

1997

A Milestone of Air Legislation in China - Some Thoughts on the Civil Aviation Law of the People's Republic of China

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Recommended Citation

Wu Jianduan, *A Milestone of Air Legislation in China - Some Thoughts on the Civil Aviation Law of the People's Republic of China*, 62 J. AIR L. & COM. 823 (1997)
<https://scholar.smu.edu/jalc/vol62/iss3/11>

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A MILESTONE OF AIR LEGISLATION IN CHINA—SOME THOUGHTS ON THE CIVIL AVIATION LAW OF THE PEOPLE'S REPUBLIC OF CHINA

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I. INTRODUCTION

ON OCTOBER 30, 1995, the Civil Aviation Law of the People's Republic of China ("Civil Aviation Law" or "Law") was adopted at the Sixteenth Meeting of the Standing Committee of the Eighth National People's Congress. Promulgated by Order No. 56 of the President of the People's Republic of China, the Civil Aviation Law became effective as of March 1, 1996. This Law, intended to ensure the safe and orderly operation of civil aviation, to protect the rights and interests of the parties involved in civil aviation and to promote the civil aviation industry within China, presents a milestone in Chinese air legislation.

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Provisions of international conventions and treaties to which China is signatory, such as the Chicago Convention of 1944¹ and the Warsaw Convention of 1929,² have formed the primary basis of civil aviation law in the People's Republic of China. Other treaties, to which China was not a party, have also influenced the development of Chinese civil aviation law, though the extent of their influence remains unclear. During the forty-six years preceding the Civil Aviation Law, the People's Republic of China enacted no national legislation concerning the inter- or intranational practice of civil aviation. To some extent, this Law is the summary of the civil aviation practices that developed in the People's Republic over those forty-six years.³

Therefore, my discussion of the Civil Aviation Law must be viewed with an understanding of both international air law and domestic Chinese law practice. To aid in this understanding, I begin with a brief description of the Chinese legislative system. The rest of this Essay is left for a discussion of the main parts of the Civil Aviation Law as it pertains to nationality and registration, rights in civil aircraft, lease of civil aircraft, air safety administration, public air transport enterprises, and carrier liability.

II. THE LEGISLATIVE SYSTEM IN CHINA

First, we must consider the Constitution of the People's Republic of China (the "Constitution").⁴ Article 5 of the Constitution states, "No laws or administrative or local rules and regulations may contravene the Constitution."⁵ Article 2 of the Constitution stipulates that all powers in the People's Republic of China belong to the people.⁶

The National People's Congress and the local people's congresses at various levels provide the means by which the people

¹ *Repertory—Guide to the Convention on International Civil Aviation*, ICAO Doc. 8900/2 (1977) (2d ed.).

² Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention] (codified at 49 U.S.C. § 40105 (1994)).

³ See Chen Guanyi, Director of the General Civil Aviation Administration of China (CAAC), Address at the First National Conference of Legal System of CAAC (1995) [hereinafter Address of the Director].

⁴ See 1 LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS 7 (Bureau of Legislative Affairs of the State Council of the People's Republic of China ed. 1991) [hereinafter LAWS AND REGULATIONS GOVERNING FOREIGN-RELATED MATTERS].

⁵ XIANFA [Constitution] art. 5 (P.R.C.).

⁶ *Id.* art. 2.

exercise state power. It is considered the highest organ of state power in China. In legislative aspects, the National People's Congress is entitled to amend the Constitution and to enact and amend basic laws concerning criminal offenses, civil affairs, state agencies, and other matters. In addition, the National People's Congress may exercise such other functions and powers as are inherent in the highest power of a state.⁷

As the permanent body of the National People's Congress, the standing committee may exercise the following functions and powers: (1) interpret the Constitution and supervise its enforcement; (2) enact and amend laws, with the exception of those reserved to the National People's Congress; (3) supplement and amend laws enacted by the National People's Congress when the National People's Congress is not in session, provided that the basic principles of the laws are not contravened; and (4) interpret the laws.⁸

The Constitution of the People's Republic of China provides for three categories of legislation.⁹ The first category is "national" law, comprising different sections of the state statutory law. Only the National People's Congress or its Standing Committee may enact this type of legislation. The second category is "subordinate" legislation, comprising administrative statutes theoretically based on national law. The State Council, acting in a regulatory capacity, may enact this type of legislation.¹⁰ The third category is regulations or orders issued under authority of the state council by subordinate ministries, such as the General Civil Aviation Administration of China (CAAC).¹¹ Sometimes, if there is no national law on a special subject, the State Council or ministries under the State Council will promulgate regulations, decisions, or orders to fill the gap. After the promulgation of a

⁷ *Id.* arts. 57, 62.

