DEVELOPMENTS IN BILATERAL AIR SERVICE AGREEMENTS

by

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DEVELOPMENTS IN BILATERAL AIR SERVICE AGREEMENTS

SUMMARY

This dissertation deals with international transport law and looks at the development of bilateral air service agreements governing international scheduled flights from their inception after the Chicago Conference of 1944 until the present day. The Chicago Conference left a legacy of separation in airline services. Scheduled and non-scheduled flights came into existence and bilateral agreements are needed to regulate international scheduled services.

The relationship between the state and its designated airline forms the pivot of the bilateral relationship. However, the aviation relationship between state and airline and between states *inter se* face challenges as globalisation and development take place in the air transport industry. New methods of cooperation now exist which need to be adapted to suit the needs of individual countries and airlines. South Africa has accepted the challenges of development and undertaken modern methods of cooperation such as code-sharing.

KEYWORDS

Chicago Convention; Bermuda Agreement; Chicago Standard Form of Agreement; bilateral air service agreements; bilateral agreements; scheduled flights; standards and recommended practices (SARPS); code-sharing; interairline cooperation; air transport.

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CHAPTER 1

THE CHICAGO CONFERENCE AND ITS LEGACY

1.1 Introduction

Bilateral air service agreements are treaties between states that allow international air services to take place between the respective countries. These agreements have developed an international law regime that governs scheduled air services. However, to understand the bilateral air service regime, the questions that must be answered are how these agreements gained prominence in international civil aviation, and what the services are. For the answers, one is forced to go back to the Chicago Convention.[1]

1.2 The aims of the Chicago Conference

Towards the end of the Second World War, there was a realisation that, as the aviation industry had grown rapidly, a suitable form of regulation of the industry was required.[2] For this reason the allied powers gathered in Chicago in November of 1944 to attempt to work out the direction that international civil aviation was to take.

The initial aims of the Conference were firstly, to devise a system that would allow for all economic matters relating to international civil aviation to be governed on a multilateral basis, and secondly, to provide a technical system that all countries could follow to standardise the industry. However, as shall be seen, no agreement could be achieved on the first aim while the second aim took precedence and became the hallmark by which the Chicago Convention would be known.[3]

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1 The Convention on International Civil Aviation was signed at Chicago on 7 December 1944 and became known as the Chicago Convention.

2 During the war, the development of aviation had taken place in a largely military context, and the Conference was one of a series of wartime conferences attended by the Allies. See Freer (1994) 29.

3 Lowenfeld (1981) Chapter 2 Section 1.12 at 2-5.

1.3 The principles adopted at Chicago

To understand why the goal of multilateral economic regulation did not materialise at Chicago, it is imperative to investigate the principles adopted towards international civil aviation by the Chicago Convention. The three most important principles to emerge from the Conference will be examined here: the right of each state to equality; the rule of absolute sovereignty; and the role of the state in international aviation.

Firstly, the basis of equality is set out in the preamble to the Chicago Convention. The concept of equality provides that all nations are to be treated equally and are to be given the same opportunities to participate in international civil aviation.

Secondly, the Chicago Convention followed the Paris Convention in maintaining the status quo relating to sovereignty.[4] Article 1 of the Chicago Convention provides that contracting states recognise that every state has complete and exclusive sovereignty over the airspace above its territory.[5] It is this concept of sovereignty that would hold the key to the lack of economic cooperation on a multilateral level. By retaining sovereignty over airspace, no right of innocent passage is permitted and each country maintains a hold over what can be done in its airspace; not only who can fly over the country, but also who can land in the country and on what (negotiated) terms.[6] With airspace being subject to the sovereign powers of the state, the government of the

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4 The Chicago Convention replaced the 1919 Paris Convention relating to the Regulation of Aerial Navigation which was concluded after the First World War. Article 1 of the Paris Convention accepted the rule of absolute sovereignty over airspace. See Diedericks-Verschoor (1993) 4. Diamond notes that the Chicago Convention codified the custom relating to sovereignty, however this is erroneous as it had been previously codified in the Paris Convention.

5 The territory of a state is the land area and adjacent territorial waters under the sovereignty, suzerainty, protection or mandate of such a state. See article 2 of the Chicago Convention.

6 Haanappel (1995) 313. Flowing from the sovereignty rule, is the rule against cabotage. Cabotage in short, is when a foreign air carrier performs domestic services in another country. For example, Carrier Y belonging to country Y, performs domestic services in country X. See article 7 of the Chicago Convention which allows states the right to refuse permission for cabotage services. In terms of article 7 each contracting state undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other state or an airline of any other state, and not to obtain any such exclusive privilege from any other state.

territory involved automatically became entangled in granting the rights to fly above the territory. The Chicago Convention resulted in government control which excluded foreign commercial aviation operations without local government participation. Therefore, governments were set to play a dominant role in the economic and political development of international civil aviation.[7] Lehner notes that sovereignty served as a basis for state protection and regulation of aviation markets:

> International air transport could have developed in myriad directions based on the principles of "exclusive sovereignty" and "equality of opportunity". Yet the negotiating countries created a regulatory system pointing in the direction of protectionism. Instead of being framed on the principles of free trade and a liberal exchange of commercial traffic rights, the international air transport regime is based on a rigid and closed system of regulation so that nations can ensure that they "get a share of the market" that sovereignty and equal opportunity arguably guarantee.[8]

Thirdly, although the Chicago Convention does not provide that airlines or aircraft are to be owned by the state (article 17 merely requires that aircraft carry the nationality of the state in which they are registered), the trends in aviation at the time influenced state involvement with the national carriers. De Leon notes that the predominant role of the nation-state, equality and sovereignty, allowed states to dominate the development of international civil aviation.[9]

The stumbling block at the Chicago Conference was how to establish a capacity system that would suit all participants in international civil aviation.[10] The above three principles acted together to stonewall attempts to create a system of economic regulation of capacity. Each state wished to negotiate the economic rights attached to international civil aviation for itself and was not prepared to be subject to a multilateral economic regime as it did not hold as many pecuniary benefits as individual state negotiations.

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7 Dempsey (1987) 8.

8 Lehner (1995) 438.

9 De Leon (1995) 247.

10 Diamond (1975) 441 notes that the problems at Chicago were the questions of the control of frequency of flights and the capacity of services offered by the international airlines.

1.4 The results of the Chicago Convention

As no progress was made on the multilateral economic front, the Conference needed to work out a system that would provide workability and flexibility for international aviation. In this process, certain freedoms of the air were identified. As these form the heart of the aviation system, it is vital that they be listed.

1 The privilege to fly across territory without landing.
2 The privilege to land for non-traffic purposes.
3 The privilege to land in a foreign territory for traffic purposes.[11]
4 The privilege to take on traffic (passengers, cargo and mail) destined for the territory of the state whose nationality the aircraft possesses.
5 The privilege to take on passengers, cargo and mail destined for the territory of any other contracting state.[12]

With the identification of these freedoms, the Chicago Convention subsequently gave the countries the option to choose one of two systems to govern their aviation relationships. These systems were set out in the Transit and Transport Agreements attached to the Chicago Convention. If a country chose the Transit (or Two Freedoms) Agreement then the privilege of flying across the other signatories' territories without landing and the privilege to land for non-traffic purposes were granted on a multilateral basis.[13]

Signatories to the Transport (or Five Freedoms) Agreement exchanged all of the five privileges mentioned above, which resulted in a multilateral exchange of freedoms and would have realised the ideals of the Chicago Convention. However, the main problem with the Transport Agreement is that, with the wide freedoms granted by it, the states would not be able to negotiate the freedoms on a right by right basis. As a result, a

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11 Traffic purposes mean the disembarkation of passengers, cargo and mail in a foreign territory.

