

Conflicts of Laws in the Law of the Air

(Some Remarks on the Resolution of the 51st Session of
the Institut de Droit International of September 11, 1963)

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I. INTRODUCTION

On September 11, 1963, the 51st Session of the *Institut de Droit International* in Brussels unanimously adopted a resolution called "Conflicts of Laws in the Law of the Air".¹

The draft resolution has been prepared by the 27th Commission of the *Institut*, while Alexander N. Makarov served as Rapporteur. The work of the Commission started in 1958², the first report was prepared in July 1959³, the final report in February 1960.⁴ The Draft Resolution was discussed during the 50th Session of the *Institut* in September 1961 in Salzburg⁵ and the discussion was there adjourned till the next session. Finally — the 51st Session in September 1963 in Brussels after extensive discussion⁶ adopted the Resolution.

The *Institut* has been engaged in studies in the field of conflicts of laws in matters of "aerial navigation" since 1931 when a Commission was set up for this purpose with Fernand De Visscher as Rapporteur⁷; this Commission, however, was evidently too impressed

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¹ *Annuaire de l'Institut de Droit International* (further *Annuaire*), Vol. 50, II. (1963) pp. 373 — 376: for French text see *loc. cit.* pp. 365-368. The *Institut* publishes its Resolution in French and English, but only the French text is considered as "faisant foi" — see *loc. cit.* p. LVI.

² See "Exposé préliminaire" by A.N. Makarov, *Annuaire*, Vol. 48 I. (1959) pp. 411-425.

³ See "Rapport provisoire et projet de Résolution", *Annuaire* Vol. 48, I. (1959) pp. 359-410.

⁴ *Ibid.* p. 457-472 ("Rapport définitive et projet de Résolution").

⁵ *Annuaire*, Vol. 49, II. (1961) p. 328-362.

⁶ *Annuaire*, Vol. 50, II. (1963) p. 188-269.

⁷ *Annuaire*, Vol. 36, II. (1931) p. 225.

⁸ *Warsaw Convention 1929*; *Rome Convention 1933* and other drafts prepared by CITEJA.

by efforts for the unification of *substantive* law which were taking place in these years⁸ and it decided to eliminate from the scope of its work problems of conflicts in private law and rather focused its attention on studies of the conflicts of penal laws in the field of aviation.⁹

The Legal Committee of ICAO has also been interested in problems of this nature under the rather vague and misleading heading "legal status of the aircraft"; although the activities in this field in the framework of ICAO were later limited to the criminal aspects of the legal status of the aircraft, "it has been always understood that it would be without prejudice to possible future study of problems of a civil law nature, such as contracts and torts, related to the legal status of the aircraft".¹⁰

The resolution of the *Institut* on conflicts of laws in the law of the air is the most recent and most all-embracing — though quite unofficial and purely scholarly — endeavour to show the direction for possible prospective unification of rules of conflict of laws in the field of aviation. Until the present time the resolution did not provoke any discussion or comments in the doctrine. This study aims at presenting a brief analytical and critical discussion of three basic questions:

1) Is the problem of conflicts of laws in the law of the air really an outstanding and urgent problem requiring an international solution?

2) Is the unification of rules of conflict of laws to be considered as a relevant step towards the unification of law?

3) Is the solution suggested by the *Institut* in the resolution on conflicts of laws in the law of the air viable and acceptable?

II. "LAW OF THE AIR" — AN UNFINISHED UNIFICATION

During the last fifty years aviation has become an important part of the economic life of society. In connection with the development of aviation and of carriage by air a wide spectrum of various social relations came into being all of which are being regulated by law.

What is usually called "air law" is but a conglomeration of different branches of the system of law — a comprehensive scientific

⁸ *Annuaire*, Vol. 40 (1937) p. 9.

¹⁰ ICAO Legal Committee, 13th Session, Montreal 6-23 September 1960, Vol. II. Doc. 8137 — LC/147 — 2, p. 90.

specialization which combines the research in several fields of law; the so-called "air law" cannot be considered an independent branch of the system of law.¹¹

The very specific subject-matter of social relations connected with aviation (aircraft, airspace and their uses) gives rise to legal relations regulated by *public international law* (e.g. legal regime or airspace, interstate agreements on air services), by *private law* (e.g. contract of domestic carriage by air), by *administrative law* (the wide complex of government regulation of aviation), by *labour law* (e.g. contract of employment of the crew, labour conditions of the flying personnel), by *financial law* (e.g. air customs regulations), etc.

By its very technical nature aviation and carriage by air aim at international contacts. International aviation and international carriage by air give rise *inter alia* to most complex private law relations in which a tremendous plurality of foreign elements may be involved. An intricate problem of *private international law* arises regarding the question of the choice of applicable law among multiple conflicting domestic laws. In no other branch of human activities can there possibly be such a plurality of foreign elements in private law relations as in the field of international aviation and carriage by air.

For a modern aircraft it is just a matter of a few hours to cross continents and to land in the territory of several states. The aircraft carrying registration marks of one state can, within short intervals of time, land in territories which are under the jurisdiction of different states and where different laws apply. Passengers on board the aircraft may have different nationalities, they may have contracted for the carriage on board that particular aircraft in different states and with different persons and they may have different destinations. The members of the crew may have nationalities different from that of the operator of the aircraft and their contracts of employment may have been concluded in different places. The operator of the aircraft or the carrier may be faced with various liability claims which may have the origin in contracts, facts or acts which took place in several different territories. Several legal acts or facts may take place on board an aircraft in flight.

Aviation and carriage by air are thus an extremely rich source of situations involving foreign elements in private law relations and

¹¹ See Knapp V., *Predmet a system cecoslovenskeho socialistickcho prava obcanskeho* (Prague 1959) p. 79. Outrata V., *Predmet mezinarodniho prava*, (1961) *Casopis pro mezinarodni pravo*, No. 1, p. 16. Milde M., *The Problems of Liabilities in International Carriage by Air. A Study in Private International Law*, (Prague 1963), p. 11-13.

create difficult problems of private international law. The solution of some of these problems might prove very difficult in practice; the following hypothetical example which has been often quoted¹² may serve as an illustration:

A Frenchman domiciled in Denmark, had purchased a passenger ticket for a flight from Geneva to London at a travel agency in Stockholm; he used a Dutch aircraft which crashed on Belgian territory; his widow intends to bring action for damages. Against whom? Before which court? Which law will be applicable — Swedish, French, Danish, Swiss, Dutch, Belgian or English?

Problems arising from the contract of international carriage by air are undoubtedly most frequent and practical but serious problems of conflicts of laws arise in other fields of aviation too. What law should govern the rights *in rem* in respect of an aircraft the *situs* of which is frequently changing? These rights *in rem* include such fundamental problems as ownership of the aircraft, transfer of property, mortgages in respect of the aircraft, etc. Which law should regulate the charter and hire of an aircraft? The crew of the aircraft perform their contract of employment in different parts of the world; which law should govern this contract of employment and conditions of work? Which law should be decisive for the settlement of legal problems arising from a collision of two or more aircraft bearing different nationalities? Which law should govern other non-contractual obligations, such as obligations arising from assistance or salvage operations between aircraft or obligations arising from damage caused by aircraft to third parties on the ground? What should be the legal regime of legal acts or facts which took place on board an aircraft in flight?

What makes all these problems even more difficult and their reasonable settlement more urgent are the great difference in the substantive laws or different countries governing these relations and a surprising instability of points of contact as criteria for the choice of law. Each State has its own laws, customs or usages which apply in the field of aviation and carriage by air. But not only is there difference between substantive laws on private law relations concerning air activities, but even the criteria for the settlement of conflicts of laws differ substantially from one state to another.

¹² Riese O., *Internationalprivatrechtliche Probleme auf dem Gebiet des Luftrechts*, *Zeitschrift für Luftrecht*, No. 3 (1958) p. 279-280. Riese O., *Luftrecht* (Stuttgart 1949) p. 389. Milde M., *op. cit.* p. 17. Sand P.H., *Choice of Law in Contracts of International Carriage by Air* (Thesis I.A.S.L., McGill University 1962) p. 5.

The plurality of foreign elements in these relations, the instability of points of contact for choice of law and the great differences of the substantive laws in various countries may create many chaotic moments as well as lack of legal security. The only remedy for the settlement of these problems is to be found in an effective international unification of private law rules regulating these relations.

The efforts for the unification of private law rules relating to aviation have been particularly successful on the international scale — more than in any other field of private law relations. A great number of private air law conventions have been adopted during the last three decades: the *Warsaw Convention for the Unification of Certain Rules Relating to Carriage by Air* of 1929¹³ which unifies the rules relating to the documents of carriage and lays down a uniform substantive law regime of the liability of the air carrier¹⁴; the *Rome Convention on Precautionary Attachment of Aircraft* of 1933¹⁵; the *Rome Convention for the Unification of Certain Rules Relating to Damages Caused by Aircraft to Third Parties on the Surface* of 1933¹⁶; the *Geneva Convention on the International Recognition of Rights in Aircraft* of 1948¹⁷; the *Rome Convention on Damages Caused by Foreign Aircraft to Third Parties on the Surface* of 1952¹⁸; the *Hague Protocol to Amend the Warsaw Convention* of 1955¹⁹; the *Quadalajara Convention*, supplementary to the *Warsaw Convention* of 1961²⁰; a *Draft Convention on Aerial Collisions* is presently on the agenda of the Legal Committee of ICAO.²¹

Mere enumeration of these conventions for the unification of private air law rules may present an impressive but misleading picture of the actual state of affairs — as if all foreseeable problems were already settled by multilateral conventions for the unification of private air law. Several writers on problems of private international law apparently yielded to the fetish of unification and they refer

¹³ Matte N.M., *Traité de Droit Aérien-Aéronautique*, 2ième Ed. (Paris 1964), p. 860-878.

¹⁴ See e.g. Goedhuis D., *La Convention de Varsovie* (The Hague 1933). Goedhuis D., *National Airlegislations and the Warsaw Convention* (The Hague 1937). Milde M., *op. cit.* p. 19-78. Rabut A., *La Convention de Varsovie. Règles relatives au transport aérien international* (Paris 1952). Sand P.H., *op. cit.* passim.

¹⁵ Matte N.M., *op. cit.*, p. 886-888.

¹⁶ *Ibid.* p. 889-893.

¹⁷ ICAO Doc. 7620.

¹⁸ ICAO Doc. 7379 — LC/34 Vol. II.

¹⁹ ICAO Doc. 7689 — LC/140, Vol. II., p. 1-13.

²⁰ ICAO Doc. 8181.

²¹ ICAO LC/ Working Draft No. 732.

almost all private air law relations indiscriminately to these conventions.²²

However impressive are the results of the unification efforts in the field of private air law, they represent but a small step towards the real unification of substantive law. There are several reasons why these conventions should not be overestimated and why problems of conflicts of laws should not be underestimated:

(a) not a single one of these conventions has really universal character; only the *Warsaw Convention* tends to almost universal acceptance but even this convention is still far from reaching real universality;²³ the number of ratifications of several other conventions is not very substantial and they cannot be considered as a serious contribution to really "uniform law".

(b) the scope of all private air law conventions is by definition limited to "certain" rules; in consequence, they do not unify the regime of social relations connected with aviation and carriage by air in an exhaustive and comprehensive manner and they relinquish (intentionally or by mere omission) many problems to municipal law applicable according to rules of conflict of laws.²⁴ Sometimes there is a indication in the convention (a rule of conflict of laws) as to which law is to be applied to fill the gap in unification²⁵, sometimes there is no indication in this respect whatsoever²⁶.

(c) several problems of private air law were not until now subject to any (or successful) unification efforts — viz. charter or hire of an aircraft, contract of employment of the crew, contract of

²² Bystricky R., *Zaklady mezinarodniho prava soukromeho*. (Prague 1958). Lunc L.A., *Mezhdunarodnoye chastnoye pravo. Osobennaya chast*. (Moscow 1963), p. 207-212. Raape L., *Internationales Privatrecht*, 5 Auflage Berlin-Frankfurt 1961) p. 480. Ehrenzweig A.A., *A Treatise on the Conflict of Laws* (St. Paul 1962) p. 535. Wolf M., *Private International Law*, 2nd Ed. (Oxford 1950) p. 7-8.

