Sovereign Immunity in the United States Courts 1976-1986" (1986) 19 Vand. J. Transnat'l L.19 at 28.

[159] 28 U.S.C. § 1603(d).

[160] *E.g.*, in *Texas Trading* v. *Federal Republic of Nigeria*, 647 F.2d 300 (2nd Cir.1981),

Following this test, PAL would be acquitted only if its employment preference belongs to a function which is exclusively exercised by government. While it may be difficult for a foreign state-owned enterprise like PAL to classify the wide variety of activities in which it engages as exclusively public or commercial in nature,[161] judicial authorities will often resort to phrases like "customarily carried on for profit" to resolve the question under these circumstances.[162] A clear but inconclusive list of the non-commercial activities conducted by foreign states and their instrumentalities was offered in *Victory Transport, Inc.* v. *Comisaria General de Abastecimientos y Transportes*:[163]

(1) internal administrative acts, such as expulsion of an alien;

(2) legislative acts, such as nationalization;

(3) acts concerning the arm forces;

(4) acts concerning diplomatic activity;

(5) public loans.

According to the US-Philippines ATA, PAL is authorized to provide scheduled air cargo and passenger services between the US and the Philippines, and it also maintains several district sales offices which mainly perform marketing functions within the US. The termination of employment in dispute occurred as part of a reorganization of the airline's sales office, undertaken to reduce its financial losses stemming from past US business operations. All these activities could also ostensibly be carried out by any other privately-owned airliner and are customarily connected with the earning of profit, so they are undoubtedly of a commercial

cert.denied, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d. 301(1982), and *MOL, Inc.* v. *People's Republic of Bangladesh*, 736 F. 2d 1326 (9th Cir, 1983), *cert.denied*, 105 S. Ct. 513 (1984).

[161] *LeDonne, supra* note 157, at 18,447. Unlike business in fully privatizated capitalist countries such as the US, state-owned business still plays an essential part as a public utility in some countries, *i.e.*, as "arms of government in pursuing government ordained goals", *LeDonne*. Such a semi-public character could not be adequately analyzed against simple standards like the private party test.

[162] *LeDonne, id*, also *Aboujdid* v. *Singapore Airlines, Ltd. and Gulf Aviation Ltd.*, 18 Avi. 18,059 (N.Y.Sup.Ct. 1984).

[163] 336 F.2d 354 (2nd Cir. 1964), *cert.denied*, 381 U.S. 934 (1965). For a detail commentary on this case, see also F. A. Weber, "The Foreign Sovereign Immunity Act of 1976: Its Origin, Meaning and Effect" (1977) 3 Yale Stud. World Pub.Ord. 1, at 16-7.

nature.[164] However, a contract of service entered into with a foreign agency is not conceived in US jurisprudence as merely commercial if its purpose is to perform a sovereign function.[165] Furthermore, the relevant cause of action must have a sufficient nexus with the foreign airline's commercial activities in US territory.[166] However, in the instant case, PAL's basic management policy requires "loyalty" to the interests of the airline from all employees,[167] translating practically into the preservation of its key managerial positions for Filipino citizens or expatriates who rotate around to its global subsidiaries. PAL's American subsidiaries implement this policy in recruiting their employees, preferring Filipinos over domestic nationals and acting primarily "as an arm of the state" by enforcing the administrative ordinance of the Filipino government,[168] and such "public" acts will therefore not be subject to judicial review by other sovereign states.[169] It

[164]The approach was adopted by *Aboujdid, supra* note 162, at 18,061, which simply reasoned that since the defendants Singapore Airlines and Gulf Aviation are commercial instrumentalities of their respective governments, and both of them conceded that they were and are engaged in commercial activities for profit, they were inevitably brought under the exception to foreign sovereign immunity. See also *Bryne, supra* note 158.

[165]*Friedar* v. *Government of Isreal*, 614 F. Supp.395 (S.D.N.Y. 1985). In *Friedar*, the plaintiff was recruited by the Israeli Government to serve in its army. According to the service agreement ratified by the Israeli Government, the Government should compensate the plaintiff's bodily injury suffered during the service period; however, when they did not, the plaintiff sued the government of Israel for breach of contract of service. The court deniedthe claim, holding that since only a sovereign power could undertake this service contract, which includes recruiting and training in martial arts, the activity is not commercial. The contract of service in *Friedar* is, of course, quite distinctive from ordinary contracts of employment. Nevertheless, it shows the purposes and terms of the relevant contract is important to the measurement of whether it is commercial in nature.

[166]See *Muwelled* v. *Lufthansa*, 20 Avi 18,472, (E.D.N.Y.1987), at 17,473-4.

[167]This policy was outlined in the Personnel Policies and Procedure Manual of PAL. See *Lemnitzer*, supra note 131, at 1239. It is not quite clear what exactly the meaning and purpose of "loyalty" might indicate. Resorting to the general objects of state-owned international airlines, it seems that it could only refer to national prestige. See also W. E. O'Conner, *An Introduction to Airline Economics*, 2d ed. (New York: Praeger Publisher, 1982) at p.18.

[168]See *Arango* v. *Guzman Travel Advisors Corp.* 19 Avi. 17,409, 621 F.2d 1371 (5th Cir.1980). In *Arango*, the defendant Dominicana, a foreign government-owned airliner, took the plaintiffs to another destination against their will because they were listed as undesirables and forbidden to enter the country. The airline's act was regarded by the court as a *jure imperii* and thus immune from its jurisdiction.

[169]See S. A. Riesenfeld, "Sovereign Immunity in Perspective" (1986) 19 Vand. J. Transnat'l L.1, at 2, also M. A. Player, *Employment Discrimination Law*, (St.Paul: West Publishing Co., 1988), at

seems that PAL should not have been permitted to erect sovereign immunity to justify its administrative policy, however, because PAL also hired local, non-Filipino citizens to fill certain key positions in its US subsidiaries,[170] thereby eroding the credibility of its defence.

From *Lemnitzer*, one can imagine the difficulties involved in measuring and balancing such complex interests inherent in the labor process of the international airline industry. The *Lemnitzer* rule does not, however, seem to be adequate with respect to the conflict of labor laws, for the element of predictability is virtually eliminated if the rights of airline employees depend upon the airline's capital composition and the identity of its shareholders. Usually, this information is unavailable to workers entering into the employment relationship; from the employer's point of view, the rule is unfair, since an airliner owned or controlled by a state could invoke this privilege - based on a certain proportion of government interest - whereas a private airliner could not, even if both of them are designated as foreign air carriers in the same ATA.[171]

5.2 *Age Discrimination in Employment Act* of 1967 (*ADEA*)[172] and the Amendments of 1984

5.2.1 Introduction

The *ADEA* prohibits age-based discrimination in employment against persons

p. 209-10 for a different openion.

[170] *Lemnitzer, supra* note 131, at 1239.

[171] For example, there are two major international air carriers in Taiwan: CAL (China Airlines), a government-owned firm, and Eva Airways, a private company. (Mandarin Airlines is a subsidiary of CAL which is set- up specially for the routes to Australia and Canada: see "Taiwan Firms Form Airline For Flight to Australia and Canada" Av.Week & Space Tech. 21 Jan.1991, at p. 45). Owing to the government's policy, both airlines operated many overlapping air routes, including trunk lines from and to the US. Though CAL is still under government control, it will be releasing less than 50% of its share to the private sector, and more than 95% of Eva Airways is owned by a private company. See "Eva Airways Prepares to Launch Competitive International Service" Av.Week & Space Tech. 21 Jan.1991, at p. 48.

[172] 29 U.S.C. §623.

between the ages of forty and seventy. Prior to the amendments of 1984,[173] the *ADEA* covered neither national employees working abroad for US companies[174] nor US or foreign employees working abroad for foreign companies. Envisaging the economic burden which may be created by a residual work-force and the need to preserve local employment opportunities,[175] the 1984 amendments extended the scope of the term "employee" to include "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country," effectively affirming its extraterritorial coverage. Therefore, the national flight attendant working on-board a national flag carrier would be covered as well as those who work solely in sales offices located at foreign termini. Like the 1991 amendments to Title VII, the employers subject to the amendments are those with twenty or more employees per working day;[176] furthermore, if it is a foreign corporation, it must be controlled by a US parent.[177] Since the legal regimes of both Title VII and the *ADEA* have effectively been integrated subsequent to the 1991 amendments to the *Civil Rights Act*,[178] the rationale emanating from

[173]*Older Americans Act Amendments* of 1984, § 802(a), 29 U.S.C.A. § 630(f) (1985).

[174]See *Cleary* v. *United States Lines,Inc.*, 555 F.Supp 1251 (D.N.J. 1983), *aff'd.* 728 F.2d 607 (3d. Cir. 1984). The plaintiff, who was working for his employer's foreign subsidiaries, alleged that his discharge was due to age discrimination. The Third Circuit Court rejected his argument and noted that due to the presumed intent of Congress, the application of the *ADEA* is geographically limited - only employment within the US is covered. For case comments, see L. P. Zanar, "Note on Recent Development to the Age Discrimination in Employment Act" (1985) 19 Geo. Wash. J. Int'l L .& Econ. 165 at 169. See also *Pfeiffer* v. *Wm.Wrigley Jr.Co.*, 573 F.Supp 458 (N.D.Ill 1983) aff'd, 755 F.2d 554 (7th Cir. 1984), and *DeYoero* v. *Bell Helicopter Textron, Inc.* 608 F.Supp.377 (N.D.Tex.1985). In *DeYoreo*, the American employee was hired by a national company to work in its Canadian office and was discharged because of his age. The court held that the *ADEA* does not apply to US citizens working abroad.

[175]It was estimated that there are approximately a quarter-million US citizens between the ages of forty and seventy employer in the private sector in foreign firms within the US in1984. See L.P.Zanar, *id.* at 165.

[176]29 U.S.C. § 630(b). This number should logically be interpreted to encompass all employees of the employer being sued, not only the employees of the subsidaries.

[177]§ 802(a).

[178] The legislative intent of the *ADEA* is substantially the same as that of Title VII; resorting to the Congressional speech of former US President Nixon: "Discrimination based on age ... can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treat him or her as a member of some arbitrarily defined group. Especially in the employment field,

Title VII precedents (*supra*, Section **5.1.2-3**) could apply equally to *ADEA* cases. However, some divergences still exist in the nature and purpose of the two *Acts*.

5.2.2 Judicial practice

There is no potential conflict between treaties, like FCNs or ATAs, and the *ADEA* because the legal regime of the latter is only concerned with age-based discrimination in employment against persons between the ages of forty and seventy; there is no reason to justify discriminatory treatment based on age in the employer preference provisions of any FCN Treaty or ATA. The remaining question, therefore, relates to sovereign immunity erected by foreign government-owned airlines.

In *Gazder* v. *Air India,*[179] the employee alleged that his termination by a foreign airline's US subsidiary was based on his age, in violation of the *ADEA*. Air India moved to dismiss the motion for lack of subject-matter jurisdiction, since it is wholly government-owned and should therefore be analogized to a foreign government under the *FSIA* such that the airline and its employees do not fall within the meaning of "person" or "employer" under the *ADEA*. This defense, however, failed.

The court noted that although Air India is an instrumentality of the foreign State of India[180] engaging in commercial activities within the host country, it is liable "in the same manner and to the same extent as a private person under like circumstances." Furthermore, there is no evidence that the US Congress intended to exclude foreign government-owned enterprises from the coverage of the *ADEA*. Interestingly, the court also remarked that because "[t]he incidence of

discrimination based on age is crucial and self-defeating; it destroy the spirit of those who want to work and it denies the Nation the contribution they could make if they were working." See H.Rep. No. 93-913, 93d Cong., 2d Sess.(1974), reprinted in 1974 U.S.Code Cong. & Ad. News 2811, at p.2849.

[179]574 F.Supp.134 (S.D.N.Y. 1983).

[180]Air India is an international airline wholly-owned by the government of India. Its general supervision, direction, and management is vested in a Board of Directors, the members of which are appointed by the General Government of India. *Id*. at 135, case note 2.

nationalization of foreign industry is growing" outside and within the US, and consequently an increasing number of US citizens and residents are finding themselves employed in such industries, it is necessary to extend the coverage of local legal instruments to these nationals by way of judicial construction.[181]

This judgment contains a view totally opposite to that of *Lemnitzer*, though they share the same logical fallacies. For even if there exists no prevailing foreign public interest to prefer workers at certain age-levels in *ADEA* cases, it does not follow that all managerial activities of a foreign airline subsidiary within the host country are commercial. The court must consider the entire employment process: if the hiring or firing decisions over a position are directed or controlled by a foreign government or its agencies, for the purpose of exercising certain administrative functions rather than pursuing purely economic concerns, then it might not be proper to characterize such decision-making as a "commercial activity;" on the contrary, without official intervention, termination or job promotion in the government-owned company are acts of a commercial operation which should be subject to local fair employment regulations.

5.3 Conclusion

The 1991 amendments to the *Civil Rights Act* and the 1984 amendments to the *ADEA* established a pioneering model of legislation for the conflict of fair employment laws, pushing the extraterritorial coverage of local labor laws to the utmost extent.[182] This unique legal regime strongly implies that the local public interest prevails over international comity with respect to the protection of human rights. Applied to the international air transport setting, all national employees working on-board foreign airlines operating to and from the US, or even on-board a national flag carrier flying abroad, are covered under US fair employment regulations; the same is true for all employees of foreign airline subsidiaries

[181] *Supra* note 179. at 138.

