

Skies Apart:

The Dubious Status of International Flight between The People's Republic of China and Hong Kong

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Abstract

The concept of international flight is the cornerstone for the application of international civil aviation treaties, introducing the need for uniformity. The People's Republic of China (PRC) and the Hong Kong Special Administrative Region are two entities with different political status: the former is a sovereign state, and the latter is a Special Administrative Region within it. The flights between the PRC and Hong Kong apply international rules under the Chicago Convention 1944 and the Montreal Convention 1999, which raises the question of how a domestic flight could be subject to such treaty obligations. This research focuses on dispelling the misty status of international flights between the PRC and Hong Kong and providing an answer to the relevant legal basis and practical interpretation.

Keywords: People's Republic of China, Hong Kong Special Administrative Region, Sovereignty, Air Service Agreements, International Carriage

I. Introduction

The political and legal relationship between the People's Republic of China (PRC) and Hong Kong is a unique creation due to historical development. In terms of sovereignty, China is an independent state including two Special Administrative Regions, Hong Kong and Macau,

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neither of which is an independent state. Yet, the feature of a Special Administrative Region, under the principle of “one country, two systems” and “high degree of autonomy,” Hong Kong retains a high level of autonomy on certain matters.¹ It can determine solely by its separation of power system or with consultation with the Chinese government.² Furthermore, the previous capitalist system and way of life, instead of a socialist system, shall remain unchanged for 50 years from 1997.³ From the outset, a clarification must be made on the actual mandate for civil aviation legislation between the two entities under two different legal systems. Moreover, an immediate research question arises: Is a flight between Mainland China and Hong Kong an international flight?

China is a state party to both the Chicago Convention of 1944 and the Montreal Convention of 1999. Using the power under Article 153 of the Hong Kong Basic Law, China extended the application of these two conventions to Hong Kong, and the Civil Aviation Ordinance (Cap 448) and Carriage by Air Ordinance (Cap 500) were created within the Hong Kong Legislative framework.

In the Chicago Convention, Article 6 requires permission or authorization of the State where the scheduled flight is to fly, where an air service agreement is developed to grant the permissions with terms and conditions. Considering Mainland China and Hong Kong are effectively one State, being the PRC, the flight between the two regions can be categorized as a domestic flight but not an international flight. In reality, Hong Kong and Mainland China have an air service arrangement, but if it is merely a domestic flight, why is permission required to fly between them?

¹ *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, adopted 4 April 1990, [1997] App III (effective 1 July 1997), arts 2, 5 [Basic Law].

² *Ibid.*, art 2.

³ *Ibid.*, art 5.

Besides, Article 1 of the Montreal Convention clearly states that the application is based on international carriage between two member states. Considering Hong Kong is not a state, and there are no specific provisions in Cap 500 to address this issue, how should we apply the Montreal Convention legally for flights between Hong Kong and China? This research aims to give an answer to the above enquiries.

II. The Mandate for Civil Aviation Legislation

The core question in the backdrop is the basis of the legal mandate for Mainland China and Hong Kong to legislate on civil aviation matters, respectively. With this finding in hand, one can delve into the intertwining relationship between the two entities in their legislative mechanism.

A. The Mandate for Civil Aviation Legislation in the PRC

The answer is simple for the PRC. As a sovereign state, it can regulate civil aviation within its complete and exclusive sovereignty. The Civil Aviation Law deals with civil aviation matters in the PRC, incorporating international treaty obligations, ICAO Standards and Recommended Practices. For instance, Article 202 states that foreign aircrafts can only overfly the PRC when there is an air service agreement as a form of permission.⁴ On the other hand, Chapter 6, Part IV of the Civil Aviation Law is specifically dedicated to carrier liability with reference to international treaty obligations.⁵ Interestingly, there is no mentioning on whether there is any special treatment with the two Special Administrative Regions within the Civil Aviation Law, which move the focus to the relevant provisions in Hong Kong law instead.

B. The Mandate for Civil Aviation Legislation in Hong Kong

⁴ *Civil Aviation Law of the People's Republic of China*, (the sixth edition, effective 1 July 2026) (China), art 202.

