MARITIME AND AERIAL TORTS

Written by ***Neha Bargotra*, Sagarika Mishra** & Yogita Raj******

** 3rd year BA.LLB (H) Student, Amity University*

*** 3rd year BA.LLB (H) Student, Amity University*

**** 3rd year BA.LLB (H) Student, Amity University*

INTRODUCTION

What Is Private International Law?

"Private International Law" or "The Conflict of Laws" is that branch of law which deals with the cases in which some relevant fact has a geographical connection with a foreign country or if there is some foreign element involved in the case. There may exist a foreign element because the parties may be citizens of a foreign country, or domiciled in a foreign country, and the dispute may relate to their status or their property situated in that country; or the dispute may relate to a contract between parties living in 2 different countries; or a suit may relate to a tort committed. In all such cases, there exists a foreign element. And in all such cases where a foreign element is involved, the principles of conflict of laws are applied. These principles are applied by the courts as a part of applicable rules of domestic law.

Almost every country, in the modern era, has not only its own system of municipal law but also its own system of conflict of law. And there is need for rules of conflict of laws because the world is divided into several territorial units with different legal systems containing different rules on subjects such as contracts, torts, succession to property etc., and people move from unit to unit or enter into personal or commercial relations in such units or with people in such units. When this happens, courts voluntarily apply the conflict of law rules of their country to resolve the problem. While certain rules of conflict of laws are accepted in most countries, other rules differ.[1]

Thus, Private International Law may be defined as the branch of laws of a country which determines:

(i) What laws, whether domestic or foreign, the courts shall apply to disputes between individuals in their private legal relations but involving a foreign element, and

(ii) What courts shall have jurisdiction or competence to decide those disputes.

According to this definition, following may be the principles of Private International Law:

[1] Viswanathan R vs. Rukn-Ul-Mulk Syed Abdul Wajid; AIR 1963 SC 1

(i) It is a branch of national law,

(ii) It is administered by the courts of nation, or the land,

(iii) It is generally administered over the individuals, whether citizens or individuals, and

(iv) There is always a foreign element in all these cases

Thus, Private International Law is the means to find out the applicable law in case of a dispute that involves a foreign element.

I. Basis of Private International Law

The basis or foundation of the rules of conflict of laws is principally the need to do justice. It would be unjust if a dispute with, say, a French element is decided by an Indian court applying only the rules of law in force in India merely because it is an Indian court which is deciding it. The result would have been different had a French court decided it applying the rules of French law. [2]

In the matter of *Stephens vs. Falchi* [3,] it was correctly held by the court that "*Whether or not the conditions are such as to require the application of the rules of law of another country is a question that must be decided by court under their own law"*

The function of conflict of laws is to indicate the area over which the rule extends – its deals with the application of laws in space. To quote a distinguished writer, *"it is the diversity of positive laws [in different territorial units] which makes it necessary to mark off for each in sharp outline, to fix the area of its authority, to fix the limits of different positive laws in respect to one another."*[4]

It has also been suggested that the doctrine of comity of nations is the basis for applying the principles of conflict of laws. Comity means the accepted rules of mutual conduct between states, which each state adopts in relation to other states and expects other states to adopt in relation to it. [5]

An instance of the Indian Legislature recognizing the rule of comity occurs in Section 11 of the Foreign Marriages Act, 1969. The Act permits Indian diplomatic & consular officers to perform the marriages of persons, one of whom is a citizen of India, abroad, but provides that no such marriage can be performed if such a marriage is prohibited in the country where it is to be performed. The Joint Committee of Parliament also gave explanation as to why this rule was enacted, *"it was done because permitting the performance of marriage prohibited in the country where it is performed would have been contrary to international law or the comity of nations, and*

[2] Technip S A vs. SMS Holding (P) Ltd. (2005) 5 SCC 465
[3] [1938] 3 DLR 590
[4] Savigny, *Private Int. Law,* cited in Cheshire, North & Fawcett, *Private Int. Law*, fourteenth edn, p 6.
[5] Buck vs. Attorney-General [1965] Ch 745, 770; [1965] 1 All ER 883 (CA)

parliament desired that a marriage performed under the Act have a high degree of international validity."