12 Lehner (1995) 442 notes that the fifth freedom is the most disputed in air services agreements.

13 Article 1 of the Transit Agreement.

state in the Five Freedoms relationship would not be able to gain a pecuniary right to the traffic freedoms. The states would not be in a position to fully control the economic aspect of civil aviation, as these would fall under the Transport Agreement. A further problem with the Five Freedoms Agreement is the issue of fifth freedom rights. As fifth freedom rights involve air traffic to third countries, the profitability of long-haul routes was influenced. It was the regulation of fifth freedom capacity that proved to be a stumbling block.[14] As can be imagined, such wide ranging freedoms were not acceptable to the majority of states. With the rejection of the Transport Agreement option, no full exchange of economic rights was achieved under the Chicago regime.

1.5 Scheduled and non-scheduled flights

The rights negotiated at Chicago led to the separation of air services into international scheduled air services and international non-scheduled air services.[15] The Chicago Convention governs non-scheduled services in article 5. Here each contracting state agrees that all aircraft of other contracting states involved in non-scheduled international air services, have the right to undertake flights into or in transit across its territory, as well as to make stops for non-traffic purposes without having to obtain prior permission and subject to the right of the state flown over to require landing. In essence article 5 amounts to a mutual exchange of certain transit and commercial rights for non-scheduled transport on a multilateral basis.[16]

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14 Naveau (1989) 33.

15 The main reason for this separation is that, at the time, economic viability lay in the proposed scheduled flights. At that stage of the development of aviation terminology, services usually organised on a large scale, were classified as scheduled. On the other hand, services which took place on an infrequent, *ad hoc* basis were classified as non-scheduled See Guldimann (1979) 135-149.

16 Cheng (1962) 2. At the time of the Chicago Convention the non-scheduled air services were considered to be of lesser importance as there was little development in the industry. However, as Haanappel (1978) and Guldimann (1979) point out, the charter industry has undergone major development and regulation of the non-scheduled services is now an issue. Cheng (1962) 27 also notes that in practice, article 5 is supplemented with further agreements to regulate the non-scheduled industry. Guldimann (1979) 147 notes that the provisions relating to traffic rights present a 'faux problème' in that there is no real difference in substance, only a difference in form and procedure as article 6 requires that scheduled air services need special authorisation from the foreign government involved, while article 5 provides that non-scheduled services can

However, for this work the focus is on scheduled air services as non-scheduled services are considered of lesser importance. International scheduled flights are regulated in terms of article 6 which states that no international scheduled flight may be operated over or into the territory of a contracting state, except with the special permission or other authorization of that state, and in accordance with the terms of such permission or authorization.[17]

1.6 The technical aspects

So far, I have concentrated on the failure of the conference to establish multilateral regulation for scheduled flights. However, the Chicago Conference had a further aim: the establishment of a technical system to govern international aviation on a standardised basis. Examples of the technical side of aviation are the communications systems and the air navigation aids.

The technical part of the Chicago Convention places duties on states that go beyond the economic and influence all states and aircraft. The system that is used is that of the international standards and recommended practices (SARPS) as contained in the 18 Annexes to the Chicago Convention. The SARPS are considered to be of such importance for international civil aviation that the comment has been made that without them, international civil transport would be in a state of chaos.[18] The SARPS are constantly updated to adapt to the changes in technology.[19] In order to implement these

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17 The ICAO Council adopted a definition of international scheduled flights in 1952 in terms of which an international scheduled service is a series of flights that possesses all of the following characteristics: it passes through the airspace over the territory of more than one state; it is performed by aircraft for the transportation of passengers, mail and cargo for remuneration; each flight must be open to use by members of the public; it is operated, so as to serve traffic between two points; and it is operated in accordance with a published time table, or it has flights on so regular or frequent a basis that they constitute a recognisable systematic series. ICAO Document 7278/841 as quoted in Guldimann (1979) 137.

18 Sochor (1989) 409

19 The International Standards and Recommended Practices are amended and adopted by ICAO without a cumbersome ratification process in terms of article 37. Article 37 states that each contributing state undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organisation in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and

standards, the International Civil Aviation Organisation (ICAO) was established by the Chicago Convention. The ICAO was established pursuant to the Chicago Convention and its membership is made up of the member states to the Chicago Convention.[20]

To sum up, one of the main aims of the Chicago Convention was that of economic control. At the Chicago Conference states could not agree on economic rights. For this reason two multilateral options were made available, the Two Freedoms and the Five Freedoms agreements. As the Two Freedoms agreement was not inherently economically based, it was a success. The far-reaching economic implications of the Five Freedoms Agreement can explain its limited membership and the fact that at present it is not used as a regulatory instrument. From this it can be seen that multilateral attempts at the economic regulation of aviation stemming from within the Chicago Convention itself, or from subsequent attempts to develop a viable economic system under its auspices, were a failure. The need to regulate remained, however, and the only avenue open to aviation states was through bilateral negotiation.

The second aim of the Chicago Convention, that of a standardised technical regime was a success and it is in this area that the Convention has made a lasting impression on international civil aviation.

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improve air navigation. To achieve this, the ICAO shall adopt and amend from time to time, as many international standards and recommended practices and procedures dealing with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.

20 Chapters VII to XII of the Chicago Convention deal with the constitutional issues of the ICAO.

CHAPTER TWO

THE EMERGENCE OF BILATERAL AIR SERVICE AGREEMENTS

2.1 Introduction

The failure of the Chicago Convention to institute a regime to regulate the economic sphere of international scheduled air transport gave rise to a vacuum and a system was needed to provide regulation. Individual states were left to determine the manner in which international scheduled air services would be governed. The exchange of economic rights between states was to be regulated by means of bilateral treaties between the countries.[21]

Bilateral air service agreements are treaties between two countries, usually negotiated by the specific government department involved in civil aviation.[22] Although bilateral air service agreements can in theory cover the spectrum from non-scheduled flights to scheduled flights, in practice the most common bilateral is that which provides for the establishment and the operation of international scheduled air services.[23] In essence, bilateral agreements on scheduled air services have to cover two areas: the exchange of rights and privileges for scheduled international air services, and the establishment of a system of devices to regulate the rights granted.[24]

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21 See article 6 of the Chicago Convention. A reason for the firm establishment of the bilateral system was to allow governments to preserve 'national interests and safeguard the value of their airline assets' Congdon (1994) 327. The bilateral system that was established relied on 'the principle of trading rights as each state sought to maintain the value of its asset' Congdon (1994) 327.

22 Diamond (1975) 430. It may be noted that bilateralism does not necessarily require a formal agreement. An operating permission may be obtained under an informal understanding between the two governments concerned, or as a 'result of a direct application by the foreign airline to the territorial state' Cheng (1962) 231. Cheng notes further that temporary permissions are frequently granted pending the conclusion of a formal bilateral agreement. However, it can be argued that, in terms of Article 3 of the Vienna Convention on the Law of Treaties, these informal agreements, either oral or in writing, effectively remain treaties.

23 Żylicz (1992) 135.

24 Diamond (1975) 426.

2.2 The Chicago Standard Form

The next aspect to be considered is the evolution of the format and content of the bilateral agreement into its present form. Brief mention can be made of the role that the Chicago Conference played in bilateral development. At the end of the Conference, with no multilateral economic regulation in sight, and loathe to leave a vacuum, the Conference delegates formulated a model bilateral air service agreement. It was hoped that the Chicago Standard Form would in essence act as a framework for bilateral agreements, which would in turn ensure a level of uniformity in bilateral air service relations.

