BILATERAL AIR TRANSPORT AGREEMENTS IN LIBYA

by

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ABSTRACT

The present thesis is primarily concerned with the bilateral air transport agreements concluded by the Libyan Arab Jamahiria.

The thesis contains three chapters. The introductory chapter reviews the international development of civil aviation. The subjects discussed in this chapter are the Paris Conference of 1910, the Paris Convention of 1919, the Chicago Convention of 1944, the International Air Services Transit Agreement, the International Air Transport Agreement and the Bermuda Agreements of 1946 and 1977. The development of civil aviation in the Libyan Arab Jamahiria together with the national airline of Libya are the subject of Chapter II. The last chapter of this thesis analyses the Libyan bilateral air transport agreements under the following titles: grants of rights, inauguration of services, capacity and frequency control, tariffs, settlement of disputes and finally, entry into force, modification and termination.

RESUME

La thèse qui suit portera surtout sur les accords aériens bilatéraux conclus par la Jamahiria arabe libyenne.

Elle comprendra trois chapitres. Le chapitre introductif décrira le développement de l'aviation civile et ce au niveau international. Ainsi, la Conférence de Paris de 1910, la Convention de Paris de 1919, celle de Chicago de 1944, l'accord international de transit aérien, l'accord international de transport aérien et les accords des Bermudes de 1946 et 1977 y seront discutés. Une analyse du développement de l'aviation civil libyenne et de la Compagnie arabe libyenne fera l'objet du Chapitre II. Le dernier chapitre de cette thèse analysera les accords bilatéraux libyens de transport aérien sous ces titres: disposition de droits, inauguration de services, contrôle de la capacité et de la fréquence des vols, tarifs, résolution des conflits et finalement, l'entrée en vigueur, la modification et la fin des accords.

CHAPTER I: INTERNATIONAL DEVELOPMENT OF CIVIL AVIATION

Section I: The Paris Conference of 1910

During the years preceding the Diplomatic Conference for the Regulation of International Navigation which was held at Paris in 1910, upon an invitation sent to the European Powers by the French Government, international flights were unregulated. Aviators from different nations took off from one State and landed in another without any consideration of obtaining the permission of the State flown over or where such landing took place. Free balloons crossed the frontiers and landed where it might be drifted by the air.[1] However, the question of the regime that should apply to the air space was raised and discussed by law writers and jurists in different parts of the world, and a number of theories were advocated as follows:

I. State sovereignty

The jurists and the writers of this school of thought, who were led by "Lycklama, Guibe and Hazeltine" advocated the theory of State sovereignty, according to which the subjacent State has absolute sovereignty over the air space above its territory. At the same time the advocates of this theory recognized the right of travel

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1. Cooper, J.C., "The International Air Navigation Conference, Paris 1910", Explorations in Aerospace Law (1968), edited by I.A. Vlasic, p. 106.

for aerial navigation during times of peace.[2] The jurists of this school used the private air law as basis for their argument. Their argument was, since individuals have the right of property in the air space, the State must have the right of sovereignty over this aggregate property rights within its territory.

II. Freedom of the air

The freedom of the air theory was advocated by the famous French jurist "Fauchille" in scholary work published during 1910. In this work the French jurist arrived at the conclusion that "the air space is not susceptible to the exercise of sovereignty, and the subjacent State has only those rights necessary for its preservation". However, in a latter stage, Fauchille suggested a division of the air space into two zones, similar to the belt of territorial waters adjacent to the coast line and the high seas. According to Fauchille, the upper zone should be absolutely free, and the lower zone should be subject to the control of the subjacent State. But even in this zone Fauchille argued that the right of innocent passage should be accorded to all aircraft during the time of peace.[4]

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2. Hotchkiss, G.H., Law of Aviation (1938), p. 5.

3. Gibson, W.M., "Development of International Air Law to 1919", Temple Law Quarterly, Vol. 5, 1930-31, pp. 162-163.

4. Gibson, W.M., ibid., pp. 166-169.

III. The Paris Conference of 1910

France which can be regarded as the most affected nation by the unregulated flights[5] decided in 1908 to invite the European Powers to a Diplomatic Conference to be held in Paris for the regulation of international air navigation.[6] Eighteen European States[7] accepted the French Government invitation, a questionnaire was sent by the French Government to those Powers and answers were received. From those answered "it appeared that a number of States did not have a clear idea of the question of the regime which should be applied to the air space". Some others came to the Paris Conference with very clear ideas about the system which should be applied to the air space.[8] However, on May 10, 1910, the European Powers who accepted the French Government invitation met at Paris to devise a system for the regulation of international flights, with three different

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5. In the period from April to November 1908, around ten German balloons crossed the frontiers and landed in France carrying a number of German officers.

6. The United States of America was not invited to the Paris Conference of 1910, due to the idea that the U.S. was out of the reach of the incidents.

7. The eighteen States who accepted the French invitation were: Austria, Hungary, Belgium, Bulgaria, Denmark, France, Germany, Great Britain, Italy, Luxembourg, Monaco, Netherlands, Portugal, Rumania, Russia, Spain, Sweden, Switzerland and Turkey.

8. Vlasic, I.A., Air Transport - Passage and Commercial Rights, a thesis presented to McGill University, Institute of Air and Space Law, August 1955, pp. 62-63.

positions. The first position was advocated by the British Government in which it argued for "full sovereign rights in the air space of the subjacent State".[9] A second position was advocated by the French Government. The French position was described by Vlasic, I.A. in a thesis submitted to McGill University in 1955 as "the most liberal position towards international navigation".[10] The third position was taken by the German Government in a draft convention presented to the Conference as a reply to the French Government questionnaire. Cooper described the German draft convention as "a document of great historical significance".[11] However, Vlasic hesitates to agree with the opinion that the German draft convention was an expression of the "theory of full and absolute sovereignty in usable space" and he argues that the German draft convention "seems to contain as the main principle the idea of freedom of air navigation rather than a claim for unrestricted sovereignty".[12]

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9. Ibid., p. 93.

10. The French position was explained in a memorandum presented to the First Commission of the Conference in the following words: "Air traffic is free. No restriction may be adopted by States other than those necessary to grant their security and that of the persons and goods of their inhabitants".

11. Cooper, J.C., supra note 1, p. 100.

12. Vlasic, supra note 8, p. 65.

The question of the admission of foreign aircraft navigation was discussed by the First Commission of the Paris Conference, then by the Examining Committee of the Conference, and five rules were adopted subject to some reservations.[13] The rules adopted by the First Commission were of great importance in the history of international air transport. Those rules read as follows:

Rule 1. "Each Contracting State shall permit the navigation of aircraft of other Contracting States within its territory, subject to restrictions necessary to guarantee its own security, and that of the persons and goods of its inhabitants.

The Contracting States undertake to conform the private law of their countries, to the preceeding paragraph.

Sojourn required by necessity cannot be refused in any case to aircraft of a Contracting State."

Rule 2. "The restrictions imposed by a Contracting State pursuant to rule 1, paragraph 1 will be applied without any inequality to national aircraft and to aircraft of every other Contracting State. This obligation does not cover measures which a State should take in extraordinary circumstances

13. Cooper, supra note 1, pp. 113-116.

to assure its national defence."

Rule 3. "Each Contracting State has the power to reserve the professional transport of persons and goods between two points on its territory to national aircraft alone, or to aircraft of certain Contracting States, or to submit such navigation to special restrictions.

The establishment of international airlines depends upon the assent of interested States."

Rule 4. "With regard to a Contracting State which imposes restrictions of the kind foreseen in Rule 1, paragraph 1, analogous measures may be applied by every other Contracting State."

Rule 5. "The restrictions and reservations contemplated by Rules 1 to 4 shall immediately be published and notified to the interested governments."[14]

The rules quoted above were reported by the French jurist Fauchille and discussed by the Conference, but no agreement could be achieved about Rules 1 and 2 as a result of the position taken by the British Government, and therefore the above two rules did not appear in the proposed convention, as recommended by the Paris Conference of 1910.[15]

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14. Ibid., pp. 115-116.

15. Ibid., p. 117.

However, the Paris Conference adjourned on June 20, 1910, and another date was set for it to reconvene,[16] but it was never called back again, due to the existing conflict of opinions.[17]

Results of the Conference

Despite the failure of the Paris Conference of 1910 to achieve its goals and to draft a convention relating to the regulation of international navigation, the writer of this paper believes that the Conference had laid a number of principles of great value and influence in the future regulation of international air transport. These principles are as follows:

1. Each State has full sovereignty in the air space above its national lands and its territorial waters.[18]
2. Each State has the right to set up prohibited zones.[19]

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16. The date set for the Conference was November 29, 1910.

17. Cooper, supra note 1, p. 118.

18. The writer of this paper considers the declaration made by Rule 1 in regard to the duty of each contracting State to permit the navigation of aircraft of other contracting States as indirect recognition of the principle of air sovereignty.

19. Rule 1, para. 1 as recommended by the First Committee of the Conference.

3. There is no general right of transit "innocent passage" or commerce for foreign aircraft.[20]

4. Each State has the right to reserve cabotage rights "transport between two points in the territory of one State" for national aircraft only.[21]

5. "The establishment of international airlines depends upon the assent of interested States."[22]

To conclude this section, we think it is worthwhile to point out here, that among the airlaw writers, there are opposite views concerning the main reason that resulted in the failure of the Paris Conference of 1910, to achieve a convention for the regulation of international navigation. On the one hand, we find a group of writers arguing that the failure of the Paris Conference was due to the "fundamental legal principles to be applied to the air space."[23] On the other hand, Prof. Cooper has argued that such failure was due to political reasons rather than legal points.[24]

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20. Cooper, supra note 1, p. 123.

21. Rule 3, para. 1.

22. Rule 2, para. 2.

23. Vlasic, supra note 8, p. 47.

24. Cooper, supra note 1, pp. 118-120.

Section II: The Paris Convention of 1919

The European Powers left the Paris Conference of 1910, unable to achieve a convention for the regulation of international civil aviation, due to the conflict of opinions between the British and German delegations, as to the right of each State to have exclusive sovereignty in the air space above its territory. However, during the years following the Paris Conference of 1910, a number of acts and decrees were issued by the different European Powers concerning the control of the aerial navigation.[25] Those acts and decrees drifted away from the spirit of Fauchille theory "L'air est libre", and they were judged by S.F. Macbrayne in a thesis presented to McGill University in 1956, as it did not leave much to the famous Fauchille theory.[26] The years of the First World War brought a great development to the aeronautical industry, the number of aircraft possessed by each nation increased,[27] and the aircraft

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25. The United Kingdom passed in 1911 and 1913 two Parliament acts, the Aerial Navigation Act of 1911 and the Aerial Navigation Act of 1913. France passed two presidential decrees on November 21, 1911 and on December 17, 1913, Germany issued a number of decrees between 1910 and 1913. Austria-Hungary passed a decree on October 22, 1912, a statute on December 1913 and another statute on January 1913, Italy issued a decree on September 1914, Netherlands, Norway and Sweden issued decrees during 1914. Also Switzerland issued a decree in 1914.

26. Macbrayne, F.S., Right of Innocent Passage. A thesis presented to McGill University, 1956, p. 103.

27. Golegrove, W.K., International Control of Aviation, 1930, p. 53.

were used for many purposes.[28] On the other hand, the experience of the war gave a very strong enforcement to the doctrine of State sovereignty which was advocated by the British delegates during the Paris Conference of 1910.[29] The great development achieved in the field of aeronautical industry, the number of aircrafts possessed by each nation, in addition to the crossing of the Atlantic Ocean in 1919,[30] made it clear that some kind of regulation is needed for the control of international civil aviation.[31] However, when the Peace Conference convened in January 1919, it appointed a Commission on International Air Navigation, and upon the invitation of the French Government, a conference in which thirty eight States were represented,[32] drafted a convention for the regulation of international civil

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28. Lupton, W.G., Civil Aviation Law, 1935, p. 7.

29. Moller, N.H., The Law of Civil Aviation, p. 4. During the years of the First World War the neutral States have shown that they are in favor of the "air sovereingty" theory. Gibson, W.M., "Development of International Law to 1919", Temple Quarterly, Vol. 5, 1931, pp. 180-181.

30. The Atlantic Ocean was crossed by Alcock and Brown between June 14 and 15, 1919.

31. Sand, P.H., A Historical Survey of the Law of the Flight, p. 103.

32. The British Empire, France, Italy, Belgium, Brazil, Cuba, Greece, Poland, Russia, the United Kingdom of the Serbes, Croats and Slavens, and the United States were represented.

aviation.[33] The Paris Convention of 1919, was described by W.M. Gibson in an article published in the Temple Law Quarterly in 1931 as "supplying the fundamental rules for the regulation of aerial navigation".[34]

Scope of the Paris Convention

For the purpose of giving a general idea of the Paris Convention of 1919, the important provisions of this Convention are going to be discussed as follows:

a) Air space sovereignty

The battle between the air law writers and jurists who advocated the State sovereignty theory and those who advocated the freedom of the air theory, was finally ended in favor of the air sovereignty theory.[35] According to Article 1 of the Paris Convention, the contracting States recognised that every State has complete and exclusive sovereignty in the air space above its territory and territorial waters. The adoption of the State sovereignty theory by the Paris Convention of 1919, was seen by W.M. Gibson as

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33. The first international convention for the regulation of air navigation was opened for signature at Paris, on October 13, 1919. For the full text see, International Commission for Air Navigation "Convention Relating to the Regulation of Aerial Navigation".

34. Gibson, M.W., "Multi-Partite Aerial Agreements", Temple Law Quarterly, Vol. 5 (1931), p. 405.

35. Article 1, para. 1 of the Paris Convention.

a result of its recognition during the years of the First World War by both belligerents and neutrals.[36] Edward Warner while discussing Art. 1 of the Paris Convention in an article published in 1932, concluded that "nothing is left of the doctrine, once espoused by many international lawyers and especially by those of French nationality, of the freedom of the air. Experience during the war did away with all that".[37] The principle of air sovereignty as recognised by the States parties to the Paris Convention extends to the air space above the mother country, above the colonies, and above the territorial waters adjacent thereto.[38]

b) The right of innocent passage

According to Article 2 of the Paris Convention of 1919, the contracting States recognised that the aircraft of a contracting State has in time of peace the right to cross the territories of the other contracting States, provided that the conditions laid down in the Convention (Paris Convention) are observed. However, the right of innocent passage is granted by the Paris Convention as a

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36. Gibson, W.M., supra note 34, p. 406.

37. Warner, E., "The International Convention for Air Navigation and the Pan-American Convention for Air Navigation: A Comparative and Critical Analysis", Air Law Review, Vol. 3, July, 1932, No. 3, p. 226.

38. Paris Convention, supra note 35.

privilege to the aircraft of the contracting States and not as a natural right.[39] The aircraft of a contracting State while crossing the air space of another contracting State is under obligation to follow the routes fixed by the State over which such flight takes place,[40] and to land if ordered to do so. Such landing must take place in one of the aerodromes named by the State flown over. However, notification of the aerodromes available for receiving aircraft engaged in international air navigation must be sent to the International Commission for Air Navigation.[41]

c) Navigation of aircraft

Much attention was given by jurists and air law writers to the question of nationality of aircraft, and five criterions for the manner in which the selection of nationality were advocated as follows:

(1) aircraft should have the nationality of the place of construction;

(2) aircraft should have the nationality of the owner;

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39. Tombs, C. Laurance, International Organizations in European Air Transport, p. 53.

40. Article 15, para. 1 of the Paris Convention.

41. Article 15 of the Paris Convention. The International Commission for Air Navigation was an international organization established by Chapter VIII of the Paris Convention of 1919.

(3) aircraft should have the nationality of the port d'attache;

(4) aircraft should have the nationality of the domicile of the owner;

(5) aircraft should have the nationality of the place of registration.[42]

The Paris Convention of 1919, has adopted the criterion of the nationality of the place of registration,[43] it also stipulated that all aircraft engaged in international air navigation shall bear registration marks.[44] Article 5 of the Paris Convention as drafted in 1919, stipulated that no nation may permit the flight above its territory of aircraft not possessing the nationality of one of the contracting States. However, this article was amended by the Protocol of 1929 to the effect that "Each contracting State is entitled to conclude special convention with non-contracting States".

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42. Gibson, supra note 10, pp. 408-409. Nationality of the place of construction was advocated by M. Armengaud in 1911, nationality of the owner was advocated by Lapradelle in 1911, nationality of the port d'attache was advocated by Oppenheim, nationality of the domicile of the owner was adopted by a French decree issued on December 17, 1913, and finally, nationality of the place of registration was approved by the "Institut de Droit International" in 1911.

43. Article 6 of the Paris Convention.

44. Article 10 of the Paris Convention.

d) Recognition of licences and certificates

By the words of Article 13 of the Paris Convention of 1919, each contracting State recognized the validity of certificates of airworthiness, certificates of competency and licences issued or rendered valid by any other contracting State, in accordance with the regulations established by Annexes B and C to the Convention.[45] However, each contracting State was granted the right to refuse to recognise certificates of competency and licences granted to its nationals by another contracting State as valid for use within its borders.[46] Any aircraft engaged in international air navigation must be provided with the following documents:

(a) certificates of registration;

(b) certificate of airworthiness;

(c) certificates of minimum technical skill for commanding officer and pilot;

(d) licences for pilots, navigators and engineers;

(e) list of passengers;

(f) bill of lading and manifest;

(g) log books;

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45. Annex B to the Paris Convention provides the conditions that govern the issue of certificates of airworthiness, and Annex C deals with the log books.

46. Article 13, para. 2 of the Paris Convention.

(h) special licences for wireless equipment.[47]

e) Cabotage rights

The Paris Convention of 1919, granted to the contracting States the right to establish reservation and restrictions in favor of their national aircraft in regard to the carriage of persons and goods for hire between two points within the territory of the State,[48] it also provided that aircraft of a contracting State, which restricted its internal traffic to its national aircraft, engaged in international air transportation may be subject "to the same reservations and restrictions in any other contracting State, even though the latter does not itself impose any reservations and restrictions on other foreign aircraft."[49]

f) Establishment of prohibited zones

States parties to the Paris Convention of 1919, were "entitled for military reasons or in the interest of public safety" to establish prohibited zones over which no flight may take place. Such prohibited zones "shall be published and notified before hand to the other contracting States", and must be applied equally to the private aircraft

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47. Article 19 and Annexes A, B, C and E of the Paris Convention.

48. Article 16 of the Paris Convention.

49. Article 17 of the Paris Convention.

of the State which established such areas and to the aircraft of other contracting States.[50] However, Article 3 of the Paris Convention of 1919 was amended by the Protocol of June 15, 1929 to the effect that each contracting State may as an exceptional measure, and in the interest of public safety, authorise flight over the prohibited zones by its nationals,[51] and such exceptional authorization shall be notified to the other contracting States and to the International Commission for Air Navigation.[52] Article 3 as amended in 1929, also gave each contracting State "the right in exceptional circumstances in time of peace and with immediate effect temporarily to restrict or prohibit flights over its territory or over part of its territory on condition that such restrictions or prohibition shall be applicable without distinction of nationality to the aircraft of all the other States".[53] The Paris Convention also provided that any aircraft which finds itself above a prohibited zone is under the obligation to land as soon as it is aware of the fact that it is flying above prohibited zone. Such landing must be made as soon as possible outside

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50. Article 3 of the Paris Convention.

51. Article 3, para. 2 of the Paris Convention as amended by the Protocol of June 15, 1929.

52. Ibid., para. 3.

53. Ibid., para. 4.

the prohibited zone at one of the nearest aerodromes of the State flown over.[54]

g) Exemption from seizure

Article 18 of the Paris Convention of 1919, granted to the aircraft of a contracting State the right to enjoy exemption from seizure under certain conditions. It provided that "Every aircraft passing through the territory of a contracting State, including landing and stoppages reasonably necessary for the purpose of such transit, shall be exempted from any seizure on the ground of infringement of patent, design or model, subject to deposit of security the amount of which in default of amicable agreement shall be fixed with the least possible delay by the competent authority of the place of seizure." The provision quoted above was described by Edward Warner as "there is nothing like it, for example in the treaties which govern the movement of private automobiles cross international boundaries in Europe."[55]

h) Assistance to distressed aircraft

The Paris Convention of 1919, required the contracting State to provide assistance to aircraft of any contracting State for purpose of landing, specially if such aircraft

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54. Article 4 of the Paris Convention.

