Liability of airports for noise hindrance : a comparative analysis

Dr. PABLO MENDES de LEON*

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Introduction

The noise contours established around airports are distinctly marked in many parts of the world. These markings have a direct correlation to the objective of reducing the level of noise hindrance around airports.

Measures are being taken at large airports, the world over, to reduce the hindrance caused to people residing in the direct vicinity. This in turn has spurred on the establishment of extensive procedures to protect the interests of the surrounding neighbours at a maximum level. These measures vary from insulation and/or the demolition of residences to compensation regulations.

Since the sites of the airports, and there economic importance, has been determined for the time being, the question arises if and when, besides the proposed and existing governmental measures, a judicial process by way of

* Director, International Institute of Air and Space Law, Leiden University, The Netherlands

administrative or civil procedure is possible to remedy the damage caused by noise hindrance.

The question becomes more current in the light of the commitments taken on by states, namely to set up national regulations to compensate victims of environmental damage,[1] during the UNCED (United Nations Conference on Environmental Development) meeting at Rio de Janeiro.

This article will highlight the following aspects:

- the parties to a settlement or a conflict;
- promotion of efficiency in handling claims: canalizing liability;
- jurisprudence (US, Europe);
- concluding remarks.

Parties to a settlement or a conflict

At a cursory glance this might seem a simple question but in the aviation sector the answer is not self-evident.

Plaintiffs

As a *plaintiff* the following come to mind:[2]

- the residents of the affected area themselves, as those most directly affected;
- the municipality where the residents live (or any other public organization at for example a provincial level);[3]

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1) Principle 13 of the *Rio Declaration on Environment and Development* (hereafter: "Rio Declaration"): "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage." Published in 22(4) Environmental Policy and Law 268-269 (1992).

2) Refers to plaintiff and defendant in the court of first instance.

3) See, the American case referred to in note 26, below, where the *Village of Cedarhurst* functioned as the defendant because it had forbidden certain flights above this town.

- the environmental groups, that have previously represented the residents or the environment and who have been admitted by the court.

Defendants

The difficulty lies in determining the *defendant*. In environmental law the principle of "Polluter pays" is embedded.[4] The question remains who in the present context should be named as the polluter, and who then should be considered as the defendant in a case.

1. The manufacturer of the aircraft engines

When this problem is applied to the scenario below, at first there is a surprising result: *the manufacturer of the aircraft engines* would be the first to be labeled as the defendant. He, the producer, has delivered the motors that are making the noise. To the best of our knowledge, till date nobody has attempted to establish that the producer of the motors is liable for the noise hindrance caused on the ground. Which is not surprising.

The *EC Regulation concerning Product Liability* is not applicable.[5] No rule hampers the person suffering from noise hindrance to sue the producer of the motors (i.e. Pratt and Whitney, Rolls Royce etc.) in accordance with a country's law of tort. The requirements of causality between the damage and the act as well as the responsibility, however, present obstacles for a successful judicial action by the plaintiff.

2. Airlines

On the basis of the principle of the "Polluter pays", it is more logical to claim damages from, for example, *the airline*. The airline is the one who is

4) See, for example, Principle 16 of the Rio Declaration and Article 130(r)(2) of the EC treaty. Principle 16 of the "Rio Declaration" specifies that states should encourage the internalisation of environmental costs.

5) EC Directive 85/374/EEC, Official Journal of the European Communities (hereafter: OJ) L 210/29-33 (1985). There is no contractual relationship between the producer and the consumer; the product is in most situations is not defective.

using the engines and is producing the noise by flying the aircraft. Unfortunately, it is not that simple. The airline could claim in its own defense that it flies its aircraft in accordance with the government regulations that in turn are based on national and international legislation.[6]

These regulations include norms pertaining to the amount of noise airlines may produce, using "Chapter 2" but in most cases "Chapter 3" aircraft, while the flight is carried out completely corresponding to the directions issued by the air traffic control. From the airline's point of view, it could contend that there is no question of illegal or careless behaviour as it has conducted its affairs according to the national government's law, for which it has a license.

This point of view, as a counter argument, is not enough in all cases to avoid a tort case. Taking into account the case law relating to operating within the parameters of a governmental license, if indeed the operation has been legal it depends on the following factors:

- the nature of the license;
- the interest that the underlying rule on which the license is based seeks to uphold;
- the circumstances of the case.[7]

A specific answer to the question to what point the possession of a license can influence the legality criterion is not given. The judge will finally have to decide this, while he still maintains the freedom to deviate from the above mentioned criteria, for example, due to a requirement in the interest of aviation.