II. Unification of Private International Law

Dictionary meaning of unification is "being united or made into a whole." [6]

A hundred years ago, many lawyers believed that the law of individual nations could, and would, eventually become unified. In a well know speech made in 1888, Ernst Zitelmann advanced a case for "global law" (Weltrecht). According to his argument, because the formalities of legal provisions are common everywhere and the policy goals are, or are going to be shared by every civilized nation, the law of every nation will in end converge.

Now, it has been said earlier that the need for private international law arises because the internal laws of different countries differ from each other. If the internal laws of the countries of the world lay down uniform rules, probably there will not be any need for private international law. But then, difference is not only in the internal laws of different countries but also in the private international laws of countries, on account of which sometimes conflicting decisions are pronounced by the courts of different countries on the same matter. Thus, the need for the unification of rules of private international law arises.

There are two modes for unification of private international law:

- Unification of the internal laws of the countries of the world, and
- Unification of the rules of private international law

III. Unification of the Internal Laws of the Countries of the World

The first step in the direction of the unification of internal laws was taken by the Bern Convention of 1886 under which an international union for the protection of rights of authors over their literary and artistic works was formed.

After the First World War, an international institute for Unification of private laws was established at Rome. The institute has achieved some success in the field of unification of civil laws of different countries of the world. The Warsaw Convention of 1929 which has been amended by the Hague Convention of 1955 is a landmark in this direction. This convention provides for uniform rules relating to carriage of goods and persons by air.

[6] Meeriam-webster online dictionary

If looked at in the background of fundamental differences in the various systems of law in the world, this achievement is not very poor, though looked at in the overall perspective, it is quite insignificant.

There has also been an attempt at the unification of civil law between the Soviet Union and the People's Democracies of Eastern Europe. These countries have also attempted to unify certain laws with the West European Countries. For instance, Convention on Economic Assistance.[7]

But this method of unifying laws is not successful due to reasons such as the kind of society of one nation differs from society of another nation. Public policy is also one such illustration, due to which unifying internal laws of all the nations of world in not practically possible.

In this project we are going to look at topic of torts in private international law.

TORTS

'TORT' may be defined to be an injury or a wrong committed with or without force to the person or property of another. A tort is an act or omission that gives rise to injury or harm to another and amounts to a civil wrong for which courts impose liability.

In the context of torts, "injury" describes the invasion of any legal right, whereas "harm" describes a loss or detriment in fact that an individual suffers. The boundaries of tort law are defined by common law and state statutory law. Judges, in interpreting the language of statutes, have wide latitude in determining which actions qualify as legally cognizable wrongs, which defenses may override any given claim, and the appropriate measure of damages.

Torts fall into three general categories:

- Intentional torts (*e.g.*, intentionally hitting a person)
- Negligent torts (*e.g.*, causing an accident by failing to obey traffic rules)
- Strict liability torts (*e.g.*, liability for making and selling defective products - s*ee* Products Liability).

Intentional torts are wrongs that the defendant knew or should have known would result through his or her actions or omissions. Negligent torts occur when the defendant's actions were unreasonably unsafe. Unlike intentional and negligent torts, strict liability torts do not depend on the degree of care that the defendant used. Rather, in strict liability cases, courts focus on whether a particular result or harm manifested.

There are numerous specific torts including trespass, assault, battery, negligence, products liability, and intentional infliction of emotional distress. There are also separate areas of tort law including nuisance, defamation, invasion of privacy, and a category of economic torts.

[7] Convention on Economic Assistance, 1956

Foreign torts under Pre-Rome-2 Regulation law

Lex loci delicti (foreign law)

Tort is a civil wrong and if such a tort is committed outside the territorial limits of the country it is called a 'foreign tort' i.e. in foreign country. A foreign country means any country which is beyond the borders of the state where the action is brought.

For example :- A, an Indian commits a tort in Sri Lanka, which is a foreign country for India. The Indian court has no competent authority to try such a tortuous cause. Only Sri Lanka is competent to try such a case. If B, a citizen of Sri Lanka, publishes a defamatory matter against C, an Indian citizen, residing in Chennai, C can sue B in the Chennai court.

