Liability on Third Parties on the Surface

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INTRODUCTION

It's a great honour to be surrounded by such distinguished and eminent academics at the International Conference on Air Law, dedicated to the presentation and discussion of matters of topical interest and legal relevance.

One good example for that is the outstanding lecture just delivered by Prof. Doo Hwan Kim on the liability in international carriage by air.

The subject I intend to address is doubtlessly extremely contemporary. However rare aviation accidents may be when considering the volume of traffic, the number of passengers and amount of cargo conveyed worldwide, the damages caused by such accidents, even minor ones, are always extensive and at times catastrophic, causing great pain to victims, relatives and friends. Of course, aviation accidents are not the only source of liability on third parties on the surface, but are definitely the most spectacular and the major ones in terms of the extent of damages and the amount of compensation. Thus, the matter merits being addressed.

In his lecture on "liability in the international carriage by air", Prof. Doo Hwan Kim presented solutions and laid down questions presently brought about by the "Warsaw system". The Warsaw Convention does not address, however, damages caused to third parties on the surface by aircraft in flight. The principles applicable to such type of liability are provided for in the 1952 Rome Convention[1], intended at the unification of certain rules regarding damages caused to third parties on the surface by aircraft in flight.

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[1] Convention on Damage Caused by Aircraft to Third Parties on the Surface, signed at Rome on October 7, 1952. The Convention came into force on February 4, 1958. It replaces the 1933 Rome Convention and the respective Brussels Additional Protocol, which merge in the text of the 1952 Rome Convention.

Yet, the countries that play a major role in international traffic refrain from ratifying that Convention: the USA object, above all, to the principle of the carrier's absolute and limited liability; some European countries object to the principle of the carrier's or his employees unlimited liability being applicable only when the accident is caused with the intend to produce damages (Article 12), as set forth in the provisions of the Convention which, in this particular case, adopted the UK's stance in favouring the generalization of the exceptions counterclaimed by the insurer vis-a-vis the victim. Such conflicting interests have been preventing new States from joining the Convention that, at present, includes 39 States[2]. Neither Portugal nor the PRC are Parties to the Convention; thus, it cannot apply to Macau while under Portuguese administration nor, very likely, after 1999.

So, you may ask what justifies the matter being addressed in this Conference.

In my opinion, two reasons justify doing so: firstly, because the Rome Convention, albeit being binding on a small number of States only - yet lately tending to increase, still has a considerable influence on national liability systems that address such problems; secondly, because the forecast growth in the volume of traffic around the globe increases the mathematical likelihood of accidents worldwide, even assuming that the present flight safety ratios remain stable. This trend, along with the greater use of aircraft with a larger seat capacity multiplies the probability of accidents ranked as major accidents. So, we believe more and more States will end up by either joining the Rome Convention or more likely, through international cooperation within the ICAO, help removing the political or legal hurdles to a wider adhesion to a new Convention.

Let us then comment on the relevant aspects of the 1952 Rome Convention.

2 - SCOPE OF APPLICATION

There are two groups of extra-contractual liability on third parties: in the first group, the passive subject is on the ground, in a wide sense; in the second, called mid-air collision, damages are caused by another aircraft in flight. I am concerned only with the extra-contractual liability belonging to the first group.

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[2] On September 23, 1978, the Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface was signed at Rome on October 7, 1952. The Protocol is to be read and interpreted with the Convention as a single instrument, to be known formally as the Rome Convention of 1952 as Amended at Montreal in 1978. The Protocol is not yet in force. The Protocol amends three points of the Convention. The first concerns Article 23, 1, which, as revised, covers damage caused by aircraft, regardless of the State of registration, when the operator thereof has his principal place of business or permanent residence in another Contracting State. The second amendment is included in Article 26, which, as revised, applies to aircraft on military, custom or police missions, regardless of the identity of the owner. The third provides for the exclusion of nuclear damages from the scope of application of the R.C. (Shawcross, 4th Edition, Issue 64, I 124/125).

From among the damages caused on the ground, one must distinguish two situations that lead to different legal approaches: a) damages arising from the aircraft or parts of it or objects carried thereby physically hitting the ground; b) damages arising, rather than from physical contact, from the disturbances caused by the flight itself, also when operated according to applicable rules, such as damages caused by the sonic boom to persons, objects or facilities.

