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JURISDICTIONAL CHALLENGES IN KENYA'S AVIATION INDUSTRY

BY:

KYOBIKA EMMANUEL

REG NO: G62/6784/2017

Declaration

I declare that this research project is my original work and has not been submitted for an award in any University or Institute.

Name: Kyobika Emmanuel

Reg No: G62/6784/2017

Signature:  Date: 28/10/2021

Supervisor's Approval

This research has been submitted to the School of Law of the University of Nairobi with my approval as the supervisor.

Name: Prof. Albert Mumma

Signature:  Date: 28/10/2021

Dedication

This work is dedicated to my family Mr & Mrs. Batabaire, Mr. Mukama Matthew, Mrs. Kyobika Sarah.

I further dedicate this work to my learned friends Mr Tom Odede, Miss. Atim, Mr. Malinzi, Mr. Mukungu for the great arguments instituted at all times in reference to my work and enabled me come up with a detailed research in my area of study.

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List of Acronyms

ICAO International Civil Aviation Organization

UN United Nations

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The Havana Convention of 1928, S 2

Paris Convention of 1919

Vienna Convention on the law of Treaties

ICAO World Wide Air Transport Conference (WATC)

International Air Transport Association (IATA)

The European Civil Aviation Conference (ECAC)

The Airports Council International (ACI)

The Warsaw Convention

International Sanitary (Hague) Convention of 1933

International Criminal Regulation of Aviation

Tokyo Convention of 1963

Montreal convention of 1999

Montreal Convention of 2009

UN international institute for the unification of private law (the ‘Cape Town Convention’)

International Civil Aviation Organisation

Havana Convention of 1928

The Bonn Declaration of 1978

Beijing Convention of 2010

International Regulation of Air Accidents

Rome Convention of 1933

Rome Convention of 1952

International Regulation of Assistance and Salvage

Brussels Convention of 1938

The Geneva Convention of 19

CHAPTER ONE

INTRODUCTION

1.1 Background

Flights owe much too scientific discoveries and advancements, which has its roots in lessons learned from nature. Human beings have always been fascinated by flight. Leonardo da Vinci whose studies stem back to the 1480s produced a codex entirely on flight in 1505, entitled the codex on the flight of birds.¹ Myths and legends such as Pegasus and Icarus constantly referred to the ability to fly and as early as 400BC the Chinese started to use kites in ceremonies and to test the weather conditions.² The history of flight has consequently been divided into mythical periods; numerous stories depict the capacity of humans to fly in words such as "horses with their wings edges," "from the sun," and "dragons that fly out of demeter."³ In contrast, the historical period started 400 years before Christ (B.C.) with man's flying efforts, and began with 'hidden air' wooden pigeon by Archytas of Tarentum and then by Simon Magus at the time of Nero, by Roger Bacon in the 13th century and Johan Muller in the 15th century. Leonardo Da Vinci later uncovered the parachute concept and built a hand-flying contraption.⁴

With the latter half of the XVth century Giovanni Dante continued this in his artificial wings linked to his body and repeatedly flown across Lake Trasimene.

¹ Fox S. Jane, 'The evolution of aviation in times of war and peace, blood, tears and salvation: International Journal on world peace' (2014) 51.

² *ibid* pp.52

³ Zeroo Fathi (2016), "The Role of International Conventions in Aviation Law, (Near East University)" p.11

⁴ *ibid*, p.11.

Francesco de Lana, a jesuit, created a flying ship in the seventeenth century. On this backdrop, the first aviation began in ballon in 1783, followed by conductors in the 1950's and gliders in the 1890's. The Wrights Brothers finally took the first motor powered flight in 1903.⁵

1.1.1 The Modern Era of Aviation

The modern age of aviation began on 25 July 1909, when Jean Bleriot crossed the English Channel, while on 13 June 1910, Charles K. Hamilton flew to Philadelphia from New York City. Airplanes were commonly recognized both in the U.S. and in Europe around that period. This led to rivalry for duration, distance, quantity and altitude of passengers. In 1912, the French first employed military aircraft, and later Germany, Russia, Austria, Italy and, ultimately, Britain and the United States used aircraft.⁶ The United States was thinking about the possibility of employing aircraft for commercial reasons towards the end of the First World War.⁷ In 1918, the Department of Post Office began its air mail from New York City to Washington, and an air mail from New York to San Francisco was created on 1 July 1924. In addition, a new road connecting New York and Chicago was built on 1 July 1925. It should also be noted that airplanes began to be used in crop dusting, plant surveys, aerial photography, forest patrols and wood cruises about this period.⁸ The debate above maps aviation history through 1925.

The Legislative History of Aviation Law.

Aviation law is a field of legislation consisting of, formed, amended or evolved rules and procedures for the purposes of aviation operations.⁹ Thus aviation law is analogous to aviation law as maritime law is an aviation law.

⁵ *ibid*, p.11

⁶ *ibid*, p.11

⁷ Zeroo (n. 3), p.11

⁸ *Ibid*, p. 22.

⁹ Ron Bartsch, Ronald .I.C, *International Aviation Law: A Practical Guide*, (<https://www.bookdepository.com>, accessed online on 12/11/19 at 10:00am), p.25-85.

Air law is a set of legislation controlling air space utilization and its advantages to the aviation industry, to the public and to global governments.¹⁰ From the air law, the aviation law has emerged. Although aviation legislation has existed from the creation of the invention, there has been a reasonable need for a realistic definition of aviation law since the time when the Paris police had requested specific balloon licenses in 1784.¹¹

The codification of aviation legislation has therefore begun in three phases:¹² aviation law before the conclusion of the First World War, aviation law between the Second and the First World War, air aviation law after World War 2.

1.1.2 Aviation Law before the end of First World War (1919)

Decrees, statues, court decisions and doctrine were used in this era and at the international level, juridical Societies, diplomatic documents, conferences recommendations and international practices were mainly used.¹³ Aircraft were considered to be mainly military weapons at the time." Following the war, lawyers and judges from throughout the world acknowledged the significant influence that aviation would have on the old concepts of frontiers and the 'owner ship' of air space. Therefore, at this period, some of the most important aviation agreements, conventions and compacts concerning public aviation legislation were adopted to assist regulate the industries.¹⁴ The first official endeavor to establish a state of law concerning airspace sovereignty, the registration of airplanes, pilot standards and the mobility of military aircraft is a case in point.¹⁵ The Convention of Paris. The Convention also established the International Commission on Aerieenne Navigation, the first official entity for the supervision of international aviation activity.

¹⁰I.H.Ph Diederiks–Verschoor (2006), *Introduction to Air Law*, Wolters Kluwer Law & Business. p.150.

¹¹Bartsch (n. 9), p.85

¹²Before 1919

¹³ Sand, Fritas, & Pratt, 1960-1961, pp. 33-42.

¹⁴ Raymond C. Speciale (2006), *Fundamentals of Aviation Law*. (The McGraw- Hill Companies). 281.

¹⁵Paris Convention of 1919

The Paris Convention was therefore a step in the right direction, and significant collaboration and legal infrastructure were necessary in order to sustain the developing aviation sector.

It was negotiated and based on the Paris Convention and the 1928 Havana Convention.¹⁶ It laid out numerous new legal rules governing international aviation.

In 1944, the Civil Aviation International Organization Convention was founded in Chicago and is in force to present. It was implemented in 1947 and the Paris and Havana Conventions respectively were terminated.

This is the basis of the Chicago Convention for our present international air transport system, which emerged straight from the First World War. It states that each country's sovereignty over its territory is total and exclusive.¹⁷

1.1.3 Aviation law post World War II

The period between 1945 and 1979 is referred to as the post – war era or the period of the post war political consensus¹⁸.

A rising globalization and the expansion of aviation operations contribute to the goal and necessity of air law. Because of the increasing characteristic of air transportation, the law on aviation is considered an International aviation law by application, thus Justice Peter has eloquently said the same in the case of *Scandinavian Airlines System Inc Vs County, Los Angeles 56 Cal.2d. 11 (1961)*.

¹⁶Full citation of the Havana Convention

¹⁷ Convention on international Civil Aviation, December 7, 1944, art. 3(d), 61 stat. 1180, 1181, 15 U.N.T.S. at 298

¹⁸H. A. Wassenbergh, Martinus Nijhoff, *Post- War International Civil Aviation Policy and the Law of the Air*, (1962) p. 125

1.1.4 Analysis of the conventions

The laws governing private aviation law provide an impressive, but deceptive image on current situations, as if all predictable issues have already been addressed by mutual unification conventions. Some authors have given rise to the fetish of unification, thereby indiscriminately referring to the connections between private air law and conventions.¹⁹

Despite the success of unification in private air law, it represents a small step towards the real unification of substantive law. There are numerous concerns as to why the conventions could not be overestimated and why challenges of conflict of laws should not be underestimated²⁰:

- a) “The conventions do not have a universal character save for the Warsaw convention that meres universal acceptance though still far from reaching real universality.²¹ The ratified conventions are not substantial enough to have enabled realization of uniform law.
- b) Certain rules limit Private air law conventions; thus do not unify the social relations regime that is connected to aviation and carriage by air in an exhaustive comprehensive manner. The convention laws relinquish intentionally or by omission, many challenges for determination to municipal law for applicability on the rules of conflict of laws.²² The convention indicates in case of conflict of laws which law to apply to fill the unification gap,²³ sometimes there is no indication in this respect whatsoever.²⁴

¹⁹ Bystricky R., *Zaklady mezinarodniho, Prava soukromcho* (1958), Lunc L.A., *Mezhdunarodnoye chastnoye Pravo, Osobennaya Chast.* (Moscow 1963), pp. 207-212. Raape L., *Internationales Privatrecht*, 5 Auflage BerlinFrankfurt 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.

²⁰ *ibid*

²¹ 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.

²² Milde M., *op. cit.* p. 23, 76-78, 100-103. Sand P.H., *op.cit.* p. 8-9 and *passim*.

²³ Warsaw Convention Art. 21 on fault and contributory negligence of the injured person; Art. 25 on fault equivalent to wilful misconduct; art. 28(2) on procedure - all referring to *lex fori*.

²⁴Warsaw Convention,Art 24(2).

- c) Private air law is challenged in its efforts of unification in areas of charter of an aircraft, contracts of employment of the crew, contracts of carriage of passengers and goods,²⁵ aerial collisions,²⁶ and assistance or salvage operations between aircraft.²⁷

It is evident that the unification of private air law, is far from being finalized and conflict of laws is still a pressing challenge.

Article 27²⁸ provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This Article gives the state an obligation to perform or and consider the international obligation arising out of a treaty priority, thus in a nature where a conflict arises between a treaty and any domestic law the later treaty prevails because of the obligation it creates” on a state.

1.1.5 Kenya’s Position on Aviation Law

Kenya ratified the 1944 Chicago Convention by virtue of Article 2 (5& 6)²⁹ of the Constitution and became a member of the International civil Aviation Organization. Kenya as a result enacted the Civil Aviation Act.³⁰

Kenya has ratified many international treaties and conventions which have been domesticated as part of aviation laws of Kenya.

²⁵ 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.

²⁶ Draft Convention prepared by CITEJA was not adopted by the IV the 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.

²⁷ The Convention on Assistance and Salvage of Aircraft signed in Brussels in 1938 was not ratified by any signatory State.

²⁸ Vienna Convention

²⁹ The Constitution of Kenya, 2010.

³⁰ Civil Aviation Act (2013) Chapter 21, Laws of Kenya.

1.2 Statement of the Problem

Although Kenya is a contracting member of the International Civil Aviation Organisation having an international obligation by virtue of Article 27³¹ nevertheless compliance remains elusive and this creates jurisdictional challenges in the aviation industry in Kenya, leading to conflict of laws between foreign civil aviation laws and the Kenya domestic laws in handling disputes arising from the aviation industry.

1.3 Justification of the study.

The purpose of this research is based on the ground that the aviation industry has quickly developed into an international latent thus the desire to have international aviation laws to guide the players on any of the emergency of conflict of laws. The development has led to jurisdictional challenges in the aviation sector, in terms of which law is applicable, whether to apply territorial, national or universal jurisdiction.

The need to know the states sovereignty over the airspaces and the outer spaces while applying the international spaces in the aviation sector necessitated this research.

Seeking redress in law is only achieved before a proper jurisdiction hence the study will necessitate the players to understand which jurisdictions to consider in the aviation sector during times of redress.

The parties face a challenge of interpretation as to; the right law to apply and this has brought exceptional inadequacies with regard to administering conflicts amongst carriers and the passengers.

Further, the research will assist the civil aviation stakeholders in applicability of the prevailing conventions, domestic laws and bilateral agreements executed amongst the parties and add to the

³¹Vienna Convention on the law of treaties.

knowledge gap. The consideration of the jurisdiction between the air space and outer spaces viz via the sovereignty of the ICAO member states.

Indeed many civil aviation accidents have occurred leaving the families of the affected people stranded on which jurisdiction to seek redress from and/or which party to sue for recovery of damages.

In Kenya the study is important because the country has invested a lot in the aviation industry thus the need to expound on the laws applicable to the players in the aviation sector.

1.4 Statement of objective

The main objective of this study is to interrogate jurisdictional challenges in Aviation law in Kenya based on nationality, territorial location and universality, choice of law, and enforcement of aviation foreign Judgments.

1.5 Specific objectives

- i. To identify the jurisdictional challenges in the aviation industry.
- ii. To discuss what to consider in the choice of laws in aviation.
- iii. To examine how international aviation laws are enforced.
- iv. To make findings, recommendations and conclusions to the study.

1.5.1 Specific research questions

- i. What are the jurisdictional challenges in the aviation industry in Kenya?
- ii. What are some of the considerations made in the choice of aviation law?
- iii. How are foreign judgments and orders in aviation enforced?
- iv. How does the legal regime in the aviation industry operate?

1.5.2 Hypothesis

The study makes the following hypothesis:

- i. That there are jurisdictional challenges in aviation laws in Kenya;
- ii. This has resulted into conflict of laws between the international civil aviation laws and domestic laws of Kenya; and
- iii. This can only be resolved by establishing an international special court on aviation in Kenya with unlimited jurisdiction to deal with all aviation relates matters.

1.6 Theoretical Framework

Diverse theory has been developed for the discussion of the concept of jurisdiction between airspace and external space: - no need theory, the aerodynamic lift theory, the Bogotan declaration view, the usque to infinite, the theory of national security and effective control, the lower point of the theory of orbital flight, theories of arbitrary flight.³²

The study will use the following theory:

1.6.1 Aerodynamic lift theory³³

The scientific circles give it a great support. States have adopted this theory and indoctrinated it into their academic legal works.

Air law is older than space law and this theory has a natural relation to air law thus being old. Its yardstick is stated in various words in Annex A of the Paris convention, 1919 and in Annex 7 of the Chicago Convention, 1944.

The theorists suggest that a continual airspace movement fulfills a basic criterion that can be represented in an equal manner, wise: = aerodynamic lifting + centrifugal force. With rising altitude, the air density and the upward air pressure decreasing beyond an estimated 83km, the

³² Dr Gbenga Oduntan, Hertfordshire Law Journal, 1(2), 64-84.

³³ Dr Gbenga Oduntan, Hertfordshire Law Journal, 1(2), 64-84.

boom in the air would totally evaporate and if the plane remained on a given speed, only the centrifugal force or "kepler force would maintain the aircraft in flight." Circular velocity is required when the airlift is reduced to zero to continue the flight and by so doing, the aircraft demarcates a line between two areas with legal regimes.³⁴

The proponents of this theory are Haley³⁵, B. Potter, J.C. Hogan³⁶ and J.C. Cooper³⁷ who have envisioned that "airspace ends where an aircraft is no longer able to find sufficient aerodynamic lift to sustain a flight thus exists in the stratosphere." It is noted in "legal and scientific circles that 25 miles above sea level is the maximum height for the practical use of an aircraft forth with requiring aerodynamic support to sustain a flight and use of breathing motive power". The maximum height at which the atmosphere is sufficiently dense to provide appreciable aerodynamic lift is fifty miles above sea level³⁸.

