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SOME ASPECTS OF CIVIL LAW REGARDING NUISANCE AND DAMAGE CAUSED BY AIRCRAFT

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INTRODUCTION

THE legal concept of nuisance being largely unknown in Civil Law countries, action against operators of aircraft and/or airports on account of noise produced by aircraft can generally be based only on

- a. violation of the absolute right to undisturbed enjoyment of real property; in that case an action exists irrespective of negligence on the part of the operator of the aircraft or airport;
- b. negligence (*faute*) of the operator of the aircraft or airport;
- c. absolute liability, if specifically provided for by statute.

Actions based on the violation of the right to undisturbed ownership are to the effect that the author of the disturbance be enjoined from producing such disturbance. In addition to the injunction the property owner can obtain damages under the statutes or case law of certain countries.

Where the action is based on negligence the situation is inverted. That is to say that the action is for the reparation of the damage created by a "wrongful act";¹ but in certain countries the courts have established the principle that where a claimant can ask for damages he can also obtain a court order enjoining the author of the damaging act to abstain in future from the damaging activities, provided, however, that there is reasonable certainty that the wrongdoer will continue them in spite of the adjudication of an indemnity for past damages.²

Similar principles apply in the case of absolute liability. The following discussion deals (a) with actions based on property rights, (b) with actions based on negligence of the operator of the aircraft or airport, (c) with absolute liability.

ACTIONS BASED ON PROPERTY RIGHTS

In some countries, air navigation acts and related statutes have established specifically or implicitly the principle that the operation of

¹ French: "acte illicite"; German: "unerlaubte Handlung"; i.e., an act which is a wrong but not necessarily illegal or unlawful.

² See, for instance, Mazeaud, Vol. 3, p. 419.

air services does not constitute, *per se*, infringement of property right.³ Such statutory recognition of the "right to fly" is not considered to amount to an expropriation of underlying real property since it applies generally to all property owners, while expropriation proper presumes taking away from a certain owner or a certain group of owners.⁴

In countries where no such rule has been enacted by legislation, the courts have constantly adhered to the principle that, whatever may be the limit to which ownership extends into the air or space, the landowner must tolerate the overflying of aircraft.⁵

Consequently, as far as can be seen, in no Civil Law country can land ownership be invoked as a basis for an action for trespass against the operator of licensed aircraft.⁶

However, the way a given service, flight or airport is actually operated may entitle the victimized landowner to certain defensive action in the courts. While he can never obtain an injunction ordering either the operator of the service or the operator of the airport to cease operations, he can sue them for damage or ask for a court order directing them to adopt measures for the protection of the neighbors against the nuisance created by these operations. Such actions are directed, as the case may be, against the operator of the air service, or against the operator of the airport, or against both of them.

In Germany the relevant rules for such actions are found in the Civil Code, the Air Navigation Act and the Industrial Enterprises Act. Section 26 of the latter provides generally that, when the proper administrative authorities have granted an operator the right to establish a certain industry or business at a given place, the court cannot enjoin him from carrying out the activities for which he has been licensed, although his neighbors may be substantially inconvenienced by them; but the neighbors can obtain a court order prescribing the adoption of measures for the prevention of the nuisance or inconvenience. Moreover, if the adoption of such preventive measures proves impossible or insufficient, the neighbors are entitled to damages. They can also claim compensation for damage or nuisance suffered prior to the adoption of protective measures.

Article 10 of the Air Navigation Act makes these rules and principles applicable to actions against the operators of an airport. The question arises, however, of whether the airport operator can be sued for damage arising from a nuisance (noise) which is in fact created by the operation of air services and not by the airport itself. German

³ Article 17 of the French Civil and Commercial Aviation Code, 1955; Article 1 of the German Air Navigation Act, 1936; Articles 3 and 4 of the Argentine Aeronautics Act, 1954; and most of the South American aeronautics acts. See also note 5.

⁴ This question has been much discussed by German jurists and a reference thereto is found in Mayer, p. 20.

⁵ See, for instance, Breitling, p. 15; Riese and Lacour, p. 152; Lemoine, p. 115; Litvine, p. 213. See also Civil Codes of Switzerland (Article 667), Netherlands (Article 626), Italy (Article 440), Spain (Article 650).