The 1952 Rome Convention (R.C.), revoking the previous 1933 Convention, is the only international legal text applicable to such matters.

The R.C. establishes a uniform liability system in respect of damages caused to persons on the surface, where such damages are caused by aircraft in flight or by a person or object falling from such aircraft.

The first source of damage to be considered is the aircraft itself - a notion, by the way, not defined by the Convention[3] and left for the judge to define. The aircraft is considered "to be in flight from the moment when power is applied for the purpose of actual take-off until the moment when the landing run ends". In case of lighter-than-air, the term "in flight" means the period of time between "the moment when it becomes detached from the surface until it becomes again attached thereto". The Rome Convention applies only when power is used for take-off purposes and not when the engines are used to propel the aircraft, as for example between the apron and the hangar, as the take-off phase has not yet started.

A second source of damage may be an object or person falling from the aircraft. The damages are appraised by the judge in charge, who must assess both the damages caused to objects and the material or moral damages inflicted upon persons.

The fundamental rule in the application of the R.C. is provided for in Article 23, 1): "this Convention applies to damages contemplated in Article 1 caused on the territory of a Contracting State by an aircraft registered in the Territory of another Contracting State".

A double condition is thus required: the damage must have been caused by aircraft registered in another State also Party to the Convention, regardless of the nationality of the victim or the person responsible for the damage.

Thus, the Convention does not apply to damages caused on the surface of a Contracting State by an aircraft registered in that same State.

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[3] The Chicago Convention of 1944 does not define the term aircraft which, however, is described as follows in Annex 7: "any machine that can derive support in the atmosphere from the reactions of the air against the earth's surface".

3 - EXCEPTIONS

Even when the conditions above are met, the R.C. does not apply to a number of situations, as follows:

- "damages caused by military, customs or police aircraft" (Article 26). Damages must be determined according to internal legislation.

- damages as "direct consequence of armed conflict or civil disturbance" or if the liable person "has been deprived of the use of the aircraft by act of public authority" (Article 5).

- "damages caused to an aircraft in flight or to persons on board of such aircraft" (Article 24). In other words, the R.C. applies only where an aircraft "in flight" causes damages to another aircraft on the surface "in flight".

- "damages on the surface if liability for such damage is regulated either by a contract between the person who suffers such damage and the operator or the person entitled to use the aircraft at the time the damage occurred, or the law relating to workmen's compensation applicable to a contract of employment between such persons" (Article 20).

This provision declaring a certain number of exceptions applies in cases where the passenger and the aircraft operator are bound by a carriage contract when the specific legislation in respect of such contract is not applicable. It applies also where an employment contract exists between the victim and the carrier.

4 - NATURE OF THE LIABILITY

Article 1 of the R.C. establishes the liability based not on fault but on risk, under the provision that there are exceptions where the principle of subjective liability based on fault prevails.

It is thus a qualified liability, usually called objective liability, and does not require any evidence of fault by the carrier, even in case of force majeur. Hence, it is more appropriate to call it, with regard to the R.C., absolute and limited liability.

Such system by no means excludes a causality link between the activity and the damage caused on the surface.

On the other hand, no compensation is due where the damage is caused by an aircraft merely overflying the air space in compliance with the applicable air navigation rules. The principle, set forth in Article 1, 1) of the R.C., does not imply that the Convention applies only to damages caused by accidents, but simply that compensations are due only for damages caused by sudden and unforeseeable events. Hence the fact that the noise of aircraft circulating in the air space in compliance

with air navigation rules is not considered a damage subject to the liability system of the R.C.

5 - PERSON LIABLE

The person liable for damages caused on the surface is, in the first place, the aircraft operator [Article 2, 1)], i.e., whoever makes use of the aircraft at the moment the damage occurs.

The same provision establishes that the operator is the person who, having directly or indirectly transferred the right to make use of the aircraft, retains the control of the navigation thereof [Article 2, 2. a)].

Paragraph 2, b) of that Article explicitly states that a person is considered to be making use of the aircraft when he makes use thereof himself or through an employee, whether or not the employee acts in within the scope of his employment.