The theorists herein admit that karman primary jurisdiction line is the highest point where sovereignty can no longer be enforced.³⁹ That is, at about 53 miles, "an aircraft speeding at 25,000 feet per second loses its aerodynamic lift and the centrifugal force takes over". The theorists lure that sovereignty of the air granted in air law relates to the regulation of aeroplanes and other aviation crafts that require aerodynamic lift. The moment an aircraft obtains aerodynamic features

³⁴ 5 William J. Hughes (1980), 'Aerial Intrusions by Civil Airliner and the Use of Force,' (Journal of Air and Commerce) pp. 595

³⁵ Pitman B. Potter (1958), 'International Law of Outer Space', (American Journal of International Law) 52- Potter also reiterated the persuasive belief that '...the functions of the physical scientist and the lawyer are inextricably intertwined'.

³⁶ Hogan (1957), 'Legal Terminology for the Upper Regions of the Atmosphere and Space Beyond the Atmosphere,' 51 American Journal of International Law 362.

³⁷ J.C. Cooper (1968), 'High Altitude Flight and National Sovereignty; in Explorations in Aerospace Law: Selected Essays, Vlassic (ed.), pp. 368, 370.

³⁸ *ibid*

³⁹ Defined as the height at which aerodynamic lift ceases and centrifugal force takes over; a suggestion put forward by Von Karma at a speech delivered in 1957 at the University of California later modified by Haley who applied the diagrams of Mascon and Gazely. See A.G. Haley, Space Law and Government, (1963) 77, 97-107.

that give it the needed lift, the sovereignty and jurisdiction claim cease. The demarcation line is based on aerodynamic features of flight instrumentalities. The buoyancy feature is used in the atmosphere to distinguish between aircraft and spacecraft.

The theorists argue that sovereignty does not exist beyond the upper most height at which an aircraft is capable of flying. They rely on Article 1 of air treaties that determine the aerodynamic yardstick a state possesses over its aerial territory.⁴⁰

Amongst other theorists, Goedhart gave more credence to the aerodynamic theorists. He agrees with the theorists that a height between 80km and 90km is appropriate in drawing a legal boundary line between airspace and outerspace.⁴¹

The research seeks to find the jurisdictional challenges the contracting member states have been facing due to the conflicting laws of two different members states in relation to domestic aviation laws. The discussion shall be on the relevant choice of laws to be applied based on nationality of the aircraft, territorial jurisdiction and universal jurisdiction vis-à-vis the applicability of Aerodynamic lift theory.⁴²

1.7 Literature Review

This study reviews literature on aviation legislation, academic and judicial literature specific on Chicago Convention on International Civil Aviation. In order to examine conflict laws surrounding the aviation law and the domestic aviation laws, this study analyses the existing legal framework

⁴⁰ Hughes (n. 31)

⁴¹ Depending on weather and other conditions, this height is put at approximately 30,000 metres above sea level. See The South African Government White paper. Available at <http://www.transport.gov.za/docs/white-paper/airportwp02.html> p.59-60

⁴² Hughes (n. 31), p.52

of jurisdiction vis-à-vis its applicability in this era of globalization especially the Paris Convention, Chicago Convention, ICAO statute, and IATA literature.

This will not be duplicative of the works of:

1. Angela Cheng-Jui Lu⁴³

She examined the framework of International Airline Alliance and its effects on harmonization of various treaties into the European Community and its legal institutions vis-a--vie European Community Competition Law. She suggested that a global activity like harmonizing the laws will enable member states achieve economic growth without any hindrances. Her work is based on Europe. She did not discuss the jurisdiction challenges that I intend to discuss in the east African perspective as a region while using Kenya as a case study.

2. Jacques Naveau⁴⁴

Naveau deals with the overview of international air transport in the changing world. He fore saw the development of the aviation industry and the evolution of the regulatory system as a factor for economic growth. He however did not give an analysis is of how his proposals would be implemented in view of the conflicting laws.

3. Raymond C. Speciale⁴⁵

Speciale brought out the revolutionary idea about the beginnings of public international aviation law vis-a-vie the formation and ratification of various treaties by states. He discussed the implementation of those treaties domestically in the aviation industry of United States of America. However his work is limited in scope as it only examined the problem from the

⁴³ Cheng-Jui Lu (2004), *International Airline Alliances*.

⁴⁴ Naveau J. (1989), *International Air Transport in a Changing World*. (Martinus Nijhoff Publishers), p.2694

⁴⁵ Speciale C. R (2004), *Fundamentals of Aviation Law*, pp.188

United States of America perspective and not worldwide. It therefore failed to provide how a worldwide harmony on the conflict of laws/jurisdictional challenge can be achieved.

4. S.A.Bayitch⁴⁶

Whose work tries to elaborate the various factors of jurisdictional challenges in the various jurisdictions in the Aviation industry and how the lack of special Aviation courts has led to a great global challenge in regard to jurisdiction in those matters affecting the aviation industry. However, his work was limited to Americas not factoring in other jurisdiction whose aviation industry is steadily growing.

5. P.P.C.Haanappel⁴⁷

Whose work has a detailed discussion of the origin of air and space law, commercial activities in outer space, law and policy of air commerce but all discussed with a limited jurisdiction of Europe my research entails to have Kenya as the case study and how those laws are applicable. His work did not discuss the jurisdiction question, which my research seeks to discover.

6. Dr Gbenga Oduntan⁴⁸.

Examines the various legal theories on spatial demarcation boundaries that countries use to determine jurisdiction between airspace and outer space. His work has been instrumental in determining the sovereignty of a state over aircrafts in the airspace and outer space⁴⁹.

7. Charles E. Robbins⁵⁰

⁴⁶ Bayitch S. A. (1973), *Aviation Jurisdiction in the Americas* (Vol. 5), (No. 2) (Lawyer of the Americas), pp. 270-298. Available at: www.jstor.org/stable/40175644 '01-12-2017 12:57 UT'

⁴⁷ Haanappel P. P. C. (2003), *The Law and Policy of air Space and Outer Space* (Kluwer law international), p.168.

⁴⁸ Dr Gbenga Oduntan, *The Never Ending Dispute: legal theories on the spatial demarcation boundary plane between airspace and outer space*. pg. 64-84

⁴⁹ *ibid*

⁵⁰ Charles E. Robbins, *Jurisdiction under Article 28 of the Warsaw Convention*. (vol 9) pg.352 – 356.

Demonstrated the significance of article 28 of the warsaw convention in determining the jurisdiction aspect in the aviation sector⁵¹.

8. S.A. Bayitch⁵²

His works analyzed the aviation jurisdiction in the Americas and his concentration is on the American study⁵³.

9. Juan E. Acosta⁵⁴

He analysed the wilful misconduct under the warsaw convention, and the non-violations of an air safety regulation. He discussed the safe guards of the aviation industry⁵⁵.

10. Convention relating to the Regulation of Aerial navigation⁵⁶

It discuss the laws governing an aircraft that is in transit and its safe guards⁵⁷.

11. John F. Easton and Jonathan D. Butler⁵⁸

The various forums were discussed and detailed case law discussed from the American case law database. They put into consideration the practability of the jurisdictional aspect in the aviation industry⁵⁹.

12. Sonal Sejjpal & Fred Mogotu⁶⁰

⁵¹ *ibid*

⁵² S.A. Bayitch, *Aviation Jurisdiction in the Americas* ,Vol.5 No. 2 (Jun, 1973), pp.270 - 298

⁵³ *ibid*

⁵⁴ Juan E. Acosta, *Wilful Misconduct under the Warsaw Convention: Recent Trends and Developments* Vol.19 pg.575 – 590.

⁵⁵ *ibid*

⁵⁶ *Convention Relating to the Regulation of Aerial Navigation*, 1 J. Air L. & Com. 94 (1930), <https://scholar.smu.edu/jalc/vol1/iss1/6>.

⁵⁷ *ibid*

⁵⁸ John F. Easton and Jonathan D. Butler, *Recent Developments in Aviation Law* pg. 303-326

⁵⁹ *ibid*

⁶⁰ Sonal Sejjpal & Fred Mogotu, *The Aviation Law Review* – Edition 8 TLR The law Reviews, <https://thelawreviews.co.uk/edition/the-aviation-law-review-edition-8/1229776/kenya> accessed on 10/10/2020.

Through their aviation law review, they discussed how Kenya has enacted various statutes to adopt the international aviation conventions to become operational in Kenya⁶¹.

13. Rene H. Mankiewicz⁶²

The literature he brings forward analysed the amendment of the Warsaw Convention to provide for jurisdiction forums such as the court of the domicile of the passenger if the carrier has an establishment in the same contracting state⁶³.

14. Carl E.B. Mc Kenry Jr.⁶⁴

Throughout his work, he analysed the various jurisdictions, limits of the agent on issuing tickets, enforcement of judgment from remote countries⁶⁵.

15. G. Nathan Calkins Jr⁶⁶.

The liability of the carrier in event of death was discussed and how such remedies are enforced in various jurisdictions for any party to receive damages.

None of the authors above have identified the jurisdictional challenges in aviation and the emerging conflicts of laws between domestic aviation laws of two states. The study thus narrows the same to Kenya as the case study.”

1.8 Methodology

The mixed research methodology where doctrinal, historical and case study research methods will be used in this particular research by way of analyzing the existing statutory provisions along with

⁶¹ *ibid*

⁶² Rene H. Mankiewicz, *the 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention*, 38 *J. Air L. & Com.* 519 (1972), <https://scholar.smu.edu/jalc/vol38/iss4/4>

⁶³ *ibid*

⁶⁴ Carl E.B. McKenry Jr, *Judicial Jurisdiction under the Warsaw Convention*, 29 *J. Air L. & Com.* 205 (1963) <https://scholar.smu.edu/jalc/vol29/iss3/4>.

⁶⁵ *ibid*

⁶⁶ G. Nathan Calkins Jr, *The cause of action under the Warsaw Convention*, 26 *J. Air L & Com.* 323 (1959) <https://scholar.smu.edu/jalc/vol26/iss4/2>.

the present case laws and then applying the reasoning from the various data acquired from libraries, archives and other databases to find a gap or problem.

1.9 Chapter breakdown

Chapter One.

This Chapter shall form the basis of the study and includes the background of the study, statement of the problem, hypothesis, theoretical frame work, literature review and methodology used in the study.

Chapter Two.

This chapter discusses the Nationality, Territorial and universality principles as a basis for jurisdiction. It examines in detail the various types of jurisdiction in aviation and their applicability.

Chapter Three.

This chapter discusses the choice of laws in the aviation industry in Kenya and in so doing divides the work into international aviation law and domestic law. It will further elaborate the evolution of aviation laws to curb the growing jurisdictional challenges.

Chapter Four.

Examines the enforcement of aviation laws and decrees obtained arising out of aviation disputes.

Chapter Five

This chapter discusses the findings, suggests conclusions and makes conclusions to the entire study. It discusses the conclusion of the study and further gives recommendations to the findings entailing gaps in l

CHAPTER TWO

NATIONALITY, TERRITORIAL AND UNIVERSAL PRINCIPLES AS A BASIS FOR JURISDICTION

2.1 Introduction

The competence of a political agency comes from the right to exert its powers over a person, a subject, or a place. In the Aviation field jurisdiction is of three types namely:

- (i) Nationality of the aircraft,
- (ii) Territorial jurisdiction,
- (iii) Universal Jurisdiction.

These are covered in the following sections. Even though they are separate, there remains the idea of legal competence, "the power of which the courts have to rule on things before them or that it means to be aware of the issues submitted formally for court decisions."⁶⁷

However, jurisdictional limits are enshrined in Charter, Statute, convention under which the court is established, and in situations where the limit is not stated it is deemed to be unlimited.

The limit is either the type or character of acts that can be taken by any court, the field of competence or both. The jurisdiction of an inferior court or court will depend on the existence of a given state of fact, the court or tribunal shall investigate the facts to determine if it is competency; except where the tribunal or court has the authority to conclude whether the facts exist. The tribunal shall determine whether they exist. If a court accepts responsibility for exercising a competence that it does not have, its ruling is nothing. Jurisdiction should be acquired prior to the decision.⁶⁸In

Safmarine Container NV of Antwerp V Kenya Ports Authority the Court ruled that it is not

⁶⁷ Halsbury's Laws of England 4th Edition, Vol. 10, p.215, paragraph 314.

⁶⁸ Halsbury's Laws of England Volume 24 (2010) 5th Edition at paragraph 623

only a *Constitution which may, by express provision or limiting jurisdiction, ⁶⁹limit/confer jurisdiction of the Court but other legislation as well.*

Having unpacked the concept of jurisdiction, it is worth noting that the aviation industry is a dynamic area where aircrafts move from one jurisdiction to another in a span of minutes and as such jurisdiction becomes everything. What are their consequences or otherwise? Thus, the need to interrogate the nationality of the aircraft, territorial jurisdiction or universal jurisdiction vis-à-vis executed bilateral treaties and the international aviation conventions become paramount.

2.2 Nationality, Territorial and Universal Principles

2.2.1 Nationality of an aircraft as abasis for Jurisdiction

Article 6⁷⁰ states that “an aircraft possess the nationality of the state where it is registered in accordance with the provisions of section 1 (c) of Annex A.” The nationality principle in aviation law was enacted into a convention relating to the regulation of aerial navigation signed in 1919’ Paris convention and today it is codified in Article 20 of the International Civil Aviation Organization Convention and its implementation in Annex 7⁷¹.

Kenya ratified the ICAO convention thus the nationality principle. The principle emanets from the requirement of registration of aircrafts and having them display nationality and registration marks in accordance with the requirements of the Regulations.⁷²

An aircraft can only commence operations in any ICAO member country if it is registered under the regulations of that country. Registration gives the country of registration the primary jurisdiction over that aircraft. The regulations do not allow double/dual registration of aircrafts in

⁶⁹ MBSA HC CC 263 of 2010

⁷⁰ Convention Relating to the Regulation of Aerial Navigation.

⁷¹ Tatiana Pak, aircraft nationality and registration, www.unitingaviation.com accessed on 19/5/2020 at 1.42 pm.

⁷² Regulation 10, The Civil Aviation (Aircraft Nationality and Registration Marks) Regulations, 2018

two different countries because the registration gives the country of origin the primary jurisdiction over that registered aircraft and if double registration is to be allowed it will lead to conflict of laws in the aviation industry. It is upon registration of an aircraft that it obtains its nationality based on the registration status hence having Jurisdiction over the registered aircraft.⁷³ It is an offence for one to operate an aircraft registered in Kenya unless it displays nationality and registration marks in accordance with the requirements of the Regulations.⁷⁴

These regulations apply to the registered aircrafts in Kenya wherever they may be in the world and to any other aircrafts though not registered in Kenya but are within Kenyan jurisdiction⁷⁵.

By this provision, the regulations give rise to the jurisdictional challenge on applicability because Kenyan registered aircraft will move to states, which also have regulations governing aircrafts in their jurisdiction hence giving a challenge to the crew members on which law to comply with. In this case 'the descendant of passten on a flight from Amsterdam to New York that collapsed in waters of the Shannon River, Ireland is about seven thousand feet from the end of the airport runway' for *Koninklijke Luchtvaart maatschappij N.V. KLM against Tuller*.⁷⁶ The first claim that the airline neglected to inform passengers of the location of the life jacket constituted deliberate wrongdoing.⁷⁷ An Irish government aviation safety rule does not need life vest instructions unless if a flight has to go from land for more than 30 minutes. Therefore, it cannot be stated that there was a violation of a regulation within around one minute following the takeoff.'