²³ 13 Latin American States have not ratified the Warsaw Convention, viz. Bolivia, Chile, Columbia, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Nicaragua, Panama, Paraguay Peru and Uruguay; in Europe: Albania in Asia: Afghanistan Korea, Mongolian Peoples' Republic, Saudi Arabia, Turkey, Yemen.

²⁴ Milde M., *op. cit.* p. 23, 76-78, 100-103. Sand P.H., *op.cit.* p. 8-9 and *passim*.

²⁵ E.g. *Warsaw Convention* art. 21 on fault and contributory negligence of the injured person; art. 2 on fault equivalent to wilful misconduct; art. 28, 2 on procedure — all referring to *lex fori*.

²⁶ E.g. *Warsaw Convention*: determination of the extent of indemnification for different forms of damage (death, injury, "moral" damage, delay etc.), determination of persons who are entitled to claim damages (art. 24, 2)

carriage of passengers and goods²⁷, aerial collisions²⁸, assistance or salvage operations between aircraft²⁹, etc.

From these remarks it may be concluded that the unification of private air law is very far from being finished; conflicts of laws are still a pressing problem.

III. METHODS OF THE UNIFICATION OF LAW

Private law relations arising from international aviation and international carriage by air may be effectively regulated and chaotic elements and lack of legal security may be eliminated only by broad multilateral unification of private law rules.

What are the possible *methods* of such unification?

(1) Unification within the most precise meaning of the term may be attained by an international adoption (in the form of multilateral conventions) of uniform rules of substantive law which would then be implemented by the municipal legislation of different states and which would be applicable for all legal relations — both those which include certain foreign element and those purely domestic. This solution would be undoubtedly the most ideal but can be hardly considered as viable.³⁰ In this form unification efforts took place only in limited fields and by far not on a general international scale.³¹ Substantial differences in the municipal laws of different states (namely the basic difference between civil law and common law countries, different concepts of law in socialist countries which reflect different social and economic basis of the society) and marked “legal nationalism” of several countries place this method of unification beyond the realms of practical possibility, the more so, that there is no urgent need for the unification of the legal regulation of both international *and* purely domestic relations. What is the pressing

²⁷ The *Warsaw Convention* unifies only documents of carriage and regime of liability but not all aspects of the contract of carriage by air as such.

²⁸ Draft Convention prepared by *CITEJA* was not adopted by the IVth International Conference on Private Air Law in Brussels in 1938; see Latchford: *Brussels Air Law Conference*, 10 *J. Air L. and Com.* (1939) p. 147; the *ICAO* Draft is in preliminary stage — see *ICAO LC/WD 732*.

²⁹ *The Convention on Assistance and Salvage of Aircraft* signed in Brussels in 1938 was not ratified by any signatory State.

³⁰ Some writers consider this solution viable. Their confidence in this respect is, however, not properly founded; see Riese O., *Réflexions sur l'unification internationale du droit aérien, sa situation actuelle, ses perspectives*, 5 *RFDA* (1951) p. 131-148. François J. L., *Le droit aérien, instrument idéal d'unification en matière de responsabilité du transporteur*. 4 *RFDA* (1950) p. 333-376.

³¹ E.g. the *Geneva Conventions relating to Bills of Exchange and Cheques* of 1930 and 1931.

problem creating great difficulties, are the relations in which some foreign element is involved.

(2) The second conceivable and most practical method of unification is to stipulate — in an international convention — uniform rules of substantive law which would be applicable exclusively to legal relations in which certain specific foreign element is involved. Such unification does not at all affect relations which are exclusively domestic and States are not reluctant to accept a reasonable unification which leaves their purely domestic regulations untouched. This form of unification has been successfully employed e.g. in the *Warsaw Convention* of 1929, in *Bern Railway Conventions CIM* and *CIV*, in *Railway Conventions* of Socialist States (*SMGS, SMPS*), in “General Conditions for the Deliveries of Goods between Foreign Trade Corporations of the Member States of the Council of Mutual Economic Aid” of 1957, etc. The long term experience proves that such conventions in the long run have influenced even the purely domestic legislation which very often adopted the principles of such conventions for domestic relations.

(3) Finally, the unification may be confined to a mere unification of rules of conflict of laws, thus establishing uniform criteria which municipal law is to be applied to certain social relations. From the point of view of unification this is the minimum conceivable achievement which more or less only declares and sanctions the existing lack of unity of substantive law among different countries. It has been submitted that mere unification of rules of conflict of laws would only petrify the lack of legal security in social — and namely commercial — relations³². In practice, on the other hand, this method of unification has been successfully employed e.g. in bilateral agreements on judicial cooperation between the socialist countries of Eastern Europe and the USSR which created, among them, the main source of private international law and which represent the first step in the trend of the unification of substantive law.³³ The same method of unification was employed in the *Codigo Bustamante* which was adopted by the VI. Panamerican Conference in 1928 and which has been ratified by 15 Latin American countries.³⁴

The unification of rules of conflicts of laws as a means of unification of law cannot be underestimated. Stable and uniform rules of

³² François J. P., *op. cit.*, p. 343. Coquoz, R., *Le droit privé international aérien. Exposé systématique et critique* (Paris 1938), p. 46.

³³ Lunc, L. A., *Mezhdunarodnove Chastnove pravo. Obshchava chast.* (Moscow 1959) p. 78-86.

³⁴ Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Equador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, Salvador, Venezuela.

conflicts of laws — it is true — cannot guarantee uniform regulation and settlement of subjective rights and duties of parties to a private law relation containing a certain foreign element; but they can, after all, provide a high degree of stability and legal security. The adoption of uniform rules of conflict may guarantee that to similar private law relations containing an identical foreign element the same law would be applied everywhere. As compared with the present state of affairs in the field of private air law relations, this would be a great achievement which would provide for the new bitterly missing security, “predictability” and “forseeability” in private air law relations in such problems where there is no or at least no adequate unification of substantive law. And these fields uncovered by unification are at present only too vast.

The following conclusion may be drawn from these considerations: “Insofar as the ideal of adoption of uniform law of the air cannot be attained it is opportune to adopt uniform laws of conflict in this matter”.³⁵ The unification of substantive law would have great advantages, but the divergences in national legal concepts are so great as to make the devising of uniform substantive law rather impracticable.³⁶ The adoption of uniform rules of conflict would be a great improvement of the present state of affairs and an important step towards the endeavours for prospective unification of substantive law which remains the ideal final aim.

IV. RESOLUTION OF THE INSTITUT

1) Basic Concept of the Resolution

The *Institut* in its Resolution of September 11, 1963, took “as the starting point the principle that general rules of conflict of laws should be applied in this special field insofar as the nature of aviation itself and the nature of aerial transport do not require the creation of specific rules of conflict”.³⁷

This approach was chosen by the Rapporteur already in his “Preliminary exposé” in 1958³⁸ and proved to be the most suitable basic concept of the Resolution. There was no need — and it would be even harmful — to suggest in the Resolution rules of conflict for all conceivable private law relations which might occur in connexion

³⁵ Preamble of the Resolution of the *Institut*.

³⁶ Wilberforce, R. O., *International Recognition of Rights in Aircraft*, 2 *International Law Quarterly* (1948-49), p. 423.

³⁷ Preamble of the Resolution of the *Institut*.

³⁸ *Annuaire*, Vol. 48, I. (1959), p. 414.

with aviation or carriage by air. The *Institut* did not intend to prepare a Draft Code of rules of conflict of laws which would be applicable *also* in matters of air law, but rather aimed at establishing rules of conflict of laws for *specific* relations in matters of air law, for *specific* situations created by the very nature of aviation, where the general rules of conflict of laws proved to be inadequate or where there is — due to the specific nature of aviation — lack of suitable criteria for the settlement of conflicts and where the application of a general rule *per analogiam* does not fit satisfactorily.

The Institut very reasonably resisted the temptation to launch a too ambitious and purely doctrinal project which would have no appeal for the practice.³⁹

As to contents: the Resolution consists of a Preamble and nine Sections; the first gives a definition of the “national law” of the aircraft; the second sets rules of conflict concerning rights *in rem* and private law claims in respect of an aircraft; the third regulates the hiring and affreightment of aircraft; the fourth the contract of employment, the fifth the contract of carriage of passengers and goods, the sixth obligations arising from aerial collisions, the seventh obligations arising from assistance or rescue carried out between aircraft, the eighth sets rules of conflict for damages caused by aircraft to third parties on the ground and finally the ninth makes rules of conflict for legal acts and facts which have taken place on board an aircraft in flight.

In previous drafts prepared by the Commission every article and some groups of articles had a headline — e.g. I. rights *in rem*, II. Obligations 1) contractual obligations, 2) non-contractual obligations, etc.; it is fortunate that this implied vestige of the statist theory which might be misleading for interpretation and qualification was finally omitted, even if the Rapporteur himself was very reluctant to agree to this omission.⁴⁰

In connection with the discussion of the basic concept of the Resolution another question arises: does the scope of the Resolution cover all the urgent matters which have arisen in the international practice? The answer may be positive as far as private law relations as such are concerned. On the other hand it can be contended that mere unification of rules of conflict without a reasonable settlement, at the same time, of the most intricate problems of jurisdiction is only of

³⁹ Only Prof. Léon Babinski was in favour of a more “creative” approach and preferred the creation of concrete specific rules rather than references to *general* rules of conflict. See: Observations de M. Léon Babinski, *Annuaire*, Vol. 48, I. (1959), p. 430.

⁴⁰ Session of September 9, 1963; *Annuaire*, Vol. 50, II., p. 242-243.

very relative value. A draft unification of criteria for jurisdiction and possibly even provisions for the recognition of foreign judgments would be a highly desirable step towards effective unification of law. But the Institut rather restricted the object of the Resolution to conflicts of laws in matters of private law, "without ignoring the importance of settling problems of jurisdiction".⁴¹ In view of the fact that no item on jurisdiction in matters of private air law appears on the current agenda of the *Institut*, this "mental reservation" has not much meaning.

The present study will follow the system of the Resolution and will analyze its Sections in the order set by the Resolution.

2) "National Law" of the Aircraft

The Resolution sets in most Sections the *national law of the aircraft* as one of the decisive points of contact for the resolution of conflict of laws.⁴² For the reason of convenience the definition of the national law of the aircraft was stipulated as the common denominator for following Sections in the very first Section, which reads as follows:

"For the purpose of the following sections, the national law of the aircraft shall be that of the State in the registers of which the aircraft has been entered.

"Nevertheless, save as regards the rights *in rem* covered by section 2, the national law of an aircraft chartered without crew by an operator who is the subject of a State other than the State of registration of the aircraft, shall, for the period of the charter, be that of the State of which the Charterer is subject."

The concept "national law of the aircraft" is a concept which — from the theoretical point of view — must be treated with great caution, since its meaning might be rather misleading. There is still a considerable uncertainty regarding "what does the nationality of aircraft consist in"⁴³. Several writers express great doubt whether the concept "nationality of the aircraft" is theoretically justifiable at all⁴⁴. On the other hand this concept has been firmly established since

⁴¹ Preamble of the Resolution.

⁴² Sections 2, 3, 4, 6, 7, 8 and 9.

⁴³ Riese, O., *Internationalprivatrechtliche Probleme auf dem Gebiet des Luftrechts*, *Zeitschrift für Luftrecht* No. 3 (1958), p. 276.

⁴⁴ Meili, F., *Annuaire*, Vol. 24 (1911), p. 308. Mandl, V., *La nationalité des aéro-nefs n'est qu'une dénomination erronée*, *Droit Aérien* (1931), p. 161.. Riese, O., *op. cit.*, n. 43/, p. 276. Riese, O., *Luftrecht* (Stuttgart, 1949), p. 201.

1919 in the positive *public international law*⁴⁵ as well as in the municipal law of individual States. The first paragraph of Section 1 of the Resolution in fact adopts the wording of Article 17 of the *Chicago Convention* of 1944: "Aircraft have the nationality of the State in which they are registered".

