

RIGHTS OF AIR CARRIERS: AN OVERVIEW

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INTRODUCTION

Many things in this world are often taken for granted. One of them is that it is the duty of 'Air Carriers' to take one anywhere as long as one has paid for it. But have we ever wondered, if they, the *air carriers* perform certain duties, they must be having certain rights too? As long as there are duties, there would always be rights & *air carriers* are no exception to this.

International public air law is dominated by the *principle of sovereignty* over the airspace above a State's territory. This principle is not only explicitly laid down in **Articles 1 & 2** of the **Chicago Convention**,¹ but is also part of *international customary law*. It is the basis of all other regulations in *international public air law*.² As a result of the application of the *principle of sovereignty*, every state decides autonomously to which extent, by whom & when its airspace is used.

THE EIGHT FREEDOMS

The permission to use a state's airspace is formally called '*air traffic right*', but commonly also called '*freedom*'.³ Depending on the extent of the possibilities to use a state's airspace, one can distinguish between *eight freedoms* in *international air law*:⁴

- The *first freedom* gives the right to overfly the territory of a State without any landings.⁵

¹ Convention on International Civil Aviation, 7 December 1944, 15 U.N.T.S. 102 [Chicago Convention].

² Alfred Verdross & Bruno Simma (1984), *Universal International Law*, 3rd edn., (Berlin: Duncker & Humblot), 664 [Verdross/Simma].

³ I.H. Philepina Diederiks-Verschoor (1993), *An introduction to air law*, 5th edn., (Deventer, the Netherlands: Kluwer), 12f. [Diederiks-Verschoor]; Max Hofmann, & Edwin Grabherr, in: Max Hofmann & Edwin Grabher, eds. (1994), *aeronautics Act*, looseleaf (Munich: Verlag C.H. Beck, 2nd supplement) §21 at para 1 [Hofmann/Grabherr]; the term 'freedom' will be used also in the following.

⁴ Hofmann/Grabherr, *ibid.* at para 1; Elmar Giemulla, in: Elmar Giemulla & Roland Schmid, eds. (2005), *Frankfurt Commentary to Aeronautics Law – Aeronautics Act*, vol. 1.1, looseleaf (Neuwied, Kriftel, Germany: Luchterhand Verlag) Pref. to §§ 20-24 Luft VG at para 29 [Giemulla, in: Giemulla/Schmid, Pref. to §§20-24].

⁵ Article 5 Chicago Convention, *International Air Service Transit Agreement* (7 December 1944), ICAO Doc. 7500, Article I, Section 1, No 1 [Transit Agreement].

- The **second freedom** grants the privilege to land in a foreign country for technical reasons.⁶
- The **third freedom** gives the right to fly passengers, mail & cargo from the registration state of the air carrier to a foreign state.⁷
- The **fourth freedom** correlates with the *third freedom* & grants the right to fly passenger, mail & cargo from a foreign state to the registration state of the air carrier.⁸
- The **fifth freedom** extends the *third & fourth freedom* & grants the right to fly passengers, mail & cargo between two foreign states, as long as the origin or the final destination of such a chain of air transportation is in the registration state of the air carrier.⁹
- The **sixth freedom** is not an explicitly granted right, but describes a combination of the *third & fourth freedom*, independently granted to a state by two other states. The sixth freedom enables an air carrier to offer air transportation services between two foreign countries by making a stop-over in the home state of that air carrier. Thereby an airline makes use of the *fourth freedom* by country A & flies passengers, mail or cargo from country A into its home state, where it makes a stop-over, & continues the flight with passengers, mail or cargo from country A to country B, thereby making use of the third freedom granted by country B.¹⁰ The *sixth freedom* is usually used to establish a hub-&-spoke system, but can also be applied, when necessary *fifth freedom* rights are not granted by two foreign states.
- The **seventh freedom** grants a right to operate between two foreign countries, which are both not the registration state of the operating air carrier. Unlike *fifth freedom* traffic, there is no link between the flights of the air carrier & its home country. The aircraft used to offer seventh freedom traffic is permanently stationed in one of the two foreign countries concerned.¹¹

⁶ Chicago Convention, *ibid.*; Transit Agreement, *ibid.*

⁷ See definition in the International Air Transport Agreement, 7 December 1944, 171 U.N.T.S. 502, Article I, Section 1, No 3 [Transport Agreement].

⁸ See definition in Article I, Section 1, No. 4 Transport Agreement.

⁹ See definition in Article I, Section 1, No. 5 Transport Agreement.

¹⁰ Diederiks-Verschoor, *supra* note 2 at 13, n. 9; Nicholas Mateesco Matte (1981), *Treatise on Air-Aeronautical Law*, (Montreal: McGill University & Carswell) at 143f. [Matte].

¹¹ Biederiks-Verschoor, *ibid.*; Matte, *ibid.* at 144.

- The ***eighth freedom***, also called cabotage, grants a right to provide air transportation services within one single country.¹²

The *first & second freedom* are also called '***technical freedoms***', while the remaining commercially more important *air traffic rights* are referred to as '***economic freedoms***'.