⁸ *Id.* art. 67. Actually, the Standing Committee of the National People's Congress can exercise such other functions and powers as the National People's Congress may assign to it other than the four items mentioned here.

⁹ This structure differs from that of many other countries. For example, Great Britain derives its legislation primarily from the two traditional sources: statutory enactment and subsidiary legislation.

¹⁰ XIANFA [Constitution] art. 89 (P.R.C.). Some of the functions and powers of the State Council are to adopt administrative measures, enact administrative rules and regulations, and issue decisions and orders in accordance with the Constitution, the law and the administrative rules, and regulations, decisions, and orders of the State Council.

¹¹ *Id.* art. 90 ("The ministries and commissions issue orders, directives and regulations within the jurisdiction of their respective departments and in accordance with the law.").

national law on the subject, the special regulatory decisions or orders are amended accordingly.

The genesis of the Civil Aviation Law may be traced back to as early as 1979. In 1979, the Central Politics and Law Group (a powerful state agency responsible for drafting laws at that time) authorized the CAAC to begin the drafting of the Civil Aviation Law.

After several years, the CAAC forwarded the preliminary draft of the Civil Aviation Law to the State Council.¹² The State Council then hosted a seminar to solicit opinions on the draft from representatives of the relevant ministries and committees under the State Council and of the military forces. Based on the seminar, CAAC revised the draft and forwarded it to the State Council for supervisory review.¹³

Investigations were subsequently made by special groups organized by the Bureau of Legislative Affairs of the State Council. Following these investigations, the State Council held still more seminars to solicit the opinions of various experts concerning detailed adjustments, amendments, and additions to the draft.

In late 1994 and early 1995, the Bureau of Legislative Affairs of the State Council and CAAC amended and refined the draft. On June 2, 1995, the CAAC presented the final draft to the thirty-second periodical meeting of the State Council for approval.¹⁴

On June 10, 1995, premier Li Peng signed the draft, authorizing its presentation to the Standing Committee of the National People's Congress. On October 30, 1995, the Standing Committee, chaired by President Qiao Shi, approved the draft by a vote of 128-yes to 0-no with 8 abstentions. Thus, the Civil Aviation Law was adopted and promulgated.¹⁵

This Law represents the first legislation concerning civil aviation ever enacted by the Standing Committee of the People's Congress of China. That is to say, it is the first time the People's Republic of China has had a law governing aviation activities to, from, or within China, binding on all parties involved in Chinese civil aviation.

¹² According to Chinese legislative procedure, only the State Council may submit drafts of proposed legislation concerning "special" fields, such as maritime or forestry law, to the Standing Committee of the National People's Congress for its examination and approval.

¹³ See Address of the Director, *supra* note 3.

¹⁴ *Id.*

¹⁵ *Id.*

Throughout the remaining discussion of the Civil Aviation Law, keep in mind the following three main themes:

1. A focus on safe management in accordance with the high technological characteristics of air transportation. Safety in civil aviation largely depends on the airworthiness of aircraft, the condition of facilities, and the qualification of pilots and ground personnel. Four chapters of the Civil Aviation Law are devoted to safe management and to the establishment of various systems to regulate the airworthiness of aircraft, the licensing of civil aviation enterprises, flight management, and the like.

2. Regulation of the legal relations between parties involved in civil aviation activities. Many provisions in the Civil Aviation Law address the legal rights and responsibilities of carriers, passengers, and consignees as they relate to each other and to third parties on the ground.¹⁶

3. Because civil aviation activities are largely international, the Civil Aviation Law includes many provisions derived from international law. The sources of international law are bilateral agreements and multilateral conventions. The drafters of the Civil Aviation Law incorporated provisions and terms from various international conventions such as the Warsaw Convention of 1929,¹⁷ the Convention on International Civil Aviation,¹⁸ the Hague Protocol of 1955,¹⁹ the Tokyo Convention of 1963,²⁰ the

¹⁶ These rights and obligations generally conform to the basic principles as set out in General Principles of the Civil Law of the People's Republic of China. LAWS AND REGULATIONS GOVERNING FOREIGN-RELATED MATTERS, *supra* note 4, at 331. Since China adopted "open door" policies, personal rights and those of corporate entities have received much attention. Now, parties engaged in commercial activities tend to solve their disputes through the legal channel instead of administrative ways.

¹⁷ Warsaw Convention, *supra* note 2. China sent the instrument of accession to the Polish government on July 20, 1958, and the Warsaw Convention became effective to China on October 18, 1958.