⁵ *Ibid*, Ch 6, pt IV.

The sovereignty over Hong Kong was officially transferred from the United Kingdom, as an overseas territory, to the PRC in 1997 through the handover. The signing of the Sino-British Joint Declaration between the governments of the PRC and the United Kingdom created the legal framework of the transfer.⁶ Since then, the “one country, two systems” regime has been in place, and Hong Kong is a Special Administrative Region of the PRC. The principle entails that the region has a high degree of autonomy and enjoys executive, legislative and independent judicial power, including that of final adjudication.⁷ The high level of autonomy retained by Hong Kong is limited to specific prescribed matters. Consequently, the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China has been created as the constitutional document of the Special Administrative Region, pursuant to section 3(12) of the Joint Declaration to implement the policies of the Joint Declaration.⁸ Therefore, the question is whether civil aviation is within the autonomy of Hong Kong, where the Mainland has delegated the regulatory mandate.

The mandate on civil aviation is also connected to the international rights and obligations under treaty law. Hong Kong follows the dualist system to integrate international law, especially treaty obligations, by way of domestic legislation.⁹ This legal tradition historically follows the colonial tracks from the common law jurisdiction.¹⁰ The dualist approach cannot be considered in silos, but also the special constitutional status of Hong Kong within the whole PRC legal system.

⁶ *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong*, 19 December 1984, 1399 UNTS 33 [Joint Declaration].

⁷ Basic Law, *supra* note 1, arts 2, 5.

⁸ Joint Declaration, *supra* note 6, art 3(12).

⁹ *Ubamaka v Secretary for Security*, [2012] 15 HKCFAR 743 (CFA HK), para 43.

¹⁰ *Thomas v Baptiste* [2000] 2 AC 1 at 23; see also Stephen Hall Foundations of International Law (Hong Kong: LexisNexis, 4th ed., 2019) at 226-228.

Articles 153 and 128 to 135 of the Basic Law are of the essence in this discussion. Article 153 states that if Mainland China is a party of an international agreement, it has the discretion to consider whether such international obligations apply to Hong Kong or not, take into account the circumstances and needs of Hong Kong, and after seeking the views of the government of Hong Kong.¹¹

Different from the other international obligations, a special mandate has been created for civil aviation within the constitution. Articles 128 to 135 are particularly targeting civil aviation. Behind the ultimate purpose to maintain “the status of Hong Kong as a center of international and regional aviation,”¹² the negotiation between the Mainland and the United Kingdom rests on continuing the previous system of civil aviation management and keeping its own aircraft register.¹³ Article 129 is the legal backbone of the independent management and registration system, apart from the PRC regime.¹⁴ Articles 133 and 134 state that Hong Kong has the authority to “renew or amend air service agreements and arrangements previously in force,” “negotiate and conclude new air service agreements providing routes for airlines incorporated in the Hong Kong Special Administrative Region and having their principal place of business in Hong Kong and providing rights for over-flights and technical stops,” and “negotiate and conclude provisional arrangements with foreign states or regions with which no air service agreements have been concluded.”¹⁵ This is the prime mandate for Hong Kong to conclude any kinds of air service agreements with foreign states and regions.

Nevertheless, the core directive for air service agreement with Mainland China appears in Article 131 of the Basic Law. It states that Hong Kong and Mainland China can “make

¹¹ Basic Law, *supra* note 1, art 153.

¹² *Ibid*, art 128.

¹³ *Ibid*, art 129.

¹⁴ Jae Woon Lee, Ho Ming Lam, Max Ting Fung Lui, “Hong Kong as a Center of International and Regional Aviation in the GBA Initiative” (2024) 24:2 China Review 69 at 74.

¹⁵ Basic Law, *supra* note 1, arts 133-134.

arrangements providing air services between the Region and other parts of the People's Republic of China for airlines incorporated in the Hong Kong Special Administrative Region.”¹⁶ This article gives a specific constitutional basis for air transportation across the whole region.