The Chicago model clauses covered areas such as airline designation, the qualification of airlines, and their authorisation. On a regulatory level, the Standard Form was not a resounding success as the provisions did not get down to the nitty gritty of economic regulation. There were no provisions to regulate the vital issues of ratemaking and capacity on international routes, which were at the time (and remain today) the crux of international civil aviation.[25] The Standard Form is in essence a 'structural model' that provided a framework for international civil aviation.[26]

As the Standard Form functioned as a guideline treaty for bilateral agreements, containing mostly general provisions, the states involved in international aviation would still need to formulate or concretise solutions to the problematic areas not covered in the Standard Form. This led to the next development in the bilaterals: the watershed Bermuda I Agreement.[27] This compromise agreement between the United States and the United Kingdom built on the provisions of the Standard Form and added successful

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25 Dempsey (1987) 52.

26 Gertler (1991) 60 notes that the standard form itself states that it is a means to promote the early development of air transportation during a transitional period which was later to be followed by more permanent arrangements.

27 The Bermuda Agreement or Bermuda I is the synonym for the Air Services Agreement between the United States of America and the United Kingdom of Great Britain and Northern Ireland, which was signed at Bermuda on 11 February 1946, on which date it also became effective.

innovations and solutions of its own.[28]

2.3 The Bermuda Agreement (Bermuda I)

As Bermuda I was based on an actual aviation relationship (that between the UK and the USA), it was able to establish workable provisions relating to the problem areas. Both countries went to the negotiating table with their own agendas. The devisive viewpoints of the UK and the US were essentially the stances adopted at Chicago which contributed to the stalemate regarding economic regulation. The bone of contention was capacity regulation, especially in relation to the fifth freedom.[29] The British point of view at the start of the Bermuda negotiations favoured predetermination of capacity with a 50/50 division of capacity, the regulation of rates, no fifth freedom grants and the institution of an international body with executive powers over air services. The American point of view, on the other hand, favoured no limitation of frequencies, no division of capacity, no regulation of rates, complete fifth freedom rights, and an international body with advisory power only.[30]

2.3.1 The provisions of Bermuda Agreement

In the final act of the Bermuda Agreement, the US and the UK set out the principles forming the backbone of their bilateral air services relationship. It was agreed that the countries would encourage a wide distribution of the benefits of air travel. Air travel would be operated at the cheapest rates consistent with sound economic principles.

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28 Gertler (1991) 61 comments that '...[A]lthough the Bermuda type agreements have become...the preferred instrument of bilateralism in international air transport relations, they are not a negation, but rather an addition to, or expansion of, the provisions of the Standard Form, supplementing the Standard Form, particularly with respect to economic or commercial transportation matters'. Diamond (1975) 442 notes as well, that in the development of bilateral agreements, the form adopted by the modern agreements follows that of the Chicago Standard Form, while the content or the substance follows that of the Bermuda Agreement.

29 Cheng (1962) 19.

30 Diamond (1975) 444. In short, these viewpoints were known as the British 'Order of the Air' and the American 'Freedom of the Air' viewpoints.

It is from here that a clear division of contents into three groups can be seen: the dispute resolution procedures: the administrative provisions; and the regulatory measures.[31]

2.3.1.1 Dispute resolution

The least contentious of these provisions are those dealing with **dispute resolution.** If either party wished to initiate amendments to the agreement, this could be done by consultation. However, if consultations failed, either party could give notice of its desire to terminate the agreement.[32] In accordance with article 9, any dispute between the parties relating to the interpretation or the application of the agreement and annex which could not be settled through consultation was to be referred to the Interim Council of the Provisional ICAO or its successor.

2.3.1.2 Administrative provisions

The second grouping of provisions set out in the agreement are those of an **administrative nature.** The administrative provisions followed the format set out in the Standard Form. These provisions can also be termed the so-called 'soft rights' aspects of bilateral agreements. Soft rights refer to the fact that these agreements require relatively little negotiation and remain standard.[33] The soft rights are also influenced by the technical provisions of the Chicago Agreement and refer back to it. The administrative provisions of Bermuda included the following.

2.3.1.2.1 Authorisation and designation provisions

To enable the air services to start, the country granted the service rights, must

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31 Cheng (1981) 34.

32 Article 13 Bermuda I.

33 Soft rights, although accepted as unenforceable in general public international law, have a specified meaning in the aviation relationship.

designate an air carrier or air carriers for the specified routes. The country granting the rights must then authorise the foreign air carriers by granting an operating permit. [34]

Just as the rights can be granted and the operating permissions obtained, so the rights can be revoked. The general grounds for revocation are firstly, if a party is not satisfied that substantial ownership and effective control of the other party's air carrier are vested in the nationals of the other contracting party; and, secondly, if a carrier fails to comply with the laws and regulations applicable in the territory of the other party.[35]

2.3.1.2.2 Charges

The charges which either party may impose on the carriers of the other party for the use of the airports and facilities may not be higher that those that would be paid by its national aircraft engaged in similar services.[36]

2.3.1.2.3 Certificates

Certificates of airworthiness and competency, as well as valid licences issued and in force by one contracting party are recognised as valid by the other contracting party for the operations of the international services.[37]

2.3.1.2.4 National laws and regulations

The territorial laws of the contracting parties apply to the designated air carriers engaged in international navigation within the other party's territory.[38] On the ground,

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34 Article 2(1) Bermuda I.

35 Article 6 Bermuda I.

36 Article 3(2) Bermuda I.

37 Article 4 Bermuda I.

38 Article 5(1) Bermuda I.

the laws relating to the entry into or departure from its territory of passengers, crew and cargo of aircraft apply to the passengers, crew and cargo of the designated carriers.[39]

2.3.1.3 Regulatory provisions

The last grouping of provisions are those of a **regulatory** nature. It is these that require negotiation and agreement and are considered to be the controversial or 'hard right' provisions. The provisions are those of capacity, routes and rates. The principles behind the regulatory system are that air transport is to be governed by the needs of the travelling public and there is to be equal opportunity for the air carriers of the USA and UK to operate on any route between their respective territories.[40]

2.3.1.3.1 Capacity

Regarding the problematic capacity provision, the Bermuda partners decided in general that the main objective of the air service is to provide adequate capacity in relation to the traffic demands between the respective territories. This adequately covers third and fourth freedom traffic. However, the fifth freedom (third country traffic) is governed by the principle that capacity is to be related to the traffic requirements between the country of origin and the countries of destination; to the requirements of airline operation; and to the traffic requirements of the area through which the aircraft passes after taking account of the local or regional services.[41]

2.3.1.3.2 Routes

The routes granted to the parties are set out in the Annex to the Agreement. In order

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39 Article 5(2) Bermuda I.

40 Wassenbergh (1996) 80 shows the development of the term 'fair and equal'. In early bilateral agreements the phrase used was 'a fair and equal opportunity to operate the agreed routes'; later the phrase changed to 'a fair and equal opportunity to compete'; and, finally, the phrase may now read ' a fair and equal opportunity to effectively participate'.