⁷³ The 1963 Tokyo Convention, Article 1.

⁷⁴ The Civil Aviation (Aircraft Nationality and Registration Marks) Regulations, 2018, Regulation 10 (1).

⁷⁵ Regulation 18, The Civil Aviation (Aircraft Nationality and Registration Marks) Regulations, 2018

⁷⁶ 292 F.2d 775 (D.C. Cir. 1961), cert. denied, 268 U.S 921 (1961)

⁷⁷ Article 28 of the Warsaw Convention deals specifically with the question of judicial jurisdiction. The specific jurisdictional contracts are provided, three relating to the carrier, and the fourth one based on the place of destination namely: - court at the domicile of the carrier; principal place of business of the carrier; business place of the carrier where the contract was reached at; at the court at the place of destination. In *Tuller*, the decision is silent as to jurisdiction. But presumably the ticket was bought in Washington, DC thus giving jurisdiction to the court within Art. 28.

The District of Columbia Court of Appeals **upheld** that *“we are not bound by the limits of the irish government’s regulations as to when the life vest instructions should be given to fulfill the duty of care owed to passangers⁷⁸”*

It is evident that there was a conflict of laws between the state that held jurisdiction over the nationality principal and the court of forum on the choice of law vide Article 28 of the warsaw convention over the court that made the decision based on the laws of the lex fori.

Regulation 31⁷⁹classifies the offences, which are committed by any crew personal, or aircraft owners wherever they may be and due to the nationality principle, they will be held liable in Kenya even if the offence is committed in a different country, where such act is not an offence.

However a contrast exist on applicability of this principle where there is conflict between two domestic laws of two countries where an offence happens while the aircraft is on ground in a foreign country, the local laws then do override the laws of the country of registration hence the jurisdictional challenge.

Captain Irfan Faiz was discovered to be three times above the legal UK blood alcohol limit for pilots before leaving Leeds Airport for the forest of Pakistan International Airlines. Captain Irfan Faiz While his aircraft was registered in Paschistan, where it was fine to fly under the rules of air travel since he had not violated their 12-hour throttle restriction under British law and spent 11 months as a guest of Her Majesty. He was judged to be guilty under British law.⁸⁰

⁷⁸ Horobin v British Overseas Airways Corp [1952],2 All E.R 1016 (Q.B)

⁷⁹The Civil Aviation (Aircraft Nationality and Registration Marks) Regulations, 2018

⁸⁰Michael Gebicki, www.traveller.com.au accessed on 20/05/2020 at 12:57 am

2.2.2 Who Qualifies to Register an Aircraft in Kenya?

Kenya Aircraft Registration is preserved by the State of Kenya, Kenyan nationals or individuals residing in the Republic of Kenya. Other persons as authorized by the Authority, provided that an aircraft is not used for business air transport, flying training or air work, as well as other requirements which may be specified by the Authority, and corporate entities set up by or established in accordance with the laws of the country as authorized by the Authority.⁸¹

The Kenya-registered aircraft owner will show the "5Y" nationality mark on his aircraft after the entry on an aircraft of three letters from the Roman Capital issued by the Authority with an ahyphen inserted between the mark of nationality and the mark of registration.⁸²

2.2.3 The Right to Disembark Route

In circumstances where “the commander of the aircraft is unable to take the aircraft to its destination because of unruly passenger he can communicate to any contracting state in whose territorial area the aircraft lie. Seeking assistance to the extent of landing to disembark the offender who will be held by that contracting state in custody pending other measures in law by that state to be continued for such time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted.⁸³

It is worthy to note that, nationality of an aircraft is deemed as a primary jurisdictional basis for trial of any offences committed on aircraft registered in a contracting state.⁸⁴

⁸¹ Ibid, 4(2)

⁸² Regulation 11 (1) The Civil Aviation (Aircraft Nationality and Registration Marks) Regulations, 2018

⁸³ Tokyo Convention 1963, Article 13.

⁸⁴ Tokyo Convention 1963, Article 16.

2.2.4 Implementation of the Nationality Principle in Kenya

The principle that international law only applies upon domestication is, the monilist principle of international law, which has been faithfully affirmed, and re-affirmed by Kenyan courts overtime. However, whether indeed Kenya is said to be completely amonilist state is arguable .Kenya has ratified a number of international treaties vide Article2 (6), and by virtue of the Treaty Making and Ratification Act as such, they become part of the laws of Kenya. The aviation law related conventions ractified by Kenya is the Montreal convention ratified by Kenya on 7/01/2002 and it has not been domesticated but applicable in Kenya by virtue of Article 2(6) of the Constitution.

The Kenya Civil Aviation Authority through bilateral agreements made with the appropriate foreign civil aviation authorities under the Chicago Convention; can transfer to the concerned civil aviation authority of another State all or part of the Authority's responsibilities for a Kenya aircraft. To be regulated by aforeign operator; or vest in the Authority all or part of the responsibilities of the civil aviation authority of another state for an aircraft registered by that state and operated by a Kenyan operator. ⁸⁵

From the fore-going, other countries, can only be seized of the Nationality jurisdiction of another country through abilateral agreement between the parties.

Jurisdiction as of right is a creature of statute and for the implementation/execution of offences in the aviation industry based on the nationality jurisdiction of the aircraft the Kenyan government enacted various regulations⁸⁶to put into effect the Civil Aviation Act but to be specific help in

⁸⁵ Civil Aviation (Amendment) Act 2016, section 3(4).

⁸⁶ The Civil Aviation (Operation of Aircraft for Commercial Air Transport) Regulations, 2018.

implementation of the operations of the commercial Air transport aircrafts. Upon implementation, it puts to emphasis other regulations, which are operational within the Aviation Industry.

It ensures the implementation of the Act on foreseeing that the Aircraft has all the required equipment and documentation satisfying the airworthiness principles for operations within the Kenya airspace. The stipulated requirements are unless otherwise authorized by the authority; a person shall not operate an aircraft registered in Kenya. Unless it has had an annual inspection within the past twelve months, a one hundred hour inspection, an altimeter and pilot-static system inspection in the past twelve months, for transponder equipped aircraft, a transponder check within the past twelve months; and for emergency locator transmitter-equipped aircraft, an emergency locator transmitter check within the past twelve months.⁸⁷

Therefore aircrafts registered in Kenya as well as those regulated by ICAO shall, when inflight; have on board the documents specified in the regulation. Except that if the flight is intended to begin and end at the same aerodrome and does not include passage over the territory of any other State other than Kenya; the documents may be kept at the aerodrome instead of being carried aboard the aircraft.⁸⁸

Kenya has come up with various regulations in the aviation sector to ensure effective compliance with the law under the Civil Aviation Manual regulation by the Kenya Civil Aviation Authority. The establishment of an aeronautical information services provider⁸⁹ within the defined area of coverage responsible for the provision of aeronautical data and aeronautical information necessary for the safety, regularity and efficiency of air navigation.⁹⁰ Air operators carrying passengers, cargo

⁸⁷ The Civil Aviation (Operation of Aircraft for Commercial Air Transport) Regulations 2018, Regulation 10.

⁸⁸ Ibid, 11(2)

⁸⁹ Civil Aviation (Aeronautical Information Services) Regulations 2018, Regulation 3(1).

⁹⁰ Civil Aviation (Aeronautical Information Services) Regulations 2018, Regulation 2.

or mail for remuneration or hire whose principal place of business or permanent residence is located in Kenya.⁹¹ And to all commercial air transport operations by air operator certificate holders for which Kenya is the state of the operator;⁹² and to all persons operating or maintaining aircraft registered in Kenya wherever they may be⁹³ operating or maintaining any aircraft registered in Kenya no matter which jurisdiction the aircraft is must at all times hold an approved maintenance organisation. Anyone who acts as such without or in violation of an Approved Operating Maintenance Organization Certificate issued under these Regulations commits an offence under the Relations.⁹⁴

The limitation period for bringing up appeals against any decision made by the Authority is 21 days.⁹⁵ The Regulations apply to all aircrafts requiring Aeronautical Search and Rescue services and to persons or organizations responsible for the maintenance and operation of Aeronautical Search and Rescue services in Kenya and in areas over the high seas to which Kenya has been given responsibility under the regional air navigation plan.⁹⁶

In conclusion the nationality principle has greatly solved the jurisdictional challenge on who has the primary authority over an aircraft in motion thus by its guidance contracting states can be able to deal with persons on board aircrafts who tend to endanger the safety of aircrafts. It gives the country with the nationality jurisdiction to try and other contracting states the obligation to enforce vis-a-vie the law to apply during enforcement.

⁹¹ The Civil Aviation (Air Operator Certification and Administration) Regulations 2018, Regulation 3(1).

⁹² Ibid, 3 (2).

⁹³ The Civil Aviation (Approved Maintenance Organization) Regulations 2018, Regulation 3.

⁹⁴ Ibid, 4(1).

⁹⁵ The Civil Aviation (Approved Maintenance Organization) Regulations 2018, Regulation 60.

⁹⁶ Regulation 3(1) The Civil Aviation (Aeronautical Search and Rescue) Regulations, 2018.

2.3 Territorial Jurisdiction

It is the Jurisdiction of the country entailing the boundaries and air space of the country. The aviation law is a diverse area of practice which deals with dynamic situations at all times since aircrafts are always on the move from one territorial jurisdiction to another.⁹⁷The main principles of international aviation law which were concluded in the Paris Convention, were the complete sovereignty over the territory of states. The free innocent passage in peace times, equality of treatment between aircraft of all contracting states, and an international commission for air navigation "to be established to organize the airplane rules among the parties and overseeing the implementation of the conventions."⁹⁸

Under Article 28⁹⁹ an action arising from international carriage by air may be brought only before the courts of certain contracting states and no others."

This by implication means that countries of passage cannot exercise their territorial jurisdiction if it is not a contracting state with the aircraft's registry state.

It is important to note that the Chicago Convention created the foundation for the current system of international transportation by air for the reason that each country was granted sovereignty over its own airspace¹⁰⁰and specifically excluded all military, police, customs and other operated aircraft from the operations of the air.¹⁰¹

The Chicago convention emphasizes the regulation of civil aircrafts that are not engaged in scheduled air services to make flights into or in transit non-stop across territories of member

⁹⁷ Section 12 of the civil procedure Act

⁹⁸ Legal rules for international aviation, 1945, p. 271

⁹⁹Warsaw Convention on International Carriage by Air.

¹⁰⁰ Convention on International Civil Aviation, December 7, 1944, Art 3(d), 61 Stat.1180,1181, 15 U.N.T.S at 298

¹⁰¹ Speciale (n. 46), p. 281.

states¹⁰².” “It also allowed civil aircrafts to make stops for non-traffic purposes such as fuel and maintenance without the necessity of obtaining prior permission.¹⁰³The objective of this organisation are to develop the principles and techniques of international air navigation, foster the development of international air transport services on the basis of equality of opportunities and to help air lines operate soundly and economically.¹⁰⁴

However the convention clearly states that aircraft operating in scheduled international air services are prohibited from operating over or into the territory of a contracting state,¹⁰⁵except with the special authorisation of that state.¹⁰⁶This provision considered the territorial jurisdiction each state holds over its territorial space. State parties reserve the right to establish restricted and prohibited areas as long as the restrictions and prohibitions apply equally to domestic and international aircraft.¹⁰⁷ Each contracting state maintains radio and air navigation services and facilities¹⁰⁸amidst a standard system of communication procedures.¹⁰⁹The Chicago convention established the territorial jurisdiction of each state as having exclusive authority over its open skies and any person who wishes to use them must do so upon seeking permission from there relevant authorities of that particular state.

Territorial jurisdiction like any other a raises by statute. An action for damages is filed at the option of the plaintiff in the territory of one of the High Contracting Parties. The Court having jurisdiction namely:- where the carrier is ordinarily resident, principal place of business, has an establishment

¹⁰² The International AIR Services Transit Agreement, signed at Chicago, on 7 December 1944 (Transit Agreement), see Article 1.

¹⁰³ Convention on International Civil Aviation, December 7, 1944, Art 3(d), 1181, 15 U.N.T.S at 298

¹⁰⁴ The Chicago Convention, see preamble and Article 44.

¹⁰⁵ International AIR Services Transit Agreement, signed at Chicago, on 7 December 1944 (Transit Agreement), see Article 1 (5).

¹⁰⁶ Convention on International Civil Aviation, December 7, 1944, Art 3(d), 61 Stat.1182, 15 U.N.T.S at 300.

¹⁰⁷ Convention on International Civil Aviation, December 7, 1944, at 1182,15 U.N.T.S at 302.

¹⁰⁸ Ibid at 1188, 15 U.N.T.S at 314.

¹⁰⁹ Ibid.

by which the contract has been made, before the Court having jurisdiction at the place of destination¹¹⁰ and the questions of procedure shall be governed by the law of the Court seized of the case.¹¹¹ In the case of *Satz V McDonnell Douglas Corp*¹¹² the court considered the public interest factors such as sovereign interests in deciding the dispute and administrative burdens posed by the trial and the need to implement or enforce foreign law. The court seated in United States was to make a decision based on Argentine law. It was **held** that *'the district court did not abuse its powers in finding that Argentine law was available and an adequate alternative forum thus the private, public interests weigh in favour of dismissal.'*¹¹³

The territorial jurisdiction is comprised of other components such as those in Articles 17, 18, 19.¹¹⁴

An international air carrier is liable for a passenger's death or injury resulting from an accident that takes place when a passenger is on an airplane, boarding an airplane, disembarking an airplane.¹¹⁵ This principle is recognised in the case of *Kihungi & another –v- Iberia Airlines of Spain SA*¹¹⁶ where it was **held** that *'the deceased's death took place after he had come under the control and direction of the Airline and was engaged actively in operations of embarking'.*

'The requirements of Article 17 of the Warsaw Convention having thus been satisfied. The carrier was liable for damages sustained by the appellants on account of the death of the deceased unless the carrier could show that at the time the deceased met his death he was engaged in operations other than those of embarking and the carrier had failed to discharge its onus of proof'.

¹¹⁰ Warsaw Convention, Article 28 (1).

¹¹¹ Ibid 2.

¹¹² ; 244 F.3d 1279,1283 (11th cir.2001).

¹¹³ John F. Easton and Jonathan D. Butler; Recent Developments in Aviation Law pg. 302 - 304

¹¹⁴ Warsaw Convention Article.

¹¹⁵ Warsaw Convention, Article 17.

¹¹⁶ Kihungi & Another v Iberia Airlines of Spain S [1991] KLR

Further, Article 18¹¹⁷ imposes liability on an air carrier for baggage that is checked and goods that are damaged while in the care and custody of the air carrier. If the occurrence that caused the damage, sustained took place during the carriage by air. The convention under the same article describes further territorial jurisdiction to which a carrier would be held liable by stating that the carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft. The case of landing outside an aerodrome, in any place whatsoever and the period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or trans-shipment, any damage is presumed, subject to proof to the contrary, to have been the result of an occurrence taking place during the carriage by air.

Article 19 provides that an air carrier is liable for any damages resulting from delays of passengers, cargo or baggage. Usually article 18 and 19¹¹⁸ are direct in application, the use of the word accident to trigger liability under Article 17 has sometimes spawned conflicting views.