Still it does not seem easy to maintain that airlines are liable, for

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6) See for example Annex 16, Volume I of the International Civil Aviation Organization (ICAO) and EEC Directive 92/14 which limits the use of Chapter 2 aircraft, OJ L 76/21-23 (1992), as amended by EC Directive 98/20, OJ L 107/4-9 (1998).

7) See Article 6 paragraph 2 of the Amended Proposal for the Council Directive pertaining to liability of damage and environmental decay caused by waste products, COM (91) 219 def. SYN 217; OJ C 192/615 (1991): "The producer cannot be freed from his liability simply due to the fact that he has a permit issued by the government."

example in "the interest that the underlying rule on which the license is based seeks to uphold" where the underlying rule is considered the interest of orderly, efficient and safe aviation. At least these are the objectives of the Chicago Convention on international civil aviation of 1944, and many national aviation codes, being the underlying rule on which the license based.

In addition to this, can be mentioned the *Convention on damage caused by foreign aircraft to third parties on the surface.* This convention, hereafter also referred to as the Rome Convention, favours the argument mapped out above: the user of an aircraft is not liable for damage to third parties on the surface by sheerly flying according to the rules as laid down by a contracting party.[8)]

A problem is created when a country is not party to the Rome Convention; besides which noise damage is not included in the damage covered by the treaty. An attempt was made in the Montreal Protocol of 1978 that amended the Rome Convention, to cover the damage caused by the sonic boom. This attempt failed.

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8) *Convention on damage caused by foreign aircraft to third parties on the surface*, Rome, 7 October 1952. Article 1(1): "Any person who suffers damage on the surface shall, upon proof only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom, be entitled to compensation as provided by this Convention. Nevertheless, there shall be no right to compensation if the damage is not a direct consequence of the incident giving rise thereto, or if the damage results from the mere fact of passage of the aircraft through the airspace in conformity with existing traffic regulations." Thus, there has to be an "incident". Noise hindrance seems not to qualify as such an "incident", which can be distilled from the last sentence. According to German case law (see the decision of the Oberlandsgericht at Oldenburg of 27 October 1987) (see, note 34) noise hindrance by air traffic can be considered an "Unfall" in the light of the Article 33 of the German Aviation Code. This rule is reconfirmed in Article 9 of the Rome Convention, in which it is explicitly stated that there is no other liability for damage to third parties on the surface than what is taken up in the corresponding articles of the treaty. When country A is a party to the convention, an airline of another contracting state does not have to worry about a claim for damages as caused by noise hindrance in country B.

3. The airport

As a *third* defendant the *airport* can be summoned. Although the airport itself is not the one that causes the noise hindrance, but its role in attracting more traffic and as the place where airlines operate with all the effects of that respectively, it *draws* such hindrance.

Yet again, the liability of the airport is not evident. First, it could maintain that the location was designated by the government. The designation takes place after careful and extensive procedures have been conducted, during which the residents have a variety of possibilities to protest. Besides which measures are taken for the residents such as isolation of their homes to ease the pain.[9]

In short, the airport can claim that it has been located in a certain place based on government policy and regulations. This does not mean, as will be explained below, that the residents *a priori* stand no chance in a civil procedure.

To begin with, the question whether an airport can in principle be sued in a civil procedure has not been examined so far. In some countries, operators and/or owners of airports, although it is more the exception than the rule, could hide behind the government's immunity.[10]

For instance, in the Netherlands, such a claim would not stand up in court.[11] The American jurisprudence shows a similar trend. When a municipality operates and/or owns an airport, the municipality cannot claim immunity to avoid possible liability.[12] In more than one case the argument

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9) See Article 26 a, b en c *Luchtvaartwet* (the Dutch Aviation Code).

10) For examples of a successful claim of immunity of airports in civil cases, see also I. Awford, *Civil Liability concerning Unlawful Interference with Civil Aviation*, in "Aviation Security", published by the International Institute of Air and Space Law at Leiden, 47-73 (1987), pg. 50.

11) District Court of Haarlem, the Netherlands, in the case of *Geluidshinder Schiphol* (noise hindrance at Amsterdam Airport Schiphol); Kort Geding (Summary Proceedings) 1997, 282. Both the foreign airlines (ElAl Israel Airlines, Polair Cargo of California) and the Dutch airlines had sued the NV Luchthaven Schiphol (Schiphol Airport N.V.). The issue of immunity was not even mentioned.