[182] Compared with the *Equal Pay Act 1970* (supplemented by the *Sex Discrimination Act 1975*, s. 8) of Great Britain, which circumscribes its applicability only to contracts of employment of men and women employed in Great Britain.

doing business within the US and participating in national works for the US air carrier on foreign soil. Only those employed by a foreign airliner to perform their duties wholly abroad are excluded from coverage. Even in the latter situation, if the foreign employer is controlled by a US parent, then the national employee can still invoke Title VII and *ADEA* protection notwithstanding its colorability.

Several factors could create exceptions to the above conflict rules, eroding their certainty and predictability with respect to foreign airlines operating within the US. First, the employer preference clause in an FCN Treaty or ATA would preempt the application of local fair employment regulations, following the rationale of *Fortino* — under this clause, foreign airlines are endowed with "special status" enabling them to lawfully discriminate against nationals of the host country, especially if the discrimination is substantially dictated by a foreign parent. Should the adjudicating court prefer to follow *MacNamara*, then the foreign airline corporation will be treated essentially the same as any local employer within the US.

Second, if the airline is a foreign government-owned enterprise, it could be treated as an instrumentality of that government and thereby acquire immunity from any legal action based on local equal treatment employment regulations, depending on whether the decision-making process in employment is based purely on economic considerations or partially serves a governmental function. No conclusive rule is provided, however, due to the great divergence existing between *Lemnitzer* and *Gazder*,[183] and the margin could be further obfuscated as the multinationalization of ownership and managerial policy in certain international airline companies becomes increasingly common, rendering the character of being "substantially owned and effectively controlled" by national governments less visible when the companies' internal regulations do not tend to expressly address administrative procedure.

[183] It is presumed that the policy of the US government towards the granting of foreign sovereign immunity is restrictive, for the government feels that the widespread and increasing practice on the part of (foreign) governments of engaging in commercial activities requires a practice which will enable persons doing business with them to have their rights determined in the courts. See *Sugarman* v. *Aeromexico, Inc.* 15 Avi. 18, 213 (3d. Cir. 1980) at 18, 216. However, the court will not necessarily be bound by the above executive policy.

Chapter 6.
Certain Labor Law Rules in International Air Transport Provided by International Conventions and Proposals

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6.0 Introduction

As a social institution created by man, law is built on various human relationships profoundly influenced by the cultural, political, and economic structure of the state, consequently varying in form and substance. A unified substantive law is therefore very hard to realize, unless the subject matter is transnational in character and one on which different states share a certain level of common regulatory interests. International air transport would be an attractive candidate; even though its basic features - like carrier liability - has already been domestically regulated for centuries, enthusiasm for this advanced mode of transportation, which symbolizes an unprecedented human breakthrough in temporal and territorial limitations, is motivated by a shared sense for integration. It can be said that air law has ever since become a legal science lab for unification; the Warsaw-Hague pact and the Rome Conventions are both raw models of its future products.

Among the subjects currently studied with respect to unification, regulation in labor matters is less advanced. Until now, aside from the contentious provision in Article 25 of the Rome Convention of 1952 (which has been discussed *supra*, chapter 2 at section **2.2.3**), no other international legal instrument specifically deals with or contains specific articles on airline labor law. However, there have been ancillary conventions (the Geneva Convention of 1925), preliminary drafts (The CITEJA Preliminary Drafts of Convention Relative to the Legal Status of Aeronautical Flying Personnel, and the ICAO Draft Convention for the Unification of Rules Relating to Liability of the Carrier in International Carriage by Air) and scholarly proposals (the Air Law and Torts Resolution of the *Institut de Droit International*) attempting to standardize certain substantive and procedural employment regulations, like compensation for industrial injuries, the conditions of the individual employment contract, the conflict of laws and on-board delictual liability between the airline and its employees; notwithstanding any real influence by these proposals on current judicial practice - some are only unofficial or academic suggestions - the principles adopted, their legislative intent and

regulatory structure, as well as their merits and weaknesses, will all serve as useful references for future unification or municipal legislation and jurisprudence of airline labor law.

6.1 The Geneva Convention Concerning Equality of Treatment for National and Foreign Workers as Regards Workmen's Compensation for Accidents[1]

6.1.1 Introduction

The Geneva Convention concerning Equality of Treatment for National and Foreign Workers as Regards Workmen's Compensation for Accidents (hereinafter "Accident Compensation Convention") belongs to a fairly old generation of several ILO Conventions which deal with industrial safety and health, yet it is one of the few which has been effectively enforced, due to its unique design. The Accident Compensation Convention was originally adopted in draft form by the International Labour Conference and has been open for ratification ever since. It was soon endorsed by the major world powers[2] and entered into force on 8 September 1926.

6.1.2 The Structure and Function of the Accident Compensation Convention of 1925

A. National Treatment

Article 1 of the Accident Compensation Convention of 1925 describes the principle of national treatment:

> Each Member of the International Labour Organization which ratifies this Convention undertakes to grant to the nationals of any other Member which shall have ratified

[1] 38 U.N.T.S. 257, ILO No. 19. See the full authentic English and French text of the Accident Compensation Convention of 1925 in M.O. Hudson, ed. *International Legislation* (Washington: Carnegie Endowment for International Peace, 1931), Vol. III, pp.1616-19.

[2] By 1931, major industrial countries in Europe like Germany, Austria, Belgium, Spain, France, Great Britain, Italy, the Netherlands and Asian countries like Japan had all ratified the Convention. For the list of ratifications, see 1931 RDIP 394. Currently, most industrial countries have become members of the Convention; see also M. J. Brown & D. J. Harris, *Multilateral Treaties: Index and Current Status*, 8th cum.supp. (Nottingham: Univ. Nottingham Treaty Centre, 1994) p.104.

> the Convention, who suffer personal injury due to industrial accidents happening in its territory, or to their dependents, the same treatment in respect of workmen's compensation as it grants to its own nationals.
>
> This equality of treatment shall be guaranteed to foreign workers and their dependents without any condition as to residence. With regard to the payments which a Member or its nationals would have to make outside that Member's territory in the application of this principle, the measures to be adopted shall be regulated, if necessary, by special arrangements between the Members concerned.

It would cause some technical difficulty for State Parties to the Accident Compensation Convention to apply this equal treatment to their nationals without revising their local compensation schemes; the ratified treaty requires such a special enactment to become national law.

"[S]ame treatment" means there should be no provisions in the national compensation system which is applied solely to foreign workers who suffers industrial injury within the forum territory. Therefore, not every restriction based on foreign elements is discriminatory; for example, if a provision imposes material restrictions on the payment of benefits to all residents of foreign countries, it is still considered equal treatment, for both the national and the foreigner maintaining their residence abroad are affected by this restriction, although the injured foreign employee who works only temporarily in the forum (and expects to return to his foreign residence after the assignment) is effectively placed at a disadvantage.[3]

Such a provision itself shall not be conceived as creating any principle of conflict of labor laws, though it has been suggested by the International Labour Office that the above-mentioned Article 1 requires the application of the laws and regulations of the country in which the accident occurred, in the absence of any special agreement (between the member states) on the coverage of foreign workers.[4] The principle of national treatment will not necessarily be applied if

[3]See Answer to the Norwegian Government (8th Session, Int'l Labour Conference (1927) Report of the Directors, vol.2, 125) Decennial Report (1936) 26, and the report of the Committee of Experts in 1949, 32 Report III (App.) 23, cited from ILO, *International Labour Code 1951*, *infra*, at pp.627-8 n.

[4]Answer to the Japanese Government (10th Session, Int'l Labour Conference (1927) Report of the Directors, vol.2, 99) Decennial Report (1937) 27, cited from ILO, *International Labour Code 1951* (Geneva: International Labour Office, 1952) Vol. 1, at p.627 n. and see also E. Rabel, *The*

the claim is made before authorities other than those of the *locus delicti*. Furthermore, there are in fact many workers' compensation statutes which do not expressly base their coverage on a condition of nationality or local residence, but this does not necessarily mean that they have adopted the principle of *lex loci delicti* in transnational settings; indeed, the national treatment approach seems more likely to erect the *lex fori* instead of the *lex loci delicti* principle.

B. Special agreement

Article 2 of the Accident Compensation Convention prescribes that:

> Special agreements may be made between the members concerned to provide the compensation for industrial accidents happening to workers whilst temporarily or intermittently employed in the territory of one Member on behalf of an undertaking situated in the territory of another Member shall be governed by the laws and the regulations of the latter Member.

In other words, member states can dictate the law applicable to industrial injury sustained by certain sectors of foreign workers through bilateral arrangements, *i.e.*, incorporate specific conflict rules in a treaty, which acts as the most efficient way at this stage to solve conflict problems between countries having frequent or scheduled labor force transactions due to geographic vicinity or economic dependency. The effect of this method is certainly limited to those two countries which share a common interest in resolving such disputes.[5] One example is the conflict rules adopted in Article 2 of the 5 February 1930 treaty between Germany and Austria:[6]

> (1) The legislative provisions of the State *in whole territory the employment on which insurance is based is carried on* shall apply as a rule with respect to the administration

Conflict of Laws — A Comparative Study, 2d ed (Ann Arbor: U of Mich. Press, 1964) Vol.3 at p. 229, n.60. The question specifically addressed the accident sustained by persons other than crew members of a ship anchored in the territorial waters of another country; according to the ILO, unless national legislation were to stipulate otherwise, compensation for accidents which occur on-board a merchant ship in foreign waters to persons other than the crew should be governed by the law of the country in the territorial waters of which the ship is situated.

[5]See also F. Morgenstern, "The Importance, in Practice, of Conflict of Labour Law" (1985) 124 Int'l Lab. Rev.119, at p.126.

[6]L.S. 1930 — Int. 10. Also ILO, *International Labour Code 1951*, *supra* note 4, at pp. 636-7 n.

of the branches of social insurance specified (in Article 1). The following cases shall be exceptions to this rule:

(a) If an employee is sent by an establishment (employer) which (who) has its head office (his domicile) in one state to undertake temporary employment in the territory of the other State, *the legislative provision of the other State in which the establishment by which he is send has its head office (the State in which is the employer is domiciled) shall apply for a period of one year.* The legislative provision of this State shall also apply to employment which owning to its nature necessitates repeated sojourn in the territory of the other State for period not exceeding one year on each occasion.

(b) The insurance of employees —

1. *of public transport undertakings of one State who are employed in the territory of the other State either permanently on junction lines or at frontier stations or temporarily;...*

shall be governed by the legislative provisions of *the State in which is situated the branch of the establishment to which the employee in question is subordinated in respect of questions of employment....*

A branch office or other permanent organization set up in one State by an establishment which has its head office in the other State shall also be deemed to be an establishment for the purpose of the provisions laid down under (a)....

(c)...

(3) If an accident occurring in one State is covered by the accident insurance laws of the other State, the provision of *the said laws shall also apply in so far as relates to other claims for compensation which may be made on account of the accident in conformity with the laws of the first State*: this provision shall also apply when an establishment is covered by the accident insurance legislation of only one of the two States. This provision shall apply to the other branches of social insurance specified in Article 1, *mutatis mutandis.*

(4) If in the case of an establishment (employer) which (who) has its head office (his domicile) in one State, the law of the other State is applicable under the proceeding provision to an employment in that State, the employment shall be placed on the same footing as an establishment for the purpose of that law.

(5) The application of the legislative provision of one State in pursuance of Nos... (4) shall also entail the competence of the social insurance carriers, authorities and courts of that State in connection with the administration of social insurance.

(6) If contributions have been paid to the insurance carrier for the other State, although they should have been paid to the insurance carrier for the other State, the former

> insurance carrier shall be deemed to be competent until such time as any dispute concerning competence has been decided in a legally binding manner. The re-establishment of the statutory position shall apply as regards the future only [emphasis added].

Curiously, the above provisions do not apply to the crew or other persons permanently employed on vessels traveling a bordering river, nor to the crew of aircraft,[7] probably due to the consideration of refraining from the institution of any official position on the controversial issue regarding sovereignty over territorial airspace and bordering (international) rivers. Nonetheless, the Germany-Austria treaty still provides an inspiring model of conflict rules with respect to industrial compensation.

The model confirms the locus insurance laws as a general principle governing the conflict of workers' compensation statutes, for both the employee and the employer have a legitimate expectation towards these laws: they may very possibly be part of the law of the employee's domicile and the place where he receives benefits, and they also help the employer to correctly calculate his insurance costs.[8] On the other hand, the major interest in compensation law of protecting the injured employee - who is presumed to decline a court battle and to urgently need the benefit for rehabilitation and basic living support while disabled - has been fully envisaged; exceptions to the locus insurance principle are designed for those who are temporary dispatched overseas. The compensation laws of the other state in which he is sent and those of the state where the employer has its head office will simultaneously apply for a period of one year to provide immediate relief. As for employees working in transnational public transport, either permanently or temporarily on junction lines or at frontier stations of a foreign country, compensation is governed by law of the foreign branch to which the employee is professionally subordinated.

[7]Article 2(7) of the Germany-Austria Treaty of 5, Feb. 1930.

[8]This position has been supported by judicial practice. See *André Ribleur* c. *Caisse primaire d'assurance maladie des Alpes maritimes*, Cour de Caasation, Chambre sociale, 7 Jan. 1971: 1972 JDI 77, *Sté Bordeaux Interim Express* c. *Caisse primaire d'assurance maladie de la Gironde*, Cour de Cass. Chambre sociale, 2 June 1976: 1978 JDI 106 and aviation case like *Compagnie francaise de l'Afrique occidentale* c. *Garnier-Chèvreville*, Cour de Cass. soc. 6 Nov.1985: (1986) RCDIP 501; these decisions have been discussed in the preceding chapters .