In considering the operator the commissioner and person responsible for the acts of his employees, even where the said employees depart from their assignments, the R.C. aimed at safeguarding the interests of the victims: on the one hand, by ensuring the solvency in case of a conviction, as the employees might often not be able to bear the imposed sums; on the other, as the operator cannot avoid responsibility on the grounds that the employee acted beyond his assignments.

However, the R.C. distinguishes between cases where an employee carries out his duties and cases where persons make unlawful use of the aircraft. In the latter case, liability rules as provided for in Article 4 are different[4].

In order to facilitate the victims' defense, the R.C. provides [Article 2, 3)] that the registered owner is presumed to be the operator. Such presumption facilitates actions brought by the victims and is aimed at encouraging the immediate registration of ownership rights of aircraft, in order to avoid liability. Obviously, the owner has a right to produce evidence to the contrary, i.e., that another person was the operator at the time the damages occurred.

The R.C provides that the owner and the operator are jointly and severally liable when the latter does not retain the exclusive right to make use of the aircraft for a period under 14 days - a rule applicable essentially to the lease contract, and when the damage occurs during that period[5]. The joint and several liability is subject to the terms and limits set forth in the R.C.

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[4] The liability provided for in Article 4 is jointly held by the operator and the unlawful user, i.e., whoever uses the aircraft without the consent of the person who has the right to control its navigation, except when the latter proves that he took the necessary precautions to avoid it being used. In this case, the operator's liability is subjective and therefore unlimited

[5] The 14-day period is counted from the moment the right to use the aircraft comes into effect.

Accordingly, the operation requires both that the aircraft is being used at the moment the damage takes place and its navigational control. Where the aircraft is entrusted to an employee, the operator remains liable. Likewise, the operator is liable, except when evidence to the contrary is produced, if the aircraft is unlawfully used or is entrusted to a third party for a period under 14 days.

Lastly, according to the R.C. the person registered as owner in the appropriate register is presumed to be the operator, except if he manages to prove that another person is the operator.

6 - LIMIT OF THE LIABILITY

To counterpoise the absolute liability, the R.C. adopted the limit of the liability of the aircraft operator, except in certain cases.

The R.C. provides an initial limit according to the aircraft's maximum authorized take-off weight stated in the certificate of airworthiness [Article 11, 3)], in case of incident:

- 500.000 francs[6] for aircraft with a MTOW of 1.000 kg or less;
- 500.000 francs plus 400 francs per kg for each kg exceeding 1.000 kg for aircraft with an MTOW over 1.000 and under 6.000 kg;
- 2.500.000 francs plus 250 francs for each kg exceeding 6.000 kg for aircraft with an MTOW over 6.000 and under 20.000 kg;
- 6.000.000 francs plus 150 francs for each kg exceeding 20.000 kg for aircraft with an MTOW of 50.000 kg or under;
- 10.500.000 francs plus 1000 franc for each kg exceeding 50.000 kg for aircraft with an MTOW over 50.000 (Article 11, 1).

Article 11, 2), sets the operator's liability for dead or injured person at 500.000 francs, meaning that within the limits set in paragraph 1), each victim is entitled to a maximum of 500.000 francs.

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6 The R.C. adopted the Poincaré gold franc as the monetary unit and establishes the exchange rules for sums in local currency (Article 11, 4.). It defines the franc by reference to a monetary unit made up of 65 1/2 mg gold with a purity level of 900/1000.
The conversion of the compensation sums in local currency is represented by the gold value in such currency on the date of the sentence or, in some cases, the date the installment is due.
The Brussels Protocol considerably raised the limit of liability that may be expressed in Special Drawing Rights instead of gold francs. Likewise, the Protocol provides that the limit may be expressed in "monetary units" totally identical to the Poincaré gold franc except in name, in respect of non-member States of the IMF, the law of which does not permit the use of SDRs.
- Shawcross, idem.

Where the limit of the total compensation is less than the total amount of the damage and, where the reparations refer only to loss of human life or injuries or just material damages, "such claims shall be reduced in proportion to their respective amount" [Article 14, a)].