"Nationality of the aircraft" must be understood in different terms than "nationality" of physical persons or legal persons; nationality of persons establishes a legal link between certain States and certain persons; "nationality" of the aircraft, on the other hand, does not establish a legal link between a State *and an aircraft*, but between the state and a person which is legally responsible for the aircraft.⁴⁶ Nationality of the aircraft as well as the nationality of a vessel, "are both merely creations of the legal technique, adapted to specific circumstances and serving specific purpose".⁴⁷ The function of the concept "nationality of the aircraft" lies mainly in the field of *public international law* where it serves as a criterion of applicability of international conventions⁴⁸ or a criterion of international responsibility of a certain State⁴⁹ or finally as a criterion of the right of protection in respect of the aircraft.

Cooper submits that "aircraft, like vessels, and unlike railway trains and automotive vehicles, now have that quality of legal quasi-personality in *public international law* discussed as *nationality*; but unlike vessels, and like railway trains and automotive vehicles, aircraft are not yet considered as having the quality of personal responsibility in *private law*. The legal status of aircraft is therefore *sui generis* and places them in a class apart from other instrumentalities of commerce".⁵⁰

⁴⁵ *The Paris Convention Relating to the Regulation of Aerial Navigation* of October 13, 1919, Article 6: "Aircraft possess the nationality of the State on the register of which they are entered..."; *the (Madrid) Ibero-American Convention Relating to Air Navigation* of November 1, 1926, Art. 6; *the (Havana) Pan American Convention on Commercial Aviation* of February 20, 1928; Art. 7; *the Chicago Convention* of December 7, 1944, Art. 17. For texts, see e.g. Matte, N. M., *op. cit.*, p. 653 seq.

⁴⁶ Planta, F. de, *Principes de Droit International Privé Applicables aux Actes Accomplis et aux Faits Commis à Bord d'un Aéronef* (Geneva 1955), pp. 120-121.

⁴⁷ De Visscher, F., *Les conflits de lois en matière de droit aérien*, Recueil des Cours de l'Académie de Droit International, Vol. 48 (1934 - II.), p. 296.

⁴⁸ E.g., *Chicago Convention*, Art. 5, 7, 11.

⁴⁹ E.g., *Chicago Convention*, Art. 12.

⁵⁰ Cooper, J. C., *A Study on the Legal Status of Aircraft* (Mimeographed copy prepared for the Air Law Committee of the International Law Association, September 1949), pp. 9 and 41; reprinted in French as *Etude sur le statut juridique des aéronefs* in RFDA (1950), pp. 125-148, 205-232.

“Nationality of the aircraft” being what it is — a mere functional concept serving certain purposes in public international law — it is far from being a well established point of contact for the settlement of conflicts of laws in private law relations. “Nationality of the aircraft” did not yet attain general recognition as a point of contact, is not generally applied and cannot be compared with the importance attained by the law of flag (*lex banderae*) in maritime law. The law of flag as point of contact in the maritime law was necessitated mainly by the specific nature of maritime transport — by the long sojourn of ships as independent communities on the high seas not subject to the jurisdiction of any State — whereas in the case of an aircraft its nationality is primarily of importance in connection with the sovereignty which States exercise in the airspace above their territory.⁵¹

By suggesting the nationality of aircraft as point of contact of wide applicability for the settlement of conflicts of laws in the field of aviation the *Institut* made a step towards the development of traditional concepts of conflicts of laws; what are the merits of the application of the law of the nationality of aircraft in particular relations, will be discussed in connexion with particular rules of conflict of laws suggested by the *Institut* in other Sections of the Resolution.

It is opportune to mention that several municipal laws have already introduced this point of contact for certain relations connected with aviation.⁵² The term “national law of the aircraft” may sound quite strange to *some* legislation or judges but the terminological fetish of this innovation may be overcome by the realization that it is nothing more than the *law of the place of registration*; as such it has its roots in the intimately known family of legal terminology connected with corporations, patents, registration of transactions concerning immovables, etc.

The concept of nationality of aircraft as used by the *Institut* evidently tends to qualify the aircraft as an “immovable” and to attach several legal aspects connected therewith to such legal order, to which the aircraft itself and the relations connected therewith have the most logical and most close relation. This need not necessarily be the law of the “nationality” of the aircraft *stricto sensu* — i.e. in the sense of public international law (Article 17 of the *Chicago Convention*), but other — fictitious — “nationality”. For the field of private

⁵¹ Honig, J. P., *The Legal Status of Aircraft* (The Hague 1956), p. 56.

⁵² E.g., the Italian *Codice della Navigazione* of 1942, Art. 6, for rights *in rem* in respect of an aircraft, Art. 9, for contract of employment of the crew, Art. 10, for hire and charter of the aircraft, etc.; the *Polish Law of the Air* of 1962, Art. 9, 10, 12 and 13; the *Czechoslovak Law on Private International Law and Procedure No 97/63*, para. 16, 2; *Codiga Eustamante*, Art. 289, etc.

international law the *Institut* preferred this more flexible approach to the concept of nationality, because in this field "nationality" has to serve different functions than the same concept in the sense of the Chicago Convention. This "functional" approach to the concept of nationality in the sense of private international law is clearly expressed in the second paragraph of Section 1 of the Resolution: this rule creates a "constructive" (fictitious) nationality of the aircraft based on the nationality of the charter of the aircraft in case of a charter on a bare-hull basis by a national of a State other than the State of registration. This rule and the rationale behind it may prove that nationality in the sense of public international law and "nationality" in the sense of private international law may be quite different concepts serving different functions.

Conclusion: "Nationality of the aircraft" as point of contact for private air law relations is a functional concept which is to serve a specific purpose: to attach certain legal relations connected with aviation to such law, to which these relations have most close and most logical link. "Nationality of the aircraft" as used in the *Chicago Convention* serves different functions in the field of public international law.

3) Rights in rem and Private Law Claims in Respect of an Aircraft

It is generally considered an unshakable axiom in conflicts of laws theory and practice that the rights *in rem* (drois réels, Sachenrechte, veshchnyye prava) are governed by the *lex rei sitae*. But is the *situs rei* as point of contact really reasonably adaptable to rights *in rem* in respect of an aircraft? The aircraft is probably the most "moveable" of all moveables in the legal sense; it changes its *situs* frequently and within a matter of hours it may be in several territories where different laws apply. Which law should be applied to problems of ownership of the aircraft, transfer of property and several differentiated forms of private law claims in respect of the aircraft which have developed as a legal security counterpart of the economic credit and financing transactions connected with the construction of giant and expensive aircraft?⁵³

Serious efforts for the unification of law in this field were undertaken by *CITEJA* as early as in 1927 and by 1931 two draft conventions were prepared: (1) on the ownership of aircraft and the

⁵³ Hypothec, mortgage, pledge, hire-purchase agreement, floating charge, conditional sale, equipment trust. See Hofstetter, B., *L'hypothèque aérien* (Lausanne 1950), Johnston, D. I., *Legal Aspects of Aircraft Finance* (Thesis, I.A.S.L., McGill University, Montreal 1961).

aeronautic register, and (2) on mortgages, other legal securities and aerial privileges; they were, however, never presented to any diplomatic conference for discussion and eventual approval.⁵⁴

The *Chicago Conference* in 1944 recommended the adoption of a convention "dealing with the transfer of title to aircraft";⁵⁵ the second Assembly of ICAO, on June 19, 1948 in Geneva adopted the "Convention on the International Recognition of Rights in Aircraft"⁵⁶ At present only 19 States have ratified this Convention.⁵⁷ The *Geneva Convention* has not created a standard form of transfer of title in respect of an aircraft, nor a standard form of mortgage. It is not a Convention of *unification* but of *recognition*.⁵⁸ In view of this fact as well as in view of the low number of ratifications of the *Geneva Convention* it can be concluded that the problems of rights *in rem* and private law claims in respect of an aircraft are not internationally settled by unification and problems of conflict of laws may arise.

In the doctrine there is a marked trend to prefer the application of the "national law of the aircraft" for these relations to the application of *lex rei sitae*: analogy with the legal status of ships in maritime law is here quite obvious.⁵⁹ A great number of writers are in favour of the nationality of the aircraft as point of contact for the settlement of conflicts in these matters — Makarov⁶⁰, Niboyet⁶¹, Wolff⁶², Hofstetter⁶³, Lunc⁶⁴, etc. Only a minority of writers advocate the traditional concept of *lex rei sitae* — e.g. Hamel⁶⁵ and De Visscher.⁶⁶

⁵⁴ Matte, N. M., *op cit.*, p. 524.

⁵⁵ Final Act of the Chicago Conference, Sec. 1.

⁵⁶ See n. 17.

⁵⁷ Argentina, Brasil, Chile, El Salvador, Ecuador, Haiti, Italy, Laos, Mali, Mauretania, Mexico, the Netherlands, Niger, Norway, Pakistan, Sweden, Switzerland, U.S.A., West Germany.

⁵⁸ Wilberforce, *op. cit.*, p. 423.

⁵⁹ Eynard, J., *La loi du pavillon. Recherche d'une règle générale de solutions des conflits de lois en droit maritime international* (Paris 1926), pp. 33, 57 and passim Fabian, J., *Normy kolizyjne w prawie ciwylnym morskim* (Poznań 1957), p. 11 and passim.

⁶⁰ Makarov, A. N., *Die zwischenprivatrechtlichen Normen des Luftrechts*, 1 Zeitschrift für das gesamte Luftrecht (1927-1928), p. 175 seq.

⁶¹ Niboyet, J. F., *Traité de droit international privé français*, Vol. IV. (Paris 1947), p. 604.

⁶² Wolff, M., *Das internationale Privatrecht Deutschlands*, 3. Auflage (1954), p. 174 seq.

⁶³ Hofstetter, B., *op. cit.*, p. 209 seq.

⁶⁴ Lunc, L. A., *op cit.*, n. 33, pp. 169-170; Lunc, L. A., *op. cit.*, n. 22, pp. 83-84.

⁶⁵ Hamel, J., *Aviation: Répertoire de droit international*, II., p. 19; quoted according to Makarov, *Annuaire*, Vol. 84, I., p. 372.

⁶⁶ De Visscher, F., *op. cit.*, n. 47, p. 285 seq.

Similar trend can be ascertained in the positive law of several countries; e.g. the Italian *Codice della Navigazione* of 1942 in Art. 6 applies the national law of the aircraft to the ownership of and titles to the aircraft; the Brazilian *Code of the Air* of 1938 in Art. 7 and the Polish *Prawo Lotnicze* (Law of the Air) in Art. 10 have identical provisions.

The practical experience proves that the application of the traditional concept of *lex rei sitae* in view of the specific nature of the aircraft would not be reasonable and that it would introduce many chaotic elements in the legal settlement of rights *in rem* and several other private law claims in respect of an aircraft; *lex rei sitae* would introduce a plurality of applicable laws, since the *situs* of the aircraft frequently changes. The need for security and stability of legal relations requires that these relations be attached to a single, permanent and stable law which would be foreseeable for all parties concerned. The best solution to be found is undoubtedly in favour of the law of the place of registration of the aircraft, which is known to all concerned, is stable and unique.⁶⁷

The *Institut* has accepted this solution in Section 2 of its Resolution which provides:

“Rights *in rem* and private law claims in respect of an aircraft shall be governed by the law of the nationality of the aircraft.

“Nevertheless creditors entitled to sums due for rescue of the aircraft and to special expenses essential for the maintenance of the aircraft may claim the preferences and the order of priority recognized to them by the law of the State where rescue or maintenance operations have been terminated.

“A change of nationality of the aircraft shall not affect rights already acquired.”

This wording of the Resolution can be considered as very successful and acceptable. The *Institut* did not try to specify, name or enumerate several forms of “rights *in rem*” or “private law claims in respect of an aircraft” which would only give rise to unsurmountable problems of conflicts of qualifications. The present wording is flexible and easily adaptable to all legal orders. The overall application of the law of the nationality of aircraft is persuasive and corresponds to practical needs and to reasonable solution of the respective legal relations.

The only exception from the overall application of the law of the nationality of the aircraft is made in favour of the law of the

⁶⁷ Article 18 of the *Chicago Convention* provides that an aircraft cannot be validly registered in more than one state.

state where "rescue"⁶⁸ or essential "maintenance" operations were terminated; preferences and the order of priority granted according to this law may be claimed by the creditors.