Foreign tort can be of two kinds;-

- A tort to realty; - when a tort is committed with respect to immovable property I a foreign country no action can be maintained in England though the wrongdoer is a British subject resident in Britain. In India also the same rule is applicable. If an action or trespass or any injury to land is caused outside India then it cannot be brought in India as given under section 16 of CPC.
- Personal tort; - when the injury is caused to a person or movable property. Where,

However, tort is once committed with respect to movable property or against the person of the plaintiff, an action of tort is maintainable provided that the following two conditions are fulfilled:-

a) The act must be unlawful in the place where it was committed.

b) The act complained of must be of such a character that it would have been actionable if committed in England.

FOREIGN LAW ON TORTS

The feature of tort in private international law is that if the tortuous act has been committed entirely locally, the lex loci deliciti governs it, irrespective of the fact whether it has or has not some foreign element, such as, both or one party to the suit is domiciled or president abroad or national of another country. [8] The foreign law is relevant only in some very exceptional situations.

Mainly, the following three theories relating to application of law foreign torts have been propagated:

- **The lex fori theory**
- **The lex loci commissi theory**

[8] Szalatnay-Stacho vs. Fink, (1947)1 K.B. 1.

- **Proper law or social environment theory**

The lex fori Theory

Lex fori is a legal term used in the conflict of laws used to refer to the laws of the jurisdiction in which a legal action is brought. It is a Latin term referring to the laws of the forum.

The theory of lex fori was that edictal liability was either akin to the criminal liability or else closely connected with the fundamental principles of public policy applicable in the country of the forum, and therefore it should be governed by the lex fori stated Savigny.

The English court have never followed this theory as this doctrine would lead to the most inconvenient and startling consequences.

In **Boys v. Chaplin**[9] which is mainly concerned with the second part of the rule has not been critical of the first part of the rule. In fact, Wilberforce, L.J. specifically said: "I am of opinion, therefore, that, as regards the first part of this rule, actionability as a tort under and in accordance with English law is required." A question arises at this stage as to whether there is difference in meaning between actionable and not justifiable. The formulation of this proposition was made in Phillips case, the meaning; or rather tile interpretation of the word "justifiable" has been giving trouble for now almost a century.

It appears that the real mischief was done by the decision in **Machado vs. Fontes** [10]the plaintiff Machado sued defendant Fontes in an English court for a pamphlet published in Brazil containing libelous material against him (plaintiff). Under the then law of Brazil publication was not actionable in civil proceedings, though it was probably subject to criminal proceedings. It was obviously actionable as tort by English law. The main defence of the defendant was that the publication was not actionable by the law of Brazil. Rejecting this plea the court said that the two conditions laid down in Phillips case are fulfilled inasmuch as the first condition was fulfilled because the libel was of such a character that it would have been actionable if committed in England, and the second condition was fulfilled because it was not justified by the law of Brazil, since it was not an innocent act there but subject to criminal proceedings. Ever since this decision has been pronounced, it has been subject of criticism. The main criticism that arose is not actionable by the lex loci delicti commissi it should not be held actionable just because it is actionable under lex fori.

The lex loci commissi Theory

Lex loci delicti commissi means the law of the place where the tort was committed. The term is commonly shortened as lex loci delicti. This phrase is commonly used in private international law. This phrase refers to the place of injury or wrong. When a case having foreign elements comes

[9] [1969] 2 All E.R. 1085 (H.L.)
[10] [1897] 2 Q.B 231

before a court the court applies private international law. In such circumstances, lex loci delicti commissi is one of the possible choice of law rules applied to cases arising from an alleged tort.

According to Wills, 'the civil liability arising of a wrong derives its birth from the law of the place, and its character is determined by the law'.

Lord Haldane said that if the lex loci delecti did not confer any right to sue, then the common action for damages for tort cannot be maintained, even if it is a tort under the lex fori. This theory prevails in the United States. The difficulty of application of this theory arises in those cases where the facts constituting tortuous act take place in more than one country. There is hardly any English decision on this aspect of the choice of law.

Cheshire suggests a test by which the theory of lex loci delicti commissi can work in all situations. According to him the lex loci delicti commissi is applied partly because it is the law of the country which is most directly affected by the defendant's allegedly tortuous activity and party in order to five effect to the reasonable expectations of the parties.