From the outset, Article 151 of the Basic Law states that Hong Kong may use the name “Hong Kong, China,” to “maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields.”¹⁷ For example, the Canada–Hong Kong Tax Agreement Act.¹⁸ Yet, the aforementioned fields do not include civil aviation. The fundamental doctrine of *lex specialis* leads to an interpretation that civil aviation is separately governed by Articles 128 to 135, and civil aviation treaties have been dealt with by Article 153 instead because the PRC is the state party of both the Chicago Convention and the Montreal Convention.

III. The Chicago Convention 1944

The nature of international air service has been enshrined in Articles 1 and 6 of the Chicago Convention, where every state has complete and exclusive sovereignty over the airspace above its territory, and special permission or other authorization of the overflying state has to be obtained before scheduled international air service is conducted in accordance with the terms and conditions therein.¹⁹ The form of special permission or authorization is by a Bilateral Air

¹⁶ *Ibid*, art 131.

¹⁷ *Ibid*, art 151.

¹⁸ *Canada–Hong Kong Tax Agreement Act*, 2013, SC 2013, c 27 s 5, Schedule 1, Preamble.

¹⁹ *Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947), arts 1, 4 [Chicago Convention].

Services Agreements or a less formal Memorandum of Understanding, following the failure of the International Air Transport Agreement.²⁰

The international obligation of the Chicago Convention has been put on contracting states.²¹

There has been some historical development regarding the parties to the Convention, from the wartime allies and neutral states, but then extended to other states under the procedure of Article 93, which is obsolete considering the number of states which signed and ratified the Chicago Convention.²² One certain element is sovereign state has always been the only entity which can obtain membership within the Chicago Convention framework.

Although the Republic of China joined ICAO in 1946 as a founding member, the UN General Assembly Resolution 2758 recognizes the People's Republic of China as the only legitimate representative of China to the United Nations, and this applies to all organizations related to it.²³ This includes all UN special agencies and institutions, especially the ICAO. Since the PRC government recognized the Convention in 1974, an international obligation has been created, and Mainland China is a contracting state of the Convention.²⁴

The legal issue is how Hong Kong obtains the international obligation under Article 6 if it is not a state in itself, let alone a contracting state. Moreover, the Chicago Convention in general applies solely to international civil aviation with an international element, where domestic civil aviation is governed by domestic law.²⁵ It is defined in Article 96(b) of the Convention that "International Air Service" means "an air service which passes through the air space over the

²⁰ Michael Milde, *International air law and ICAO*, 3rd ed (The Netherlands: Eleven International Publishing, 2016) at 113, 115-116.

²¹ Pablo Mendes de Leon, *Introduction to Air Law*, 11th ed, (Alphen aan den Rijn: Kluwer Law International, 2022) at 37-38.

²² Milde, *supra* note 20 at 31-33.

²³ United Nations General Assembly Resolution 2758, A/RES/2758(XXVI).

²⁴ Ministry of Foreign Affairs, People's Republic of China, "China's Relation with International Civil Aviation Organization" (27 September 2023), online: <https://www.mfa.gov.cn/eng/wjb/zzjg_663340/gjs_665170/gjzzyhy_665174/2594_665176/2600_665188/202406/t20240606_11404350.html>.

²⁵ Mendes de Leon, *supra* note 21 at 38-39.

territory of more than one State.”²⁶ It is clear that a flight between Hong Kong and the Mainland China cannot be considered as an air service which fly “to, from, through, or within foreign airspace.”²⁷ This arrangement is essentially a domestic flight.

The position is clear: Hong Kong has been allocated the rights and obligations from the Chicago Convention by domestic law, where Mainland China assumes state responsibility of such rights and obligations.²⁸ In other words, Hong Kong is never a state party to the Chicago Convention, but the application thereof is based on the discretionary power of Mainland China following the reunion, where Hong Kong’s status changed from a British overseas colony to a Special Administrative Region under the PRC. The constitutional basis of such application is Article 153 of the Basic Law, where in this particular situation, the mainland government deemed it suitable for the Chicago Convention to be extended to the region.