¹⁸ Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention]. On November 9, a resolution was made at a meeting of the Conference of the Council of ICAO that the People's Republic of China restore its legal status thereof after the resolution of United Nations on November 9, 1971.

¹⁹ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on Oct. 12, 1929, done Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter Hague Protocol]. This treaty became effective to China on November 28, 1975.

²⁰ Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 1641, 704 U.N.T.S. 219. This treaty became effective to China on February 12, 1978.

Hague Conventions of 1970,²¹ the Montreal Convention of 1971,²² the Geneva Convention of 1948,²³ the Guadalajara Convention of 1961,²⁴ the Rome Convention of 1952,²⁵ and others.

III. NATIONALITY AND REGISTRATION

"Nationality," as first used, identified the citizenship status of a natural person. A citizen "belongs" to the state and must be loyal to the state while the state is obligated to protect its citizens.²⁶ Nationality is a fixed legal connection between a single person and a state, with the state obligated to protect its citizen. The principle of nationality is very important because it delineates those over whom a government may claim jurisdiction and control. Such claims embrace economic, political, and financial considerations of the highest importance.²⁷

In modern society, the concept of nationality has been extended to legal persons (corporations), ships, and aircraft. Chapter 3 of the Chicago Convention of 1944 contains 4 articles concerning nationality of aircraft. Article 17 stipulates that aircraft designate the nationality of the state in which they are registered.²⁸ Article 18 stipulates that an aircraft cannot be validly registered in more than one state, but its registration may be changed from one state to another.²⁹ Therefore, the registration of an aircraft is very important in identifying and establish-

²¹ Convention on the Taking of Evidence Aboard in Civil and Commercial Matters, Mar. 18, 1970, art 12(b), 23 U.S.T. 2555, 2562, 847 U.N.T.S. 231; Convention for Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, art. 1, 22 U.S.T. 1641, 860 U.N.T.S. 105. This treaty became effective to China on October 10, 1980.

²² Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564. This treaty became effective to China on October 10, 1980.

²³ Convention on the International Recognition of Rights in Aircraft, June 19, 1948, 4 U.S.T. 1830, 310 U.N.T.S. 151 [hereinafter Geneva Convention].

²⁴ Guadalajara Convention of 1961, Sept. 18, 1961, 500 U.N.T.S. 31. Though China is not a contracting party to this Convention, the basic contents thereof have been absorbed into the Civil Aviation Law.

²⁵ Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Oct. 7, 1952, 310 U.N.T.S. 181. Some provisions of the Convention have been absorbed into the Civil Aviation Law; however, China has not yet become a contracting party.

²⁶ WU JIANDUAN, A DICTIONARY OF INTERNATIONAL LAW 806 (1995).

²⁷ R. Y. Jennings, *International Civil Aviation and the Law*, 22 BRITISH Y.B. INT'L LAW 207 (1945).

²⁸ Chicago Convention, *supra* note 18, art. 17.

²⁹ *Id.* art. 18.

ing the rights and responsibilities of the owners or other persons connected with the aircraft.

Under the terms of Article 19 of the Chicago Convention of 1944, the municipal law of the contracting state exclusively governs the conditions of the registration of aircraft. The Chicago Convention of 1944 also requires that each contracting state undertake to supply to any other contracting state information concerning the registration and ownership of any particular aircraft registered in the state.³⁰ The Chicago Convention of 1944 does not restrict a state to register only those aircraft owned by enterprises within its territory and thus having the nationality of the state.

Article 6 of Civil Aviation Law provides that a civil aircraft obtains the nationality of the People's Republic of China once it is, in accordance with law, registered with the CAAC. Upon completing registration, the aircraft receives a nationality registration certificate issued by the CAAC under authority of the State Council. Accordingly, the CAAC must set up a Civil Aircraft Register to maintain the nationality registration records. The registration certificate mainly includes such items as the nationality and registration mark, the type and manufacture of the aircraft, the series of production, the name and address of the owner, and the date of issuance.³¹

To obtain a nationality registration certificate, one must follow procedures stipulated in the laws and regulations. The basic documents needed for application are as follows: (1) the legal evidence of the applicant; (2) the certificate of ownership of the aircraft, sales bill, delivery certificate or transfer certificate, or certificate of use of the aircraft; (3) any lease agreements or contracts; and (4) a certificate for nonregistration in other states. After examining and verifying the documents and application, the CAAC will register the aircraft on the nationality register.

Article 7 of the Civil Aviation Law lists the three kinds of aircraft that may be registered in the People's Republic of China: (1) the civil aircraft of a state agency of the People's Republic of China; (2) the civil aircraft of a corporate enterprise set up in accordance with the law of the People's Republic of China;³²

³⁰ *Id.* art. 21.