The proper law theory (Environment theory)

Lord Denning, M.R. propounded proper law theory thus; 'after considering the authorities, I am of the opinion that we should apply the proper law tort , that is, the law of country with which parties and act done have the most significant connection. And once we have decided which the correct law to apply is. I think that law should be applied, not only to ascertain whether there is a case of action, but also ascertain the heads of damages that are recoverable and also the measure of damages: for these are matters of substantive law.

They are quite distinct from the mere qualification of damages, which is a matter of procedure for the lex fori.

CASE LAWS

Phillips v. Eyre [11]

In this case, A filed a suit against governor of Jamaica for false imprisonment. The governor pleaded that the arrest was made in connection with suppression of rebellion and that the arrest he made was under the authority of act of Jamaica legislature. The court observed that 'by the law of another country an act complained of is lawful, such act, though it would have been wrongful by our law if committed here, cannot be made the ground of an action in English court.' It was held that the plaintiff could not succeed. The Privy Council was of the view that it was contrary both to principle and authority to give a remedy for that which did not constitute wrong by English law, even though it was a wrong under the lex loci delicti commissi. Thus, the double action ability test came to be applied: the wrong complained of must be wrong not only under the lex loci delicti commissi but also under the English law, the lex fori.

[11] [(1870) LR 6B1]

As already stated, where a tort is committed in England, English law will apply; but where it is committed in England, English law will apply but where it is committed abroad, the double action ability rule in Phillips case will apply this rule has two limbs: The act must be actionable as a tort in England and it must not have been justifiable by the law of the place where it was committed.

Babcock v. Jackson [12]

This is a landmark U.S. case on conflict of laws.

A husband and wife from New York went on a car trip with a friend Babcock to Ontario. While in Ontario they had a motor vehicle accident. Babcock sued Jackson, the driver, claiming his negligence caused the car crash.

This case brought up a question of 'choice of law'; if the law of the place of residence of the accident victims (New York) be applied, or, should the law of the place of the tort (Ontario) be applied. Under the old conflict rules, the law of the place of the accident should apply. However, Ontario had a law that prohibited passengers from suing the driver.

The court rejected a traditional fixed method of determining which law should apply, and instead, a process of weighing factors such as relationship between the party, decisions to take the trip, connections to the locality. Thus, the Court held that the parties did not have substantial connection with Ontario and so it would be unfair to apply the law as the location was largely fortuitous. The Court found that the jurisdiction with the most connections was New York and so New York law should apply.

THE MODERN ENGLISH LAW

Jurisdiction

Since an action on tort is an action in *personam* the English court acquires jurisdiction by the mere presence of the defendant within the jurisdiction.

WHAT IS *LOCUS DILICTI?*

It refers to the place where the tort, offence or injury has been committed. It is a Latin term which means 'scene of the crime''.

In case of civil proceedings it is the place where an alleged thing was done. For e.g. the place where the disputed property lies. Locus Deliciti gives the court exclusive jurisdiction over the

[12] 191 N.E.2d 279 (N.Y. 1963)

dispute or crime. Under common law, crimes are local and it's cognizable and punishable exclusively in the court where it is committed.

In **Monro (George) Ltd. American Cynamid and Chemical Corporation,**[13]

A suit was filed with the averments that the defendant company was liable in negligence for selling to the plaintiffs in New York a substance without warning them of its dangerous qualities. The substance was shipped to England where the plaintiffs sold it to a farmer who suffered injury by its use upon its land.

It was held that since the alleged tort i.e. the sale of the harmful drug without warning was committed in the United States the leave to serve the writ out of the jurisdiction could not be given.

Similarly in **Bata vs. Bata,**[14] a libelous matter had been published abroad from where it was posted to England and was further published.

The court of appeal distinguished the **Monro case** (mentioned above) by saying that the tort was committed in England and leave to serve out of the jurisdiction was granted.

The Privy Council considered the question in **Distillers Co. (bio chemical) Ltd. vs. Thompson**[15] where a similar provision of the New South Wales law came for interpretation and said that what was necessary was the act or omission on the part of defendant, which gave the plaintiff his cause of complaint should have been performed within the jurisdiction. In this case the act complained of was the omission of the defendant to give warning that the article was dangerous if taken by the expectant mother if taken in the first three months of pregnancy. Since this warning was not communicated in New South Wales, the omission took place there where the plaintiff's mother purchased the drug.

