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Springer

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ISBN 978-3-319-00067-1 ISBN 978-3-319-00068-8 (eBook)
DOI 10.1007/978-3-319-00068-8
Springer Cham Heidelberg New York Dordrecht London

Library of Congress Control Number: 2013944364

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Printed on acid-free paper

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Preface

The 70th Anniversary of the signature ceremony of the Convention on International Civil Aviation (Chicago Convention) will fall on 7 December 2014. This day each year also happens to be designated “International Civil Aviation Day” marked by a modest ceremony by the International Civil Aviation Organization (ICAO). In reality, the 7th of December is not the day the Chicago Convention’s anniversary should be associated with. It should be the date on which the Chicago Convention entered into force, which was 4 April 1947. However, the ICAO Assembly chose otherwise and, at its 29th Session (Montreal, 22 September–8 October 1992), adopted Resolution A29-1, which declared that each year, starting in 1994, the 7th of December shall be designated “international civil aviation day”. This practice is at variance with “The United Nations Day”, which is celebrated each year on 24 October—the day on which the United Nations came into existence.

At the time of writing, there were 191 States that had signed or otherwise adhered to the Chicago Convention, which *ipso facto* make them member States of ICAO. However, in 1944, only 52 signatory States (approximately 27 % of the current number) were party to the Convention. Over the years, the Convention has retained its pristine purity with no fundamental amendments or revisions, although a few “cosmetic” revisions have been added. In particular, three amendments entered into force, relating to articles: Article 3 *bis*, Article 83 *bis*, Article 50(a), and Article 56, in 1995–1998.

The Chicago Convention has been an enduring multilateral treaty for the past several decades, showing both resilience and vision. The treaty is far-reaching and can today be taken to apply to aspects of aviation such as security and environmental protection, which are not even explicitly referred to therein. However, The Chicago Convention has been vulnerable to misinterpretation and has often been misquoted by States mostly for political reasons and gains. For example, the provision on State sovereignty over airspace has been used to block useful initiatives on the liberalization of air transport, the imposition of air navigation charges, and other levies on airlines. It is submitted that the Convention should be interpreted to accord with the intent of its forefathers and current exigencies so that it

achieves its main objective of serving the needs of the people of the world and not exclusively those of individual businesses and States.

One of the unique characteristics of the Chicago Convention is its wording in various provisions that ascribes specific meaning and purpose to its provisions. To this extent, the Chicago Convention stands out as an international treaty carved out in the early years of international comity after World War 2, having particular diplomatic nuances in its language. Various provisions, depending on their compelling nature, use words that effectively describe the meaning and intent of the treaty. For example, Article 1, on the question of sovereignty, states that the Contracting States “recognize” that each State has complete and exclusive sovereignty over the air space above its territory. Here, the word “recognize” conveys the meaning that the legal recognition of sovereignty of nations has already existed, which is a fact, as sovereignty over national airspace was first referred to in the Paris Convention of 1919. In Articles 2 and 3 that follow, the Convention uses the word “shall” to denote a peremptory rule of law (for example, in Article 3(a)) the Convention stipulates that it “shall” be applicable only to civil aircraft and shall not be applicable to State aircraft).

In Article 3(a) and (b), one sees again the word “recognize”, where the Convention provides that Contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that States also recognize that each State has the right to require aircraft to land at designated airports. However, in Article 3(c), the provision starts with “Every civil aircraft shall comply with an order given in pursuance of paragraph b) of the Article”, thus bringing in the mandatory element of compliance.

A slight deviation is seen in Article 4, where the Convention provides that each Contracting State “agrees” not to use civil aviation for any purposes inconsistent with the aims of the Convention. Here, the word “agrees” implies general agreement of States. It is arguable that the particular use of the word leaves a window of opportunity for a State to deviate from its agreement if it is impossible for that State to keep to its agreement. In the following Article, the word “agrees” occurs once again where States are recognized as having agreed to allow non-scheduled flights the right to make technical and non-commercial flights into their territory.

Article 6 deviates from the positive approach of the preceding provisions by saying that each Contracting State shall have the right to refuse cabotage rights or commercial air traffic rights to foreign aircraft between points within their own territory. The use of the words “shall have the right to refuse” is skillfully used to convey the meaning that a State’s right to grant cabotage rights already exists.

The discretionary right of a State is explicitly recognized in Article 9, which provides that each Contracting State may, for reasons of military necessity or public safety, restrict or prohibit aircraft in certain circumstances from flying over their territory. The use of the word “may” is clear in its meaning and purpose.

Article 12 carries yet another nuance of language where each Contracting State is required to undertake to adopt certain measures. The word “undertake” implies accountability and responsibility. The difference between the use of the words

“agree” and “undertake” brings to bear the clear intent of a treaty carved out many years ago with vision and foresight by its founding fathers.

The above terminology can be compared with the use of the words in Article 17, which states that “aircraft have the nationality of the State in which they are registered”. It is to be noted that this provision does not have the peremptory admonition issued by the word “shall”, and one could only conclude that the provision conveys that it is a fact taken for granted, that once an aircraft is registered in a particular State it shall *ipso facto* be deemed registered in that State. The following statement in Article 18, that aircraft cannot be validly registered in more than one State, conveys the impossibility of such an exigency. Here, the use of the word “cannot” instead of “shall not” leaves no room for doubt that in this instance the right for dual registration of aircraft did not exist to begin with. This usage is contrasted with the use of the words “shall not”, which implies that a right that seemingly exists is taken away.