41 These principles are found in Cheng (1962) 555-557 and Matte (1981) 231-232.

to operate the routes, the designated air carriers are granted the rights of transit, of stops for non-traffic purposes and of commercial entry and departure for international traffic in passengers, mail and cargo in the other party's territory, as well as the use of the international airports and ancillary features.[42]

2.3.1.3.3 Rates

Section II of the Annex regulates the rates aspect. In terms of Bermuda, the rates charged by the air carriers on the routes granted, are subject to the approval of contracting parties.[43] Bermuda I allowed for the involvement of the International Air Transport Association (IATA) in rate setting.[44] Any rate agreements concluded through IATA that involve US air carriers are subject to the approval of the United States Civil Aviation Board.[45] New rates proposed by the air carriers must be filed with the aeronautical authorities of both contracting parties at least 30 days before the commencement of the services.[46]

From the above provisions, it can be seen that the Bermuda I compromise consisted of the following: the United States accepted the international control of fares (IATA) and the parameters within which the services could be operated, while the UK abandoned the predetermination of capacity; capacity was to be determined on a needs basis with the market influences having the final say.

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42 See Annex I Bermuda I.

43 Section 11 (a) Annex Bermuda I.

44 IATA was established as a private inter-airline organisation after the Chicago Conference to assist with the coordinating of airline activities, one of which is the determination of international tariffs. See Manual (1996) 3.8-1 and Żylicz (1992) 155.

45 Annex section 11(b).

46 Annex section 11(c). IATA is the world-wide non-governmental organisation of scheduled airlines established in 1945 to promote safe, regular and economical air transport, to provide means for collaboration among air transport enterprises, and to cooperate with ICAO. Manual (1996) 3.8-1. Supplementary to these rate provisions are the provisions relating to the IATA rate conference and the possible non-application of IATA rates. If the IATA rates are non-applicable then section 11(d) sets out the manner in which the countries are to agree on rates.

2.4 Assessment

The Bermuda Conference is considered to be one of the most important events in aviation history as it succeeded in resolving the Chicago deadlock: the capacity issue.[47] As Bermuda represented a melting pot of viewpoints and offered a workable hard rights system, it was soon regarded as the general guideline for the industry to achieve economic regulation. With the firm entrenchment of bilateral agreements in the years after Bermuda, the dream of a multilateral solution faded and the economic regulation of international air transport was confined to bilateralism.[48] Bilateralism also reinforced the role of the national government in formulating international civil aviation policy,[49] which was started at Chicago. Haanappel notes that "in the commercial field, governments have not only acted as regulators of a privately owned industry, but they have also acted as 'operators', that is, the phenomenon of state-owned airlines."[50]

The Bermuda Compromise has affected two principal areas. Firstly, the fact that the USA allowed for the regulation of fares by and outside body influenced the strength of IATA which has subsequently assumed primary responsibility for the determination of fares, subject to the approval of the governments affected by its decision.[51] Secondly, capacity would be regulated by the Bermuda principle that allowed 'the governments to set out the capacity principles for designated airlines to follow, but allow[s] each airline the freedom to determine its own capacity, subject to an *ex post facto* review by the governments through their consultation procedure...'.[52]

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47 Diamond (1975) 443.

48 Wassenbergh (1995) 85.

49 Stockfish (1992) 609.

50 Haanappel (1995) 312.

51 Dempsey (1987) 53.

52 Manual (1996) at 4.3-2.

2.5 Bermuda II

I have previously stated that bilateral agreements can be seen from two perspectives: firstly from the regulatory perspective which has been considered above; and secondly as a policy document. The compromise that was reached at Bermuda I reflected the two governments' policies of the day.[53] However, with time the economic background in the aviation industry underwent a change, and the policies followed suit. By the 1970s the aviation industry was undergoing an upheaval with America, the industry leader, moving towards the deregulation of its domestic aviation industry.[54] This deregulation in turn influenced international civil aviation.[55]

At the same time there was dissatisfaction from the UK with Bermuda I as its open route policies appeared to favour the American carriers. The UK wished to enact a more restrictive air policy to protect its interests. The UK denounced Bermuda I in 1976 with the result that a new bilateral agreement was negotiated between the US and the UK. Bermuda II, reflecting a new approach, came into operation in 1977.[56] The end result of Bermuda II is that the fifth freedom opportunities and multiple designations were restricted, and IATA's role in tariff fixing was downgraded.[57] The hard rights were renegotiated. Oddly enough, the restrictive approach adopted by Bermuda II came in for harsh criticism from the US industry which was moving towards deregulation. This shows that Bermuda II was something of an anomaly in that when it was signed the deregulation of the industry was starting yet the bilateral was more restrictive and

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53 See footnote 30 of this work for the Open Air and the Order of the Skies viewpoints.

54 The 1970's United States Carter Administration was responsible for the start of deregulation in that it brought free market economic theory into the international aviation arena. Dempsey (1987) 23. See also Stockfish (1992) 614 on the deregulation of domestic aviation in the United States.

55 Haanappel (1995) 313 notes that the deregulation would eventually spread to other parts of the world. The instrument of deregulation would be the open skies agreements that the United States would promote.

56 Bermuda II shows a more restrictive approach with the stricter regulation of routes, capacities, frequencies and the designation of fifth freedom rights.

57 Diedericks-Verschoor (1993) 51.

regulatory.[58]

Although the regulatory aspects of Bermuda II can be seen as a retrogressive step, on the administrative side, development was taking place to keep abreast with advances in the industry. Further soft rights were evolving. Safety and security provisions were included in the agreement. These provisions reflected the growing concern of the industry with these aspects and show the ability of bilateral agreements to adapt to changing circumstances and the continued development of standard bilateral provisions.

Bermuda II must be seen as an agreement typifying the relationship between the UK and the US. The hard right provisions were not so favourable that other countries felt the need to incorporate them into their own bilateral air service agreements. The standard form for bilateral agreements remained Bermuda I.

Bermuda II reflected not only the changes in policy between two countries, but also allowed for further development of the standard provisions. Areas vital to the aviation relationship were also included. Bermuda II saw the introduction of safety and security clauses. It will be seen that future bilateral agreements would retain these provisions as standard clauses, just as Bermuda I retained clauses from the standard form, and Bermuda II retained clauses from both the Standard Form and Bermuda I.

To conclude, with Bermuda I, bilateral air service agreements became entrenched in the aviation industry. These agreements allowed airlines, the authorised users of the rights granted, to operate services between the respective countries. The Bermuda type agreement reflects a strong state influence with its involvement of the states in tariff authorisation and the role of the airline appears to be that of the authorised user, not the negotiator of the rights.

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58 Żylicz (1992) 142.

CHAPTER 3

THE FURTHER DEVELOPMENT OF BILATERAL AIR SERVICE AGREEMENTS

3.1 Introduction

After the 1970s deregulation upheaval, a new approach was needed in aviation. Ever on the forefront of aviation happenings, the United States promoted the concept of open skies.[59] Continual growth and changes in the industry have led to new approaches in modern bilateral air service agreements. I shall be highlighting the three aspects that most reflect the new attitudes. These are the development of clauses that adapt to the needs of the day, the increase in airline involvement partnered with the reduction of state involvement, and the new forms of airline cooperation that have stretched the concepts of sovereignty and the nationality of airline rules.

In the discussion of these developments, the 1996 SA-USA Bilateral Air Service Agreement will be used as the point of departure.[60] The previous SA-USA relationship under the 1947 bilateral agreement came to a dramatic end in 1986 which necessitated the negotiation of the present bilateral. South Africa's apartheid policy was the underlying cause of the renunciation of the bilateral agreement by the United States. The United States' Congress passed the Comprehensive Anti-Apartheid Act of 1986 which resulted in the immediate termination of the Air Service Agreement between the two countries. A legal technicality arose as to the validity of the termination as it did not comply with the one year notice of termination required in the bilateral agreement. South Africa attempted to have the United States Department of Transport's revocation

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59 The modern open skies policy is reflected in the Model Bilateral Air Transport Agreement of 20 March 1995. See (1996) 35 International Legal Materials 1479.