This rule was evidently taken from the *Geneva Convention* of 1948⁶⁹ and its rationale is to be found in the desire to encourage the efforts for salvage, rescue and other emergency operations by a legal guarantee of compensation⁷⁰ or a guarantee of a foreseeable priority of claims. It may be only submitted that the expression "maintenance" as used in the Resolution may easily lead to misinterpretation. The *Geneva Convention* of 1948 in its Article IV. (1) uses the expression "preservation" of the aircraft which underlines the requirement of an *emergency* nature of the respective operation. The expression "maintenance" can be easily interpreted as routine overhaul operation which was undoubtedly not the intention of the Drafters of the Resolution.

Conclusion: The substitution of the national law of the aircraft for the concept of *lex rei sitae* in the settlement of conflicts of laws concerning rights *in rem* and private law claims in respect of an aircraft is reasonable and acceptable. It reflects the practical needs of stability and foreseeability in these legal relations and it also reflects the trends of the modern legislations as well as the prevailing doctrine.

4) The hiring and affreightment of aircraft

The hire and affreightment of aircraft are at present ever more frequent operations in the field of international transportation and are used on an ever larger scale. These commercial operations enable more flexible utilization of aircraft in mutual cooperation of two or more air transport enterprises according to actual demand for transportation. The economic substance of these commercial operations is usually described as "interchange of equipment" and it became particularly practical in the United States,⁷¹ but its importance even in

⁶⁸ It is submitted that the French wording "sauvetage" would be better translated as "salvage".

⁶⁹ Article IV. (1): "In the event that any claims in respect of (a) compensation due for the salvage of the aircraft, or (b) extraordinary expenses indispensable for the preservation of the aircraft give rise, under the law of the Contracting State where the operation of salvage or preservation were terminated, to a right conferring a charge against the aircraft, such right shall be recognized by Contracting State and shall take priority over all other rights in the aircraft."

⁷⁰ A similar provision is also in the *Brussels Convention for the Unification of Certain Rules on Assistance and Salvage on Sea* of September 23, 1910.

⁷¹ Winkelhake, D. C., *Interchange Services Among the Airlines of the United States*, 22 J. of Air L. and Com. (1955), pp. 1-50. Sundberg, J. W. F., *Air Charter, A Study in Legal Development*, (Stockholm 1961), pp. 91-92.

international relations is steadily rising. "The interchange" ⁷² banalisation d'aéronefs, Austausch von Luftfahrzeugen) as such is not a legal technique but rather an economic method of utilization of aircraft. As far as the legal aspect of interchange is concerned, it may have the form either of hire or that of affreightment.⁷³

It is not easy to draw a dividing line between the contract of hire and contract of affreightment without a reference to the law of a particular country; nevertheless an abstract and more or less generally applicable dividing criterion may be found depending upon who has the *possession* and *control* of the aircraft by the particular contract: by the contract of hire the possession and control of the aircraft passes for the period of the contract over to the lessee while by the contract of affreightment the lessor keeps the possession and control of the aircraft.⁷⁴

The solution of conflicts of laws in connection with the hiring and affreightment of aircraft is unclear both in theory and in practice.⁷⁵ The theoretical approach is to apply to the contract of hire the law of the lessor's principal place of business or that of his residence,⁷⁶ while other doctrine recommends the application of the law of the place where the moveable object was delivered to the lessee.⁷⁷

The Italian *Codice della Navigazione* of 1942 — the only law which regulates this problem *verbis expressis* — applies to the hiring and affreightment of the aircraft the law of nationality of the aircraft unless the parties have indicated their intention to apply other law.⁷⁸

Very strong arguments may be brought in favour of the application of the law of the nationality of the aircraft, especially in view of the fact that a number of states have administrative regulations

⁷² The European Civil Aviation Conference has defined "interchange" as "l'utilisation par une entreprise du transport aérien exploitant un service international en vertu d'une autorisation officielle, d'un aéronef appartenant à une entreprise étrangère et immatriculé dans un Etat étranger avec ou sans son équipage". See Doc. 7676, ECAC/1, p. 16. Midle, H., *op. cit.*, p. 91.

⁷³ Cartou, L., *La structure juridique du transport aérien en Europe à la veille du marché commun*, RFDA (1958), p. 118.

⁷⁴ Dutoit, B., *La collaboration entre compagnies aériennes: ses formes juridiques* (Lausanne 1957), p. 112.

⁷⁵ Makarov, A. N. Rapport provisoire, *Annuaire*, Vol. 48, I., p. 379.

⁷⁶ Bystricky, R., *op. cit.*, p. 298. Schnitzer, A. F., *Handbuch des internationalen Privatrechts*, 4, Auflage II, (1958), p. 702.

⁷⁷ Batiffol, H., *Traité élémentaire de droit international privé*, 2e Edition (Paris 1955), p. 653.

⁷⁸ Article 1.

of imperative character which require that every person must have administrative approval of the state of the registration of the aircraft for possession, control and operation of an aircraft.⁷⁹ The requirements of the law of nationality of the aircraft must be taken into consideration by any contract for hire or affreightment since their neglect might render the legal transaction invalid or null and void.

In the *Institut* the problem of conflict of laws in connection with hiring and affreightment of an aircraft did not provoke much discussion.⁸⁰ The *Institut* was unanimous in emphasizing the primary importance of the "intention" of the parties in respect of the applicable law; the "intention of the parties", i.e. the party autonomy in the choice of law (*lex voluntatis*) is considered the leading point of contact for most contractual relations generally.⁸¹ Only if the parties have not indicated their intention as to applicable law, the *Institut* recommends the application of the national law of the aircraft. Section 3 of the Resolution reads as follows:

"The hiring and affreightment of aircraft shall be regulated by the law to which the parties have indicated their intention to submit-them.

"If the parties have not indicated their intention in this matter, the hiring and affreightment shall be subject to the national law of the aircraft".

The question arises whether the first paragraph of Section 3 was necessary at all, since it only repeats an obvious general principle of private international law the applicability of which for the field of aviation was stressed in the Preamble;⁸² only the second paragraph contains a specific rule of conflict the creation of which is necessitated by the specific nature of hire or affreightment of an aircraft.

Conclusion: The applicability of *lex voluntatis* for hire or affreightment of an aircraft follows from the general principles of private international law and its mentioning in the Resolution is superfluous. The law of the nationality of the aircraft as point of contact for these relations is persuasive and meets practical needs for a simple and foreseeable solution.

⁷⁹ See e.g. Sections 6 and 8 of the *Civil Aviation Law of Czechoslovakia* No 47/1956 Collection of Laws; Public Notification of the Czechoslovak Ministry of Transport 144/1957 Relating to Control of Aircraft and Operation thereof.

⁸⁰ See *Annuaire*, Vol. 50, II., pp. 194-196, 247-248.

⁸¹ Lunc, L. A., *op. cit.*, 22, p. 129 seq.; Batiffol, H., *op. cit.*, p. 614 seq.

⁸² See sub. IV. 1) of this study.

5) The Contract of Employment of the Crew of an Aircraft

In the contract of employment of the crew of an aircraft many foreign elements may be involved and difficult problems of choice of law often arise. The crew of the aircraft may have different nationality than the operator of the aircraft, their contracts of employment may have been concluded in different places, the crew performs the actual work in several different countries.

In theory it has been submitted that the contract of employment need not necessarily be submitted in all respects to one law only; the formal validity of the contract may be governed by one law and the conditions of employment by another; some of these conditions of employment may be governed by the dispositions of the *public order* applicable on a territorial basis while in other respects the parties may be free to determine the applicable law.⁸³ In other words — *lex obligationis* (i.e. the proper law of the contract to be determined according to the choice made by the parties or according to rules of conflict of laws) is considered applicable to private law aspects of the contract of employment, while public law aspects (e.g. labour conditions according to labour legislation which forms part of the national public order) are as a rule regulated by the *lex loci laboris*.⁸⁴

The fourth Commission of *CITEJA* studied the problem of the contract of employment of the crew in connexion with the preparation of a *Draft Convention on the Legal Status of the Flying Personnel*, the first draft of which was ready in 1932; ⁸⁵ article 2 of this Draft provided that the contract of employment should be governed by the law of the nationality of the aircraft. This Draft was never formally submitted to any international conference for discussion and eventual approval. It was considered desirable to coordinate the Draft with the International Labour Organization which was dealing with this problem at the same time,⁸⁶ but no marked progress was achieved; after the dissolution of *CITEJA* in 1947 this item never appeared on the agenda of the Legal Committee of *ICAO*.

In municipal legislation there is a marked trend to leave the choice of law in the contract of employment in general to the party auto-

⁸³ Jenks, W., *Annuaire*, Vol. 50, II., p. 198.

⁸⁴ Szaszy, I., *Voprosy trudovogo prava v mezhdunarodnom chastnom prave* (Problems of labour law in private international law), *Vestnik Instituta gosudarstva i prava*, Vo. IV., No 1-2 (Moscow 1961); Lunc, L. A., *op. cit.*, n. 22, pp. 342-344.

⁸⁵ *Compte rendu de la 8e Session*, p. 23. Bucher, P., *Le statut juridique du personnel navigant de l'aéronautique civile* (Lausanne 1949), p. 103.

⁸⁶ Kamminga, M. S., *The Aircraft Commander in Commercial Air Transportation*, (The Hague 1953), pp. 120-121.

nomy.⁸⁷ Only a few countries have specific rules of conflict of laws for the contract of employment of the crew of an aircraft: according to the Italian *Codice della Navigazione* of 1942 art. 9, the contract of employment of the flying personnel is governed by the national law of the aircraft, unless the parties have expressed their intention to submit it to other law; the choice of law by the parties is however not permitted if the aircraft possesses Italian nationality. The Polish *Law of the Air* of 1962 has in its Article 9 identical wording as the Italian law of 1942 but does not limit the possibility of the choice of law made by the parties even if the aircraft has Polish nationality. The Czechoslovak *Law on Private International Law and Procedure* of 1963 submits the contract of employment of employees of an air transportation enterprise to the law of the place of registration of the aircraft.⁸⁸

The *Institut* after ample discussion⁸⁹ decided to follow the trends of modern legislation — namely to apply *lex voluntatis* as the primary point of contact and the law of the nationality of the aircraft as an alternative. Section 4 of the Resolution reads as follows:

“The contract of employment of the crew of an aircraft shall be governed by the law to which the parties have indicated their intention to submit it.

“If the parties have not indicated their intention in this matter, the contract shall be governed by the national law of the aircraft”.

The first paragraph of the Section 4 is generally acceptable since it reflects the modern trends of wide applicability of party autonomy in the choice of law. It is, however, to be expected that most courts in the world will be inclined to test the applicability of the law chosen by the parties against the imperative rules of *lex fori* concerning conditions of labour which form a part of the public order.

The second point of contact suggested by the *Institut* — namely the law of the nationality of the aircraft — has also some precedents in the Draft Convention prepared by *CITEJA* in 1932 and in some municipal laws but it is submitted that the general applicability of this point of contact may be rather unpersuasive. If e.g. the aircraft

⁸⁷ E.g. para. 16(1) of the Czechoslovak law No. 97/1963 on Private International Law and Procedure.

⁸⁸ Para. 16(2) of the Law 97/1963 is rather confused and unpersuasive because it makes no distinction between the *flying* personnel and other employees; in para. 16(1) the possibility of party autonomy is mentioned but the wording of para. 16(2) does not imply this possibility, though the intention of the legislators undoubtedly was in favour of party autonomy even in this case.