6.1.3 Remarks on the Accident Compensation Convention of 1925

The national treatment formulae will not directly solve the conflict of laws problem immediately faced by employees in the international air transport industry. It could induce the injured worker to claim before the *locus laboris* or, at best, reduce the chance of forum shopping and statutory conflict. Furthermore, though the municipal residence requirement is discarded, since it would be hard to define in whose territory the personal injury due to industrial accidents was sustained if it occurs on-board an aircraft in flight, the relief effect of national treatment for injured flying personnel may be weakened; even if the *locus delicti* is interpreted as the first country where landing takes place immediately after the incident, only those who suffer instant and visible injury are benefited.

Bilateral arrangements like the Germany-Austria pact are an excellent model for dealing with the conflict of workers' compensation laws, yet their feasibility is still circumscribed to those two countries sharing a common interest in resolving these disputes. Otherwise, it will become a popular clause in FCN treaties or ATAs. The possibility of incorporating these flexible mechanisms is also based on this bilateral form; their acceptability would be questionable in a multilateral context.

6.2 The Resolution of the *Institut de Droit International*: "Conflicts of Laws in the Law of the Air"

6.2.1 Introduction

At its 51th Session in Brussels (11 September 1963), the *Institut de Droit International* adopted a Resolution entitled "Conflits de lois en matière de droit aérien (Conflicts of Laws in the Law of the Air)" (hereinafter the "Air Law Resolution");[9] this painstaking legal project, which took three years of preparation,[10]

[9]The French version of the Resolution (which is considered by the *Institut* as *faisant foi*) is found in (1963) 50 II Annuaire de l'institut de Droit International 365-8, and the English version

is intended to unify certain major conflict of laws rules in matters of air navigation, ranging from nationality (Article 1), rights in rem and private law claims (Article 2), hiring and affreightment of the aircraft (Article 3), contracts of carriage (Article 5), torts arising from aerial collisions and surface damage (Article 6 and 8), and also with respect to aerial rescue or salvage and the legal acts and facts taking place on-board aircraft in flight (Article 7). The Air Law Resolution was designed only to unify certain rules of the conflict of laws which might be encountered in specific situations of international air transport, for which the general principles of private international law were unable to provide an adequate solution, as opposed to substantive private international air laws, like the Warsaw Convention,[11] so the raw model it envisages could only be considered an example of the procedural aspect of unified international private air law.

The Air Law Resolution is the first and only attempt to introduce an all-encompassing scheme of conflict of laws specifically for international air transport. Each rule provided in the Air Law Resolution is designed to deal with specific aviation settings containing plural foreign elements, for which principles of the conflict of laws were not yet adequately formulated, and the result might be awkward if applied to general conflict rules *per analogiam*. Such a unique arrangement cannot help but arouse curiosity on the legitimacy of singling out an individual group of conflict rules for a loosely categorized sphere of law; nevertheless, the answer to this question is beyond the scope of the present study and, as a matter of fact, has already been positively answered by another learned researcher.[12]

6.2.2 The General Principle of Party Autonomy

at pp.373-77.

[10]For a brief drafting history of the Resolution of the 51th Session of the Institut, see M. Milde, "Conflicts of Laws in the Law of the Air" (1965) 11 McGill L. J. 220, at pp. 220-1, which also provides an overall review of the Air Law Resolution, and M. A. Makarov, "Exposé préliminaire", (1959) 48 I Annuaire de l'institut de Droit International 411, "Rapport provisoire et project de Résolutions"(1959) 48 I Annuaire de l'institut de Droit International 359.

[11]*Infra* note 48.

[12]See M. Milde, "Conflicts of Laws in the Law of the Air", *supra* note 10, at pp.221-6.

Among the totality of nine Articles, there exists one (Article 4) which is concerned with rules of the conflict of labor laws in international air transport. It provides that[13]

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

A preliminary question raised by this provision will be: does the phrase "contract of employment" refer only to the individual contract of employment between airlines and flying personnel, or does it also cover the "collective contract of agreement" between managerial forces and organized labor? No definitive answer is provided by the law or doctrine. However, since all preliminary discussions focused on the current trend of laws governing the individual contract,[14] it seems that the conflict of collective agreements is beyond the scope of the Institute's intentions.

Moreover, unlike the Torts Resolution also adopted by the Institute,[15] which is expressly prescribed to cover all questions related to the on-board delict and consequently deprives all privileges once enjoyed by the *lex fori*, the Air Law Resolution is silent on the scope of application for the rule. So it is doubtful that its principles would also apply to issues like the capacity of the parties or the form of the contract.

According to Article 4, the applicable law governing the contract of employment will be that chosen by the parties. The worker and the airline company are free to select any law they wish. The chosen law need not to be that which has a substantial connection to the party or the relevant employment

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[13]The French version reads as follows: "Le contract d'engagement du personnel d'un aéronef est régi par la loi à laquelle les parties ont manifesté la volonté de le soumettre.
Si les parties n'ont pas manifesté leur volonté à cet égard, ce contrat est soumis à la loi nationale de l'aéronef," see *supra* note 9, at p. 366.

[14]See (1959) 48 I Annuaire de l'institut de Droit International, at pp. 381-5, 428, 444, 447, 453, and (1963) 50 II Annuaire de l'institut de Droit International, pp. 197-203, 248-50.

[15]See *infra* Section 6.3 of this chapter.

relations as prescribed by the U.S. Restatement.[16] The principle of *autonomie de la volonté* is surely the prevailing trend in the private international law of contract. However, as we have mentioned *supra*, in chapter 3, party autonomy has never been popularly accepted by classical theory as a general principle of the conflict of laws with respect to the individual contract of employment[17] because it is doubtful that the right or ability of the economic-weaker party to choose the applicable law really exists in view of its inferior negotiating capability in the transaction. Thus, when faced with Hobson's choice, most employees do not really exercise free-will at the bargaining table, and the applicable law is in fact chosen unilaterally by the employer. For this reason, the *lex voluntatis* is strictly circumscribed by various conditions, although it is principally admitted by the EEC Contracts Convention,[18] and this restriction is severe enough to actually deactivate the operation of autonomy. In comparison, the *laissez-faire* approach of the Air Law Resolution is surprising, though it was noted that most courts will be inclined to accept the *lex voluntatis* unless it violates the imperative rules of the forum.[19]

Another unusual point in the first paragraph is that it does not mention if the chosen law must be "indicated" in express terms or simply demonstrated with reasonable certainty, as evidenced by employing certain legal expressions,[20] a logical consequence of party autonomy which also serves as a protective requirement of adequate notice, especially to the weaker party who substantially adheres - rather than agrees - to the contract. Without such a requirement, the indication could be tacit, and the court must then interpret the parties' common

[16]§ 187 (2), Restatement of the Law (Second): Conflict of Laws, (St.Paul: American Law Institute Publishers, 1971).

[17]See, *e.g.*, in E. Rabel, *The Conflict of Laws — A Comparative Study*, Vol.3 2d ed. (AnnArbor: Univ. Mich. Press, 1964), at pp. 190-200, *autonomie de la volanté* has never been admitted as a connecting factor for the contract of employment.

[18]See *supra* chapter 3.

[19]See M. Milde, "Conflicts of Laws in the Law of the Air", *supra* note 10, at p. 240.

[20]Comparison with EEC Contract Convention and Restatement Second, see also S. Cohen, "The EEC Convention and U.S. Law Governing Choice of Law for Contracts, with particular Emphasis on the Restatement Second: A Comparative Study" (1989) 13 Md. J.Int'l L. & Trade 223, at p. 231.

intention with discretion, possibly deteriorating the situation of the weaker party who generally cannot afford to avail himself of better litigation techniques in arguing for his best interests before the bench.[21]

6.2.3 The National Law of the Aircraft

When the parties do not indicate any applicable law of contract, the Air Law Resolution prescribes in the second paragraph of Article 4 that the national law of the aircraft, on which the flying personnel rendered their service, shall govern. A precedent can be found in the CITEJA Preliminary Drafts of the Convention Relative to the Legal Status of Aeronautical Flying Personnel, which is discussed in the following section.[22] Most of the theoretical drawbacks of the place of registration as a connecting factor for the conflict of torts in international air transport, as examined in chapter 2, also apply here, and curiously the Institute did not provide any valid reason to support the proposal.[23] In practice, not only may the nationality of aircraft have nothing to do with the on-board employment relationship in a typical example of the dry lease,[24] but the crew interchange agreement[25] might also create a similarly strange result.

Though such a situation might not occur frequently, since adherence to the standard contract of employment constitutes the usual practice in the present highly-unionized international air transport industry, yet it can still take place when the flight is operated completely abroad, providing the employer with the opportunity to sign a more advantageous contract of employment - *e.g.*, in obscure

[21]This point of view is supported by Australian private international law, while allowing for tacit choice in contractual relationship generally (§ 11); the IPR-Gesetz (Bundesgesetz vom 15, Jun.1978 über das internationale Privatrecht, which took effect on 1 Jan. 1979 and repealed the former provisions incorporated in the Civil Code) in § 44 (3) prescribes that a contractual choice of law shall be taken into consideration only when expressly made. See the full German text and English translation of the IPR-G in (1980) 28 Am. J.Comp.L. 222

[22] See *infra*, Section 6.4.

[23]See (1963) 50 II Annuaire de l'institut de Droit International, at pp.248-9.

[24]See also M. Milde, "Conflicts of Laws in the Law of the Air", *supra* note 10, at p. 241.

[25]See footnote 326 and 684 of chapter 2.

language - if he is allowed to escape from the coverage of a local collective agreement.[26]

6.2.4 Remarks on the Resolution

The major contribution of the Air Law Resolution is to provide predictable rules to the conflict of contracts with respect to employment in the air industry: two simple rules without exception. Yet insistence on predictability may at the same time sacrifice other considerations which are indivisible from the contract of employment, especially those regarding the protection of a weaker party. In comparing the serious curtailment of the *autonomie de la volonté* in Article 6 of the EEC Contracts Convention and §187(2) of the Second Restatement, one can grasp the difficulty involved in reaching a balance between these two ends.

6.3 The Resolution of the *Institut de Droit International*: "Delictual Obligations in Private International Law"

6.3.1 Introduction

Conceiving of the urgent need to unify certain principles governing delictual liability in private international law which cope with technical development in the sphere of global jurisprudence,[27] the Edinburgh Session of the *Institut de Droit International* on 11 September 1969[28] adopted another resolution which also carries certain articles related to airline labor law: the resolution on "Delictual Obligations in Private International Law"[29] (hereinafter the "Torts Resolution"). The Torts

[26]See *supra* chapter 4 on the extraterritoriality of the local collective agreement.

[27]This motif has been indicated in the preamble to the Torts Resolution: "[b]eing of the opinion that as a result of technical developments the principles governing delictual liability in private international law have greatly gained in practical importance and that they continue to do so," see *infra*, at p. 386.

[28]This is the 54th session of the *Institut de Droit International*, from September 4 to 13, 1969. A brief report on the resolutions adopted by the session is found in Q. Wright, "Reports (on the Edinburgh Session of the Institute of International Law)", (1970) 18 Am. J. Comp. L. 476.

[29]The full text of the English version of the Torts Resolution can be found in (1969) 53 II

Resolution deals specifically with the conflict of laws rules related to delictual liability claims, which is intended to provide a general principle to guide the courts and academic writers.[30] It finally excluded the following general principles of private international law that inevitably accompany them: the first is the classification of delictual liability or torts in the case, which is to be left to the court to decide through the *lex fori* or other methods.[31] The other general principle of private international law related to delictual claims which the Torts Resolution reluctantly deals with is the problem of public law violations, which usually ensue from an interpretation of the *lex delicti* where its scope of application does not coincide with that of the system of law comprising the relevant rules of public law;[32] the problem is expected to be encountered often in deciding whether the employer is negligent *per se*. Since the problem transcends the scheme of the Torts Resolution, and should be solved through general analysis of the relation between public and private law in the conflict of laws, it was excluded from consideration. As for party autonomy, *i.e.* the freedom of the parties to stipulate their rights and obligations in law - excluding contractual liability - other than those which would normally be constructed through conflict rules, it is also categorized as a general problem of private international law and is not dealt with in the Torts Resolution.[33] The drafters of the Torts Resolution also decided not to expressly tackle the basic problems which might occur in maritime or

Annuaire de l'institut de Droit International 386-90, and the French version at pp. 370-4.

[30]See J. Offerhaus, "Rapport provisoire (pour les obligations délictuelles en droit international privé)" *infra* note 43, at 341 ("[I]l est nécessaire de se limiter aux grandes lignes"), and O. Kahn-Freund, "Final Report and Draft Resolution (on Delictual Obligations in Private International Law)", *infra*, at 438 ("It would be inopportune to encumber the Resolution with considerations of detail many of which defy discussion in terms of the law of delict in general and require an analysis of particular types of delict").

[31]"The Institute will not express any view on whether or not the criteria of classification should be taken from the *lex fori*. While it would not be for the *lex fori* to say whether the impugned conduct comes within the category of those acts which are illicit, it may be the task of the *lex fori* to determine whether such conduct, if it was illicit according to the *lex fori*, would or would not come within the definition of what that law calls a 'delict' or a 'tort:'" see O. Kahn-Freund, "Final Report and Draft Resolution (on Delictual Obligations in Private International Law)", (1969) 53 I Annuaire de l'institut de Droit International 435, at pp. 448-9.