60 The 1947 USA-SA agreement regulated international scheduled services until 1986. Treaty Series No 17 (1947) Agreement between the Government of the Union of South Africa and the Government of the United States of America relating to air services between their respective territories. Date of signature 23 May 1947 Cape Town. Date of entry into force 23 May 1947. The 1947 agreement followed Bermuda I in essence. Amendments were made to it during its lifespan to cater for route changes.

of the SAA permit set aside on this ground. However, the court concluded that Congress had intended the immediate suspension of rights.[61]

3.2 Changes in policy lead to innovations in bilateral agreements

Before I continue with the provisions of the 1996 Agreement, South Africa's policy towards international aviation should be noted. South African civil aviation started to undergo a change in the late 1980s when the government announced that there would be deregulation of the industry. The deregulation that took place on the domestic level also influenced international services. The international policy changed to offer more flexibility in negotiating the hard rights. In principle, multiple designation is supported in that states are permitted to designate more than one airline to fly any route. However, the designated airlines have to share the allocated capacity of that country on the specified route. On the capacity front, airlines now have the power to adjust their services to satisfy demand within a framework of upper and lower limits. Route access points in South Africa are Johannesburg, Durban and Cape Town. Reciprocity governs the gateways: if a foreign airline is allowed to use more than one gateway, then South Africa will seek equivalent rights. With the traffic rights, the third and fourth freedoms are negotiable while the fifth freedom 'will only be granted to a foreign airline in exceptional cases after the potential consequences have been carefully evaluated and then only if reciprocal or comparable rights or benefits have been obtained for a South African airline'.[62] The last important policy aspect is that of tariffs: the airlines themselves are now permitted to set the tariffs and a double disapproval system exists in terms of which the tariffs are to be filed with the aeronautical authorities of both parties, but the tariff will only by disallowed if both parties disapprove.[63]

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61 *South African Airways v Dole* 817 F 2d 119.

62 Prins (1992) 12

63 See Prins (1992) for full exposition on change in policy. It may be questioned here as to what IATA's role is in tariff setting. IATA, as an inter-airline organisation, is still involved in the setting of tariffs amongst the airlines. However, it would appear that mention is not made of the IATA structure in the actual bilateral as it is accepted that as the airlines are IATA members, and the IATA machinery is the preferred way of organising tariffs, then it is unnecessary to mention that aspect of inter-airline cooperation in the bilateral agreement.

This more liberal, theoretical approach is reflected in practice in the 1996 South African-US bilateral agreement. The agreement presents a radical departure from the previous bilateral and can be seen both as a reflection of the state of the industry, and an indication of future trends. It is perhaps the most liberal and complex agreement that South Africa has yet undertaken.[64] The negotiation of the agreement was not without its difficulties as the reluctance of South Africa to accept innovative developments such as code-sharing led to stalling in the negotiations.[65]

The main aim to come out of the agreement is that the two governments desire to promote an international aviation system based on competition among airlines in the market place with minimum government interference and regulation.

3.3 The development of the technical provisions

3.3.1 General

Against this background, the next step is to investigate certain changes and developments in the standard clauses stemming from both the Standard Form and Bermuda I. Multiple designation for airlines is approved in article 3 of the 1996 agreement. However, for the authorisations and permits to be granted, three conditions must be met. Substantial ownership and effective control of the airline must be vested in the designating party, its nationals or both. The designated airline must be qualified to meet the legal conditions applied to the operation of air transport. The above two qualifications hark back to Bermuda I. A new qualification is that the designating party must maintain and administer the safety and aviation security standards.[66] The authorisations and permits may be revoked after consultation with the defaulting party

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64 Opinion of Mr Johan Bierman of the South African Directorate of Civil Aviation expressed in an interview conducted with the author on 18 February 1998.

65 Delport (1995) 23.

66 Article 3(2) (a) (b) (c) 1996 Agreement.

if the above conditions are not met.[67] Aviation safety allows the parties to recognise certificates of airworthiness and competence on a mutual basis. The standards that must be met must be equal to the minimum standards set by the Chicago Convention.[68]

3.3.2 Aviation Security

Aviation security, on the other hand, is more directly related to the parties' obligations under multilateral conventions dealing with security. The parties reaffirm that their obligation to each other to protect the security of civil aviation against acts of unlawful interference forms an integral part of the agreement.[69] The parties, when requested, are to provide all necessary assistance to each other to prevent acts of unlawful seizure of aircraft and other unlawful acts against the safety of such aircraft, of their passengers and crew, and of airports and air navigation facilities and to address any other threat to the security of civil air navigation.[70] Furthermore, the parties are required to act in conformity with the ICAO aviation security standards and recommended practices as set out in the ICAO annexes and are required to ensure that the operators (of both aircraft and airports) act in conformity with the aviation security provisions.[71] In order to facilitate aviation security, each party agrees to observe the security provisions required by the other party for entry into the territory of that other party and to take adequate measures to protect aircraft and to inspect passengers, crew, and their carry-on items, as well as cargo and aircraft stores, prior to and during boarding or loading.[72]

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67 Article 4 1996 Agreement.

68 Article 6 1996 Agreement.

69 In terms of article 7(1) the parties are to act in conformity with the provisions of the Convention on Offenses and Certain Other Acts Committed on Board Aircraft , signed at Tokyo on 14 September, 1963; the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December, 1970; and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on 23 September, 1971. These Conventions have been incorporated into the South African law by means of the Civil Aviation Offences Act 10 of 1972.

70 Article 7(2) of the 1996 Agreement.

71 Article 7(3) of the 1996 Agreement.

72 Article 7(4) of the 1996 Agreement

Haanappel notes that the large role that the states play in safety and security intervention is undisputed.[73] The responsibility is given to the state to ensure that the airlines implement the rules, while the airlines can act in an advisory capacity in relation to aviation safety and security.

3.3.3 Surface transportation of cargo

A further example of the development in bilateral provisions is the provision relating to the surface transportation of cargo that the airlines may employ in connection with international air transport. The designated airlines can employ any surface transportation for cargo to or from any points in the territories of the (other) parties or in third countries. This transport includes transport to and from all airports with customs facilities and the right to transport cargo in bond under applicable laws and regulations. The airlines can perform their own surface transportation or provide transit arrangements with other surface carriers. Single intermodal cargo services can be offered at a single price for the air and surface transportation combined, as long as the shippers are not misled as to the facts concerning such transportation.[74] An example of the flexibility that this section offers is the following: A South African airline carries cargo destined for Canada from Johannesburg to New York. Once in New York, the South African carrier can contract with a trucking company or a railway company (or both) in the United States to transport the cargo to Canada.

3.4 Development of economic provisions

The next areas of focus is to show how the bilateral agreements now allow for more airline influence in the vital economic provisions - which means a lessening of government influence and shows that the aims as set out in the preamble are being implemented in practice.

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73 Haanappel (1995) 312.