55. Warner, E.P., supra note 37, p. 271.

is in distress. The amount of assistance which shall be provided to a distressed aircraft must be equal to that provided to national aircraft.[56] The salvage of aircraft wrecked at sea - according to the Paris Convention - is to be governed by the principles of maritime law.[57] The Convention also provided that the public aerodromes of every contracting State must be open to the aircraft of the contracting States upon the payment of amount of money likewise that is paid by the national aircraft as charges of landing and length of stay.[58]

i) Establishment and operation of international airways and lines

Article 15 of the Paris Convention as adopted in 1919, provided that:

> "Every aircraft of a contracting State has the right to cross the air space of another contracting State without landing. In this case it shall follow the route fixed by the State over which the flight takes place. However, for reasons of general security it will be obliged to land if ordered to do so by means of the signals provided in Annex D.
>
> Every aircraft which passes from one State into another shall, if the regulation of the latter State requires it to land in one of the aerodromes fixed by the latter.

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56. Article 22 of the Paris Convention.

57. Article 23 of the Paris Convention.

58. Article 24 of the Paris Convention.

> Notification of these aerodromes shall be given by the contracting States to the International Commission for Air Navigation and by it transmitted to all the contracting States.
>
> The establishment of international airways shall be subject to the consent of the State flown over."

The last sentence of the above article presented "perhaps the knottiest problem" of the Paris Convention.[59] However, during the meeting of the International Commission for Air Navigation which was held at Paris in 1929, the German delegate argued that the last sentence of the above article was interpreted differently by the States parties to the Paris Convention and he proposed the following text to make it more explicit:

> "The installation and the operation of regular airlines from the territory of one contracting State to the territor- of another contracting State or over the latter territory with or without intermediate landing, shall form the subject of special agreement between the contracting States concerned."

The British delegate who was in favour of the freedom of the air for international navigation opposed the German text and argued that previous authorization was required

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59. Edward, W.P., supra note 37, pp. 204-205.

only for the establishment of an airway. However, the text provided by the German delegate which required prior authorization for the establishment of an international line was adopted by the Paris Conference of 1929 and the last paragraph of article 15 of the Convention amended to the effect that "Every contracting State may make conditional on its prior authorization the establishment of international airways and the creation and operation of regular international air navigation lines, with or without landing, on its territory."[60]

j) The International Commission for Air Navigation

The International Commission for Air Navigation was a permanent organization established by the provisions of Chapter VIII of the Paris Convention of 1919, and placed under the direction of the League of Nations.[61] The International Commission for Air Navigation was originally composed of two representatives of the following States: the United States of America, France, Japan and Italy. One representative of Great Britain and one of each of the British Dominions and India, and one representative of each of the other contracting States.[62] However, the above

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60. Tombs, C.L., supra note 39, p. 61; also Warner, E.P., supra note 37, pp. 205-207.

61. Article 34, para. 1 of the Paris Convention.

62. Ibid., paras. 2, 3 and 4.

rule was amended by the Protocol of 1929 to the effect that "Each contracting State may have not more than two representatives on the Commission".[63] The International Commission for Air Navigation was vested with various powers and large duties.[64] The duties imposed on and carried by the International Commission for Air Navigation were of administrative and technical nature. Most of the administrative duties, specially those relating to the publication of information among the contracting States were carried by the permanent office of the International Commission which was opened in Paris in 1919. The technical duties were entrusted to subcommissions on medical service, on radio telegraphy and on various other matters.[65]

To conclude this section the writer of this paper believes that, it is worth to point out here that two other conventions for the regulation of international air navigation were concluded during the years preceding the Second World War. Those conventions were the Ibero-American Convention of 1926 and the Pan-American Convention of 1928.[66]

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63. Ibid., para. 2 as amended by the Protocol of June 15, 1929.

64. For the duties vested in ICAN, see Arts. 9, 13, 14, 15, 16, 27, 28, 34, 36 and 37 of the Paris Convention.

65. Warner, E.P., supra note 37, pp. 286-287.

66. For the full text of the Havana Convention, see Treaty Series No. 840.

The Ibero-American Convention which is commonly known among the airlaw writers as the Madrid Convention, was concluded in 1926 during a congress held at Madrid, and in which all the Latin American countries were represented, in addition to Spain.[67] The provisions of the Ibero-American Convention have followed the provisions of the Paris Convention of 1919, very closely, except that the Ibero-American Convention did not create relationships similar to that created by the Paris Convention with the League of Nations. However, the Ibero-American Convention did not receive a large number of ratification,[68] and therefore it was not of great value in the field of international air navigation. Edward Warner described the Ibero-American Convention in an article published in July, 1932 as it "appears as of purely academic and historical interest."[69]

The second international convention is the Pan-American Convention which is commonly known by the airlaw

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67. States participating in the Madrid Congress were: Argentina, Bolivia, Brazil, Chili, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Portugal, Salvador, Spain, Uruguay and Venezuela.

68. According to Shawcross and Beaumont, the Madrid Convention was ratified by seven States only.

69. Warner, E.P., supra note 37, pp. 222-223.

writers as the Havana Convention. The Pan-American Convention was concluded by the Pan-American Conference, which was held at Havana in January 1928, and it was signed by most Latin America States, in addition to the United States of America.[70] The provisions of the Pan-American Convention were judged by Slotemaker as "deviating in many respects from those of the Convention of 1919";[71] also the Havana Convention of 1928 did not create an international body similar to the International Commission for Air Navigation which was created by the provisions of the Paris Convention of 1919. However, we must point out here that according to John, C. Cooper, the Pan-American Convention was ratified by Mexico, Nicaragua, Panama, Guatemala and the United States of America.[72]

Finally, it is worth to point out here that all the three conventions discussed above are not in force at the present day, as a result of the conclusion of the Chicago Convention of 1944, which is going to be discussed in the following section.

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70. The signatories were: Argentina, Bolivia, Brazil, Chili, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Salvador, United States, Uruguay and Venezuela.

71. Slotemaker, L.H., Freedom of Passage for International Air Services, p. 32.

72. Cooper, J.C., "The Pan-American Convention on Commercial Aviation and the Treaty-Making Power", American Bar Association Journal, Vol. 19 (1933), p. 22.

Section III: The International Civil Aviation Conference of 1944

Upon an invitation[73] sent by the Government of the United States of America to the States associated with it during the years of the Second World War and to certain neutral States, the representatives of fifty four nations[74] met at Chicago fron November 1 to December 7, 1944 to design a plan and to draft a single international convention for the regulation of post-war civil aviation.

At the opening of the Chicago Conference of 1944, different positions were advocated by the delegates of the States represented at the Conference. Those positions can be summarized as follows:

The first position was advocated by Australia and New Zealand jointly. The two nations proposed the establishment of an international authority by an international agreement. Such authority should operate the major trunk routes of the world. The international authority

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73. For the text of the United States invitation and for the list of States invited, see Proceedings of the International Civil Aviation Conference, Department of State Publication 2802, International Organization and Conferences, Series IV, 1948, Vol. I, pp. 111-113.

74. The only two nations who were invited and did not take part in the Conference were the U.S.S.R. and Saudia-Arabia.

as proposed by these two nations should own the aircraft and carry on full managerial function. In addition to the international authority, each nation would be free to choose any regime to its domestic air services and to establish air services with its neighbours through bilateral agreements.

In defending the above position the delegate of New Zealand stated that:

> "... any other system, we suggest, leads to national competition, to an attempt to serve national interests as against world interests, to achieve individual needs at the expense of others. It must lead to the creation and expansion of large commercial organizations whose activities must in the long run based primarily on the profit motive. It may well be felt that in commercial hands there might be some small degree of extra efficiency; I would ask you to balance this possibility with what seems to us the certainty of a commercial and national rivalry in this field which must lead in the long run to commercial and national competition and ill-will, and which cannot in the long run hope to achieve that proper balance between the rights and the necessities of all nations, which would to a much greater degree be within the competence of an international body."[75]

The Australian delegate added to this, that there would be a great advantage in having an international authority

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75. The Proceedings, supra note 73, vol. 1, p. 79.

with the power to operate all world air services as far as this international authority "would have at its command all the best technical, research, and other aviation resources of all countries. Under past conditions such resources were often preserved in secrecy in national interests instead of being pooled in the common interests of mankind."[76] However, the joint Australian proposal as summarized above was rejected by the Chicago Conference at an early stage.

A second proposal was presented to the Chicago Conference by the Canadian delegates. In its proposal, Canada envisaged an international authority similar to the Civil Aeronautics Board of the United States of America. For the operation of an international route, an airline would obtain a certificate from the international authority. In the certificate the international authority would describe the route, specify the initial frequency and rates to be charged by the airline in question. The issuance of such certificate by the international authority enables the airline to operate the described route on the basis of what so-called by the Canadian delegate the Four Freedoms of the air; transit without landing, landing for non-traffic purposes (for refuelling or technical purposes), taking on passengers,

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76. Ibid., p. 83.

mail and cargo at the country of origin to any place in the world and taking on passengers, mail and cargo at any place for carriage to the country of origin. However, according to the Canadian proposal, the Fifth Freedoms rights could not be granted by the international authority, but should be left as a subject of bilateral agreements between the governments concerned.[77]

A third position was advocated at the Chicago Conference of 1944, by the delegates of the United Kingdom. The British position was that of a white paper submitted to the British Parliament by the Secretary of State for Air, few weeks before the opening of the Chicago Conference.[78] In its position the United Kingdom advocated that the "Freedom of the air" should extend to the first four Freedoms. The Fifth Freedom would be "a matter of negotiation". The above position was judged by W.E. O'Conner as to put the United Kingdom in favor of the establishment of an international authority "along the Canadian lines with powers to issue licences and determine rates and frequency."[79]

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77. For the full Canadian proposal, see The Proceedings, supra note 73, Vol. 1, pp. 67-74.

78. For the full text of the white paper, see The Proceedings, supra note 73, Vol. 1, pp. 566-570.

79. O'Conner, W.E., Economic Regulation of the World Airlines - A Political Analysis, Prager Publisher, New York, Washington, London, p. 27.

The last position was taken by the delegates of the United States of America who strongly argued for the principle of the complete freedom of the air for international navigation, and rejected the establishment of an international authority as suggested by the Canadian delegates. According to the United States proposal, such international authority would be consultative only.[80]

However, near the closing of the Chicago Conference the two great powers in the field of aviation industry, the United States of America and the United Kingdom, with Canada acting as a mediator, agreed that "the international authority could have powers limited strictly by formulas to be written into the multilateral agreement, for the regulation of capacity and Fifth Freedom, that the signatory agreement would be obliged to observe". An ultimate disagreement appeared when the United Kingdom was "prepared to accept an escalator when the load factor of Third/Fourth Freedoms traffic averaged above an agreed percentage". But the United States of America insisted that "there also be permissible increase of frequencies based on a load factor which includes Fifth Freedom traffic".[81] The Canadian delegation tried to reduce the gap between the two nations, but

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80. For the United States position, see The Proceedings, supra note 73, Vol. I, pp. 423, 450, 451, 452, 463, 464, 481, 499.

81. O'Conner, supra note 79, pp. 30-31.

both the United States and the United Kingdom refused to accept the Canadian middle proposal,[82] and at this point the Chicago Conference gave up its efforts to achieve an agreement at this matter.

Results of the Chicago Conference

The purpose of the Chicago Conference of 1944, was the replacement of the earlier conventions concerning international navigation by drafting a single document providing the regulations needed for the development of international civil aviation in the period following the Second World War. But as a result of the different positions and proposals advocated by the delegates of the States represented at the Conference, four agreements were drafted and opened for signature on December 7, 1944. These agreements are:

I. The Convention on International Civil Aviation.

II. The Interim Agreement.

III. The International Air Services Transit Agreement.

IV. The International Air Transport Agreement.

In addition to these four documents, the Chicago Conference drafted a fifth document known as the Chicago

82. The Proceedings, supra note 73, Vol. 1, pp. 610-614.

Standard Form,[83] to be used by the States parties to the "Chicago Convention" as guidance while concluding bilateral agreements for the establishment of international air services between their respective territories.

I. The Convention on International Civil Aviation

The Convention on International Civil Aviation,[84] which is commonly known as the "Chicago Convention" was opened for signature at Chicago on December 7, 1944. The Chicago Convention which became operative on April 4, 1947, was accepted up to the present day by 150 States.[85]

The Chicago Convention - the main document produced by the Conference - consists of a preamble and 96 articles divided into two parts. Part one deals with certain regulation to be applied in international air navigation, and Part

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83. For the full text of the Chicago Standard Form, see ICAO Circular 63-AT-6, Handbook on Administrative Clauses in Bilateral Air Transport Agreements.

84. For the full text of the Chicago Convention, see The Proceedings, supra note 73, Vol. 1, pp. 147-174; also see ICAO Doc. 7300, pp. 3-35.

85. For the list of States parties to the Chicago Convention, as of 31 December, 1980, see ICAO Doc. 9327, pp. 177-179. "Zimbabwe notified its adherence to the Convention on International Civil Aviation on 11 Feb., 81 and therefore became a Contracting State of the Organization on 13 March 1981. This brings the total membership of ICAO to 150 States", ICAO Bull., Vol. 36, No. 4 (April 1981), p. 41.

two deals with the establishment of an international organization. However, the preamble of the Chicago Convention states that:

a. international civil aviation can "help to create and preserve friendship and understanding among the nations and peoples of the world";
b. international civil aviation should be "developed in a safe and orderly manner"; and
c. international air transport services should be "established on the basis of equality of opportunity and operated soundly and economically".

a) State sovereignty over the air space

Part one of the Chicago Convention of 1944 deals with several aspects of international air navigation. The first article of this Convention followed very closely the Paris Convention of 1919 and the Pan-American (Havana) Convention of 1928, by adopting the theory of air sovereignty.[86] Article 1 of the Chicago Convention declares that:

86. Article 1 of the Paris Convention of 1919 provides: "the High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory". The same principle is found in Art. 1 of the Havana Convention of 1928.

> "The Contracting States recognize that every State has complete and exclusive sovereignty over the air space above its territory."

J.C. Cooper explained the article quoted above by stating that:

> "Every State of the International Civil Aviation Organization has formally acknowledged that air space above national lands and waters is an integral part of the territory of the subjacent State whether the latter is or not a member of the International Civil Aviation Organization."[87]

Dr. N.M. Matte in his book "Treatise on Air-Aeronautical Law" regards the present article as a declaration and affirmation of a generally recognized principle under international customary law, and he arrives at the conclusion that the principle of State sovereignty as declared by the first article of the Chicago Convention "does not imply a right of innocent passage."[88]

The term territory as defined by the Chicago Convention includes "the land areas and territorial waters adjacent

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87. Cooper, J.C., "The Chicago Convention After Twenty Years", University of Miami Law Review, No. 3, pp. 334-335.

88. Matte, N.M., Treatise on Air-Aeronautical Law, p. 132.

thereto under the sovereignty, suzerainty, protection or mandate of such State".[89]

b) Rights granted to the aircraft and the Contracting States

The provisions of the Chicago Convention of 1944 deal with two kinds of international air services, and provide different regulations for each kind with the right of every contracting State to operate international air services to points situated in the territories of the other contracting States. According to Article 5 of the Chicago Convention, every contracting State grants to the aircraft of the other contracting State "not engaged in scheduled international air services" the right "to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing". In addition, Article 5 grants to the said aircraft the privilege of taking on or discharging passengers, mail or cargo in the territories of the contracting States. However, the right of taking on or discharging passengers, mail and cargo, granted by the above article differs from the right of landing for refuelling or other non-traffic purposes in the fact that the former right is subject to the right of the State where such embarkation or disembarkation takes place to impose regulations, conditions or limitation as it may consider

89. See Article 2 of the Chicago Convention.

desirable.

The Chicago Convention does not grant similar rights to the aircraft of a contracting State engaged in scheduled international air services. Article 6 of the Convention provides that:

> "No scheduled international air services 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."

In an article written by R.Y.J. Jennings and published in the "British Year Book of International Law" for 1945, the writer argued that by the words of Article 6 "the main Chicago Convention leaves the law concerning transit and landing privileges substantially where it was before, mainly because of the impossibility of reaching agreement on any alternative proposal".[90] However, the "special permission or other authorization" required by article 6 of the Chicago Convention has been regarded by most States parties to it as requiring the conclusion of bilateral agreements between the States concerned,[91] and therefore a large

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90. Jennings, R.Y., "International Civil Aviation and the Law", British Year Book of International Law, 1945, Vol. XXII, p. 202.

91. Matte, N.M., supra note 88, p. 144.

number of bilateral agreements were concluded between States all over the world for the operation of aircraft engaged in international scheduled air services.[92]

While the provisions of the Chicago Convention of 1944 deal with two different kinds of international air services, and provide different regulations for each kind, the Convention leaves the contracting States without any definition for the terms "scheduled" and "non-scheduled". Such definition was regarded by J.C. Cooper, of great importance for "the decision whether a particular international air service is entitled to the privileges described by article 5 or subject to the strict limitations of article 6".[93] However, a definition for the term "scheduled international air services" was adopted by the Council of the International Civil Aviation Organization, pursuant to the directive of the International Civil Aviation Organization Assembly on March 25, 1952. The said definition reads as follows:

> "A scheduled international air service is a series of flights that possess all the following characteristics:

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92. For the list of bilateral agreements registered with ICAO, up to December 31, 1981, see ICAO Doc. 9307-LGB/347, pp. 7-150, and ICAO Doc. 9355-LGB/358, pp. 4-11.

93. Cooper, J.C., supra note 87, p. 339.

(a) it passes through the air space over the territory of more than one State;

(b) it is performed by aircraft for the transport of passengers, mail or cargo for remuneration, in such a manner that each flight is open to use by members of the public;

(c) it is operated, so as to serve traffic between the same two or more points, either

(i) according to published timetable, or

(ii) with flights so regular or frequent that they constitute a recognized systematic service."[94]

Now, it is worth to point out that the definition quoted above has no obligatory function on the contracting States, but it only provides guidance for these States "in the interpretation or application of the provision of articles 5 and 6 of the Convention."[95]

c) Cabotage rights

The Convention on International Civil Aviation contains a clause similar to that found in the Paris Convention of 1919.[96] According to this clause the States parties

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94. ICAO Doc. 7278/C841, ICAO Assembly Resolution A2-18.

95. Ibid., ICAO Assembly Res. A2-18, para. 1.

96. Article 16 of the Paris Convention of 1919 provides that "each contracting State shall have the right to establish reservation and restrictions in favor of its national aircraft in connection with the carriage of persons and goods for hire between two points in its territory".

to the Chicago Convention recognise that every contracting State has the right to reserve carriage of passengers, mail and cargo between two points or more in its territory, for remuneration to its national aircraft.[97] In addition, article 7 of the Chicago Convention provides that:

> "Each contracting State undertakes not to enter into any arrangements which specifically grant any such privileges on exclusive basis to any other State or to an airline of any other State, and not to obtain any such exclusive privilege from any other State."

During the Sixteenth and the Eighteenth Sessions of the International Civil Aviation Organization which took place in Buenos Aires in 1968 and in Vienna in 1971, Sweden made a proposal for the deletion of the second sentence of article 7 quoted above but no decision has been made either by the Assembly or by the Council.[98]

d) Non-discrimination

The provisions of the Chicago Convention of 1944, put upon every contracting State an obligation to accord to the aircraft of other Contracting States similar treatment

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97. See Article 7 of the Chicago Convention.