³¹ AN EXPLANATION OF CIVIL AVIATION LAW 18 (1996) (Chinese ed.).

³² If such corporation has foreign investment, its organizational structure, composition of personnel, and proportion of contribution of foreign investment shall conform to the special provisions of the relevant regulations. On May 6, 1994, the CAAC and the Ministry of Foreign Trade and Economic Cooperation

and (3) other civil aircraft,³³ the registration of which is approved by the CAAC.

IV. RIGHTS IN AIRCRAFT

Before World War II, the CITEJA had prepared two drafts of a convention to define aircraft ownership and to establish a way to register rights and privileges in aircraft.³⁴ The first draft concentrated on ownership while the second dealt with mortgage and other real securities and privileges in aircraft. This last draft was submitted for the approval of the International Civil Aviation Organization (ICAO) during its second assembly held in Geneva in June of 1948. After the ICAO Legal Commission made important modifications, the Assembly adopted what has since been called the "Convention on the International Recognition of Rights in Aircraft" on June 19, 1948.³⁵

Although the Convention is now effective between fifty-three countries, the People's Republic of China does not adhere to the Convention's regime. However, certain provisions of the Civil Aviation Law mirror those of the Geneva Convention almost exactly. Article 11 of the Civil Aviation Law provides that the person entitled to rights in a civil aircraft must register the following rights with the CAAC: (1) the ownership of civil aircraft; (2) the right to the acquisition and possession of civil aircraft through an act of purchase; (3) the right to possess civil aircraft in accordance with a lease contract covering a lease term of six months or longer; and (4) mortgage of a civil aircraft. Therefore, with the passage of the Civil Aviation Law, China has joined the list of countries, like the United Kingdom, Ireland,

jointly issued a *Notice on Policies Concerning the Foreign Investment in Civil Aviation*. For further reference, see Wu Jianduan, *Investment in China Civil Air Transportation—Some Legal Aspects*, 20 AIR & SPACE L. 201 (1995).

³³ Article 7 of the draft of the Civil Aviation Law presented to the Standing Committee required registration of the civil aircraft of a Chinese citizen who has a residence or principal business location within the territory of the People's Republic of China. This provision was meant to address the registration of aircraft owned by so called self-employed individuals. Over the past twenty years since the People's Republic adopted the open-door policy, some people have become very rich. But generally speaking, a natural person in China cannot for the time being afford the enormous investment required to purchase an aircraft.

This provision was deleted by the Standing Committee of National People's Congress. As a result, the Civil Aviation Law does not expressly address the question of private registration but simply states that "other" aircraft are to be registered as permitted by the civil aviation authority under the State Council.

³⁴ NICOLAS M. MATTE, *AERONAUTICAL AIR-LAW* 543 (1981).

³⁵ *Id.* at 546.

Canada, and Australia, which did not ratify the Geneva Convention but which do recognize the concept of a mortgage on aircraft through their national legislation.³⁶

To protect the legitimate rights and interests of creditors, the nationality registration of a civil aircraft or the registration of rights thereof shall not be transferred abroad before the registered rights of such aircraft are compensated or before the consent of the person entitled to the aforesaid rights is given.³⁷

Mortgage rights are among the most important rights in aircraft. Article I of the Geneva Convention of 1948 requires the contracting states to recognize mortgage, hypothec, and similar contractual securement rights in aircraft where the mortgage or other rights were constituted in accordance with the law of the state in which the aircraft was registered and recorded in a public record of the registering state.³⁸ Similarly, Article 16 of the Civil Aviation Law requires joint registration of a mortgage by the mortgagee and mortgagor with the CAAC before the mortgage may be enforced against a third party.

Article 13 of the Civil Aviation Law prohibits, with the exception of compulsory auction in accordance with the law, the transfer abroad of nationality registration or of the rights of registration until the rights of civil aircraft have been compensated or the creditors of the civil aircraft have consented. These provisions of the Civil Aviation Law are intended to protect creditors and to guarantee their rights under the law.

Nevertheless, Article 34 of the Guarantee Law of the People's Republic of China stipulates that machines, transportation vehicles,³⁹ or other property owned by a debtor can be mortgaged. But the Guarantee Law contains no provision requiring a debtor to obtain consent from creditors before making any mortgage on a civil aircraft or to inform the creditors that they have already transferred the object of the mortgage.⁴⁰

³⁶ Berend J. H. Crans, *Selected Pitfalls and Booby-traps in Aircraft Finance*, 17 AIR & SPACE L. 43 (1992).