There is an air service agreement between Hong Kong and Mainland China, which is named as “Air Services Arrangement between the Mainland and the Hong Kong Special Administrative Region.”²⁹ This is the legal basis of air transport permission between the two entities, and the preamble specifically mentions Article 131 of the Basic Law as the legal origin to create such an arrangement.

The issue of scheduled air transport permission between the PRC and Hong Kong is a domestic legal problem. There is no international obligation binding on Hong Kong and Mainland China

²⁶ Chicago Convention, *supra* note 19, art 96(b).

²⁷ Paul S. Dempsey, *Public International Air Law*, 2nd ed, (Montreal: William S. Hein & Co., Inc. for the Centre for Research of Air and Space Law, McGill University, 2017) at 660.

²⁸ ICAO, “States of China with regard to International Air Law Instruments” (last visited 3 June 2026), online: <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.icao.int/sites/default/files/secretariat/legal/Status%20of%20individual%20States/china_en.pdf>, note 2, Notification issued by the Government of the People’s Republic of China dated 5 June 1997.

²⁹ *Air Services Arrangement between the Mainland and the Hong Kong Special Administrative Region*, 2 February 2000 (entered into force 2 February 2000), online: <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.doj.gov.hk/en/mainland_and_macao/pdf/airservices_mainland_e.pdf>.

because Hong Kong is never a state party. It is only based on the domestic constitutional foundation of the Basic Law that creates the requirement of special permission between Hong Kong and Mainland China. Therefore, in the eyes of the Chicago Convention and Article 6, the PRC is treated as one state and must arrange air service permission with other contracting states. This obligation does not and shall not extend to the regional and domestic matters of the PRC, as it is within the realm of sovereignty, which is the very principle of international civil aviation.³⁰

It is correct to say that a flight between Hong Kong and China should be understood as a domestic flight in the context of the Chicago Convention, where the special authorization is only required by Article 131 in the Basic Law. The current situation can be well distinguished from the Air Service Agreement arbitration case between the United States and France, as only one state is involved in the Mainland and Hong Kong arrangement, and there is no international obligation being violated.³¹ Consequently, there will be no international responsibility attached to Mainland China if there is any violation between the PRC and Hong Kong on the terms of the air service agreement, as it is not founded by treaty law or international customs, but a mere domestic matter.

IV. The Montreal Convention 1999

The dubious situation becomes more complicated in the Montreal Convention context simply because international carriage is related to the scope of application of the whole Convention, instead of just one particular obligation as in the Chicago Convention.³² This means that if there is no international carriage of persons, baggage or cargo, the Montreal Convention clearly does

³⁰ Chicago Convention, *supra* note 19, art 1.

³¹ *Air Service Agreement of 27 March 1946 between the United States of America and France (Decision of 9 December 1978)* (1978), 18 RIAA 417.

³² *Convention for the Unification of Certain Rules for International Carriage by Air*, 28 May 1999, 2242 UNTS 372, art 1. [Montreal Convention]

not apply and shall not provide any protection to the passengers and cargo shipper therein.³³

Article 1 of the Montreal Convention inherited the legacy of the Warsaw Convention except the last paragraph.³⁴ Article 1(2) further explains international carriage as place of departure and the place of destination are situated within the territories of two State Parties, or within the territory of a single State Party.³⁵ The focus is on the contract of carriage to examine whether there is an international carriage.³⁶

The immediate legal question is how we should view flights between Hong Kong and Mainland China, if it is just two points within one sovereign state, as a domestic carriage clearly does not fall under any international protection. Furthermore, how could the domestic legislation in Hong Kong implement such an international protection?

A. The Legal Basis for Hong Kong to Apply the Montreal Convention

The first element we shall tackle is the definition of “State Party,” which derives the concept of international carriage. State Party is not defined in the Convention, but it clearly means a sovereign state that has signed and ratified the Convention. This position has been affirmed by the Warsaw Convention, and the ratification of a state is the key element.³⁷ In the context of the Montreal Convention, it is in line with the doctrine that “only sovereign states have the right to become parties to international instruments,” where non-sovereign entities can never be contracting parties of the Convention.³⁸ Therefore, “[c]arriage between two points within

³³ Paul S. Dempsey & Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (Montreal: Centre for Research in Air & Space Law, McGill University, 2005) at 71.