⁶ See note 5.

jurists answer this question affirmatively⁷ by pointing out that the interference with property rights and/or the damaging act, namely the noise produced by aircraft on landing and take-off, do not originate with the operator of the airport, but are, nevertheless, ascribable to the establishment and operation of the latter, and therefore justify court action against the airport operator under the above-stated principles. However, in accordance with the general principles of the laws of real property, no such action against the airport operator will succeed when the defendant proves that the noise and nuisance do not exceed "nuisances which are considered to be normal in this particular location." Consequently only excessive noise—which indeed may be produced by landings and take-offs made in conformity with prescribed regulations—is a cause for an action against the operator of an airport.

What is the position of neighboring landowners vis-à-vis the operator of a flight creating a nuisance? No action can be brought against him under Section 26 of the Industrial Enterprises Act or under the relevant rules of the Civil Code, for it is held that his liability towards third persons is governed exclusively by the rule of absolute but limited liability established by Article 10 of the 1936 Air Navigation Act.⁸ This Article will be studied further on.

French law,⁹ in respect to actions both against air services and airport managements, is similar to the German, although significant variations will be noted. These differences derive from the fact that French law provides a statutory limitation of the right to fly and that actions against the operator of the airport are governed in France by judge-made law, not by statute.

Article 1 of the French Air Navigation Act of 1924, as codified by the Civil and Commercial Aviation Act of 1955, establishes the rule that aircraft may fly within French territory without any restriction (*librement*); but Article 18 of that law introduces an important limitation by providing that "the right of an aircraft to fly over private property shall not be exercised in any way which would interfere with the exercise of the rights of the property owner." If an aircraft violates

⁷ Achnich, p. 259 sq; Mayer, p. 18; Riese, p. 236.

⁸ See references in note 7—Theoretically there remains a possibility, according to the general principles of German tort law, of obtaining an injunction in order to prevent further damage (for instance by the noise of the aircraft) when an action for damage is justified and it is reasonably certain that the damaging act will be repeated. The scope of such an injunction is, however, limited for the reason that the operator cannot be ordered to fly on another route, since he commits no trespass; neither can he be ordered to fly at a higher altitude, if damage occurs even though the aircraft normally flies at the prescribed altitude. Consequently, the aircraft operator could only be ordered to fit the aircraft with noise-reducing equipment that can be reasonably required and is technically possible. General consent, however, is that the establishment of absolute liability forecloses any other kind of action against the aircraft operator since absolute liability is based on the principle that the operator is free to fly any certified aircraft in accordance with established rules and procedures, provided he pays compensation for damage caused by his activities.

⁹ See Lemoine, p. 115, p. 604; Juglart, p. 167; Mazeaud, Vol. 1, p. 570 sq, Vol. 2, p. 317.

this obligation,¹⁰ though flying in accordance with established rules and procedures, the victimized property owner can sue its operator for damages under Articles 18 and 36 of the said Act. But, for reasons to be given hereunder, such violation does not create action to enjoin the aircraft operator from interfering with property rights.¹¹

Actions by neighboring landowners against the operator of the airport are the same as those under German law, but are derived from judge-made law only. French jurists hesitated for some time in admitting that neighboring landowners may have a defensive action against the airport operator because the establishment of an airport is preceded by an inquiry where the neighbors can oppose its erection. They felt that after complaints against future operation of an airport have been overruled by the proper administrative authorities, neighbors cannot later on claim damages for nuisance produced by this operation.¹² Moreover, where the establishment and safe functioning of an airport require restrictions to be placed on the use of land in the immediate vicinity, special legislation has been enacted for servitudes on such land and for the payment of proper compensation.¹³ It can thus be argued that the legislation has authoritatively decided where and to what extent the operation of an airport justifies indemnification of neighboring landowners for infringement of their right to full enjoyment of their ownership.

However, in accordance with traditional case law, the general consent¹⁴ is that the granting of a license to operate an airport, although given after proper inquiry as to the legitimate interests of the neighbors, does not prejudice or restrict the exercise of property rights of the neighboring landowners.