³⁷ See Civil Aviation Law art. 13.

³⁸ Geneva Convention, *supra* note 23, art. I(d)(i)-(ii).

³⁹ It is unclear whether or not the term "transportation vehicle" includes aircraft.

⁴⁰ See Guarantee Law of the People's Republic of China art. 34 (1995) (P.R.C.) (effective as of Oct. 1, 1995).

V. LEASE OF CIVIL AIRCRAFT

The leasing of aircraft in China began in the early 1980s when the CAAC leased its first Boeing 747sp's under an American leverage lease contract. In 1990, the Chinese airlines began to make use of operating leases of aircraft to introduce aircraft into China. By the end of 1994, the major Chinese airlines had leased 179 aircraft of various types, including Boeing series, Airbus series, and MD series, with a total value of approximately \$8 billion. By the end of 1994, Chinese airlines had obtained 269 aircraft through leasing—204 of which were obtained through financing leases, with the remainder obtained through operating leases.⁴¹

The rules governing financing leases, the most common form of aircraft leases in China, may be found in Articles 28-31 of the Civil Aviation Law. The major points of this section are summarized as follows: (1) the lessor retains legal ownership of the civil aircraft while the lessee obtains the rights of possession, usage, and benefit of the aircraft; (2) upon the expiration of a lease contract, the lessee is entitled to continue to lease; and (3) a supplier may not be held liable to a lessee and a lessor for the same damage.⁴²

VI. AIR SAFETY ADMINISTRATION

The Civil Aviation Law places heavy emphasis on air safety. Many provisions of the Law aim at maintaining the safety of air traffic, the airworthiness of aircraft, and the qualifications of personnel. Many others are directed toward preventing external threats to the safe operation of aircraft and facilities.

A. THE ADMINISTRATION OF AIRWORTHINESS

The regulation of airworthiness in China began relatively recently.⁴³ From 1949, the year in which the CAAC was established, to early 1980, there was no administration for original airworthiness within the CAAC.⁴⁴ But with the rapid development of the civil aviation and aircraft manufacturing industries in China, the regulation of airworthiness became more and more important.

⁴¹ See 4 CIVIL AVIATION ECONOMICS AND TECHNOLOGY (1995).

⁴² See Civil Aviation Law arts. 28-31.

⁴³ See WU JIANDUAN, A COURSE IN AIR LAW 121 (1996).

⁴⁴ There was, however, an administration for the maintenance and repair of aircraft that included some work on airworthiness.

In 1985, the CAAC promulgated the Provisional Regulations for Airworthiness—Civil Aviation Regulation of China. These regulations divided the administration of airworthiness into several major fields. The scope of airworthiness administration has been extended from use and maintenance to include design and manufacture. The administration now issues many different regulatory certificates: types qualification, production licenses, nationality registrations, maintenance and repair licenses, and maintenance and repair personnel licenses.

The cornerstone for the administration of airworthiness in China was the promulgation of the Regulation of the People's Republic of China for the Administration of the Airworthiness of Civil Aircraft by the State Council on May 4, 1987. Accordingly, the CAAC issued a series of orders and regulations concerning the administration of airworthiness. As the natural outgrowth of this history, Article 37 of the Civil Aviation Law stipulates that civil aircraft having the nationality of the People's Republic of China must obtain the certificate for airworthiness issued by the CAAC prior to beginning service.

B. SAFETY AND SECURITY OF CIVIL AIRPORTS

Article 62 of Civil Aviation Law requires governmental authorities at the county level or higher to announce any construction or extension of civil airports. Upon the opening of a civil airport, the following safety conditions must be present: (1) sufficient air traffic control, communication, navigation, and meteorological facilities and personnel to ensure flight safety; (2) security systems conforming to state regulations; and (3) emergency plans and the corresponding facilities and personnel to deal with extraordinary circumstances.

C. RESPONSIBILITIES OF PUBLIC AIR TRANSPORT ENTERPRISES

Articles 95-100 of the Civil Aviation Law subject public air transport enterprises to the following safety responsibilities: (1) a public air transport enterprise must make it a basic principle to safeguard flight safety and maintain normal flights;⁴⁵ (2) a public air transport enterprise must formulate a security plan and submit the plan to the CAAC for recordation;⁴⁶ and (3) no public air transport enterprise may carry munitions of war, im-

⁴⁵ Civil Aviation Law art. 95.