[32]O. Kahn-Freund, *id.*, at pp. 456-7.

[33]*Id.*, at p. 462. This problem mostly focuses on the issue of contract as a defence in tort,

aerial settings, such as what occurs when the delict or tort is committed on the high seas or *territorium nullius*, but they expected to overcome these problems with the rules and methods already provided.[34]

The law indicated by the principles of the Torts Resolution encompasses the standard of liability (*i.e.*, whether the relevant act constitutes gross negligence or simple negligence), along with all the presumptions relating to liability (*i.e.*, the application of the doctrine of *res ipsa loquitur* or negligence *per se*), as well as the question of the victim's contributory negligence and the delictual capacity of infants, mentally-disordered persons, and corporate bodies, the immunities of charitable organizations and trade unions, the vicarious liability of employers for their employees and of corporate persons for their organs, the determination of the persons entitled to compensation, and finally the amount of compensable damage and its assessment (Article 4). The result is the deprivation of all privileges previously enjoyed by the *lex fori*. For example, suppose an airline stewardess breaks her leg while working on-board due to midair turbulence. If the law of country *A* is indicated as applicable to her tortious action against the airline in the courts of country *B*, pursuant to Articles 1 and 2 of the Torts Resolution, then the law of *A* determines the scope of the duty of care owed by the airline, as well as the availability of *res ipsa loquitur* or negligence *per se* as a defence, plus contributory negligence, voluntary presumption of risk, and act-of-God defences; most importantly, it determines the applicability of common employment or fellow servant rules and consequently the employer's vicarious liability. No laws of country *B* will operate with respect to either the assessment or the compensable range of damages.[35]

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which has been dealt with in Section 3.1.1. of chapter 3.

[34]"[B]ut [the Torts Resolution]...may have the ancillary effect of helping to overcome the somewhat crude solution of applying the lex fori , e.g. to collision on the high seas between vessels of which neither wears the flag of territorium fori:" O. Kahn-Freund, *supra* note 30 at p. 463.

[35]However, the *lex fori* could still apply in the name of forum public policy, especially on the amount of compensation awarded, since it is a common practice of codified private international law of the civil law countries to introduce a special public policy clause on torts, which limits the compensable damage to a maximum amount by virtue of *lex fori*: see, *e.g.*, Article 135, sec.2 of the Federal Statute on Private International Law (PIL Statute) of Switzerland ("If claims based on a defect or defective description of a product are governed by foreign law, *no*

Structurally, the Torts Resolution consists of a Preamble and five Articles. The first Article prescribes the *lex loci delicti* as the general rule governing the conflict of laws in delictual liability. The second Article provides the definition of the *locus delicti* in order to solve the long-standing controversies between the *locus actus* and the *locus injuriae*. The third Article lays down the exceptions created by special relations between the parties and the appropriate situation to substitute the *lex loci delicti* rules. Article Four delineates the scope of the law indicated, while the final Article regulates the conditions for the operation of the forum public policy exception.

6.3.2 *Lex loci delicti*: the General Principle and its Exceptions

The *lex loci delicti* rule was chosen as the general principle of the Torts Resolution after a thorough review by the Commission of three broad theories (or policies) in the conflict of torts. The principle of *lex fori* was struck out because it is generally conceived as a substantive mutation of choice of law procedure (an abuse of the public order exception) which encourages of forum shopping.[36] The prominent "most significant relationship" rule was abandoned due to the criticism that it is, in fact, a non-theory: "the theory would elevate the reason for choosing a connecting factor into the connecting factor itself."[37] The rule would not only deteriorate the already-beclouded general norms of the conflict of torts, but would also eliminate the element of predictability completely. Even though in many situations, such as in international transport settings, the *lex loci delicti* rule is shown to be "unconnected with the social environment of the parties, or of the relationship which exists between them,"[38] since this basic, if not dominant, rule has responded well to ancient traditions and the requirements of expediency

damage can be awarded in Switzerland beyond those that would be awarded under Swiss law for such a damage or injury"[emphasis added]): an English version of the PIL Statute can be found in P. A. Karrer, K. W. Arnold & P. M. Patocchi, *Switzerland's Private International Law*, (Deventer: Kluwer Law & Taxation Publisher, 1994) at pp.31-, and *infra* section 6.3.6.

[35] O. Kahn-Freund, "Final Report and Draft Resolution (on Delictual Obligations in Private International Law)" *supra* note 30, at p. 441.

[37] *Id.*, at pp.442-3.

and justice,[39] and most importantly been constantly reaffirmed by judicial practice and statutory legislation in many systems,[40] the Institute eventually decided to retain it as a general principle and the "last line of defence" in the choice of tort laws.[41] Article 1 of the Torts Resolution crystallizes the principle that "delictual liabilities are governed by the law of the place at which the delict is committed."

Since the Institute has fully recognized that the geographic environment of the delictual act or conduct does not always create a meaningful link with the social environment of the parties, especially when those torts occur in the course of rapid mobility, it then introduced several exceptions in the Torts Resolution that can "work out separately for each type of delict" (such as traffic accidents, accident at work, *etc.*) and "transcend the limits [and functions] of a general resolution on delictual liability,"[42] to substitute the *lex loci delicti* principle. However, these exceptions are strictly limited to function only "[i]n the absence of any substantial connection between the issue to be determined and the place or places at which the delict has been committed," (see Article 3, sec.1); only when there is no compelling interest for the *lex loci delicti* to govern the relevant claim, as "indicated by a special relation between the parties or between the parties and the occurrence" (see Article 3, sec.1), will the law apply.[43] These "special relations," though, were deemed to be "a concession to the need for flexibility at the expense of predictability."[44] They are not regulated in an abstract form, but are expressly listed in subsections (a) and (b) of section 1 and section 2 of Article 3 of the Torts Resolution. Two of these exceptions are directly related to the conflict of employer's tortious liability in the international air transport industry; they are "the law of

[38] *Id.*, at p. 439.

[39] *Id.*, at pp. 443-4.

[40] See the decisions cited in Section 2.4.5 of chapter 2.

[41] See O. Kahn-Freund, "Letter to the Members and Invited Members of the Twenty-Sixth Commission" in Annex 1, (1969) 53 I Annuaire de l'institut de Droit International 484, at p. 489.

[42] See preamble of the Resolution, *supra* note 28.

[43] "The meaning of 'in the absence of any substantial connection' should be strictly interpreted; *i.e.* the general principle (locus rule) should not be easily displaced:" see O. Kahn-Freund, "Final Report and Draft Resolution (on Delictual Obligations in Private International Law)", *supra* note 30, at p. 460.

the seat of an enterprise to liabilities arising between employers and employees and between fellow employees of the same enterprise" (see subsection (a) of section 1) and "the law of the place of registration to delicts committed on board an aircraft" (section 2).

6.3.3 The Law of the Seat of an Enterprise

Though some members of the Institute cast doubt on the maturity and validity of the exception provided for the employer's tortious liability,[45] and though it is undeniable that a great portion of the employer's tortious liability will be governed by a workers' compensation system, palliating the urgency of unifying the conflict of laws rule on this subject notwithstanding that the compensation claim does not itself give rise to a true choice of law problem,[46] the provision was eventually included in the Torts Resolution. As O. Kahn-Freund noted in his *Réponse*, "[i]f one excludes the cases which touch ... Labour Law, ... [and] Transport Law, one excludes almost the entire scope of the modern law of tort in practice."[47]

In the Torts Resolution, it is envisaged that the special relation between the employer and employee justifies the replacement of the general principle of *lex loci delicti* with "the seat of an enterprise (du siège de l'entreprise)" where the former does not have any connection with the situation of parties. The theory is set out in Article 3, subsection (b):

> In the absence of any substantial connection between the issue to be determined and the place or places at which the delict has been committed, and by way of exception to the rules in Article 1 and 2, the law is to be applied which is indicated by a special

[44]O. Kahn-Freund, *id.*, at p. 458.

[45]See J. Offerhaus, "Rapport provisoire (pour les obligations délictuelles en droit international privé)" (1969) 53 I Annuaire de l'institut de Droit International 293, at p. 305, also Résponse à l'exposé préliminaire du 1er août 1965 et au questionnaire du 1er novembre 1965 de M. J. Offerhaus (hereinafter as "*Résponse*") by E. E. Cheatham, "there should be excluded at this time from the study Topic...'Le droit du travail '...since these subjects vary so widely in local law that it may be especially difficult to lay down rules of conflict of laws as to them", at (1969) 53 I Annuaire de l'institut de Droit International 390.

[46]See discussion in Section 2.3.3 of Chapter 2.

relation between the parties or between the parties and the occurrence:

(a)...*the law of the seat of an enterprise to liabilities arising between employers and employees* and between fellow employees of the same enterprise [emphasis added].

The Torts Resolution itself does not provide any definition for "the seat of an enterprise," yet according to the Final Report made by O. Kahn-Freund, the term should refer to the *siège social effectif, i.e.*, the center of management and control for the employment relation.[48] The *siège social effectif* of the employer does not necessarily have to be at his domicile, or as in most cases, the place of incorporation.[49] Especially for enterprises involved in transnational business activities, such as the international air transport industry, the operating center through which the employer (or his delegates) maintains routine professional interaction with his local employees may be found in multiple locations. Article 28 of the Warsaw Convention employs a similar phrase, the "siège principal de son (transporteur) exploitation (the [carrier's] principal place of business),"[50] which according to writers on this subject refers to the air carrier's actual center of management, or home office,[51] as the "principal" place of business, *i.e.*, the "main part" of the place where the executive and managerial work of the enterprise takes place, as the carrier's only possible *siège principal de exploitation*.[52] However, the relations

[47] *Résponse* by M. O. Kahn-Freund, *supra* note 44., at p. 395.

[48] O. Kahn-Freund, "Final Report and Draft Resolution (on Delictual Obligations in Private International Law)", *supra* note 30, at p. 466.

[49]Yet in many systems the domicile of a corporation is usually its principal place of business, or *siège social*; Article 3 of the Corporation Law of Taiwan prescribes that the domicile of a corporation is the place designated for its principal corporation (office); a similar approach is adopted in France: see P. Lerebours-Pigeonnière & Y. Loussouarn, *Droit International Privé*, 9th (Paris: Dalloz, 1970) at pp. 302-.

[50]Convention for the Unification of Certain Rules relating to International Carriage by Air, 137 LNTS11, ICAO Doc.601, 1947 CTS 15.

[51]See G. Miller, *Liability in International Air Transport*, 1st ed (Deventer: Kluwer Publisher, 1977), at pp. 302-3, L. B. Goldhirsch, *The Warsaw Convention Annotated — A Legal Handbook*, (Dordrecht: Martinus Nijhoff Publisher, 1988), at p. 145, Shawcross & Beaumont, *Air Law*, P. Martin, J. D. McClean, E.de. M. Martin, ed. 4th ed.(London: Butterworth, 1993), at VII/140, E. Giemulla & R. Schmid, *Warsaw Convention*, (The Hague:Kluwer Law International, 1995), at WC Art.28, 5.

[52]See *Nudo* v. *Sabena*, 7 Avi 18, 295 (E.D.Pa. 1962), *Eck* v. *United Arab Airlines, Inc.* 9 Avi 18, 146 (2d Cir. 1966), *Re Korean Air Lines Disaster of September 1, 1983*, 19 Avi 17, 579 (D. D.C. 1985), *Standford* v. *Kuwait Airways Corp.*, 20 Avi 17, 393 (SDNY, 1986), *Duff* v. *Varig Airlines Inc.*, 22

and the interests involved which legitimize the jurisdiction of Warsaw claims differ from those which justify the law applicable to the action in tort against employers. A simple analogy, therefore, would be a false one.

6.3.4 The Law of the Place of Registration

According to O. Kahn-Freund, whenever the delict occurs on-board an aircraft or even in the "transit lounge" of an airport, there might exist only a minimal connection between the situation of the parties and the place of the delict, for the parties are in fact surrounded by their own unique social environment.[53] The place of registration of the aircraft, which is in fact envisaged as a personification of the aircraft itself, is therefore considered by the Torts Resolution to be the sovereign territory more appropriate than the locus delicti for controlling on-board delicts, subject to formidable dissent. Article 3, section 2 of the Torts Resolution reads:

> With the same intent the law of the flag may be applied to delicts on board a ship in foreign territorial water and the law of the place of registration to delicts committed on board an aircraft.

So regardless of whether the aircraft is flying over the territorial airspace of a foreign state or, as suggested by O. Kahn-Freund,[54] is still taxying on the traffic apron of a foreign airport, any delicts occurring on-board will be governed by the *lex portitoris*. One could imagine one major reservation in formulating this "new rule:" it will inevitably contradict current practice in international air law, which recognizes that each state has exclusive sovereignty over the airspace above its territory. [55]

Notwithstanding the suitability of the law of flag in governing on-board delicts (see below), the immediate question encountered in the airline labor law

Avi 17, 367 (Ill App. 1989), and Shawcross & Beaumont, E. Giemulla & R. Schmid, *id;* also section 2.3.3.C of Chapter 2.

[53]O. Kahn-Freund, "Final Report and Draft Resolution (on Delictual Obligations in Private International Law)", *supra* note 30, at p. 461.