Reference is made in this respect to Article 12 of the act of December 19, 1917, regarding dangerous and unhealthy industries. This article restates the principles established by a series of court decisions; namely that permission to operate such industries is granted "without prejudice to the rights of third persons." The neighbors are therefore entitled to damages and can exercise various other defensive actions in the case of nuisance attributable to such industry, in accordance with the general rules of the law of real property and civil liability. However, they cannot enjoin the industry from operating.

Like principles are held to apply to nuisance (noise) created by an airport or an air service.¹⁵ Thus, if the airport or air service has been authorized by the government, the inconvenienced landowners cannot

¹⁰ The words "in a way" (*dans des conditions telles*) mean, for instance, at such an altitude, at such frequencies or by aircraft so noisy as to interfere with the rightful enjoyment of property.

¹¹ See references made in note 9—The remarks made in note 8 apply here.

¹² For discussion of that problem see Mazeaud, Vol. 2, p. 579 sq.

¹³ Act of July 4, 1935. Similar provisions are found in other legislations; for instance, Article 15 of the German Air Navigation Act and Article 30 sq. of the Argentine Aeronautics Act, 1954.

¹⁴ See references at Mazeaud, *loc cit.*

¹⁵ See note 9.

enjoin the airport or air service operator to cease its operation. As in German law, they can only ask that appropriate measures be taken by the operator to prevent the nuisance.¹⁶ Only if such measures cannot be adopted or prove inadequate can they claim damages.

Even then their action against the airport operator will be rejected if the disturbance objected to does not exceed "that which may be normally expected." Hence, noise produced by an aircraft does not give landowners an action against the airport management if that noise is not greater than would be expected from aircraft at the time when the airport was authorized to operate, provided such aircraft complied with approved rules and procedures. However, any increase in the noise level, due to the introduction of entirely new types of aircraft or to a decisive change in the rules for landing, take-off and maneuver, could justify the actions outlined above.

The situation is somewhat different in the case of an action for damages against the operator of an air service, as will be seen in the paragraphs dealing with absolute liability.

Although based on differently worded statutes, the French and German approaches to the problem under discussion are practically alike. Another approach would consist of compelling the airport to acquire (possibly through expropriation) servitudes on, or ownership of all the neighboring land the free enjoyment of which will be limited or disturbed as a consequence of the establishment and operation of the airport. Swiss legislation¹⁷ on real property, as enacted in the relevant provisions of the Civil Code, to some extent implements the first alternative since landowners are entitled, as of right, to compensation from the operation of any business or industry for damage caused by the *excessive* noise of its operations, and this rule applies also to the operation of airports.

ACTIONS BASED ON NEGLIGENCE (FAUTE)

Most Civil Laws contain a general rule that the author of a wrongful act must indemnify the victim,¹⁸ but, save in very special circumstances, an action for damage arises only in the case of proven negligence. The violation of regulations and established rules and practices is considered as negligence except where *force majeure* can be pleaded. Consequently, the operator of an aircraft is liable for all damage caused by an aircraft operated contrary to the air navigation regulations in force. In the case of damage attributable to the noise of aircraft, this means that the aircraft operator is liable for compensation if the noise exceeds the normal level; for example, because the

¹⁶ That such measures are already within the reach of the aircraft industry is demonstrated by the fact that the French jet aircraft "Caravelle" operates with so little noise that it was permitted to land at Idlewild Airport, which other jet aircraft are forbidden to use on account of their noise.

¹⁷ See Lacour in *Revue Française*, p. 32; Riese and Lacour, p. 154.

¹⁸ For instance, Article 1382, French Civil Code; Article 823, German Civil Code; Article 1053, Quebec Civil Code.

aircraft was flying below the regulatory altitude or because its engines or exhaust pipes were not in proper order, etc.

An exception to the principle that negligence must be proven is admitted, by the statute and case law of most countries, where the damage is caused by the use of an object which is dangerous *per se* (*théorie du risque créé*).¹⁹ However, an aircraft operated according to established rules and principles is normally not considered dangerous *per se*, and where the legislator has a different view he provides for absolute liability of the aircraft operator, as explained in the following section.