98. ICAO Doc. 8771-A16, Ex-Report of the Executive Committee, p. 43; also see ICAO Doc. 8960-A18, Ex-Report of the Executive Committee, pp. 32-33.

to that accorded to its national aircraft with reference to charges and facilities in connection with the use of public airports. The International Civil Aviation Organization Council may upon representation by any interested contracting State review the charges imposed by any contracting State for the use of its airports, and shall report and make recommendations thereon for the consideration of the State or States concerned.[99] In addition, article 15 of the Chicago Convention provides that:

> "No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon."

Article 15 of the Chicago Convention was judged by J.C. Cooper as to "constitute definite limitation on the general power of the State fo fix charges for the airports and navigation facilities constructed on its territory".[100]

e) Nationality and registration of aircraft

Articles 17, 18, 19 and 20 of the Chicago Convention deal with "nationality of aircraft". The privileges

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99. See art. 15 of the Chicago Convention.

100. Cooper, J.C., supra note 87, p. 340.

granted by the provisions of the Convention can only be exercised and enjoyed by an "aircraft of a contracting State". The criterion used by the Chicago Convention for determining the nationality of such aircraft is the same as that used by the Paris Convention of 1919.[101] According to article 17 of the Chicago Convention "aircraft have the nationality of the State in which they are registered". No procedure is provided by the provisions of the Chicago Convention for the registration of such aircraft, but it leaves such procedure to the municipal law of each contracting State.[102] However, an aircraft cannot be registered in more than one State,[103] and "every aircraft engaged in international air navigation shall bear its appropriate nationality and registration marks".[104] In addition to this, the Convention put all States members of the International Civil Aviation Organization under obligation "to supply to any other contracting State or to the International Civil Aviation Organization, on demand, information concerning the registration and ownership of any particular aircraft registered in that State".[105]

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101. According to article 6 of the Paris Convention "Aircraft possesses the nationality of the State on the register of which they are entered".

102. See Art. 19 of the Chicago Convention.

103. See Art. 18 of the Chicago Convention.

104. See Art. 20 of the Chicago Convention.

105. See Art. 21 of the Chicago Convention.

f) The International Civil Aviation Organization

Part two of the Chicago Convention contains provisions for the creation of an international body under the name of the "International Civil Aviation Organization (ICAO)".[106] The provisions creating the above organization were regarded by J.C. Cooper as "the most important provisions of the Convention".[107] The International Civil Aviation Organization was established on April 4, 1947 to replace another international organization created by the provisions of the Interim Agreement under the name of the Provisional International Civil Aviation Organization.[108] ICAO is a specialized agency related to the United Nations. The aims and objectives of this organization are to develop the principles and techniques of international navigation and to foster the planning and development of international air transport as to:

> "(a) insure the safe and orderly growth of international civil aviation through the world;
>
> (b) encourage the arts of aircraft design and operation for peaceful purposes;

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106. See Art. 43 of the Chicago Convention.

107. Cooper, J.C., supra note 87, p. 337.

108. PICAO was established on June 26, 1945 under the provisions of the Interim Agreement signed at Chicago Conference of 1944.

(c) encourage the development of airways, airports, and air navigation facilities for international civil aviation;

(d) meet the needs of peoples of the world for safe, regular, efficient and economic air transport;

(e) prevent economic waste caused by unreasonable competition;

(f) insure that the rights of contracting States are fully respected and that every contracting State has fair opportunity to operate international airlines;

(h) promote safety of flight in international air navigation;

(i) promote generally the development of all aspects of international civil aeronautics."[109]

The International Civil Aviation has an Assembly in which all the States parties to the Chicago Convention are members. The Assembly shall meet "not less than once in three years".[110] An extraordinary meeting may be held at any time upon the call of the ICAO Council or at the request of any ten contracting States addressed to the Secretary General of the International Civil Aviation Organization. Each contracting State may be represented in the meeting, and is entitled to one vote only. Decisions

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109. Article 44 of the Chicago Convention.

110. The expression "not less than once in three years" was introduced into para. (a) of Art. 48 by an amendment adopted by the Assembly in Res. A8-1 to replace the word "annually" which appears in the original text of the Convention as drafted by the Conference.

of the Assembly require a majority of the votes cast.[111] The ICAO Assembly has powers to deal with any question or matter within the sphere of action of the organization and not specifically assigned to the Council, it also has the power to delegate any matter to the Council, to subsidiary commission or to any other body.[112] The International Civil Aviation Organization also has a Council in which twenty one contracting States are represented. This number was raised to thirty three.[113] The election of the members of the Council is to be held every three years. However, in such election the ICAO Assembly is required to give adequate representation to:

1. the States of chief importance in air transport;
2. the States not otherwise include, which make the largest contribution to the provisions of facilities for international civil air navigation; and
3. the States not otherwise included whose designation will insure that all the major geographic areas of the world are represented in the Council.[114]

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111. See Art. 48 of the Chicago Convention.

112. See Art. 49 of the Chicago Convention.

113. The membership of the ICAO Council was increased to twenty seven by the Thirteenth Extraordinary Session of the ICAO Assembly. Another increase to 30 members was made by the Seventeenth Extraordinary Session and finally, this number was increased by the Twentythird Session in 1980.

114. See Art. 50, para. (b) of the Chicago Convention.

The functions of the ICAO Council can be divided into mandatory and permissive functions. The mandatory functions are to carry out the directive of the Assembly and discharge the duties laid on it by the provisions of the Convention such as, to adopt international standards and recommended practices, to appoint an air transport committee and an air navigation commission, to report to the contracting States any infraction to the Convention, to submit annual reports to the Assembly, to determine its organization and rules of procedure, to administer its finances, to appoint a chief executive officer, and to collect and publish information relating to the advancement of air navigation.[115] The permissive functions of the Council are to conduct research into all aspects of air transport and air navigation which are of international importance, to study any matter affecting the organization and operation of international air transport, to investigate at the request of any contracting State any situation which may appear to present avoidable obstacles to the development of international air navigation, to establish committees on air transport on a regional or other basis and finally to delegate certain duties to the Air Navigation Commission.[116]

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115. See Article 54 of the Chicago Convention.

116. See Article 55 of the Chicago Convention.

Finally, the writer of this paper believes that it is worth to point out here that the Chicago Convention of 1944, as a replacement to the Paris Convention of 1919 and the Havana Convention of 1928, requires the contracting States to give notice of denunciation to the said Conventions.[117] It also provides for the registration with the ICAO Council of any agreement between a contracting State or an airline of a contracting State and another State or an airline of another State,[118] and that the Chicago Convention declares that the provisions of this Convention do not affect the freedom of any contracting State to take action in case of war or national emergency.[119]

II. The Interim Agreement

The Chicago Conference of 1944 produced, in addition to the Convention on International Civil Aviation, which we discussed above, another document under the name of the "Interim Agreement" to be applicable during the period prior to the coming into force of the Chicago Convention.[120] The Interim Agreement became effective on

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117. See Art. 80 of the Chicago Convention.

118. See Arts. 81 & 83 of the Chicago Convention.

119. See Art. 89 of the Chicago Convention.

120. For the full text of the Interim Agreement, see the Proceedings, supra note 73, Vol. 1, pp. 132-146.

December 7, 1944 after it had been accepted by twenty-six States. The provisions of this agreement are very similar to the provisions of the Chicago Convention. It also created an international organization under the name of the Provisional International Civil Aviation Organization with technical and advisory nature,[121] but the life of this organization was limited "until a new permanent convention on international civil aviation shall have come into force or another conference on international civil aviation shall have agreed upon other arrangements".[122] However, the life of the Interim Agreement and its international organization was ended upon the coming into force of the Chicago Convention on April 7, 1947, and the work of PICAO was taken over by the new international organization which was established by article 43 of the Chicago Convention.

III. The International Air Services Transit Agreement

The International Air Services Transit Agreement, which is commonly known as the "Two Freedoms Agreement",[123] was opened for signature at Chicago on December 7, 1944. Thirty four nations indicated that they would sign the Air Transit Agreement. However, the said agreement has been

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121. See Art. 1, Sec. 1 of the Interim Agreement.

122. See Art. 1, Sec. 3 of the Interim Agreement.

123. For the full text of the International Air Transit Agreement, see the Proceedings, supra note 73, Vol. 1, pp. 175-178.

accepted up to the present day by 95 States.[124] The States parties to the Air Services Transit Agreement grant to the aircraft of each other engaged in scheduled international air services the following privileges:

1. The privilege to fly across their territories without landing.
2. The privilege to land in their territories for refuelling or for other non-traffic purposes.[125]

In addition, the Air Transit Agreement authorises the State flown over to ask the international operator to land on its territory and offer reasonable commercial services,[126] and in order to meet the security problems, it gives the State concerned the right to designate the routes to be followed and the airports to be used in its territory.[127] It also provides that any State which deems

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124. Afghanistan, Bolivia, Canada, Chile, Costa Rica, Ecuador, Egypt, France, Greece, Guatemala, Haiti, Honduras, India, Iran, Iraq, Lebanon, Liberia, Mexico, the Netherlands, New Zealand, Nicaragua, Norway, Peru, Philippine Commonwealth, Poland, Spain, Sweden, Turkey, U.K., U.S., Uruguay, Venezuela, Denmark, Tai. For the list of States parties to this Agreement as of 31 December, 1980, see ICAO Doc., supra note 85.

125. See Art. 1, Sec. 1 of the Air Transit Agreement.

126. See Art. 1, Sec. 3 of the Air Transit Agreement.

127. See Art. 1, Sec. 4(1) of the Air Transit Agreement.

an action taken by another State under the provisions of this agreement to be causing injustice or hardship, may request the ICAO Council to examine the situation. The Council shall investigate, call the States concerned into consultation, and may make any recommendation to such States. In the event that the State unreasonably fails to take suitable corrective action, the Council may recommend to the ICAO Assembly to suspend the rights and privileges granted under the provisions of the Air Transit Agreement to the aircraft of the State in question.[128] However, the said agreement provides that the privileges granted by the provisions of the Air Transit Agreement, may be suspended or revoked by any contracting State if it is not satisfied that the air transport enterprise of another contracting State is not substantially owned and effectively controlled by nationals of the contracting State, or if the air transport enterprise failed to comply with the laws and regulations of the State flown over. The International Air Service Agreement can be denounced by any contracting State by one year notice.[129]

Finally, it is worth to point out here that a similar agreement was concluded between a number of Arab States and entered into force on June 18, 1965. The only

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128. See Art. II, Sec. 1 of the Air Transit Agreement.

129. See Art. IV of the Air Transit Agreement.

difference between the International Air Services Transit Agreement and the Arab Air Transit Agreement, appears in the fact that the privileges granted by the latter can be enjoyed by aircraft engaged both in scheduled and non-scheduled international air services.[130]

IV. The International Air Transport Agreement

The International Air Transport Agreement is commonly known as the "Five Freedoms Agreement",[131] due to the fact that the States parties to the present agreement exchange totally the "Five Freedoms" of the air, in regard to aircraft of the contracting States engaged in scheduled international air services. The "Five Freedoms" of the air as granted by the said agreement consist, in addition to the first two privileges as granted by the International Air Services Transit Agreement of:

> "3. The privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses.

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130. Khairy, H.Y. Mostafa, Al. tatwurat al-Jadida fi Qanun al-tayaran, pp. 318-319.

131. For the full text of the International Air Transport Agreement, see the Proceedings, supra note 73, Vol. 1, pp. 179-183.

4. The privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses.
5. The privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory."[132]

The above three privileges which are known by the airlaw writers as "traffic rights" or "commercial rights" are available "only to through services on a route constituting a reasonable direct line out from and back to the homeland of the State whose nationality the aircraft possesses".[133]

The International Air Transport Agreement does not contain any provision for the control of rates to be charged for the carriage of passengers, mail and cargo or for the limitation of the capacity and frequency. However, the said agreement provides a number of limitations to the effect that the routes to be followed and the airports to be used may be designated by the State flown over,[134] in

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132. See Art. I, Sec. 1 of the Air Transport Agreement.

133. Ibid.

134. See Art. I, Sec. 5(1) of the Air Transport Agreement.

the operation of through services "due consideration shall be given to the interests of the other contracting State so as not to interfere unduly with their regional services or hamper the development of their through services".[135] In addition, the Air Transport Agreement gives each contracting State the right to make reservations at the time of signature or acceptance - in regard tothe Fifth Freedom privilege, and it may at any time after acceptance withdraw itself from such rights and obligations by giving a six months notice to the Council of the International Civil Aviation Organization.[136] The above right was regarded by I.A. Vlasic as the weaking point of the Air Transport Agreement.[137]

Finally, it is worth to point out that the role of the Air Transport Agreement in today's legal regime of international civil aviation, is insignificant, due to the fact that a few nations has accepted this agreement and that the United States which can be regarded as the most important nation in the field of international civil aviation denounced it on July 25, 1946.[138]

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135. See Art. III of the Air Transport Agreement.

136. See Art. IV, Sec. 1 of the Air Transport Agreement.

137. Vlasic, I.A., supra note 8, Sec. 1, p. 184.

138. The Air Transport Agreement was accepted up to 31 December, 1980 by 12 States. For the list of States Parties to this agreement, see ICAO Doc., supra note 85.

Attempts for the achievement of a multilateral agreement for the exchange of commercial rights

During the Chicago Conference of 1944, it appeared clear that no agreement could be reached on a number of questions and economic matters, such as the exchange of the third, fourth and fifth freedoms rights multilaterally, and the regulation of capacity, frequency and rates.[139] Thus, the Conference referred these matters to the Provisional International Civil Aviation Organization established by the Interim Agreement for further study. A draft multilateral agreement was drafted by PICAO and submitted to the First PICAO Assembly which met in 1946, but the Assembly rejected it. Another draft was prepared by PICAO and submitted to the ICAO Assembly which met at Montreal in May 1947.[140] The ICAO Assembly referred the whole matter to a special body under the name of "The Commission on Multilateral Agreement on Commercial Rights". The above Commission met at Geneva from November 4 to 27, 1947,[141]

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139. Due to the conflicting positions of States the Chicago Conference drafted in addition to the Chicago Convention two agreements for the exchange of the "Five Freedoms" of the air, but both agreements do not provide any regulation for capacity frequency and rates.

140. ICAO took over the work of PICAO on April 4, 1947.

141. The States represented at the Geneva Conference were: Argentina, Australia, Belgium, Brazil, Canada, China, Colombia, Czechoslavakia, Denmark, Dominican Republic, Egypt, El Salvador, France, Greece, India, Ireland, Italy, Mexico, the Netherlands, New Zealand, Nicaraqua, Norway, Portugal, Sweden, Switzerland, Turkey, United Dominion of South Africa, U.K., U.S., Venezuela, Guatemala, Luxemburg and Poland as observers.

and discussed certain matters such as methods of determining rates to be charged in international air transport, procedure for the settlement of disputes concerning the interpretation and application of the agreement, methods for the exchange of traffic rights and the general principles governing the capacity to be provided by an airline on an international route, but no agreement could be reached.[142]

The reasons for the failure of the Geneva Conference as viewed by Sand are "the United States and the United Kingdom had concluded the Bermuda Agreement, and being quite satisfied with its effect in practice did not want a multilateral agreement to replace it". Sand added to this that "the small countries wanted to reserve their rights to contract out of the "Fifth Freedom" in order to maintain their bargaining position in bilateral route negotiations".[143]

In 1953, the ICAO Assembly, during its Seventh Session which took place at Brighton, adopted a resolution to the effect that "there is no present prospect of achieving

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142. See Record of the Commission on Multilateral Agreement on Commercial Rights in International Civil Air Transport, ICAO Doc. 5230-A2-EC10 (1948). See also McClurkin, R.J., "The Geneva Commission on Multilateral Air Transport Agreement", J.A.L.C., Vol. 15 (1948), p. 40.

143. Sand, P.H., supra note 31, Sec. 11, p. 36.

a universal multilateral agreement".[144] However, attempts to achieve a multilateral agreement for the exchange of commercial rights continued on regional basis and resulted in the conclusion of two agreements for non-scheduled international air services only.[145]

To conclude this section, the writer of this paper believes that it is worth to point out that all air-law conferences up to the present day have failed to achieve - as far as the scheduled international air services are concerned - an international agreement for the exchange of commercial rights, and left the door widely open for bilateralism as the only way through which nations all over the world exchange commercial rights and control capacity frequencies and rates.

Section IV: The Bermuda Agreements

I. The Bermuda Agreement of 1946

The failure of the Chicago Conference of 1944, to achieve a multilateral agreement for the exchange of the so-called

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144. ICAO Doc. 7417, A7.P/3, August 27, 1953, Res. A7-15, pp. 27-28.

145. The Agreements achieved for the exchange of commercial rights for non-scheduled international services are: The Paris Agreement of 1956 and the South East Asian Agreement of 1971.

"Five Freedoms" of the air,[146] and to produce a formula for the regulation of capacity, frequencies and rates,[147] in addition to the desire of the United States air carriers to increase their frequencies to London beyond the limits allowed by the pre-war bilateral agreements, and to cut the fares for carriage from the United States to Great Britain and France,[148] led the representatives of the United Kingdom and the United States to meet at Bermuda Island from January 12 to February 11, 1946, and to work out a bilateral agreement for the regulation of the movement of international civil aviation between the territories of the two nations.[149]

The Bermuda Agreement of 1946 which is known by airlaw writers as Bermuda I, represents a compromise between the conflicting positions presented by the representatives

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146. The Chicago Conference of 1944, was unable to achieve a multilateral agreement for the exchange of the "Five Freedoms" of the air due to the conflict between the British and the American positions.

147. The Chicago Conference produced the Chicago Standard Form to be used as guidance by the contracting States in formulating bilateral agreements, also the Conference produced an international organization "The International Civil Aviation Organization (ICAO)" with an advisory opinion only.

148. Haanappel, P.P.C., "Bilateral Air Transport Agreements, 1913-1980", The International Trade Law Journal, Vol. 5, No. 1, Fall-Winter, 1979, pp. 246-247.

149. Air Services Agreement, Feb. 11, 1946, United States-United Kingdom, 60 State 1499, T.I.A.S. 1507 [hereinafter cited as Bermuda I].

of these two nations at the Chicago Conference, and which have been summarised as follows:

> "1. No limitation of frequencies v. predetermination.
>
> 2. No division of capacity v. 50-50 division of capacity.
>
> 3. No regulation of rates v. regulation of rates.
>
> 4. A complete grant of the fifth freedom v. no grant of fifth freedom.
>
> 5. An international body with advisory powers only v. an international body with executive powers over international air services."[150]

However, the signature of the Bermuda Agreement of 1946, was met by great satisfaction by Statesmen from the two nations. On February 26, 1946, Truman, the President of the United States made a special statement in which he expressed his satisfaction with the Bermuda Agreement.[151] Two days later, Lord Swinton, speaking in the House of Lords, described the Bermuda Agreement as "probably the most important civil aviation agreement that this country entered into".[152] The general plan of the Bermuda Agreement was summarised by J.C. Cooper in an article published in October 1946, in the following terms:

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150. Wassenbergh, H., Post-War International Civil Aviation Policy and the Law of Air (1962), p. 59.