12) See *Nestle v. City of Santa Monica*, 6 Cal. 3d 920 [10] Cal. Reports 568, 496 P. 2d. 480.

that the government regulates and organizes the air traffic was used by the municipalities that operated or owned airports; but this does not negate the liability of the airport.[13] Nor could the American government call in its immunity when it was charged with noise hindrance caused by military aircraft near a military airport.[14]

4. The government

An airport is a potential defendant, but its role is not always de-linked for that of the government. This governmental responsibility can be traced back to the concept of state sovereignty over a country's airspace established by the Chicago Convention. Here one finds the starting point of the vertical organization of civil aviation: due to security reasons the responsibility for security and the development aviation is placed with the state, insofar later international or national legislation does not deviate from this principle. In the event of a deviation, it should be correlated with the basic principle.

According to this system, airports are at least partially dependant on a state's authority,[15] without an independent niche with its own responsibility and liability for international civil aviation. Privatization of airports casts another light on this subject, however.

Besides the responsibility for security and organization of the aviation sector, the government is also tasked with protecting the environment. These tasks are enshrined in international law[16] and in the basic laws of most countries. Hence, one could conclude that the government can be considered liable in a tort case.

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13) See *Griggs v. Allegheny Airlines and Loma Portal Civic Club v. American Airlines,* Inc. 61 Cal. 2d. 582, 591-594; City of Oakland v. Nutter, 13 Cal. App. 3d 752, 763.

14) See *United States v. Causby* (1946) 328 U.S. 265 [90 L.Ed. 1206, 66 Supreme Court 1061], and the German case concerning the liability of NATO (North Atlantic Treaty Organization) aircraft, cited in note 35, below.

15) See, inter alia, Art. 28 of the Chicago Convention: "Each contracting State undertakes, ··· to ··· Provide in its territory, airports, ···"

16) See, note 5, above.

Unfortunately, this too is not an easy solution. Before a look can be taken at if the action of the government is legal or illegal, one has to examine if indeed there is a case to be made for an 'action' by the government since the action has to result in noise hindrance. Taking the "Polluter pays" principle into account, the government is a polluter in the same sense as the airport. At best, it can be contended that the government draws noise hindrance by opening its national airspace to air traffic. This striking resemblance to the airports exists also in the arguments put forward in the government's defense, i.e. isolation of houses and extensive procedures.

Yet again the victim finds obstacles strewn in his path to find a remedy for the damage incurred by noise hindrance. Every potential defendant (manufacturer of engines; airlines; airports; government) has arguments to resist a claim. From the above paragraphs, it becomes evident that there exists no clear solution to this problem.

Canalization of liability

Using the criteria, *reasonableness* and *proportionality*, it would seem that the person most fit to carry out '*risk management*' should be made liable. This would come closest to the practice in the aviation sector of allotting damages within the framework of a contractual relationship. The 'canalizing of liability' in the direction of the airlines in the case of a *contractual* relationship does not imply that the same trend exists in cases that fall outside of this relationship. Besides, those involved in a contractual relationship, the surrounding inhabitants will benefit from this trend as well. The following paragraphs will examine the question which party is most liable to be identified as a defendant pursuant to case law, and in the light of the concept of chanelising of liability.

Jurisprudence in selected countries

International law

Noise hindrance is a 'local' issue as the cause and the effect is limited to the airport and its surroundings. To mitigate these problems, 'local' regulations are applied. This, however, does not exclude the international dimension this issue could take on.

In the *Trial Smelter* case, between Canada and the United States, the following principle was laid down:

"…under the principles of international law, as well as the law of the United States, no State has the right to use or permit to use of its territory in such a manner as to cause injury by fumes in or to the other territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence".[17]

The judgement held Canada responsible for the cross-boundary pollution by the Trial Smelter. Canada was required to take measures to stop the air pollution in the State of Washington. Also, the both governments had to create a method whereby people affected by the air pollution could claim damages.

The problem of responsibility for cross-boundary pollution within the aviation sector will probably be a greater issue in Europe than in North America due to geographical reasons. In the case of *Salzburg Airport*, Germany and Austria made an agreement[18] so that the interests of both countries were taken into account while dealing with the cross-boundary

17) Judgement of 11 March 1941, *Trial Smelter Case; United States v. Canada*, III United Nations Reports of Arbitral Awards 1907-1981 (1941).

18) *Agreement between the Federal Republic of Germany and the Republic of Austria concerning the effects on the territory of the Republic of Germany of construction and operation of the Salzburg airport*; 93 United Nations Treaties Series 93-96 (1974).

noise hindrance caused by the use of Salzburg Airport. Article 4 paragraph 3 states:

"Claims arising from the effects of airport traffic or of the operation of the airport on persons, property or interests in the territory of the Federal Republic of Germany may be based either on German law or on Austrian law. If a claim is based on German law, section 11 of the German Air Transport Act, in conjunction with section 26 of the German Commercial code shall apply mutatis mutandis, provided that the airport is operated in accordance with the Austrian laws and regulations in force and within the framework of this Agreement. The ordinary courts of the Federal Republic of Germany shall have exclusive competence to adjucate disputed claims".