74 Article 8(7) of 1996 Agreement.

3.4.1 Tariff setting

As will be recalled from the analysis of the Bermuda I provisions, the governments of the day were involved with the pricing or tariff setting provisions by means of the 'double approval' system. This was also carried through to the 1947 SA-US bilateral agreement. However, in terms of the 1996 bilateral agreement, the general approach to pricing has changed. The designated airlines determine the prices for air transportation. The prices themselves are to be based upon commercial considerations in the marketplace. The states of the designated airlines may only intervene in three circumstances: a) to prevent unreasonable discriminatory prices or practices; b) to protect consumers from prices that are unreasonably high or restrictive due to the abuse of a dominant position; and c) to protect airlines from practices that are artificially low due to direct or indirect governmental support or subsidy.[75]

3.5 Cooperation between airlines

The third area of interest is that of the cooperation between the airlines. The annex to the agreement, which is valid for 5 year periods, sets out in section 6 the cooperative arrangements permitted in terms of the agreement. In terms of section 6, any designated airline of one party may enter into cooperative marketing arrangements with an airline or airlines of the other party and an airline or airlines of a third party. These cooperative arrangements are only permitted if all the airlines involved have the appropriate authority and if they meet the requirements normally applied to such arrangements.[76] Examples of cooperative provisions given are block-space, code-sharing or leasing arrangements. Cooperative arrangements with third party airlines are also permitted as long as the third party authorises or allows comparable arrangements between the airlines of the other party and other airlines on services to, from and via the third country. The introduction of code-sharing in South Africa has only been made

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75 Article 12(1) of 1996 Agreement.

76 It is not set out what exactly these requirements are, which leaves the provisions somewhat vague.

possible in terms of the more open approach of the aviation authorities.

3.5.1 Code-sharing

The area of cooperative arrangements has grown in scope and importance. To evaluate the role of cooperative arrangements, code-sharing will be discussed not only to highlight the problems it presents, but even more, to show how airlines can benefit from it.

Code-sharing initially developed in the United States domestic arena as a marketing alliance that allowed cooperation between airlines in terms of which the airlines would in effect channel traffic to one another.[77] Code-sharing is the use of the flight designator code of one air carrier, which service is usually also identified (and, may be required to be identified) as a service of, and being performed by, the second air carrier. The effect is that airlines can market flights to destinations under their own code number without themselves providing the service.[78]

With code-sharing, an airline agrees to share a code with another airline. The end result of code-sharing is that from an operational point of view, each of the airlines in the partnership operates the same flights as before the code-share agreement. However, from a marketing perspective things change: with a code-share agreement each airline is able to offer a wider choice of destinations.[79] From the passenger's perspective, code-sharing allows for the sale of air transport involving more than one airline on an inter-airline basis as if it were transportation on one airline.[80]

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77 Humphreys (1994) 196.

78 The code is the designator code assigned by IATA to the airline for the use in its airline operations. The number is that given to a specific flight. Codes are combined with numbers to designate a particular flight. Montag (1994) 2.

79 Montag (1994) 8.

80 Interlining 'refers to agreements between airlines which enable a traveller to use a ticket issued for a flight with one airline, and allowing one airline to issue tickets for journeys to be made partly on another airline.' Montag (1994) 5.

3.5.1.1 Forms of code-sharing

Code-sharing takes on different forms. The most common form of code-sharing in terms of bilateral agreements is third and fourth freedom code-sharing where the codes are shared between the two countries of the airlines involved. However, it does not end there. If one looks at the SA-USA Agreement, provision is made for third country code-sharing which involves the fifth freedom and allows for the codes to be shared from one of the home countries to a third country.[81] In terms of the SA-USA bilateral agreement, the US and SA are the home countries while Britain could be the third country. The code-share services can involve the third country by having the services land at a third country airport, or involve flights on the third country carrier.[82] A problem area that arose with third country code-sharing, is whether the third country must give regulatory approval.[83] It appears from section 6 of the Annex that approval by the third country is required as third party code-sharing is only permitted as long as code-sharing is accepted by the third country. As the SA-USA bilateral was negotiated after the problems areas arose and were resolved, one questions whether it is safe to assume that such approval has become standard or custom.

3.5.1.2 Problems with code-sharing

Problem areas have been identified in code-sharing. These can be classed in two

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81 Montag (1994) 3.

82 De Groot (1994) 63.

83 The classic example of third country approval being required is that of the USA-Netherlands Agreement which allowed code-sharing between the US carrier Northwest and the Dutch carrier KLM. KLM and Northwest agreed on a route that would see Northwest flying into Amsterdam and then code-sharing with KLM on KLM's route to Germany. Although KLM had the rights to the Amsterdam/Munich route, Northwest did not. The German court found that the authority granted to Northwest in terms of the USA-Germany bilateral agreement did not allow for the use of Northwest flight numbers by KLM for routes between Amsterdam and various German cities. The court accepted that code-sharing arrangements amount to the establishment of new routes and are not merely a marketing instrument on existing routes. On these grounds, code-sharing arrangements need the authorisation by the German authorities even if the code-share partners are in possession of the underlying rights to fly the routes. Decision No. 4 L1236/93 Adm. Court Cologne (1 October 1993) unreported as quoted by De Groot (1994) 69. See Montag (1994) 11-12.

categories. The consumer related problems and the competition related problems. The consumer aspect can be dealt with briefly. The identified problem is that code-sharing can reduce the ability of the consumer to identify the provider of the service he is buying, which amounts to consumer deception.[84] The solution to this problem is to adopt measures obliging travel agents to inform the travelling public about the implications of a code-share service.

The second problem, that of competition law, is more complex as national policies could be in conflict: the transport policy and the competition policy. Europe has been the focus point of the competition law problems. The reason for this is that in some countries, in order to receive regulatory approval from the air transport authorities, the airlines had to be competitors. However, when a code-sharing arrangement exists between actual or potential competitors, it can restrict competition between the airlines. Examples that are given of restricted competition are that the code-sharing agreement could induce the parties to restrict the capacity on a route so that the capacity is sufficient to cover the needs at the time, rather than compete against each other by offering additional capacity.[85] Furthermore, code-sharing agreements could possibly lead to an alignment of fares for the code-share flights. The end result of these competition aspects is that competition between the airlines and possibly third parties can be negatively affected.[86]

3.5.1.3 Advantages of code-sharing

For all the negative rhetoric, the positive aspects continue to promote code-sharing. Code-sharing allows participants to increase their choice of destinations and increase

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84 Montag (1994) 22.

85 Montag (1994) 19.

86 However, competition and code-sharing need not be seen negatively. Humphreys (1994) 206 regards code-sharing as only a small part of cooperative arrangements in general and believes that the relevance of code-sharing in relation to competition policy will vary from case to case as code-sharing can either reduce competition or strengthen the participants so that they can be more effective competitors in the open market.

the frequency of flights. Added to this, in a code-share relationship the airlines involved do not run the risk of operating on their own. For smaller airlines to link up with larger airlines holds a distinct advantage as they can both continue services on the less travelled routes and still remain profitable if they are attached to a larger airline. Code-share agreements also allow airlines a measure of access to the national markets - it would appear that it offers a loophole in the ownership and cabotage rules.[87]

However, this is not the case, as the foreign carrier is not granted cabotage rights. What happens is that the domestic carrier in a code-share arrangement, can offer a national flight under its own designator code and so circumvent the cabotage rules. This is a major benefit as it attracts airlines to code-share agreements by providing access to markets that both national and international rules may prevent them from serving. Code-sharing offers the airlines '...an excellent means to extend the reach of their networks without spending extreme amounts of capital to acquire aircraft and introducing excessive additional capacity into markets that cannot sustain it.'[88]

A recent South African example of a problem with code-sharing came before the South African International Air Services Council. Transnet Ltd lodged a complaint in terms of the International Air Services Act 60 of 1993 regarding the franchise agreement between Comair and British Airways. Transnet argued that as a result of the franchise agreement, Comair was no longer in active and effective control of the relevant international air services as required by section 17(5)(b) and that consequently British Airways was being permitted to operate services in breach of section 17(5)(a)(ii) of the International Air Services Act.[89] The Council found that Comair was still in active and

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87 As will be recalled, standard bilateral air service agreement provisions provide that substantial ownership and effective control of the airline must be vested in the party designating the airline, the nationals of the party or both. Cabotage provisions state that nothing in the agreement shall be deemed to confer on the airline or airlines of one party the right to take on board, passengers, mail, or cargo, carried for compensation and destined for another point in the territory of the other party.