³⁴ Timothy M. Ravich, “Article 1 Scope and Application” in George Leloudas, Paul S. Dempsey & Laurent Chassot, eds, *The Montreal Convention: A Commentary* (Massachusetts: Edward Elgar Publishing, 2023), para 1.13.

³⁵ Montreal Convention, *supra* note 32, art 1(2).

³⁶ Paul S. Dempsey, *Aviation Liability Law*, 3rd ed (Toronto: LexisNexis, 2025), para 9.8.1.

³⁷ Lawrence B. Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook*, 2nd ed (The Hague: Kluwer Law International, 2000) at 15.

³⁸ Dempsey & Milde, *supra* note 33 at 251.

the territory of a single State Party plus the absence of ‘an agreed stopping place’ within the territory of another State” does not qualify the concept of international carriage.³⁹

The PRC is a state party of the Montreal Convention and ratified it on 31 July 2005, where it also entered into force on this date.⁴⁰ Regarding Hong Kong, the instrument of ratification by the PRC includes a declaration that based on Article 153 of the Basic Law, “the Government of the PRC has decided to apply the Convention in the Hong Kong Special Administrative Region of the PRC from the date of December 15, 2006.”⁴¹ This declaration is with reference to Article 56(1) of the Convention for states with more than one system of law, also known as the “Hong Kong Clause.”⁴²

This Article inherits from Article 40 of the Warsaw Convention to deal with the issues of overseas colonies, which Hong Kong used to be one of them.⁴³ It states that “If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.”⁴⁴ An example is when the legislative competence does not rests with the sovereign state signing and ratifying the Convention regarding the subject matter of the Convention but the

³⁹ Ravich, *supra* note 34, para 1.18; Elmar Giumulla, “Chapter I – General provisions: Article 1 – Scope of application” in Elmar Giumulla, Ronald Schmid, Wolf Muller-Rostin, Regula Dettling-Ott and Rod Margo, annotated, *Montreal Convention*, (Kluwer Law International BV, Netherlands, 2022), para 10; *Borges-Santiago v. American Airlines, Inc.*, 2010 WL 569883 (D. Puerto Rico, 19 Feb. 2010).

⁴⁰ ICAO, “Convention For The Unification of Certain Rules for International Carriage by Air Done at Montreal on 28 May 1999” (last visited 1 June 2026), online:< chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.icao.int/sites/default/files/secretariat/legal/CurrentListofParties/Mtl99_EN.pdf>.

⁴¹ *Ibid*, note 18.

⁴² Montreal Convention, *supra* note 32, art 56; Michael Milde, “The Warsaw System of Liability in International Carriage by Air: History, Merits and Flaws and the New “non-Warsaw” Convention of 28 May 1999” (1999) 24 *Annals of Air and Space Law* 155 at 185.

⁴³ Paul S. Dempsey, “Article 56 States With More Than One System of Law” in George Leloudas, Paul S. Dempsey & Laurent Chassot, eds, *The Montreal Convention: A Commentary* (Massachusetts: Edward Elgar Publishing, 2023), paras 56.01-56.03, 56.06, 56.08.

⁴⁴ Montreal Convention, *supra* note 32, art 56.

specific territorial unit.⁴⁵ This is the exact situation for Hong Kong,⁴⁶ and it is clear that under the definition and context of the Montreal Convention, Hong Kong is treated as a territorial unit within a contracting state but not a contracting party in its own right, while a contracting state can “specify and to modify at any time the unit or units to which the Convention applies.”⁴⁷ This argument is further confirmed by Article 53 of the Convention stating that only States and Regional Economic Integration Organizations can be eligible for signature and ratification, where Hong Kong is not one of them.⁴⁸

There are early opinions demonstrating a special category of flight between Hong Kong and Mainland China because of Hong Kong’s unique status as a Special Administrative Region. It has been categorized as “not a pure domestic flight” and “special flight” mainly because Hong Kong has autonomy to deal with all matters as stipulated under the Basic Law, including civil aviation matters, but excluding defense and foreign matters.⁴⁹ Yet, such differences with other provinces of the PRC do not create a special kind of air transport under the international framework. A carriage by air can only be either international or domestic, without reference to a potential third option. The special mandate that Hong Kong possess does not qualify a region to be a sovereign state or a state party in both the Chicago Convention and the Montreal Convention.