ACTIONS BASED ON ABSOLUTE LIABILITY

Certain legislations make the operator of an aircraft liable for all damage caused by its operation, irrespective of negligence and even in the case of force majeure. In consideration for such absolute liability, some of these legislations provide for limited liability, and reserve the right of the victim to claim full compensation if the negligence of the operator or his agents or servants is established.²⁰ Under this system the operator of an aircraft appears to be liable for damage caused by the noise of an aircraft although operated under normal conditions and in accordance with prescribed flight rules and procedures.

A first example of that regime is provided by the 1924/1955 French Air Navigation laws. Article 36 of the 1955 Code (Article 53 of the 1924 Act) provides that "the operator of an aircraft is liable *ipso jure* for all damage caused to persons or things on the ground by the flight of the aircraft or by objects which fall therefrom." Such absolute liability is unlimited as to the amount of the indemnity. The only defense available to the operator under Article 36 is the proof of negligence by the victim, in which case damages may be denied or apportioned. Some French jurists²¹ are, however, of the opinion that the principle of absolute liability as established by the said Article 36 should apply only when the damage was caused by "abnormal" operation (noise) of the aircraft and that no liability at all is incurred when the aircraft is operated according to established rules and principles. There is, however, no jurisprudence in line with this doctrine, and it might properly be argued that the introduction of such an element of "abnormality" would in fact destroy absolute liability and reintroduce the general principles of tort liability analyzed in the previous section.

The Italian Air Navigation Act of March 30, 1942 contains a slightly different rule in Article 965, which provides that "the operator is

¹⁹ On this doctrine see Mazeaud, Vol. 1, p. 356 sq.

²⁰ Although it is a general principle of Civil Law that absolute limited liability does not foreclose an action for full damage on the basis of negligence, some legislations provide so specifically: for instance, Argentine Aeronautics Act, 1954 (Article 152); German Air Navigation Act (Article 28); also Article 12 of the 1952 Rome Convention.

²¹ For references see Juglart, p. 168; Lemoine, p. 604.

liable for damage caused by the aircraft to persons or goods on the ground, even in cases of *force majeure*, from the beginning of the take-off maneuvers to the end of the landing maneuvers." Liability in such cases is limited in accordance with the weight of the aircraft. It will be noted first of all that such absolute liability falls on the operator even in the case of *force majeure*. On the other hand, while the French law refers to the flight of an aircraft, the Italian provision attaches liability to damage caused "by the aircraft." It therefore may be argued that only damage caused by physical contact with the aircraft is governed by Article 965; still, Italian jurists do not deny the possibility of a constructive interpretation of Article 965 in order to make it applicable to damage caused by the flight or the maneuver of the aircraft, *i.e.* by its noise.

The Swiss Aeronautics Regulations of January 20, 1920, are in line with French law in decreeing absolute and unlimited liability of the operator for any damage caused by the operation of his aircraft. They go further than the French law since the negligence of the victim does not necessarily limit or exclude the operator's liability. According to Article 26 of the Regulations, the judge may or may not take account of the victim's behavior in assessing the amount of compensation.

Under German law the situation is essentially different and, furthermore, obscured by a unique decision of the German Supreme Court on the interpretation of the relevant Article 19 of the 1936 Air Navigation Act. This article provides for absolute but limited liability of the aircraft operator only in the case of damage caused to persons or things "by an accident" during the operation of an aircraft. According to a decision of the German Supreme Court the noise made by an aircraft while operating under normal conditions can be considered as an accident within the meaning of Article 19.²² The case involved a silver fox farm, the operation of which had been ruined by the noise of overflying aircraft. The farmer's damage suit was rejected, however, because the Court felt that there was no "adequate relationship" between the accident (noise) and the damage to the farmer, the loss being attributable to the extreme but natural nervousness of the foxes, not to the aircraft noise.²³

While disagreeing with the findings of the Supreme Court that noise of an overflying aircraft complying with the normal flight rules and procedures may be considered an accident, most German legal writers²⁴ strongly support the other reason advanced by the Supreme Court that the general principles of German law on civil liability

²² Decision of July 4, 1938. This decision and decisions of non-German courts dealing with similar situations, particularly from Norwegian courts, are extensively discussed by Bärmann, *loc cit*, and Mezger, *Revue Générale*, p. 432 sq.—See also *Revue Générale de Droit Aérien*, 1936, p. 504, and note 26 hereunder.