Here like in the *Trial Smelter* case, both countries had to make a provision for the discharge of liabilities. The question arises what the legal situation is when there is no cross-border noise hindrance; in other words, when noise is produced and hindrance is experienced within the boundaries of one single country. That question will be looked at by analysis of jurisprudence in selected countries.

United States case law

In the case of *Irving D. Aaron v. City of Los Angeles*[19] the operator of the international airport of Los Angeles (LAX) was liable for the depreciation in value of real estate belonging to residents living in the direct vicinity of the airport, in the event:

- the owner can show a measured depreciation;
- the depreciation is the result of the use of the airport such that the noise of aircraft utilizing the airport has is substantial interference in enjoyment of the real estate;
- the owner, if uncompensated, contributes more to the public undertaking in maintaining the airport than his proper share as a citizen.

19) 40 Cal. App. 3d 471, 115 Cal. Rptr. 162.

Obviously the terms, the amount of depreciation, substantial interference, and the balance between private interests of the residents relating to their real estate and the public undertaking of maintaining the airport, have to be analyzed on a case by case basis. The Supreme Court stated that the damage has to be *substantial* before it can be claimed. In certain cases, the damage caused by noise hindrance came about as a result of or was additional to another situation. That damage, citizens have to indulge as their contribution to carrying out the public undertaking. If in the area around airports that private interest is *disproportionately* sacrificed for the public undertaking it could lead to compensation.

Interesting part of the case was that the city of Los Angeles, who is the airport operator, tried to evade its liability by pointing out the fact that it was not the *proximate cause* of the damage. After all it is the engines and the airlines that directly cause the damage. The Supreme Court did not address this argument. The fact that the city of Los Angeles builds and operates an airport is sufficient for liability. It is not necessary that the airport is the *only* cause of damage. An important condition is that it is a *substantial cause* of damage.

In the *Irvings* case mention is made of another California case, namely *Loma Portal Civic Club v. American Airlines, Inc.*[20] In this case the plaintiffs did not sue the airport but the airlines that flew close to their houses. Plaintiffs claimed that airlines were causing an unreasonable infringement on the normal use of the said real estate.

The California Court of Appeal found that the airlines flew entirely following the rules established by the government, meaning with valid airworthiness certification, and taking into account the existing safety measures.[21] The demand for compensation of damage from the airlines could not be honored; the court added that this decision does not affect the rights of house owners versus the airport.

A case that falls out of the range of liability issues but does concern

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20) Referred to in note 13, above.

21) Having a license forms no exemption from a tort case; see also, above.

noise regulation is that of the *City of Burbank et. Al. v. Lockheed Air Terminal.*[22] The city of Burbank (California) prohibited the airport of Hollywood-Burbank to fly any aircraft from 23hrs till 7hrs to avoid noise hindrance. The airport was one of the only airports in the country that was in private hands. This fact had no influence on the decision, however. The Supreme Court stated that *only* the federal government had the authority to issue such a prohibition and not the city of Burbank. The links within air traffic and the division of powers did not leave room for local governments to take autonomous measures.

The motivation focuses on applicability of national (read as: federal) regulations;[23] also notice should be taken of international regulations which stipulate that the use by air traffic of airports on the territory of a state, falls under the responsibility of that state. Interesting is the fact that *the responsibility* to establish rules for noise hindrance does not automatically lead to *liability* for noise hindrance. This point came to the foray in a later judgement,[24] which contains another approach. The fact that noise regulation is closely related to local circumstances, and that airport operators may be held responsible for excessive noise pollution, means that the authority to set up such regulations should be given at the level where the problem comes to light; i.e. at the local level which, in this case, is the *New York Port Authority*, the operator/owner of, amongst others, *John F. Kennedy Airport.* Also, foreign airlines must conform to "local regulations", as long as these regulations do not discriminate between, for example, national and foreign airlines.

For that matter, even the American airforce is not exempted from the specified requirements with regards to liability for noise pollution. The authoritative verdict is that of *United States v. Causby*: military aircraft so often flew low over private property that this same property was reduced

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22) 411 U.S. 624, 93 S.Ct. 1854.

23) The "Noise Control Act" and the "Federal Aviation Act" of the United States.