IMPORTANCE OF THE FIFTH FREEDOM

In the recent past, in particular the *fifth freedom* has become quite important as it allows to combine several flight services & thus to use the capacities of aircrafts more efficiently. ***From a commercial perspective, this freedom may even be the most important freedom.***

If, for example, on flights between *Australia & Europe* an air carrier can make only use of the *third & fourth freedom*, it is limited to offer air transportation services between two destinations only, for example *Sydney/Paris* or *Sydney/Frankfurt*. If the same airline is also granted the *fifth freedom*, it can combine these flights to one single flight, for example *Sydney/Frankfurt/Paris*. At the same time it will be enabled to offer purely intra-Community flights. Not only will the airline save one aircraft that it can use for different flight connections, it will also increase its load factor on the route between *Australia & Europe*. The *fifth freedom* thus allows for a more efficient & profitable use of an airlines fleet.

Taking into account the increasing competition in the *air transportation sector* & the reduction of state aids as a result of *privatisations of airlines*, the success & survival of an airline will depend very much on the efficiency & profitability it can achieve.

The problem of the fifth freedom is that it must be granted by all countries that would be part of such a chain of flights.

In the above given example for an *Australian* air carrier to operate on the route *Sydney/Frankfurt/Paris*, *Germany & France* would have to grant *fifth freedom* to *Australia*. If this fails, an airline might be able to bypass this advantage & still be able to increase its efficiency & profitability by combining available *third & fourth freedom*, which leads to the above mentioned *sixth freedom*. The idea is that an airline coming from a third state & before continuing flying to another country, makes a stop-over in its own country. As a result it can transport passengers & cargo between two foreign countries.

The disadvantage of this model compared to the *fifth freedom* is that airline must always make a stop-over in its own country. Whether the *sixth freedom* can be applicable depends therefore to a large extent on the *geographical location of a country*.

¹² Article 7 Chicago Convention.

If, for example, *Germany, France & Australia* do not grant each other the *fifth freedom*, a *German* air carrier can still fly passengers, mail & cargo from *Paris to Sydney*, if it makes a stop-over in *Frankfurt*. An *Australian* air carrier, on the other hand, would have difficulties in selling tickets for a flight *Paris/Frankfurt via Sydney*.

SCHEDULED & NON-SCHEDULED INTERNATIONAL AIR SERVICES

The granting of the different freedoms depends very much on the type of the air transportation services offered. In international air transportation a distinction is made between *commercial & non-commercial flights*. As far as *commercial aviation* is concerned, another distinction is made between ***non-scheduled international air services & scheduled international air services***. *Scheduled international air services* are defined pursuant to **Article 5, 6, 96(a) Chicago Convention** as ‘*public & planned air transportation of passengers, cargo & mail*’.

When it comes to *non-scheduled international air transportation, international law does not provide for any regulation*.¹³ *A comprehensive & coherent set of regulations comparable to the one existing for schedule air transportation does not exist*.¹⁴ It lacks, in particular, a *positive definition* of what is to be understood as *non-scheduled air transportation*. This is because *non-scheduled air transportation* covers all kinds of different services, for example taxi flights, sightseeing flights, medical flights, advertisement flights or flights as part of holiday packages.¹⁵ Therefore, *non-scheduled flights* are only *negatively defined* as not being *scheduled air transportation*.¹⁶

Air traffic rights, which are, as indicated above, indispensable for the carrying out of international air transportation services, are granted partly in *multilateral treaties* & partly in *bilateral agreements*.

The two most important multilateral treaties in this respect were concluded in 1944 & are the Chicago Convention & the Transit agreement.

¹³ Walter Schwenk & Elmar Giemulla (2005), *Manual of Aeronautics Law*, 3rd edn., (Cologne: Carl Heymanns Verlag), 723 [Schwenk/Giemulla].

¹⁴ Hofmann/Grabherr, *supra* note 38 at § 22, para 3; Giemulla, *inn*: Giemulla/Schmid, *Pref. to §§ 20-24, supra* note 4 at para 15.

¹⁵ Hofmann/Grabherr, *ibid.*; Giemulla, *ibid.* at para 7.

¹⁶ See also § 22 German Aeronautics Act or Article 5(1) Chicago Convention where reference is made to ‘aircrafts not engaged in international scheduled air transportation;’ Giemulla, *ibid.* § 22, para 4; Schwenk/Giemulla, *supra* note 13 at 724; Alfred Rudolf, ‘The so-called holiday package charter flight in the tension between scheduled & non-scheduled air transportation’ (1970) *Air & Space L. Rev.*, 110 at 113 [Rudolf].

CHICAGO CONVENTION

According to **Article 5(1) Chicago Convention** the signatory states grant the *first & second freedom* to all air carriers engaged in international non-scheduled air transportation. This category includes *commercial non-scheduled air transportation & private, non-commercial traffic*. The more important *economic freedoms* are also granted to *non-scheduled air carriers* pursuant to **Article 5(2) Chicago Convention**, but additional conditions up to total restrictions can be imposed by every single state on the exercise of these *freedoms*.

