The Concept of Air Law and its Place in the System of Law

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PREAMBLE

I have been asked to address this quite general theme to introduce the subject of air law to persons in various professions, including lawyers specializing in other branches of the law and government as well as aviation industry specialists who may be less familiar with the law. Thus, I will not delve too deeply into the perhaps boring and impenetrable complexities of the narrow legal issues which often appeal to lawyers and particularly to law academics. Nor will I deal with specific jurisdictions, as, fortunately, there is considerable international uniformity in most principles of air law. However, I may refer to some Asian examples. I can only hope that in attempting to provide a useful introduction to this topic for such a diverse audience, I do not discuss too many issues in too little depth.

BREADTH OF THE TOPIC

For the uninitiated, even the lawyers, the concept of "air law" could conjure up all sorts of images reflecting one's own experience. Commercial lawyers may imagine joint ventures for bottling fresh mountain air and marketing it in Hong Kong's Kai Tak airport. On a more serious note, to the environmentalist, air pollution and noise legislation may come to mind. Conveyancing lawyers may contemplate injunctions to stop tall buildings from blocking adjacent landowners' views and natural light. Others may reminisce on the rights or obligations of construction companies operating gigantic swinging cranes hundreds of metres above the ground and carrying enormous loads of concrete high above crowded streets and private premises, or, the rights of landowners to sue for or remove simple advertising signs or branches of trees projecting across from a neighbour's land. In some respects all these perceptions do find a common home in "air law".

The common law torts of trespass to land and nuisance developed to regulate such competing property rights and interests. Even transient incursions into another's airspace had legal consequences. As far back as the 1870's, the owner of a horse on one side of a fenced paddock in the English countryside was held legally liable when

it bit and kicked the mare on the other side of the fence. Recovery of damages was on the grounds that the intrusion into the neighbour's airspace was a trespass to land[1]. In an analogous situation, more recent and closer to Macau, political and jurisdictional complexities as well as environmental concerns were highlighted when hunters in Shenzen were shooting across the border into Hong Kong's Mai Po marshes killing the endangered species of birds living there[2].

Arguably, at the foundation of all these perceptions, issues and legal principles related to them is what has may be called the *ad coelum* doctrine[3], loosely meaning that a landowner's property rights (and for that matter, a State's territorial rights) extend from the centre of the earth right up to the heavens. Though this doctrine may be of long (but doubtful) ancestry[4], it has probably been commented upon by every air law academic at some stage of his or her career[5]. Also, strictly speaking, it has little or no theoretical application today, but it is a notion that does underpin most modern principles of air law and the law affecting aircraft flight, at both municipal and international law levels.

Air law, in its modern sense, dates from World War 1, when the future significance of military and civil aviation began to be grasped. From that time, there was a rapid development of relatively "uniform" principles of air law - at least in comparison to the sea transport, where admiralty law and jurisdiction and those laws governing the carriage of goods by sea had been evolving slowly over the centuries. These modern "uniform" principles of air law provided a stable and widely accepted framework for international and domestic law governing a number of specific aspects of air transportation.

Relevant international conventions and other agreements established international organizations and other agencies to control the safety and technical regulation of air transport and some airport operations, as well as uniform commercial controls over international air services; relatively uniform regimes for carrier liabilities in respect of passenger and cargo damage claims and injuries suffered by persons on the ground; a basis for the recognition of private property rights in aircraft; and also a system of international criminal law applicable to aviation.

These international law initiatives have, for the most part, been reproduced in each State's municipal laws so that there is a close similarity between the legal principles governing both international and domestic air transportation.

AVIATION LAW: NOT AIR, SPACE NOR AIR TRANSPORT LAW

From the early part of this discussion, it can be seen that the concept of "air law" with its varying perspectives and private property law implications, is perhaps

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1 *Ellis v Loftus Iron Co.* (1874) L.R. 10 C.P. 10

2 There have even been cases in Australia where persons have been shot across state boundaries raising interesting jurisdictional problems. See *Ward v The Queen* (1980) 142 C.L.R. 308 and *Hazlett v Presnell* (1982) 149 C.L.R. 107.

3 *Cuius est solum ejus est utque ad coelum.*

4 See Bouvé, *Private Ownership of Airspace* (1930) 1 Air Law Review 232.

5 Even this one, though in an obscure context: see Heilbronn, *Some Legal Consequences of Weather Modification: An Uncertain Forecast* (1979) 6 Monash Law Review (1980) 122-164.

already too broad for present purposes. Its natural extension into the area of space law, where technological and telecommunications issues would add yet another dimension to the present discussion, are not only too vast to be included, but beyond the expertise of this speaker[6]. And of course, the military and defence aspects of this topic are barely being hinted at here.