88 De Groot (1994) 65.

89 Section 17(5)(b) IASA requires that the applicant for a licence is considered fit if the person is actively and effectively in control of the international air service. Section 17(5)(b)(ii) requires that the applicant be incorporated in the Republic and that the voting rights in respect of the applicant

effective control of the air services on the basis that code-sharing can be operated in several acceptable forms and that Comair was in a broad sense, utilising the British Airways flight designator on a code-share basis. This is not in contravention of the International Air Services Act. The Council found no substantiation for the allegations that Comair had relinquished active and effective control of its licensed international routes in favour of the UK-registered British Airways.[90]

3.5.1.4 The development as a tradable right

Now that code-sharing has been discussed briefly, its importance can be considered in the light of the development of bilateral agreements. I have already made mention of the soft rights and hard rights (negotiable rights) that are exchanged in bilateral agreements and their development. Now the question is whether another tradable hard right has developed in the form of code-sharing.

It is trite that code-sharing is now a negotiable point in terms of bilateral air service agreement consultations.[91] One may question why code-sharing needs to be considered, in terms of the exchange of rights. Bilateral agreements are inherently concerned with the granting of rights and code-sharing can be considered to be a form of airline cooperation permitted in terms of the bilateral agreement. General airline cooperation has never been a problem (for example, interairline cooperation forms the backbone of cooperation), so why is code-sharing so problematic? The answer, in brief, is that state attitudes and developments in the industry indicate that code-sharing (and possibly airline alliances in general) may have developed into a tradable commodity, or an exchangable bilateral hard right. It is for this reason that code-sharing is so

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are held substantially by residents of the Republic.

90 Fax dated 7 April 1997 (reference CA21/4/2/1) from the Department of Transport to the Directorate of Air Transport Regulation. Subject: International Air Service Act 1993 (Act No 60 of 1993). Press release April 09 1997 CDCAA on the British Airways/Comair Franchise Agreement decision by the International Air Services Council.

91 See Delport note 65 above on the SA-USA negotiations.

problematic.[92]

De Groot has identified a progression in the development of code-sharing in the United States.[93] Code-sharing started out as a marketing instrument between airlines. It progressed to requiring the underlying traffic rights for a code-share arrangement and then a specific form of authorisation from the aviation authorities. As the influence of code-sharing grew, traffic rights were exchanged for the sole purpose of allowing code-sharing. Now code-sharing can be viewed as a 'quasi-traffic' right.[94] The development of code-sharing from a soft right (a marketing instrument) to a hard right (a traffic right) has been fostered by the aviation authorities taking a restrictive approach to code-sharing by relating it to traffic rights, and not regarding it as a cooperative marketing arrangement.

3.6 Assessment

Where does code-sharing belong in bilateral negotiations? The conservative approach places code-sharing in the hard rights category as a tradable commodity. On the other hand, the liberal perspective advocates that code-sharing must be viewed from a purely marketing perspective; the airlines themselves arrange code-sharing and there is no regulation in bilaterals and no requirement of authorisation. Code-sharing has not developed into a tradable commodity as there is no custom (as evidenced by the requirements of *usus* and *opinio iuris*) supporting code-sharing as a tradable right. The reason for this lack of custom is that code-sharing developed purely for reasons of expediency. For this reason, De Groot states that the restrictive approaches relating to code-sharing do not represent custom and that '...[S]uch legal position is utterly at odds with established international custom. It would severely compromise the existing interairline practice and the traditional frequency regimes observed by all countries of

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92 De Groot (1994) 65.

93 De Groot (1994) 69-71.

94 De Groot (1994) 69-71 and Humphreys (1994) 201.

the world under existing bilateral agreements.'[95]

Although there is merit in this argument, it can also be argued that it was expediency which led to the development of the standard (or rather customised provisions) that are now part and parcel of bilateral air service agreements. Both soft and hard provisions became customised with a development that arose out of need: a need for a flexible and operational system. For this reason, it is quite possible that in the continued development of the bilateral air service agreement, the result may well be the customisation of the code-share provisions. This will naturally depend on the industry growth patterns, the attitudes of governments and airlines, and expediency.

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95 De Groot (1994) 72.

CHAPTER 4

WHERE DO BILATERAL AIR SERVICE AGREEMENTS FIT INTO THE SOUTH AFRICAN LEGAL SYSTEM?

4.1 Introduction

A bilateral air service agreement is an treaty between two states with the aim of setting up an international regime to govern international scheduled flights between two countries. The agreement has as its aim the granting of rights to another country (broadly speaking, the right to enter and undertake transactions in its airspace which, without the agreement, would amount to a violation of its sovereignty). Bilateral air service agreements contain all the elements required for a valid treaty as they are international agreements concluded between states in written form intended to create rights and duties and governed by international law.[96]

4.2 The International Air Services Act (IASA) 60 of 1993 and South African Bilateral Air Service Agreements

In South Africa, the IASA is the umbrella legislation that allows for the negotiation of bilateral air service agreements and regulates air services to and from the Republic.[97] The background objectives against which bilateral agreements are negotiated in South Africa are that trade and tourism to and from the Republic are to be promoted, competition in international air services is to be promoted, and a high standard of safety in international air services is required.[98]

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96 See the Vienna Convention on the Law of Treaties Article 2(a). Article 2(a) goes on to mention that the treaties can be embodied in a single instrument or in two or more related instruments. This is particularly apt for bilateral air service agreements as follow-up memoranda of understanding often change elements in the bilateral relationship. These additional memoranda, or instruments, are to also be considered as part and parcel of the treaty relationship.

97 It should be noted that the air services regulated in the Act include both scheduled and non-scheduled.

98 Section 3 of IASA.

Section 35 of the IASA states that the Minister may enter into any transport service agreement with the government or other appropriate authority of another state or territory regarding the control over and regulation of any class of or type of international air service. The agreement may include arrangements with regard to, inter alia, the following: the designation of persons to operate the service, control over the capacity and frequency of the services, the reciprocal exchange of rights, the filing of tariffs, anti-competitive practices, commercial agreements between the airlines, and the reciprocal equal treatment of airlines.[99]

4.3 The South African legal system and bilateral air service agreements

The next question to be considered is what kind of treaties or agreements these bilaterals constitute. An answer can be found in the early writings on air service relations where the American view of bilateral agreements is that they are executive agreements.[100] This is supported by the 1996 SA-USA bilateral air service agreement where no provision is made for the constitutional provisions relating to treaties to be complied with prior to the agreement's entry into force. The agreement entered into force on the date of signature.

In South Africa, it is trite that treaties need to be incorporated into the law of the country before they can be considered as part of the municipal law and so be available to the courts. In fact, the *locus classicus* that sets out this principle is the *Pan Am-case* which happened to involve a bilateral air service agreement.[101] Historically, bilateral air service agreements are not incorporated into the municipal law of South Africa and remain beyond the scope of court interpretation.

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99 Article 35(2) IASA.

100 Lissitzyn (1950) 32.

101 *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co. Ltd* SA 1965 3 151. See on 161 where it is stated that the 1947 bilateral agreement between South Africa and the United States had not been incorporated.