24) *British Airways Board and Compagnie Air France v. The Port Authority of NewYork*, United States Court of Appeals, Second Circuit; judgement of 14 June 1977 (558 F.2d 75).

in value; the resulting reduction in value was to be compensated by the government. Simultaneously, this decision recognized that the doctrine of *Cuius est solum eius est usque ad infinitum* could no longer be applied.[25]

The criteria for liability claims in the United States, consequently, is determined in a pragmatic manner by asking whether or not there was real or substantial, in a disproportionate amount, loss incurred. The fact alone that planes are flying below a specified altitude, for example, 100 feet, is not reason enough for compensation to be offered. In one way or another, it must be demonstrated that a disproportionate and essential value reduction of private property has occurred.[26]

The European context

At the European level, aircraft noise hindrance is hardly accounted for. To begin with, the *Treaty of Lugano* of the Council of Europe generally discusses the liability for environmentally dangerous activities but it does not apply to the issue at hand. A glance at the EC regulation reveals not much progress in the field of liability for environmental damage. For example, *a proposal for a Council directive pertaining to the liability for damage and environmental decay caused by waste products* has not yet been adopted.[27] Taking into account, the need for local assessment and the principle of subsidiarity, the question arises if at all there is a need to regulate this at the level of the European Union.

The following paragraphs are designed to compare case law of selected European countries in order to find out to what extent a similar approach towards this subject is adopted by national courts.

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25) Referred to in note 14, above. In a German case, cited further down in note 35, owners of NATO airplanes were also held liable for noise pollution.

26) See also *Alleghenny Airlines et. al. v. Village of Cedarhurst*, United States Court of Appeals, Second Circuit 238 F.2d 812; 1956 U.S. App. LEXIS 4929

27) See, note 8, above.

France

In France, a controversial case arose in which the inhabitants of a Paris suburb, Villeneuve-le-Roi, resisted certain airlines, to wit: Air France, Pan Am and TWA. The administrative court of Paris[28] decided in favor of compensation for losses incurred that ran into the hundreds of thousands of US dollars for Air France and into the tens of thousands of US dollars for the American airlines.[29]

The airlines paid the specified amounts and then once again approached an administrative organ so as to reclaim their loss from the organization that runs the airports of Paris (*Aéroports de Paris).* The first organ rejected the demand; in higher appeal the French Council of State (*Conseil d'Etat) instructed the Aéroports de Paris* (AdP) to cover the losses of the airlines.[30]

With this subject in mind, it is important to call attention to certain points regarding the French Council of State.

The AdP was held responsible regardless of the fact that no liability or unlawfulness could be attributed to it. The AdP conformed fully with the rules. This fact brought the Council of State to the difficult subject which has been referred to above.

The airlines use engines that generate noise but airports draw these airplanes with noisy engines. Thus, judiciary organs are trapped in circular reasoning of the chicken and egg variety. The French Council of State did not give into this reasoning: the airport was considered liable because it was the most directly involved party in causing the losses.[31]

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28) Decision of 19 March 1979 of the Appeals Court (*Cour d'Appel*) of Paris; See L. Rapp, Qui est *responsable des nuisances sonores*? 48 ITA Magazine 30-33 (1988)

29) Air France: FF 1,119,308.54; PanAm and TWA: FF 78,286.91. These amounts are based upon the volume of traffic of each respective airline. This criterium can, of course, be appealed: the issue is not the amount of air traffic *per se*, but the noise that is produced.

30) Decision of the French Council of State from 6 February 1987; See L. Rapp, note 28, above.

31) See also the remarks above regarding "*risk management*" and the canalization of

The following was taken into consideration:

- the "liability" of the airlines could not be ruled out offhand, certainly when they did not make all the necessary attempts to reduce the engine noise;
- the airport is an institution that serves the public interest, as a result of which, on the one hand, it provides the society with a useful service, while on the other hand, having a duty to compensate the injured parties in the common interest;
- the airport charges fees to the airline operators that may be used as contributions to indemnity to the neighboring inhabitants.

Finally, the AdP has attempted to hold the French state liable. After all, it has the exclusive authority to extend permits for the construction and operation of airports. The Council of State does not go beyond a marginal analysis of the government's performance: only if the French government would have acted in a blatantly unlawful manner in the sense of "*faute lourde*" or "*décision illégale*" would there be the possibility of liability. However, there was no evidence of this.

Here, as well, a rational and pragmatic solution was sought. The airlines, airports, and the government are entangled in a complex triangle. New and fundamental divisions of responsibilities and the pertaining liabilities have not yet taken place in this time of diminished government action, as reflected by processes of deregulation, liberalization, and privatization of airports, among other things.

Germany

It is not easy to make a civil claim for compensation in Germany. The main rule is that the sound pollution caused by airplanes must be tolerate d.[32] This obligation to tolerate sound pollution is far-reaching and even

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liability.