On the other hand, if we come back a bit closer to earth and focus this discussion on "air transportation" alone, we may be adopting an unnecessarily narrow approach to the topic and neglect some related, but important areas of law concerning, for example,

* airport construction and operations,
* aircraft manufacturing and financing[7], and
* the regulation and commercial activities of travel and freight agents[8].

We should also not overlook the sometimes complex (though often lucrative) areas of commercial law practice which are offshoots of the everyday business activities of airlines. These range from the more familiar issues of licensing of personnel and air services, employment relations, contracts of carriage; to the rather less common questions surrounding the application of antitrust, monopoly and consumer protection laws to airline business practices: not only tariff coordination (pricing), but the more unusual issues as to the anti-competitive biases in airline computer reservations systems[9], ticketless air travel[10], and the complications of airline code-sharing agreements for air services on routes operated as a joint venture[11], interlining or other profit-sharing arrangements[12].

It may well be that the term "aviation law" more appropriately encompasses all these different kinds of legal issues which exercise the minds of lawyers working in the air transport law field today. Also, it may more accurately reflect the fact that, in some respects, this is an area of "applied" law, in the sense that it involves the application of principles from other branches of the law (administrative, criminal, commercial and liabilities law) to one particular industry: aviation. However, it should not be thought that aviation law is no more than traditional legal principles being applied to a particular industrial activity. In fact, it would not be easy to transfer from being a shipping lawyer to a being an aviation lawyer, except in quite narrow areas of practice. There are some quite special and peculiar aspects to the aviation industry, which make it different from most other industries. Notably, aviation has:

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6 Some relevant issues are discussed in the paper which follows, by Dr. Pedro Ferreirra, *The Limits of Space and the Limits of Law*.

7 See the discussion by Sharon Pearman Wright, *Legal Aspects of Financing and Leasing* which follows.

8 See generally, Gary N Heilbronn, *Traveland Tourism Law* (Sydney: Federation press; 1992).

9 Quite a bit has been written about CRS bias over the last decade. See e.g. R.J. Fahr Jr. *Regulation of computerized reservation systems in the United States and Europe* (1986) 6 Vol.XI Air Law 232.

10 This concept has been experimented with in the USA over the last couple of years. See P.Martin, *"Phone In, Turn Up, Take-off" A look at the Legal Implicaiotns of Self-service Ticketing* (1995) No.4/5 Vol.XX Air and Space Law 189.

11 It is becoming increasingly common to see arrangements between two airlines whereby only one operates but using the carrier code of the other on the return route or for certain services. An example is the services operated by Cathay Pacifidc Airways and Vietnam Airlines between Hong Kong and Vietnam.

12 See eg J. Balfour, *Airline Mergers and Marketing Alliances - Legal Constraints* (1995) No.3 Vol XX Air & Space Law 112, 116-117.

* a close historical link with governmental obligations in terms of national security, national pride and the provision of public transportation,

* been regionalized and in some cases, globalized as regards certain aspects of its operations,

* been highly regulated internationally as it is the subject of a large array of international law and conventions (often implemented by municipal legislation), multi and bilateral agreements between governments and airlines, internationally recognized technical and commercial practices,

* always been a high cost, potentially hazardous activity marketed at a grass-roots level for mass consumption by man and woman in the street.

These "political" facts, international developments and array of specialized aviation law principles impinge upon most aspects of aviation industry activities.

EVOLUTION AND MODERN COMPONENTS OF AVIATION LAW

Early dependence on uniform international law

As mentioned above, World War 1 saw the real beginnings of aviation law and in the decade thereafter, international conventions established basic regimes and organizations for broad technical control and some commercial control of air transportation[13], though they were not to survive World War 2. Only the early recognition and resolution of jurisdictional and conflict of laws problems in respect of air carrier liabilities to passengers, shippers and persons on the ground contained in the 1929 Warsaw Convention[14] and the 1933 Rome Convention on Surface Damage[15], did manage to survive and are still significant today.