It seems that these cases lay down that if act or omission constituting the wrongful act is committed within the jurisdiction then that is the locus deliciti, even if the damage was ensued at another place.

CHOICE OF LAW

When cause of action arose in England, English domestic law applies alone. Choice of law in England differs depending on whether the tort committed in England or abroad. The foundation of the English Rule of choice of law is still the following passage in the decision of the Court of

[13] (1944) K.B. 432.
[14] (1948) W.N. 366
[15] (1971) 1 ALL E.R. 694.

Exchequer Chamber in **Philips vs. Eyre**[16]. In Jamaica and the Governor, Edward Eyre, proclaimed martial law and called out the force to suppress it. During these days Phillips was arrested in the house, handcuffed, put on board a ship and taken away. After the insurrection was suppressed, the legislative council of Jamaica passed an Act of Indemnity saving Governor Eyre from any liability for what was done in suppressing the revolt. Governor Eyre returned to England. Phillips had already returned. On an action for assault and false imprisonment by Phillips against Eyre in English Court, Eyre, inter alia, pleaded the Act of Indemnity as- an answer to the action.

This plea was sustained by the Court of Exchequer Chamber. In sustaining the plea and in meeting plaintiff's argument that Jamaican Act cannot have any extra-territorial validity, Wills, J. said that civil liability arising out of a wrong derives its birth from the law of the place and its character is determined by that law. Therefore, an act committed abroad, if valid and unquestionable by the law of the place, cannot so far as civil liability is concerned, be drawn in question elsewhere. Two years earlier the Privy Council had taken the same view in The **Halley case**[17] were an action of foreign ship-owners against a British steamer to recover compensation for a collusion caused by the negligent navigation of the British steamer in Belgian waters, the defendants pleaded that since at the time of the collusion their steamer was under the charge of a compulsory pilot whom they were compelled to employ under the Belgian law, they were not liable for the negligence of the compulsory pilot under English law. But the defendants were liable even for the negligence of compulsory pilot under the Belgian law.

The Privy Council was of the view that it was contrary both to principle and authority to give a remedy for that which did not constitute wrong by English law, even though it was a wrong under the lex loci delicti commissi. Thus, the double actionability test came to be applied: the wrong complained of must be wrong not only under the lex loci delicti commissi but also under the English law, the lex fori.

As already stated, where a tort is committed in England, English law will apply; but where it is committed in England, English law will apply but where it is committed abroad, the double actionability rule in Phillips case will apply this rule has two limbs: The act must be actionable as a tort in England and it must not have been justifiable by the law of the place where it was committed. Should this double test be retained: What is the precise meaning of "actionable" in England? Cheshire says that position could be alleviated by a liberal construction of the rule itself. "It might, for instance, be taken to mean no more than that -the lex fori must recognize a type of liability roughly similar to that for which the plaintiff seeks remedy."

The House of Lords decision in **Boys v. Chaplin**[18] which is mainly concerned with the second part of the rule has not been critical of the first part of the rule. In fact, Wilberforce, L.J. specifically said: "I am of opinion, therefore, that, as regards the first part of this rule, actionability as a tort under and in accordance with English law is required." A question arises at this stage as to whether there is any difference in meaning between actionable and not justifiable. The formulation of this

[16] (1870) L.R. 6 O.B. 1.
[17] (1868) LR 2 P.C.193
[18] [1969] 2 All E.R. 1085 (H.L.)

proposition was made in Phillips case, the meaning; or rather tile interpretation of the word "justifiable" has been giving trouble for now almost a century. It appears that the real mischief was done by the decision in **Machado v. Fontes**[19] the plaintiff Machado sued defendant Fontes in an English court for a pamphlet published in Brazil containing libelous material against him (plaintiff).

Under the then law of Brazil publication was not actionable in civil proceedings, though it was probably subject to criminal proceedings. It was obviously actionable as tort by English law. The main defence of the defendant was that the publication was not actionable by the law of Brazil. Rejecting this plea the court said that the two conditions laid down in Phillips case are fulfilled inasmuch as the first condition was fulfilled because the libel was of such a character that it would have been actionable if committed in England, and the second condition was fulfilled because it was not justified by the law of Brazil, since it was not an innocent act there but subject to criminal proceedings. Ever since this decision has been pronounced, it has been subject of criticism. The main criticism that arose is not actionable by the lexi loci delicti commissi it should not be held actionable just because it is actionable under lex fori.