32) See Art. 1 of the German Civil Aviation Code ("Luftverkehrsgesetz")

exceeds the regular protection of property owners.[33] The otherwise open airspace can be confined by closing[34] off parts of it to air traffic and by establishing a hard deck. In case of flight contrary to such regulations, action could be taken.

A possible civil claim for compensation could be based on Article 33 of the German Civil Aviation Act ("*Luftverkehrsgesetz*"). This article lays strict liability on the operators of airplanes for personal and material damages to third parties on the ground by accidents. By way of German jurisprudence, forms of psychological trauma also fall under the scope of this article.[35] The question now is if the article sufficiently covers problems caused by noise pollution, for instance, health problem, among which supersonic bang.

Liability of airports could be based on causes in the field of neighborly rights of noise pollution.[36] The difficulty with this is that airports are only indirect sources of noise pollution. A causal connection is a prerequisite for liability.

The legal starting point is apparently that air traffic must be tolerated when it is in agreement with the regulations of public law; in such cases the approach of civil law is relatively prospectless. For this reason, the jurisprudence is concise on this matter.

Switzerland

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33) See P. Wysk, *Ausgewhlte Probleme zum Rechstshutz gegen Fluglrm*, Zeitschrift fr Luft- and Weltraumrecht 19-20 (1998). The "regular" protections are the guarantee of Articles 905 and 906 of the German Code ("Bundesgesetzbuch")

34) Prohibited or restricted areas ("Sperrzonen"), see Art. 26 of the German Civil Aviation Code.

35) See the decision of the District Court (*Oberlandesgericht*) of Oldenburg dated 27th October 1989, where the plaintiff had been awarded damages to the sum of 500 DM (appr. 250 US$) for having suffered psychological trauma from passing NATO (North Atlantic Treaty Organization) aircraft. The verdict is published in 24 Versicherungsrecht 910 (1990)

36) See Par. 906 and 1004 of the German Code.

The jurisprudence in Switzerland regarding this matter is of a relatively recent date. The Swiss courts had awarded damages, under certain stipulations, to individuals who had been troubled by car and train traffic in the past. In its verdict of 12 July 1995, the Federal Court of Geneva decided that surrounding inhabitants of an airport may not, under strict stipulations, be refused the right to compensation.[37]

It concerned an administrative appeal of ten joint cases. Surrounding inhabitants have the option of a civil suit under Swiss law if the nuisance originates from a public service (e.g. an airport), if in the process of creating the public service no right to compensation was incorporated, and if the public service necessarily involves nuisance.

With regards to liability suits in cases concerning nuisance caused by traffic on land the Swiss jurisprudence has developed a *tripartite* test over the years.

The three prerequisites are:

- the severity ("*gravité*") of the damage;
- the special nature of the damage;
- the (un)foreseeable consequences of the act.

Until the above-mentioned verdict from 1995, this test may have been applied to air traffic, but decisions were lacking in which actual compensation had been awarded to surrounding inhabitants of an airport. The court in Geneva made it a point to cover in detail the resemblances and differences between traffic on land, on the one hand, and air traffic on the other hand; and came to the conclusion that *in casu* the aforementioned prerequisites were applicable. The right to compensation in the administrative judicial process exists only when the three prerequisites are cumulatively fulfilled.

Under the criteria "severity of the damage" the interests between public

37) Verdict of the Federal Court of Switzerland, Chamber for Public Law ("Tribunal Fédéral Suisse, Cour du Droit Public"), of 12 July 1995 in the attached cases E.40/1989, E.50/1989, E.22-24/1991, E.22/1992, E.50-52/1993, E.71/1993.

service provider on the one hand, i.e. the airport, and the personal interests of the surrounding inhabitants, on the other hand, were weighed. Bearing in mind the principle of *proportionality* this is a matter of judgement regarding all factual circumstances of the case.

The prerequisite concerning the "special nature of the damage" has been fulfilled when the nuisance exceeds a normal and tolerable level. For example, the relevant sound standards and the position of the land is taken into account.

Finally, the prerequisite of "(un)foreseeable consequences" deals with the situation that persons who had come to live in the neighborhood of Geneva Airport after a certain date, namely 1 January 1961, could not claim compensation. Those surrounding individuals could have known, after all, or at least should have known that airplanes make noise and that they could be inconvenienced thereby. A number of claims in the above-mentioned case have been rejected on the basis of this analysis.