In *Western Digital Corporation & Others V British Airways PLC*¹¹⁹ it was held '*that the Warsaw Convention was a complete code in relation to matters falling under it, and the issue of liability of the carrier was one such matter*'.

Further, that the court held that '*in carriage by air, any action for damages, however founded, whether in contract or in tort, can only be brought subject to the conditions and limits of liability set out in the Warsaw Convention*'. The Warsaw convention provides for the offences to which a

¹¹⁷ Warsaw Convention, Article.

¹¹⁸ Warsaw Convention

¹¹⁹ Western Digital Corporation & Others V British Airways PLC [2000] 2 KLR 142 page 35

party can sue an airline and further provides for the options of the territorial jurisdiction the plaintiff has.

Exposure to liability for baggage, expanded in the Montreal convention of 1999. It modified the Warsaw convention by defining baggage as both checked and unchecked baggage.”

The Warsaw Convention did not enable an applicant to bring suit in his nation and so, because of the trouble and the cost of a legal lawsuit to be filed in another country, the regulation tended to operate as a block to complainants filing cases. Dismissed from a passenger's incapacity to initiate a lawsuit in their place of origin, these rules were amended in accordance with the Montreal Convention. To the degree that a plaintiff can take legal action in the nation of the passenger's primary and permanent residence on condition that the carrier is required to rent own property in the country of origin and fly from and to that country.¹²⁰

The Montreal Protocol, 2014 extended the territorial jurisdiction in the aviation industry from the country of registration/Nationality to the operating countries and landing countries to deal with unruly passengers, recognition of in-flight security officers as currently provided for under the provisions of Annex 17 and extending immunity to in-flight security officers.

The Protocol¹²¹ makes provision for the right to seek recovery for damages by any party from any person who commits an offence or act on board aircraft under national laws. Kenya participated in the ICAO Diplomatic Conference that adopted the Montreal Protocol, 2014 and signed the Final Act but not the Protocol which was opened for signature on 4th April, 2014 due to the requirements of the Treaty Making and Ratification Act, 2012.¹²² Carriage by several successive carriers in

¹²⁰ Montreal convention of 1999, Article 33.

¹²¹ *ibid.*

¹²² Report on Departmental Committee on Transport (2014), Public Works and Housing the Ratification of the Protocol to amend the on Article 33, Convention on offences and certain Acts committed on board aircraft (Montreal).

article 1(3) remains undefined whether done by several carriers and several airway bills.¹²³The ratification of this convention by Kenya gave the operators/users of aircrafts in the aviation industry the territorial jurisdiction to file suits within Kenya.

To implement traffic control in the aviation industry an aeronautical data, and information necessary for the safety, regularity, and efficiency of air navigation is to be made available to the operators by the service providers for traffic control.¹²⁴

“A certificated Aeronautical Information Service Provider shall ensure that the provision of aeronautical data, Aerodrome mapping data¹²⁵and aeronautical information covers the entire territory of Kenya for which it is responsible for the provision of air traffic services and are regulated by the authority.”¹²⁶

The established tribunal deals with issues arising from breach of the regulations and the Act, and which acts as an appellate court within 21 days from the time the authority has communicated its decision to the aggrieved person.¹²⁷

2.4 Aerodrome Jurisdiction

Aerodrome is an area on land or water including any buildings, installations, equipment used wholly or in part for the arrival, departure and surface movement of aircraft. Aerodrome beacon is an aeronautical beacon used to indicate the location of an aerodrome from the air¹²⁸.

¹²³ Parke Davis & Co. v BOAC, NYC Ct, 30-01-1958,5 Avi 17,838, ‘Air Cargo Regulation and Claims’ Butterworths, 1983.

¹²⁴ *ibid*, p. 11. Civil Aviation Act of Kenya.

¹²⁵ *ibid*, p. 50.

¹²⁶ *ibid*, p. 10.

¹²⁷ *ibid*, p. 70.

¹²⁸ The Civil Aviation (Certification, Licensing and Registration of Aerodromes) Regulations 2018, Regulation 2.

The aeronautical beacon gives the territorial jurisdiction of the aerodrome over aircrafts in Kenyan air space. Licensing, certification, and registration of aerodromes within Kenya, done based on categories of capacity an aerodrome can handle.

‘Category ‘A’ comprises aerodromes available for use by both international and domestic airtraffic. ‘B’ comprises aerodromes available for use only by domestic air traffic. ‘C’ comprises aerodromes available for use only by domestic airtraffic of maximum certificated take-off mass not exceeding thirty thousand kilograms. ‘D’ comprises aerodromes available for use only by domestic helicopters operations. ‘E’ comprises aerodromes available for use only by domestic airtraffic of maximum certificated take-off mass not exceeding five thousand seven hundred kilograms or such aerodrome as may be determined by the Authority to be registered as a category eaerodrome using the methodology described.’¹²⁹

In the case of *Selle V Fayetteville Aviation, Inc*¹³⁰ a plane crash occurred in March 2003, Georgia and left the pilot dead, a resident of Tennessee but employed by a Tennessee corporation. The widow sued in Tennessee an Indiana corporation, which sold the aircraft. It was **Held** that *‘the Indiana Corporation was not subject to general personal jurisdiction in Tennessee and the plaintiff’s cause of action as the beneficiary originated in Georgia, where the crash occurred’*¹³¹

2.4.1 Implementation

Sovereign states have sole jurisdiction over air traffic services within designated air spaces at an aerodrome¹³² within their states. Save to state that it does not apply to persons providing air traffic services in the course of their duties to state aircraft.¹³³ The Kenya aviation authority has the

¹²⁹ *ibid* 5, Civil Aviation (Aerodrome Designand Operation) Regulations, 2018.

¹³⁰ No.M2005 – 01185 – COA-R3-CV, 2006 Tenn.App. LEXIS 335 (May 22, 2006).

¹³¹ *ibid*

¹³² Civil Aviation (AIR Traffic Services) Regulations 2018, Regulation 3(1).

¹³³ *ibid*, 3(2).

regulatory authority to oversee the conduct of business in the aviation industry and any person aggrieved with the decision of the Authority may within twentyone days of such decision appeal to the Tribunal.¹³⁴

The regulations whether by express reference or otherwise apply to aircraft registered in Kenya and to such aircraft wherever they may be, it applies to other aircraft, when they are within Kenya.

As far as they prohibit, require, regulate, whether by express reference or otherwise, the doing of anything by any person in, or by any of the crew of, any aircraft registered in Kenya. The regulations apply to such persons and crew, wherever they may be and in so far as they prohibit, require or regulate, whether by express reference or otherwise, the doing of anything in relation to any aircraft registered in Kenya by other persons shall, where such persons are citizens of Kenya ,apply to them wherever they” may be.¹³⁵

2.5 Jurisdiction on Communication Procedures

Territorial jurisdiction therefore assists a person offering Communication, navigation and surveillance services inside specified air areas and in aerodromes with communication in the aviation sector.¹³⁶It does not apply to individuals that provide state aircraft with Communication, Navigation and Monitoring services. ¹³⁷An airport controller’s radio station offers radio communication between an aerodrome, aircraft and mobile aircraft control towers. ¹³⁸However, an Air Navigation Service Provider certificate is issued for everyone who is able to offer Air Navigation Services or run a support facility for an air traffic service. ¹³⁹

¹³⁴ Civil Aviation (AIR Traffic Services) Regulations 2018, Regulation 100.

¹³⁵ *ibid*, 47.

¹³⁶ The Civil Aviation (Communication Procedures) Regulations 2017, Regulation 3(1).

¹³⁷ *ibid*, 3(2).

¹³⁸ The Civil Aviation (Communication Procedures) Regulations 2017, Regulation 2.

¹³⁹ Regulation 5, Civil Aviation (Certification of Air Navigation Services Providers), 2018

An operation typically managed by a rescue coordination centre or rescue sub-centre is an aviation search operation utilizing available staff and equipment to identify distressed people.

¹⁴⁰Aeronautical search and rescue is a service for distress surveillance, communication, coordination, aeronautical search, rescue, medical aid initiation and medical evacuation.

Helicopter operators registered in Kenya like any other operating in the Kenyan airspace shall abide by the Kenyan and other state laws, procedures, regulations in which their operating.¹⁴¹

The Authority has jurisdiction over all aeroplanes in the airspace of Kenya and is mandated to guide, offer assistance to all aeroplanes within the air space of Kenya, offer emergency landing services to any aircraft that seeks assistance within the airspace of Kenya. The jurisdiction it has over such aeroplanes mandates them to offer investigative services in case of any accident.

2.6 Universal Jurisdiction

It is a state's responsibility to execute its duties as a government.¹⁴² Jurisdiction internationally refers to the sovereignty of a State in exercising its judicial, legislative and administrative authorities.¹⁴³ The universal competence in the prosecution of international crimes is the execution of the judicial role of each state in respect of global law. "It is the international constitutional order and international criminals who offend it that 'each Member of the International Community shall be prosecuted.'¹⁴⁴ There may be international crimes beyond boundaries or on open sea. By a link between its territory and crime, no state may establish the normal foundation for competence.

¹⁴⁰ *ibid* 2.

¹⁴¹ The Civil Aviation (Operation of Air Craft Helicopter) Regulations 2018, Regulation 3(1).

¹⁴² John Dugard, Daniel L. Bethlehem, Max Du Plessis (2006); *International Law: A South African Perspective*, 3rd ed. Kluwer, Netherlands.

¹⁴³ Brownlie (1999), *Principles of International Law*, 5th Ed. (Oxford University Press), p. 301

¹⁴⁴ *ibid*, p. 497.

International Law gives States with universal jurisdiction to pursue international crimes independent of where the offense is committed and of whether the perpetrator or victim is a citizen.

¹⁴⁵It is the idea of universal jurisdiction that some crimes are so heinous that any State may or is obliged, despite the nationality of the perpetrators, the victims and the area where the crime has taken place, to arrest and punish suspected delinquents. ¹⁴⁶It is not based on concepts of sovereignty or State consent and it is different from other types of international jurisdiction. ¹⁴⁷

It is based on the argument that there should be no safe refuge for those accountable for the most severe crimes by the world community. Therefore, all international governments can bring the criminals to justice via the notion of universal jurisdiction. The idea that each state is concerned with bringing the perpetrators of international crimes to justice is within this Authority.

¹⁴⁸Therefore, all countries are required, to serve as guardians of international law and in the name of the global community to pursue international crimes.

The main differences between international conventions, resolutions and declarations are the legislative instruments. Focusing on the safety of unlawful actors' skies in civil aviation, ensuring passenger safety, crew and encouraging the recovery of affected aircraft.¹⁴⁹

¹⁴⁵ Alexander et al supra

¹⁴⁶ See Inazumi, M, (2005), Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecution of Serious Crimes under International Law, Pennsylvania Studies in Human Rights

¹⁴⁷ Kontorovich E., (2004), The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation, 45 Harvard International Law Journal, 183, 184. At p. 190 he stated. that "...before a Law of Nations in the Modern sense of the terms was in existence, a pirate was considered an outlaw, a hostis humani generis... Piracy is so called international crime; the pirate is considered the enemy of every state, and can be brought to justice anywhere. For as long as sovereignty-based jurisdictional principles have existed at least since the early seventeenth century, any nation could try any pirates it caught regardless of the pirates' nationality or where on the high seas they are apprehended"

¹⁴⁸ International Criminal Court (2001), Making International Court Work: A handbook for implementing the Rome Statute. Vol 13, No. 4 (G), p.17.

¹⁴⁹ Yool, 2005, p. 1

To meet this specific goal, the member States adopted agreements that would serve to enable states to have power in relation to crimes committed on airplanes. To this particular goal, the universal jurisdiction within the aviation sector.

The Warsaw Convention had two key goals, the first being the establishment of a uniform system for regulating ticketing, baggage transport and cargo movements and the same conventions establishing the principle of universal jurisdiction for the application of such statutes, and of passengers or customers in relation to lost, damaged or freight.

Customary international law grants all governments' universal competence to deal with offenses beyond the territory. Offenses threatening world peace also harm mankind and courts have decided that such crimes can be punished in court Martials.¹⁵⁰With respect to the matter of Israeli *Prosecutor Vs Eichman: Decision Trial Court 36 Intl. L. Rep.5 (Israel, Distict Jerusalem, Israel Court* indicated as follows:

“The odious offenses that this Legislation defines are not just crimes under Israel's law. The crimes that have struck all human beings and shaken countries' consciences are serious transgressions [delikta jurit gentium] against the law of nations itself.’

'Therefore, as far as international law is concerned, the international concept of universal jurisdiction denies or restricts the authority of countries with respect to such offenses. A State may define and prescribe penalty for any crime "recognizing the community of nations." Significantly, universal jurisdiction applies only to those crimes that the international community has universally condemned and also agreed, as procedural matters deserve to be made universally cognizable”

¹⁵⁰ Attorney General v Mohamud Mohammed Hashi & 8 others [2012] eKLR

2.7 International Conventions

There are four international conventions, which govern parties while dealing with civil aviation law issues namely:-

- (a) Tokyo Convention
- (b) The Cape Town Convention
- (c) Warsaw Convention
- (d) Montreal Convention
- (e) Chicago Convention 1944.

2.7.1 The ‘Cape Town Convention’

"Aircraft are readily transferred from one nation to another, the financial arrangements are inherent in problems and the interests of creditors are secured. A Kenya loan holder may want to utilize an aircraft recently bought as a guaranteed loan since the aircraft may be transported easily to another nation in which the interest of the loan holder cannot be protect. Most nations participated in the Cape Town Convention because of this difficulty.¹⁵¹

At Cape Town, participants attempted to develop an agreement to make aircraft title, safety interest on aircraft and aircraft leasing legally stable and enforceable. In 2001, 53 countries approved the Cape Town Convention dealing missiles, aircraft engines and helicopters over specified weight criteria.¹⁵²

The convention has some significant features worth noting:-¹⁵³

- (a) ‘The creditors got rights to repossess, sell any aircraft in case of default of a loan.’

¹⁵¹ Raymond C. Speciale, Fundamentals of Aviation Law; Pg.286

¹⁵² Sean D. Murphy, Contemporary Practice of the United States Relating to International Law: Private International law: Cape Town Convention on Financing of High- Value, Mobile Equipment, The American Society of International Law American Journal of International Law, 98 A.J.I.L 852 (October 2004)

¹⁵³ Raymond C. Speciale, Fundamentals of Aviation Law; Pg.286

- (b) 'It created a high tech international aircraft registry to give a first in time priority to creditors who register security interests in an aircraft'.
- (c) 'It created a system of protection of creditors and debtors that mirrors that of USA'.
- (d) 'It permits creditors to deregister an aircraft when a debtor defaults and procure the export of the aircraft'.
- (e) 'Gives ability to creditors to take possession of an aircraft upon default.'

Cape Town Convention on becoming effective on 1st April 2004 resulted into lower financing charges and provides easier funding of aircraft transaction¹⁵⁴. It has also helped in recovery as was discussed in the case of **Fly Aviation Services v Bravo Cargo Air Dwc Llc & 2 others**¹⁵⁵ where it was Held that *'there is no cogent evidence that the aircraft was in fact disposed of at the time of the first application. In fact, Kenya Civil Aviation Authority ("KCAA") reports attempts at disposal were on going on 24th August 2015. It could also be the case that the negotiations were taking place during the currency of the Court's order of 22 May 2015 prohibiting attempts at disposal. Again, that is a matter for Trial apart from the absence of any cogent believable evidence of purchase, the Objector is tainted by Defendant's unclean hands in relation to its conduct regarding failure to supply the aircraft and then default in refund/payment'*.

Through its Application, the Objector demonstrates knowledge of the facts. The timing suggests the consent and purported sale was merely a device to evade payment.