⁸⁹ *Annuaire*, Vol. 48. I., pp. 381-385, 428, 444, 447, 453; *Annuaire*, Vol. 50. 11. pp. 197-203, 248-250.

is hired without crew by a foreign enterprise and no change of nationality takes place, is there necessarily a logical link between the law of the place of registration of the aircraft and the contract of employment of the crew ?⁹⁰

It may be submitted that the contract of employment need not have any legal relation to the country where the aircraft is registered. The contract of employment does not create any legal link between the crew and the aircraft (or the place of the registration of the aircraft) but between the crew as employees and the air transport enterprise as employer. The employer and the employees are the relevant parties to a contract of employment and their mutual rights and duties form the substance of the contract of employment. In these mutual relations between the employer and employees the nationality of the aircraft may be quite an accidental element which can hardly influence the contract or establish a persuasive legal link between the contract of employment and the law of the state where the aircraft is registered. It may be, therefore, submitted that the employer's *permanent place of business* would be a more suitable point of contact for the settlement of conflicts of laws arising from the contract of employment of the crew; in most instances this permanent place of business would coincide with the place of registration of the aircraft but in the same time this solution would provide for a reasonable and desirable flexibility in cases where there is no coincidence between the employer's permanent place of business and the place of registration of the aircraft.

The possibility of the solution of conflicts in favour of the law of the employer's permanent place of business was also mentioned in the *Institut*⁹¹ but it was not discussed properly and — as it follows from the summary records of the discussion — the *Institut* proceeded to a rather hasty voting.⁹²

Conclusion: The applicability of *lex voluntatis* as point of contact for the settlement of conflicts of laws in connection with the contract of employment of the crew of an aircraft reflects the general trends in the field of private international law and is acceptable; it is, however, to be expected in practice that the applicability of *lex voluntatis* would be tested against the imperative rules of *lex fori* or *lex loci laboris* in respect of labour conditions which form part of the parti-

⁹⁰ The fiction stipulated in Section 1 of the Resolution according to which the aircraft is considered to have the nationality of the Charterer during the period of the charter without crew, may probably settle this problem.

⁹¹ E.g. *Annuaire*, Vol. 50, II., pp. 248-249.

⁹² *Ibid.*, pp. 249-250.

cular national public order. The application of the law of the employer's principal place of business would be preferable to the national law of the aircraft which was recommended by the *Institut*, since in some instances the national law of the aircraft may have little bearing in respect of the contract of employment.

6) The Contract of Carriage of Passengers and Goods

The contract of carriage of passengers and goods is obviously the most frequent and most important legal relation arising in international aviation. At the same time it is a legal relation in which the greatest amount of foreign elements may be involved. The passengers on board the same aircraft carrying the registration marks of a certain State may have different nationalities, they may have contracted for that particular carriage with different persons and in different places, their place of departure may be different, they may have different destinations, some of them may — within the framework of the same contract of carriage — continue the trip from the final destination of the particular aircraft *via* a successive carrier to another destination; an accident involving liability may occur in the territory of another State the law of which has absolutely no bearing to the contract of carriage, etc.

The tremendous plurality of foreign elements which as a rule accompany every contract of international carriage by air make the problems of choice of law extraordinary difficult. It is only understandable that already at the dawn of transportation by air — as early as 1923 — these problems were realized and their solution was sought in the unification of substantive law.⁹³ The *Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air* of 1929 was undoubtedly a great achievement in the field of the unification of private law and it virtually became the most widely accepted convention for the unification of private law in general. The *Hague Protocol* of 1955 brought some rather radical amendments to the rules of the *Warsaw Convention* relating to the documents of carriage as well as partial amendments to the regime of liability of the carrier, but it did not change the basic concept of the *Warsaw Convention*⁹⁴: the *Warsaw Convention* is a Convention for the unification of only *certain* rules relating to the contract of

⁹³ On August 17, 1923 the French Government sent diplomatic notes to diplomatic representatives accredited in France with the recommendation for the convocation in Paris of a diplomatic conference for the unification of private law in the field of aviation. See *Conférence Internationale de Droit Privé Aérien* (Paris 1926), p. 5.

⁹⁴ Milde, M., *op. cit.*, p. 23.

carriage, it does not unify the contract of carriage as such and in all respects; it settles only certain problems (unification of documents of carriage, regime of the liability of the carrier, problems of jurisdiction), but even in this relatively narrow framework it shows several serious gaps and leaves the solution of a series of questions to national laws applicable according to principles of conflicts of laws⁹⁵. In addition, the scope of applicability of the Convention is rather restricted by the definition of "international carriage" ("Warsaw Carriage")⁹⁶ and by express omission of certain types of carriage.⁹⁷

In addition it is necessary to realize that several states the air transportation of which is by far not negligible, are not parties to the *Warsaw Convention*.⁹⁸

Thus the *Warsaw Convention* did not abolish the possibility of conflicts of laws connected with the contract of carriage of passengers and goods and the Convention may be labelled as "unfinished unification".

Since the criteria for the choice of law in different countries are not uniform as are not the rules of substantive law in respect of the contract of carriage, it would be highly desirable to adopt a uniform rule of conflict of laws for the contract of carriage which would indicate the proper law of the contract in such instances, where the *Warsaw Convention* is inapplicable or shown a gap in respect of a particular question.

What should be the relevant point of contact for the settlement of conflicts of laws in respect of a contract of carriage by air? The first solution which comes to the mind of any modern lawyer dealing with any contractual relations is the application of the principle of party autonomy in the choice of law — *lex voluntatis*. This is, as rule, a starting point of all consideration.⁹⁹ This sweeping reference to the law chosen by the parties of a contract of carriage by air must be, however, treated with a great deal of scepticism.

⁹⁵ *Ibid.*, pp. 77-78 and passim. Sand, P. H., *op. cit.*, pp. 6-15 and passim.

⁹⁶ Article 1 of the *Warsaw Convention*; the criterion of "international carriage" is the agreed place of departure and the agreed place of destination (or an agreed stopping place) which must be situated in the territories of different contracting parties to the *Warsaw Convention*.

⁹⁷ Experimental flights and other flights under extraordinary circumstances (Art. 34), gratuitous carriage performed by a carrier who cannot be classified as "air transport enterprise" (Art. 1), carriage performed directly by a State which applied the relevant reservation (Art. 2); carriage performed under the terms of any postal convention (Art. 2, 2).

⁹⁸ See n. 23.

⁹⁹ Makarov, A. N., *Annuaire*, Vol. 48, I., p. 386.

The first objection may be raised against *lex voluntatis* in respect of contracts of carriage falling under the *Warsaw Convention*: the rules of the *Warsaw Convention* are of imperative character and any choice of law made by the parties by which the parties would purport to infringe the rules laid down by the Convention, would be null and void.¹⁰⁰ The choice of law clause would have to be formulated very carefully only to fill the gaps of the Convention and not to be intended to govern all aspects of the particular contract of carriage.

The second objection against a sweeping reference to *lex voluntatis* stems from practical considerations: the greatest part of all international carriage by air is performed by big air transport enterprises which use uniform standard contracts mostly based on IATA Conditions of Contract¹⁰¹; unlike the Antwerp IATA Conditions of 1931 where there was a provision for choice of law¹⁰² the new Conditions do not contain any choice of law clause¹⁰³. The contract of adhesion which is most common in air transportation can be hardly considered to be a genuine expression of party autonomy in making the choice of law, since the bargaining power and position of the contracting parties is not equal.¹⁰⁴ Most judges in the world would probably test the validity of such "choice of law" against their own *lex fori* — at least within the framework of requirements of the national *public order* — before granting an enforcement to such contract.

It must be admitted that the choice of law made by the parties would be probably practicable only in exceptional cases where the carriage is not performed by an air transport enterprise.¹⁰⁵ The overall application of the choice of law made by the parties cannot be, therefore, overestimated as a general remedy and general solution of conflicts of laws in connection with the contract of carriage by air, since it is hardly practicable.

If the parties did not avail themselves of the possibility of making choice of law, the solution of the conflicts of laws is, according to the doctrine, rather confused.

¹⁰⁰ Article 32 of the *Warsaw Convention*.

¹⁰¹ IATA Resolution 275b — Passenger Ticket — Conditions of Contract; issued: 1st April 1964; IATA Resolution 600b — Air Waybill — Conditions of Contract; issued 1st April 1964.

¹⁰² Article 22 para. 4(1) of IATA Conditions for the carriage of passengers of 1931 made the choice of law in favour of the *lex fori* of the court of the carrier's principal place of business.

¹⁰³ Gazdik, J., *The New Contract between Air Carriers and Passengers*, 24 J. of Air L. and Com. (1957), p. 158.

¹⁰⁴ Sand, P. H., *op. cit.*, p. 49.

¹⁰⁵ Makarov, A. N., *Exposé préliminaire, Annuaire*, Vol. 48, I., p. 421.

At least six different points of contact have been contemplated in the doctrine¹⁰⁶:

- a) the law of the place where the contract was concluded (*lex loci contractus*);
- b) the law of the agreed place of departure;
- c) the law of the agreed place of destination (*lex loci solutionis*);
- d) the law of the flag (the law of the place of registration of the aircraft — *lex banderae*);
- e) the law of the court seized of the case (*lex fori*);
- f) the law of the contracting carrier (law of the carrier's principal place of business)

Several of these conceivable constructions do not offer a satisfactory solution which would correspond to a reasonable settlement of the respective legal relation. The practical needs require a reasonable solution of different conflicting economic interests which might be involved in every particular case — notwithstanding any traditional concepts of private international law. Some Western writers call such a flexible approach to problems of conflicts of laws a *policy rationale*¹⁰⁷, the socialist legal concept calls it “application of such law which corresponds to a reasonable settlement of a given legal relation”¹⁰⁸; both concepts are, from the formal point of view, very close each to other.

Several “policy requirements” may be conceived in this connection; the basis of them seems to be to apply such law which would firstly have a real connexion with the given contract of carriage and the application of which would be reasonably foreseeable by the parties concerned and, secondly, a law which would guarantee that all persons and goods on board the same aircraft would be subject to the same law.¹⁰⁹

Taking this as a starting point it is possible to eliminate some points of contact suggested in the doctrine as not acceptable and not reflecting reasonable policy requirements:

¹⁰⁶ Riese, O., *op. cit.*, n. 43, pp. 280-281; Milde, M., *op. cit.*, p. 17; Sand, P. H., *op. cit.*, pp. 61-62; Makarov, A. N., *Annuaire*, Vol. 48, I., p. 386; De Visscher, F., *op. cit.*, p. 325.

¹⁰⁷ Sand, P. H., *op. cit.*, pp. 62-66.

¹⁰⁸ Para. 10(1) of the Czechoslovak Law, No. 97/1963 on Private International Law and Procedure.

¹⁰⁹ Riese, O., *op. cit.*, n. 43, p. 280; Sand, P. H., *op. cit.*, p. 63; Milde, M., *op. cit.*, p. 18.

Thus e.g. the place where the contract was concluded¹¹⁰ may be quite an accidental element (carriage from State A to State B can be contracted for in State X or Y) without any bearing on the relations of the contracting parties and it may be different for all passengers on board a particular aircraft.

The law of the agreed place of departure¹¹¹ is easily ascertainable and foreseeable for the parties, but in most instances in practice it would discriminate among passengers who have boarded the same aircraft in different places; it would also fail in cases of successive carriage performed by several carriers within the framework of the same contract of carriage.

The law of the agreed place of destination¹¹² would equally discriminate the legal position of passengers on board the same aircraft; in addition in several cases the real connexion of the law of the destination to the contract of carriage may be construed only with difficulties (e.g. a Canadian citizen goes by Air France from Montreal via Paris to Karachi and the flight ends in disaster in Turkey; may the Pakistani law be reasonably applied as the "proper law of the contract"?)

The law of the place of the registration of the aircraft (the law of the flag)¹¹³ is due to pooling arrangements and interchange operations in most cases quite an accidental element and cannot be foreseen by the passengers and consignors of goods for whom as a rule their travel agents or freight forwarders make the booking for specific carriers.

The application of *lex fori*¹¹⁴ would be in practice rather unstable and unforeseeable — even according to the *Warsaw Convention* there are three criteria for the determination of the jurisdiction¹¹⁵ and beyond the Warsaw carriage there is no theoretical limitation as to what courts might assume jurisdiction in a particular case.

¹¹⁰ Suggested by McNair, A. D., *The Law of the Air*, 2nd Ed. (London 1953), p. 135; Makarov, A. N., *op. cit.*, n. 60, p. 180; Shawcross and Beaumont, *On Air Law*, 2nd Ed. (London 1951), No. 337, p. 311.