This book provides a commentary on the Chicago Convention and its various provisions against the backdrop of legal analysis. I was prompted to write this commentary as I had not seen a comparable treatise that explains the Convention, its nuances, and the manner in which the ICAO Assembly and Council have interpreted the Convention. In doing so, I address the main provisions of the Convention that impact civil aviation law. Those provisions, which are self-explanatory and have not been subject to actions of the international aviation community or of ICAO, are not mentioned in the text under separate chapters. The text of the Chicago Convention is attached for ease of reference.

1 July 2013

Ruwantissa Abeyratne

Contents

Preamble

Preamble 3

Part I Air Navigation

Chapter I General Principles and Application of the Convention

Article 1. Sovereignty 13

Article 2. Territory 45

Article 3. Civil and State Aircraft 51

Article 4. Misuse of Civil Aviation 75

Chapter II Flight over Territory of Contracting States

Article 5. Right of Non-scheduled Flight 95

Article 6. Scheduled Air Services 101

Article 7. Cabotage 111

Article 8. Pilotless Aircraft 117

Article 9. Prohibited Areas 137

Article 10. Landing at Customs Airport 145

Article 11. Applicability of Air Regulations 155

Article 12. Rules of the Air 179

Article 13.	Entry and Clearance Regulations	185
Article 14.	Prevention of Spread of Disease	213
Article 15.	Airport and Similar Charges	227
Article 16.	Search of Aircraft	241

Chapter III Nationality of Aircraft

Article 17.	Nationality of Aircraft	251
Article 18.	Dual Registration	253
Article 19.	National Laws Governing Registration	255
Article 20.	Display of Marks	257
Article 21.	Report of Registrations	259

Chapter IV Measures to Facilitate Air Navigation

Article 22.	Facilitation of Formalities	283
Article 23.	Customs and Immigration Procedures	305
Article 24.	Customs Duty	309
Article 25.	Aircraft in Distress	315
Article 26.	Investigation of Accidents	329
Article 27.	Exemption from Seizure on Patent Claims	339
Article 28.	Air Navigation Facilities and Standard Systems	341

Chapter V Conditions to be Fulfilled with Respect to Aircraft

Article 29.	Documents Carried in Aircraft	347
Article 30.	Aircraft Radio Equipment	349
Article 31.	Certificates of Airworthiness	351
Article 32.	Licenses of Personnel	383
Article 33.	Recognition of Certificates and Licenses	407
Article 34.	Journey Log Books	409
Article 35.	Cargo Restrictions	411
Article 36.	Photographic Apparatus	413

Chapter VI International Standards and Recommended Practices

Article 37. Adoption of International Standards and Procedures 415

Article 38. Departures from International Standards
and Procedures 417

Article 39. Endorsement of Certificates and Licenses 465

Article 40. Validity of Endorsed Certificates and Licenses 467

Article 41. Recognition of Existing Standards of Airworthiness 469

Article 42. Recognition of Existing Standards of Competency
of Personnel 471

Part II The International Civil Aviation Organization

Chapter VII The Organization

Article 43. Name and Composition 475

Article 44. Objectives 515

Article 45. Permanent Seat 525

Article 46. First Meeting of Assembly 527

Article 47. Legal Capacity 529

Chapter VIII The Assembly

Article 48. Meetings of the Assembly and Voting 539

Article 49. Powers and Duties of Assembly 557

Chapter IX The Council

Article 50. Composition and Election of Council 559

Article 51. President of Council 569

Article 52. Voting in Council 571

Article 53. Participation Without a Vote 573

Article 54. Mandatory Functions of Council 575

Article 55. Permissive Functions of the Council 585

Chapter X The Air Navigation Commission

Article 56.	Nomination and Appointment of Commission	587
Article 57.	Duties of Commission	589

Chapter XI Personnel

Article 58.	Appointment of Personnel	591
Article 59.	International Character of Personnel	593
Article 60.	Immunities and Privileges of Personnel	595

Chapter XII Finance

Article 61.	Budget and Apportionment of Expenses	597
Article 62.	Suspension of Voting Power	599
Article 63.	Expenses of Delegations and Other Representatives	601

Chapter XIII Other International Arrangements

Article 64.	Security Arrangements	603
Article 65.	Arrangements with Other International Bodies	613
Article 66.	Functions Relating to Other Agreements	615

Part III International Air Transport

Chapter XIV Information and Reports

Article 67.	File Reports with Council	619
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Chapter XV Airports and Other Air Navigation Facilities

Article 68.	Designation of Routes and Airports	621
Article 69.	Improvement of Air Navigation Facilities	623
Article 70.	Financing of Air Navigation Facilities	625
Article 71.	Provision and Maintenance of Facilities by Council	627
Article 72.	Acquisition or Use of Land	635

Article 73. Expenditure and Assessment of Funds 637

Article 74. Technical Assistance and Utilization of Revenues 639

Article 75. Taking Over of Facilities from Council 641

Article 76. Return of Funds 643

Chapter XVI Joint Operating Organizations and Pooled Services

Article 77. Joint Operating Organizations Permitted 645

Article 78. Function of Council 647

Article 79. Participation in Operating Organizations 649

Part IV Final Provisions

Chapter XVII Other Aeronautical Agreements and Arrangements

Article 80. Paris and Habana Conventions 653

Article 81. Registration of Existing Agreements 655

Article 82. Abrogation of Inconsistent Arrangements 657

Article 83. Registration of New Arrangements 659

Chapter XVIII Disputes and Default

Article 84. Settlement of Disputes 663

Article 85. Arbitration Procedure 669

Article 86. Appeals 671

Article 87. Penalty for Non-conformity of Airline 673

Article 88. Penalty for Non-conformity by State \$ 675

Chapter XIX War

Article 89. War and Emergency Conditions 677

Chapter XX Annexes

Article 90. Adoption and Amendment of Annexes 679