According to the rule in Article 14, b), damages refer both "to loss of life or personal injury and in respect of damage of property, one half of the total sum distributable shall be appropriated preferentially to meet claims in respect of loss of life and personal injury and if insufficient, shall be distributed proportionally between the claims concerned". The second half of that sum shall be shared proportionally between the compensations pertaining to material damages and, where necessary, the portion of non-compensated damages for death or injuries [Article 14, b)].

The R.C. establishes, thus, a liability plafond that varies according to the MTOW and a limit for each dead or injured person. Where damages refers solely to persons, the proportional rule must be applied when the allowable maxima do not allow for total compensation.

The same proportionality rule shall apply in case of mere material damages exceeding the total plafond as, in such case, the limit provided for in Article 11, 2) does not apply.

If both types of damage are caused by aircraft, the first half of the compensation is allotted preferably to the indemnization loss of life and personal injury and the 500.000 maximum and proportional reduction applies, while the second half is allotted to the indemnification for property damages yet uncompensated.

The practical application of those rules raises numerous problems.

On the one hand, according to Article 13, 1, where different persons are responsible for the same damage, the victim shall not receive a sum exceeding the highest amount due by one of such persons, but may claim reparations from the person liable for the highest amount. Thus, there is no accumulation of compensation where different persons are jointly and severally liable.

On the contrary, the accumulation of compensations due to the victims is possible "when two or more aircraft have collided or interfered with each other in flight and damage for which a right to compensation is contemplated in Art. 1 results, or two or more aircraft have jointly caused such damage, each of the aircraft concerned shall be considered to have caused damage and the operator of each aircraft shall be liable, each of them being bound under the provisions and within the limits of liability of this Convention" (Article 7).

It is not necessary to find out which aircraft caused the damage. The victim may claim compensation up to the set cumulated limits provided in respect of each aircraft involved in the collision, but each operator is liable only up to the limits set

for his aircraft, except as provided in Article 12 (damage caused by deliberate act or omission of the operator, his servants or agents).

7 - EXCEPTIONS OF THE LIMITS OF LIABILITY

Where damage is caused by a deliberate act or omission with the intent to produce damage, of the operator, his servants or agents (the latter while performing their duties), the operator's liability is unlimited (Article 12, 1).

This liability system confined to wrongful acts appears hardly acceptable, as Article 25 of the Warsaw Convention (see the Hague Protocol, "willful misconduct") provides a better protection to the passenger who consciously takes upon himself the risk of air carriage than to third parties utterly unconcerned with the air carriage who, in order to be awarded damages, have to prove the existence of a deliberate act (act or omission) of the operator or his employees or agents with the intent to cause damage.

In fact, the mere awareness that a damage is likely to occur is insufficient. It is also vital, for that purpose, that the victims produce evidence to the effect that the employee or agent acted within the scope of his employment and within the limits of contractual assignments (except in cases where the employee departs from or acts beyond the scope of his employment).

Article 12 provides for another case of unlimited liability i.e., in case of unlawful appropriation and use of an aircraft without the consent of the person who has the right to use it (Article 12, 2).

The provision above applies only to the flight of the aircraft and not to the unlawful use thereof, that confers on the person so using the aircraft the quality of unlawful user subject to limited liability (Article 4).

8 - GUARANTEES TO BE PROVIDED BY THE OPERATOR

The R.C. provides, in a very precise manner, the guarantees intended to cover the operator's liability. Article 15:

a) grants on each Contracting State the right to require that the liability of operators of aircraft registered in another State be insured up to the applicable liability limits (paragraph 1);

b) establishes that the insurance shall be accepted as satisfactory where it has been effected "by an insurer authorized to effect such insurance under the laws of the state where the aircraft is registered or of the State where the insurer has his residence or principal place of business, and whose financial responsibility has been verified by either of those States" [paragraph 2. a)];

Notwithstanding the preceding provision, the State overflown may refuse to accept as satisfactory any insurance effected by an insurer who is not authorized for that purpose in any Contracting State (paragraph 3);

c) the insurance may be replaced either by a cash deposit in a depository maintained by the state of immatriculation or by a bank authorized to act as a depository by the state or by a guarantee given by such a bank authorized to do so by the immatriculation state and whose financial responsibility has been verified by the state; or else by a guarantee given by the immatriculation State if that State undertakes that it will not claim immunity from suit in respect of that guarantee (paragraph 4);

d) the State overflown may require that the aircraft shall carry a certificate issued by the insurer certifying that the insurance has been effected in accordance with the provisions of the Convention or a certificate issued by the appropriate authority in the immatriculation State with regard to the guarantee mentioned in 4).