By providing that the international registration of interests in a single, web-based international registry is open and that the interests under a simple priority regime, whose main principles are ensured that registered interests take priority than unregistered ones, the Convention introduced a

¹⁵⁴ Raymond C. Speciale, Fundamentals of Aviation Law; Pg.286

¹⁵⁵ [2016] eKLR

registering dimension enabling the universality of jurisdiction of the Member Contracting States. Previous registrations gain priority over future registrations, and by registering subordination agreements on the International Registry the parties might differ in their priorities. The procedure for repossessing and other wise realization of aircraft and engines is accelerated, guaranteed, and cost savings in insolvency and other default, especially when those assets are in a nation whose legal system is otherwise a topic of worry.¹⁵⁶

The creation of an international registry introduced the universal jurisdiction amongst the contracting states to exercise their powers over aircrafts currently within their jurisdiction; for any issues/interest arising out of the registration status from the registry.

2.8 Warsaw convention

The convention established 4 forums for which a complainant could" bring a legal complaint against the carrier, that is, the carriers' domicile, the carrier's principal place of business, the country where the carriage contract was entered into provided that the carrier was operating there, and the carrier's destination.¹⁵⁷ The subject of judicial competence is covered under Article 28 of the Convention. There are four specific jurisdictional contracts provided where three relate to the airlines and the fourth one deals with place of destination such as:-

- (i) Court of the domicile of the carrier
- (ii) Carrier's principal place of business
- (iii) Where a carrier has a place of business through which the contract had been made. In

Ngunjiri Vs British Airways World Cargo¹⁵⁸ Held that *'the plaintiff is entitled to damages of \$7,640 for damage of cargo amongst other reliefs.'*

¹⁵⁶ Flynn O'Driscoll ,THE CAPE TOWN CONVENTION – AN OVERVIEW

¹⁵⁷ Article 17,18,19 of the Warsaw Convention

¹⁵⁸ Civil suit No. 60 of 2000, [2003] eKLR

(iv) ‘The court situate at the place of destination’.¹⁵⁹ See **Ethiopian Airlines vs Alfred Gborie**¹⁶⁰

In the case of In **Kihungi & Another vs. Iberia Airlines of Spain SA**¹⁶¹ the Court of Appeal expressed itself as follows:

“The boarding ticket or card is issued only after a passenger is accepted for the flight. Therefore, the issuing of the boarding card to the deceased was evidence that he had been accepted for the flight. Death took place after the decease had come under the control and direction of the Airlines and was engaged actively in operation of embarking.” ‘Having satisfied the requirements of Article 17 of the Warsaw Convention, an airline, that is the respondent, is liable for damages sustained by the appellants (plaintiffs) on account of the death of the deceased unless the carrier can show that at the time the deceased met his death he was engaged in operations other than those of embarking. ‘So long as passengers are on board, an aircraft, or during the time when his movements are under the control of the carrier; and an accident occurs during that time’. The burden of proof shifts from the plaintiff to the defendant, when it is the latter’s turn to prove that the injury or death consequent upon the accident did not occur as a result of a breach of duty by the carrier.”

Further, in the case of **Western Digital Corporation & Others V British Airways PLC**¹⁶² **held** that “*the Warsaw Convention is a complete code in relation to matters falling under it, and the issue of liability of the carrier was one such matters*”. Further, that the court **held** that ‘in carriage

¹⁵⁹ Juan E. Acosta, *Wilful Misconduct Under the Warsaw Convention: Recent Trends and Developments*, 19 U.Miami L. Rev. 575 [1965] pg. 582

¹⁶⁰ Civil Appeal No.32 of 1998

¹⁶¹ **[1991] KLR 1**

¹⁶² **[2000] 2 LLR 142 page 35**

by air, any action for damages, however founded, whether in contract or in tort, can only be brought subject to the conditions and limits of liability set out in the Warsaw Convention’.

2.9 Montreal Convention

The Treaty entered into force on 4 November 2013, although updating many features of the Warsaw system, it is completely a new Treaty that unites and replaces the strict liability system created by the Warsaw Convention and later revisions and protocols.¹⁶³

The Convention establishes a forum of jurisdiction to allow a passenger to take action in a State party to the agreement where the passenger is the principal place of residence at the time of the accident, as long as the carrier operates in that State either directly or indirectly.¹⁶⁴ In **Karen Njeri Kandie Vs Alssan Ba & Another**¹⁶⁵ stated that:

“The applicability of the Montreal Convention in Kenya was also affirmed by the High Court in Civil Case Number 39 of 2006 (Hon. Ahmed Mohammed Khalif & another Vs Mia International Limited & Another) where the learned Judge held that a claim for damages based on a contract of carriage by air is governed by the Act and the Montreal Convention.”

A plaintiff whose claim is for damages has an option of instituting suits in the territory of any contracting parties such as:- (a) the court of the domicile of the carrier (b) carrier’s principal place of business. (c) Its place of business through which the contract was made (d) the court at the place of destination.¹⁶⁶

The Convention has recognized universal jurisdiction by offering state officials the choice of whatever state they choose to bring claims. The major reason it was selected over the Warsaw

¹⁶³ Ron Bartsch Ronald I.C Bartsch, International Aviation Law, Practical guide.pg.25

¹⁶⁴ Ron Bartsch Ronald I.C Bartsch, International Aviation Law, Practical guide.pg.25

¹⁶⁵ Court of Appeal in Civil Appeal No. 20 of 2013

¹⁶⁶ Article 3, Montreal Convention 1999.

system was because of this extra forum and the enhanced compensating value available for the applicants under the Montreal Agreement and because more than 100 nations ratified the convention at the beginning of 2012. Including Kenya.¹⁶⁷

In the case of **Farida Abdullahi Ibrahim & 2 Others vs. Gulf Air Limited**¹⁶⁸, I held that ‘*this suit should have been brought within 2 years as provided under Article 29(1) of the Convention.*’

2.10 International Civil Aviation Organization

It was enacted and ratified with the sole aims/purpose of entering into a relationship with the “United Nations in accordance with the charter of the United Nations to form part of the general pattern of international cooperation.¹⁶⁹The major duty of the council lies in adopting international Standards and Practices for the benefit of all member states.

ICAO works with member states to reach consensus on international civil aviation Standards and Recommended Practices (SARPs) and policies in support of a safe, efficient, sustainable and environmentally responsible civil aviation sector.¹⁷⁰The standards set up by ICAO are adopted by all the contracting states thus helps in creating universality of jurisdiction which gave universal jurisdiction to International Court of Justice. The International Court of Justice has jurisdiction on the airspace disputes¹⁷¹.It has jurisdiction over interpretation of aviation conventions¹⁷², advisory opinions/appeals to and from ICAO Council¹⁷³

¹⁶⁷ Ron Bartsch Ronald I.C Bartsch, International Aviation Law, Practical guide.p.g 25

¹⁶⁸ Nairobi HCCA No. 95 of 2002

¹⁶⁹ ibid Pg.287

¹⁷⁰ Raymond C. Speciale, Fundamentals of Aviation Law;Pg.287

¹⁷¹ Art.9,36 ,92 of the International Court of Justice of 1945.

¹⁷² Hague Convention of 1970.

¹⁷³ Art. 84 of The Chicago Convention of 1944.

2.11 Conclusion

The chapter has demonstrated the evolution of aviation law in the sector of jurisdiction; and how the challenges to jurisdiction have been resolved over time by enactment and ratification of various conventions to provide a solution to the challenge.

However as much as the challenge of territorial (where), when (limitation period), who (nationality principle) have been dealt with at a certain extent the enforcement of the orders still remain a challenge in the aviation industry. This chapter on the development on various laws in the aviation industry now leads us to the next chapter on the” choice of laws or forum available to any person seeking a legal remedy within the aviation law.

CHAPTER THREE

THE CHOICE OF LAWS IN THE AVIATION INDUSTRY

3.1 Introduction

Conflicts of legislation may be referred interchangeably to as privately-owned international or international privately owned,¹⁷⁴ whereas in common law jurisdictions, the term conflict of law is primarily used, and in France, Italy, Greece, the Spanish or Portuguese-speaking countries the term private international law is normally used.¹⁷⁵ The phrase "international private law" is used in Germany as well as in Russia and Scotland.¹⁷⁶ It relates to procedural rules that determine the legal system and jurisdiction applicable to a given case. This comes about when domestic laws of two different countries are applicable before a court seized with the matter and the court has to choose which law to apply. The rules typically apply when a legal dispute has a 'foreign' element such as a contract agreed to by parties located in different countries.¹⁷⁷

The term conflict of laws itself comes from circumstances in which the eventual result of a legal dispute is based on what law is to be implemented and how the court resolves the disagreement between such laws. However, the phrase might mislead if it relates not to "conflict" itself, but to conflict resolution between competing systems.¹⁷⁸

The use of aircrafts, airspace give rise to social, legal relations regulated by private international law. For example "the legal regime on airspace, interstate agreements on air services, contract of domestic carriage by air, administrative law in regard to government regulations of aviation, labour

¹⁷⁴ England, Canada, and Australia, the United States, Kenya

¹⁷⁵ Speaking Countries such as Austria, Leichtenstein and Switzerland

¹⁷⁶ Busalile (n. 157)

¹⁷⁷ Busalile Jack Mwimali, Conflict of laws, p.1. https://www.academia.edu/5275416/CONFLICT_OF_LAWS, accessed on 17/10/2018.

¹⁷⁸ *ibid*, https://www.academia.edu/5275416/CONFLICT_OF_LAWS, accessed on 17/10/2018

laws on contract of employment of the crew, labour conditions of the flight personnel, financial law such as air customs regulations”¹⁷⁹.

3.2 Aspects of laws to be considered

In interrogating this, the study shall discuss ‘private international law’ as an aspect of ‘conflict of laws’.

3.2.1 Private international law

Aviation law is an international field of law dealing with private issues in which parties may have related local laws controlling them from various countries. In 1925, the French authorities organized the first international conference on private air law in Paris, an initiative of its type, and the genuine first attempt to settle difficulties related with conflict of law in aviation law.¹⁸⁰

Six years after the Paris Convention of 1919, new airlines were expanded and a far wider network of worldwide scheduled air services was established. With this type of expansion, an inevitable increase in mishaps and accidents occurred in airplanes which led to a rise in numerous lawsuits over the related damage and loss. Due to the absence of any worldwide legislative framework, conflicts of laws relating to passenger and aircraft owners' rights have been dramatically escalating. Conflicts cannot be resolved effectively.¹⁸¹ The final protocol to create a special committee of experts was directed by Albert Roper, Secretary General of the International Air Law Conference.

¹⁷⁹ *ibid*

¹⁸⁰ Bartsch R. Ronald (Year), *International Aviation Law; A Practical guide.* (publisher), p. 22.

¹⁸¹ *ibid.*

In an effort to discuss the challenges of international airlines and to determine the necessary tasks of codifying this quickly developing field of private aviation law, the international committee of specialists of technique, jurisdictions of Aeriens, was formed up.

The works of CITEJA transitioned to ICAO in 1947¹⁸² thus developing various conventions namely the Warsaw Convention, Montreal Convention, Cape Town convention to tame the conflict of law challenges affecting various parties in “the aviation sector.

3.3 Choice of Laws

Aviation has played a great role to boost economies in society in the last fifty years. The improvement of aviation and carriage by air has widen the scope of several social relations that is regulated by law. "Airlaw" is a combination of several branches of law, comprehended of scientific specialization that combines research in several fields of law; thus cannot be taken to be an independent branch of the system of law.¹⁸³

International contacts are targeted for air traffic by operation. International aviation and air transportation lead to a complicated relationship between private law and the huge plurality of foreign elements. Private international law addresses the question of the choice of legislation that applies among mutually contradictory domestic laws. It was shown that this area is the only field of private law foreign elements as any other branch of human work.¹⁸⁴

It requires just hours for a modern aircraft carrying registration marks of one state to fly through boundaries and land in countries where different laws apply. The aircrafts always have different

¹⁸² *ibid.*

¹⁸³ Michael Milde, Csc, Conflicts of Laws in the Law of the Air. Vol.11 (Mc Gill Law Journal), pp. 221-222. See Knapp V., Predmet a system ceskoslovenskeho socialistickcho prava obcanskeho (Prague 1959) p. 79. Outrata V., Predmet mezzinarodniho prava, (1961) Casopis pro mezzinarodni pravo, No. 1, p.16. Milde M. The Problems of Liabilities in International Carriage by Air. A Study in Priv'ate International Law, (Prague 1963), p. 11-13.

¹⁸⁴ *ibid*

nationalities on board that purchased air tickets from different states and each having different destinations. The crew members' may be of a different nationality from that of the operator and the contract of employment executed in different States. The operator of the carrier may have various liabilities arising from contractual obligations, facts and acts that occurred in transit territories.¹⁸⁵

Aviation law has a remely rich source of occurances that involve foreign elements that create challenges in private international law.

Finding a solution to some of these challenges may seem difficult in practice. The following hypothetical example¹⁸⁶ may serve as an illustration.

A French man 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?

There are certainly the most common and practical difficulties originating from the international air travel contract, but major conflicts of legislation happen in other areas of the aviation industry too. What legislation should the rights in rem apply to airplanes that often alter their location? These rights cover basic issues such as aircraft ownership, transfer of property, and aircraft mortgages. ” Which legislation should control aircraft charter and hire? What laws should regulate this employment contract and working conditions by the aircraft's crew in different regions of the

¹⁸⁵ *ibid* 161

¹⁸⁶ Riese O., *Intemational privatrechtliche Probleme auf dem Gebiet des Luftrechts*, Zeitschrift ffr 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 Contracts of International Carriage by Air* (Thesis I.A.S.L., McGill University 1962) p. 5.

world? In which legislation should legal concerns arise from a collision between two or more airplanes of different countries be settled? Which law should regulate additional non-contractual obligations, such as help or rescue duties between aircraft or liabilities deriving from harm caused to third parties in the field by aircraft? Which legal regime regulates the conduct or facts of a flying aircraft?¹⁸⁷

Individually and legal entities are entitled to seek legal redress in the courts of the forum if they are a forum recognized person or legal entity or if they are alternatively granted the right to bring legal redress in the courts of the forum.¹⁸⁸

International aviation law derives from a number of choices of law thus the most important ones are:

- (a) International treaties and conventions
- (b) Bilateral and multilateral air services and safety agreements
- (c) Domestic aviation law
- (d) Judicial decisions in respect to the interpretation of international treaties and other areas of law that specifically relate to aviation activities.(customs)
- (e) Contracts between states and airlines
- (f) Commercial alliance and other agreements between airlines
- (g) Regional safety programmes and other initiatives

3.4 Contributions of the Warsaw Convention on the choice of law to be taken.

Jurisdictional powers of international law are derived from sovereignty, and multilateral treaties among them the Warsaw Convention Article 28 that states that:-

¹⁸⁷ *ibid*

¹⁸⁸ S.A Bayitch, lawyer of the Americas, vol. 5, No.2 (Jun. 1973) pp.270: <http://www.jstor.org/stable/40175644>; accessed on 1/12/2017.

*“An action for damages must be brought at the option of the plaintiff. In a territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court of the place of destination”.*¹⁸⁹

Jurisdiction is based on subject matter, which is an action for **damages** and the **forum being the territory of a high contracting member state** selected by the plaintiff to pursue his claim.¹⁹⁰

The Convention gives an exclusive Jurisdiction but does not indicate consequences of actions and effects of judgments issued in member countries and not so identified in non-member countries.¹⁹¹ “Difficulty in interpreting this provision lies on whether the four contacts are designed to only identify the country to allocate jurisdiction on the international plane as a whole or to function also as an internal jurisdictional rule¹⁹² and as such implement or even eliminate the forum’s jurisdictional law”.

