Ruwantissa Abeyratne

Aeronomics and Law

Fixing Anomalies

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ISBN 978-3-642-28944-6 ISBN 978-3-642-28945-3 (eBook)
DOI 10.1007/978-3-642-28945-3
Springer Heidelberg New York Dordrecht London

Library of Congress Control Number: 2012940255

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

Preface

At the base of the trouble with air transport is the Convention on International Civil Aviation (Chicago Convention) of 1944, or, to put it more accurately, the way it has been understood and applied. The intent of the forefathers of the Convention was to promote air transport and not to stultify it. They intended the Convention to solve unforeseen issues as they arose, such as the deleterious effects of aircraft engine emissions, through existing provisions or additions to the Convention. So far only a few such instances have been addressed and a few revisions incorporated. At the core of the problem lies a certain insouciance on the part of the aviation community and a reluctance to "ruffle the feathers" of an aged instrument that should mature with time and change if its invaluable utility is to continue. In Chap. 1 of this book, I discuss the anomalies in the regulatory structure of air transport with particular emphasis on the Chicago Convention and some issues that may have caused the problem.

Fundamentally, there is nothing wrong with the Chicago Convention. In fact, it is a visionary document that has shown direction and a way forward for air transport. The fault lies in the perception by Contracting States of the various provisions of the instrument and the tendentious manner in which those provisions have been interpreted for individual benefits and interests. This has led to air transport economics always being unique compared to economics of other modes of transport. The normative foundation of air transport has been built on the myopic delusion that air transport and the sovereignty of States are inextricably linked by an immutable construct of protectionism, and that airlines have to be substantially owned and effectively controlled by nationals of the States in which they are registered. The latter condition has neither been defined in any air law instrument nor entrenched in the Chicago Convention which was signed in 1944 and which lays down the overall principles pertaining to air navigation and air transport.

This anomaly has compelled commercial air carriers, in the absence of their ability to attract foreign capital and equity, to perform elusive practices to circumvent collapse. Mergers, alliances, code sharing and franchising are some of the tools used by air carriers to maximise capacity and optimise market access. The accessibility to foreign direct investment by airlines warrants serious discussion and

consideration if the airlines were to be treated like any other business and if passengers are to gain access to regular, efficient and economical air transport as prescribed by the Chicago Convention.

In Chap. 2, I discuss the three obstacles preventing FDI in air transport and examine the need for encouraging FDI in the industry. I also address the legal safeguards that would be available to foreign investors in the instance of such liberalization and conclude that the international community should take a serious look at this anomaly from a consumer-protection perspective.

Another grave lacuna in the current air transport scenario is the lack of attention paid to the carriage by air of cargo. Chapter 3 covers this aspect.

A further troubling issue in air transport is the lack of global principles on aircraft engine emissions. This has prompted States to go their different ways and lose sight of the compelling need to arrive at an acceptable global structure and direction towards investing in the mitigation of aircraft engine emissions in a meaningful manner. This aspect is discussed in Chap. 4, particularly how States muddle through the concept of a global fuel tax on aviation to mitigate aircraft engine emissions.

Chapter 5 discusses the importance of focusing on the rights of the passenger, his right to accurate information, timely travel and other entitlements. Chapter 6 is dedicated to a discussion on the disabled passenger.

Chapter 7 is about ICAO and its meaning and purpose in air transport. It has been an exceptional United Nations Agency and the service it has provided to the aviation community over the past 65 years has been outstanding. However, the Organization has been over-cautious in its mission and vision statements, as I elaborate in this chapter. Arguably the most troubling issue for air transport is that the Chicago Convention identifies the aims and objectives of ICAO as "to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport", making it clear that ICAO has no authority to develop principles of air transport as it can in the area of air navigation. Despite this theoretical obstacle, ICAO has performed in an outstanding manner in educating the aviation community on the economics of air transport. This has helped States to charter their own economic policies on air transport.

In the concluding chapter, I indulge in a discussion on what should be done to ensure the objectives of the Chicago Convention and the sustainability of the air transport product and what measures one might take to improve the various disadvantages faced by air transport.

Montreal Ruwantissa Abeyratne
January 2012

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The Chicago Convention

There is no recognized definition of "air transport". In the absence of such, let us say that air transport is a product that offers carriage by air from one point to another or several other points and that a study of air transport would essentially involve economic theory and practice pertaining to the air transport industry i.e. the airline industry. Therefore, what we are addressing are primarily the economic aspects of air transport, whether they apply to market access[1] or market based measures in aircraft engine emissions. As the ensuing discussion will reflect, investment in air transport plays a key role in such a discussion.

But first we have to discuss the regulatory structure that provides a foundation for the economics of air transport. In the Preface, I touched on the difficulties posed by the treatment of the Chicago Convention[2] by the international community as a "moribund" instrument that will continue to serve the ever changing vicissitudes of air transport without much revision. A commentator offers this view:

> During its period in force the Chicago Convention underwent a series of minor amendments. However, it must be recognized that, with two exceptions, the amendments were related to cosmetic matters and did not touch the unification of international air law. Nothing of fundamental importance has been amended in the Convention over 60 years. Most of the amendments occurred in a haphazard manner without any thorough preparation

[1] Air transport market access, by any particular air carrier or carriers, is the nature and extent of the basic rights (with any accompanying conditions and limitations) that are granted/authorized by the relevant governmental authorities (and identified and discussed in this chapter) as well as ancillary rights such as those covering product distribution. Air transport market penetration by any particular air carrier or carriers is the extent to which access is actually used to obtain and carry traffic. Rights can be subject to numerous constraints (outside the scope of this chapter) such as aircraft range and payload limitations, airport congestion and distribution system problems. See *Manual on the Regulation of International Air Transport*, ICAO: Montreal, First Edition-1996, Chapter 4.1.