9 - COURT OF JURISDICTION

By force of Article 20 of the R.C., the actions under the provisions of this Convention may be brought only before the courts of the Contracting State where the damage occurred.

The provision above establishes only the international courts' competence and refers to the internal law of the court of jurisdiction the duty to determine the applicable material and territorial jurisdiction[7].

In abrogation of that rule, the R.C. allows for the dispute to be referred to arbitration [Article 20, 1) in fine] in one of the Contracting States or for the legal action to be filed with the law courts of another Contracting State by agreement between the parties concerned. However, the legal arrangements shall not harm the rights of the persons filing the suit in the State where the damage occurred[8].

A major concern of the drafters of the R.C. was to group all legal actions related with the same event and try to achieve that, if possible, the same court disposes in a single proceeding of all claims (Article 20, 3).

Now a final remark on the liability action. Under Article 21 of the R.C., the suit shall be filed within two years from the date of the incident that caused the damage.

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7 De Juglart, M., *Traite Élémentaire de Droit Aérien* (Paris, Pichon et Durant - Anzins, 1952), no. 259, pg. 158.

8 De Juglart, M., ob cit., no. 258, pg. 156.

As opposed to the provisions of the Warsaw Convention, this is a statute of limitation that may be suspended or interrupted on grounds of suspension or interruption as provided by the law of the court of jurisdiction. However, after a period of three years from the date of the incident that caused the damage, the claim shall be dismissed by the Court (Article 21, 2.)[9].

Regardless of the terms above, the rule set forth in Article 19, provides that: "If a claimant has not brought an action to enforce his claim or if notification of such claim has not been given to the operator within a period of six months from the date of the incident which gave rise to the damage, the claimant shall only be entitled to compensation out of the amount for which the operator remains liable after all claims made within that period have been met in full".

In other words: the victims should enforce or notify a claim within a period of six months from the date of the occurrence of the damage, or else - and in case other claims are enforced in that period - they shall be entitled only to that part of the compensation as remains after compensation has been paid to those who complied with the 6-month term.

10 - INTERNAL LAWS – THE SPECIFIC CASE OF MACAU

Earlier in this lecture, we mentioned that one of the main reasons why the R.C is important despite being binding only upon a relatively reduced number of contracting States, is the fact that it influences other countries' legislations. The most recent and significant case, from the point of view of direct and indirect involvement in air transportation in this region of the world, is the Chinese legislation, whose main aspects concerning liability on third parties on the surface shall be addressed next. Later a reference shall be made, if only briefly, to the Macanese legislation on that matter[10].

10.1 - China

"The Civil Aviation Law of the People's Republic of China"[11] came into force on March 1, 1996, after a long period of maturation. The law is structured in 16 chapters and "is enacted for the purposes of safeguarding the national air sovereignty

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9 De Juglart, M., ob cit., no. 265, pg. 163.

10 In Portugal, the civil liability arising from the air carriage of passengers, luggage and cargo including animals and mail by aircraft registered in Portugal or abroad operating in Portuguese airports or aerodromes or overflying Portuguese airspace is provided for by Decree-Law no. 321/89 of September 25. Compensation for damages caused to third parties on the ground by aircraft in flight is provided for in Article 10 ff, of the same law, as a system of limited liability regardless of fault of the aircraft owner or operator.

11 Adopted by the 16th Session of the Standing committee of the Eighth National People's Congress on October 30, 1995, promulgated by the Order No. 56 of the President of the People's Republic of China on October 30, 1995.
(English translation by CBnet, 1995)

and the rights of civil aviation, ensuring the safe and orderly growth of civil aviation, protecting the legitimate rights and interests of parties to civil aviation activities and promoting the development of civil aviation services" (Article 1).

Generally speaking, the law aims at the unification of civil aviation regulations throughout the country and rendering more effective the management of civil aviation activities controlled by the competent central department.