In another case Privy Council reviewed and considered the dual actionability test in **Red Sea Insurance Co. v Bouyagues**[20] an act done in a foreign country was a tort and actionable as such in England only if it was actionable as tort both actionable as such according to the law foreign country was a tort and actionable as such in England only if it was actionable as tort both according to English law & actionable according to the law of foreign country where it was done. However, the privy council said the rule of double actionability was inflexible and it was possible to depart from it on clear and satisfying ground and in order to avoid injustice by holding that a particular issue between the parties to litigation should be govern by the law of the country which with respect to that issue had the most significant relationship with the occurrence and with parties.

As a general rule, in order to find a suit in England, for a wrong alleged to have been committed abroad, two the conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. Secondly, the act must not have been justifiable by the law of the place where it was done.

MARITIME AND AERIAL TORTS

The maritime and aerial torts are different from inland torts because of the nature of their location. It is stated in the academic literature that aerial torts (i.e. torts committed on board aircraft) are governed by similar principles to those obtaining in relation to maritime torts.

The municipal law on collisions on the high seas has been internationally unified in important aspects by the "International Convention for the Unification of certain Rules concerning Collision" of Brussels (September 23, 1910). The Convention, however, does not apply to collisions

[19] (1897) 2 Q.B. 231
[20] (1994) 3 All ER 794

involving vessels of nonparticipant states, including the United States which signed but did not ratify the Convention; does not deal with state ships; and is restricted to the case where at least one vessel is plying on the high seas. On the other hand, the navigation rules have followed a vigorous trend of unification. International regulations of 1897, 1905, and 1927, largely adopting the experiences of Great Britain, have succeeded in attaining a high degree of uniformity. For e.g. Warsaw Convention[21]

MARITIME TORTS

English courts until 1862 applied the ordinary British rules of navigation to collisions of any ships occurring in British waters or involving two British ships on the high seas. They followed somewhat different rules of seamanship if a collision took place between a British and a foreign, or two foreign ships, on the high seas. The latter rules were assumed to be common to seamen of all nations, a "general maritime law," though administered in special form in England[22]. The duality of "British" and "general maritime" rules was abolished by the Merchant Shipping Act Amendment Act of 1862 providing that all ships, British and foreign, should be judged by British law with reference to the rule of the road and the extent of the owner's liability. Since then, the English statutory law is the expression of the "general" law of maritime torts.

Maritime torts apply to case where injury, loss or damage is caused to a person or their interests in a maritime setting. Under maritime law, generally cases are brought against a corporation rather than an individual, as the carriage of persons or goods carries with it an element of responsibility for their safety. Damage to goods can, occur as a result of inadequately secure storage on the part of the carrier and leaves them liable to face a claim for damages.

In **Canal Barge Co. vs Torco Oil Co**.[23], a heavy residue was left behind by the company on the vessel while transporting a cargo of oil which was chartered by the plaintiff - shipping company. As the defendant's negligent loading of their product was proven in court, the case was upheld and Torco were found liable for material damages.

In general maritime torts mean torts which are committed on high seas. There are two categories under which such tortious act may fall under, they are:-

- Acts which are confined to a single ship. For e.g.; assault by one crew member on another. Such acts do not fall under the ambit of private international law; rather they are governed by the law of the flag, as a ship belongs to the territory of the country of the flag which it flies. Thus, if the ship is Indian and is sailing with an Indian flag then it will be governed

[21] Convention for the Unification of Certain Rules for International Carriage by Air, done at Warsaw on 12 October 1929

[22] The Dumfries (1857) Swab. 63, n5.

[23] Canal Barge Company vs Torco Oil Company**,** No- 99-30002, Decided: July 20, 2000; US Courts of Appeals

by Indian law. But if such a tort case is brought to an English court then the rule laid down in **Phillips vs. Eyre** modified by the House of Lord in **Boys vs Chaplin** will be applied. Difficulty arises in case of composite countries where the law of the port of registry is suggested to be followed.