The Warsaw convention primarily deals with jurisdictional issues in the aviation sector hence two levels of judicial power have to be examined, to determine if the suit can be maintained. In the case of **Smith v Canadian Pacific Airways, Ltd**¹⁹³ it was **Held** that *the jurisdiction of the international treaty herein the Warsaw convention under Article 28 and the power of the domestic court to hear a case arising from that convention has to be ascertained first for a suit to be sustained. Further, the court HELD that ‘the suit be sustained in United States by virtue of Article 28 where a carrier has a place of business through which the contract has been made.’*

¹⁸⁹ Warsaw Convention

¹⁹⁰ S.A. Bayitch; Lawyer of the Americas, Vol.5 No.2 (Jun; 1973), Pg.277

¹⁹¹ *ibid*, 178

¹⁹² *Dunning v Pan American World Airways*, 4 Av. Cas. 17.394 (1954)

¹⁹³ 452 F.2d 798 (1971)

The applicability of the convention in respect of Article 28 on judicial jurisdiction entails the justification of Article 1¹⁹⁴ dealing with international carriage of persons, goods, or luggage performed by aircrafts for reward¹⁹⁵.

*The Warsaw Convention*¹⁹⁶ requires the complainant to file an action for damages. In the territory of one of the High Contracting Parties, either before the court of competence where the carrier is normally resident, or has its headquarters or an establishment whereby the contract was concluded or before the court of competence on its destination.

(a) Court of the domicile of the carrier.

The domicile of the carrier entails forum as a basis for judicial jurisdiction. In the case of **Winsor Admr vs United Airlines**,¹⁹⁷ “wherein the defendant carrier was incorporated in the state of Delaware, but the accident took place in Colorado, court dismissed the action concluding ‘that the doctrine of forum non conveniens should be applied in this case and that this court is free in its discretion to apply such doctrine.’”

(b) Carrier’s principal place of business.

The principal place of business for an airline is taken as the jurisdiction in which the executive and main administrative functions of the carrier are located. In one federal case: -¹⁹⁸ ‘the nerve center from which it radiates out to its constituent parts and from which its officers direct, control and co-ordinate all activities without regard to locale, in the furtherance of the corporate objective.’

¹⁹⁴ Warsaw convention

¹⁹⁵ Carl E.B. McKenry Jr., Judicial Jurisdiction under the Warsaw Convention, 29 J.Air L. & Com. 205 (1963); <https://scholar.smu.edu/jalc/vol29/iss3/4>

¹⁹⁶ Article 28

¹⁹⁷ Inc, Delaware superior court, New castle county, Sept 12, 1958, 5 Av. Cas 18,170

¹⁹⁸ Scot Typewriter Co. vs Underwood Corp; 170 F Supp. 862, 865 (S.D.N.Y. 1959)

The headquarters is not a synonym for home or a domicile test for a company or for a natural person.¹⁹⁹

(c) Where the carrier has a place of business through which the contract is executed.

Where a carrier has an office of its own, through which tickets or airway bills are sold then the forum having jurisdiction over the place where the said office is located clearly qualifies under the established jurisdiction under the Warsaw Convention.²⁰⁰

The jurisdiction raised out of this particular forum raises issues. Fore stance if tickets sold by another airline or carrier through an agreement with an independent travel agency authorised to maintain the carrier's ticket stock and issue contracts of carriages on behalf of a carrier gives rise to a principal place of business establishing jurisdiction for that particular airline. In the case of **Rotterdamsche Bank N.V vs British Overseas Airways Corp**²⁰¹, it was **Held** that "*the problems leading the court with competence at the accident site to be omitted also prevail over the competency of a court with responsibility at the site where the carrier has an establishment through which the contract was entered into.*" *The word business place should be recognized that the latter word business agencies were initially used and were established by the word establishment to include the carrier's branch executives.*²⁰²

*Furthermore, the Court held that 'it lacked jurisdiction over the second defendant, Aden Airways' in relation to **Rotterdamsche Bank vs. Brit Overseas Airways Corp.***²⁰³ **Mr. Justice Pilcher** observed that "*Article 32 of the Convention states that all provisions in the carriage contract which*

¹⁹⁹ Guinn v Iowa central Ry. Co; 14 Fed.323,324 (C.C.S.D. Iowa 1882)

²⁰⁰ Carl E.B. McKenry Jr., Judicial Jurisdiction under the Warsaw Convention, 29 J.Air L. & Com. 205 (1963); <https://scholar.smu.edu/jalc/vol29/iss3/4>

²⁰¹ 1 Lloyd's List L.R, 154 (QB) 1953

²⁰² Goedhuis, National Airlegislations and the Warsaw Convention (1937), at p.293

²⁰³ 1 Lloyds List L.R. 154 (Q.B 1953)

pretends to violate the rules established by the Convention must be null and void, whether by choosing the law to be applied or by modifying norms of authority. This strengthens the conclusion that the competence of Article 28(1) of the Convention, “is intended to be applied strictly and I accordingly conclude that the effect of Article 28(1) is to oust the jurisdiction of the courts of this country to entertain a claim by the plaintiffs against the second defendants.”

(d) The destination courts.

It provides a forum where any carrier, that does not have its agreed destination within a high contracting state, shall not be subjected to convention applicability.

For example, “a passenger purchases a ticket in country ‘A’ for carriage on carrier ‘X’ from country ‘B’ to country ‘X’ and return to country ‘B’. If country ‘A’ and country ‘X’ are both non-warsaw convention countries and carrier ‘X’ is a national of Country ‘X’, which is also its principal place of business, none of the carrier contacts for jurisdiction would be in a high contracting party. Therefore all contacts except place of destination would not be available under article 28 which limits the action to the courts of high contracting parties”²⁰⁴.

In the case of **Northwest Airlines v Gorter Admx**²⁰⁵ it was held that “*the destination of the plane in which the deceased was killed was McChord field in the state of Washington the court of that state being the courts at the place of destination would have jurisdiction of the action*”.²⁰⁶

3.5 Aviation Domestic choice of law in Kenya

Kenya has adopted different statutes and regulations dealing with commercial air transport operations, aerodrome licensing and registration, air service licensing, staff licensing, air transport

²⁰⁴ Carl E.B. McKenry Jr., Judicial Jurisdiction under the Warsaw Convention, 29 J.Air L. & Com. 205 (1963);pg.215 <https://scholar.smu.edu/jalc/vol29/iss3/4>

²⁰⁵ 49 Wash 2d 711, 306 P.2d 213 [1957]

²⁰⁶ Carl E.B. McKenry Jr., Judicial Jurisdiction under the Warsaw Convention, 29 J.Air L. & Com. 205 (1963);pg.216 <https://scholar.smu.edu/jalc/vol29/iss3/4>

services, aeronautical information services, aerospace charts, instruments and devices, authorized maintenance organisations, certified training organisations, and air rules. Management of safety, surveillance and avoidance systems, communication protocols, air navigation meteorological services, air operator certification and management, aircraft nationality and records, certification, investigation into air accidents and occurrences, air worth and aviation safety.²⁰⁷

The Civil Aviation Authority Act establishes the National civil Administrative Review Tribunal²⁰⁸, which has jurisdiction concerning the administrative actions taken by the Authority while conducting its duties such as licences; this however does not deal with the issues arising out of the Warsaw Convention and the ICAO Convention. In this case, Korir, J was correct in **Republic vs. Kenya Civil Aviation Authority & Another ex parte Timothy Nduvi Mutungi [2012] eKLR** when he held that:

“A plain reading of the Act clearly shows that the 1st Respondent (Kenya Civil Aviation Authority) is under a duty to provide height specifications once an application is made. The height specifications should, not exceed the height specified by the Minister in the Kenya Gazette. I do not think that Parliament intended to empower the respondents to completely deny land owners development of their land.”

The 2010 Kenya Constitution is a groundbreaking constitution in all respects. The recognition of international law as part of Kenyan legislation is one of its main elements.²⁰⁹ From a philosophy

²⁰⁷ Sonal Sejjal, The Aviation Law Review 8 – TLR, <https://thelawreviews.co.uk/edition/the-aviation-law-review-edition-8/1229776/kenya> accessed on 4/11/2020.

²⁰⁸ Section 66.

²⁰⁹ Prior to the current Constitution, the sources of law in Kenya, as set out in s 3 of the Judicature Act, were as follows: the Constitution; Acts of Parliament; some specified United Kingdom statutes; where no written law existed. The substance of the common law, doctrines of equity statutes of general application in force in England on 12 August 1897 and finally customary law:- See Judicature Act, Chapter 8 of the Laws of Kenya. While this position remains to date, the introduction of international law as a source of law in the current Constitution has created confusion in terms of the place that it should occupy within the

that is clearly dualistic and international law has local influence only when it is domesticated by the law. The country presently has a 'somewhat' monistic system of international law recognition. Accordingly, the general rule of the law of Kenya should be enshrined in Article 2(5) of the Constitution.²¹⁰ This is why, without looking for explanation outside the Constitution, a tribunal must accept the so-called 'generic norms.' In Article 2(6) "Agreements approved by Kenya shall constitute part of Kenya's law."

In the aviation area, Kenya has ratified the Convention on International Mobile Interest (Cape City Convention). It is also referred to as the Varsovia Convention, together with the Montreal Convention, as the convention on the unification of certain international air transport rules signed on 12/10/1929 in Warsaw²¹¹.

hierarchy of norms. Before the current Constitution, Kenyan courts have held for a long time that no legal principles outside the framework of the Judicature Act would be applied as a source of law. In particular it had been decided in the case of *Okunda v R* [1970] EA 453 that international law did not form part of Kenyan law unless it was domesticated. This is a principle deriving its source from the British constitutional law rule of parliamentary supremacy by which Parliament, being the supreme law-making organ, must be the originator of all law. The principle that international law only applies upon domestication; that is, the dualist principle of international law, is one that had been faithfully affirmed and reaffirmed by Kenyan courts over time.

²¹⁰ The term 'somewhat' is used because there has been a tendency to dispute whether indeed Kenya can now be said to be monistic, in the sense that ratified international treaties become locally enforceable sources of law. Part of the confusion stems from the Constitution, when, in art 2(6), it provides that once a treaty is ratified, it becomes part of the law of Kenya. However, the Constitution then proceeds to provide, in art 94(5), that no person body other than Parliament has the mandate to make laws unless otherwise allowed to do so by the Constitution or an Act of Parliament. The first impression created by art 94(5) is that a treaty, even if ratified, does not become law unless passed by Parliament. A careful reading of the Constitution, however, shows that it does not contemplate anything beyond ratification as necessary for a treaty to have binding effect in Kenya. This in effect would mean that Kenya is a monist State. But as shall be discussed elsewhere in this article, the Constitution is not clear on whether Kenya is a monist state.

²¹¹ Sonal Sejjal, *The Aviation Law Review* 8 – TLR, <https://thelawreviews.co.uk/edition/the-aviation-law-review-edition-8/1229776/kenya> accessed on 4/11/2020

Kenya adopted the International Interests in Aircraft Equipment Act No. 27 of 2013 on the domestication of the Convention of Cape Town which gives the High Court of Kenya the power to deal with claims made in accordance with Cape Town Convention.²¹²

By enacting the Carriage by Air Act No 2 of 1933, Warsaw Convention was domesticated; however,²¹³ it enables internal and non-conventions transport, cabinet secretary vides gazette notice to apply to all Non-International Air Carriages in Kenia to the provisions of both CBAA and the Warsaw Convention, except Articles 3, 4, 6, 8, 9, 10 and 28.²¹⁴ Under Article 2(6) of the Constitution, the Montreal Convention became effective in Kenya.²¹⁵

The Montreal Agreement deals with airline, servant, passenger, consignor, delivery officer and other person's rights and obligations independent of their nationality. The liability system include death, passenger injury, loss and cargo damage and harm caused by air travel delays. The Carriage by air Act in Kenya deals with the carrier's obligation in relation to death of any passenger pursuant to Article 17 of the Warsaw Convention under any legislation of or under common law²¹⁶.

The Civil Aviation Act is the primary choice of law in the Aviation sector in Kenya hence stipulates its jurisdiction on applicability to²¹⁷ aerodromes used for civil aviation in Kenya. Kenya-based air services, aircrafts licensed or operating by the authority, Kenyan-based foreign aircrafts, aerospace staff and training centers, authorized aircraft, companies operated in Kenya for the design, manufacture, maintenance, repair and modification of air traffic components and aircrafts, air navigation facilities and air services in Kenya. These particular provisions of the law give the

²¹² Ibid pg.3

²¹³ Legal Notice No. 162 of 1993

²¹⁴ Section 11 of the CBAA

²¹⁵ Ibid pg.3

²¹⁶ Sonal Sejjal, The Aviation Law Review 8 – TLR pg. 4, <https://thelawreviews.co.uk/edition/the-aviation-law-review-edition-8/1229776/kenya> accessed on 4/11/2020.

²¹⁷ Section 53 Civil Aviation Act No.21 of 2013

Kenya Civil Aviation Authority jurisdiction to oversee/regulate the aviation viz via the Act being the primary source of law.

The Kenya Civil Aviation Authority was established²¹⁸ to ensure implementation of the Act and policies established under the aviation industry. Consequently, it establishes and maintains a registration system for and marking of civil aircraft for licensing for air services, certification, registration and monitoring of aerodromes. Coordinated search and rescue services and guidance; facilitated and provided the chief investigator with all the required assistance for aviation accident and incident investigations; carried out investigations into occurrences that do not qualify as accident and serious incidents.²¹⁹No restriction is imposed under Section 41 of the Civil Aviation Act.

This policy has helped to ensure that when states apply their competition laws, policies, and practices to economic activities in the international air transport market, it should have regard for international comity, moderation and restraint and it should carefully weigh the interests of other states under such circumstances.²²⁰States were encouraged in situations of implementing laws that give rise to actual or potential conflicts in international air transport relations to engage the executive level or branch of government to notify other contracting states of its national interests and seek to solve the conflicts via consultation before taking any unilateral action that might aggravate the conflicts.²²¹

²¹⁸ Section 7,Civil Aviation (Amendment) Act 2016

²¹⁹ Civil Aviation (Amendment) Act 2016, section 7.

²²⁰Guidelines B, D of ICAO Guidance on Conflicts over the Application of competition Laws to international Air Transport.

²²¹Guidelines C, F,G,H of ICAO Guidance on Conflicts over the Application of Competition Laws to International Air Transport at 3-5.

When a private legal action is filed in a court under the competition law of one state, and when such action may affect the national interest of another state. There should be enough machinery to exchange information between these two states under the out laid judicial body without applying the so-called blocking statutes easily in order to reduce the dispute between the states and the same to apply *mutatis mutandis*.²²²

The ICAO greatly helped contracting states on which choice of laws to consider where a conflict arises between the international competition laws and the domestic competition laws. In the case of **Republic v Kenya Bureau of Standards Exparte Kenya Airways Limited**.²²³ The issue of the law applicable and who is obliged to enforce it was discussed thus **Held** that ‘*there is no dispute that the functions of the Kenya Bureau of Standards include promotion of standardization in industry and commerce and such other functions as stated under Section 4 of the Act.*’

However, as regards Civil Aviation industry in Kenya, vide the amendments to the Act made in 2002, the Legislature specifically mandated the KCAA to deal with safety and technical regulations including enforcement of approved technical standards of aircrafts in a manner consistent with the Chicago Convention relating to international standards and recommended practices. That being the case, “this court’s considered view is that all aspects of *aircraft safety and enforcement of approved standards ought to be under taken by KCAA exclusively but in so doing it should co-ordinate its activities with other government agencies*”.