²³ Schleicher and Reymann, p. 119; Achtnich, p. 259; and references given by these authors.

²⁴ References at Achtnich, p. 260.

require the existence of an "adequate relationship" between the damaging act (accident—noise) and the damage suffered.

In line with this doctrine, German courts are extremely reluctant to adjudicate compensation in the case of damage allegedly suffered through the noise of an aircraft operating under normal conditions; for they hesitate to consider such noise as "the adequate cause" of the damage. Consequently²⁵ they rejected an action by a nursing home which had lost a large part of its business as a consequence of the noise of overflying aircraft. On the other hand they did admit the existence of an "adequate relationship" when a person was killed by a horse which bolted when frightened by the noise of an aircraft.²⁶

Compensation claims for the depreciation of real property resulting from the noise of overflying aircraft encounter a special difficulty under German law. Article 19 of the Air Navigation Law applies the principle of absolute liability to bodily injuries, including damage to health, and to "damage to things." However, it is doubtful whether the loss of land value, which is not a consequence of a physical deterioration or destruction of the property, can be considered as "damage caused to a thing."

In any case, compensation under the principle of absolute liability is limited by German law (Article 23 of the Air Navigation Act) to 100,000 Marks in the case of aircraft weighing less than 2,500 kg, and to an additional 40 Marks for each additional kilogram of aircraft weight, up to a maximum of 300,000 Marks. Only one-third of the above amount is available for damage other than personal injury or death. Moreover, no victim can receive more than 36,000 Marks.²⁷

²⁵ References at Achtnich, p. 268.

²⁶ Silver fox and similar farms have provided the *cause célèbre* on the question of compensation for damage caused by aircraft noise in many Western countries during the 1930s. Recorded judicial decisions are far from uniform, even in the same country. In Norway, where the first recorded case occurred, there were no less than six silver fox farm cases between 1936 and 1939, many of which were decided in favor of the farmer; see translation and analysis of these decisions in *Archiv für Luftrecht* 1938, p. 223 sq, and Bärmann, *op. cit.* In the U.S.A. the problem was first dealt with, and damages awarded, by a decision of the United States Comptroller General of October 20, 1928 (USA v R 1928, 46); then by decisions of the United States District Court in Omaha, Nebraska, *Nebraska Silver Fox Corporation vs. Boeing Air Transport*, April 1, 1931, (USA v R 1932, 165); the United States District Court of Minnesota, *Leisy vs. United States*, February 26, 1952 (USA v R 1952, 565); the Supreme Court of Wisconsin, *J. W. Maitland vs. Twin City Aviation*, April 12, 1949 (USA v R 1949, 217); and finally by a private act for relief, 82nd Congress, Private Law 665 (USA v R 1952, 572). A Canadian court rejected a damage suit by a mink farmer against an air service, the action being based on negligence; see Supreme Court of Nova Scotia, *Nova Mink Ltd. vs. Trans-Canada Air Lines*, January 5, 1951, (USA v R 1951, p. 1). In France the same problem was dealt with in connection with cows and wild geese by the Commercial Court of Marseille on January 10, 1939, (*Revue Aéronautique Internationale* 1939, p. 24).

²⁷ Limited absolute liability is also provided, for example, by the laws of Guatemala (Decree No. 563 of 1949), Honduras (Act of March 17, 1950), Mexico (Act of December 27, 1949) and Spain (Decree of December 27, 1947). The 1938 Aeronautics Act of Brazil establishes absolute liability, but sets limits only in the case of damage to persons. Absolute unlimited liability is provided for in the following countries: Bolivia (Regulations of January 10, 1939), Ceylon (Air Navigation Act of 1950), Chile (Act of October 14, 1925), Denmark (Act of May 1, 1923),

Attention is finally drawn to the rules of the 1952 Rome Convention on damage caused by foreign aircraft to third persons on the surface, which, in some countries, *e.g.* Belgium,²⁸ apply equally to national aircraft. These rules provide for absolute but limited liability by making the operator of aircraft liable vis-à-vis "any person who suffers damage on the surface . . . upon proof only that the damage was caused by an aircraft or by any person or thing falling therefrom" (Article 1).