- Acts which are external to the ship. Torts which do not refer to or affect the people or property on board the ship. Such acts are of following two types;
  (i) Negligent navigation resulting in collusion with another ship.
  (ii) Negligent navigation resulting in some damages to the property of another.

It is evident that in such cases the general rule cannot be applied. It is an established rule of English law that in such cases it is general maritime law, as applied an administered by the admiralty decision of the high court, applies, whatever might be the law of the flag. But as a condition the act must amount to tort by English law and by general maritime law. Only then an action in English court could be maintained.

This rule does not apply if the matter is covered by some international convention to which England is a party. In that case, the matter will be governed by the convention's provisions. For e.g. Convention on High Seas concluded at Geneva in 1958 covers matter relating to claims for damages by reason of interference with or damage done to platforms, derricks, etc., installed for exploration or exploitation on the sea-bed and sub-oil and their natural resources on the continental shelf.

In **Wartaj Seafood Products Ltd vs. Ministry of Home Affairs**[24], the plaintiff's vessel was grounded in the harbor. The plaintiff asked the local police to 'keep an eye on the vessel' and the police agreed. The boat was stripped, and the plaintiff sought compensation claiming negligence on the part of the police for their failure to protect the vessel. The defendant applied to strike out the Statement of Claim on the grounds that it disclosed no reasonable cause of act. It was held that, it is settled law that the police owe no special duty to individual members of the public at large. The requisite special relationship of proximity does not arise to support a claim in negligence. The vessel owners should have hired a private security firm to protect their vessel. The plaintiff's case was dismissed.

AERIAL TORTS

No judicial authority exists on aerial torts in England or India yet. Aerial torts include torts committed on an aircraft, collusions in the air between two aircrafts, or damage caused to life or property on account of crashing of an aircrafts (aircrafts = any mechanical device capable of flight). In the absence of law of aerial torts, the law is sought to be developed either on the analogy of the

[24] [2000] FJHC 99;Hbc0129j.2000s (8 September 2000)

ships or motor cars. Then, under international law the territorial jurisdiction of a state extends to the air space over land and territorial waters. Which means, that the place of a tort committed in and internal to an aircraft on the ground or in and internal to an aircraft in flight over land or over the territorial sea of a state is the place in or over which the aircraft was located at the relevant time and not the place of registration of the aircraft as such. Exception being when the flight is over High Seas. Thus the place of a tort committed in and internal to a United States registered aircraft in flight at an altitude of 31,000 feet above Scotland is Scotland, not the United States.[25]

Here the choice is between the law of locus deliciti and the law of the country of aircraft's registration. If a tort claim arises out of a collision between two aircraft over the high seas (or any other place outside the jurisdiction of any state), the lex fori is the applicable law. Kahn-Freund suggested that it should be the law of the place where the aircraft is registered, i.e. the law of the nationality of the aircraft, because "the connection of the aircraft and its passengers and crew with the territories of the countries over which it flies is fortuitous and fleeting, and in many cases it will be difficult to be prove the precise the moment at which the tort was committed and therefore, the precise location of the aircraft at the time if the tort"[26]. Graveson doubts if this would serve the purpose but he seems to be in favour of its application on torts committed on the board of an aircraft. In respect of torts committed when the aircraft is on high seas the law applicable to maritime torts seems to be applied to them by analogy.

As a practical matter, in relation to both jurisdiction and choice of law, the role of private international law in the context of aerial law is limited by the Warsaw Convention on Air Transport[27] which regulates the liability of air carriers for the death or bodily injury of passengers and has the force of law in Australia. There are other international conventions which govern the matter of aerial torts covering various extents. Some are; article 29[28] of the Convention on Air Transport provides that the right of damages shall be extinguished if an action is not brought within two years. The statutory provisions cover only certain aspects of the aerial torts. It is submitted that Lord Denning's "proper law of tort" theory is most suited to the maritime and aerial torts.