⁴⁶ *Id.* art. 99.

plements of war, or other articles the transport of which is prohibited by state regulations, unless approved by the CAAC.⁴⁷

D. GENERAL SAFETY CONCERNS

Safety is always a focus in civil aviation circles. Because China's enormous population makes it extraordinarily difficult to maintain safety, the CAAC is continually taking measures to strengthen its systems.

For example, several hijackings in the latter part of 1993 raised concerns for the safety of air transportation. To assuage these fears and improve safety, the CAAC first held a number of meetings to encourage its subordinate units to take measures to prevent further hijackings. Second, because highly qualified security personnel provide the best means for avoiding a hijacking, the CAAC removed unqualified security personnel, instituted special training programs for those remaining,⁴⁸ and recruited more than 1350 additional people to staff security sectors throughout China.

On July 6, 1996, Order No. 201 of the State Council of the People's Republic of China, Regulations of Safety and Protection of Civil Aviation of the People's Republic of China ("Order No. 201") was issued by Premier Li Peng. The provisions of Order No. 201 are divided into six chapters: Chapter 1, General Provisions; Chapter 2, Safety and Protection of Civil Airports; Chapter 3, Safety and Protection of Civil Aviation Operations and Transportation; Chapter 4, Safety Checking; Chapter 5, Punishment; and Chapter 6, Annex.

Article 2 of Order 201 stipulates that these regulations apply to all relevant organizations and persons engaged in civil aviation and related activities within the territory of the People's Republic of China. By promulgating these regulations, the Chinese government attached priority to safety in civil aviation. These regulations, together with the provisions in the Civil Aviation Law form an adequate legal basis for aviation safety oversight in China.

Under Article 3 of Order No. 201, the safety and protection of civil aviation is to be carried out based on the principle of unified administration and divided responsibility. Civil aviation se-

⁴⁷ *Id.* art. 100.

⁴⁸ Some experts from the ICAO were invited to provide two training programs of anti-hijacking techniques. See YEAR BOOK OF CHINA TRANSPORTATION COMMUNICATIONS 293 (1995) (in Chinese).

curity agencies are responsible for the implementation of unified administration, examination, and supervision. The top civil aviation security agency, called the Security Bureau, is a department organized directly under the CAAC.

VII. PUBLIC AIR TRANSPORT ENTERPRISE

Article 91 of the Civil Aviation Law defines a "public air transport enterprise" as any enterprise engaged in the air transport of passengers, baggage, mail, or cargo with civil aircraft for remuneration.⁴⁹ Anyone seeking to establish an air transport enterprise must file an application as required under Article 92 of the Civil Aviation Law and meet all of the following conditions: (1) all civil aircraft used must conform to state regulations and fit the requirements of safe flight; (2) all necessary personnel must have obtained licenses in accordance with the law; (3) the enterprise must possess registered capital in an amount no less than the minimum limit stipulated by the State Council; and (4) the enterprise must comply with other conditions stipulated by law and administrative regulation. In addition, the organizational form and structure of a civil air transport enterprise once formed must conform with the Company Law of the People's Republic of China.⁵⁰

In keeping with its policy of actively encouraging business expansion into and within China, the People's Republic is now opening more sectors of its economy, including the airline industry, to the world. Since May of 1994, China has allowed foreigners, especially foreign air carriers, to buy shares of Chinese airlines and to participate with their Chinese counterparts in setting up new airline companies.⁵¹ Still, foreign investment in such joint enterprises is restricted to thirty-five percent of an airline's total registered or actual paid in capital and twenty-five percent of voting rights. Airlines with foreign investment enjoy the same legal treatment as their Chinese counterparts.⁵²

⁴⁹ Civil Aviation Law art. 91.

⁵⁰ The Company Law divides companies into three kinds: (1) limited liability companies; (2) solely state-owned enterprises in which there is a board of directors but no conference of shareholders; and (3) limited liability companies by share. See Company Law of the People's Republic of China (1994) (P.R.C.) (effective July 1, 1994).

⁵¹ See Notice on Policies Concerning the Foreign Investment in Civil Aviation (CAAC & Ministry Foreign Trade & Econ. Co-Op. May 6, 1994).

⁵² See Jianduan, *supra* note 32, at 201-05.

All public air transportation enterprises must apply to the CAAC for approval of the air routes they will service and the aircraft they will fly. An enterprise operating scheduled air services must publish its timetables.⁵³

The taxable business items of a public air transport enterprise shall be determined by the CAAC. Regardless, the tariff concerning domestic air transport applies in accordance with relevant regulations of the state, and tariffs concerning international air transportation are determined according to the bilateral agreements existing between the Chinese government and other governments.⁵⁴

Finally, public air transportation enterprises must take certain security precautions. As stated earlier, a public air transportation enterprise must formulate a security plan and submit the plan to the CAAC for recordation. Similarly, public air transport enterprises must observe the regulations concerning the transportation of forbidden or dangerous goods.