By the end of World War 2, the modern system for the regulation of international air navigation and its governance by a specialized agency of the United Nations (to become the International Civil Aviation Organization: ICAO), had been established under the 1944 Convention on International Civil Aviation[16], though primary emphasis was again given to "uniform" technical and safety regulation. The convention included only a few fundamentals affecting commercial control, notably - and again reminiscent of the old *ad coelum* doctrine - the recognition that each and every state has sovereign control of the airspace of its territory and that international

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13 The Convention of Paris of 1919 and the Havana (Pan-American) Convention of 1928 each established a series of rules for international air navigation in Europe and most of South America (former) and North America (latter). The International Commission of Aerial Navigation (ICAN) and the Comité Internationale Technique d'Experts Juridique Aériens (CITEJA) were also set up.

14 The Convention for the Unification of Certain Rules relating to International Carriage by Air, Warsaw, 12 October 1929.reproduced in Shawcross & Beaumont, *Air Law* (4TH ED) Vol..2 A73.

15 International Convention for the Unification of Certain Rules relating to Damage caused by Aircraft to Third Parties on the Surface, Rome, 29 May 1933 which was largely superceded by the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Rome, 7 October 1952, both reproduced in Shawcross & Beaumont, AIR LAW (4TH ED) Vol..2 A73 and A130 respectively. See also, paper by Dr José Tomás Baganha, *Liabilities of Third Parties on the Surface*.

16 Reproduced in Shawcross & Beaumont, *Air Law* (4TH ED) Vol..2 A91.

air services through or over that State may only be operated with that State's permission[17]. Other than that, some basic principles were stated as regards:

- prevention of economic waste by unreasonable competition [Art 44(e)];
- each contracting State having a fair and equal opportunity to operate international airlines [Art.44(f)][18]; and
- non-discriminatory access of all contracting states airlines to airports and air navigation facilities, as well as the non-discriminatory imposition of airport and air navigation charges [Article 15].

Thus, for the most part, economic regulation was left to the joint control of governments (or their aeronautical authorities) - through bilateral air services agreements (supplemented by each State's air service licensing process) - and to a lesser extent, the airlines, who negotiated prices and agency commission levels under the auspices of the International Air Transport Association (IATA).

In the few decades following the creation of ICAO, the system was consolidated considerably, as most States developed their technical/safety and commercial licensing regimes for air services, airline personnel and airports (based mainly upon the 18 technical Annexes to the 1944 Chicago Convention)[19];

- the structure was set up for the application of the criminal law of each State to aircraft and air navigation facilities within its jurisdiction or control[20]; and
- the uniform air carrier liability regime established pre-World War 2 was updated and refined to try (not always successfully) to meet the needs of most States at different levels of economic development[21].

Recent perspectives and more disparate developments

However, the success story of the aviation law system has not been without set-backs and it was not long before cracks began to appear in this edifice of aviation law.

From the 1970's, mixed and deteriorating economic fortunes of airlines[22] combined with social and political controversies over the role of air transport in an increasingly affluent and consumer-oriented society, shook the previously stable legal and regulatory regime governing aviation with challenges to most of its

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17 Articles 1,5 and 6, though attempts were made to exchange multilaterally technical and commercial overflight rights in two agreements appended to the Convention. However, only the former has had wide acceptance.

18 An innovative interpretation of the meaning of 'fair and equal opportunity to operate' as a fair and equal opportunity to fight for your share of air traffic, has been proposed by Henri A Wassengergh, *World Trends in Air Transport Policies (Approaching the 21st Century)* No3 Vol XIX Air & Space Law, 174, 175, though it may be that objectivity has been lost in translation.

19 See paper by Prof. Cheng Chie Jui, *Enforcement of Aviation Safety Standards*.

20 See paper by Prof. Li Zhaojie, *Security of International Civil Aviation and International Law*.

21 See the Appendix: 'Main Components of Aviation Law' for a summary. See also the paper by Prof. Doo Wan Kim, *The System of the Warsaw Convention on Liability in International Air Carriage*.

22 See *IATA, World Air Transport Statistics* for that period, which even in the years when overall losses were not being made, refer consistently to financial results being inadequate to meet the future capital needs of the industry.

fundamental principles. ICAO has tried to review and react to such matters every four years or so in its Special Air Transport Conferences. This era also gave rise to the old joke: How do you make a small fortune in the airline business? Easy. Start with a large one!

Until just about this time, the Warsaw regime's "passenger liabilities" system had continued with only the precarious and half-hearted support of the USA. In 1965, the USA was only prevented from renouncing the Warsaw convention by a voluntary agreement amongst airlines to make a seven-fold increase in the liability limits for passenger claims[23]. This issue has remained controversial and the Warsaw system has been the subject of other airline industry rescue attempts as recently as several months ago[24]. Although it is significant that on several such occasions the airline industry has come to the rescue of governments, voluntary airline industry arrangements are not without their "down-side". They have put an increasing emphasis on the precise contents of individual airline's contracts of carriage, underlined the possibility of significant difference amongst airlines, as regards carrier's liability obligations, and also the inability of the traveller to rely upon the "uniform" passenger liability arrangements under the Warsaw Convention actually being uniform.