It had been proposed at one of the preparatory meetings of the Rome Conference that the above rule be drafted so as to make sure that only damage caused by physical contact by the aircraft would be covered by the provisions of the Convention; but that proposition was defeated, and it is therefore believed that damage caused purely by the noise of an "aircraft in flight" can be compensated under the absolute-liability rules of the Convention.²⁹ However, the Convention *explicitly* provides that "there shall be no right to compensation if the damage . . . results from the mere fact of passage of the aircraft through the airspace in conformity with existing air traffic regulations." Hence, only the damage caused by noise, which could have been avoided by strict adherence to prescribed flight rules and procedures, gives cause for an action for damages under the Rome Convention and under national laws which extend the application of the Rome Convention to national aircraft. Still, the amount due from the operator in these cases is limited to the amounts prescribed by Article 11 of the Convention in accordance with the weight of the aircraft, except where "the person who suffers damage proves that it was caused by a deliberate act or omission of the operator, his servants, or agents, done with intent to cause damage" (Article 12).

SUMMARY

The Civil Law regime of liability for damage caused by aircraft noise may be summarized as follows. Compensation for noise may be obtained variously, either from the operator of the airport or from the operator of the flight, or from both, but in some countries compensation will be accorded only when the noise was excessive or was due to failure to observe normal flight rules and procedures. In some countries negligence of the operator of the airport or the service must be proved, while others provide for absolute liability, the amount of which is sometimes limited to a maximum for each damaging act. In

Dominican Republic (Act of January 28, 1948), Finland (Act of February 25, 1923), Iceland (Act No. 32 of 1929), Iraq (Act No. 41 of 1939), Lebanon (Act of January 11, 1949), New Zealand (Civil Aviation Act of 1948), Norway (Act of June 17, 1932), Sweden (Act of May 26, 1922), Union of South Africa (Aviation Act of 1923) and Uruguay (Aeronautics Code, 1942). *See also* L. Brunswick, p. 27 sq and 49 sq.

²⁸ *See* Litvine, p. 219.

²⁹ *See* Juglart, *La Convention de Rome, Paris, 1956.*

addition, in most countries the operator of the airport may be ordered to adopt proper measures to prevent disturbance of neighboring land-owners.

The foregoing analysis of the rules applied in some Civil Law countries seems to invite the conclusion that whether aircraft noise creates liability for repairing damage produced by that noise depends largely on the basic philosophy underlying national aviation laws. Where the regular and efficient operation of aircraft is considered to be paramount, no remedies are afforded to persons on the ground who suffer from its normal operation. On the other hand, there are legislations proceeding from the principle that, while nothing should be laid in the way of aircraft operators who obey the law, cognizance should be taken of the fact that aircraft are dangerous, *per se*, and inevitably interfere to some extent with the rights of other persons; in this case, while the operator may proceed freely within the limits of established regulations, he still shall indemnify persons inconvenienced or suffering real damage. On the basis of that philosophy absolute liability is established—except in the case of negligence of the victim—and the heavy burden of such “liability without negligence” is mitigated, in some countries, by providing a maximum or limited liability.

As regards the special noise which may be expected from the operation of certain types of jet aircraft, the question may be asked whether the law as it presently stands provides sufficient protection for the public, particularly for people living near an airport. Noise produced by conventional aircraft operated in accordance with prescribed procedures is presently considered, for all practical purposes, as normal and not exceeding the level of the nuisances “which may be expected” in a community near to an airport. There is certainly a risk that like principles will be applied to the specific noise of a jet aircraft, which today may appear to be “excessive” but which may be classified as normal as soon as jet operations become predominant.

However, the existing legislation in Civil Law countries provides the means for protecting the public against undue disturbance from jet aircraft through appropriate government regulations.

First of all, the competent authorities may require jet aircraft to land only on such airports as are far away from built-up centers. Moreover, they may refuse the licensing of aircraft which appear to be too noisy and eventually they may prescribe flight routes and flight procedures which will prevent the public from being inconvenienced by the operation of jet aircraft.

This thus means that in future the public should seek protection against nuisance from aircraft, not so much through civil actions against the operators of airports or air services, but through pressure being exercised at government level to adopt the appropriate regulatory measures.

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