The first two prerequisites, namely the "seriousness" (*proportion of interests*) and the special nature of the damage have also been applied elsewhere. The explicit mentioning of the prerequisites concerning the foreseeable consequences is new, but could elsewhere be brought under the scope of the applicable legislation by applying the "reasonableness" criterion to it. The prerequisite of "foreseeability" has been derived from traffic over land. If that traffic follows a normal and foreseeable development, there is no right to compensation for the surrounding inhabitants. Based on this prerequisite, the buyer of a house, who knew or could have known, that in the vicinity of said house a road or railroad would be laid can therefore also be refused compensation.

United Kingdom[38)]

Aircraft noise, including the effect of sonic boom, can cause damage to

38) Relevant information for this section has been taken from: Shawcross & Beaumont, *Air Law*, London: Butterworths, 1998.

persons, especially to their hearing, and also to property. Claims may be made against both aircraft operators and airport authorities. In the United Kingdom, "such actions are limited due to the underlying acceptance that aircraft noise is a necessary evil emanating form increased air transport an the economic and social advantages it confers".[39]

So far as aircraft operators are concerned, the Civil Aviation Act 1982 confers immunity from any action in trespass or nuisance provided the conditions set out in the Act, including compliance with the Air Navigation (Noise Certification) Order 1990 are met. There could, however, be liability under the Act in respect of material loss or damage caused by an aircraft in flight, taking off or landing[40].

Specific immunity from actions in respect of nuisance by reason of noise and vibration caused by aircraft at certain aerodromes is also given by the Civil Aviation Act 1982. These include government aerodromes, authority aerodromes, licensed aerodromes and those at which the manufacture, repair or maintenance of aircraft is professionally carried out. This immunity also depends upon compliance with the Air Navigation Order and regulations made hereunder.[41]

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39) Peter Davise and Jeffery Goh, *Air Transport and the Environment: Regulating Aircraft Noise*, Air & Space Law, Vol. XVIII, Number 3, 1993.

40) See Civil Aviation Act 1982, Article 76 paragraph 2; *Greenfield v. Law* (1955) 2 Lloyd's Rep 696. An Airports and Aerodromes (Noise) Bill 1997 was introduced to insert a new provision in the Civil Aviation Act 1982 making it a duty for the CAA to investigate methods of noise reduction at airports.

41) Article 77 paragraph 2 Civil Aviation Act, and see the Air Navigation (No 2) Order 1995, SI 1995/1970, Article 97 and the Air Navigation (General) Regulations 1993, SI 1993/1622, reg 13. *See Steel-Maitland v. British Airways Board* 1981 SLT 110. For the principles governing the extent to which statutory authority (eg. to operate an airport) provides a defense to an action based on nuisance see *Allen v. Gulf Oil Refining Ltd.* [1981] AC 1001, [1981] 1 All ER 353 and HL. See also the case of *Powell and Rayner v. United Kingdom* (1990) 1 S&B Av R III/37, 12 EHRR 355 which was decided by the European Court of Human Rights and which relates to a complaint of excessive noise levels arising from the operation of Heathrow Airport; this case it the first serious challenge to the rights and obligations first granted to a statutory authority by Article 9 of the Air Navigation Act 1920.

The problem of aircraft noise is dealt with in English law in two other ways, that is, by setting standards as to noise and by making special provisions to mitigate loss and hardship suffered by owners of property in the area of airports. The former, implements both international and European legislation; makes specific regulations, orders, directions, notices and so forth for steps to reduce noise hindrance and fixes aerodrome charges. The latter primarily deals with issues governing compensation.

Provision for compensation for depreciation of value of interests in land from noise and vibration caused by the use of an aerodrome, including factors caused for arriving or departing aircraft, is made in the *Land Compensation* Act of 1973. To qualify for the compensation there must be immunity from actions for nuisance. Thus, the aerodrome involved must be one to which Article 77 paragraph 2 of *Civil Aviation Act of 1982*, which states that "no action shall lie in respect of nuisance by reason only of the noise and vibration caused by aircraft on an aerodrome ", for the time being applies. If a responsible authority disclaims any statutory immunity from actions for nuisance, thereby contending that the Land Compensation Act 1973 does not apply, if no compensation is paid and an action for nuisance is then brought, the authority cannot then raise the defense of immunity set forth in the Civil Aviation Act 1982.

The *Airports Authority Act* of 1965 and the Civil Aviation Act 1971 had provided that certain local schemes should be established requiring the British Airports Authority to pay grants towards the cost of insulating certain dwellings near Heathrow and Gatwick Airports. These provisions as amended by the Airports Authority Act 1975 have been reenacted in the Civil Aviation Act 1982.

The schemes establish the type and location of the building, the beneficiary and the amount of the grant, as well as the standards for the insulation works and the conditions upon which payment may be dependant. They further set time limits for the application for the grant and the completion of the insulation work.