[2] Convention on International Civil Aviation, 7 December 1944, 15 U.N.T.S. 295, ICAO Doc 7300/9. The Chicago Convention also established the International Civil Aviation Organization.

R. Abeyratne, *Aeronomics and Law*, DOI 10.1007/978-3-642-28945-3_1,

> and reasoning, without any systemic logic but only in response to sometimes "selfish interests of influential States wishing to maintain their acquired quasi permanent position on the Council.[3]

While this may well be the case, a greater problem is that the understanding by regulatory authorities of the regulatory principles as enshrined in the Chicago Convention has not progressed with the changing times and remains as it was in 1944. To begin with, one might well ask whether the Chicago Convention applies only to international civil aviation (as its title denotes) or whether the Convention should apply to all civil aviation as was presumed when the international aviation community called for the involvement of the International Civil Aviation Organization (ICAO)[4] in considering possible action relating to the attacks on the United States on 11 September 2001 which involved only domestic aviation. Confusion is worse confounded by the fact that the concept of State sovereignty as embodied in Article 1 of the Chicago Convention, which states that the Contracting States to the Convention recognize that every State (not merely Contracting States but any State) has complete and exclusive sovereignty over the airspace above its territory, is still viewed by many as a cloistered virtue and a rigid principle whereby States can shut down commercial air traffic within their territories arbitrarily and at will. While technically this may appear to be true, in reality it is both counter intuitive and unjustifiably restrictive. This subject is discussed in more detail in the next chapter.

Although "State Sovereignty" is the term applicable at public international law, it is an incontrovertible fact that sovereignty is vested in the people and in governments. As such sovereignty belongs to the nation and not the State. The fundamental distinction between these two terms is that a nation denotes the people of a country whereas a State as a person at law, as defined in the Montevideo Convention of 1933[5] comprises four factors: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States. In this context the United Nations, which is a collection of States that acts to the benefit of the people of those States, is appropriately named. This practical anomaly, where States ascribe to themselves sovereignty which should belong to their people, is exposed in the Preamble to the Chicago Convention (which sets the tone and overall objectives of the Treaty) which speaks of preserving friendship and understanding among the "nations and peoples"(my emphasis) of the world for whom air transport services may be established on the basis of equality of opportunity and operated soundly and economically.

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[3] Milde (2004) at 443.

[4] ICAO is the specialized agency of the United Nations handling issues of international civil aviation. ICAO was established by the Convention on International Civil Aviation, signed at Chicago on 7 December 1944 (Chicago Convention). One of the overarching objectives of ICAO, as contained in Article 43 of the Convention is to foster the planning and development of international air transport so as to meet the needs of the peoples for safe, regular, efficient and economical air transport. ICAO has 191 member States, who become members of ICAO by ratifying or otherwise issuing notice of adherence to the Chicago Convention. See ICAO Doc 7300/9 Ninth Edition 2008.

[5] Montevideo Convention on the Rights and Duties of States (1933), Article 1. See http://www.cfr.org/sovereignty/montevideo-convention-rights-duties-states/p15897.

When we move to Article 2 of the Convention, we find that it is antiquated and outmoded in terms of modern government and governance. The territory of a state, as defined in this provision panders to the vestiges of colonialism which no longer can be found in as much abundance as was seen in 1944 when the Convention was signed. The terms "suzerainty, protection and mandate" are the offenders (suzerainty occurs where a region or people is a tributary to a more powerful entity which controls its foreign affairs while allowing the tributary vassal State some limited domestic autonomy). Furthermore, the reference to "territorial waters" as a benchmark of sovereignty without tagging the term to applicable regimes of international law leaves the reference bereft of clarity and direction.

Article 3 of the Convention stipulates that it would apply only to civil aircraft and will not be applicable to State aircraft. The provision further explains that aircraft used in military, customs and police services will be deemed to be State aircraft. At best this provision is ambivalent and leaves the reader puzzled as to whether it is an inclusive or a comprehensive provision that excludes all other forms of aircraft engaged in the services of the State. According to one commentator this provision is in itself not a definition but remains a rebuttable presumption which is not exhaustive.[6]

A civil aircraft has been defined as any aircraft, excluding government and military aircraft, used for the carriage of passengers, baggage, cargo and mail.[7] Civil aviation comprises in general all aviation activities other than government and military air services which can be divided into three main categories: commercial air transport provided to the public by scheduled or non scheduled carriers; private flying for business or pleasure; and a wide range of specialized services commonly called aerial work, such as agriculture, construction, photography, surveying, observation and patrol, search and rescue, aerial advertisement *et.al*.[8] By the same token, military aviation must be aviation activities carried out by military aircraft. Military aircraft have been defined as aircraft that are designed or modified for highly specialized use by the armed services of a nation.[9]

The Convention does not address the subject of the use of civil aircraft for military purposes. This subject brings to bear issues of identification of aircraft and the status of aircraft under article 3 of the Chicago Convention. The question as to whether civil aviation and military aviation have demarcated operational regimes or whether they can still function in symbiosis has become an argumentative one in view of developments in the air transport industry which have occurred over the years. There are some determinants in this regard. Firstly, the nature of the cargo carried. Are they supplies or equipment for the military, customs or police services of a State? Article 35 of the Chicago Convention recognizes that the mere carriage

[6] Milde, *supra*, note 3 of this chapter at 418.

[7] Groenewege (1999) at 437. It must also be noted that an aircraft has been defined in Annexes 6, 7 and 8 to the Chicago Convention as any machine which can derive support in the atmosphere from the reactions of air other than the reactions of air on the Earth's surface.

[8] *Ibid*.

[9] http://www.answers.com/topic/military-aircraft.