¹¹¹ Lemoine, M., *Traité de droit aérien* (Paris 1947), pp. 399-400.

¹¹² Abraham, H. J., *Der Luftbeförderungsvertrag* (Stuttgart 1955), p. 10.

¹¹³ Lunc, L. A., *op. cit.*, n. 22, p. 212; Art. 10 of the Italian *Codice della Navigazione* of 1942.

¹¹⁴ Makarov, A. N., *Annuaire*, Vol. 48, I, quotes that Art. 68 of the Brazilian Code of the Air and Art. 120 of the *Aeronautical Code* of Uruguay apply *lex fori* for contracts of carriage.

¹¹⁵ Article 28: a) the court in the carrier's principal place of business; b) place of the carrier's establishment through which the contract has been made; c) place of destination.

It seems, in consequence, that only the law of the carrier's principal place of business would offer a reasonable solution. This law is easily ascertainable, foreseeable and stable. In the doctrine this solution has been strongly favoured¹¹⁶. The *Institut de Droit International*¹¹⁷ has adopted this criterion for contracts of carriage in general already in 1908 in Florence and some recent national laws have adopted this criterion as well.¹¹⁸

During the sessions of the *Institut* the problems of conflict of laws in respect of the contract of carriage of passengers and goods did not attract too much attention — quite in disproportion to the extraordinary importance of the issue.¹¹⁹

Without having entered any fundamental discussion the *Institut* has adopted the following wording of the Section 5 of its Resolution:

“The contract of carriage of passengers and goods shall be governed by the law to which the parties have indicated their intention to submit it.

“When the parties have not settled the law applicable, the contract shall be governed by the law of the principal place of business of the carrier.”

Conclusion: The Resolution recommends to apply to contracts of carriage of passengers and goods by air primarily *lex voluntatis*: this solution, through obvious theoretically, is hardly practicable. The second recommended point of contact — the law of the carrier's principal place of business — satisfies most “policy requirements” and is acceptable in practice. Many serious gaps of the *Warsaw Convention* — such as e.g. the determination of the parties entitled to sue — will not be, however, filled by the determination of the “proper law of the contract”, the scope of which is limited.

7) Obligations Arising from Aerial Collisions

The vast expansion of air traffic in the course of recent years and the continuous increase of the frequency and density of flights in established international airways and flight levels have increased the danger of collisions between aircraft. This danger is particularly

¹¹⁶ De Visscher, F., *op. cit.*, p. 325; Riese, O., *op. cit.*, n. 43, at p. 281; Milde, M., *op. cit.*, p. 19; Schnitzer A. F., *op. cit.*, pp. 414 seq.; Bystricky, R., *op. cit.*, p. 302; Sand, P. H., *op. cit.*, pp. 65-66 (not unequivocally).

¹¹⁷ *Resolutions de l'Institut de Droit International 1873-1956*, p. 309.

¹¹⁸ E.g. para. 10(2) c) of the Czechoslovak Law No. 97/1963 on Private International Law and Procedure.

¹¹⁹ *Annuaire*, Vol. 50, II., pp. 203-205, 250-251.

imminent in zones of approach for landing¹²⁰ where the density of flights is highest, but a collision may occur practically everywhere on the route.¹²¹

A collision between aircraft gives rise to difficult problems of liability; the solution of mutual claims between the operators of the two colliding aircraft is even more difficult if aircraft registered in different states were involved and if moreover the collision occurred above the territory of a third state. In such a case first of all a question arises under which law the mutual rights and liabilities should be considered; in view of the plurality of foreign elements which might be involved, the choice of law is not easy.

Attempts to unify the rules of substantive law relating to problems arising from collisions of aircraft were undertaken by CITEJA as early as in 1932. At its 11th session in Bern in 1936 a Draft convention was prepared which was submitted to the IVth International Conference on Private Air Law held in Brussels in September 1938.¹²² The Brussels Conference, however, did not discuss the Draft and the unification works were suspended until the post-war period. The Draft itself was seriously deficient in its general concept¹²³ and it did not become the basis for the new unification works in the post-war period within ICAO Legal Committee.

The ICAO Legal Committee has had the problem of aerial collisions on its agenda since its 9th Session in 1956¹²⁴ and several working drafts have been prepared up to the present¹²⁵ but no decisive step regarding the adoption of the drafts has yet been made. The prospective convention will not settle the problems of conflicts of

¹²⁰ See e.g. ICAO Circular 64-AN/59 — Aircraft Accident Digest No. 12 (1963), p. 314 describing the biggest disaster in aviation history — a collision of a Super-G Constellation of the TWA with DC-8 of the UAL which occurred on December 16, 1960 over New York during the approach for landing; a total of 134 peoples were killed. — On p. 124 and p. 174 this Digest lists other two collisions which occurred during landing operations.

¹²¹ On July 1, 1956 a collision occurred between UAL and TWA aircraft in a routine airway over Grand Canyon, Colorado.

¹²² For text of the draft see "IVe Conférence de Droit Privé Aérien", Vol. II. Documents (Brussels 1938), p. 10.

¹²³ For analysis of this draft see Fitzgerald, G. F., *The Development of international liability rules concerning aerial collisions*, J. of Air L. and Com. (1954), 203-210, Milde, M., *op. cit.*, p. 129.

¹²⁴ Drion, H., *Zur Frage eines internationalen Abkommens betr. den Zusammenschluss in der Luft*, Zeitschrift für Luftrecht (1957), p. 22.

¹²⁵ ICAO Doc. L. C./ Working draft No. 465 of 1954; ICAO Doc. L.C./ Working draft No. 642 of 1959; ICAO Doc. 8101/L.C./145 of 1960 and finally ICAO Doc. L.C./ Working draft No. 732 adopted by the 15th Session of the Legal Commission on September 18, 1964 in Montreal.

laws but will set substantive rules for liability; its scope will be limited to collisions or interference between two or more aircraft in flight, if the collision or interference occurs in the territory of a contracting State and at least one aircraft is registered in another contracting State, or if two or more aircraft involved are registered in different contracting States, irrespective of where the collision or interference occurs.¹²⁶

Only a few national legislations have specific rules for aerial collisions: the Italian *Codice della Navigazione* of 1942 in Article 12 regulates obligations arising from aerial collisions which occurred over high seas or a territory not subject to State sovereignty; the national law of the colliding aircraft is held applicable if it is common to both colliding aircraft; if they have different nationality, *lex fori* is to be applied. The *Polish Law of the Air* of 1962 in Article 11 applies *lex loci delicti commissi*; if the occurrence took place in a territory not subject to State sovereignty, *lex fori* of the court seized of the case is applied.

The prevailing doctrine considers the application of the *lex loci delicti commissi* "comme exprimant le droit actuellement en vigueur"¹²⁷. It may be, however, submitted that the traditional concept of *lex loci delicti commissi* is not accepted unequivocally. The rules of law relating to punishable and other unlawful or illicit acts form a part of the public order of each country and therefore the claims *ex delicto* or *ex quasi-delicto* must be considered also under *lex fori*.¹²⁸

British practice of torts, for instance, considers the chief question of torts — the qualification of the unlawful character of the act — not only under *lex loci delicti commissi* but also under *lex fori*.¹²⁹ The theory of the USSR also clearly adopts the view that a Soviet court would not be authorized to award damages for such acts which, according to the *lex fori*, are not unlawful, although they may be unlawful under the law of the place where they have been done.¹³⁰ Under Art. 12 of the *Introductory Law of the German Civil Code*, no

¹²⁶ Article 1(1) of the Working draft No. 732.

¹²⁷ Makarov, A. N., *Annuaire*, Vol. 50, II., p. 211.

¹²⁸ Savigny, K., *System des heutigen römischen Rechts*, Band VIII. (1848), pp. 278-279.

¹²⁹ *Dicey's Conflict of Laws*, 6th Edition (London 1949), rule 174, p. 800: "An act done in a foreign country is a tort actionable as such in England, only if it is both: 1) actionable as a tort, according to English law, or in other words, is an act, which if done in England, would be a tort; and 2) not justifiable, according to the law of the foreign country where it was done".

¹³⁰ Lunc, L. A., *Mezhdunarodnove chastnoye pravo*, (Moscow 1949), p. 274-276; Lunc, L. A., *op. cit.*, n. 22, p. 237 seq.; Pereterskiy, I. S., Krylov, S. B., *Mezhdunarodnoye chastnoye pravo*, 2nd Ed., (Moscow 1955), p. 146.

higher claims than those laid down by German law shall be actionable against the German citizen, even if the act has been done abroad. In the United States the traditional concept of the "place of wrong" as point of contact has been vigorously criticized both in the doctrine¹³¹ and in recent judicial decisions on air law.¹³²

In consequence, *lex loci delicti commissi* is not a quite unequivocal point of contact in private international law. The court of any State, considering the claims for damages arising from an act done abroad, cannot ignore its own *lex fori*, at least to the extent and limits of the requirements of public order.

Even more difficult problems may arise from a collision of two or more aircraft of different nationalities over high seas or a territory not subject to State sovereignty. These problems (torts on the high seas) are treated in the doctrine with much hesitation.¹³³ In the absence of any other available criteria the *lex fori* of the court seized of the case would have to be applied. If, however, the two aircraft which have collided over high seas had common nationality, there is a logical common denominator which can be used as point of contact and the law of the nationality common to both aircraft may be reasonably applied.

The *Institut* has adopted the following wording of the Section 6 of its Resolution :

"In case of an aerial collision which occurs in an area subject to State sovereignty, the law of the place where the collision has occurred shall apply.

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

Conclusion: The *Institut* has adopted a sweeping reference to the traditional concept of *lex loci delicti commissi* and did not take into account the modern trends in the doctrine and practice. The reference, in the second paragraph, to the law of nationality common to the colliding aircraft is reasonable and acceptable. The reference to *lex fori* of the court seized of the case is, in the absence of any other available points of contact, the only practical solution for collisions which occurred in an area not subject to State sovereignty. It is only

¹³¹ Ehrenzweig, A. A., *A Treatise on the Conflict of Laws* (St. Paul 1962), p. 541 seq.; Ehrenzweig, A. A., *The Lex Fori - Basic Rule in the Conflict of Laws*, 58 Mich. L. Rev. (1960), p. 637.

¹³² *Griffith v. United Air Lines, Inc.*, 9 CCH Aviation Cases, 17, 225 (1964).

¹³³ Wolff, M., *op. cit.*, n. 22, p. 497; Cheshire, G. C., *Private International Law*, 4th Ed. (Oxford 1952), pp. 273-275.

to be regretted that the Institut did not set criteria for jurisdiction — the reference to *lex fori* is rather vague without establishing which court may be seized of the case.

8) Obligations Arising from the Assistance or Rescue between Aircraft

Even at the present stage of technical perfection in the field of aviation any aircraft may be faced with situations of distress — i.e. a state of being threatened by a serious and imminent danger and requiring immediate assistance.¹³⁴ An aircraft may be forced to ditching¹³⁵ on the sea or to a forced landing outside an aerodrome in a desert area. However rare such occurrences are, they may happen due to various factors — failure of engines, fuel shortage caused by heavy icing or unexpectedly strong headwinds or other adverse unexpected weather conditions which force the aircraft to substantial deviations off its route, etc. Such situations may bring about the necessity of search for the missing aircraft and eventual assistance or rescue operations. In these operations other aircraft may be involved: the aircraft taking part in rescue or assistance operations may search for the missing aircraft, trace the scene of the accident and report its position, they can drop food and rescue equipment or they can land in the vicinity of the aircraft in distress.¹³⁶

While the problems of assistance or rescue between aircraft are primarily a matter of an obligation assumed by states in international public air law conventions¹³⁷ several problems of private law are involved too. The assistance and rescue operations carried out by other aircraft are costly and sometimes risky and a problem of private law arises what remuneration may the operator of the assisting aircraft and its crew charge, against whom, should the remuneration depend on the successful result and on the value of the objects saved (the principle of maritime law — “no cure no pay”) or should the merits, efforts and expenditures of the rescuers be indemnified under any circumstances, etc.

In maritime salvage between ships the master of the ship usually signs an agreement with the rescuers¹³⁸ laying down all conditions and remuneration, but in the field of aviation it is practically unthinkable and an extracontractual relation arises.