“In view of the fore going, this court finds that the respondent acted in excess of its statutory jurisdiction under the Standards Act by formulating the Standards known as KSISO3324-1:1997 Kenya Standard–Aircraft tyres and rims Part1: specifications, First Edition; and KSISO3324-

²²²Guideline K of ICAO Guidance on Conflict over the Application of Competition Laws to International Air Transport.

²²³ **Republic v Kenya Bureau of Standards Exparte Kenya Airways Limited** [2011] eKLR

2:1998 Kenya Standard–Aircraft tyres and rims–Part2: Test methods for tyres, First Edition.”

“Any administrative act, which is ultra vires, is void in law i.e. deprived of legal effect.”

The Kenya Bureau of Standards intended to implement its own regulations as per the act as far as the quality regulations are concerned. Kenya Airways could not accept to be governed by the Kenya Bureau of Standards regulations since they are licensed and regulated by the Kenya Civil Aviation Authority, vide its regulations adopted by International Civil Aviation Organisation on the quality of tyres and rims to be used by airplanes. It emphasized the application of competition laws to economic activities in international air transport and further suggested that different anti trust and competition laws be harmonised²²⁴and Kenya has harmonised various laws to regulate the competitions laws in the aviation sector.

3.6 International Carriage

It is where the aerodrome of departure and that of the place of destination are situate within two different territories of high contracting parties. “Whether there is a break or not in the carriage, transshipment within the territory of a single high contracting party so long as there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention”.²²⁵ The nature of aviation warrants use of international laws/conventions. In the case of **Western Digital Corporation & Others V British Airways PLC [2000]2LLR142 page 35 HELD** that “*the Warsaw Convention was a complete code in relation to matters falling under it, and the issue of liability of the carrier was one such matters. Further, that the court held that in carriage by air, any action for damages, however founded, whether in contract or in tort, can only be brought subject to the conditions and limits of liability set out in the Warsaw Convention. International law is widely recognised from*

²²⁴ *ibid.*

²²⁵ Warsaw Convention, Article 1(2).

its sources such as the treaties, conventions, customs, court decisions and treaties, General Law."²²⁶

3.7 Treaties

These are agreements between sovereign nations that have been formally adopted under the law of each nation involved thus bilateral while between two nations and multilateral between multiple nations²²⁷. Upon ratification of each treaty by a state it becomes a domestic law thus Article 2(6)²²⁸acknowledges the fact that once a treaty is ratified it becomes part of the law of Kenya.

3.8 Conventions

These are treaties and are supported by an international organization. These are kinds of treaties. This is why agreements are usually signed by several states. Kenya has confirmed many aviation conventions to enable the International Civil Aviation Organization,²²⁹the Montreal Convention and the Warsaw Convention to resolve the aviation competence issue in particular.

The Paris Convention of 1919, for example, eventually formed the first official enforcement agency, the first of its kind in order to establish a rule of law on airspace sovereignty, the registration of aircraft and the requirements for pilots and movements of military aircrafts. Aérienne Navigation²³⁰. This was instrumental in effecting jurisdictional challenges by introducing the sovereignty element²³¹that is being used as a limit basis for defining territorial jurisdiction.

²²⁶ Raymond C. Speciale, Fundamentals of Aviation Law; Pg.280

²²⁷ ibid

²²⁸ 2010, constitution

²²⁹ ibid

²³⁰ ibid

²³¹ Raymond C. Speciale, Fundamentals of Aviation Law pg.281

The limitation period to bring up a suit for a right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date the aircraft ought to have arrived, or date on which the carriage stopped.²³²The court seized with the case shall determine the limitation period.²³³ **Sitati, J's decision in Farida Abdullahi Ibrahim & 2 Others vs. Gulf Air Limited Nairobi HCCA No.95 of 2002**, It was **held** that '*this suit should have been brought within 2 years as provided under Article 29(1) of the Convention*'.

A person intending to sue an airline for the delivery of baggage or products for responsibility should, following discovery of the harm, make a complaint with the carriers for damages to the goods/purses. This is done in the case of the luggage within three days of the receipt date and in the case of products within seven days of the receipt. In the event of delays, the complaint should be filed no later than 14 days from the date of the disposition of the luggage or products.²³⁴

This Article caps the limitation period to have the cause of action to have accrued to 14 days hence, no action shall lie against the carrier, save in the case of fraud on the carrier's part.²³⁵ Whereas the limitation Act²³⁶ provides for 6 years as the limited time from the date of breach of contract for any party to file a suit in court. Due to this conflict in laws, any aggrieved party wishing to file his suit in Kenya will face difficulty when the defence of the Airline lies on the limitation period of two years and Fourteen days respectively. The court will have no option but to consider the choice of law of the forum that gives the court the jurisdiction to deal with the issue at hand.

²³² Article 29(1), 'Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929.

²³³ Ibid, Article 29(2)

²³⁴ Ibid, Article 26(2)

²³⁵ Ibid, Article 26(3)

²³⁶ Section 4, Chapter 22 of Kenya

3.9 Custom

A custom is an overtime course between nations. It must be established that the custom has been applied in the national transactions for a considerable amount of time and the countries involved have come to treat the custom as the law among themselves in a custom which can be recognized as international law.²³⁷

3.10 Courts decisions (ICJ)

International Court rulings which do not bind the court under Stare Decision often guide the court when it examines its prior decisions and the writings of legal experts in order to form conclusions in certain circumstances. On aerial space conflicts, ²³⁸the International Court of Justice is responsible. ²³⁹It is competent to interpret air transport agreements, to provide advice / appeals to and from the ICAO Council.²⁴⁰

In cases brought by the Commission or the Member State of the European Community infringing the European Community Treaty or disputes between the EU member states in relation to EC Treaty concerns, the European Court of Justice shall have jurisdiction. ²⁴¹The ECJ may provide a decision on the interpretation of the actions of Community institutions and their legality. In future such instances, the judgments of this court may be relied upon by the same court to decide on disputes between the parties in court.

²³⁷ Raymond C. Speciale, Fundamentals of Aviation Law; Pg.281

²³⁸ *ibid*

²³⁹ Art.9,36 ,92 of the International Court of Justice of 1945.

²⁴⁰ Art.84 of The Chicago Convention of 1944.

²⁴¹ Art.220, 226, 227, 234& 239 of EC Treaty of 1957.

The Council may serve as arbitrator between the Chicago Convention Contracting States on questions relating to flights and implementation of the Chicago Convention and the special arbitral courts provided under the treaty, or agreed upon by the parties to a dispute.²⁴²

3.11 General Law

Basic law is based on the common law and statutory general principles created by civilized nations. Where these basic legal concepts may be drawn, in any particular instance, is difficult to be exact. However, this vague source of international law may be directed to the International Court in the absence of treaties, conventions or customs dealing directly with the question.²⁴³

3.12 Jurisdictional Forum

Whether the court has the power to settle the issue is the question arising in the situation of conflicts of law or the selection of law cases. If the first question about the court's competence is yes, then the second question is: which law is used to settle the dispute?

As discussed above, a court of law is seized with jurisdiction based on the four forums established by article 28 of the Warsaw Convention. However there instance where the court seized with the matter will have to apply foreign law to come up with a declaration on the cause of action before it, this possess a jurisdictional challenge mostly when foreign law will be in conflict with the local law in which the court is situate. In the case of **King V Cessna Aircraft Co.**²⁴⁴ a court sitting in the Southern District of Florida **Held** that “*Italy was an adequate forum because Cessna was amenable to process in Italy and was willing to submit to the country’s jurisdiction*”. “Although the court had jurisdiction it also considered the various private and public interests such as access

²⁴² Art.84 of the Chicago Convention of 1944.

²⁴³ *ibid*

²⁴⁴ 405 F.Supp. 2d 1374 (S.D. Fla. 2005)

to evidence, availability of witnesses, the sovereigns' interest in deciding the dispute, the need to apply foreign law and other legal practice problems."²⁴⁵

The court noted that "*if it retained the jurisdiction it will have to determine nine issues of foreign law thus concluded that in a tort case the foreign country is ordinarily the best to litigate a dispute concerning a foreign rule of decision*".²⁴⁶

The complexity in resolving the urgent challenges that arise, is the difference in substantive laws of different countries in governing relations while using contracts as a criteria for the choice of law. Contracting states have their own substantive and procedural laws, customs, usages applied in aviation as well as carriage by air. The criteria for settlement of disputes of conflict of laws differ substantially from one contracting state to another.²⁴⁷

Under Article 32 the Convention²⁴⁸ explicitly removes jurisdiction from any other court and terms contained in any contract entered into with any carrier by any traveler. Therefore, any clause in the Contract or any specific agreement entered into before the harm that the Parties allegedly claim to infringe upon the rules established by this Convention shall be null and void, whether by determining the legislation to be used or changing the rules on jurisdiction.

However, in the event of an arbitration in the context of one of the jurisdictions listed in the first subparagraph of Article 28, the transport of goods may be subject to the present Convention. In the case of *Safmarine Container NV of the Kenya Ports Authority*²⁴⁹ of Antwerp the court

²⁴⁵ John F. Easton and Jonathan D. Butler ;Recent Developments in Aviation Law;pg.302 - 303 <http://WWW.jstor.org/stable/25763838> accessed on 21/10/2020.

²⁴⁶ ibid

²⁴⁷ ibid 223

²⁴⁸ Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929.

²⁴⁹ MBSA High Court Civil case 263 of 2010.

concluded that "it is not only the constitution that may, by express provision, bestow or restrict authority, limit the jurisdiction of the court, but also any other legislation."

The choice of the legal regime to be administered where a conflict arises amongst the parties and the development of the same has been instrumental in settling the jurisdictional challenges for it establishes the forum which guides any party on which law applies to them. It also helps in resolving the plaintiffs claim as far as compensation is concerned.

Article 28 of the Warsaw convention provides for the venue/ forum in which to sue and further at Article 28(2) states that the forum court procedural rules will apply hence only apply in implementing the substantive law such as the Warsaw convention or the foreign laws to be litigated upon²⁵⁰. In the case of **Spencer V Northwest Orient Airlines, Inc**²⁵¹ it was **held** that "so far as Article 28 would operate as a plea in bar to the maintenance of an action for damages against an air carrier. It seems to me to be concerned only with the question of the circumstances under which resort may be had to the national court system of one of the high contracting parties as the forum available to a claimant in which to pursue his remedies." "Foremost once one of the requirements of Article 28 is that the domicile or place of business of the carrier is in the territory of one of the high contracting parties, and then the plaintiff seeking damages against that carrier can sue in the courts of that high contracting party as per its laws of procedure"

In Kenya, the Warsaw convention was ratified through the Carriage by Air Act and the provisions of the convention are applicable in Kenya.²⁵² The court seized with the jurisdiction shall always adhere to international laws and foreign laws to which the parties contracted thus where there is a

²⁵⁰ Charles E. Robbins, Jurisdiction Under Article 28 of the Warsaw Convention P.g 353

²⁵¹ [1962] 201 F. Supp. 504 (S.D.N.Y)

²⁵² Section 3 of the Carriage by Air Act.

conflict between the laws of two high contracting parties, the court shall always make a decision on which law to apply.

In cases where the liability is or may be partly executive in other actions in Kenya, the court proceedings initiated in order to execute a liability restricted by Article 22 of the Convention shall. If not, if the limitation had been imposed just in the proceedings before the Court or to make any portion of its adjudication conditional upon the conclusion of other procedures, the jurisdiction to award an amount would have been less than the Court would have granted.²⁵³

This provision conflicts with the laws of other high contracting states who have domesticated the Warsaw convention word for word as far as Article 22 of the Warsaw convention is concerned. The same provides for the compensation limit as 125,000 francs thus the courts in Kenya do not have that jurisdiction to lower it down.

Having analyzed the legislative framework leading to the choice of law in the aviation industry, and jurisdictional forum to be considered by any aggrieved plaintiff and all the possible jurisdictional challenges likely to arise, I proceed to the next chapter to discuss how the various aviation judgments or orders are enforced within this dynamic industry. The study shall proceed to examine the execution of foreign judgments and orders obtained in the aviation law forum.

²⁵³ Section 6; Carriage by Air Act

CHAPTER FOUR

THE ENFORCEMENT OF FOREIGN JUDGMENTS AND ORDERS IN AVIATION

4.1 Introduction

A judgment is a decision made by a competent court equipped with jurisdictional authority over the issues adjudicated before it. A judgment becomes foreign when any of the parties seek to enforce it outside the territorial jurisdiction of the court, which awarded it. Any party who seeks to enforce a foreign judgment/orders, decree has a statutory obligation to perform to ensure a particular procedure is followed to put to effect his foreign Judgment/ orders, decree.

4.2 Enforcement in Kenya

Kenya enacted a foreign Judgments Act, to provide for procedures on how contracting states that have signed reciprocating agreements can have their judgments executed in either countries based on the national laws of that reciprocating country.

The reciprocating countries are stated in the schedule of the Act²⁵⁴.

Judgments and decrees obtained from superior and subordinate courts of Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, the United Kingdom, and Republic of Rwanda.²⁵⁵ For recovery of any debts, damages, costs, compensation, specific performance and it is required that the decree shall be executed in Kenya upon the person or property of any party to that suit in Kenya the judgment and decree shall be transferred to the High Court of Kenya.

²⁵⁴ Foreign Judgments Act

²⁵⁵ First schedule Foreign Judgments Act

The enforcement can be in respect of a decree, order of a designated forum court where a sum of money is made payable, and movable property is ordered to be delivered to any person, including payment of a lump sum as financial provision.²⁵⁶

Enforcement of foreign judgments can only take place between the countries listed in the foreign judgment Act schedule as the reciprocating countries.

Kenya is not having reciprocating agreements to enforce foreign Judgments with all the high contracting states as envisaged by the Warsaw Convention forums thus posing a challenge in enforcement of the aviation judgments issued in countries not listed in the foreign judgment Act save for those where Kenya has signed bilateral aviation agreements.

In the case of **Mohamedali Mulla Ebramji -v- Alibhai Jivanji Mamuji²⁵⁷ and Nagina Singh t/a Tarlochan Singh s/o Boor Singh²⁵⁸**, It was **Held** that *‘Kenyan Courts have no jurisdiction to hear and make determination on foreign judgments from non-designated countries.’*

Section 10²⁵⁹ indicates that Kenyan courts acquire jurisdiction by way of consent from high contracting party states to the Convention who have not availed themselves to the additional protocol. This applies where an action is filed under the provisions of Article 28 of the Convention to enforce a claim, and proceeds to the hearing of the same never the less the court cannot issue execution against the property of any High contracting Party. In the case of **Keshavji Ramji Ladha -v- Bank of Credit and Commerce International**²⁶⁰ this Court expressed:

“It is now trite in civil litigation in this jurisdiction that a judgment of whatever nature, whether foreign or otherwise, is good until otherwise declared. But it is not in its form as a judgment per

²⁵⁶ Foreign Judgments Act, section 3(1).

²⁵⁷ [1917] Vol. VII EALR 89

²⁵⁸ [1936] Vol. XVII KLR 82.

²⁵⁹ Carriage by Air Act

²⁶⁰ – SA (BCCI), Civil Appeal No. 44 of 2004,

se that it is capable of being enforced. It has to take the shape of another procedural document before it can reach any execution stage”.