VIII. CARRIER'S LIABILITY

Carrier liability has been the subject of many studies abroad. However, something can be added to the discourse on this subject by a review of the relevant provisions of the Civil Aviation Law.

Article 124 of the Civil Aviation Law states that the carrier shall be liable for the death or bodily injury of a passenger in its care.⁵⁵ Liability attaches if the accident took place on board the aircraft or during the course of embarking or disembarking, except that the carrier is not liable for death or bodily injury resulting solely from the state of health of the passenger.

This provision in the Civil Aviation Law differs somewhat from the provisional regulations that preceded it.⁵⁶ The earlier regulations provided an exception exculpating a carrier if it proved that the death or bodily injury was caused by force majeure.

⁵³ Civil Aviation Law art. 96.

⁵⁴ *Id.* art. 97.

⁵⁵ *Id.* art. 124.

⁵⁶ See Wu Jianduan, *The Current System Relating to the Compensation for Bodily Injury or Death of Passengers in Domestic Air Transport in China*, 15 AIR L. 87 (1990) (discussing the "Provisional Regulations Relating to the Compensation for Bodily Injury to Passengers in Domestic Air Transportation" promulgated through Order No. 28 of State Council [hereinafter Order No. 28]).

This exception was allowed in addition to the exception for a preexisting infirmity.⁵⁷

With respect to the international carriage of passengers, an exception for force majeure is found in both the wide-governing Warsaw Convention of 1929⁵⁸ and the Hague Protocol of 1955.⁵⁹ But under the Montreal Agreement of 1966, which was intended as a temporary arrangement to avoid the denunciation of the Warsaw Convention by the United States, the absolute liability system prevailed.⁶⁰ Neither the Civil Aviation Law nor the Montreal Agreement of 1966 contain an exception for force majeure in the liability for the death or bodily injury of passengers.

The Montreal Agreement of 1966 also stipulates that for international air transportation of passengers traveling to, from, or with an agreed stopping place in the United States, the liability of carriers, absent proof of negligence, is limited in most cases to \$75,000 per passenger.⁶¹ Article 20 of the Warsaw Convention of 1929 stipulates that the carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible to take such measures.⁶² While the Civil Aviation Law does contain similar wording in Article 126 for damages caused by delay of flight, it does not contain analogous general liability limitations. Instead, the Civil Aviation Law provides a comparative negligence scheme, whereby a carrier may be exonerated wholly or in part if able to prove that the negligence of the injured party caused or contributed to the damage.⁶³

⁵⁷ Order No. 28 should be duly amended since the Civil Aviation Law is now effective.

⁵⁸ Warsaw Convention, *supra* note 2, art. 20(1).

⁵⁹ Hague Protocol, *supra* note 19, art. 16..

⁶⁰ Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol Agreement, Agreement CAB 18900, May 13, 1966, 31 Fed. Reg. 7302 (1966) [hereinafter Montreal Agreement].

⁶¹ Including contingent fee. *Id.*

⁶² Warsaw Convention, *supra* note 2, art. 20(1).

⁶³ Civil Aviation Law art. 127 stipulates that if the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, the carrier shall be wholly or partly exonerated from his liability to such person to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When, by reason of the death or injury of a passenger, compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from his liability to the extent that he proves the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. *Id.* art. 21. The drafters of the Civil Aviation Law referred not only to the Hague Protocol but also to the Guatemala Protocol of 1971, the basic princi-

Article 22 of the Warsaw Convention of 1929 caps the liability of the carrier to each passenger at 125,000 francs (approximately \$8300).⁶⁴ The Hague Protocol of 1955 doubled this maximum liability.⁶⁵ Although China is a contracting party to both documents, the Civil Aviation Law departs from these provisions. Article 129 of the Civil Aviation Law limits the liability of an air carrier to 16,600 "units of account" per passenger.⁶⁶ The value of this amount would probably exceed that prescribed by the Warsaw Convention as amended by the Hague Protocol because of the favorable exchange rate between U.S. dollars and Special Drawing Rights.

Although the Civil Aviation Law has been in effect for over a year, the international ticketing contracts of some Chinese airlines still refer to the Warsaw Convention for rules governing liability limitations. Thus, there is a problem of conflict between international and domestic law that still requires resolution by Article 142 of the Civil Aviation Law. It is also problematic that the Civil Aviation Law fails to offer any solution for dealing with the international air transportation of passengers traveling to, from, or with an agreed stopping place in the United States.