¹³⁴ Definition adopted by the Annex 12 to the *Chicago Convention* (Search and Rescue, Chapter I - Definitions).

¹³⁵ “The forced alighting of an aircraft on water” - *ibid.*

¹³⁶ Kamminga, M. S., *op. cit.*, p. 71.

¹³⁷ See Art. 25 of the *Chicago Convention* and Annex 12.

¹³⁸ E.g. “Lloyd’s Standard Form of Salvage Agreement”.

Which law should govern these extracontractual obligations if a foreign aircraft comes to the rescue? The rescue operation may occur in the territory of a third state or — what is most probable in practice — on high seas or in some other area not subject to state sovereignty.

On its 9th Session in 1934 in Berlin *CITEJA* started to draft a convention on salvage of aircraft on the sea which was in 1938 presented to the IV. Conference on Private Air Law in Brussels.¹³⁹ It was signed by 16 countries but no state has ratified this *Convention for the Unification of Certain Rules Relating to Assistance and Salvage of Aircraft or by Aircraft on the Sea*. The Convention set the principle that indemnity for assistance in the absence of any agreement should be paid only if a successful result was achieved.¹⁴⁰ The national law of the assisted aircraft should determine, who is to pay the indemnity for salvage (the owners of the aircraft, its operator, owners of the rescued cargo) ¹⁴¹. In other respects the Convention set rules of substantive law on the remuneration and its limitations.

Other draft prepared by *CITEJA* — *Convention for the Unification of Certain Rules Relating to Assistance to Aircraft and by Aircraft on Land* ¹⁴² was not adopted by the Brussels Conference in 1938. Both *CITEJA* drafts were in their concept evidently influenced by the Brussels *Maritime Convention for the Unification of Certain Rules Relating to Salvage on Sea* signed on September 23, 1910.

The Italian *Codice della Navigazione* of 1942 in Art. 13 regulates problems of salvage on high seas and applies the national law of the aircraft which has rendered the assistance. The Polish *Law of the Air* of 1962 in Art. 11 regulates the remuneration for salvage according to the law of the place where the assistance was rendered (*lex loci actus*); if the operation took place in an area not subject to state sovereignty the *lex fori* of the court seized of the case is held applicable.

From the theoretical point of view assistance and salvage create an extracontractual obligation which may be compared with unjust enrichment ¹⁴³ and as such is to be governed by the *lex loci*.¹⁴⁴ More

¹³⁹ *IVe Conférence de Droit Privé Aérien*, Vol. II. Documents (Brussels 1938).

¹⁴⁰ Article 3, para. 2.

¹⁴¹ Article 3, para. 3.

¹⁴² For text see Matte, N. M., *op. cit.*, pp. 751-754.

¹⁴³ Batiffol, H., *op. cit.*, p. 612.

¹⁴⁴ *Ibid.*, pp. 608-611; Bystricky, R., *op. cit.*, pp. 313-314; Lunc, L. A., *op. cit.*, n. 22, pp. 242-245; Rézei, L., *Internationales Privatrecht* (Budapest 1960), pp. 345-346; contrary: Ehrenzweig, A. A., *Treatise...*, pp. 601-603; pleads for *lex fori*.

difficult is the choice of law in such cases, where the act of assistance or salvage cannot be localized in a territory of any state — namely if it occurred in an area not subject to state sovereignty. In such instances the practice of the maritime law applies either the law of the flag of the assisted ship¹⁴⁵ or the law of the assisting ship¹⁴⁶ or the law of the port where the salvage was terminated.¹⁴⁷ The choice of the proper law rests on the choice of the “legal policy” considerations.

The *Institut* in Section 7 of its Resolution adopted the following wording:

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

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

While the application of the *lex loci actus* in the first paragraph is practically the only acceptable solution, the application, in the second paragraph, of the national law of the *assisted* aircraft cannot be accepted unequivocally as expressing the proper legal policy considerations. It is submitted that in problems of assistance and salvage between aircraft all measures should be taken which would *encourage* everyone to render maximum assistance to aircraft in distress; this aim could be attained *inter alia* by establishing a guarantee for potential rescuers that their efforts and expenditures will be remunerated according to law the application of which they can foresee and on which they willingly rely — and this is primarily the law of the nationality of the *assisting* aircraft, as expressed e.g. in the Italian *Codice della Navigazione* of 1942.

It is also to be regretted that the *Institut* in Section 7 of its Resolution did not consider the relevance of the law of the place where the rescue operations have been terminated; in Section 2 of the Resolution this law is held to be relevant for the determination of preferential claims and of the order of priority by rights *in rem* and claims in respect of aircraft due to assistance or salvage operations, while no reference to this law is made in the most proper place — in Section 7 dealing with assistance and rescue themselves.

Conclusion: The application of *lex loci* in respect of assistance or rescue carried out in a State territory is a reasonable and acceptable

¹⁴⁵ Ripert, G., *Droit maritime*, Vol. III (Paris 1953), pp. 161-162.

¹⁴⁶ Italian *Codice della Navigazione* of 1942, Art. 13.

¹⁴⁷ Batiffol, H., *op. cit.*, p. 612; Ripert, G., *op. cit.*, *ibid.*

solution. Legal policy considerations would, however, require the application of the law of the *assisting* aircraft if assistance or rescue took place in a territory not subject to State sovereignty. There is a marked inconsistency between Section 2 which invokes the law of the place where rescue operations have been terminated, and Section 7 where there is no reference to this law.

9) Damage Caused by Aircraft to Third Parties on the Ground

The inherent risks of aviation may bring about certain categories of damages affecting third parties on the ground — i.e. persons who do not take part in the carriage by air and who are in no contractual relation with the operator of the aircraft. These third parties on the ground may suffer damage to life, health or property in the event of a crash of an aircraft on the ground, or damage may be caused by objects falling or jettisoned out of the aircraft; damage may be also caused by excessive noise in the vicinity of airports and especially by the sonic boom of supersonic aircraft; property on the ground may be also damaged during the investigation of the accident or by efforts to remove the debris.

If the respective legal relation involves some foreign element (damage caused by *foreign* aircraft), the problem of choice of law arises.

Already the 1st Conference on Private Air Law held in Paris on October 26, 1926 expressed the opinion that the problem of the unification of the liability of the aircraft operator for damage caused by aircraft to property and persons on the surface should be studied.¹⁴⁸ On May 29, 1933 the IIIrd International Conference on Private Air Law in Rome adopted the *Convention for the Unification of Certain Rules Relating to Damage Caused to Third Parties on the Surface*.¹⁴⁹ Only five States¹⁵⁰, however, have ratified the Rome Convention of 1933 and even the Brussels Protocol supplementary to the Rome Convention adopted on September 29, 1938 did not preserve this unification effort from complete failure.

The question of a new convention was raised at the first ICAO Assembly in 1947 and was then studied on several sessions of the ICAO Legal Committee and on October 7, 1952 in Rome¹⁵¹ a new

¹⁴⁸ *Conférence Internationale de Droit Privé Aérien* (Paris 1926), p. 14.

¹⁴⁹ For analysis see: Stanesco, D. N., *La responsabilité dans la navigation aérienne. Dommages causés aux tiers à la surface* (Paris 1951); Coquoz, R., *op. cit.*, pp. 171-249; Milde, M., *op. cit.*, pp. 109-115.

¹⁵⁰ Belgium, Brazil, Guatemala, Rumania, Spain.

¹⁵¹ For text see e.g. Matte, M. N., *op. cit.*, pp. 894-895.

Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface was signed¹⁵². Until today only 16 states¹⁵³ have ratified this convention, which sets rules of substantive law for the regime of liability of the operator of the aircraft. In the legal writing an opinion is being justly voiced that even the new Rome Convention is a "political disaster and utter failure of unification efforts".¹⁵⁴

In consequence, the problem of choice of law in these relations cannot be considered as a matter settled by the unification of substantive law and the problems of conflicts of law continue to be open problems.

The only specific rule of conflicts of laws for damages caused by aircraft to third parties on the ground in national legislation is to be found in the Polish *Law of the Air* of 1962 which in Article 11 applies *lex loci delicti commissi* or *lex fori* (if the occurrence took place in an area not subject to state sovereignty).

Much of what has been said on conflicts of laws in connection with collisions of aircraft under 7) above applies here. The traditional doctrine considers the application of *lex loci delicti commissi* as the only relevant point of contact while strong arguments may be brought forward in favour of the application of *lex fori*.¹⁵⁵ The *lex loci delicti commissi* cannot be any more considered the only unequivocal point of contact for torts.

The damage caused by aircraft to third parties may take place also in a territory not subject to state sovereignty where the *lex loci* is *per definitione* unavailable as point of contact; they may occur in the Antarctic region or they may be caused to ships on high seas. Damage caused to ships on the high sea may become quite a serious and practical problem after the introduction of supersonic aircraft to trans-Atlantic routes — the sonic boom may cause serious damage to ships. The only criterion of conflicts of laws existing in practice for torts on the high seas is the *lex fori* of the court which would be seized of the case.

The *Institut* has dealt with these matters in Section 8 of its Resolution, which reads as follows:

¹⁵² For text see n. 18. For analysis see Milde, M., *op. cit.*, pp. 115-124; Juglart, M. de, *La Convention de Rome du 7 octobre 1952 relative aux dommages causés par les aéronefs aux tiers à la surface* (Paris 1956).

¹⁵³ Australia, Brazil, Canada, Ceylan, Ecuador, Egypt, Haiti, Honduras, Italy, Luxembourg, Mali, Mauretania, Niger, Pakistan, Spain and Tunis.

¹⁵⁴ Pluchon, P., *La responsabilité de l'exploitant de l'aéronef dans la Convention internationale de Rome du 7 octobre 1952*, *Revue Générale de l'Air* (1961), p. 125.

¹⁵⁵ See p. 46 above.

"Damage caused by aircraft to third parties on the ground shall be governed by the law of the place where it has been caused.

If damage has been caused in an area not subject to State sovereignty, the national law of the aircraft shall apply."

While the sweeping reference in the first paragraph to *lex loci delicti commissi* may provoke certain criticism that it does not take into account the modern trends of both the theory and the practice in favour of *lex fori*, the second paragraph is quite surprising: damage caused in an area not subject to State sovereignty should be governed by the national law of the aircraft, i.e. by the national law of the "tortfeasor".

This decision in favour of the national law of the aircraft was taken by the *Institut* during the hasty discussion and under evident time pressure¹⁵⁶; all previous drafts contained reference to *lex fori* of the court seized of the case. The application of the law of the tortfeasor in these relations is quite an unprecedented step from the theoretical and practical point of view. In addition it is in marked discrepancy with Section 6 of the Resolution which adopted *lex fori* as a relevant criterion in similar relations. This discrepancy was not satisfactorily justified and no persuasive arguments have been brought forward in favour of the law of the nationality of the aircraft.

As said above, all previous drafts were in favour of *lex fori* and the author of the amendment — C. J. Colombos — raised as his main argument that "in the maritime field all questions beyond the limit of the territorial sea are governed by the law of the flag. This solution which has given satisfactory results in maritime navigation could be *per analogiam* also adopted in respect of the regime of aircraft".¹⁵⁷ This statement must meet strong disagreement: it may be hardly taken for granted that in maritime law *all* questions are governed by the law of the flag; even if it were so, how does this criterion without further qualification help to settle problems of damage caused on the high sea to a ship wearing the flag of State "A" by an aircraft registered in State "B" ! For this particular case the *Institut* has in fact chosen not the law of the flag as such, but in a rather specific and qualified sense — the "law of the flag" of the aircraft which caused the damage; any conceivable analogy with the maritime concepts cannot lead to such conclusion because such solution is unknown even in the field of maritime law.

¹⁵⁶ *Annuaire*, Vol. 50, II., pp. 253-255.

¹⁵⁷ Colombos, C. J., *Annuaire*, Vol. 50, II., p. 253 (translation supplied).