151. Vlasic, I.A., supra note 8, Sec. 1, p. 195.

152. Ibid.

"Each nation grants to the air carriers of the other nation transit privileges "freedoms one and two" to operate through the air space of the other and to land for non-traffic purposes on routes any where in the world subject to the provisions of the Chicago Transit Agreement, including the right of the nation flown over to designate the transit routes to be followed within its territory and the airports to be used. Each nation also grants to the other commercial privileges of entry and departure to discharge and pick up traffic "freedoms three, four and five", but these commercial privileges are valid, in contrast to the transit privileges, only at airports named in the agreement and on routes generally indicated, and in accord with certain general traffic principles and limitations. Rates to be charged between points in the territory of the two nations are to be subject to approval of the governments within their respective powers. As to frequencies and capacities, each nation or its designated air carrier, is free at the outset to determine for itself the traffic offered to the public on the designated commercial routes, but the operations must be related to traffic demands and conducted according to the agreed principles effecting frequency and capacity. In case of dispute not settled by consultation, each nation has the right to insist on an advisory opinion of the Provisional International Civil Aviation Organization and, in the case of rates, each nation will use its best efforts within its powers to make the rate recommended by PICAO effective. As the advisory opinion of PICAO can cover any dispute, it apparently follows that PICAO can be asked for an opinion as to whether either party to the agreement is violating the principles applicable to traffic frequency and capacity and the special limitations as to fifth freedom traffic. But nothing in the agreement provides for the enforcement of a decision."[153]

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153. Cooper, J.C., "The Bermuda Plan: World Pattern for Air Transport", reprinted at: Exploration in Aerospace Law (1968), edited by I.V. Vlasic, p. 384.

In regard to the fact that Bermuda I represents the most important bilateral agreement, ever concluded between two nations for the exchange of commercial air services,[154] and the spirit of this agreement appears in many bilateral agreements between nations all over the world, we think it is worthwhile to present in the following a brief discussion of its main principles.

a) Exchange of rights "privileges" and routes

According to the system established by the provisions of the International Air Services Transit Agreement which was signed by the two nations, "the United States and the United Kingdom", air carriers of either nation have the rights to fly across the air space of the other, over specified routes "First Freedom" and to land at specified airports for refuelling and other non-traffic purposes.[155] The International Air Transport Agreement which grants the "Five Freedoms" of the air was signed

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154. Cooper, J.C., The Right to Fly (1947), pp. 177-178.

155. Art. I, Sec. 1 of the Air Transit Agreement provides:

"Each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air services:

1. the privilege to fly across its territory without landing;
2. the privilege to land for non-traffic purposes."

and ratified by the United States only,[156] which means that there is no general grant of privileges to pick up and discharge passengers, mail and cargo by the airlines of either nation in each other territories.[157] However, by the conclusion of the Bermuda Agreement, the "Five Freedoms" of the air became operative between the two nations. The Bermuda Agreement granted to the "designated air carriers" of the two nations the right to operate international air services over a number of routes "specified in the Annex". In addition, the "designated air carriers" of either nation have the right to use the airports and the facilities available on those

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156. The Air Transport Agreement was denounced by the United States in 1946.

157. Art. 1, Sec. I of the Air Transport Agreement provides:

"Each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international services:

(1) the privilege to fly across its territory without landing;
(2) the privilege to land for non-traffic purposes;
(3) the privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses;
(4) the privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses;
(5) the privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory.

routes, as well as rights of transit, of stops for non-traffic purposes, and of "commercial entry and departure" for international traffic in passengers, cargo and mail.[158] The traffic rights can be only exercised at specific routes, and indicated airports.[159] In addition, the exercise of the traffic rights is to be subject to certain principles laid down in the Final Act to the Bermuda Agreement. These principles and limitations are as follows:

> "(3) That the air transport facilities available to the public must bear close relationship to the requirement of the public for such transport.
>
> (4) That there shall be a fair and equal opportunity for the carriers of the two nations to operate on any route between their respective territories (as defined in the Agreement) covered by the Agreement and its Annex.
>
> (5) That, in the operation by the air carriers of either Government of the trunk services described in the Annex to the Agreement, the interest of the air carriers of the other Government shall be taken into consideration so as not to effect unduly the services which the latter provides in all or part of the same routes.
>
> (6) That it is the understanding of both Governments that services provided by a designated air carrier under the Agreement and its Annex shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which

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158. See Annex I to the Bermuda Agreement.

159. For the routes granted by the Bermuda I, see Annex III.

such air carrier is a national and the country of ultimate destination of the traffic. The right to embark or disembark on such services international traffic destined for and coming from third countries at a point or points on the routes specified in the Annex to the Agreement shall be applied in accordance with the general principles of orderly development to which both Government subscribe and shall be subject to the general principle that capacity should be related:

(a) to traffic requirements between the country of origin and the countries of destination;

(b) to the requirements of through airline operation; and

(c) to the traffic requirements of the area through which the airline passes after taking account of local and regional services."160

b) Capacity and frequencies

In our discussion of the capacity clauses of Bermuda I Agreement, it is useful to keep in mind, the fact that the clauses of this Agreement were drawn up as a compromise between two conflicting philosophies, on the one hand a strong desire for a large amount of freedom for commercial activities, and on the other hand, an equally strong desire for protection of national civil aviation

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160. See Resolutions 3, 4, 5 and 6 of the Final Act of the Bermuda I Agreement.

interests.[161] However, according to the principles set up by the provisions of the Bermuda Agreement, the number of services which can be provided on the routes exchanged, shall retain as primary objective, the provision of capacity adequate to the traffic demands between the country of the flag air carrier and the countries of ultimate destinations of the traffic.[162]

Resolution 4 of the Final Act to the Bermuda Agreement provides that "there shall be fair and equal opportunity for the carriers of the two nations to operate on any route between their respective territories."

With regard to Fifth Freedom traffic "carriage of passengers, mail and cargo to and from third countries", the Final Act to the Bermuda Agreement provides certain restrictions. Resolution 6 states that:

> "the right to embark or disembark on such services international traffic destined for and coming from third countries at a point or points on the routes specified

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161. Van Der Tuuk Adriani, "The Bermuda Capacity Clauses", Journal of Air Law and Commerce, Vol. 22 (1955), p. 406.

162. The most important provisions of the Bermuda I Agreement is that contained in Res. No. 6 of the Final Act. See Bin Cheng, The Law of International Air Transport (1962), p. 555.

in the Annex to the Agreement shall be applied in accordance with the general principles of orderly development to which both Governments subscribe and shall be subject to the general principle that capacity should be related:

(a) to traffic requirements between the country of origin and the countries of destination;

(b) to the requirements of through airline operation; and

(c) to the traffic requirements of the area through which the airline passes after taking account of local and regional services."

With regard to the frequencies of services to be offered by the designated air carriers of either nation, the provisions of the Bermuda Agreement do not provide for predetermination of frequencies.[163] However, according to the "Joint Statement" which was issued by the delegations of the two nations at the close of the Bermuda Conference, the two delegations indicated that the Bermuda Agreement contemplates that:[164]

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163. The policy of the U.S. has always opposed any predetermination of capacity. In an official statement it was said that "Our policy then, will be to oppose both arbitrary capacity restrictions and the stretching of those principles to the point of abuse. We shall continue to take the initiative in resisting predetermined capacity levels." See Lissitzun, O.J., "Bilateral Agreements on Air Transport", Journal of Air Law and Commerce, Vol. 13 (1946), p. 271.

164. Cooper, J.C., supra note 154, p. 185, see also Vlasic, supra note 8, s. 1, Chap. 1, p. 194. See also Kanaan I.Y., Air Transport Bilateralism in The Arab Middle East. A thesis presented to McGill University, 1970, p. 120.

- Each nation is free to determine the frequencies of the operation of its air carriers; and

- the air carriers of either nation are free to carry fifth freedom traffic subject to adjustment in the light of experience.

In the same statement, the delegations of the two nations declared that there is no specific limiations on frequencies; and each nation is free to determine for itself the number of frequencies which are justified services being related to traffic demands.

Finally, the Bermuda Agreement provides for "ex-post facto review" which means that either party to this agreement may ask for a review of the amount of capacity offered, in the event that it felt that the interests of its air carriers are being adversely effected, "but such review comes after and not before the market is tested".[165]

c) Change of gauge

The term "change of gauge" is a railroad term, used in the airlaw for the first time by the Bermuda

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165. McWhinny and Bradley, The Freedom of the Air, (1968), pp. 142-144.

Agreement of 1946.[166] The Bermuda Agreement defines "change of gauge" to mean "the onward carriage of traffic by an aircraft of different size from that employed on the earlier stage of the same route". However, according to the Bermuda Agreement, change of gauge may take place under certain conditions only. These conditions are as follows:

1. The change of gauge must be justified by reasons of economy of operation.

2. The aircraft used on the section more distance from the territory of the contracting State designating the airline is to be smaller in capacity than the one used on the near section.

3. The aircraft of small capacity shall operate only, in connection with the aircraft of larger capacity and shall be scheduled to do so.[167]

4. There must be adequate volume of through traffic.

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166. Al. Jassani, A., Iraq's Bilateral Agreements. A thesis submitted to the Institute of Air and Space Law, McGill University, 1971, p. 119. Lissitzyn noted that a broader term "transshipment" than the "change of gauge" was used in the U.S./France and the U.S./Belgium bilateral air transport agreements. See, O.J. Lissitzyn, "Change of Aircraft on International Air Transport", Journal of Air Law and Commerce, Vol. 14, 1947, p. 57.

167. Lissitzyn noted that "there is no requirement for the larger aircraft to wait for the arrival of the smaller one on the reverse direction". O.J. Lissitzyn, ibid., p. 60.

5. The provisions of the Bermuda Agreement relating to the regulation of capacity shall apply to all arrangements made with regard to the change of gauge.[168]

d) Rates and tariffs

Rates to be charged by the air carriers of the two nations for carriage of passengers, mail and cargo between points in the United Kingdom and points in the United States, are tobe determined at reasonable levels, due regard being paid to all relevant factors, such as cost of operation, reasonable profit and the rates charged by any other air carriers.[169] Such rates "shall be subject to the approval of the contracting Parties within their respective constitutional powers and obligations".[170] In addition, the Civil Aeronautics Board of the United States, announced its intention to approve the rate mecanism of the International Air Transport Association (I.A.T.A.).[171]

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168. See Annex V of the Bermuda I Agreement, paras. (a), (b) and (c). See also A. Al. Jassani, supra note 166, pp. 120 & 121.

169. See Annex II of the Bermuda I Agreement, para. (h).

170. Ibid., para. (a).

171. Annex II, para. (b) states that "The Civil Aeronautical Board of the United States having announced its intention to approve the rate conference machinery of the International Air Transport Association (hereinafter called "IATA"), as submitted, for a period of one year beginning in February 1946, any rate agreements concluded through this machinery during this period and involving United States air carriers will be subject to approval by the Board."

The Civil Aeronautics Board of the United States, when the Bermuda Agreement was concluded does had the power to require that any rate agreement involving the United States air carriers, operating domestically or internationally, should be filed with the Board for approval.[172] However, the Civil Aeronautics Board approval to the International Air Transport Association rate-making machinery was obtained for one year starting in February, 1946[173] and it was renewed in 1947, 1948, 1950, 1952, 1954 and it became permanent from 1955 to 1978.[174]

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172. When the U.S. signed the Bermuda Agreement of 1946, the C.A.B. has no direct power to regulate rates charged in international air transport, but it has only indirect power when the U.S. air carriers enter into rate agreements with each other or with foreign air carriers. See, S.W. Alpert, "American Bilateral Agreements on the Threshold of the Jet Transport Age", J.A.L.C., Vol. 26 (1956), p. 134. See also G.J. Gazdik, "International Rate-Making", IATA Bulletin, No. 9, July 1949, pp. 64-65. However, this rule was changed by s. 1002(j) of the Federal Aviation Act, by which the C.A.B. is empowered upon a complaint or upon its initiative to enter into a hearing concerning the lawfulness of existing tariff or a new tariff, and it may suspend the operation, or defer the use of such rate for a period or periods not exceeding three hundred and sixty five days in the aggregate from the effective date of such suspension, or it may take action to reject or cancel such tariff and the use of such rate.

173. C.A.B. reports 639 (1946).

174. C.A.B. Reports E-269 (1947), E-706 (1947), E-1227 (1948), E-3888 (1950), E-5709 (1951), E-6390 (1952), E-8023 (1954) and E-9305 (1955).

The two parties to Bermuda I foresaw certain cases where there is no IATA resolution, or when a rate agreement did not get the approval of either party, or finally, when either party withdraw or failed to renew its approval to such rates, and therefore paragraphs (e) and (f) of Annex II to the Agreement specify the procedures to be followed in such case. These procedures distinguish between two periods, the first period before the Civil Aeronautics Board of the United States has been given the power to regulate international airfares and the second after such power has been granted.[175]

Finally, it is worth to point out that the Bermuda rate provision provides for the submission of any rate dispute to the Provisional International Civil Aviation Organization and later to the International Civil Aviation Organization for an advisory report, and each contracting State agreed to use its best efforts to put into effect the opinion expressed into such report.[176] However, the Bermuda Agreement of 1946, which regulated the civil aviation relations between the United States and the United Kingdom for a period of three decades was finally denounced by the

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175. For more details about the procedures to be followed in such case, see paras. (e) and (f) of Annex II to Bermuda I Agreement.

176. See para. (g), Annex II of Bermuda I Agreement.

United Kingdom,[177] due to the fact that Britain became dissatisfied with the results achieved under Bermuda I regime, and looked for a bigger market share for British Airways.[178]

II. The Bermuda Agreement of 1977

The denunciation of the Bermuda Agreement of 1946, by the United Kingdom was followed by long-heated negotiations between the delegations of the two nations, and resulted in the conclusion of a new agreement between the two countries, known as Bermuda II on June 22, 1977.[179] The signature of Bermuda II by the United States has raised out cries of airlines official in the U.S. A number of the United States air carriers argued that the Bermuda II compromise would encourage other nations with which the United States has air services agreements to denounce them in order to get better concessions from the United States

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177. The notice of denunciating the Bermuda I Agreement, was made by the Secretary of State for Trade, Mr. Edmund Dell, and to be effective from June 22, 1976. See Av. Week & Space Tech., July 5, 1976, p. 5.

178. The British Dep. of Trade estimated that U.S. air carriers are earning nearly £300 million a year on the routes covered by the Bermuda I Agreement, while the British air carriers are earning £120 million only. See, Flight Internationals, July 1976, p. 4; see also Av. Week & Space Tech., July 26, 1976, p. 26.

179. Agreement relating to air services, July 23, 1977, United States - United Kingdom, U.S.T. - T.I.A.S., No. 8641.

as the United Kingdom did.[180] Others argued that the United States have demonstrated by the signature of Bermuda II that it can be "blackmailed into agreements simply by a threatened cessation of air services".[181] Some U.S. air carriers official argued that the United States should have allowed air services between the territories of the two nations to terminate rather than submit it to British demands.[182]

However, the compromise achieved at Bermuda in 1977, was called by the British Secretary of State for Trade, Edmund Dell, as "reasonable, sensible and satisfactory to both sides".[183] Alan S. Boyed, Special Ambassador and Chairman of the United States delegation described it "very satisfactory".[184] Secretary of Transport Brock Adams stated that Bermuda II supports the "principles of competition in the international market place. Although the British side had clearly sought to a more restrictive agreement, our negotiations held firm for that principle. In certain respects, more competition is permitted under

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180. Av. Week & Space Tech., July 18, 1977, p. 25.

181. Ibid.

182. Ibid.

183. Wall Street Journal, June 23, 1977, p. 4.

184. Ibid.

the new agreement than under the old".[185] It is worth to mention here that the British conservatives believed that the renegotiation of the Bermuda Agreement of 1946, had resulted in an obvious failure for the United Kingdom.[186]

In our brief discussion of the provisions of the Bermuda Agreement of 1977, we will throw few lights on the capacity to be offered, the tariffs to be charged, designation of airlines, settlement of disputes, and finally we will say some words about the reasons which prevented Bermuda II from being a model such as Bermuda I.

a) Capacity and frequencies

The capacity and the frequency of flights offered in scheduled air services between the United Kingdom and the United States can be regarded as the most important reason for the denunciation of the Bermuda Agreement of 1946, by the United Kingdom Government on June 22, 1976. However, the principle of "fair and equal opportunity to compete" which was established by Bermuda I, remains in force,[187] subject to the requirement that air carriers

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185. Statement of U.S. Secretary of Transportation Brook Adams, on the signature of the U.S.-U.K. Air Services Agreement in Bermuda (July 23, 1977).

186. See Journal of Commerce, June 24, 1977, p. 4.

187. Bermuda II, supra note 179, Art. 11(1).

take into consideration the interests of the other country's air carriers serving the same route,[188] and gear their services towards the provision of "capacity adequate to traffic demands".[189]

Although no restrictions on the amount of capacity provided can be made unilaterally, Bermuda II has complex and elaborate procedures for reviewing and controlling the capacity at the North Atlantic routes. The purpose of such procedures is "to provide consultative process to deal with cases of excess provision of capacity, while insuring that designated airlines retain adequate scope for managerial initiative in establishing schedules and that the overall market share achieved by each designated airline will depend upon passengers choice rather than the operation of any formula or limitation mechanisms".[190] Each designated air carrier is required to file its proposed schedules with both governments 180 days before each summer and winter seasons.[191] Such schedules may be amended after the airlines have seen the schedules filed by their competitors.[192] In the case that either party believes that

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188. Ibid., Art. 1(2).

189. Ibid., Art. 1(3).

190. Ibid., Annex 2(2).

191. Ibid., Annex 2(3).

192. Ibid.

there is an increase in frequency in any of the proposed schedules which is inconsistent with the principles set forth in article 2, it may so notify the other contracting party and request consultation.[193] However, such increase must take into account "the public requirements for adequate capacity, the need to avoid uneconomic excess capacity, the developments of routes and services, the need for viable airline operations, and the capacity offered by airlines of third countries between the points in question".[194] If the two parties disagree on the appropriate increase of the operation of each airline on the route in question, it will be limited to a level equal to the total of the number of frequencies the airline was allowed to operate during the previous corresponding session and the average of the traffic forecast percentages submitted by the two governments during the consultation.[195] Regardless of the come out of the consultation process, affected airlines will be allowed to increase their frequencies by twenty (20) round trips during the summer season and by fifteen (15) trips during the winter season. In no event a designated airline will be required to operate fewer than one hundred and twenty (120) round trips during the

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193. Ibid., Annex 2(4), (5).

194. Ibid., Annex 2(4).

195. Ibid., Annex 2(6).

summer traffic season and eighty eight (88) during the winter season.[196]

With regard to "Fifth Freedom" rights, Bermuda II provides very significant changes. The United States gave up fifth freedom rights to twenty two (22) cities.[197] In addition, the United States air carriers may serve Austria and Belgium for only three more years and the Netherlands, Norway and Sweden for five more years, which means the United States air carriers will have fifth freedom rights to Frankfurt, Hamburg, Munich and Berlin from London and Prestwick/Glasgow.[198] The United Kingdom will have fifth freedom rights to points in Central and South American, Japan and Mexico City.[199] Finally, it is worth to point out that the operation of the Concorde is expressly exempted from the capacity regulations provided by Bermuda II Agreement.[200]

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196. Ibid.

197. Brown, "Compromise Marks Bilateral Pact", Av. Week & Space Tech., June 27, 1977, p. 26.

198. Bermuda II, supra note 179, Annex I (United States Routes.

199. Ibid., (United Kingdom Routes).

200. Ibid., Annex 2(8).

b) Tariffs

With regard to the tariffs and fares to be charged for carriage of passengers, mail and cargo on the routes covered by Bermuda II, the International Air Transport Association was kept as the basic mechanism through which rate agreements will be reached, with the submission of such agreements to government approval.[201] Under Article 12 of Bermuda II, individual air carriers are "encouraged to initiate innovative cost-based tariffs".[202] However, the governments of the two contracting parties will furnish appropriate guidance to their air carriers during the International Air Transport Association conferences.[203] In order to avoid unnecessary delays and confusion, the agreement provides for the submission of tariff agreements involving the air carriers of the two countries to the appropriate aeronautical authorities of both countries for approval at least one hundred and five (105) days before the proposed date of effectiveness, and the authorities are required to use their best efforts to render their decision within sixty (60) days after such submission.[204] Tariffs

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201. Ibid., Art. 12(4).