[54]*Id.*

[55]See J. Offerhaus, "Rapport provisoire (pour les obligations délictuelles en droit

setting will be which law will govern in an action of delictual liability arising between employers and employees with respect to delicts committed on-board an aircraft: the law of the seat of the employer, or the law of the place of registration of the aircraft? Considering the structure and legislative intent of Article 3 of the Torts Resolution, subsection (a) should preempt the second section no matter where the industrial accident occurs. First, the connecting factors listed in both subsection (a) and (b) already specifically indicate the most proper applicable law governing delictual liability between the parties, so it is unnecessary to further refer to the more general scheme provided in section 2. Furthermore, aside from the sea and airline cabin crew, there are yet other workers who perform their service at exotic places where the *locus delicti* has no substantive connection with the situation of parties, such as on an off-shore drilling rig,[56] or in the enclaves of foreign territory, where there exists no solid reason to set up special rules for these workers. Besides, the *lex portitoris* has not yet been recognized as a well-established rule for the conflict of torts in maritime or airline labor law. If delictual liability arises between a husband and wife on-board an aircraft (as in a case of spousal abuse), then the law of their common habitual residence,[57] rather than the *lex portitoris*, shall govern; the same holds true between employers and employees. The conflict rules provided in Article 3, section 2 will therefore apply only when there exists no specific rule indicating the law which governs on-board delictual acts.

6.3.5 Public Policy Exception

If the applicable law would encroach upon a certain notion of the essential

international privé)", *supra* note 44, at p.310.

[56]See *e.g.*, *Sayers* v. *International Drilling Co. N.V.* [1971] 1 W.L.R. 1176 (C.A.). In *Sayers* the English employee was injured while working on an oil rig in Nigerian territorial water for his Dutch employer, a drilling company. In holding that Dutch law governed the damage claim, Lord Denning concluded that "[t]he Nigerians had nothing to do with the rig. So Nigeria is out" (at 1181). For a general discussion on the applicable law to the compensation claim arising from oil drill rig disasters, see T. Hayashi, "Offshore casualties in Canadian Waters" (1983) 21:1 Alta. L. Rev. 165.

[57]See Article 3(a) of the Torts Resolution ("thus the law of the common habitual

law of the forum court or impede the realization of the latter,[58] it will generally be considered to be against the public policy of the forum. Considering that the forum's public policy could be "flexibly" utilized to justify the application of *lex fori* in an action of delictual liability,[59] especially insofar as it operates against the employer,[60] the Torts Resolution strictly limits its application. According to the rules adopted by the Resolution, only when there exists "manifest incompatibility" with the public policy of the forum can it override the law which would normally apply.[61] Practically, however, when will the result of applying a foreign law constitute "manifest incompatibility" with the public policy of the forum court? The Final Report indicated that whenever "the application of that law in the concrete case to be decided would violate the fundamental principles of policy which the forum seeks to enforce,"[62] the *lex fori* would preempt the foreign law.

6.3.6 Remarks on the Resolution

"The seat of an enterprise" is defined within the context of the relevant employment relation, rather than within the operating structure of the business. As mentioned in the section **2.2.3.C** of Chapter 2, above, a unique labor process forces the international air transport industry to keep more than one center of operations; the corporations concerned are also required to maintain offices in every airport where they undergo business. Any commercial center which has routine professional interaction with the injured employee, such as the place

residence may be applied betwen members of the same family"), *supra* note 7.

[58]See P. Lagarde, "Public Policy" in Kurt Lipstein, *International Encyclopedia of Comparative Law*, (Tübingen: J.H.C.Mohr, 1994) Vol. III (Private International Law), Chapt. 11, at p.3.

[59]*E.g.*, in the famous British case of *Chaplin* v. *Boys* [1969] 2 All E.R. 1085, per Lord Pearson (at 1105, 1116).

[60]See Section **2.3.3.B ii)** of Chapter 2.

[61]"The application of the law which is applicable in accordance with the preceding rules can be only excluded in so far as such application to the issue to be determined would be *manifestly incompatible with the public policy of the forum* [emphasis added]:" Article 5 of the Torts Resolution, *supra* note 28.

[62]O. Kahn-Freund, "Final Report and Draft Resolution (on Delictual Obligations in

from where the employee regularly receives instructions and supervision, should qualify as a *siège social effectif* with regard to issues of industrial injury. Whether it is the place where "the brain which controls the operation of the company is situated"[63] is of little consequence to the employer's delictual liability, even if it is the domicile of the main shareholder or the actual (*de facto*) controller of the airline.[64]

It is a good idea to implicate the applicable law as indicated in the Torts Resolution with all issues arising from delictual liability prescribed in Article 4, thereby eliminating possible intervention by the *lex fori* and enhancing overall predictability. In many aviation cases, the applicability and availability of the presumption relating to delictual liability - such as the doctrine of *res ipsa loquitur* - is often treated as a procedural rule of evidence[65] subjected to *lex fori*, whether or not delictual liability is ultimately governed by foreign law under choice of law rules. Yet an actual scenario might include a court whose law of torts does not recognize a particular doctrine with respect to an issue wherein the application of such foreign procedural rules "would violate the fundamental principles of policy which the forum seeks to enforce." Therefore, the *lex fori* would still be substituted, an unfortunately inevitable result of the "public policy" concession made in Article 5 of the Torts Resolution.

As for Article 3, section 2 of the Torts Resolution, although under the above interpretation it should not apply to the employer's liability for delicts on-board an aircraft, further exploration is needed if it has been understood otherwise. We have already mentioned in section **2.4.5.** of Chapter 2 that the registration of the aircraft does not by itself carry too much of a meaningful connection with respect to the conflict of employer's on-board tortious liability. The registration of the aircraft is an administrative process intended to verify the existence of substantive

Private International Law)", *supra* note 30, at p. 470.

[63]This test is borrowed from *Cesena Sulphur Co.* v. *Nicholson*, [1876] 1 Ex. D. 428.

[64]On the divergence between the place of incorporation and domicile of an airline, see D. Zepos, "Dual Nationality in Airline Business — Greek Air Transportation Exploitation Agreement" (1958) 25 J. Air L. & Com. 95.

[65]See *e.g.*, the US court decisions in *Citrola* v. *EasternAirlines, Inc.*, 264 F.2d 815 (2d Cir. 1959) and *O'Keefe* v. *Boeing Company*, 335 F.Supp. 1104 (SDNY, 1972).

connections between the aircraft and the registered state, and has been frankly described in the CITEJA's Draft Convention on the Ownership of Aircraft and the Aeronautic Register as "for the publicity of rights, having in view the inscription of ownership and the real rights by the competent authority of the said state;"[66] based on these connections, the state of registry has a legitimate interest in exercising its public authority over the aircraft, to inspect the airworthiness of the aircraft,[67] to recruit it as part of an auxiliary air force in times of war,[68] and so on. Consequently, that state must fulfill certain international responsibilities for the aircraft.[69] All these effects, along with cabotage and public interest (*e.g.*, national security), originated from complete and exclusive state sovereignty over the air. Thus, without registration, an aircraft cannot engage in any aerial navigation, creating the impression that a genuine link exists between the aircraft and the registering state. However, even if this link is essential for the operation of an aircraft, the nationality thereby conferred with registration serves only as a mark of identification for the object; the registered aircraft itself is not implicated with any political causatum under international law. Furthermore, international state practice does not allow the adoption of the law of registry to be justified as the necessary consequence of an extended application of the *lex loci delicti,* because the aircraft in flight is unquestionably subject to the territorial jurisdiction of the airspace over which it travels. The conferment of nationality cannot make the aircraft a flying or moving territory of the registry, any more than a national motor-car driving on the highway of foreign soil, when an accident happens. The *locus delicti* will always be the spot upon which the delictual act occurs, as

[66]Article 1 (1). The Draft Conevntion on the Ownership of Aircraft and the Aeronautic Register was adopted in the Sixth Session of the CITEJA in Paris, October 1931. An English version of the Draft Convention can be found in (1937) 8 J.Air L. 325.

[67]"Registration...involves an inspection to determine the fitness of the aircraft for flight — with periodic re-inspections and inspections incident to repairs:" see R. Kingsley, "Nationality of Aircraft" (1932) 3 J. Air L. 50, at p. 55.

[68] See U.S. H.R. Rep. No. 1262, 68th Cong. 2d Sess. 26 (1925) , cited from E. E. McMeen & J. J. Sarchio, "Administrative Flexibility and the FAA: The Background and Development of United States Registration of Foreign-Owned Aircraft" (1980) 46 J.Air L.& Com. 1.

[69]Such as to insure the aircraft has complied with the rules and regulations relating to air navigation as prescribed in Article 12 of the Chicago Convention.

opposed to within the cabin. The argument that aircraft are different from motor-cars, since the former are instruments of national policy of the registered state, generally embracing the highest degree of economic, political, and financial consideration,[70] does not change this practice described above.

If not a variant of the *lex loci delicti*, then why would the law of the state of registration govern? Notions of predictability could be the major consideration inducing many learned authorities to replace the accidental *lex loci* rule with this necessary evil.[71] In modern air transport, disregarding the radical example of a midair collision occurring in various *locus delicti*, it is almost impossible to determine the sovereign territory above which the aircraft is traversing when a minor incident - like a slip and fall in a toilette on-board which takes place at over 2000 m.p.h. cruising speed; even if the locus could be technically determined, it would be accidental to the parties, since the legal connection between the on-board activities and this *locus delicti* could barely be justified. As indicated in the jurisprudence,[72] the only relevant connections drawn on-board will be those concerning flight safety and any technical assistance prescribed by the registering state. Therefore, it is the latter which has controlling interests over such on-board activities. As for the expectation of the parties, it is asserted that as an enterprise, the airline will prefer to maintain uniform treatment of the legal liabilities arising from their carriage; based on economic considerations, the law of the center of their social activity — the law under which the airline is incorporated or has placed its headquarters, and the place where it holds its assets - is naturally to be expected. The passenger should also realize that once he has boarded the flight, he is placing himself within the legal framework under which the airline usually

[70]See R. Y. Jennings, "International Civil Aviation and the Law" (1945) 22 Brit.Yearbok Int'l L. 191, at pp.206-7.

[71]Lord McNair, Chapter 2 note 505, at p.270, Dicey and Morris, L. Collins, ed. 12th ed *Vol.*2, Chapter 2 note 496, at p.1542, E. Rabel, *Vol.* 2, Chapter 2 note 309, at p.347, and O. Riese, Chapter 2 note 674 at p. 273, L. M. Bentivoglio, Chapter 2 note 674, at pp. 97, 138, 161-4, O. N. Sadikov, "Conflicts of Laws in International Transport Law" (1985) 190 I Recueil des Cours 189, at pp. 246-7.

[72]L. M. Bentivoglio, *id.*, at p. 97.

operates,[73] and such an interpretation will not deprive the protection offered to passengers by the community to which he belongs, since "most passengers resort to the services of national air lines."[74] In most cases, the law under which the airline is incorporated or has placed its headquarters will be identical to the law of the flag.

The opposite conclusion, however, has been reached by other authorities,[75] which assert that most passengers are not only usually unaware of the nationality of the aircraft they are boarding, but they do not expect that the *lex portitoris* shall be applied, especially under the prevailing code-sharing program or carriage pool.[76] Nonetheless, the aircraft during most of its flying time is still subject to the supervision and direction of the subjacent state concerning safety, hygiene, and public order,[77] as well as making use of the latter's navigational aids and facilities; comparatively, the registering state has much less power to execute its legal order on-board; the trend of modern airline management has also begun to erode the validity of the above argument in favor of *lex portitoris.* Unlike the Convention on the High Seas of 1958 (also known as the Geneva Convention), which requires a genuine link between the ship and the registering state,[78] the Chicago Convention does not prescribe any specific conditions on the conferment of aircraft registration, and each state therefore enjoys full discretion in setting

[73]*Id.*, at p.138.

[74]O. N. Sadikov, *supra* note 70, at p.246.

[75]See J. Németh, *The Nationality of Aircraft* (Montréal: LL.M. Thesis, McGill Univ. 1953), at pp. 103, 106-7 and ICAO Doc 7157 LC/#130.

[76]Not to mention under the "blocked-space agreement," which provides for the allocation to an airline of a number of seats on another airline's flight. On the theory and practice of code-sharing and other joint-operation programs, see J. E. C. de Groot, "Code-Sharing — United States' Policies and the lesson for Europe" (1994) 19 Air L. 62.

[77]See also M. Lambie, "Universality versus Nationality of Aircraft" (Part 2) (1934) 5 J. Air L. 246, at 290.

[78]450 U.N.T.S. 82, U.N.C.L.S., off. Rec. II, p.136 (A/Cont.13/38) "There must exist a genuine link between the state and the ship. In particular, the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over the ships flying its flag:" Article 5.

their criteria of registration[79] according to their practical needs. At the dawn of civil air transport, national ownership still served as a compulsory requirement for qualifying registration due to prevailing public interest considerations;[80] there could equally be a substantive interest justifying the application of the law of registry, as the locus is generally the place where the airline maintains its assets or its principal place of business. However, with the evolution of financial instruments applied to the international air transport enterprise, such a narrow requirement of ownership by nationals or national companies can no longer cope with the flourishing need of leasing, hiring, and mortgaging aircraft in the airline business. The law has since tended to disregard national ownership of the aircraft and treated registration as mere administrative machinery. In the U.S. 1977 Amendment to the *Federal Aviation Act*,[81] for example, which prescribes only a condition that the registered aircraft shall be "based and primarily used in the United States," the notion has been defined by the Secretary of Transportation as entailing "only those aircraft which are operated at least 60 percent of the time in the United States," including "all non-stop flights between two points in the United States."[82] The operator need not even be a US corporation. Under such

[79]See D. Goedhuis, "Conflicts of Law and Divergencies in the Legal Regimes of Air Space and Outer Space" (1963) 109 III Recueil des Cours 257, at p. 275 and D. Renton, *The Genuine Link Concept and the Nationality of Physical and Legal Persons, Ships and Aircraft*, (Köln: PhD Thesis, Universität zu Köln, 1975), at p.141.