Local authorities may act as agents of the aerodrome authority and the scheme may require the aerodrome manager to give a written statement of his reasons refusing the application for a grant.

The Netherlands

In the Netherlands, a legal recourse, that is, an administrative procedure, for claims by surrounding inhabitants of Amsterdam Airport Schiphol and the regional airport of Maastricht regarding damages incurred by noise hindrance has been created. When a person suffers damage due to the location of Amsterdam Airport Schiphol, and cannot be compensated by acquisition, expropriation or any other method, nor can the damage in any way be attributed to him/her, then a possibility exists for compensation to be awarded on the basis of *reasonableness*.[42]

This procedure is yet to be put into place. The Directorate General of Civil Aviation has established a "Damage Fund" that will address damages to property and possible immaterial damage to see if these damages can be marked "planning damages"[43]. This Damage Fund will consist of a "joint committee" that will entertain each claim.

When the Dutch compensation procedure is not available, it is possible to claim these damages from the municipality. This happened in a case where the surrounding inhabitants of Eindhoven Airport charged the municipality of Veldhoven. In this case, certain houses were incurring more noise hindrance than before due to turning of the start and landing strips. These damages were allotted to the claimants.[44]

The damages awarded on the basis of the Dutch compensation procedure

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42) Minister of Transport and Public Works and Minister of Housing/Planning and Environmental Protection: *Aanwijzing Luchtvaartterrein Schiphol* (Designation Amsterdam Airport Schiphol)(1996), Article 21.

43) See Article 49 *Wet Ruimtelijke Ordening* (Law of Area Planning).

44) See 16 *Nieuwsbrief Ruimtelijke Ordening* (Newsletter Area Planning) 3-4 (1997).

are utilized for general purpose. The preventive measures, such as isolation of houses, are paid for by the airlines.[45] Hence, this procedure provides a solution for victims of noise hindrance.

In the event, the plaintiff in an administrative case is provided an insufficient remedy, in highly exceptional situations, the civil suit might offer a solution. Neither recourse withholds the ability to claim immaterial damages for residents.

Once a civil case has been admitted into court, the plaintiff will have to show that the defendant has acted illegally and/or not carefully. For example, a possible argument could be the interference in the enjoyment of property for the surrounding inhabitants. Dutch property law makes an exception to the right of the property owner as to permit the flight of an aircraft overhead. Thus, flying is allowed but it must not result in carelessness causing harm to people and property on the ground.

Noise hindrance by air traffic has to be considered by applying the carefulness criterion. This according to the Dutch Supreme Court is an act in balancing of interests, in this case, the interest of the aviation sector and the willingness of the government to implement protective measures for the concerned third parties. If the government was not prepared to take the necessary measures then there is a case to be made for the illegal action by the government. Hence, a tort case against the government in most cases will not lead to a successful outcome because there exists an administrative procedure which has a priority and it would be difficult to illustrate the illegality involved.

An alternative method would be a tort case against the airport instead of the government. The increased autonomy of the airports due to privatization brings the need to reconsider the division of tasks between the government and the airport, especially in the case of liability, which leads us to some concluding remarks.

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45) See Article 26d of the Dutch Aviation Code.

Concluding Remarks

There exists a tendency since the 1980's within the sphere of general environmental law, to utilize the civil procedure to acquire compensation for damages incurred.[46] On occasion since the past few years, a special procedure for people suffering from noise hindrance in the direct vicinity of designated airports is used. This judicial process includes both material norms and procedural norms.

In most cases the airport as the responsible person will have to compensated the damages caused by noise hindrance. This "choice" follows, though not explicitly, from the application of the principle that the party, which is most involved in the cause of the damage, and the easiest to be addressed by the victims, is liable (see, the concept of "canalization of liability").

When airports do not wish *a priori* to be branded as the culprits, and they want to make a gesture towards the neighboring inhabitants, for example, the usage of the phenomenon of more or less voluntarily agreed covenants may be possible.

According to the trend of privatization of airports will act as providers of services, such as the availability of infrastructure and dealing with the traffic. This means that this provider is responsible for the execution of these services. When the provision of these services cause hindrance, agreements will have to be made, for example in the form of the above mentioned covenants.

Agreements concerning liability for noise hindrance are not bound by the exclusive responsibility of the government. Governmental cooperation in administering more control in direction of the airports seems like a logical consequence in the development of granting airports a more autonomous task in international civil aviation. Such a "division of tasks" between the government and airports would fit into the tendency described above, resulting in airports carrying out an economic activity as full-fledged players.

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46) See G.Betlem, *Civil Liability for Transfrontier Pollution* 8 (1993) and the sources included there.