The legal basis for Hong Kong to apply the rights and obligations of the Montreal Convention is based on both the domestic constitutional foundation of Article 153 of the Basic Law and

⁴⁵ Elmar Giemulla, “Chapter VII – Final Provisions: Article 56 – States with More Than One System of Law” in Elmar Giemulla, Ronald Schmid, Wolf Muller-Rostin, Regula Dettling-Ott and Rod Margo, annotated, *Montreal Convention*, (Kluwer Law International BV, Netherlands, 2022), para 1.

⁴⁶ Bin Cheng, “A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)” (2004) *International & Comparative Law Quarterly* 833, 854.

⁴⁷ Bin Cheng, “The 1999 Montreal Convention on International Carriage by Air Concluded on the Seventieth Anniversary of the 1929 Warsaw Convention” (2000) *ZLW* 287, 305.

⁴⁸ Montreal Convention, *supra* note 32, art 53; Andreas Dimopoulos, “Article 53 Signature, Ratification and Entry Into Force” in George Leloudas, Paul S. Dempsey & Laurent Chassot, eds, *The Montreal Convention: A Commentary* (Massachusetts: Edward Elgar Publishing, 2023), paras 53.01-53.04.

⁴⁹ Jessika Li-Juan Ko, “Liability Aspects of Air transport Between Taiwan, Hong Kong and mainland China” LLM Thesis, Institute of Air and Space Law, McGill University, Montréal, Canada (September 1995) at 31-32.

Article 56(1) of the Convention. Even though Hong Kong is never a state party under the context of Article 1, these two legal bases support the application of the content of the Convention, which has been recognized by jurisprudence. For instance, the PRC ruling in 2018 has established that a flight between Hong Kong and the United States amounts to an international carriage under the Montreal Convention, and the Convention is applicable.⁵⁰ The same has been demonstrated in the Hong Kong courts throughout the years.⁵¹

B. The Incorporation of the Montreal Convention into Domestic Legislation

The analysis above has not entirely addressed the legal gap regarding the application of the Convention to domestic flights between Hong Kong and Mainland China. Due to the deference of legal system, the applicable international rights and obligations are required to be implemented through incorporation for their effectiveness, where Hong Kong has legislated the Carriage by Air Ordinance (Cap 500).⁵² On this occasion, the constitutional basis is no longer coming from Articles 128 to 135 of the Basic Law, as none of them is related to private international air law. In turn, it is Article 2 which provides the right to perform the legislative power. The preamble of the Ordinance states that it is to give effect to “certain Conventions concerning international carriage by air” and “to make provisions relating to non-international carriage by air and international carriage by air to which the Conventions do not apply.”⁵³

The domestic legislation recognizes the legitimacy of the Montreal Convention and the application thereof. Yet, there is no specific reference to international carriage under the Montreal context, nor is the term in the definition section. One can never provide a reasonable

⁵⁰ *Victor Pacific Service Limited. v. PICC Property and Casualty Company Limited, Guangzhou Branch (Insurer's Subrogation Case)*, (2018) Guangdong Province (Yue) 04 Civil Final Appeal Case (Min Zhong) No. 454 [translated by author] (域多利货运有限公司、中国人民财产保险股份有限公司广州市分公司保险人代位求偿权案, (2018) 粤 04 民终 454 号).

⁵¹ *Stephen Graham Olding v Singapore Airlines Ltd* [2002] HKCU 796; *Kwok Kam Ming v China Airlines Ltd* [2006] HKCU 1087; *Chiu Pui Yin v China Airlines Ltd* [2007] HKCU 1839; *Joshua Ong v Malaysian Airline System Berhad* [2008] 3 HKC 26.

⁵² *Ubamaka v Secretary for Security*, *supra* note 9, para 43.