At the same time, rapid technological advances have not prevented air crashes. The liabilities of, on the one hand, aircraft manufacturers in respect of defective construction, parts and maintenance, as well as the suppliers of other aviation equipment, and, on the other hand, aeronautical and airport authorities in the exercise of their powers, remains singularly subject to uncoordinated municipal law principles and procedures. The considerable difficulties inherent in litigating in foreign jurisdictions tend to dominate relevant damages claims.

Also in recent times, terrorist activities - sometimes with the support of "fringe" governments - began to highlight practical weaknesses in the collection of international agreements designed to bring law and order to the "open skies". Obligations, supposedly accepted under international conventions, to bring politically-motivated aircraft hijackers to trial were being honoured as much in the breach as in compliance and "gun-toting sky marshalls" disguised as passengers were being seen as necessary to ensure aviation security. Though airline security programs involving baggage checking and other controls were being stepped up, high-tech explosives seemed to be one step ahead of them.

In the following decade, the commercial side of air transportation came under attack. Deregulation, or "open-skies" movement, took hold in the USA and some European States, making US domestic and North Atlantic international air services a battlefield. In the international arena, more "liberal" bilateral air services agreements

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[23] Known as the 1966 Montreal Airline Agreement, CAB Doc. No. 18900, reproduced in Shawcross & Beaumont, Air Law (4TH ED) Vol.2 at AB43. At first the arrangement applied only to flights into and out of the USA, but subsequently was extended almost worldwide and the voluntary liability limit often increased to SDR100,000.

[24] See P. Martin, *The 1995 IATA Intercarrier Agreement* (1996) No.1 Vol XXI Air and Space Law 17 and P. Martin, *The 1995 IATA Intercarrier Agreement: An Update* (1996) No.3 XXI Air & Space Law (1994) 127.

were being negotiated, particularly at the behest of those States which perceived that increased economic benefits would flow from them. Deregulationists challenged what some described - in many ways inaccurately - as the "cosy airline cartel" in IATA and redefined the structure of the airline and travel intermediary industries, loosening and in some cases removing completely, any IATA controls.[25] This has occurred particularly in the North America, the European Community (EC) - where peculiarly regional approaches have been adopted to the economic regulation of the air transport industry - and also in many other parts of the world. Possibly, most effected was middleman sales. Air travel had become a "political football" in domestic and international politics. Generally, the previously "benevolent" airline-government managed system of economic regulation was replaced by a high level of airline commercial freedom (within the limits of relevant bilateral air services agreements), and subject to rather intrusive *ex post facto* control by antitrust and consumer protection authorities, who were often unfamiliar with the peculiarities of the industry and whose aim was not to ensure the provision of an efficient and comprehensive system of public transportation but to protect the interests of the consumer from actual and imagined abusive commercial practices.

The previously standardized tariff arrangements were replaced in many parts of the world with much more chaotic and complex pricing structure (though some standards have returned in recent years). The consumer's earlier suspicion that inefficient state-subsidized airlines were charging everyone too much, was replaced by the fear that the passenger in the next seat had got a better deal than he did. Either way, the airline industry was to blame in the minds of the travelling public.

Meanwhile, there began a proliferation of airlines and interregional services. Thus, despite fluctuating costs of aviation fuel, plans for construction of mega-sized aircraft were scrapped and larger numbers of smaller aircraft started plying the skies and vying for increasingly rare slots at airports[26]. Their technological capacity to deal with the traffic became strained[27], and their imposition of airport and air navigation service charges was becoming a major burden on airlines[28]. International regulation in this area has been rudimentary under the 1944 Chicago Convention, despite ICAO's development of some basic criteria and standardized procedures[29]. It would seem that there is continued scope for considerable arbitrary independent action by

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25 It should be remembered that IATA never controlled capacity and market entry. These were controlled by governments. IATA did manage pricing, though subject to government approvals of tariffs.