[80]For example, the original provision of the US *Air Commerce Act* of 1926 provided that "[n]o aircraft shall be eligible for registration (1) unless it is a civil aircraft owned by citizen of the United States and not registered under the laws of any foreign country." (currently 49 U.S.C.A. § 1401(b) section 3(a)), which in policy consideration is analogous to the *Shipping Act* of 1916 which prescribed that no corporation, partnership or association shall be deemed a citizen of the US unless "the controlling interest therein is owned by citizen of the United States"(46 U.S.C.A. §§ 1-1508 (1976 Supp. I. 1977)).

[81]See *e.g.*, the US law on November 9, 1977 (which amended Section 501 (6) of the *Federal Aviation Act* of 1958, 49 U.S.C.A. § 1401(b)), providing that "An aircraft shall be eligible for registration if, but only if — (1)(A) it is — (i) owned by a citizen of the United States (other than a corporation) or by an individual citizen of a foreign country who has lawfully been admitted for permanent residence in the United States; or (ii) owned by a corporation lawfully organized and doing business under the laws of the United States or *any States* thereof *so long as such aircraft is based and primarily used in the United States*; and (B) it is not registered under the laws of any foreign country [emphasis added]."

[82]See 44 Fed. Reg. 63, 64-5 (1979); under this interpretation, although the aircraft may be in flight over the High Seas or neighboring country during a non-stop flight between two points

circumstances, there exists only minimal interests justifying the application of the *lex portitoris*.

On the other hand, though long-criticized as anti-choice of law, the *lex fori, i.e.*, the law of the court seized of the case, might even bear more legitimacy in governing the on-board delict if it identifies (often) with the *locus delicti*, providing a convenient court for the investigation of the injury and relevant evidence.

An analogy could also be drawn from the resolution made by the Coordination Committee of the Twenty-first Session of the International Labour Conference, which declined to adopt the nationality as an appropriate criterion for determining the jurisdictional rights of a state over conditions of employment on-board a maritime ship, since the nationality of a ship as determined by registration cannot reveal the actual ownership and control of that ship.[83]

In summary, back to the realm of torts, the proper law should be the one that best serves the interests of justice between the parties,[84] most possibly the law which could be expected to govern the social surroundings of the parties: as between carrier and passenger, the law relating to the carriage; as between employer and employee, the law relating to employment, and so on. Only when no such relation exists, *e.g.*, in the case of a casual occurrence between two individuals, could the predictability of the *lex portitoris* play a supplementary role, notwithstanding the public interests of the registering state toward the aircraft.

6.4 The CITEJA Preliminary Drafts of the Convention Relative to the Legal Status of Aeronautical Flying Personnel

6.4.1 Introduction

The *Comité International Technique d'Experts Juridique Aériens* (CITEJA), was

in the US, all the flight hours accumulated during such flight are considered flight hours accumulated in the US.

[83]See C. W. Jenks, "Nationality, the Flag and Registration as Criteria for Demarcating the Scope of Maritime Conventions" (1937) III 19 J. Comp. Legis. & Int'l L. 245, at p.249.

[84]See A.J.E. Jaffey, "The Foundations of Rules for the Choice of Law" (1982) 2 Oxford J. Legal Stud. 368, at pp. 375-7.

instituted in May 1926 pursuant to a motion adopted at the First International Conference on Private Air Law (hereinafter the "first Diplomatic Conference").[85] As its name indicates, CITEJA was a body composed of specialists - lawyers and legal experts - in the field of private air law, endowed with the task of continuing the work of the first Diplomatic Conference, namely, of studying the requisite subjects for the future unification of international private air law.[86] Under CITEJA, the first Diplomatic Conference also recommended nine subjects as priorities for study,[87] including the legal status of the air commander and his personnel.

From the very beginning, the research project of CITEJA on the legal status of flight personnel was scheduled into two working parts: *i.e.*, the aircraft commander and the remaining flight deck personnel.[88] Probably due to such a questionable division, which more or less undermined the first part's priority and urgency,[89] the second part was doomed to become a failure; work on the remaining flight personnel never achieved any significant progression after this arbitrary starting point. Since 1937, CITEJA has creatively proposed to collaborate with the International Labour Office on this subject,[90] yet this cooperation was

[85]The first Diplomatic Conference was held between 27 Oct. and 6 Nov. of 1925. For a brief history of the creation of CITEJA, see J. J. Ide, "The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.), (1932) 3 J. Air L. 27, and L. R. Fike, "The CITEJA", (1939) 10 Air L.Rev. 169, at pp. 170-1.

[86]See Article V of the By-Laws of CITEJA ("The CITEJA has adopted three fundamental principles for its guidance: 1. Establishment of a program covering various subjects pertaining to *private air law* to be studied by Commissions of experts. 2. Preparation of texts of international conventions on legal subjects for consideration at periodic International Conference. 3. Maintenance of the principle of progressive elaboration of *a single international code of private air law* [emphasis added].") For the complete text of the By-Laws, see J. J. Ide, *id.*, Appendix A, at pp. 45-6.

[87]The nine subjects are: damages caused by aircraft to goods and persons on the ground: compulsory insurance; establishment of aeronautical registers: ownership of aircraft, vested rights and mortgages; seizure; renting of aircraft; aerial collisions; legal status of commanding officers of aircraft; bill of lading; uniform rules for the determination of the nationality of aircraft. See the Report of 1925 Private Air Law Conference, pp.82-3, cited from J. J. Ide, *id.*, also A. A. van Wijk, "The Legal Status of the Aircraft Commander — Ups and Downs of a Controversial Personality in International Law", in A. Kean, ed. *Essay in Air Law*, (The Hague: Martinus Nijhoff Publisher, 1982) p. 311, at pp.314-5, and n.26.

[88]CITEJA Doc 451, p.2.

[89]See *id.*

[90]CITEJA Doc N° 210, p.36 (statement delivered by the Rapporteur M. Babinski in the

not fruitful either;[91] so until the outbreak of World War II, no preliminary draft was ever approved by the Commission.[92] After the end of World War II in 1946, CITEJA resumed its drafting function for only a short period before being replaced by the Legal Committee of PICAO.[93] In the Fourth Commission of CITEJA, a report and avant-projet on the "Convention relatifs à la situation du Personnel Navigant de l'Aéronautique" was proposed by the new rapporteur, M. Garnault, who attempted to combine the terms specially applicable to the air commander, provisionally adopted in 1931, and the avant-projet relating to the legal status of aeronautical flying personnel, originally brought forward by Mr. Babinsky (see below), into a single convention. The report and avant-projet were discussed at the meeting of the Commission,[94] but since the Commission eventually decided that the status of cabin crew should be treated separately from that of the aircraft commander, only the first part was adopted as a draft by the XV Plenary Session in Cairo and subsequently transmitted to PICAO.[95] The provisions on other flight deck personnel were not discussed at the meeting, and of course no resolution was adopted;[96] the topic has never since been listed on the agenda of the ICAO

Eighth Session of the CITEJA)

[91]"[I]l est aussi possible qu'il ne reçoive rien, qu'on lui réponde que le fonctionnaire chargé de cette enquête est malheureusement mort et que l'examen des matériaux qui ont été envoyés au B.I.T. demande un certain temps. Dans ce cas, évidemment, le Rapportellr ne demandera pas de réunir la Commission, mais, pour avancer les travaux, il faut absolument trouver un moyen quelconque d'interrompre le silence du B. I. T. Comme il n'entrait pas dans les idées sdu C. I. T. E. J. A., quand on a pris une décision sur la collaboration avec le B. I. T., de trop s'engager dans cette collaboration officielle" (statement delivered by the Rapporteur M. Babinski in the Eighth Session of the CITEJA) , *id.*

[92]See the brief of resolutions adopted in each Session of CITEJA from the First Session (1926) to the Thirteen Session (1938), in L. R. Fike, *supra* note 84, at pp.175-180.

[93]There were five sessions of CITEJA held after World War II during the year 1946 before the Legal Committee of PICAO (the latter's status was formally established during the First Session of ICAO Assembly on 23 May 1947) took over.

[94]See CITEJA Doc N° 451, p.1 (in June 1946).

[95]The "Draft Convention on Legal Status of Aircraft Commander." The full text can be found in (1947) 14 J.Air L. & Com. 84. The resolution on transmitting is shown on PICAO Doc. 2359, LG/#5, 29/11/46.

[96]See a brief report on the activities held in the XV Plenary Session of CITEJA in Cairo, November 6-17, 1946 in (1947) 14 J. Air L. & Com. 80.

Legal Committee, which is supposed to continue with the unfinished tasks of the liquidated CITEJA.[97]

Three versions of the preliminary draft on the legal status of flight personnel were presented between 1935 and 1946:[98] two from M. Babinski, dated separately in May 1935[99] (hereinafter the "1935 Draft") and March 1938[100] (hereinafter the "1938 Draft"), and one from M. Garnault, in June 1946[101] (hereinafter the "1946 Draft"). Since no single one of them has ever been officially adopted by the Commission or the Plenary Session of CITEJA, similar provisions of the three drafts will be discussed collaterally in the following sections and no priority will be given to either one of them.[102]

6.4.2 The Definition of Employee

The definition of flying personnel is closely related to the regulatory scheme designed for the convention; thus, if the convention was intended to unify certain rules of airline labor law, then consideration shall first be given as to which part of the labor law regime must be specially formulated for the international air transport industry due to the uniqueness of its labor process. The specific classes of employees that should be subjected to these special formulae and treated differently could thereby be inferred. Contemplating the spectrum of these unified rules, commonly adopted by the three drafts covering the conflict rules of the employment contract and certain substantive contractual terms relating to the

[97]See M. Milde, *supra* note 10, at p. 239, and I.H.Ph. Diederiks-Verschoor, W.P.Heere & A.Moll, "Die Rechtsstellung des Personals der Zivilluftfahrt" (1972) ZLW 107, at p.109.

[98]The original French text of the draft was shown in CITEJA Doc N° 246 5/35.

[99]*Id.*, and the Rapporteur's comment on CITEJA Doc No 283 1/36; an English translation of both documents can be found in (1936) 7 J. Air L. & Com. 266.

[100]CITEJA Doc N° 354 3/38; an English translation can be found in (1938) 9 J. Air L. & Com. 601.

[101]CITEJA Doc N° 451 6/46.

[102]All the three drafts were reported in French only, the English text used in the sections below does not exactly comply with the unofficial English translation of these drafts shown in (1936) 7 J. Air L. & Com. 266 and (1938) 9 J. Air L. & Com. 601.

issue of jurisdiction, it would be tolerably to say that the convention is aimed at solving all the legal issues which arise from the contract of employment in international air transport industry incorporating foreign elements. Airline employees who perform their service under such contractual terms should therefore be covered.

In his commentary on the 1935 Draft, M. Babinski expressed an intention to broaden the definition of flying personnel so as to cover the greatest possible number of persons employed in the aeronautical industry who work on-board: not only the aircraft commander and other regular cabin crew, but also the auxiliary personnel whose assignments require them to work on-board. These persons included stewards and bartenders, *etc.* However, they did not include the personnel on-board only for special assignments or missions, such as photographers and scientists. Thus Article 1 of the 1935 Draft prescribed:

> By flying personnel, in the meaning of this convention, shall be meant any person employed or hired in any capacity whatsoever, for the service of an aircraft in flight, with the exception of persons who are on board under special contract.

The provision was later revised in the 1938 Draft as:

> By flying personnel, in the meaning of this convention, shall be meant any person (including aircraft commander) who is assigned to the conduct of the aircraft or to other services on board, and is hired for remuneration, for the purposes indicated above.

The 1946 Draft was even more concise:

> In the meaning of this convention, the flying personnel include all persons assigned to the conduct of the aircraft or to the services on board, the aircraft commander is the member of the flying personnel who is the chief on board the aircraft.

Even if the phrase "under special contract" was deleted, it is clear that only the employee who is assigned to the conduct of the aircraft, such as the pilot, navigator, or on-board mechanic who is directly in charge of the navigation of the aircraft, or those on-board for the service of the aircraft in flight, such as the airline stewardess, would qualify as flying personnel. The airline employee on-board only for transportation to a specific assignment, such as the deceased in *Sulewski*,[103]

[103]See *Sulewski* v. *Federal Express*, 23 Avi 17, 685 (2d Cir. 1990), at 17, 688.

will not be covered, nor will auxiliary ground personnel. However, there is little reason to justify this strict limitation. Unlike delictual liability with a temporal connection to the social surroundings (*i.e.*, an "industrial accident" is limited to that which occurs in the course of employment), issues relating to the contract of employment do not necessarily arise while the employee is working on-board, even if that is where the labor is normally provided. Such issues may include the termination of contract or disputes over the calculation of working hours, which usually take place while the employee is on layover or has arrived at his home base, rather than in the sky. Moreover, as previously mentioned, the main reason to distinguish this particular class of workers from employees of other industries is because the former can encounter choice of law problems, due to the nature of their employment, underscoring several connecting factors. An airline employee like Sulewski could have faced a similar problem; for instance, he could be fired for refusing to work overtime at a certain foreign stopover; even ground personnel of an airline will sometimes find themselves in such a scenario, like the district manager who is hired to supervise the business at the foreign stopover. Neither of these types of employees are members of the on-board cabin crew. The problems which these drafts endeavored to solve, therefore, do not belong to flying personnel only, but also to the employees of the whole industry. As a result, it would make little difference how broadly the judiciary interprets the meaning of flying personnel, revealing an inherent structural paradox in the drafts.