202. Ibid., Art. 12(2).

203. Ibid., Art. 12, paras. 9(a), (b).

204. The 105 days may be waived or shortened with the consent of the aeronautical authority of the contracting Party with whom the filing is to be made.

of the designated airlines themselves must be filed with the aeronautical authority of the other contracting party seventy five (75) days before their effective date.[205] Finally, we must point out that Article 12, paragraph 9(a) of Bermuda II provides for the establishment of a Working Group to discuss rate-making standards.[206]

c) Designation of airlines

Under the Bermuda Agreement of 1946, each contracting party has the right to designate one or more airlines to serve the scheduled air routes agreed between the two nations. The new Bermuda Agreement provides for multiple designation in general,[207] but when it comes to North Atlantic routes, the multiple designation is only allowed on two routes selected by each party.[208] However, in the other North Atlantic routes multiple designation may take place if:

(1) total traffic on a particular route exceeds 600,000 passengers per year; or

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205. Bermuda II, supra note 179, Art. 12(5).

206. The "Tariffs Working Group" composed of experts in accounting, statistics, economic, financial analysis and market fares.

207. Bermuda II, supra note 179, Art. 3, para. 1(a).

208. Ibid., Art. 3, para. 2(b).

(2) an air carrier carried more than 450,000 passengers per year regardless of the total number carried by both airlines; or

(3) one air carrier does not compete in the route.[209]

d) Settlement of disputes

The settlement of disputes is the subject of Article 17 of Bermuda II Agreement. According to this article, a dispute is to be handled first by a formal consultation and then submitted to some persons or body agreed on by the two contracting parties. In the event that no agreement can be reached, the dispute will be referred to a three-member arbitration tribunal.[210]

Finally, it is worth to conclude this section by pointing out that the Bermuda Agreement of 1977, did not play the same role played by the Bermuda Agreement of 1946, and it did not work as a model like its predecessor. Prof. P.P.C. Haanappel summarized the reasons for this as follows:

"In the first place Bermuda II with its often very detailed provisions proved to be geared almost exclusively to the

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209. Ibid., Art. 3, para. 2(b)(i)-(ii).

210. The Bermuda I Agreement had provided for consultation then submission to the Interim Council of the Provisional International Civil Aviation Organization (PICAO). See Bermuda I, supra note 149, Art. 9.

United States-United Kingdom market. Secondly and more importantly, the new administration in Washington, D.C., the Carter administration became heavily committed to a more freely competitive international aviation policy than the one expressed in Bermuda II."[211]

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211. Haanappel, P.P.C., supra note 148, p. 261.

CHAPTER II: THE DEVELOPMENT OF CIVIL AVIATION IN THE LIBYAN ARAB JAMAHIRIA

Section I: The development of civil aviation in Libya

A. Introduction

The Libyan Arab Jamahiria is one of the Arab nations, it is located in the heart of the Continent of Africa, the Mediterranean Sea borders the country to the north. To the east of the country, lie the Arab Republic of Egypt and the Republic of Sudan. The country's southern side connects with Niger, Chad and the Republic of Sudan, with the Republic of Algeria in the west. On the north-west the Libyan Arab Jamahiria borders meet the Republic of Tunisia.[1]

The Libyan Arab Jamahiria land is vast, it is the largest country in the African Continent.[2] The population of Libya as shown by the last Libyan census is about three millions.[3] Libya was governed by the Turks from 1551 to 1711 and from 1835 to 1911, when the country was invaded

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1. "Libya A Glimpse of the Country, Its People, Its Past", ALQALAM, Vol. 2, No. 6, p. 4.

2. The territory of the Libyan Arab Jamahiria is seven times the size of the United Kingdom.

3. Most of the Libyan people, 57 percent, are concentrated in Tripoli, Bengazi and Zawia. More than 90 percent of them are Arabs, with a few Berbers, blacks, a small number of Greeks, Maltese, Palestinians, Tunisians, Egyptians, Syrians, Turks, Europeans and Americans.

by the Italians.[4] On December 24, 1951 the Libyan independence was proclaimed, defence and foreign affairs were taken over by Libyans.[5] However, on September 1, 1969, the revolution of the Libyan Arab people was trigged off under the leadership of the Libyan strong man Colonel Muammer Al. Qadhafi and the Libyan Arab Republic was established.[6]

B. Historical survey

In view of the fact that air transport industry all over the world was developed during the years following the First World War, it is natural that the Italians were the first who built airports and developed some aviation air services in the Libyan territory. Such airports and aviation air services were built and developed by the Italians for purely military purposes.[7]

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4. The Libyan territory was invaded by the Italians in September 1911, for more details, see Dr. Habib, H., "The Libyan Political Heritage", ALQALAM, Vol. 2, No. 6, pp. 11-16.

5. The United Kingdom of Libya was established and Idris first became the King of Libya until he was turned over by the September revolution of 1969.

6. In the words of Colonel Muammer Al Qadafi "the Revolution occurred because of national popular and human considerations".

7. Transport in Libya, A General Survey and Study of the Means of Communication, Vol. I, Policies Programmes, Doxidis Associates-Consultants on Development and Existics, p. 213.

However, the first international air service between Libya and the outside world was inaugurated on November 1, 1928, by the Italian Societa Anonima Navigazione Aera (S.A.N.A.), on a weekly basis between Rome-Syracuse-Tripoli, using Dornier Super Walfling boats.[8] In 1931, North Africa Aviazione (N.A.A.), another Italian airline was founded and inaugurated Tripoli-Sirt-Bengazi and Bengazi-Cyrena-Derna-Tobrouk services with land planes.[9]

Besides the Tripoli and Bengazi airports, which are used today for international air services, the Italians created during the Inter-War period a large number of landing strips in the various isolated communities such as Nalute, Ghat, Ghadams, Sebha, Murzaq, Brak and several others, but these were used and operated only for military purposes.[10]

During the years of the Second World War, all the Italians civil aviation operations were stopped, but during this period another batch of air fields were built mainly by the Royal Air Force.[11]

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8. Ibid., p. 213.
9. Ibid., p. 213.
10. Ibid., p. 213.
11. Ibid., p. 213.

Immediately after the end of the Second World War, the Libyan territory was served once again by civil international air services, which at the beginning were exclusively British.[12]

On July 14, 1960, the Libyan air carrier NAA/ Libiava started operating Tripoli-Sebha "twice weekly services" and Tripoli-Bengazi-Athens. Both services were operated with D.C. 4s, to be subsequently replaced by a D.C. 3, on the Tripoli Sebha route and D.C. 6B, on the Tripoli-Bengazi-Athens route.[13]

During 1963 and 1964, a general study for the means of communication in the Libyan territory was made and steps were taken by the Libyan Government for the establishment of a Libyan national air carrier as a wholly government-owned corporation.[14] According to Article 3 of Law No. 22 of 1964, by which the first Libyan air carrier was established, the carriage of passengers, mail and cargo for hire between two points in the Libyan territory, was granted to the

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12. Ibid., p. 213.

13. Ibid., p. 213.

14. The Kingdom of Libya airlines was established by the Royal Decree No. 22 of 1964. The national airline of Libya will be discussed in the second section of this chapter.

Libyan national airline only.[15] However, on October 1, 1965, the first national airline "Kingdom of Libya Airlines" began operations nationally and internationally.[16]

C. Regulation of Civil Aviation in the Libyan Arab Jamahiria

During the years following the independence of Libya, two laws were issued for the regulation of civil aviation in the Libyan territory. The first law was issued by a Royal Decree on September 23, 1956,[17] and the second was issued during 1965.[18] In our review of these two laws, we will discuss the articles which as we believe appear to have some importance in regard to our subject "the Libyan Bilateral Air Transport Agreements".

I. The Civil Aviation Law of 1956

This law was enacted by the Royal Decree No. 47 of 1956, and it consists of fifty three (53) articles divided into eight parts. The subjects discussed by the provisions of this decree can be specified as follows:

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15. Before the establishment of the United Kingdom of Libya airlines, foreign airlines operated routes not only from points outside Libya, but between points in the Libyan territory.

16. The Libyan Arab Airlines Magazine (1975), p. 1.

17. Royal Decree No. 47 of 1956.

18. The Libyan Civil Aviation of 1965.

general rules, such as interpretation of certain terms,[19] nationality and registration of aircraft,[20] licences of the crews and airworthiness of aircraft,[21] air services,[22] airports,[23] accident investigation,[24] and penalties and fines.[25] The last part of the Royal Decree No. 47 of 1956 deals with rules of the air, weather reports and the shipment of weapons.[26]

A. Scheduled air services

According to the provisions of the Royal Decree No. 47 of 1956, scheduled air services cannot be established unless with an agreement between the Libyan Government and the State whose nationality the aircraft possesses, or with a permit issued by the Minister of Communications, and in accordance with the conditions laid down therein. The points as specified by the Royal Decree No. 47 of 1956 are:

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19. See Article 2, supra note 17.
20. See Articles 5 to 14, ibid.
21. See Articles 15 to 18, ibid.
22. See Articles 19 and 20, ibid.
23. See Articles 22 to 31, ibid.
24. See Articles 32 to 39, ibid.
25. See Articles 40 to 43, ibid.
26. See Articles 44 to 53, ibid.

1. Air services between points in the Libyan territory and points in foreign territories.

2. Air services between points situated in the Libyan territory.[27]

B. Non-scheduled air services

The provisions of the Royal Decree No. 47 of 1956, grant to the aircraft of the States parties to the Convention on International Civil Aviation (the Chicago Convention), not engaged in scheduled international air services the following rights:

1. The right to cross the air space above the Libyan territory without landing (First Freedom), or to land for refuelling or other non-traffic purposes (Second Freedom).

2. To take on and put down passengers, mail and cargo, in accordance with the conditions which may be laid down by the Minister of Communications.

However, no foreign aircraft can make non-scheduled air service between two points in the Libyan territory, except with special permission, and in accordance with the conditions laid therein.[28]

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27. See Article 19, ibid.

28. See Article 20, ibid.

From the reading of Articles 19 and 20 of the Royal Decree No. 47 of 1956, we may come to the conclusion that:

1. International and domestic scheduled air services may not be inaugurated in the Libyan territory unless:

   a) a bilateral agreement was concluded between the Libyan Government and the State whose nationality the aircraft possesses;

   b) a permission was granted by the Minister of Communications.

2. The aircraft of the States parties to the Chicago Convention of 1944, not engaged in scheduled international air services, may:

   a) cross the air space above the Libyan territory without landing;

   b) land in the Libyan territory for refuelling or other non-traffic purposes;

   c) take on and put down passengers, mail and cargo, in accordance with any condition laid down by the Minister of Communications.

3. Non-scheduled air services cannot be inaugurated between two points in the Libyan territory by an aircraft of a State party to the Chicago Convention of 1944, unless a permission was obtained from the Minister of Communications.

C. Aircraft of non-contracting States

The provisions of the Royal Decree No. 47 of 1956, prohibited the aircraft of non-contracting States

(a State which is not party to the Chicago Convention)[29] from flying over the Libyan territory, except with the permission of the Minister of Communications, and in accordance with any conditions laid down therein.[30]

D. Foreign military aircraft

The Royal Decree No. 47 of 1956 declared that no foreign military aircraft can fly across the air space above the Libyan territory or land for any purpose, except in accordance with:

1. An agreement between the Libyan Government and the State whose nationality the aircraft possesses.
2. A permit from the Minister of Communications.[31]

II. The Civil Aviation Law of 1965

The Royal Decree No. 47 of 1956, was substituted by the Libyan Civil Aviation Law of 1965, which is in

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29. Article 2 of the Royal Decree No. 47 of 1956 defines the term "contracting States" to mean States parties to the Chicago Convention of 1944.

30. See Article 47, supra note 17.

31. During the years following the independence of Libya on December 24, 1951, a number of agreements were concluded between Libya and other nations, by which the Libyan Government granted to the military aircraft of those nations the right to cross the Libyan territory, and to land in certain points. However, all those arguments were terminated by the September revolution of 1969.

force at the present day. The Civil Aviation Law of 1965 consists of eighty three (83) articles divided into ten parts. The subjects discussed by the new law are: air space, types of aircraft, nationality, registration, ownership, attachment and seizure of aircraft, establishment of airlines, air transport, aircraft accidents and penalties.

In the following, we will discuss certain articles which as we believe, have some connection with our subject (the Libyan Bilateral Air Transport Agreements).

A. Air sovereignty

The Law of 1965 made the principle of sovereignty much clearer than the Royal Decree No. 47 of 1956. The Libyan Civil Aviation Law of 1965 declares that Libya has complete and exclusive sovereignty over the air space above its territory and its territorial waters,[32] and therefore no foreign aircraft may overfly or land in the Libyan territory except with:

a) An international convention,[33] or bilateral or multilateral agreement to which Libya is a party.

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32. See Article 2, supra note 18.

33. Libya became a contracting party to the Convention on International Aviation, concluded at Chicago on December 7, 1944, on January 29, 1953.

2. A permit issued by the Director General of Civil Aviation.[34]

Foreign military aircraft are not allowed to overfly the Libyan territory or to land therein, unless authorised by the Director General of Civil Aviation.[35] However, the above condition is not applicable to foreign military aircraft flying over the Libyan territory according to the provisions of an international convention or bilateral or multilateral agreement in force.[36]

B. Scheduled and non-scheduled air services

The provisions of the Libyan Civil Aviation Law of 1965, do not provide the rules that should be applied to scheduled and non-scheduled air services, both domestically and internationally. However, Article 82 of the Civil Aviation Law of 1965 states that:

> "Law No. 47 of 1956 is hereby replaced. Regulations in force shall remain effective insofar as they do not conflict with the provisions of this Law until they are repealed or amended."

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34. See Article 3, supra note 18.

35. See Article 18, ibid.

36. See Article 19, ibid.

This means that all regulations concerning scheduled and non-scheduled air services, both internationally and domestically, shall remain effective and applicable if it met the following conditions:

a) do not conflict with the provisions of the Civil Aviation Law of 1965;

b) such provisions are not repealed or amended.[37]

In the following, we will try to examine Articles 19, 20, 47 and 49 of the Royal Decree No. 47 of 1956 and Articles 2, 3, 18 and 19 of the Libyan Civil Aviation Law of 1965, in order to findout if there is any conflict between these articles. The rules laid down by Articles 2, 3, 18 and 19 of the Civil Aviation Law of 1965 are:

1. Libya has complete and exclusive sovereignty over the air space above its territory and territorial waters.

2. No foreign aircraft may overfly or land in the Libyan territory except in accordance with:

   a) an international convention or bilateral or multilateral agreement in force;

   b) a permit issued by the Director General of Civil Aviation.

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37. See Article 82, ibid.

The words "foreign aircraft" and "land" are used in a general way, which means a foreign aircraft can be a civil or military aircraft, it also means that such aircraft may be engaged in scheduled or non-scheduled air services. On the other hand, the word "land" may mean landing of an aircraft for any purpose, "non-traffic purposes or traffic purposes".

Article 19 of the Royal Decree No. 47 of 1956, deals with international and domestic scheduled air services; such air services cannot be inaugurated except with an agreement between the Libyan Government and the State of the aircraft, which means a bilateral agreement between the State whose nationality the aircraft possesses and the Libyan Government is to be concluded before the inauguration of such scheduled air services.[38]

Article 20 of the Royal Decree No. 47 of 1956, deals with the operations of non-scheduled air services. It declares that the aircraft of any State party to the Chicago Convention of 1944, not engaged in scheduled air services may:

a) cross the air space above the Libyan territory without landing, or land

38. See Article 19, supra note 17.

for refuelling and other non-traffic purposes;

b) take on and put down passengers, mail and cargo.

The same article also declares that no foreign aircraft may make non-scheduled flights between points in the Libyan territory, except with a special permit issued and the conditions specified of by the Minister of Communications.[39]

3. Foreign military aircraft are not allowed to overfly the Libyan territory or land therein unless:

a) according to the provision of international treaty or agreement; or

b) according to an authorisation issued by the Director General of Civil Aviation.[40]

Article 49 of the Royal Decree No. 47 of 1956, declares that:

"No foreign military aircraft may overfly the Libyan territory, except with:

a) the conclusion of an agreement between Libya and the State whose nationality the aircraft possesses; or

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39. See Article 20, ibid.

40. See Article 19, supra note 18.

b) a permit issued by the Minister of Communications.[41]

From the above comparison between the provisions of the Libyan Civil Aviation Law of 1965 and the provisions of the Royal Decree No. 47 of 1956, the writer of this paper believes that there is no conflict between the two laws as far as scheduled and non-scheduled air services are concerned, and therefore articles 19 and 20 of the Royal Decree No. 47 of 1956 are still applicable.[42]

Section II: The National Airline of the Libyan Arab Jamahiria

A. Background

Kingdom of Libya Airlines (K.L.A.), was the first national airline; it was established under a Royal Decree issued in November, 1964.[43] The Kingdom of Libya Airlines was a wholly government-owned corporation.[44] It was granted the rights to purchase and lease commercial aircrafts, to repair and overhaul its aircrafts, to act as an agent for other international airlines, and to establish institutions or to make any other arrangements for the training of the

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41. See Article 49, supra note 17.

42. For the rules governing scheduled and non-scheduled air services, see pp. 84-86 above, Section II.

43. See Article 1, supra note 14.

44. See Article 6, ibid.

Libyan nationals.[45] The Kingdom of Libya Airlines inaugurated its scheduled international air services on October 1, 1965, using two newly purchased Caravelle VIR aircraft, and a third Caravelle was put in services in 1967, to enable the Kingdom of Libya Airlines to increase its scheduled international air services. Domestic air services were inaugurated during this period using F.27 and D.C. 3 equipment.[46]

The scheduled international air services of the first Libyan national airline include services from Tripoli and Bengazi to Rome, Cairo, Athens, Paris, Geneva, London, Beirut, Tunisia and Malta. All of these cities were served exclusively with Caravelle, except for Tunisia and Malta which were served with F.27. Domestic schedules include services to and from Tripoli, Bengazi, Marsa Brega, Beida, Tobrouk and Kufra.[47]

In September 1, 1969 the Libyan Revolution broke out to change the system of government and all faces of

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45. See Article 3, ibid.

46. Kingdom of Libya Airlines Study. A study made by T.W.A., p. 2; see also the Libyan Arab Airlines Magazine, supra note 16, p. 1.

47. Kingdom of Libya Airlines Study, ibid., p. 2; also the Libya Arab Airlines Magazine, ibid., p. 1.

life in the country.[48] The importance of the national airline was put into consideration. The Royal Decree was amended, and the name of the Libyan national airline was changed to the Libyan Arab Airlines Corporation.[49] Newly purchased Boeing 727-200 were put into service in March 1971, in addition to more F.27s.[50] Shortly thereafter, the Libyan Arab Airlines Corporation began considering membership in international and regional organizations.[51]

On January 1, 1975, the life of the Libyan Arab Airlines Corporation was terminated,[52] and a new body under the name of the Libyan Arab Airlines Company was established.[53] This action was taken, in order to take the national airline out of the very strict government regulations, and to grant to the new body the freedom of movement which is available

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48. Before the September Revolution of 1969, Libya was very poor and the country was unable to gain its full freedom, due to the existence of two military bases for the United Kingdom in Tobruk and the United States in Tripoli.

49. The Royal Decree No. 22 of 1964 as amended by the Decree No. 98 of 1970. Article 2.

50. The Libyan Arab Airlines Magazine, supra note 16, p. 1.

51. L.A.A. became an active member in the International Air Transport Association (I.A.T.A.), the Arab Air Carriers Organisation (A.A.C.O.), and the Association of African Airlines (A.A.F.R.A.).

52. Aljarida Elrassmia, No. 22/1975, Decree No. 4, Art. 1.

53. Aljarida Elrassmia, ibid., Decree No. 5, Article 1.

under the Libyan Commerial Law.