On the other hand, the law is a necessary instrument in order that the PRC can modernize and cope with the enormous economic development of international air services and related activities forecast for the coming fifteen years, as well as the domestic ones. It is meaningful that the chapter on liability on third parties on the surface is deeply influenced by the international rules of the Rome Convention[12] as drafted 56 years ago.

As in the R.C., the sources of damage caused on the surface are aircraft in flight or a person or thing falling therefrom. The damages that entitle the victims or their representatives to compensation are caused on the surface, including the water surface, by death, injury or property damage (Article 157).

On the other hand, damages must be a "direct consequence" of the incident that gave rise thereto, and may not be caused by aircraft merely overflying the air space in compliance with the rules governing air navigation.

By law, aircraft are considered "in flight" when a civil aircraft uses power for the purpose of actual take-off until the time when the landing strike ends" (Article 157, 2).

Article 157 adopts the system provided for in Article 1 of the R.C.

Other fundamental principles of the R.C. are enshrined in the new Chinese civil aviation law, such as: the operator of a civil aircraft shall be liable for the said damages; the holder of a civil aircraft registration shall be deemed as the operator and assume the liability of the operator; the operator shall be deemed as using the aircraft when his servants or agents, whether or not acting within the scope of their employment, use the aircraft (Article 158).

Where the aircraft is used without the consent of the person who, by right, holds the power of is navigation, this person is considered, by law, jointly and severally liable with the unlawful use for damage, unless he proves that he has taken precautions to prevent such use (Article 159).

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[12] Chapter XII: Liability for Damages to Third Parties on the Ground, pg. 42.

The provisions in that Chapter are in line with the systematization and the principles of the RC, although the notions are less precise and the rules expressed in a more vague manner.

This trait of the law puts a burden on interpretation, both on the part of the person who suffers a damage on the surface or his representative, and on the legal authorities all over that huge country.

The practical result may be a greater uncertainty as to the possibility of the victim or injured party claiming their rights in face of "semi-official" interpretations of a widely administrative nature, in a country where airlines still have a long way before they become autonomous vis-à-vis the State.

However, the system of limited liability in the Chinese law departs considerably from the R.C.'s system of absolute liability, in a very important aspect. Under the terms of Article 11 of the R.C., the operator's total liability may not exceed certain limits, that vary according to the MTOW and, in case of death or injury, may likewise not exceed 500.000 gold francs per person. The Chinese law, though, does not set any legal limits to the operator's total liability, nor the maximum amount of compensation due in case of death or injury in respect of damages caused on the surface.

The problem of the limit of the operator's liability is partially solved by the Chinese law by imposing exclusively on operators of foreign civil aircraft tending to fly into the territorial airspace of the PRC the obligation to prove that he holds an appropriate certificate showing that he already effected the liability insurance for third parties on the ground or has already acquired related liability guarantee (Article 175).

The law does not establish the exact meaning of appropriate certificates or liability guarantees, and likewise does not refer to by-laws the establishment of the respective amounts. So, whoever interprets it may assume that the respective amounts may vary according to each single operator following respective administrative decisions.

This interpretation, made possible by the legal provisions, would not support the principle of the victim's or injured parties' equality, nor safeguard their right to a fair compensation.

With regard to the operators of aircraft registered in China, the operations of which are confined to "domestic air transport" (Article 107), the law does not pronounce on the applicable liability system. One may only assume that there exist administrative rules governing the matter, based on the general principles laid out in the said law that are, to a large extent, inspired by the R.C.

10. 2 - The specific case of Macau

Before I finish I would like to refer, briefly, to Macau's legislation on the

matter, in order to add to a wider dissemination of the technical legal information relating to air transport in the region.

With regard to Macau it is not possible to draw an immediate parallel with the RC, even though some of its principles apply to the Territory's legislation, yet to a lesser extent than on the legislation of the PRC.

Macau legislation[13] embraces, among others, the principle of limited liability inherent in air transport operations along with requirements for an appropriate insurance system.

The law applies to all operators using both the Macau International Airport and the Macau Heliport or to aircraft overflying the air space under the responsibility of Macau's air traffic control unit, engaged in the carriage of passengers, luggage, mail and cargo[14].