In **Lazarus vs. Deutsche Lufthansa[29]**, the plaintiff, Mr Phillip Lazarus, was a passenger on a flight from Germany to Australia operated by the defendant. In proceedings in New South Wales, the plaintiff alleged that, while the aircraft was on the ground at New Delhi airport, India he was defamed and assaulted by a member of the defendant's crew. The court accepted without comment

[25] Smith vs. Socialist People's Libyan Arab Jamahiriya 113 ILR 534 (1997)
[26] Dicey and Morris, 958.
[27] Convention for the Unification of Certain Rules for International Carriage by Air, done at Warsaw on 12 October 1929
[28] Convention for the Unification of Certain Rules for International Carriage by Air, done at Warsaw on 12 October 1929
[29] Lazarus vs. Deutsche Lufthansa (1985) 1 NSWLR 188,

the parties' agreement that the place of commission of the alleged tort was India even although the alleged tort was internal to the German registered aircraft.

By no means a matter of course, it has nevertheless been categorically recognized by the international conventions on air navigation "that every state has complete and exclusive sovereignty over the air space above its territory and territorial waters." It follows that collisions between two airplanes occurring in the air over a state territory are subject to the law of the state.

INDIAN LAW ON FOREIGN TORTS

The Indian position on choice of law rules in the case of cross border torts is in the early stages of development. There seem to be only two decisions on the matter. For the most part, Indian jurisprudence on the matter follows the early English Court decisions, prior to the engrafting of exceptions to the "double action ability" rule by the English Courts. There are no court decisions that have deliberated specifically on the issue of torts committees intentionally or negligently.

1. As far as the jurisdiction of the courts is concerned, the rules laid down in Code of Civil Procedure, 1908, will apply. Section 9 of the Code lays down that 'where a suit is for compensation for wrong done to the person or to the moveable property, if the wrong was done within the local limits of the jurisdiction of one court and defendant resides or carries on business or personally works for gain, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of the said courts'. It does not include within its ambit the suits on respect of foreign torts. Such cases are covered by section 20, which overlaps this section. This section deals with inter partes suit. This section read as follows:

Subject to the limitations aforesaid, every suit shall be instituted in court within the local limits of whose jurisdiction.

(a) The defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
(b) Any of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
(c) The cause of action, wholly or in part, arises.

Explanation to this section says that a corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Thus in case in which a suit for compensation is filed for a tort committed abroad, the Indian court will entertain an action against a defendant who resides, carries on business, or personally works for gain in India. In short, it's up to the court to determine the scope of word 'residence' here. Thus in pre-independence case[30] the Privy Council held that the court at Quetta has jurisdiction to entertain an action against a defendant who resides in Punjab and carried on business in Quetta in respect of a tort committed by him in Persia which follows English law.

The first decision on the matter is of the Madras High Court. The court was dealing with a claim of defamation. In the case the then Raja of Cochin (which was at the time an independent Indian State), sent a communication to the plaintiff excommunicating him from his caste. This communication was then sent to British India. The Madras High Court applying the "double action ability" rule dismissed the claim stating that as the communication was from a superior to a subordinate with no trace of malice, the defence of qualified privilege would apply thus not giving rise to civil liability under the laws of the State of Cochin.[31]

In *The Kotah Transport Ltd. vs. The Jhalawar Bus Service Ltd.*[32] In this case the plaintiff filed for damages for injury caused due to rash and negligent driving by the defendant's driver. The accident took place in Jhalawar, and the action was brought in Kotah; both these places were then independent Indian States. The court found for the plaintiff as there was nothing in the law of the state of Jhalawar that justified his actions, and the act was a tort under the laws of the state of Kotah, and thus the requirements of "double action ability" was satisfied.

CONCLUSION

In conclusion as far as choice of law in the matter of cross border torts is concerned, the real problem is not really what theory to apply – *lex fori, lex loci delicti,* or proper law – but how to apply the theory in such a way that it provide certainty and is still flexible enough to accommodate complex cases.

As far as India is concerned, our courts are yet to develop a concrete position on the matter. It would be advantageous if they could evolve a rule independent from those already in place, by

[30] Haveli shah vs. painda khan,(1926) 96 I.C. 887.
[31] Govindan Nair vs. Achuta Menon, (1915) I.L.R. 39 Mad 433
[32] The Kotah Transport Ltd. vs. The Jhalawar Bus Service Ltd., A.I.R.1960 Raj. 224

adopting the best of both Civil and Common law, i.e. a flexible version of *lex loci delicti* akin to the proper law or social environment theory.