As for domestic air travel, Article 6 of the Provisional Regulations Relating to the Compensation for Death or Bodily Injury of Passengers in Domestic Air Transportation in China originally limited liability to a maximum of Renminbi 20,000 yuan per passenger. The State Council later raised this cap to 70,000 yuan.⁶⁷

On October 31, 1995, representatives from the world's airlines gathered in Kuala Lumpur for the International Air Transportation Association (IATA) General Meeting. At this meeting, the airlines endorsed a new intercarrier agreement. This agreement allows compensatory recoverable damages with respect to death or injury of passengers to replace the various specific lim-

ple of which is strict liability, attenuated by the contributory fault of the passenger and by his state of health.

⁶⁴ See Warsaw Convention, *supra* note 2, art. 22(1).

⁶⁵ Hague Protocol, *supra* note 19, art. 11.

⁶⁶ The "Unit of Account" mentioned in this Law refers to the Special Drawing Right as defined by the International Monetary Fund; its equivalent in Renminbi shall be the amount calculated in terms of the conversion rate from the Special Drawing Right of the International Monetary Fund to Renminbi as prescribed by the competent State foreign exchange authority at the date of judgment, the date of the award of arbitration agency, or the date agreed between the parties concerned. Civil Aviation Law art. 213.

⁶⁷ See Order No. 132 of the State Council (Jan. 1, 1994).

its applicable around the world.⁶⁸ Because of restructuring and decentralization within the CAAC, the Chinese airlines have obtained a greater degree of autonomy over their commercial operations. The three leading airlines—Air China, China Eastern Airlines Co., Ltd., and China Southern Airlines—have already become the members of IATA. Perhaps in the future, they may be able to become parties to the new intercarrier agreement.

In summary, the Civil Aviation Law borrows provisions from many international agreements, but mirrors none. Unlike the Warsaw Convention of 1929, the Civil Aviation Law makes no exception for damages caused by force majeure, except for damages caused by delay. Similar to the Hague Protocol of 1955, the Civil Aviation Law follows a regime of limited liability. Finally, unlike the Montreal Agreement of 1966, the Civil Aviation Law permits comparative liability.

Except for the Montreal Agreement of 1966, one may wonder which document shall prevail in the international carriage of passengers by a Chinese airline—international treaty or national law? Article 142 of the General Principle of the Civil Law of the People's Republic of China provides the answer.⁶⁹ This provision states that if any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the Civil Aviation Law of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations.⁷⁰

IX. CONCLUDING REMARKS

In western developed countries with market-oriented economies, the ultimate aim of civil aviation law is to reach the best economic result for their developed industries. Unlike these countries, China's civil aviation industry and laws are still developing. Chinese civil aviation has an enormous potential for growth. But with such a huge population and comparably backward industry, the major concerns for civil aviation law within

⁶⁸ This move has satisfied many consumer protection groups such as the Airline Passenger Association. IATA REV. 1995.

⁶⁹ This provision was adopted at the fourth session of the Sixth National People's Congress, promulgated by Order No. 37 of the President of the People's Republic of China on April 12, 1986, and effective as of January 1, 1987.

⁷⁰ LAWS AND REGULATIONS GOVERNING FOREIGN-RELATED MATTERS, *supra* note 4, at 347.

China are smooth development and benefit for the whole society.

The original CAAC was organized under the military because of the cold war and the threat from superpowers from the 1940s to the 1970s. Following the reform of the leadership and management system of the CAAC during the early 1980s, CAAC was placed under the leadership of State Council, becoming the so-called competent civil aviation authority under the State Council. The eleven administrative regulations promulgated by the State Council and the over one hundred technical and economic regulations promulgated by the CAAC played an active role in the reform and development of civil aviation law in China. But because of their limited scope and poor coordination, those regulations failed to meet the needs of the civil aviation industry for establishing a market for the rapid development of civil aviation domestically and abroad. The Civil Aviation Law was meant to adapt its provisions and rules to continuing changes within the Chinese civil aviation industry, to help facilitate exchange with foreign countries, and to integrate China's economy with the world.

In this author's opinion, public dissemination and effective administration of the Civil Aviation Law should be among China's top priorities.⁷¹ The establishment of legal advisory institutions to assist in the implementation of the Civil Aviation Law in government agencies as well as in private enterprises is necessary.

⁷¹ The CAAC is in the process of drafting the Frame of Law System of Civil Aviation of China. These will consist of 15 volumes and 400 sections of regulation under this Law. Such regulations should greatly help the continuing rapid and healthy development of civil aviation in China.