The owner or operator of the aircraft is deemed liable, regardless of fault, for damages caused to third parties on the surface by aircraft in flight and on the ground. This provision, combined with the provision in paragraph 1, b) establishes a presumption that confers on the owner entered in the respective register the quality of aircraft operator until evidence to the contrary is produced. Operation presupposes the utilization of the aircraft and control of its navigation the moment the damage occurs. The operator remains liable if the aircraft is entrusted to an employee and remains so if the employee acts beyond the scope of his employment or when the aircraft is entrusted to a third party for a certain period of time.

In short, the owner of the aircraft is, by legal presumption, the operator, except where he proves that another person was the operator when the damage occurred.

In compensation of the strict liability, the law limits the maximum total liability (Art. 23, 1), regardless of the number of injured, to sums that vary according to the aircraft's landing weight as established by Ordinance no. 328/95/M of December 26[15].

However, the limits of liability stipulated by that Ordinance do not apply

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13 Decree-Law no. 36/95/M of August 7, in BOM no. 32.

14 Military aircraft or equivalent are not subject to the provisions in Article 19 ff. of Decree-Law 36/95/M, to begin with as they are not owned or held by an air service operator.

15 Article 2 1) : The maximum total liability sum for aircraft owners or operators, regardless of the number of injured, is:
a) MOP55.900.000 for aircraft with a maximum 5.000 Kg landing weight;
b) MOP119.800.000 for aircraft with more than 5.000 Kg and up to 10.000 Kg landing weight;
c) MOP297.600.000 for aircraft with more than 10.000 Kg and up to 28.000 Kg landing weight;
d) MOP958.600.000 for aircraft with more than 28.000 Kg and up to 100.000 Kg landing weight;
e) MOP1.997.100.000 for aircraft with more than 100.000 Kg and up to 170.000 Kg landing weight;
f) MOP3.275.200.000 for aircraft with more than 170.000 Kg and up to 270.000 Kg landing weight;
g) MOP4.793.000.000 for aircraft with more than 270.000 Kg landing weight.
- In BOM no.52.

where the injured party proves that the damage was caused by negligent act or omission of the owner, the operator or his representatives (Article 23, 2) of Decree-Law no. 36/95/M).

The Ordinance provides for some causes of discharge of liability in respect of damages caused by aircraft in result of natural phenomena (earthquakes, seismic disturbances and other act of God), wars, armed conflicts, etc. (Article 4) and rules out liability where the accident is due exclusively to the injured party's fault (Article 5).

Legal actions in respect of liability for damages caused on the surface in Macau are brought before the Macau forum.

On agreement between the parties, however, the dispute may be referred to a forum outside the Territory or an arbitral tribunal (Decree-Law 36/95/M, Art. 27). The proceedings must be instituted within 3 years from the date of the occurrence of the damage (Ordinance 328/95/M, Art. 8). No causes of suspension or interruption are provided for; thus, this term must be construed as a caducity term.

The main differences with respect to the RC are: no limit per dead or injured person; the aircraft causing the damage on the surface may be in flight or on the ground, standing still; the weight of the aircraft taken into account in the application of the limits of liability is the landing weight and not take-off weight; the owner or operator of the aircraft is always liable up to the limits set by the Ordinance 328/95 for damages caused by unlawful use of the aircraft (unlawful appropriation or unlawful navigation), regardless of the right of recourse to the person who caused the damage (Article 6).

FINAL REMARKS

Several technical aspects of the RC were left out, as this is not the best moment to engage in a detailed analysis which, as a matter of fact, is best left for university professors or lawyers.

As for myself, I am mainly concerned with stressing the relevance of the RC as the single instrument of unification of a portion of public international air law.

The full or partial adoption of the principles of the RC or its mere influence on internal legislation as mentioned above[16] are extremely positive facts, often connected with the requirement for a compulsory insurance. The laws in several States require that carriers satisfy the licensing aeronautical authorities that they possess

[16] Certain Parties to the Rome Convention have incorporated the provisions of the RC, into domestic air law with modifications, whereby the regime of liability is applicable also to the national aircraft registered in that State: Belgium, Brazil and Germany.

appropriate insurance covering potential damages, including those relating to damages caused to third parties on the surface[17].