6.4.3 The Law Applicable to the Contract of Employment

Article 2 of the 1946 Draft prescribes that "[s]ubject to compliance with the compulsory provisions of the present Convention, the contract of hire (employment) of the flying personnel shall be governed by the laws of the state where the aircraft in which the employment service is engaged aboard, is registered." Two implications can be straightly derived from this provision: first, the Draft has provided certain unified substantive rules regulating the contract of employment for flying personnel which is applied directly without further

reference to other national laws. Second, the *lex portitoris* acts as the only conflict rule which governs the remaining issues, not unified by the Draft, arising from the contract of employment on-board.

The theoretical drawbacks of the *lex portitoris* as a connecting factor in the conflict of labor laws have been amply discussed above and need not be repeated here. The jurisprudence has also evidenced its inadequacy; in related decisions, the *lex portitoris* has always been erected because there were other prevailing connecting factors involved, such as the seat of employer, or the *locus laboris* which accidentally identified with the state of registration.[104]

On the conflict rule, the 1938 Draft provides a more flexible approach, supplementing the earlier rule with an exception. Article 2, paragraph 2 provides that the *lex locus contractus* may still apply if it pertains to compulsory conditions which are considered to be of public character. The 1935 Draft adopted an even wider spectrum, allowing all public order provisions to prevail.[105] In practice and in either context, municipal mandatory rules and public policy will never give way to the *lex portitoris*, yet the regulatory technique of 1938 Draft is still to be preferred among the three (regardless of its inherent defect), for it at least allows the competent court to consider mandatory rules other than those of the *lex fori*.

The drafts provide an unprecedented unification of substantive rules for the contract of employment, including the particular conditions for the contract of employment, the required period of notice of termination, special treatment for the employee dismissed on-board, the terms of termination, disciplinary actions, and charges of repatriation, *etc.* Yet since most of their functions are now undertaken by or subordinated to the collective agreement, the relevant regulatory interests have inevitably been diminished. Therefore, no further exploration is necessary for the purposes of this study.

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[104]See note 33 of chapter 3.

[105]"This field of application of the national legislation of the registration Government of the aircraft must, however, come after territorial requirements of a public character:" see the Rapporteur's comment on CITEJA Doc N° 283 1/36, *supra* note 98, at 268.

6.4.4 The Law Applicable to Industrial Injury

The industrial injury provision adopted in the three preliminary drafts shows a progressive limitation of Article 1 of the 1925 Accident Compensation Convention,[106] which calls upon its High Contracting Parties to implement in their national law the provisions regarding risks of accident, particularly those of death and permanent or temporary disability of flying personnel, irrespective of the nationality of the victim or the place of the accident.[107] The 1938 and 1946 Drafts further refined and completed the provision with a workable complement: only with respect to flying personnel who perform their service aboard the aircraft registered on the home territory shall the contracting state enact and apply this industrial injury law. In compliance with this requirement, the national workers' compensation scheme of each contracting state shall cover all industrial accidents sustained by flying personnel, nationals or foreigners, who perform their service on-board the registered aircraft.

Though the 1938 and 1946 Drafts strongly imply that the issues of industrial injury sustained by flying personnel will be governed by the law of the state of registration, they cannot be interpreted to have established a firm choice of law rule, due to the plain fact that national treatment fails to solve the conflict of laws problem and because the protection would apply only when the infliction of industrial injury on flying personnel brings the action before the courts of the state of registration. Consider the example of flying personnel of *A* nationality, who are hired in *A* country by the airline registered in *B* country to work on-board the airline en route from *B* to *A*, where both *A* and *B* are contracting states to the draft conventions. If these flying personnel claim industrial remedies in *B*, then the best result would see them covered by the compensation system of *B*; but if they apply for benefits in *A*, that country is under no obligation to guarantee coverage, since they do not work on-board an aircraft registered in *A*; of course, if *A* does apply its compensation scheme in such a situation, it will be based on

[106] See Section 6.1 of this Chapter.

[107] The industrial injury provisions are prescribed in Article 9 of the 1935 Draft, Article 8 of the 1938 Draft and Article 6 of the 1946 Draft.

the conflict rules of *A* rather than the industrial injury provision of the Drafts.

6.4.5 Remarks on the CITEJA Preliminary Draft

The CITEJA drafts could be described as the first scholarly attempt to unify the greater part of airline labor law rules — the substantive and procedure matters of the individual contract of employment, along with a provision on national treatment of industrial injury — into a single instrument. Their failure, however, was predictable, mostly due to the lack of consensus on the scope of a unified legal regime for flying personnel.

The standardization of elementary terms to supplement the individual labor contract is without doubt helpful to protect the weaker party, yet as mentioned in chapter 3, due to the highly-unionized character of the international transport industry, collective agreements between employers and trade unions have essentially substituted for the above functions; thus there is very little left for which the individual bargains. Furthermore, the collective bargaining process provides a more flexible approach to the dynamic adjustments of labor conditions, and can better cope with the speedy evolution of aeronautic science, the rapid change of airline management policy, and the fluctuation in the world transportation market. On the contrary, a minimum standard would be easily rendered obsolete, would probably need constant updating through the painstaking process of international law-making, and could only therefore receive a lukewarm welcoming.

As for the conflict rule, the contribution of the CITEJA Drafts is not so significant, perhaps due to the much more humble business scale and simple management technique of the time,[108] the possible problems encountered by the *lex portitoris* in cases such as the dry lease, the interchange of crew and joint operation, all of which were beyond the imagination of the drafters.

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[108] As seen in the comment of Article 2 of 1935 Draft, which implied that the large operating company is exceptional. See Rapporteur's commentary in CITEJA Doc N° 283 1/36, *supra* note 98.

6.5 The Draft Convention for the Unification of Rules Relating to Liability of the Carrier in International Carriage by Air (Paris Draft)[109]

6.5.1 Introduction

The Draft Convention for the Unification of Rules Relating to Liability of the Carrier in International Carriage by Air (hereinafter "the Paris Draft") was the brainchild of the Warsaw Sub-Committee established in Paris in September 1951, per a request by resolution of ICAO's Legal Committee.[110] Though the Warsaw Sub-Committee was directed to prepare the Paris Draft fully in accordance with all decisions of principle taken by the Legal Committee at its Madrid Session,[111] the drafters were not restrained from considering any matter which the Committee had failed to consider. The Paris Draft was completed on 24 October 1951, comprising seven chapters[112] and 32 articles. Several new features were created to replace original instruments (which do not merit further discussion here).[113]

[109]ICAO Doc. LC/Working Draft #391 30/1/52; the full text and editor's notes are found in (1952) 19 J. Air L. & Com 85.

[110]See the Preface to the "Report of the Sub-Committee on the Revision of the Warsaw Convention to the Legal Committee", *id.*, p.1, and E. T. Nunneley, "Excerpts from Report of United States Delegation to Eight Session of the Legal Committee of ICAO, Held at Madrid, Spain, September, 1951" (1952) 19 J. Air L. & Com 70, at p. 84.

[111]The principles to revise the original Warsaw Convention proposed at the Madrid Session (Eight Session) can be found in E. T. Nunneley, *supra*, at pp. 71-84.

[112]Definitions (I), Scope of Convention (II), Traffic Documents (III), Extent and Limits of Liability (IV), Claims, Actions, Jurisdictions, Prescription and Extinguishment, (V) Formal Provisions (VI), and Final Provisions (VII).

[113]According to the Report made by K. M. Beaumont, the Chairman of the Sub-Committee "Warsaw", the Paris Draft contains following main features which distinguishes it as an overall revision: 1.) the general principles of Art. 12 to 15 of the original Warsaw Convention have been introduced in the air waybill which are not negotiable; 2.) practicable and reasonably simple provisions concerning negotiability of the air waybill have been included; 3.) provision for the liability of the person who agrees to carry but does not operate the carriage have been added; 4.) new provision to limit the personal liability of the employees whether or not they are indemnified by carriers; 5.) the carrier's liability for delay have been comprehensively emphasized; 6.) new provisions on the time in which the notice of claim must be made were added; 7.) a system of compulsory insurance was introduced. See Preface to the "Report of the Sub-Committee on the Revision of the Warsaw Convention to the Legal Committee", *supra* note 58, at p.2, also ICAO Doc 7229, LC/133, Annex I, pp.191-216.

Some useful references to the draft were considered necessary for the proper interpretation and application of the Convention, and were thus provided in footnotes attached to the relevant articles on alternative proposals previously considered, as well as minority points of view, but unfortunately, there are no such footnotes on the labor provisions provided in the Paris Draft.

However, the Paris Draft eventually ended up in the document cellar of ICAO without ever being formally considered by the Ninth Session of the Legal Committee, due to a resolution made by the latter in Rio de Janeiro on 25 August 1953, It decided not to consider the formulation of a new Convention to replace the original Warsaw instrument, opting instead to incorporate a "real improvement over the existing text"[114] in the form of a Protocol,[115] because the members of the Legal Committee conceived that as the original Warsaw Convention had already received wide acceptance, a Protocol which included only limited revisions of certain provisions would more likely be accepted by a substantial majority of the contracting states;[116] some even worried that the introduction of a totally new convention would in effect lead only to the denunciation of the Warsaw Convention which was then fully operating.[117] The Paris Draft was therefore doomed to become the last instrument proposed as an overall replacement for the Warsaw Convention,[118] and the labor provision which first appeared with the Paris Draft

[114]See G. W. Orr, "The Rio Revision of the Warsaw Convention — Part I" (1954) 21 J. Air L. & Com 39, at p.40.

[115]Protocol to Amend the Convention of Warsaw for the Unification of Certain Rules Relating to International Carriage by Air (1929) Adopted by the Ninth Session of the Legal Committee of ICAO (the Rio Protocol), ICAO Doc. LC/Working Draft #459 11/9/53, full text could also be found in (1953) 20 J.Air L. & Com. 326.

[116]See K. M. Beaumont, "The Proposed Protocol to Warsaw Convention of 1929" (1953) 20 J.Air L. & Com. 264, at p.265, and Legal Committee, Ninth Session, Rio de Janeiro, 25 August-12 September 1953, ICAO Doc 7450, LC/136, p. XV.

[117]Goedhuis notes that the Warsaw Convention should have assimilated the Rome Convention such as to "specially exclude from its régime the carriage of the personnel of the carrier", see D. Goedhuis, *National Airlegislations and the Warsaw Convention*, (The Hague: Martinus Nijhoff, 1937) at p. 130, also G. W. Orr, *supra* note 113, at p.42.

[118]On the Legal Committee work on the revision of the Warsaw system after the Ninth Session, see also M. Milde, "ICAO Work on the Modernizationof the Warsaw System", (1989) 14: 4-5 Air L. 193, at pp. 196-.

was never subsequently resurrected in the later Protocols of the Warsaw family, the ICAO Draft Convention on the Liability of the Air Carrier and Other Rules Relating to International Carriage by Air of 1996,[119] nor the scholarly proposals on the revision of current system.[120] It was silently terminated at the Rio de Janeiro arena.[121]

6.5.2 The Scope of the (Draft) Convention

As no principle was laid down by the Legal Committee at the Madrid Session on the carrier's liability towards its on-board employees,[122] the labor provision in the Paris Draft was solely the creation of the Warsaw Sub-Committee. However, its contribution to the unification of labor laws in international air transport is similar to that of Article 25 of the Rome Convention of 1952, and could very possibly have been inspired by the latter.[123] The labor provision of the Paris Draft

[119]ICAO Doc C-WP/10470 20/9/96 Attachment. This "Draft New Warsaw Instrument" was prepared by a Secretariat Study Group established per the request by the ICAO Council during its 146th Session in Nov. 1995, which was present ed as a Report by Legal Bureau to the Council during its 147th Session. On a brief history of ICAO's new draft, see M. Milde, "Warsaw Requiem-or Unfinished Symphony? (From Warsaw to the Hague, Guatemala City, Montreal, Kuala Lumpur and to...?" (unpublished) at pp. 14-5, and L.Weber & A. Jakob, "Reforming the Warsaw System" (1996) 21: 4/5 Air & Space L. 175, at pp.178-9; Article 1 of ICAO's new draft prescribes the general scope of its application and retains the original Warsaw structure without visible modification, whereas Article 2 concerns only the carriage of postal items; like its predecessors after the Rio de Janeiro Session, the proposed instrument contains no provision related to employment relations.

[120]No change was made on the Article 2 of the Warsaw Convention as Amended at the Hague, 1955 by the recent Alvor Draft Convention Relating to International Carriage by Air, which is mainly contributed by B. Cheng and adopted by the Forth Lloyd's of London International Aviation Law Seminar, Alvor, Portugal, 11-16 Oct. 1987. See the full text of the Alvor Draft in (1990) 39 ZLW 3. Orientation and comment on the draft see B. Cheng, "Sixty Years of the Warsaw Convention: Airline Liability at the Crossroad (Part I)" (1989) 38 ZLW 319.