However, Decree No. 5 of 1975, by which the Libyan Arab Airlines Company was established, grants to it the same rights that were granted to the old Kingdom of Libya Airlines (K.L.A.) under Article 3 of the Royal Decree No. 22 of 1964.[54] In addition, the new Decree gives it the freedom of movement and action which is available under the provisions of the Libyan Commercial Law.[55] The direct result of the freedom granted can be appreciated by looking at the enlargement of the Libyan Arab Airlines operations, internationally and domestically, the number of aircraft purchased and the number of Libyan pilots, co-pilots, flight engineers and ground engineers.[56] The fleet of the Libyan Arab Airlines at the present day consists of about twelve (12) 727-200[57] and more than fifteen (15) F.27s. A new contract was signed last summer between L.A.A. and the

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54. See Article 2, ibid.

55. See Article 1, supra note 53.

56. According to the Libyan Arab Airlines official documents, about 70 percent of the operating crews are Libyan citizens and a large number of students are sent every year for training. According to the Libyan Arab Airlines winter timetable No. 46, the national airline flies to more than twenty three cities in Europe, Africa and Asia.

57. One of L.A.A. Boeing 727-200 was shot down by Israel on February 21, 1973.

Air Bus Corporation for the purchase of ten (10) Air Bus A-300.[58]

B. Name and the legal capacity of the national airline

Article 1 of Decree No. 5 of 1975 declares that the Libyan Arab Airlines is a national company, attached to the Ministry of Communications, with headquarters in Tripoli, the capital of the Libyan Arab Jamahiria. However, branches and offices may be established anywhere in the Libyan territory or anywhere abroad. Under the provisions of the Libyan Commercial Law which apply to the L.A.A. Company, in addition to Decree No. 5 of 1975, the Libyan Arab Airlines has the capacity to sue and to be sued.

C. Management of the Libyan Arab Airlines

According to the Decree No. 5 of 1975, the management of the Libyan Arab Airlines Company is vested in the Board of Directors. The Board consists of a chairman and not more than six (6) other directors to be appointed by the Government, two other directors are to be elected by the working force.[59] The Board of Directors has the

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58. A contract was concluded between L.A.A. and the Boeing Corporation, during 1977 for the purchase of three Boeings 747, the aircrafts were manufactured but never granted the exporting licences needed, due to political reasons.

59. See Article 8, supra note 53.

largest powers to run the company and to put its general policies.[60] However, the rules mentioned above which are concerning the appointment of the Board of Directors, are not applicable at the present day, due to the application of Part II of the Green Book which was written by Colonel Quadafi, the leader of the Libyan Revolution of 1969. According to Part II of the Green Book "The Solution of the Economic Problem", the principle of workers should be disappeared and the principle of partners should be applied, which means there is no Board of directors, but the partner "all the working force" have the right to appoint individuals for the "Peoples Committee" which replaces the Board of Directors.[61]

D. Functions and powers

The Libyan Arab Airlines is the only scheduled national air carrier in the Libyan Arab Jamahiria, and therefore its functions and objectives are so large. However, the principal function of the company as declared by Article 2 of the Decree No. 5 of 1975 is:

> "to carry out all air transport operations within and outside the Libyan Arab Republic, including the transport of mail and cargo."

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60. See Article 9, ibid.

61. The principle of partners as advocated by Colonel Quadafi in his Green Book is applicable at the present time in all the Libyan national companies, with an exception in regard to the oil companies.

To enable L.A.A. to fulfill its functions, it has the following powers:

1. To acquire , charter, hold or dispose of aircraft.
2. To repair and overhaul its aircraft and other vehicles.
3. To be an agent for other international air carriers.
4. To carry on operations of importing and exporting related to its objectives.
5. To establish, institute or make other arrangements for the training of persons engaged in any activities connected or ancillary to air transport services.
6. To acquire, hold or dispose of any property.

In addition, the Libyan Arab Airlines may enter into associations or collaboration of any kind with other companies, corporations or organizations which carry out similar activities or which help in the achievement of its objectives, and to merge the said companies and organizations in it.[62]

E. Capital

According to Article 7 of Decree No. 5 of 1975, the authorised share capital of the Libyan Arab Airlines

62. See Article 3, supra note 53.

is twenty five (25) million Libyan Dinnars (about seventy five (75) million American dollars), divided into twenty five (25) thousand shares, wholly owned by the Libyan Government. The above amount includes any property transferred from the old Libyan Arab Airlines Corporation to the Libyan Arab Airlines Company.[63] However, the Libyan Arab Airlines Company has the power and the right to invest its funds in any securities and make any investments. The Company also has the right to borrow money in Lybia or in foreign countries after obtaining the permission of the Government. The capital of the Libyan Arab Airlines cannot be increased except in accordance with a decision from the Council of Ministers which is nowadays called the "General Peoples Committee".[64]

F. Budget

According to Article 12 of Decree No. 5 for 1975, Libyan Arab Airlines has its own budget which is independent of the State's budget. The budget of L.A.A. should be prepared in the same manner as the budget of any commercial

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63. The value of any property transferred from L.A.A. Corporation to the L.A.A. Company would be decided by the Minister of Communications. However, in practice, L.A.A. Company did not accept the transfer of all L.A.A. Corporation property. For example, L.A.A. Company refused the transfer of two Caravelles owned by the old Corporation.

64. See Article 7, supra note 53.

airline, and its financial year is the same as that of the State.[65]

However, the Libyan Government is under an obligation to compensate for any loss suffered by the Company as a result of:

1. The establishment of a new service, due to the government order and without taking into account the commercial principles.

2. If the Company made any discount in regard to a specific category of passengers or mail, or in regard to certain route or certain flight, as a result of a government order.[66]

3. If the government issued regulations or instructions that may affect the level of services provided by the Company.[67]

G. Auditor's account

Due to the fact that the Libyan Arab Airlines is wholly owned by the Government, the right to appoint one or more auditors is given to the Minister of Communications after seeking the opinion of the President of the State

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65. The State financial year starts on January 1 and ends on December 31.

66. According to Government orders, L.A.A. has special fares for workers who come from certain countries to work in Libya; there are also special fares for students.

67. See Article 15, supra note 53.

Audit Department.[68]

To conclude this chapter, the writer of this paper believes that it is worth to mention here that the Libyan Arab Jamahiria and other Arab States,[69] met at Bagdad in April 1961 and concluded an agreement for the establishment of Arab air carrier under the name of the Arab International Airline Corporation.[70] The main objective of this Corporation is the establishment of scheduled air services between the Arab States on one hand, and between the Arab States and the outside world on the other hand.[71] The Arab International Airlines has all the rights to acquire, charter, hold or dispose of aircraft, spare parts and any other equipment needed for its operations, to be an agent for the Arab Airlines and other international air carriers in the territories of the Arab States or anywhere abroad.[72] The capital of this airline is £17 millions divided into 170 shares.[73] The management of the Corporation

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68. See Article 13, ibid.

69. The Arab States represented at the Bagdad Meeting are: Jordan, Tunisia, Algeria, Sudan, Iraq, Saudia Arabia, Egypt, Lebanon, Libya, Yemen, Morocco, Kuwait, Quater, Syria and the South Yemen Republic.

70. See Article 1 of the Bagdad Agreement for the establishment of Arab International Airlines.

71. See Article 2, ibid.

72. Ibid.

73. See Articles 6 and 7, ibid.

is vested in the Board of Directors in which each contracing State is represented.[74] The Board of Directors has all the powers needed for the management of the Corporation,[75] and it meets four times a year. Extraordinary meeting may be held at any time at the request of the Chairman of the Corporation or the General Manager and two members of the Board of Directors.[76]

However, the States parties to the Agreement are under the duty to grant the "Five Freedoms" of the air for the operations of the said corporation; they were also required to provide all the assistance needed for its operations, and in general, to put the Corporation on the same foot with their national airlines.[78]

Finally, we like to express that the establishment of the said air carrier, will be of great importance for the development of civil aviation in the Arab region, but as far as this writer is informed the Arab International Airline exists on paper only.

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74. See Article 18, ibid.
75. See Article 19, ibid.
76. See Article 22, ibid.
77. See Article 26, ibid.
78. See Article 27, ibid.

CHAPTER III: ANALYSIS OF THE LIBYAN BILATERAL AIR TRANSPORT AGREEMENTS

Section I: The Grants of Rights

I. Reciprocity clause

Air transport rights are exchanged between nations all over the world by provisions embodied in bilateral agreements. Such rights should be designated to meet two purposes. First, the need of public for air transport, and second, to assure that national airlines have the opportunity to achieve benefits not less than those available to the foreign airlines.[1] However, the experience with bilateral agreements has shown, that in a bilateral agreeemnt between a small country and a big country, reciprocal rights exist "on paper only",[2] but in practice, only the country which has a strong aeronautical industry and strong airline or airlines, will be able to use all the rights granted to it under the provision of the bilateral agreement, which means a small country like the Libyan Arab Jamahiria with a young national air carrier, and very little experience in the field of air transport and generally in the field of aeronautical industry, in addition to a small

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1. Gilliland, W., "Bilateral Agreements", The Freedom of the Air, edited by E. McWhinney and M.A. Bradley, 1968, p. 140.

2. See ICAO Doc. 4510 A-2-EC/72, Discussion of Commission No. 2 of the First Assembly, Vol. I, Development of International Air Transport (Montreal, May 1947), p. 14.

amount of population, will not be able to use all the rights granted to it under its bilateral agreements, and to operate air services to all the points it has achieved.[3]

II. The operating permission

In all the bilateral agreements concluded by the Libyan Arab Jamahiria, it is expressly stated that, the agreed services may not be inaugurated by the designated airline(s) unless an operating permission has been obtained from the contracting party granting the rights.[4] Such permission must be granted to the designated airline without undue delay.[5]

III. Transit Rights

Both the Paris Convention of 1919,[6] and the Havana

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3. The national air carrier of the Libyan Arab Jamahiria "Libya Arab Airlines" operates international air service to a few points in comparison with the number of points achieved by the bilateral agreement concluded by Libya.

4. See the air services agreement between the Libyan Arab Jamahiria and the U.S.S.R., concluded on October 26, 1974, and registered with the International Civil Aviation Organization, Reg. No. 2590, Art. 4, para. 1(6).

5. Article 3, para. 3 of the air services agreement between the Libyan Arab Jamahiria and the Swiss Confederation, concluded on June 11, 1971. The operating permission will be discussed in more details under section II of this chapter.

6. The Convention Relating to the Regulation of Aerial Navigation, supra note 33, Section II, Chapter I.

Convention of 1928,[7] failed to provide for multilateral exchange of transit and traffic rights. Prior to the Chicago Conference of 1944, a number of nations prohibited the transit flights in the air space above their territories. Turkey prohibited all transit flights over its territory, and in 1939, Spain refused to permit British Airways, Air France and KLM to fly over the Spanish territory.[8] At the end of the Chicago Conference of 1944, two agreements were drafted separately to cover the economic control problems. These agreements are the International Air Transit Services Agreement "The Two Freedoms Agreement" and the International Air Transport Agreement "The Five Freedoms Agreement".[9] The two agreements are based on the so-called "Five Freedoms of the Air" as defined by the Canadian delegation in the Chicago Conference.[10]

The Libyan Arab Jamahiria is not a contracting party to the International Air Transit Services Agreement, and therefore most of the bilateral agreements concluded by

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7. The Pan-American on Commercial Aviation, supra note 66, Section II, Chap. I.

8. Goedhius, Air-Law Making (The Hague Martinus Nijhoff, 1938), p. 9.

9. For more details, see pp. 46-51 of Chapter I above.

10. For the Canadian position at the Chicago Conference, see the Proceedings, supra note 77, Sec. III, Chap. I.

this country, expressly provide for the exchange of transit rights "the right to cross the air space of the other contracting party without landing and the right to land for refuelling and other non-traffic purposes". However, the above rights are applicable only, in respect of the agreed services. Generally, such provisions are formulated as follows:

> "Subject to the provisions of the present agreement the airline designated by each contracting Party should enjoy, while operating international air services:
>
> a) the right to fly without landing across the territory of the other contracting Party;
>
> b) the right to make stops in the said territory for non-traffic purposes."[11]

In the air service agreement between the Libyan Arab Jamahiria and Chad, the transit rights are not expressly mentioned, but even so, the writer of this paper believes that these rights are to be enjoyed by the airlines designated by the two nations, due to the fact that the agreed services cannot be inaugurated in the absence of the rights discussed above.

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11. See Art. 2 of the air services agreement with the Swiss Confederation, supra note 5.

IV. Traffic Rights

Traffic rights which can be considered as the main substance of any bilateral air transport agreement, in addition to the transit rights provide the legal basis for the operations of international air services by the airline designated by either contracting party. Article 1, section 1 of the International Air Transport Agreement defines traffic rights as follows:

> "3. The privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses.
>
> 4. The privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses.
>
> 5. The privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory."[12]

During the negotiation of any bilateral air transport agreement, the representatives of the two parties usually consider the Third and Fourth Freedoms as their

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12. ICAO Doc. 2187, International Civil Aviation Conference, Final Act, Appendixes, Chicago, Nov. 1-Dec. 7, 1944, p. 71.

"primary objectives of air services".[13] The Fifth Freedom comes as a "secondary", "complementary" or "fill up" traffic.[14] However, States cannot confine their air services to the Third and Fourth Freedoms only, due to the fact that it is impossible for the airline to operate economically and profitably, particularly over long distances.[15]

Here again, we should point out that the Libyan Arab Jamahiria like most nations is not a contracting party to the International Air Transport Agreement, and therefore, traffic rights should be expressly granted by the provisions of the bilateral agreements. The formula used by most of the Libyan bilateral agreements reads as follows:

> "Subject to the provisions of the present agreement, the airline designated by each contracting Party shall enjoy while operating international air services:
>
> c) the right to take on and put down in the said territory at the points specified in the Annex, international traffic in passengers, mail and cargo."[16]

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13. Azzie, R., "Negotiation of Bilateral Air Agreements", a lecture given to the Students of the I.A.S.L., McGill University, 1967, p. 14.

14. ICAO Doc. 4510, supra note 2, p. 31.

15. ICAO Doc. 4510, ibid.

16. Air service agreement with the Swiss Confederation, supra note 5.

With regard to the annexes to the Libyan bilateral air transport agreements, which in the opinion of this writer form the most important part of any bilateral agreement as far as the traffic rights are concerned, the policy adopted by Libya varies from one agreement to another.

However, in most of the bilateral air transport agreements concluded by the Libyan Arab Jamahiria, the two contracting parties exchange, in addition to the third and fourth traffic rights, the right to carry fifth and sixth traffic rights. For example, in the Annex to the agreement between the Libyan Arab Jamahiria and the Kingdom of Saudia Arabia, the air carrier designated by the Libyan Government has the right to operate international air services and to take on and put down passengers, mail and cargo on the following route: points in Libya - intermediate points - points in Saudia Arabia - beyond points to be agreed upon.

On the other hand, the air carrier designated by the Government of Saudia Arabia has the right to operate international air services and to take on and put down passengers, mail and cargo on the following route: points in Saudia Arabia - intermediate point (Beirut) - points in Libya (Tripoli) - beyond points (Tunis-Algiers-Elrebat or Casablanca.[17]

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17. See Annexes A and B of the air service agreement between the Libyan Arab Jamahiria and Saudi Arabia, concluded on August 23, 1971.

In the air service agreement with Syria, the carriage of Fifth Freedom traffic between certain points is subject to the approval of the program submitted to the aeronautical authority of each party by the designated airlines.[18]

In other bilateral agreements, such as the air transport agreements with Sudan and Yugoslavia, the contracting parties grant to the designated airlines the right to carry only Third, Fourth and Fifth Freedoms traffic.[19]

Finally, it is worth to point out that in the bilateral air service agreement with Chad, each contracting party grants to the airline designated by the other, only Third and Fourth Freedoms rights.[20]

V. Air Cabotage

The term "cabotage" was borrowed from the Law of the Sea and it was introduced to the airlaw by the Paris

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18. See the Annex to the air service agreement between the Libyan Arab Jamahiria and Syria, concluded on July 26, 1971.

19. See Annexes A and B of the air services agreement between the Libyan Arab Jamahiria and Sudan, concluded on July 30, 1972.

20. See Annexes I and II of the air services agreement between the Libyan Arab Jamahiria and Chan, concluded on March 2, 1966.

Convention of 1919.[21] The origin of the word "cabotage" derives from the Spanish word "cabo" which means "to travel from cape to cape".[22] In the modern maritime law, the word "cabotage" refers to coastal trade along the same sea coast "petit cabotage" or between ports of the same geographical unit of a State on two different seas "grand cabotage". In the air law the word "cabotage" means the air transport between two points or more in the territory of one State.[23] However, it is worth to point out that the right of cabotage in maritime law is an exception to the general rule of the freedom of the seas, but in air law "cabotage" is a part of the right of every State to exercise complete and exclusive sovereignty in the air space above its territory.[24]

Nowadays, practically all international civil aviation conventions and agreements in force, grant to every nation the right to reserve the right to carry passengers, mail and cargo between points situated in its territory to

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21. See Art. 16 of the Paris Convention of 1919, supra note 33, Sec. II, Chap. I.

22. Meyres, A. Dr., "Critical Reflexion on Air Cabotage", Interavia, Vol. 5, No. 12 (1950), p. 429.

23. Bin Cheng, supra note 162, Sec. IV, Chap. I, p. 314.

24. Shawcross and Beaumont in Air Law, 3rd ed., Vol. I, p. 209.

its nationals.[25]

According to Article 7 of the Convention on International Civil Aviation, the contracting States have all the right to refuse to grant cabotage rights to other contracting States, and undertakes not to seek from or grant "specifically" to "any State" or "airlines of any State" such privilege "on exclusive basis".[26]

All the bilateral air transport agreements concluded by the Libyan Arab Jamahiria contain clauses by which the contracting parties reserve cabotage rights to their nationals.[27]

VI. Ancillary Rights

Ancillary rights are reciprocal rights granted by the contracting parties in respect of the aircraft of the

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25. The only international convention now in force is the Chicago Convention of 1944. Article 7 of this Convention grants to every contracting State the right to reserve cabotage rights to its national aircraft.

26. An attempt was made by Sweden at the Sixteenth and Eighteenth meetings of the ICAO Assembly, to amend Article 7 of the Chicago Convention to the effect that the second sentence of the article would have to be deleted, but the necessary two third majority vote was not reached for approving the amendment, and article 7 remains as it stands now.

27. See Art. 3 of the air services agreement between the Libyan Arab Jamahiria and the U.K., concluded on July 13, 1971.

designated airlines engaged in international air navigation.

Under the provisions of the Convention of International Civil Aviation, the contracting States reciprocally grant to each other certain rights ancillary to international air navigation, in respect to aircraft registered therein.[28] Some bilateral air transport agreements, specially when one of the contracting parties is not a party to the Chicago Convention, provide for the application of the provisions of the Chicago Convention as between the contracting parties.[29] Where the two parties to a bilateral agreement are at the same time parties to the Chicago Convention, we believe that there is no need to incorporate such provisions into the bilateral agreement, due to the fact that these provisions will be applicable between the contracting parties pursuant to the Chicago Convention. However, in practice, some bilateral air transport agreements expressly incorporate certain provisions of the said Convention, and some others expressly reaffirmed the applicability of such provisions for the duration of the bilateral agreement. Bin Cheng believes that "the only value of such provision resides in its keeping in force the Chicago Convention of 1944, for the duration of

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28. Bin Cheng, supra note 162, Sec. IV, Chap. I, p. 327.

29. The air service agreement between Libya and Germany prior to the admission of these two States to ICAO.

the bilateral agreement, in the remote contingency that the parties still wish to be bound by the bilateral agreement, in its existing form even if the Chicago Convention suddenly lapses."[30]

The bilateral air transport agreements concluded by the Libyan Arab Jamahiria contain a number of provisions by which the contracting States grant to each other certain rights ancillary to those rights granted for the purpose of establishing international air services between their respective territories. In this brief analysis of the ancillary rights granted by the provisions of the Libyan bilateral agreements, the following subjects will be discussed:

1. Non-discrimination

Article 11 of the Chicago Convention provides "the laws and regulations of a contracting State relating to admission to or departure from its territory of aircraft engaged in international air navigation, or to operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality."