4.3 Bilateral aviation agreements as a mechanism of enforcement

Kenya has signed several bilateral agreements with various countries to foresee development of its commercial planes carry passengers from one country to another. The bilateral agreements lead to the grant of rights by the parties. The airlines of the parties shall enjoy the right to fly without landing across the territory of the other party. The right to make stops in the other territory for non-traffic purposes, offload and take passengers on board and by execution of the agreements, each party may designate through diplomatic channels. Airlines have to seek authorization to operate the agreed services in accordance with the bilateral agreements with minimum procedural delay.²⁶¹

The Ministry of Transport, Infrastructure, Housing and Urban Development negotiates and reviews Bilateral Air Services Agreements between Kenya and various Countries to enable Kenyan air operators such as Kenya Airways provide scheduled air services and expand their existing route network. In addition, the Agreements allow foreign carriers access the Kenyan market. These Agreements are negotiated by a team comprising of representatives from the Ministry of Foreign Affairs, office of the Attorney General and Department of Justice, Kenya Civil Aviation Authority, Kenya Airports Authority, Kenya Tourism Board, Kenya Airways.²⁶²

Kenya has executed several bilateral air services agreements with other countries such as:- ‘Kingdom of Cambodia negotiated and executed on 19th September, 2014. Burkina Faso was negotiated and executed on 14th December, 2018. Finland was negotiated during ICAN 2017 on

²⁶¹ BASA Report Pg.7

²⁶² BASA Report (Bilateral Air Services Agreement), p. 7.

5th December, 2017 and signed on 14th December, 2018. Seychelles negotiated on 13th December, 2013. Hellenic Republic negotiated on 5th December, 2016 and signed on 14th December, 2018.²⁶³

The agreements were negotiated in accordance with the National Integrated Transport Policing, which states that, under the Yamoussoukro Decision for Countries within Africa and based on fair, equal and reciprocal opportunity for other States, Kenya wants to liberalize new and existing agreements.²⁶⁴

On 1 April 1933, Hague signed an International Sanitary Convention²⁶⁵ on Air Navigation enabling States to enforce, in the presence of a contracting State's aircraft, specific sanitary and quarantine rules on infectious diseases. In order to minimize increased delays on arrival of aircraft, the arrangements implemented for the sanitary services and supplies, and the reservation, are for inspection in particular areas.

This Convention was not an aviation convention, but its rules relating to passengers flying in the air by which they must hold an immunization certificate to present the immigration authorities at the entrance airport. This includes different laws on pesticides, cholera, yellow fever, typhus and small pox dissemination. The sanitary treaty signed in Washington on 15 December 1944, with a Protocol to that Convention signed on 23 April 1946, modified several of its provisions.²⁶⁶

4.4 Procedure on enforcement of foreign Judgments

In order to get this decision recorded within 6 years after the judge's date the decree holder of a designated court and nation with which the reciprocal agreement is reached with Kenya applies to

²⁶³ *ibid*, The Ratification of the Bilateral Air Services Agreement between Kenya and the Hellenic Republic Kenya and Burkina Faso; Kenya and Cambodia; Kenya and Seychelles and Kenya and Finland, p. 14.

²⁶⁴ *Ibid*

²⁶⁵ Of 1933

²⁶⁶ Legal rules for international aviation (1945), pp. 276-277.

the limitless court of authority. Where the appeal against the decision was brought, the date of the last judgment in the proceedings.²⁶⁷

In *Elizabeth Namutebi v Threways Shipping Services (K) Ltd*²⁶⁸ it was held that the application is made *ex parte* apparently because, from the disclosures made the judgment-debtor appeared in the original suit and or was represented by legal counsel. The application is accompanied by an affidavit in support thereof a certified photocopy of the Decree, Ruling on Taxation; and the judgment.

This application is governed by section 5 of the Foreign Judgment (Reciprocal Enforcement) Act, and more specifically Section 5(4) which requires that the application should be accompanied by certain pertinent documents. The specific requirements are discernible from Section 5(4) and the application for registration of a judgment under subsection (1) shall:-

- a. Please include in the schedule a certificate like that, original court decisions and the seal, executed by that court registrar and an affidavit for the same purpose.
- b. Have attached the judgment or the exemplification thereof, or a copy thereof, certified or properly verified, by a notary public on the registrar of the original court or certified in an affidavit, where the judgment is not in the English language;
- c. A declaration accompanying an affidavit:—
 - i. That the judgment, or, as the case may be, the amounts or pieces of moveable property for which the judgment remains unsatisfied, was not satisfied on the date of application;

²⁶⁷ Foreign Judgments Act, section 5(1).

²⁶⁸ *Elizabeth Namutebi v Threways Shipping Services (K) L* [2014] eKLR

- ii. the execution of the decision in the nation of the originating Court might be enforced at the date of the application;
- d. Where judgment may only be registered pursuant to section 6(5), the provisions on which judgment is sought shall be recorded with respect to certain sections thereof;
- e. In case of decision of a superior court of a common nation of wealth, accompanying the certificate under the seal, signed by a judge or registrar in that country, unless the High Court differently orders; to be certified that the tribunal is in that country a Superior Court;
- f. Additional proof may be accompanied as specified.

After the application is heard, the Court may appeal the debtor of the court or have the decision served on the debtor of the judgment in line with Order V of the Rules of Civil Procedure.²⁶⁹

4.5 Legal frame work on enforcement in the aviation industry

The aviation industry involves aircrafts, which are constantly on the move from one jurisdiction to another, and thus the enforcement of court orders against an aircraft can only be achieved through enforcement of foreign judgments procedure.

The Cape Town Convention was implemented by the Contracting Parties in order to tackle the problems inherent in financing arrangements and safeguarding the interests of lenders, in order to cap those gaps in the aviation sector. An aircraft freshly acquired from a Kenya creditor may want to be used as collateral for a loan, but the fact that it is easy to move an aircraft into another country where the interest of the lender cannot be safeguarded reduces its expectations.

Due to this problem, majority of the nations engaged in the Convention²⁷⁰ in Cape Town which attempted to develop an agreement to make the title, security interest in aircraft and leasing of

²⁶⁹ Foreign Judgments Act, section 5 (3).

²⁷⁰ Raymond C. Speciale, Fundamentals of Aviation Law; p. 286.

aircraft more solid and enforceable. The Cape Town convention for the air frames, aircraft engines, and helicopters which are beyond specific weight limits was adopted by fifty-three countries in 2001.²⁷¹

Kenya ratified and domesticated the Cape Town Convention by enacting the International interests in Aircraft Equipment Act, which gives the High Court Jurisdiction²⁷² to handle all causes of action arising from it. It also established an international registry where all interests in aircraft equipment have to be registered²⁷³ if a party is to acquire ownership rights.²⁷⁴

The court in the case of **Rudufu Limited v Pt.Transnusa Aviation Mandiri & 2 others; Freedom Airline Express Limited(Intended Interested Party)**²⁷⁵ Observed *‘the significant features and restrained the Defendants from dealing and/or transacting in any manner in the aircraft Fokker 50 Manufacturer Serial Number 20260, Registration No.5Y-JRN to defeat or otherwise prejudice the Plaintiff’s interests which were duly registered.’*

The Cape Town Convention became effective on 1st April 2004 and eased funding of aircraft transaction due to the lower financing charges.²⁷⁶

It has also helped in recovery as was discussed in the case of **Fly Aviation Services vs-Bravo Cargo Air Dwc Llc & 2others**²⁷⁷ where it was **Held** *‘that there is no cogent evidence that the aircraft was in fact disposed of at the time of the first application. In fact, Kenya Civil Aviation Authority(“KCAA”)reports attempts at disposal were on going on 24th August 2015.It could also*

²⁷¹ Sean D. Murphy (2004), Contemporary Practice of the United States Relating to International Law: Private International law: Cape Town Convention on Financing of High- Value, Mobile Equipment. (The American Society of International Law American Journal of International Law, 98 A.J.I. L 852).

²⁷² Section 6 International Interests in Aircraft Equipment Act,

²⁷³ 1st Schedule, Article 16 , International Interests in Aircraft Equipment Act,

²⁷⁴ Article 29(1), (3a) Convention on International Interests in Mobile Equipment Act.

²⁷⁵ [2019] eKLR

²⁷⁶ Raymond C. Speciale, Fundamentals of Aviation Law; Pg.281

²⁷⁷ Fly Aviation Services V Bravo Cargo Air Dwc Llc & 2 others [2016] eKLR

be the case that the negotiations were taking place during the currency of the Court's order of 22 May 2015 prohibiting attempts at disposal. Again, that is a matter for Trial apart from the absence of any cogent believable evidence of purchase; the Objector is tainted by Defendant's unclean hands in relation to its conduct regarding failure to supply the aircraft and then default refund/payment.'

Through its Application, the Objector demonstrates knowledge of the facts. The timing suggests the consent and purported sale was merely a device to evade payment.

The enactment of an express law governing financing of aircrafts (Cape Town Convention) gave a universal jurisdictional bearing on the contracting parties while trying to enforce their interests and rights in the various courts of the contracting members thus the enlargement of the list of states listed in the foreign Judgments Act.

The challenge a decree holder can obtain in this particular arrangement is to the effect that he may intend to enforce that judgment/decreed in a given country and before the same is registered for enforcement the intended aircraft for attachment leaves the country to which the decree holder intends to enforce. The other challenge is when a country issuing the judgment/ decree has no reciprocating agreement to enforce a foreign judgment in the advance party's country.

In conclusion, the enforcement of foreign judgments in aviation law is a great challenge to parties for the procedure of enforcement differs from one country to another and dependent of the foreign judgment reciprocating Act. In the case of **Keshavji Ramji Ladha -v- Bank of Credit and Commerce International – SA (BCCI)**²⁷⁸, this Court stated that *“It is now trite in civil litigation in this jurisdiction that a judgment of whatever nature, whether foreign or otherwise, is good until*

²⁷⁸ Civil Appeal No. 44 of 2004

otherwise declared. It is not in its form as a judgment per se that it is capable of being enforced. It has to take the shape of another procedural document before it can reach any execution stage”.

It takes a lot of time due to the judicial procedures for any attachment of an aircraft to be done. This makes enforcement difficult since aircrafts move from one jurisdiction to another and by the time, the judgment debtor discovers the intention of the creditor he will ensure the aircraft does not go to that jurisdiction with attachment orders.

4.6 Conclusion

“It has been seen that at common law, the only method of giving affirmative effect to a foreign judgment in the English jurisdiction is to institute an English action upon the foreign judgment in order to obtain a judgment upon a judgment. This procedure is in practice not as cumbrous as it would appear to be since, owing to the conclusive effect normally produced by a foreign judgment, a limited number of defenses is admitted²⁷⁹”.

On establishment of a vacuum on enforcement of aviation law related judgments and orders leads us to the next chapter which is a recap of a conclusion on what should be done to enable effective enforcement of aviation law related disputes occurring in different apparent juristic.

²⁷⁹ [Clive Maximilian Schmitthoff](#); English Conflict of Laws, Private International Law”, 2nd edition at page 438, London, Sir I. Pitman & Sons, 1945.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Findings of the Study

The study makes the following findings:

The existence of foreign elements in this field of aviation law, inconsistencies on points of contract on the law applicable despite the different substantive and procedural laws of contracting member states, and enforcement of aviation related foreign judgments creates a challenge on legal security.

The research reveals that there has been a success on the international unification of private laws on the issues of jurisdictional forum, standard monetary remedies applicable amongst others pleaded based on the substantive laws of the member contracting state. It is also a finding that enforcement of those orders/ foreign judgments obtained is a challenge due to the lack of reciprocating agreements amongst member states.

The conventions have unified only certain rules with respect to the contract of carriage and the liability arising thereof. Upon considerable judicial hesitation, it is now established, in both the United States and England, that in case of actions for personal injury, Article 17 of the convention, is the only exclusive remedy if the convention provides for no remedy; there is no other remedy at common law. The case is different with Kenya that gives a variety of remedies to litigants.

Numerous conventions were enacted over years namely: -

- (i) “Warsaw Convention, for the Unification of Certain Rules Relating to Carriage by Air of 1929”²⁸⁰ that unites rules in regard to documentations of carriage thus uniformity of substantive laws on liability of the carrier.²⁸¹
- (ii) The “Rome Convention on Precautionary Attachment of Aircraft of 1933”.²⁸²
- (iii) “Rome Convention for unification of certain rules relating to damages caused by Aircrafts to third parties on the Surface 1933”.²⁸³
- (iv) “Geneva Convention on the International Recognition of Rights in Aircraft 1948”.²⁸⁴
- (v) “Rome convention on damages Caused by Foreign Aircrafts to third parties on the Surface 1952”²⁸⁵.
- (vi) “Hague Protocol to Amend the Warsaw Convention 1955”²⁸⁶
- (vii) The “Quadalajara Convention, supplementary to the Warsaw Convention 1961”.²⁸⁷
- (viii) “A draft Convention on Aerial Collisions is presently on the agenda of the Legal Committee of ICAO”.²⁸⁸

The enactment of the Cape Town Convention established an international registry with a central registrar to register financial claims, debts, charges against aircrafts and whose members are encouraged to enforce in case any attachment of an aircraft is concerned.

²⁸⁰ Matte N.M., *Traits de Droit Aérien-Aéronautique*, 2^eme Ed. (Paris 1964), p. 860-878.

²⁸¹ 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

²⁸² Matte N.M., *op. cit.*, p. 886-888.

²⁸³ *ibid.*, p. 889-893.

²⁸⁴ ICAO Doc. 7620.

²⁸⁵ ICAO Doc. 7379 - LC/34 Vol. II.

²⁸⁶ ICAO Doc. 7689 - LC/140, Vol. II., p. 1-13.

²⁸⁷ ICAO Doc. 8181.

²⁸⁸ ICAO LC/ Working Draft No. 732.

This however on enactment of the Cape Town Convention and having the same being ratified in Kenya does not amend the foreign Judgment Act and the civil procedure rules of Kenya on enforcement of foreign Judgments in Kenya.

This still possesses a jurisdictional challenge on enforcement of foreign judgments arising from countries, which do not have a reciprocating agreement with Kenya despite having registered interests at the registry established by the Cape Town Convention.

The study has also proven that Article 28 of the Warsaw convention plays a great role in the unification of international aviation laws by establishing a forum/ substantive law to be applied on resolving the possible conflict of laws that would arise at the forum court.

5.2 Conclusions

The Aviation industry is a diversified dynamic industry that is fast growing, thus requires constant law checks to cover the growing lacunas in law at all times. It is an industry that involves cross boundary regulations having an apex difficulty in their jurisdictional applicability.

The desire of a dedicated general law to regulate the aviation industry is far from being reached due to the diversity of the aviation industry on the cross border laws.

Article 28²⁸⁹ established the various forums to which an aggrieved party may sue and further allowed the forum court to use its procedural laws in handling the dispute, save for the substantive laws where the aviation international conventions still apply together with the aviation regulations of the forum state. In case of an accident, and the forum state not being the accident place will lead to difficulty on applicability of foreign laws. In the case of **King Vs Cessna Aircraft Co.**²⁹⁰ it was held that in a tort case, the foreign country is ordinarily the best place to litigate a dispute revolving around a foreign rule of decision.

²⁸⁹ Warsaw Convention

²⁹⁰ [2005] 2d 1374 (S.D.Fla) [405] (F.supp).

5.3 Recommendations

- There is need for high contracting member states to create an international special civil aviation law Registry to be, domesticated by the contracting member states to be recognised by all ICAO member states.
- The judgments arising out of civil aviation law dispute of high contracting member states to be enforced without the need of high contracting members having a prior reciprocating agreement but to do so by virtue of the fact that they are high contracting members to the ICAO, Warsaw convention, Hague convention , Montreal Convention, Cape Town Convention and the protocols therein.
- There is need to have the aviation law judgments registered at the international registry for purposes of enforcement and publicity.

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