With the constitutional changes that have taken place in South Africa recently, the question can be asked as to the status of the executive bilateral air service agreements in South African law. In terms of section 231(4) of the 1996 Constitution, Act 108 of 1996, an international agreement of a technical, administrative, or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and Council within a reasonable time. As a result of this, bilateral air services agreements will be binding on the Republic without Assembly and Council approval, but will have to be tabled before the Assembly and Council for information purposes. As a result of this, bilateral air service agreements do not have municipal application and disputes arising under them will not be adjudicated in the municipal courts.

4.4 The procedure after the signing of the bilateral agreement

The IASA also regulates what takes place after the bilateral agreement (if there is one), has been negotiated and the airlines designated. The designated South African airline(s) applies for a licence to operate the service while the foreign airline applies for a foreign operators permit.[102] To obtain the licence, the applicant needs to be fit and able to operate the international service.[103] The applicant needs to satisfy the Council that as a natural person, he is resident in the Republic.[104] Alternatively, if the applicant is not a natural person, that it is incorporated in the Republic and that voting rights in respect of that person are substantially held by residents of the Republic.[105] The applicant needs to satisfy the Council that it will be actively and effectively in control of the international air service and that the aircraft involved in the operation of the

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102 Sections 17 and 25 of IASA respectively.

103 A prerequisite is that the international service must be operated within the structure of the existing international air service system of the Republic.

104 Section 17(5)(a) of IASA.

105 Section 17(5)(b) of IASA.

international air service will be South African aircraft.[106]

The designated foreign airline obtains a permit if certain conditions are satisfied[107]. The applicant has to comply with the applicable international conventions as implemented in South Africa as law;[108] must be fit and able to operate the service;[109] must have a valid foreign licence from the designating country or the service must fall under a air transport agreement.[110] The applicant also has to comply with the prescribed requirements as set out in the International Air Service Regulations of 1994.[111] These regulations set out the general section 25 requirements. However, more mention should be made of the services that fall under an air transport agreement.

It would appear from section 25(2)(c) that a valid foreign licence is not required for a foreign operator's permit if the service is operated by virtue of an air transport agreement. However, the air transport agreement indicates that the states mutually agree on requirements that need to be fulfilled in order to obtain a valid operating authorization, such as the permit.

Section 25(2)(c) must be read together with the air services agreement that governs the specific relationship. Air service agreements require that the country designating an airline fulfill certain requirements. An example that can be mentioned is that of the South Africa - United States air service agreement where Article 3 relating to designation states in section 2:

> On receipt of such a designation, and of applications from the designated airline, in the form and manner prescribed for operating authorizations and technical permissions, the other Party shall

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106 Section 17(5)(c) of IASA.

107 Section 25(2) of IASA.

108 Section 25(2)(a) of IASA.

109 Section 25(2)(b) of IASA.

110 Section 25(2)(c) of IASA.

111 Section 25(2)(d) of IASA.

> grant appropriate authorizations and permissions with minimum procedural delay, provided:
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> ...
>
> b the designated airline is qualified to meet the conditions prescribed under the laws and regulations normally applied to the operation of international air transportation by the Party considering the application or applications; and
>
> c the Party designating the airline is maintaining and administering the standards set forth in Article 6 (Safety)....

Article 6 goes on to state in section 1 that each party shall recognize as valid, for the purpose of operating the air transportation provided for in this Agreement, certificates of airworthiness, certificates of competency, and licences issued or validated by the other Party and still in force, provided that the requirements for such certificates or licences at least equal the minimum standards which may be established pursuant to the Convention.

The air service agreement itself sets the requirements for operating authorizations. Therefore, when reading section 25(2)(c) of the IASA together with the air services agreement, it is clear that in order to obtain authorization from the partner country, valid licences are required. A further reading of section 25 and the air service agreement gives the impression that the agreement grants an automatic right to obtain a foreign operating permit. This, however, is not the case. Although the provisions in the air service agreement state that the parties will grant authorisations, these are subject to the maintenance of standards as set out in national legislation.[112] If the standards set are not met by the applicant airline, there is no duty to grant the permit.

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112 This national legislation usually incorporates the international standards set out in the Convention.

CHAPTER 5

CONCLUSION

The main theme of this work has been a discussion of the development of the provisions of bilateral air service agreements. It has been shown that bilateral provisions have evolved to encompass changes and growth in the industry. The essence of the bilateral agreement is the regulation of the air services. The technical, administrative and economic regulatory provisions are included here. States are very much involved with this process, both as administrators of the technical system and as regulators of the economic.

The states' involvement is thanks to the historical influences. Firstly, the Chicago Convention, based on sovereignty and with its protectionist approach, allowed for the development of bilateral agreements and promoted the role of states in granting reciprocal rights in aviation. Secondly, what also needs to be borne in mind is that, until recently, most airlines were wholly state owned and run as part of the state machinery. In many countries this situation still exists. Today, the focus has shifted somewhat. What was once considered to be an industry requiring measures of state control, is now moving towards a more liberal, global approach. The problem is that many states remain trapped in protectionist attitudes befitting the early years of aviation.

Airlines too are involved in the world of bilateral relationships. However, today the role of the airline is changing as it moves from state-owned airline to private company with a very costly business to run. Protectionist state involvement is declining. Airlines are involved with the bilateral agreements as the promotors of new and innovative ways of accessing and harnessing the potential of designated routes and alliances that come their way.

Within this change in the aviation relations between the state and the airline, the question must be asked: does it still make sense for the state to be negotiating the parameters within which the airline may operate?

A liberal approach would deny states the right to set parameters. However, to undermine state involvement would be to undermine the entire Chicago system as it exists today - that is both the Chicago Convention and the bilateral regime that arose as a result of it which is based on the sovereignty that gives states the right to barter aviation rights with other countries. The Chicago system and the bilateral agreements cannot simply be wished away. It would also mean an open-market, free-for-all approach that could well see the demise of the "national" airline and the possible growth of supra-national airlines which could consist of various airlines in alliances or cooperative arrangements.

What then are the possible solutions? I would like to suggest two alternative approaches that could well see a clearer definition between the state and the airline.

The first is the ever present idea of a final multilateral solution to the economic regulation of international civil aviation. Long dreamed of, a multilateral regime devoted to the economic aspects of the industry has yet to materialise. Too much stands in opposition: the protective nature of the state being just one opposing force. However, there may well be small developments on other fronts. The GATS agreement allows for a small measure of multilateral regulation of certain aspects of the aviation industry.[113] As the GATS regulates trade in services, it is conceivable that with future negotiations in the WTO, air services could well be more fully incorporated into a multilateral system that could regulate the economic aspects.

A second proposal, somewhat more radical, relates directly the arguments that I have attempted to make in this work. There have been developments in bilateral air service agreements that indicate the growing influence of the airlines in the organising of the relationship. I would like to propose that state involvement be lessened in the bilateral agreement and that the agreement return to a more "pure" form. Simplify the agreement. By focussing on the most important areas of the bilateral, the conditions of

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113 The General Agreement on Trade in Services (GATS) which forms part of the World Trade Organisation (WTO).

the services, the states regulate the aspects that directly involve the international requirements and are affected by sovereignty - such as designation, authorisation, routes, safety and security. This maintains state involvement in the aviation relationship. By removing from the bilateral agreement the provisions relating to cooperative arrangements, these arrangements are left in the hands of the airline. In any event, these working relationships are those proposed by the airlines and they should be left to sort them out, organise and implement them. By all means, allow the states to determine the capacity available, but then allow the airlines to cooperate in any fashion to achieve the workable capacity. The bilateral arrangement should merely allow for cooperative arrangements without dictating the nature or kinds of arrangement.

The advantage of such a system is that it would encourage growth in the industry without undue state involvement.

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