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30. Bin Cheng, supra note 162, Sec. IV, Chap. I, pp. 327-328.

With regard to the non-discrimination clause, the Libyan bilateral agreements may be divided into agreements without non-discrimination clause,[31] and agreements with non-discrimination clause.[32]

In the Libyan bilateral agreements which contain a non-discrimination clause, an identical provision to the one quoted above is found. In addition, this category of Libyan bilateral agreements extends the principle of non-discrimination to cover all laws and regulations of one contracting party governing entry into, sojourn in, transit through, and departure from its territory of passengers, crew, cargo and mail. Article 7 of the bilateral air transport agreement with Switzerland states:

> "1. The laws and regulatoins of one Contracting party governing entry into and departure from its territory of aircraft engaged in international navigation or flights of such aircraft over that territory shall apply to the designated airline of the other contracting Party.

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31. For example, the two air services agreements concluded with the United Kingdom on February 1953 and July 1971 do not contain non-discrimination clauses.

32. See Art. 7 of the air services agreement between the Libyan Arab Jamahiria and Iraq, concluded on November 10, 1975.

> 2. The laws and regulations of one contracting Party governing entry into, sojourn in, transit through and departure from its territory of passengers, crew, cargo or mail, such as formalities regarding entry, exit, emigration and immigration as well as customs and sanitary measures shall apply to passengers, crews, cargo or mail carried by aircraft of the designated airline of the other contracting Party while they are within the said territory."[33]

Although some Libyan bilateral agreement do not contain any provision to this effect, this writer believes that any discrimination against the aircraft of a contracting party based solely on their nationality would be regarded in international air law as illegal.[34]

2. The right to use airports and other facilities

Under the regime of the Chicago Convention, the contracting States enjoy certain privileges as to the use of airports and other air navigation facilities. Every airport in the territory of a contracting State which is open to the public use by its national aircraft shall likewise be open under the same conditions to the aircraft of all other contracting States, and in a similar way this applies to the use of all air navigation facilities including radio

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33. See Art. 5(1) of the air services agreement with the U.S.S.R., supra note 4.

34. Bin Cheng, supra note 162, Sec. IV, Chap. I, p. 328.

and meteorological services.[35]

In all the bilateral agreements concluded by Libya, no mention is made of these privileges. However, the writer of this paper refers the absence of such clause to the fact that there is no need to include the above clause in the bilateral agreement as far as such privileges have already been accorded by the Chicago Convention.

3. Airports and similar charges

According to the Chicago Convention, the aircraft of any contracting State engaged in scheduled international air services as well as other aircraft not engaged therein, shall enjoy in the territory of the other contracting States national treatment as to charges imposed for the use of airports and other air navigation facilities.[36]

A provision to this effect is found in some of the Libyan bilateral agreements. Article 13 of the bilateral agreement between Libya and Austria provides:

> "The charges imposed by either contracting Party for the use of airports and other aviation facilities by the aircraft of

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35. The Chicago Convention of 1944, supra note 84, Sec. III, Chap. I.

36. Ibid., Art. 15(2).

> the designated airline of the other contracting Party shall not be higher than those paid by its designated airlines operating international services."[37]

Other Libyan bilateral agreements added to the above clause the qualification "just and reasonable charges".[38] It is worth to point out here that according to the Libyan civil aviation law, airports are divided into two categories: aerodromes and airfields. Article 28 of the said law defines an aerodrome as "Every delimited area of land or water and buildings, installation, and apparatus thereof specified for take-off and landing of aircraft", and article 29 defines an airfield as "Every land suitable for landing and take-off withot the necessary facilities for public use such as hangarings and supplies of aircraft or acceptance of passengers and freight." However, such aerodromes or airfields can be public or private.[39]

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37. See Art. 2 of the air services agreement between the Libyan Arab Jamahiria and Tunisia, concluded on May 19, 1971.

38. See Art. 11 of the air services agreement between the Libyan Arab Jamahiria and France, concluded on May 24, 1974.

39. Art. 30 of the Libyan Civil Aviation Law of 1965, provides that "No private aerodrome or airfield may be established except after the approval of the Director General."

4. Certificates of airworthiness and licences of personnel

The Chicago Convention regime requires that every aircraft engaged in international air navigation, shall be provided with a certificate of airworthiness,[40] and the crew shall be provided with certificates of competency and licences issued or rendered valid by the State in which such aircraft is registered.[41] It also requires each contracting State to recognise the validity of such certificates and licences issued in accordance with requirements equal or above the minimum ICAO standards,[42] subject to the right of each State to refuse, for the purpose of flight above its own territory, certificates and licences granted to any of its nationals by another contracting State.[43]

A provision to this effect is found in few of the Libyan bilateral agreements. The formula used in these agreements is nearly the same.[44] Article 8 of the bilateral

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40. The Chicago Convention of 1944, supra note 84, Sec. III, Chap. I, Art. 31.

41. Ibid., Art. 32(a).

42. Ibid., Art. 33.

43. Ibid., Art. 32(b).

44. The Libyan air service agreements which contain provisions relating to the recognition of licences and certificates are the agreements with Switzerland, Niger, Chad, and Tunisia.

agreement between Libya and the Swiss Confederation provides:

> "1. Certificates of airworthiness, certificates of competency and licences issued or rendered valid by one of the Contracting Parties shall, during the period of their validity, be recognised as valid by the other Contracting Party.
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> 2. Each Contracting Party reserves its right, not to recognize as valid, for the purpose of flights over its own territory, certificates of competency and licences granted to its nationals or rendered valid for them by the other Contracting Party or by any other State."

The writer of this paper here again, believes that, even though most of the Libyan bilateral agreements do not contain a provision dealing with recognition of certificates and licences issued or rendered valid by either contracting party, that the rules provided by the Chicago Convention should dominate.

5. Exemption from customs duties

Libya as a contracting State to the Chicago Convention is under duty to grant certain exemptions from customs duties in its territory to the aircraft of any other contracting State. These exemptions apply to the aircraft itself on flight to, from or across its territory. In addition to exemption from customs duties, fuel, lubricating oils, spare parts, regular equipment and aircraft, stores retained

on board the aircraft on arrival in and departure from its territory are also exempted from inspection fees or similar national or local duties and charges. Supplies unloaded after arrival are subject to national customs regulations.[45]

The Chicago Standard Form recommends the principle of national and most-favoured nation treatment as to fuel, lubricating oils and spare parts introduced into the territory of a contracting party and intended solely for use by the latter's aircraft.[46]

In all the Libyan bilateral agreements, a provision is found whereby certain reciprocal concessions are made by both parties regarding customs duties. Article 6 of the bilateral agreement between Libya and the U.S.S.R. provides:

> "1. The aircraft of the designated airlines of either Contracting Party engaged in operating the agreed services as well as their regular equipment, supplies of fuel and lubricants, and aircraft stores (including food, beverages, and tobacco) on board such aircraft shall be exempted from all customs

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45. The Chicago Convention of 1944, supra note 84, Sec. III, Chap. I, Art. 24.

46. The Chicago Standard Form, supra note 83, Sec. III, Chap. I, Art. 4(b).

duties, inspection fees and other duties or taxes on arriving in the territory of the other Contracting Party, provided such equipment and supplies remain on board the aircraft up to such time as they are re-exported.

2. There shall also be exempt from the same duties and taxes, with the exception of charges corresponding to the service performed:

a) aircraft stores taken on board in the territory of either Contracting Party for use on board aircraft engaged on an international air service of the other Contracting Party;

b) spare parts entered into the territory of either Contracting Party for the maintenance or repair of aircraft used in international air services by the designated airline of the other Contracting Party;

c) fuel and lubricants destined to supply aircraft operated in international air services by the designated airline of the other Contracting Party, even when these supplies are to be used on the part of the journey performed over the territory of the Contracting Party in which they are taken on board."

Identical clauses to this are found in most of the Libyan bilateral agreements.[47] The most-favoured nation treatment as recommended by Article 4(b) of the Chicago Standard Form, appeared only in the bilateral agreement between Libya and the United Kingdom, which was concluded in

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47. See Art. 6 of the air services agreement with the Swiss Confederation, supra note 5.

1953,[48] and terminated by the conclusion of a new bilateral agreement in 1971.[49]

6. Facilitation

States parties to the Chicago Convention are under duty to adopt all practicable measures to facilitate and expedite navigation by aircraft between their territories, and to prevent unnecessary delay to aircraft, crews, passengers and cargo.[50]

Most of the Libyan bilateral agreements do not contain any provision in respect of facilitation, due to the fact that there is no need among members of ICAO to include provisions to this effect in their bilateral agreements. However, some Libyan bilateral agreements stipulate that:

> "passengers, baggage and cargo in direct transit across the territory of one Contracting Party and not leaving the area of the airport reserved for such

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48. See Art. 4 of the air services agreement with the United Kingdom, supra note 31.

49. The air services agreement with the United Kingdom of 1971, contains a clause identical to the one quoted above.

50. Chapter IV of the Chicago Convention of 1944, is entirely devoted to set forth measures to facilitate air navigation; see also Annex 9 to the Chicago Convention "Facilitation".

> purpose shall only be subject to a very simplified control. Baggage and cargo in direct transit shall be exempted from customs duties and other similar taxes."[51]

With regard to assistance to aircraft in distress, the Chicago Convention obliges the contracting States to provide such measures of assistance to aircraft in distress in their territories.[52]

A provision dealing with this matter is only found in the bilateral agreement between Libya and the U.S.S.R. Article 5 of the above agreement provides that:

> "In the event of a force landing or an accident to an aircraft of one Contracting Party in the territory of the other Contracting Party the provisions of the Convention shall be observed while taking appropriate procedure relating to search rescue and investigation."

However, we believe that, apart from the Chicago Convention, if not under the principles of international law at least for humanitarian reasons, any State is under a

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51. The provision quoted above is found in the air services agreement with the U.S.S.R., supra note 4, and the air services agreement between the Libyan Arab Jamahiria and Turkey, concluded on August 11, 1975.

52. The Chicago Convention of 1944, supra note 84, Sec. III, Chap. I, Art. 25.

duty to provide all possible assistance to any aircraft in distress in its territory.[53]

7. Transfer of funds

In most of the bilateral agreements concluded by Libya a provision regarding the transfer of funds earned in the territory of one of the contracting parties by the airlines designated by the other contracting party, is found. In some agreements, the provision relating to the transfer of funds provides that:

> "Each Contracting Party grants to the designated airline of the other Contracting Party the right of free transfer to its head office at the official rate of exchange fixed in accordance with the regulation in force at the time when transfer is requested, the excess gains over expenditure earned by this airline on its territory in connection with the carriage of passengers, mail and cargo."[54]

Other agreements added to the above clause:

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53. On February 21, 1973, a Libyan commercial airliner was in distress over Sinai desert. Israel which is a contracting party to the Chicago Convention did not provide for the airliner the assistance needed, but instead it shot it down.

54. See Art. 11 of the air services agreement with the United Kingdom, supra note 27.

> "Whenever the payment system between the Contracting Parties is governed by special agreement, this agreement shall apply."[55]

To conclude this section, it is worth to point out that most of the Libyan bilateral agreements contain provisions as to personnel necessary for operating the agreed services of the designated airlines of either contracting party, who may be maintained in the territory of the other contracting party. Article 7(3) of the bilateral agreement between Libya and Tunisia provides that:

> "The designated airline of the one Contracting Party shall have the right to maintain representations, including commercial and technical staff, in the territory of the other Contracting Party, subject to the applicable laws and regulations."[56]

Article 13 of the bilateral agreement with the U.S.S.R. adds that the representatives and their assistance shall be citizens of the contracting parties.[57] Other

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55. See Art. 10 of the air services agreement with the Swiss Confederation, supra note 5.

56. A similar clause is found in the air services agreements with Switzerland, Niger, the United Kingdom, Iraq, Bulgaria, Sudan and Yemen.

57. The air services agreement with the United Kingdom provides that such representatives shall be nationals of the contracting parties or nationals of any other State as agreed between both parties.

bilateral agreements stipulate that each contracting party undertakes to exempt from taxes, revenues and profits occurring from the operation of aircraft in international air services by the designated airline of the other contracting party.[58]

Section II: Inauguration of Services

Before either party to a bilateral agreement can exercise the rights granted to it under the bilateral agreement, certain steps must be taken and a number of conditions must be complied with.

A. Designation of an airline or airlines

In general, all bilateral agreements require each contracting party, prior to the inauguration of the agreed services, to designated an airline or airlines to exercise the rights achieved under the respective agreements, and to communicate such designation to the State granting these rights.[59] However, in a few bilateral agreements, the name of the designated airline appears in the Annex to the agreement.[60]

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58. See Art. 11(1) of the air services agreement with Sudan, supra note 19.

59. Bin Cheng, supra note 162, Sec. IV, Chap. I, p. 359.

60. In the Annex to the air services agreement with the U.S.S.R., the Soviet Union designated Aeroflot to operate the agreed services and Libya designated Libyan Arab Airlines.

In the bilateral agreements concluded by Libya, two policies were followed. In some bilateral agreements, each contracting party has the right to designate only one airline for the exercise of the rights granted.[61] In some others, each contracting party may designate more than one airline for the exercise of such rights.[62]

With regard to the period in which such designation should be made, and the procedure that should be followed for such designation, it is worth to point out that all the Libyan bilateral agreements do not fix a specified time for designation, and do not specify the procedure to be followed in designating the airlines. Finally, all the Libyan bilaterals follow the ECAC Standard Clauses, by requiring that the designation of airline(s) must be in writing.[63]

B. Operating permission

The second step to be taken for the operation of international air services, after the designation of an airline or airlines for the exercise of the rights granted,

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61. See Art. 10 of the air services agreement with Chad, supra note 20.

62. See Art. 3 of the air services agreement between the Libyan Arab Jamahiria and Yugoslavia, concluded on March 20, 1971.

63. See Art. 8, para. (a) of the air services agreement with Tunisia, supra note 37.

is to obtain an operating permission from the other contracting party. The granting of the operating permission represents the fulfillment of the provisions of the agreement, since the agreed services cannot be commenced without the necessary permission having been obtained. In all the bilateral agreements concluded by Libya a clause is found to the effect that the designated airline(s) must obtain appropriate operating permission prior to the inauguration of the agreed services.[64] No specific time is specified for the grant of the operating permission, but as a general rule in the Libyan bilateralism, such permission should be granted "without delay"[65] or "without undue delay".[66]

C. Requirement of operating permission

As we have mentioned above, the agreed services cannot be inaugurated by the designated airline(s) unless an operating permission has been obtained. But in order

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64. See Art. 4, para. 1(b) of the air services agreement with Saudia Arabia, supra note 17. Similar clauses are found in the Chicago Standard Form and the ECAC Standard Clauses.

65. See Art. 10 of the air services agreement with Chad, supra note 20. See also Art. 2 of the air services agreement with Yugoslavia, supra note 62.

66. See Art. 3, para. 1(b) of the air services agreement with Austria, supra note 33. See also Art. 4, para. 1(b) of the air services agreement with France, supra note 38.

to obtain the operating permission needed, the Libyan bilateral agreements provide that the designated airline(s) may be required to satisfy the aeronautical authority of the contracting party granting such permission that "it is qualified to fulfill the conditions prescribed under the laws and regulations normally and reasonably applied to the operation of international air services by such authorities, in conformity with the provisions of the Convention.[67]

D. Substantial national ownership and effective control

One of the most important reservations found both in multilateral,[68] and bilateral agreements is that the designated airlines should be substantially owned and effectively controlled by the State designating them or its nationals.[69] Both the Chicago Standard Form and the ECAC Standard Clauses contain provisions to this effect.[70] The substantial ownership and effective control clause was

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67. See Art. 3, para. 2 of the air services agreement with Austria, supra note 33.

68. See Arts. 5 and 6 of the Air Transit and the Air Transport Agreements respectively.

69. Bin Cheng, supra note 162, Sec. IV, Chap. I, p. 375.

70. According to Art. 7 of the Chicago Standard Form, a contracting party has the right to "withdraw" or "revoke" the permits if it has doubts as to the ownership and control of the designated airline. A similar clause is found in the ECAC Standard Clauses, see Art. 2.

born for reasons of security to prevent a carrier flying a flag of another State which could be an enemy.[71] This clause originated in the Lima Conference of 1940, and was intended to prevent German-owned companies incorporated in Latin America from conducting their activities near the Panama Canal Zone.[72] After the Chicago Conference of 1944, the substantial ownership and effective control clause was introduced for reasons of economic protection, to prevent indirect operations by third States not parties to bilateral agreements;[73] it also prevents airlines and investors from circumventing national laws by acquiring substantial ownership in a foreign airline. Furthermore, it prohibits a single State from acquiring a greater share of international air traffic by holding substantial interests in foreign air carriers.[74]

The substantial ownership and effective control clause is found in all bilateral agreements concluded by

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71. Goedhius, D., Basis of the Present Regime of Air, Recueil des cours, 1952, pp. 209-213.

72. Wassenbergh, Post-War International Aviation Policy and the Law of the Air, (The Hague Martinus Nijhoff 1962), p. 62. In January 1941, 25% of the local airlines operating in Latin America was owned by German nationals.

73. Goedhius, supra note 71, p. 213.

74. Wassenbergh, supra note 72, p. 63.

Libya.[75] According to Libyan bilateralism, each contracting party has the right to refuse to accept the designation of an airline by the other contracting party for the exercise of the agreed services, and to withhold or revoke the rights granted to the designated airline by the provisions of a bilateral agreement, or to impose any condition as it may deem necessary, in any case when it is not satisfied that the substantial ownership and the effective control of the airline in question are vested in the contracting party designating the airline or in its nationals.[76]

However, J.G. Gazdik, regards the clause of "substantial ownership and effective control" as it may raise a problem of interpretation, due to the fact that the Chicago Convention of 1944, do not provide any measures that may help in considering such an airline as a national of a State, and thus substantially owned and effectively controlled by that State or by its nationals.[77]

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76. See Art. 5, para. 1 of the air services agreement with France, supra note 38; see also Art. 4, para. 1 of the air services agreement between the Libyan Arab Jamahiria and Bulgaria, concluded on June 20, 1971.

77. Gazdik, J.G., "Nationality of Aircraft and Nationality of Airlines as Means of Control in International Air Transportation", Journal of Air Law and Commerce, Vol. 25 (1948), p. 4.

Section III: Capacity and frequency control

Capacity refers to the maximum amount of pay load,[78] which may be carried in the same direction along the route for which pay load is determined, as limited either by available seating or cargo space, or by maximum allowable weight, after allowing for the weight stores and fuel.[79] Dr. Edward Warner defines capacity as:

> "the total capacity to transport commercial load over a given route in some convenient unit of time. It may be expressed for example, as the product of the number of schedules operated by the average commercial capacity of one of the aircraft of the type used."[80]

From the above definition, it appears that the term "capacity" constitutes three elements:

I. Commercial load: This includes passengers, baggage, freight and mail. Anything additional, such as fuel, the weight of

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78. Pay load refers to the capacity expressed in metric tons available for sale for the transportation of passengers, baggage, amil and freight. See ICAO Doc. 7200. Lexion of terms used in connection with international civil aviation (Montreal, 1952), p. 3.

79. See the Minutes of Committee I on Multilateral Aviation Convention and International Body. Proposal of Canada, the Proceedings, supra note 73, Sec. III, Chap. I, Vol. I, p. 614.

80. Warner, E., "The Chicago Air Conference Accomplishments", Unfinished Business in Blueprint, p. 28.

the required stores, equipment necessary for the operation of aircraft, crew members, and any other load which do not come under the above four items, are excluded from the capacity control.

II. The routes: This refers to the routes specified and agreed upon in a bilateral agreement. The load carried outside the specified routes is not subject to capacity control by the contracting parties to such bilateral agreement.