26 It has even been suggested that airlines who lose established slots might be able to rely on the doctrine of propriety estoppel, at least in common law jurisdictions, to sue governments or airport authorities and prevent the loss or obtain damages. See P.P.C. Haanappel, *Airport Slots and Market Access: Some Basic Notions and Solutions* No.4/5 Vol XIX Air & Space Law (1994), 198, 201

27 These effects of deregulation and the inability of some countries to keep pace with the increasing pressures put on the system have been blamed for aviation accidents in less developed parts of the world, and most recently for the mid-air collision of a Saudi Arabian 747 and a cargo plane over India in November 1996.

28 For example, it is said to cost HK$500,000 to land a B747 at Kai Tak and even more at Narita.

29 See eg ICAO, *Statements by the Council to Contracting States on Charges for Airports and Air Navigation Services* ICAO Doc 9082/4 4th ed 1992.

airport authorities and a need for greater international recognition and refinement of appropriate principles and procedures concerning issues such as slot allocation and charges. However, more recently, the development of Future Air Navigation Systems (FANS), whereby at least regionalized control and management of Air Navigation Services is now being fostered under the auspices of ICAO runs counter to sovereign State monopolization of the air navigation and traffic control aspects of aviation. However, it is unlikely that uniform international law principles will be agreed to extend to the commercial aspects of these services.

This and other indicators of the modern trend towards globalization are presenting further challenges to the fundamental notion that sovereign states and their laws control aviation. Throughout the latter part of this most recent era and into the early 1990's, a debate raged over the inclusion of air transportation in the GATT and subsequently GATS. This suggested that the exchange of the rights to operate air services, previously negotiated independently and bilaterally, would become just one of the many bargaining chips in overall multilateral trade negotiations[30]. This has now been partially achieved by the inclusion of a Special Air Transport Annex to the General Agreement on Trade in Services of April 1994, which was to apply from 1 January 1995, though little practical effect seems to have been experienced so far. Under this arrangement, members are free to apply or not to apply 'free market access' and 'national treatment' principles to three specific areas: aircraft repairs and maintenance; selling and marketing services; and Computer Reservation Services[31]. The evolution of this development is still occurring but it is difficult to imagine that there will be any rapid falling away of bilateral air services agreements and their wholesale replacement by staggered scheme of worldwide "open skies" under the GATS.

CONCLUSIONS

The perspective which adopted above in outlining the concept of air law and its place in the system of law may not be without some controversy.

Air law, or to give the concept what I would suggest to be the more modern description, aviation law, encompasses not only the broad application of traditional areas of legal theory to a particular industry, but comprises a vast body of international and municipal law, regulation, governmental policy and judicial decisions.

Here, a somewhat anecdotal approach has been relied upon to illustrate where aviation law finds itself today. While it would be an enormous exaggeration and a monumental error to suggest that the edifice of air law constructed over half a century is crumbling around us, it is evident that there are specific areas and activities where one must envisage that fundamental changes may well be made to adapt aviation law to the prevailing economic and social perspectives of the early twenty-first century. There has been a breaking down of some multilateral intergovernmental procedures and a return to global industry-negotiated solutions. Thus, some of those

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30 This approach has been promoted by H.A. Wassenbergh for almost two decades.

31 Slot allocation would not appear to be encompassed.

dreams of voluntarily agreed multilateral approaches and solutions to world aviation problems, cherished at the end of World War 2 when the foundations of the modern system of aviation law were laid, may well have to be relinquished in favour of global and regional solutions imposed through the more cynical wielding of economic might.

Appendix

MAIN COMPONENTS OF AVIATION LAW

1. **Safety and technical regulation: international and municipal**
   - based on the 1994 Chicago Convention and its 18 Annexes
   ICAO and CAA's
   - broad areas of regulatory control include
     aircraft
     personnel
     aircraft accident investigation
     airport and air navigation services

2. **Security:criminal law,hijacking, anti-terrorist/airline security programs**
   1963 Tokyo Convention (offences on board);
   1970 Hague Convention (hijacking)
   1971 Montreal Convention (crimes against air navigation)
   antiterrorism agreements
   airline security programmes

3. **Liabilities/Insurance: carrier's,manufacturer's, & government liability**
   Warsaw/Hague/Montreal regime
   1966 Montreal Agreement
   1995 IATA Intercarrier Agreement

4. **Commercial Regulation antitrust and consumer protection**
   air services
   certification
   licensing
   multilateral and bilateral air services agreements
   roles of aeronautical authorities and IATA
   agency
   state licensing
   IATA accreditation

5. **Airports: construction, commercial exploitation and aircraft use**
   1944 Chicago Convention
   municipal laws

6. **Aircraft Financing and Leasing**
   Taxation