In addition to the USA and the UK disagreeing in principle with regard to the extension of the operator's liability as a means for providing a better protection to the interests of third parties on the surface, the fact that in a growing number of States the internal law provides for a compulsory insurance of the operator - first established by the RC of in 1933 - has added to the lesser importance of the problems arising from third party liability.

Let us yet not forget that, however generalized the compulsory insurance in international civil aviation may be - aimed above all at the operator's liability on third parties, and however sophisticated the insurance system, there will always be a need to resort to legal principles in order to enforce and grade this liability[18].

Countries with an Anglo-Saxon legal system or that are influenced by that system ascribe a limited relevance to written law when compared with case law. This circumstance partially explains the fact that the USA and the UK - for decades the leading nations in international air transport - minimize the role of the RC as an instrument of unification of public international law and consider the liability on third parties on the surface a matter to be solved essentially by national insurance laws or by the courts in the countries where the damages occurred[19].

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17 Under Decree-law 36/95/M, Article 26 the issuing and validation airworthiness certificates of aircraft registered in Macau is subject to previous submission of the insurance certificate or police. The same requirement applies to aircraft registered outside the Territory. Under Article 26 of Ordinance 38/96/M of February 22 governing the compulsory insurance contract, the Civil Aviation Authority or the body legally entrusted with the operation of the MIA shall make sure that the aircraft is insured.

18 In USA, the federal law imposes, in respect of foreign aircraft or aircraft registered outside the USA engaged in international or domestic air services a compulsory insurance for the benefit of passengers and third parties.
The Code of Federal Regulations (CFR) imposes on operators a US$300.000 minimum coverage per passenger and a total of US$300.000 times 75% of the number of seats in the aircraft (CFR 14 ßß 205.3-205.5).
On the other hand, the coverage of the third party liability insurance amounts to US$300.000 per person involved in any occurrence and US$20.000.000 per aircraft.
Aircraft with 60 seats or less or with 18.000 pounds maximum commercial capacity or less only need to cover US$2 million per aircraft and occurrence (CFR 14 °± 205.6).
The minimum limits of coverage required for passenger and third party liability may be used for a combined single limit of insurance per any one occurrence.
- R.D. Margo, *Aviation Insurance*, ob.cit. pg.17.

19 Other reasons added to the international underestimation of issues relating to third party liability: the fact that victims are mostly nationals of the State where the incident that caused the damage occurs and that, at the same time, establishes the applicable national law; property damages are almost exclusively an internal matter of the States and have little international impact.
Still an important reason is the fact that often aircraft licensing legislation enables combining different types of insurance in respect of each aircraft: hull insurance, passenger, luggage and cargo insurance and third party insurance in a single police. This solution brings about considerable economic and practical advantages not only to aircraft owners and operators, but also to insurers who by that means reduce the risk factor and optimize risk premiums.
See Article 3 of Ordinance 36/96/M of February 22, BOM no. 8.

We believe, though, that the present situation can only meet the needs of operators bound, under the internal law, by a compulsory insurance.

At present, different types of aircraft with different capacity are used in air transport, for private purposes and for the purpose of public transportation of passengers, cargo and mail bound for an ever growing number of destinations worldwide. The technological progress registered in navigation equipment and flow management, along with the different countries' or regions' economic progress will further enhance the importance of air transport in the years to come.

Therefore, safeguarding the interests of the potential victims or injured on the surface acquires a new magnitude, specially as such persons are totally alien to the benefits of the economic activity in question and often live in less developed countries that cannot provide them with legal and judicial protection.

In turn, the unrelenting trend to internationalization of an ever greater number of activities in the service sector, in particular mass tourism and related activities, mostly seen from the point of view of air service operators, necessarily increases the risk of victims and property damage involving foreign individuals and interests in the State where the damages occur.

So, we firmly believe in the huge advantage of an international Convention relating to that matter, aimed at uniformizing the legal principles applicable to third party liability regardless both of the place where the damage occurs and any protection as may be provided by the applicable national legislation, such as nowadays. In short, an international Convention based on the adaptation of the principles of the RC to the socioeconomic conditions and those of air transport in the 21st century.