[121]Article 2 of the Rio Protocol prescribes: "In Article 2 — (a) Paragraph 2 shall be deleted and replaced by: "2. The Convention shall not apply to : (a) Carriage of persons, cargo and baggage for military authorities by aircraft the whole capacity of which has been reversed by such authorities. (b) Carriage of mail and postal packages on behalf of postal authorities", *supra* note 63; only Article 2(5)(a) and (c) of the Paris Draft were preserved, and no reason or explaination were offered by the Reporter, who ironically was still Mr. K. M. Beaumont, on the revision made, see K. M. Beaumont, *supra* note 115.

[122]See E. T. Nunneley, *supra* note 108, at pp. 72-4 (Scope of Proposed Convention).

[123]See N. E. Hesse, *The Aircraft Operator's Liability*, (Montréal: LL.M. Thesis, McGill Univ.

plainly excludes carrier employees from the coverage of its liability regime, which is prescribed in Article 2 (5)(d):

> The following categories of carriage are not subject to the provisions of this Convention:
>
> ...
>
> (d) carriage of employees of the carrier travelling on duty whether or not as members of the crew of the aircraft;

No explanation is provided in the attached Notes on the rationale of this exclusion, and without such a useful reference, the scope of exclusion may yet be ambiguous. Considering the use of the phrase "on duty whether or not as members of the crew," the only reasonable interpretation is that the drafters intended to leave all remedies arising from the employment relation to other available legal institutions governing industrial accident occurring in the course of employment, such as labor law, workers' compensation statutes or other social security systems.[124] So "on duty" refers to the period when the employee is obliged to exercise his official duties under the contract of employment;[125] and under this construction, not only are members of the flight's cabin crew definitely ousted from the coverage of the liability regime, but other employees of the carrier who are requested to travel for the purpose of (and consequently, in the course of) their employment on flights provided by the carrier - such as managerial staff flying to foreign business meetings, or even the flight deck personnel on another flight heading toward their assignment[126] - could also be dispelled.

There are still more problems left for another class of on-board airline employees. As mentioned in Chapter 2, above, it has commonly been suggested that if the transportation is provided by the employer, or if there is a specific payment made by the employer for the transportation or time spent in transit, then the injury sustained by the commuting employee during his return (home)

1953), at p.327.

[124]Long proposed by D. Goedhuis, *infra* note 116, at p.130 ("[i]t is to be regretted that the Warsaw Convention did not specially excluded from its regime the carriage of the personnel of the carrier. If these carriages are made in the execution of the contract of employment, only the rules of this contract should regulate the relations between the carrier and his personnel").

[125]See H. Achtnich, "Luftrechtliche Betrachtungen anläßlich des Absturzes eines Flugzeuges der Königlich Niederländischen Luftverkehrsgesellschaft (KLM) am 22. März 1952 bei Frankfurt a. M." (1952) ZLR 323, at p.344.

and departure (to work) will be conceived as an accident arising in the course of his employment with respect to the workers' compensation claim; in the airline industry, such transportation service is generally included in the collective bargaining agreement between the parties as a way of inducing the carrier to make more efficient use of the employee's time. Due to economic considerations, it is usually performed by the aircraft belonging to the employer, substantially extending the scope of employment to the period of time spent en route; furthermore, there is usually a remuneration paid by the employer to cover the time required to travel to and from work, and it may be inferred that the employer has agreed to commence the employment relation at the time when the employee left his home up until his return, making the perils encountered during such a journey to and from work into hazards incident to his employment; so will the commuting employee therefore also be considered to be "on duty" while on-board? To maintain consistency in interpretation, *i.e.*, following the underlying presumption in subsection (5)(d) that the Draft regime precludes any remedial claim which would be collaterally governed by the employment contract or social security statutes, the commuting employee who is covered by the workers' compensation system shall also be excluded from coverage, even if they are issued flight credits or documents of transportation.

6.5.3 Remarks on the Paris Draft

The labor provision of the Paris Draft could be a relatively easier formula to decipher the conundrum created by the drafters of Warsaw on its scope of application, yet it is by no means a well-founded one. Until now, there existed no solid reason to legitimize the exclusion of on-board employees from the coverage of the Warsaw regime, so the clean effect which is expected from this formula might not be easily obtained due to inherent difficulties resulting from the exclusion of on-board employees as contemplated in section 2.1 of Chapter 2.

A writer on the subject once suggested replacing this provision with the following: "[t]his Convention does not apply to carriage, if regulated by the law

relating to workmen's compensation applicable to a contract of employment."[127] However, considering the confusion which has been created by Article 25 of the Rome Convention,[128] such a proposal could perhaps aggravate an already chaotic situation.

Moreover, the other provision of the Paris Draft implies that even the drafters themselves might have cast some doubt on the validity of the above exclusion: in subsection (5)(e) of the same Article, the Warsaw Sub-Committee boldly overturned the formidable majority opinion which insisted that unauthorized on-board personnel should not be covered by the Warsaw Convention because there is no contract of carriage between the parties.[129] A new provision was introduced into the Paris Draft prescribing that:

> (The following categories of carriage are not subject to the provision of this Convention:...)
>
> (e) carriage of any person who is in the aircraft without the knowledge or consent of the carrier, provided that any such person shall not have rights better than those of a passenger under this Convention.

Thus, if the unauthorized person on-board (*i.e.*, stowaways) could access a better regime of compensation than could the "passenger" in the same aircraft from other applicable national laws, such as an unlimited amount of damages,[130] then even though there exists no contract of carriage between the carrier and the person physically present on-board, the latter will still be entitled to damages under the Convention.

This innovative provision surely aroused a fierce debate during the draft proceedings; the dissenting opinions all centered on the unavoidable chain effect and paradox created by a substantive abrogation of the contract of carriage as a

[126]See *e.g.*, *Sulewski* v. *Federal Express*, *supra* note 102.

[127]See N. E. Hesse, *supra* note 122, pp. 327-8.

[128]See Section 2.2.3 of Chaper 2.

[129]See *e.g.*, D. Goedhuis, *National Airlegislations and the Warsaw Convention*, *supra* note 66, at p.131 (who questioned the inconsistency between Article 1 and the following Articles), See O. Riese, *Luftrecht — Das internationale Recht der zivilen Luftfahrt unter besonderer Berücksichtigung des schweizerischen Rechts*, (Stuttgart: K.F.Koehler Verlag, 1949), at pp.406-7, G. Miller, *supra* note 50, at pp. 7-8, L. B. Goldhirsch, *supra* note 50, at p. 9, Shawcross & Beaumont, *supra* note 50, at VII/104-5, E. Giemulla & R. Schmid, *supra* note 50, at WC Art.1, 21-2

prerequisite condition for the application of the Warsaw Convention: for example, without prior agreement, the place of departure and destination would not be determined, and consequently it would be difficult to decide if the relevant carriage is international and subject to the Convention's liability regime.[131] Another immediate side effect concerning the absence of a contract of carriage is the strenuous defense seen in doctrine and jurisprudence to bar the employee's Warsaw claim against airliners:[132] if the carrier's liability could be instituted without a pre-existing contract of carriage, then there would be no solid reason to prohibit on-board employees from taking advantage of the Warsaw remedy.

Though the phrase "have rights better than" is in itself too abstract for practical measurement, from the employee's point of view the same treatment offered in Article 2(5)(e) of the Paris Draft for unauthorized personnel could never be a favorable one, and seems an ideologically inappropriate formula for the employee who is on-board with the consent or at the request of the carrier, for the provision is certainly inspired by an intention to reprimand the trespasser by preventing him from being better-treated than other regular passengers by virtue of their illegal act. For economically-inferior workers, on the contrary, the provisions presents them with the widest selection of remedies, enabling them to choose that which best suits their interests.

[130]See Note 6 of the Paris Draft, *supra* note 108.

[131]*Id.*

[132]See Section **2.1.2.B** of Chapter 2.

Chapter 7.
Conclusion

Detailed concluding remarks on every aspect of labor laws examined in this thesis have been included at the end of previous sections and chapters. The following chapter is simply a concise summary.

For industrial accidents suffered by international airline employees, the regime of liability is already partly unified in both the Warsaw Convention of 1929 - along with its subsequent amendments - and the Rome Convention of 1952. These instruments would help greatly to solve a considerable number of related legal issues, especially the cumbersome conflict of laws problems, if they were properly applied. The Warsaw regime provides a collateral recourse for both personal and property (luggage) damages suffered by employees on-board or in their course of embarking and disembarking, whether on- or off-duty; the Rome Convention governs liability towards ground employees damaged by foreign aircraft in flight, without distinguishing which part of the debris belongs to his employer, whether he is directly hit by debris or merely injured by flying glass, for example, from the smashed windows of the terminal building. The employers' economic burden or vested interest in undertaking calculable risks would hardly be disadvantaged. In fact, their operating cost might even be reduced, due to a predictable and limited liability regime and restricted loci of jurisdiction. This study has clearly revealed that the dominant doctrinal and juridical opinions on the scope of application of the Warsaw regime - and the contentious Article 25 of the Rome Convention of 1952 - are preoccupied with a hypothetical idea: that there exists sheer incompatibility between the liability of the employer and the carrier, without further examination of the regulatory world of labor law.

It is wishful thinking to envisage, in the near future, a unification of the employer's liability regime for workers in the international air transport industry; the history of the revision of Warsaw (addressed above in the discussion of the Paris Draft) and the total failure of CITEJA's Drafts of the Convention Relative to the Legal Status of Aeronautical Flying Personnel have foretold all. The simplest

method seems to involve a cure for Warsaw laborphobia. In their innovative Article 2(5)(e), the experts contributing to the Paris Draft also confirmed that the regime of liability should apply to all cases of carriage, notwithstanding any valid reason to incorporate one or more "special categories of carriage" into the coverage of a unified system.

The Rome preclusion and Article 2(5)(d) of the Paris Draft are also the products of an ill-founded presupposition that certain existing workers' compensation statutes will at any rate indemnify for total damages. In practice, however, since this system denies relief to the injured employee based upon the opposite presupposition, the necessity of their existence is questionable. In most workers' compensation schemes, the employer's tort liability is not absolutely abrogated unless the coverage and compensable amounts provided through a social security benefit is sufficiently wide and adequate. Otherwise, the employee is either allowed to elect mechanisms before or after the industrial accident occurs, or under certain conditions to accumulate remedies from both institutions. Furthermore, a mechanism for the adjustment of collateral amounts of compensation is logically left to the regulatory compensation system, rather than the civil law of torts, to obviate the inevitable risk of double deprivation.

Supposing that the abandonment of the more refined and victim-friendly tort liability regime in the unified regime represents a *quid pro quo* for rapid and efficient redemption in the workers' compensation system, the choice is left to the weaker injured party, as the justifiable distribution of risk may vary in each case. In erecting this compulsory distribution, the Hobson's choice supplies a loophole, since the workers' compensation system usually provides compensation for personal damages only; pain and suffering are excluded from consideration to ensure quick, no-fault redemption without complications. The property damage claim, on the other hand, would not be part of the compensation scheme, and the employee is therefore forced to trade more than he can bargain for in return: he is left with only the more difficult recourse in the civil law of tort for property damage.

Territorial application is conceived by its advocates as a well-established

compromise between international comity and forum labor policy. If a state cannot limit its own jurisdiction to a certain degree, the result might be retaliation in the form of foreign legislation. In the application of labor-management relations, the affected interests should yet be subject to critical examination. Nevertheless, the worst foreseeable effect created by foreign legal retaliation does not seem to balance out the forum interests sacrificed with respect to the conflict of laws — the national trade union's interest in representing foreign-based workers is no less than its interest in the right to bargain for locally-based workers of a foreign company in the labor-management process. Moreover, the conferral of exclusive representation would prohibit employers from adopting a flexible labor-shopping strategy and thereby escaping the institutions of labor protection provided by the domestic collective bargaining framework. Foreign interests would not necessarily be infringed, though a universal labor standard would surely evolve — the exclusive representation exercised by the ITU in the maritime context serves as a good example. Even if local management relations law, in its original context, is not intended for extraterritorial application, there is no reason to restrain it in this respect should the parties be willing to accept its jurisdiction, *i.e.*, application by virtue of party autonomy. Forum public policy is not impeded by such an extension and should thus play only a limited role under these circumstances.

The *lex portitoris* has been revealed in the preceding chapters as an inadequate connecting factor for the conflict of labor laws in international air transport. Conversely, the seat of the enterprise, or the *siège social effectif* of the employer, could be used to meet many ends vis-à-vis the employer's liability, the individual contract, or the collective agreement; for it is usually the controlling center for the relevant industry, where managerial decisions concerning the interests of employees - such as working hours, wage adjustments, *etc.* - are made. It is equally the place where collective bargaining, strikes, or lockouts most often take place.

Concerning equal treatment at work, the employer preference clause in FCN Treaties or ATAs may preempt local fair employment regulations if the international instruments entitle foreign airlines to "special status," enabling

employers to lawfully discriminate against nationals of the host country, especially if the discriminatory labor operation was substantially dictated by a foreign parent. Yet sometimes foreign airline corporations, especially those incorporated under local laws, should be treated almost the same as any local employer. Meanwhile, according to US jurisprudence, if the airline is a foreign government-owned enterprise, it can be treated as an instrumentality of that government, immune from legal actions based on local equal employment regulations depending on whether the relevant decision-making process in the employment relation is based purely on economic considerations or simultaneously serves a foreign governmental function. The desirability of basing the expectation of local fundamental policy upon such an obscure margin is questionable, as it would not be easy for employees to know whether their employer is "substantially owned and effectively controlled" by a national government, particularly in view of the current trend toward the multinationalization of ownership and managerial policy in international airline companies.

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