⁵³ Carriage by Air Ordinance, Cap 500.

reading for the Convention's application without considering the issues of international carriage, as it is a prerequisite of the scope of application. It is a blatant violation of the clear wording in Article 1 if flights between Hong Kong and Mainland China are treated as international carriage.

A proposed reading of the correct interpretation gives reference to Article 13, Schedules 3 and 4 of the Convention. These sections clearly introduced that Schedule 3 will apply if a carriage by air is a non-international carriage as defined under Schedule 4, pointing to the defined scope in the Warsaw Convention 1929. The Montreal Convention does not modify Article 1 in the Warsaw Convention except for the newly introduced paragraph 4, which suggests that the definition of international carriage under both Conventions is essentially the same. By drawing this inference, Article 13 and Schedule 3 also apply to non-international flights under the Montreal Convention.

This position is in accordance with the air service arrangements between Hong Kong and the Mainland China, which defines the nature of air transport as “specially managed domestic air transport by nature with reference made to the management of international air transport.”⁵⁴ Yet, there is no regulation within the Chinese Civil Aviation Law on air carriage legal requirement between Hong Kong and the Mainland.⁵⁵ Therefore, the only resort can only be the Hong Kong's own legislation.

Schedule 3 is a modified version of the Montreal Convention, particularly for the purpose of non-international flights, and this is the exact answer to the dubious international nature of flights between Hong Kong and Mainland China. Except for Chapter VII under the original Convention for the final provisions, Article 50 on mandatory insurance requirement for air

⁵⁴ ASA, art 1.

⁵⁵ Yifei Long & Jun Han, “Impact of the Montreal Convention upon Construction of China's Carriage by Air Contract System: As well as on the Urgency and Necessity of Clarifying the Carriage by Air Contract System between China's mainland and Hong Kong, Macau and Taiwan” (2006) 6 *Jurists Review* 53 at 61.

carriers and the removal of international carriage to “all carriage of persons, baggage or cargo performed by aircraft for reward,” other provisions largely replicate the Convention. Especially, the compensation limits are keeping abreast with the update from the Montreal Convention according to Article 21 of the Ordinance.⁵⁶ If we also consider the Legislative Bill for amendment of the Carriage by Air Ordinance in 2005, it also particularly aims to give effect to the Montreal Convention and extend it to non-international carriage. Specifically, amendments have been promoted to create the then Schedule 3 for the very purpose of “carriage within Hong Kong and carriage between Hong Kong and the Mainland, Taiwan and Macau,” of which the Convention does not apply.⁵⁷

The Convention applies only to international carriage, which is still true in the Carriage by Air Ordinance, but regarding non-international flights, a special domestic regime has been created without creating an international treaty obligation. Again, it is a domestic arrangement between Hong Kong and Mainland China within the PRC’s sovereignty on what law should apply for air travel between regions, which also goes back to the idea of territorial exclusivity and completeness under the Chicago Convention. The applicability of certain contents of the Montreal Convention in the Carriage by Air Ordinance is solely a domestic requirement.

Although the domestic air carriage is not covered by the Convention, it does not prohibit states from using the content therein for domestic transportation.⁵⁸ In fact, the Convention defers to local law in the case of Article 56.⁵⁹ From the Warsaw Convention, countries have been adopting the treaty for domestic transportation.⁶⁰ The Montreal Convention has no difference in this particular aspect, as demonstrated in the example of Hong Kong.

⁵⁶ See the latest limitation amount update in 2024.

⁵⁷ Legislative Council, Legal Service Division Report on Carriage by Air (Amendment) Bill 2005, LC Paper No. LS84/04-05, paras I(1), II(9).

⁵⁸ Mendes de Leon, *supra* note 21 at 252-253.

⁵⁹ Dempsey, *supra* note 36, para 7.75.

⁶⁰ Goldhirsch, *supra* note 37 at 5.