On the other hand it is to be admitted, that any new and non-traditional point of contact could be held justifiable if it reflected certain well founded "legal policy" considerations. But the *Institut* did not attempt deep and persuasive reasoning in this respect and yielded to an alleged (in fact non-existent) analogy with maritime law. If e.g. the principle of fairness to the parties ("substantial justice" as called by Sand¹⁵⁸) were taken into consideration as a basis of legal policy, undoubtedly there would be a very strong argument in favour of the application of the law of the victim, i.e. *lex personalis* of the person who suffered damage or *law of the flag* of the damaged ship. This point was raised by H. Valladão¹⁵⁹ but was not seriously discussed.

Conclusion: Section 8) of the Resolution of the *Institut* is unper-
suasive and may be challenged in two points: the sweeping reference to *lex loci delicti commissi* is too axiomatic and does not reflect the trends of legislation, practice and doctrine. The reference to the law of nationality of the aircraft which caused damage in an area not subject to State sovereignty is inconclusive and cannot be considered as a positive contribution to the creation of what Ehrenzweig called "the proper law of torts"¹⁶⁰ — a reasonably foreseeable law which would guarantee substantial justice.

10) Legal Acts and Facts which Have Taken Place on Board an Aircraft in Flight

Excessive attention has been paid by the doctrine to problems of conflicts of laws in respect of legal acts and facts which have taken place on board an aircraft in flight.¹⁶¹ These relations would undoubtedly present an extraordinary opportunity for the most brilliant and sophisticated legal thinking in the field of conflicts of laws but, on the other hand, every self-respecting scholar should

¹⁵⁸ Sand, P. H., *op. cit.*, pp. 63-64.

¹⁵⁹ Valladão, H., *Annuaire*, Vol. 50, II., pp. 253-254.

¹⁶⁰ Ehrenzweig, A. A., *op. cit.*, n. 22, p. 548.

¹⁶¹ These problems are discussed in practically every comprehensive treatise on air law. In particular see: Ambrosini, A., *Législation et juridiction compétentes en matière de navigation aérienne internationale*, 7 *Revue Juridique Internationale de la Locomotion Aérienne* (1923), pp. 97-101, 145-152; Caspers, H. F., *Internationales Lufttransportrecht* (Thesis Kiel, 1930); Hamel, J., *Nationalité et conflits de lois en droit aérien*, 20 *Revue de Droit International Privé* (1925), pp. 32-51, 200-225; Karrer, M., *Der Einfluss der Souveränität im Luftraum auf die Begrenzung des Privatrechts* (Thesis, Zurich, Neue Folge, Cahier 63, 1938); Makarov, A. N., *op. cit.* n. 60; Mueller, H., *Das internationale Privatrecht der Luftfahrt*, Planta, F. de, *op. cit.*, n. 46; Riese, O., *op. cit.*, n. 43; Scerni, M., *Il diritto internazionale private parittimo ed aeronautico* (Padova 1936); Visscher, F. De, *op. cit.*, n. 47.

realize how rare these relations are; it is also hardly possible to find convincing arguments that all these relations involve specific problems of air law (*a contrario* general private international law).

However fast transportation by air may be, the crew and passengers on an international flight usually spend several hours on board a flying aircraft; during an international flight the aircraft may cross the airspace of several countries as well as vast areas of oceans not subject to state sovereignty. It has been submitted that it is at present technically impossible to pinpoint at any given moment with absolute accuracy the exact position of the aircraft in flight — namely to establish beyond any doubt whether or not in a given moment the aircraft has already crossed the frontier of a certain State or its territorial waters.¹⁶²

It may be theoretically conceived that during the few hours of flight some legal relations — legal acts — between passengers or crew may take place or some facts giving rise to legal liability as between the persons on board may occur. In the doctrine all conceivable relations were contemplated: conclusion of a contract on board an aircraft, creation of a right *in rem* (transfer of property), marriage celebrated on board an aircraft in flight, testament signed on board an aircraft, etc.¹⁶³

None of these conceivable relations has ever become object of a published judicial decision and some of them seem highly improbable in practice. During a normal flight on an international route serious and self-respecting parties would hardly seek to conclude a marriage (even if it were only common marriage by simple consent¹⁶⁴); during a situation of distress, on the other hand, the parties would rather be concerned with other preoccupations than to get married, draft a testament or to act as witness at a marriage or a testament.

Several points of contact have been suggested in the doctrine for the settlement of conflicts of laws connected with these relations, namely: *lex personalis* of the persons involved, the law of the *place of departure*, the law of the *place of destination* of the aircraft, the law of the country overflowed (*principle of territoriality*). The law of the place of registration of the aircraft (*principle of nationality*) and finally *lex fori*.¹⁶⁵ The doctrine is primarily concerned with the question of "localization" of legal acts and facts which have taken place on board an aircraft in flight over State territory:

¹⁶² *Annuaire*, Vol. 48, I., p. 369 — statement based on the information supplied by Swissair and Lufthansa.

¹⁶³ *Ibid.*, pp. 398-404.

¹⁶⁴ Rabel, E., *The Conflict of Laws*, (1945), Vol. I. p. 223.

¹⁶⁵ Planta, F. de, *op. cit.*, pp. 63-67.

what should be considered as *locus actus* — the territory overflown or should the aircraft itself be considered as *locus* ?

The early doctrines of air law were to a large extent influenced by the analogies with maritime law where the "law of the flag" plays a very important role. In 1910 P. Fauchille in a draft presented to the *Institut de Droit International* suggested that acts on board an aircraft — in whatever part of the airspace the aircraft be — should be governed by the national law of the aircraft.¹⁶⁶

This concept was followed by early municipal legislation. The following countries have adopted this strict principle of "nationality" (law of the flag): Belgium — in the Royal Decree of November 16, 1919 in Art. 6; Switzerland — Decree of January 27, 1920 in Art. 2 al. 2; Italy — decree of August 20, 1923 in Art. 8 al. 2; Greece — law of June 13, 1931 in Art. 5.¹⁶⁷ All these laws have since been amended and the only law which strictly applies the "law of the flag" at present is probably the Syrian *Loi relative à la circulation et à la navigation aérienne au-dessus de territoire syrien* of December 12, 1949:¹⁶⁸ Article 22 of this law applies the law of the flag to legal relations occurring on board a *foreign* aircraft !

It is submitted that by raising a question whether the territory of the overflown state or the aircraft itself should be considered as *locus actus*, the doctrine is creating a non-existing artificial problem; while in the airspace of a foreign state, the aircraft, its crew and passengers are in the territory of that state and are subject to its jurisdiction, laws and regulations in all respects.¹⁶⁹ While in the airspace of a foreign state, the aircraft does not enjoy any "extraterritoriality" and no analogy with vessels on the high seas may be drawn.

It may be also submitted that the determination of what is to be considered as *locus actus* in these relations is not of utmost importance since *lex loci actus* is no longer an all important point of contact in the field of private international law. In the field of contracts e.g. the proper law of the contract (*lex causae*) is to be determined primarily according to express or implied choice made

¹⁶⁶ Art. 13 of the draft : "Les actes passés à bord des aérostats publics et privés en quelque partie que ce soit de l'espace tombent sous la compétence des tribunaux de l'Etat auquel appartiennent les aérostats et sont jugés selon les lois de cet Etat". — See *Annuaire*, Vol. 23 (1910), p. 308; Vol. 24 (1911), p. 108.

¹⁶⁷ Planta, F. de, *op. cit.*, pp. 127-128.

¹⁶⁸ RFDA 4 (1950), p. 40.

¹⁶⁹ This conclusion follows from the general international law which considers the airspace as an integral part of the state territory; Art. 1 of the *Chicago Convention* is declaratory of this general rule.

by the parties and in the absence of such choice of law made by the parties other points of contact are being applied for a particular type of contract, such as nationality of the parties, residence or principal place of business of one of the parties involved, etc.¹⁷⁰ and *lex loci actus*¹⁷¹ (*contractus* or *solutionis*) is of very subsidiary nature. Even for the form of the contract the *lex causae* is primarily relevant and the *lex loci actus* serves only as an alternative solution.

Another problem arises if the legal act which has taken place on board an aircraft in flight relates to some goods situated on board that aircraft — e.g. one passenger would sell to another some object which is in his luggage in the luggage compartment of the aircraft. For the transfer of property (right *in rem*) the *situs* of the goods is relevant; what is to be considered as *situs* of the goods? The theory and practice considers *res in transitu* to be fictitiously localized either by *situs praeteritus* (place of departure) or by *situs destinationis* (place of destination);¹⁷² while the *situs destinationis* is usually given preference in the theory,¹⁷³ *situs praeteritus* prevails in practice.¹⁷⁴ The non-fictitious *situs praesens* would be, however, preferable wherever available.

The *Institut* devoted great attention to the discussion of legal acts and facts which have taken place on board an aircraft in flight. It is to be appreciated that the *Institut* realized the limited practical (namely economic) importance of these relations as well as the limited scope of applicability of the concept of *lex loci actus* in modern private international law. The *Institut* has abandoned specific rules on contracts, marriages, testament and transfer of property which appeared in the former drafts and has adopted a very realistic concept in Section 9 of its Resolution:

“If a legal act has taken place or a fact giving rise to legal liability occurred on board an aircraft in flight in an area not subject to State sovereignty, or whenever it is not possible to determine the territory over which the flight has taken place at the time of the act or fact giving rise to legal liability, the national law of the aircraft is substituted for the law of the place where such act or fact has occurred.

¹⁷⁰ Lunc, L. A., *op. cit.*, n. 22/, pp. 138-154; Riese, O., *op. cit.*, n. 43/, p. 287; Ehrenzweig, A. A., *op. cit.*, n. 22/, pp. 314, 461 seq., 490 seq.

¹⁷¹ See e.g. para. 10(3) of the Czechoslovak Law No 97/63 on Private International Law and Procedure.

¹⁷² Lunc, L. A., *op. cit.*, n. 22/, pp. 83-84.

¹⁷³ Bystricky, R., *op. cit.*, pp. 206-207.

¹⁷⁴ E.g. para. 6 of the Czechoslovak Law No. 97/1963.

If the act covered by the preceding paragraph relates to goods situated on board an aircraft, the national law of the aircraft shall be substituted for the law of the situation of the goods."

Conclusion: The solution suggested by the *Institut* may be considered as very satisfactory. It would help to fill the vacuum in such cases where, according to general principles of private international law, the *lex loci actus* is to be applied to a particular legal relation but no *situs* in the legal sense exists (area not subject to State sovereignty) or the *situs* cannot be determined with accuracy at a given moment. In such cases it is justifiable to substitute the aircraft itself as a fictitious *locus* and to apply the national law of the aircraft. The same applies for goods situated on board an aircraft; under similar circumstances the *lex rei sitae* — in fact non-existent or undeterminable — is to be replaced by the national law of the aircraft.

V. CONCLUSIONS

The Resolution of the *Institut de Droit International* of September 11, 1963 on "Conflicts of Laws in the Law of the Air" is a remarkable scholarly effort pointing to possible and viable solutions of conflicts of laws in the field of private law relations connected with aviation. The serious study of the principles suggested by the *Institut* and further theoretical elaboration on them may lead to their eventual adoption by municipal legislation or by an international agreement. This would greatly help to do away with the presently existing chaotic elements and lack of legal security and foreseeability in private international air law relations.

The following main conclusions may be drawn from the present study:

1) the unification of substantive private law rules in the field of aviation is far from being finished and manifold conflicts of laws still arise.

2) the unification of rules of conflict of laws is an effective means of the unification of law in general and it would be an important step and starting point to prospective endeavours for the unification of substantive law.

3) the criteria for the settlement of conflicts of laws suggested by the *Institut* are reasonable and acceptable, even though some suggested principles may require some further discussion and minor adjustments to correspond more with the modern trends of theory

and practice; this applies to Section 4 on contract of employment; Section 6 on aerial collisions; Section 7 on assistance and rescue; Section 8 on damage caused to third parties on the ground.

4) uniform rules of conflicts of laws are only of relative value without a simultaneous settlement of problems of jurisdiction; it is to be regretted that the *Institut* did not endeavour to study problems of jurisdiction in matters of private air law.

¹⁷⁵ Projet de Résolution, 15 juillet 1959, art. 11-14, *Annuaire*, Vol. 48, I., pp. 409-410.