Air carriers offering *scheduled international air transportation services* require pursuant to **Article 6 Chicago Convention** a particular permission for any kind of use of a state's airspace. This regulation contained in **Article 6 Chicago Convention** is considered as the basis of *numerous bilateral agreements*, in which States regulated the details of *international scheduled air transportation* that is to be conducted between their territories.¹⁷ Apart from the exchange of *air traffic rights*, these agreements contain various other clauses that are important for *international aviation*.

TRANSIT AGREEMENT

Coming back to *air traffic rights*, a particularity exists in respect of the *first & second freedom*. According to **Article 1 Transit Agreement** at least the *first & second freedom* are granted for *scheduled international air transportation services* in a *multilateral agreement*. **However, some of the geographically big states like Canada, Brazil, Russia & China are not parties to this agreement.** This makes it necessary to include the *technical freedoms* in their *bilateral agreements* these states conclude with other countries.

Due their size & geographical location the first ones have a strong bargaining power with the first & second freedom in all negotiations on air service agreements.

As far as the *third, fourth & fifth freedom* are concerned, a similar *multilateral approach* was envisaged in the **Transport Agreement**. **Unlike the Transit Agreement the Transport Agreement was not very popular & was signed only by 11 states.** *It was & is therefore of no*

¹⁷ Schwenk/Giemulla, *ibid.* at 630; Giemulla, in: Giemulla/Schmid, *ibid.* at para 26 (Germany, for example, has concluded about 170 bilateral air service agreements, while worldwide number is assumed to be at about 4000 bilaterals); Virginia Rodriguez Serrano, 'Trade in Air Transport Services: Liberalizing Hard Rights' (1999) 24 *Ann. Air & Sp. L.* 199 [Serrano].

*significance & most of the current state parties to the Transport Agreement are, from the perspective of international aviation, still only of secondary importance.*¹⁸

DESIGNATION

As far as the *air traffic rights*, agreed upon in *bilateral air service agreements*, are concerned, ***it is important to know that these rights are not granted directly to airlines, but are exchanged among the contracting states, who, in a second step, pass these rights to the airline(s) registered within their jurisdictions.***¹⁹

This *transfer of air traffic rights* to an air carrier goes along with a notification to the other state about which air carrier was granted the *air traffic rights*. ***This whole procedure is called designation. The designation is a crucial step before air transportation services between two countries can be offered.***

Designation is regularly understood as the permission to enter a market & to operate between two or more destinations located in two or more countries.²⁰

Being designated enables airlines to operate from a point within the *designated country* & it can apply to the other country for permission to fly into & out of its airspace, thereby making use of *the rights* agreed in the corresponding *air service agreement*.

Although the *designated airline* must also obtain a *separate permission* of the other country to enter & leave its airspace, this is usually not very difficult as the only reasons, for which an airline can be *withhold this permission*, are set out in the *air service agreement*. Thus, *each country has only a limited discretion in refusing an air carrier designated by the other contracting state.*²¹ This also means that whether an air carrier can make use of air traffic rights depends mostly on whether it is *designated* by its *registration state*.

¹⁸ Knut Ipsen(2004), *International Law*, 5th edn., (Munich: Verlag C.H. Beck) at 902, para 6 Ipsen, *Intl. Law*; Verdross/Simma, *supra* note 2 at 664, note 12; it is presently signed by 11 countries of which only Netherlands are of substantial significance in respect of air transport services.

¹⁹Matte *supra* note 10 at 143; Bin cheng (1962), *The law of International air transport*, (London: Stevens & Sons) at 359 [Cheng].

²⁰See e.g. Eugene Sochor, 'From the DC-3 to Hypersonic Flight: ICAO in a Changing Environment' (1989-1990) 55 *J. Air L. & Com.*, 407 (author refers to designation as part of market entry, at 431, n. 78) [Sochor]; Jennifer Yang (1995), *Air Transport Regulation in a new Era*, (LL.M. Thesis, Institute of Air & Space Law, McGill University), (air traffic right is defined as 'a market access right which is expressed as an agreed physical or geographical specification, o combination of specifications, of who or what may be transported over an authorized route to parts thereof in the aircraft authorized', at 101) [Yang].

²¹See also Matte, *supra* note 10 at 147; Cheng, *supra* note 29 at 359, 363; Burkhardt, *supra* note 24 (Sometimes it is even possible that a foreign air carrier is granted the necessary permissions solely for political reasons, although it could be rejected under the applicable bilateral, at 138f.).

CONCLUSION

The fact that states *can impose limitations* on flights of foreign aircraft & that each state has a complete & *exclusive sovereignty* over the airspace above its national territory limits the scope of air travel & transportation. But air traffic rights have paved the way for *Globalisation & Liberalisation*.

These '*freedoms*' have facilitated *world trade*, improved *productivity*, *business operations* & *mobility*, increased *efficiency*, generated *employment opportunities* & have proved indispensable for *tourism*.

So, the things that we take for granted are not granted after all & had it not been for the *air traffic rights*, the "*freedoms of air*", world would not have been the same & thus, these '*freedoms*' have now become a *way of life*.