C. A Discussion on Existing Jurisprudence

Moving the lens from legislation to jurisprudence, case law has always served as an anchor of interpretation since the Warsaw regime. There are around 30 cases in Hong Kong courts that are related to the Warsaw and Montreal regime, the majority being cargo cases.⁶¹ Unfortunately, there are no court cases on carriage by air claim between Hong Kong and Mainland China that deals with the applicability of the Convention. The limited cases in relation to Montreal Convention also do not feature the air transport between Hong Kong and Mainland China, with the latest decision in 2008 and without any further jurisprudential development.⁶² It is important to note that the Hong Kong courts “typically begin by stating that Hong Kong is a contracting party to the Warsaw Convention or the Montreal Convention, which is applied in the territory pursuant to the Carriage by Air Ordinance.”⁶³ The former part of this sentence is an inaccurate interpretation by the Hong Kong courts as per the analysis in this section, where Hong Kong is not a contracting party in itself under the Warsaw and Montreal Conventions. The PRC is the contracting party, and Hong Kong only applies the treaty as one of the regions under the sovereign regime.

In the 2017 PRC case, the court overlooked the importance of whether Macau is a party to the Montreal Convention in deciding the case.⁶⁴ The key flaw of this judgment is that Macau is not a party to the Montreal Convention, akin to Hong Kong. It is correct to say that the air carriage case between Mainland China, Hong Kong, and Macau is outside the scope of the Convention.

⁶¹ According to Lexis Advance Hong Kong, accessed 2 June 2026. Jae Woon Lee, “Passenger Injuries in International Air Law: Case Law Development and Upcoming Questions for Hong Kong Courts” (2020) 50:1 Hong Kong Law Journal 49 at 68.

⁶² Stephen Graham Olding v Singapore Airlines Ltd features a flight from Bangkok to Hong Kong; Kwok Kam Ming v China Airlines Ltd features a flight from Bangkok to Taipei with a stopover in Hong Kong; Chiu Pui Yin v China Airlines Ltd features a flight from Bangkok to Taiwan, with intermediate stop in Hong Kong; Joshua Ong v Malaysian Airline System Berhad features a flight from Kuala Lumpur to Hong Kong.

⁶³ Lee, *supra* note 61 at 69.

⁶⁴ *D2D Logistics (Macau) Co., Ltd. v. PICC Property and Casualty Company Limited, Guangzhou Branch (Insurer's Subrogation Case)*, (2017) Guangdong Province (Yue) 04 Civil Final Appeal Case (Min Zhong) No. 2175 [translated by author] (中立物流(澳门)有限公司、中国人民财产保险股份有限公司广州市分公司保险人代位求偿权案, (2017) 粤04民终2175号).

This can be categorized as a specially managed air transport, which takes reference from the international framework, particularly the Montreal Convention.⁶⁵ Distinguishably, this fact never promotes Hong Kong to the level of a state party to the Convention. Nevertheless, a judgement which provides the legal basis for the question of applicability is always preferable for the sake of legal certainty and clarity.

Although jurisprudence has not been developed to clarify the dubious status, the regulatory and circumstantial analysis provides support to the application of the Montreal Convention content in a domestic legal basis.

V. Conclusion

Hong Kong's status as a Special Administrative Region, as demonstrated under the Joint Declaration and the Basic Law, gives autonomy to deal with civil aviation matters. The rights and obligations under the international regime of the Chicago Convention and Montreal Convention apply to Hong Kong based on the declaration of the PRC during its ratification process, but such a measure does not and should not transform Hong Kong into a state party nor a contracting state under both international regimes. The mandate for Hong Kong and Mainland China to enable air travel is through permission or authorization, which rests on a constitutional basis of the Basic Law. Regarding the rights and obligations for carrier liability, the substantial content of the Montreal Convention has been incorporated into the domestic regulation of Hong Kong. Therefore, the applicability of freedom of flights and carrier liability rests on domestic law, but not an international obligation. After all, the finding of this research shows air transport between Hong Kong and the PRC is a form of domestic air transport. The issue related to international carriage and overflying a foreign state party within the treaty does

⁶⁵ Haixia Xie, "An Empirical Analysis of the Application of the Montreal Convention in China Courts" (2020) 2 Business and Economic Law Review 33 at 45-46.

not affect the legitimacy and eligibility of the obligations to Hong Kong, be it in a theoretical or practical sense.