III. Frequency: This refers to the number of flights, which usually have to be fixed per week in the proportion of the traffic offering.[81]

In all the bilateral air transport agreements concluded by the Libyan Arab Jamahiria, a clause is found for the definition of the term "capacity". This clause defines capacity in relation to an aircraft, and in relation to a specific air services.

Capacity in relation to an aircraft means "the pay load of that aircraft available in the route or section thereof", and capacity in relation to a specified air services means "the capacity of the aircraft used on such services, multiplied by the frequency operated by such aircraft over a given period on route or section of route".[82]

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81. Wassenbergh, supra note 72, p. 47.

82. See Art. 1, paras. (e) and (f) of the air services agreement with the Swiss Confederation, supra note 5, and Art. 1, paras. (e) and (f) of the air services agreement with Austria, supra note 33.

The purpose of having a capacity clause in an air services bilateral agreement is to determine the volume of air transport that may be offered by each designated airline, while operating the agreed services. In addition, the capacity clause imposes certain conditions and limitations, in regard to the capacity that can be offered by the designated airlines.[83] However, the capacity which a designated airline is entitled to offer on its routes is composed of two kinds of traffic:

I. The traffic of the contracting party, which comprises the traffic out from the State and back to it. This kind of traffic is known as "Third and Fourth Freedoms" traffic.

II. Supplement traffic or as Dr. Ferreyra of Argentina calls it "complementary to direct traffic", which comprises the traffic between other States along the route "Fifth Freedom" traffic.[84]

Most of the bilateral air transport agreements concluded by the Libyan Arab Jamahiria contain a clause, according to which the amount of capacity provided by each designated airline should be determined by an agreement between the aeronautical authorities of the two contracting

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83. Kanaan, I.Y., supra note 164, Sec. IV, Chap. I, p. 210.

84. Al. Jassani, A., supra note 166, Sec. IV, Chap. I, pp. 210, 211.

parties prior to the inauguration of the agreed services.[85]

In determining the capacity to be offered by the designated airlines, certain principles must be taken into consideration. The first principle which is accepted by most nations in concluding bilateral air services agreements is "the designated airlines shall enjoy fair and equal opportunities to operate the agreed services between the territories of the Contracting Parties".[86] The second principle expressed by Libyan bilateralism and to be taken into consideration is "the interests of the airline of the other Contracting Party as not to affect unduly the services which the latter provides in the whole or part of the same route."[87] The third principle used by the Libyan bilateral agreements to control the amount of capacity offered by the designated airlines is that the services provided "shall bear close relationship to the requirements of the public for transport on the specified routes and shall have as their primary objective the provision at a reasonable load factor, of

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85. See Art. 6, para. 3 of the air services agreement between the Libyan Arab Jamahiria and Yemen, concluded on February 18, 1975, and Art. 7, para. 4 of the air services agreement with Saudia Arabia, supra note 17.

86. See Art. 5, para. 1 of the air services agreement with the Swiss Confederation, supra note 5, and Art. 8, para. 1 of the air services agreement with the United Kingdom, supra note 27.

87. See Art. 8, para. 2 of the air services agreement with the U.S.S.R., supra note 4, and Art. 9, para. 4 of the air services agreement with Yugoslavia, supra note 62.

capacity adequate to carry the current and reasonably anticipated requirements for the carriage of passengers, cargo and mail originating from or destined for the territory of the Contracting Party which has designated the airline".[88] The carriage of "Fifth Freedom" traffic, carriage of passengers, cargo and mail both taken on and put down at points on the specified routes in the territories of States other than that designated, the airlines shall be made in accordance with the general principles that capacity shall be related to:

> "I. traffic requirements to and from the territory of the Contracting Party which has designated the airline;
>
> II. traffic requirements of the area through which the airline passes, after taking account of other transport services established by the State comprising the area; and
>
> III. the requirement of through airlines operation."[89]

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88. See Art. 7, para. 1 of the air services agreement between the Libyan Arab Jamahiria and Morocco, concluded on July 22, 1970, and Art. 6, para. 1 of the air services agreement with Sudan, supra note 19.

89. See Art. 6, para. 2 of the air services agreement between the Libyan Arab Jamahiria and Hungary, concluded on November 27, 1975, and Art. 10, para. 4 of the air services agreement with Turkey, supra note 51.

Finally, it is worth to point out that in the annexes to some Libyan air transport agreements, there is a limitation on the frequencies provided on specific routes.[90]

Change of gauge

The term "change of gauge" was introduced for the first time to the air law by the Bermuda Agreement which was concluded between the United Kingdom and the United States in 1946.[91] This term was used only in the bilateral agreement concluded between the Libyan Arab Jamahiria and the United Kingdom on February 23, 1953, and terminated by the conclusion of a new agreement without a change of gauge clause on July 13, 1971.[92] The "change of gauge" as used by the agreement mentioned above can take place only in the territory of the other contracting party under the following conditions:

A. Economy of operation: The change of gauge must be justified by reasons of operation.[93]

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90. See the Annex to the agreement with Sudan, supra note 19. Also see the Memorandum of understanding between Libya and the United Kingdom, dated July 13, 1971.

91. See Annex V, para. (a) to the Bermuda Agreement of 1946, supra note 149, Sec. IV, Chap. I.

92. The air services agreement with the U.K. of 1971 does not contain any clause dealing with the change of gauge.

93. See Art. 6(1) of the air service agreement with the U.K. of 1953, supra note 31.

B. Size of aircraft: The aircraft to be used on the section of the route, on which less traffic is carried by the airline to and from the territory of the first contracting party must be smaller in capacity than those used on the other sections.[94]

C. "One service" clause: The aircraft of smaller capacity shall operate only in connection with the aircraft of large capacity, and shall be scheduled to do so. The smaller aircraft shall "arrive" at the point of the change for the purpose of carrying traffic transferred from, or to be transferred into the aircraft of larger capacity, and their capacity shall be determined with primary reference to this purpose.[95]

D. Adequate through traffic: There must be an adequate volume of through traffic.[96]

E. Capacity regulation: Any provision found in the agreement to regulate capacity in general shall govern all arrangements made with regard to the change of gauge. This rule applies in addition to that, the capacity of smaller aircraft shall be determined with primary reference to the traffic to be carried from or to the larger aircraft.[97]

Section IV: Tariffs

The term "tariffs" refers to the prices to be paid for the carriage of passengers, baggage and freight and the conditions under which these prices apply, including prices

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94. Ibid., Art. 6(II).

95. Ibid., Art. 6(III).

96. Ibid., Art. 6(IV).

97. Ibid., Art. 6(V).

and conditions and other auxiliary services, but excluding remuneration or conditions for the carriage of mail.[98]

During the Chicago Conference of 1944, most of the nations represented there were prepared to accept that regulation of tariffs is essential for the development of international air transport. The only nation which strongly stood against this principle was the United States of America.[99]

The joint meeting of Committees I, II and IV drafted the Chicago Convention which includes in article 10, five sections dealing with rate provisions,[100] but those sections were eliminated from the Final Act due to the opposite positions taken by many States regarding the rates to be charged by the designated airlines.[101] However, a rate provision appeared for the first time in the agreement concluded between

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98. ICAO Doc. 8681 - International Agreement on the Procedure for the Establishment of Tariffs for Scheduled Air Services (Paris, 10 July 1967), Art. 2.1, p. 4.

99. Stephen Wheatcroft, Air Transport Policy (London 1941), p. 75.

100. The Proceedings, supra note 73, Sec. III, Chap. I, Vol. I, p. 385.

101. Wayurakul, W., The Control of International Air Transport in Thailand. A thesis presented to the I.A.S.L., McGill University, August 1966, p. 85.

the United Kingdom and the United States at Bermuda in 1946. Annex II of the Bermuda Agreement provides that rates to be charged by the designated airlines by either contracting party for carriage between points in the territory of the United States and points in the United Kingdom "shall be subject to the approval of the Contracting Parties within their respective constitutional powers and obligations".[102] In addition, the two contracting parties have agreed that they should be guided by any rate resolutions adopted by the International Air Transport Association.[103] The ECAC Standard Clauses contain a provision for the regulation of tariffs.[104]

A. Regulation of tariffs in the Libyan bilateral agreements

All the bilateral air transport agreements concluded by the Libyan Arab Jamahiria contain a clause dealing with the procedure to be followed in order to fix the tariffs to be charged by the airlines designated by the contracting parties. Such procedure can be divided into the following categories:

According to the first category, which covers most of the Libyan bilateralism, tariffs may be fixed:

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102. See Section II, para. (a) of the Annex to Bermuda I Agreement, supra note 149, Sec. IV, Chap. I.

103. Ibid., para. (b).

104. See Art. 7 of the ECAC Standard Clauses, ICAO Circular 63-AT/6, supra note 83, Sec. III, Chap. I, p. 118.

a) according to the resolutions adopted by the International Air Transport Association (IATA), or by any other organization to which the airlines concerned are members;[105] or

b) by an agreement between the designated airlines, where the airlines concerned are not members to the same organization, or when no resolution was adopted by the International Air Transport Association, or by the organization to which the airlines concerned are members.[106]

According to the second category which covers some of the Libyan bilateralism, tariffs shall be fixed by a mutual agreement between the designated airlines of the two contracting parties, after having consultations with the other airlines operating over the whole or part of the route in question. In determining the tariffs the airlines shall, wherever possible, reach an agreement through the rate-making procedure established by the international body to which both designated airlines are members.[107]

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105. See Art. 10, para. 2(a) of the air services agreement with Bulgaria, supra note 76; also see Art. 10, para. 2(a) of the air services agreement with Syria, supra note 18.

106. See Art. 10, para. 2(b) of the air services agreement with Iraq, supra note 32; also see Art. 10, para. 2(b) of the air services agreement with Saudia Arabia, supra note 17.

107. See Art. 9, para. 3 of the air services agreement with the U.K., supra note 27; see also Art. 9, para. 2 of the air services agreement between the Libyan Arab Jamahiria and Niger, concluded on Oct. 18, 1971.

Finally, in the air service agreement between the Libyan Arab Jamahiria and the Soviet Union, the International Air Transport Association is not mentioned, and the only way for the fixing of the tariffs to be charged by the designated airlines, is by an agreement between the airlines concerned.[108] However, in the event that only one contracting party has designated an airline in respect to any of the specified routes, and the tariffs which may be charged for carriage on the route in question has not been fixed in accordance with resolutions adopted by the International Air Transport Association, the airline designated by the other contracting party to operate the route may unilaterally fix the tariffs thereof.[109]

B. Government approval

All the bilateral air transport agreements concluded by the Libyan Arab Jamahiria make tariffs subject to government approval. The tariffs fixed according to the International Air Transport Association resolutions, or by a mutual agreement between the designated airlines, or unilaterally by the airline designated by the other contracting party; when only one contracting party has designated an airline to

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108. See Art. 10, para. 2 of the air services agreement with the U.S.S.R., supra note 4.

109. See Art. 13, para. 2(b) of the air services agreement with Tunisia, supra note 37; see also Art. 10, para. 2(b) of the air services agreement with Sudan, supra note 19.

operate on specific routes, shall be submitted to the aeronautical authorities of the contracting parties.[110] Some agreements require that the submission shall be made "at least thirty (30) days before the proposed date of their introduction".[111]

Other agreements require ninety days,[112] but most of the Libyan bilateral agreements do not specify a fixed period for the submission of the agreed tariffs.[113] The writer of this paper belives that even in this case when there is no specific period for the submission of the tariffs to be charged, such submission must be made in reasonable time, in order to give the aeronautical authorities of the contracting parties, the time needed for studying such tariffs. In special cases, the period mentioned above for the submission of tariffs may be reduced by an agreement

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110. See Art. 7, para. 3 of the air services agreement with Yugoslavia, supra note 62, and Art. 10, para. 4 of the air services agreement with Hungary, supra note 89.

111. See Art. 10(b) of the air services agreement with Morocco, supra note 88, and Art. 9, para. 3 of the air services agreement with Niger, supra note 107.

112. In the bilateral agreement with the U.K. of 1971, the tariffs agreed upon by the designated airlines, shall be submitted to the aeronautical authorities of the two contracting parties, at least ninety (90) days before the proposed date of their introduction. See Art. 4 of Libya-the U.K. agreement, supra note 27.

113. See Art. 10, para. 4 of the air services agreement with Yemen, supra note 85.

between the aeronautical authorities of the two contracting parties.[114] Such tariffs shall become effective upon notification by the aeronautical authorities of both contracting parties declaring their approval, or upon the expiration of fourty five days after the receipt of the proposed rates without any notification.[115] In the air services agreement with the United Kingdom, the above period is reduced to thirty days.[116] The air services agreement with Austria provides that "In the absence of approval of the proposed tariffs, the aeronautical authorities shall, upon request of the aeronautical authority of one Contracting Party, within sixty days enter into consultation with a view to find a solution to the matter".[117]

To conclude this section, it is worth to point out that, in the event that the designated airlines did not reach an agreement relating to the tariffs to be charged, or if the aeronautical authorities of either contracting

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114. See Art. 9, para. 3 of the air services agreement with Niger, supra note 107, and Art. 10, para. (b) of the air services agreement with Morocco, supra note 88.

115. See Art. 11, para. 3 of the air services agreement with Turkey, supra note 51, and Art. 10, para. 3 of the air services agreement with France, supra note 38.

116. See Art. 9, para. 5 of the air services agreement with the U.K., supra note 27.

117. See Art. 11, para. 3 of the air services agreement with Austria, supra note 33.

party disapproved such tariffs, the aeronautical authorities of both contracting parties shall try to determine the tariffs in question by an agreement between themselves.[118] The last step to be taken to fix tariffs, in the event that the aeronautical authorities did not reach an agreement is the application of the provision relating to the settlement of disputes, which is going to be discussed in the following section. However, during the period when no agreement is reached the tariffs in force, and in the even that there is no tariffs in force, the tariffs internationally recognized by the scheduled international airlines, shall be charged by the airlines of both contracting parties on the routes under dispute.[119]

Finally, it is worth to mention here that some of the Libyan air transport agreements stipulate that, rates presently in force may remain until an agreement concerning the tariffs to be charged is reached, but it would not be applicable for more than twelve months from the date at which the old tariffs have expired.[120]

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118. See Art. 10, para. 4 of the air services agreement with Iraq, supra note 32.

119. See Art. 10, para. 4 of the air services agreement with Saudia Arabia, supra note 17.

120. See Art. 11, para. 4 of the air services agreement with Turkey, supra note 51.

Section V: Settlement of disputes

When a bilateral agreement enters into force and becomes operative, a number of disputes may arise between the contracting parties concerning the application and the interpretation of its provisions, and therefore a clause regarding the settlement of disputes that may arise is needed in every bilateral agreement. The Chicago Standard Form does not contain any clause dealing with the procedure to be followed for the settlement of disputes, but it suggests that a provision for arbitration may be inserted, the details of which will be a matter of negotiation between the parties to each bilateral agreement.[121] The ECAC Standard Clauses contain a clause for the settlement of disputes.[122] Article 13 of the ECAC Standard Clauses provides a two-step procedure for the settlement of disputes that may arise:

1. Direct negotiation between the contracting parties.
2. Arbitration on failure to reach a settlement through direct negotiation.

The Bermuda Agreement of 1946 also provides a two-step procedure for the settlement of disputes arising between

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121. See Art. 9 of the Chicago Standard Form, ICAO Doc. 62.AT/6, supra note 83, Sec. III, Chap. I, p. 115.

122. See Art. 13 of the ECAC Standard Clauses, ibid., p. 120.

the contracting parties relating to the application and interpretation of the provisions of the agreement. These two steps are:

1. Direct consultation between the contracting parties.

2. Referring the dispute to the Council of the Provisional International Civil Aviation Organization or to the Council of its successor, the International Civil Aviation Organization.[123]

The International Air Services Transit Agreement and the International Air Transport Agreement contain an arbitral clause referring to Chapter XVII (Articles 84-88) of the Chicago Convention any dispute relating to the application and interpretation of the respective agreements which cannot be settled through negotiation.[124] Chapter XVII of the Chicago Convention outlines the essential procedures which require compulsory arbitration by the International Civil Aviation Organization Council with a possible appeal to the International Court of Justice or to an ad hoc tribunal agreed by the parties to such dispute.[125]

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123. See Art. 9 of Bermuda I Agreement, supra note 149, Sec. IV, Chap. I.

124. See Art. 2, Section 2 of the Air Transit Agreement and Art. 4, Section 3 of the Air Transport Agreement, supra notes 123, 131, Section III, Chap. I.

125. See Art. 84 of the Chicago Convention of 1944, supra note 84, Section III, Chap. I.

All the bilateral air transport agreements concluded by the Libyan Arab Jamahiria contain provisions for the settlement of disputes relating to the interpretation and the application of the respective agreements. With regard to the procedure to be followed for the settlement of disputes, the Libyan bilateral agreements can be divided into:

A. Bilateral agreements with a three-step procedure

Most of the Libyan bilateral agreements provide three steps for the settlement of any dispute arising:

1. Direct negotiation between the contracting parties.

2. "To refer the dispute for a decision to some person or body, if both contracting parties agreed to do so."

3. To submit the dispute for a decision to a tribunal of three arbitrators, at the request of either party.[126] Each contracting party shall nominate an arbitrator within a period of sixty days from the date of receipt by either contracting party from the other of a notice through diplomatic channels requesting arbitration, the third arbitrator shall be appointed by an agreement between the first two arbitrators within a further period of sixty days. If either contracting party failed to nominate an arbitrator, or if the two arbitrators did not reach an agreement about the third arbitrator, within the specified period,

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126. See Art. 14, paras. 1 and 2 of the air services agreement with Austria, supra note 33, and Art. 12, paras. 1 and 2 of the air services agreement with Sudan, supra note 19.

> either contracting party may ask the President of the International Civil Aviation Organization Council to nominate an arbitrator or arbitrators as the case requires. The third arbitrator who acts as a president of the tribunal shall be in all cases a national of a third State.[127]

In the Libyan-Iraqi bilateral air transport agreement, the person who nominates an arbitrator in the cases mentioned above, is the President of the Arab Civil Aviation Council (A.C.A.C.).[128] It also stipulates that the third arbitrator, who acts as a president of the tribunal, shall be a national of an Arab State.[129] However, the parties to a dispute undertake to comply with any decision given by the arbitral body.[130]

B. Bilateral agreements with a two-step procedure clause

According to the two-step procedure clause, any dispute arising shall be settled:

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127. See Art. 17, para. 2 of the air services agreement with Tunisia, supra note 37, and Art. 11, para. 2 of the air services agreement with Saudia Arabia, supra note 17.

128. The Arab Civil Aviation Council is a regional organization similar to ECAC, established through the Arab League, in order to develop the art of civil aviation between the Arab States.

129. See Art. 12, para. 4 of the air services agreement with Iraq, supra note 32.

130. See Art. 12, para. 3 of the air services agreement with France, supra note 38, and Art. 12, para. 3 of the air services agreement with Bulgaria, supra note 76.

1. By direct negotiation between the aeronautical authorities of the two contracting parties, or through diplomatic channels.

2. To submit the dispute to an arbitral tribunal composed of three members.[131]

C. Bilateral agreements with a one-step procedure clause

According to the one-step procedure clause, the only way that may be used for the settlement of any dispute arising is the negotiation between the contracting parties which can be direct between the aeronautical authorities or through diplomatic channels.[132]

With regard to the expenses, some Libyan bilateral air transport agreements provide that each party to the dispute shall bear the expenses of its own members as well as the expenses of its representatives in the proceedings of the arbitral tribunal. The expenses of the President of the

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131. See Art. 14, para. 1 of the air services agreement with the Swiss Confederation, supra note 5, and Art. 12, para. 2 of the air services agreement with Yugoslavia, supra note 62. The procedure for nominating arbitrators is the same as the procedure discussed above, except that in some agreements the period for the nomination of the third arbitrator is reduced to thirty (30) days. See Art. 12, para. 3 of the air services agreement with Yugoslavia, ibid.

132. See Art. 16 of the air services agreement with the U.S.S.R., supra note 4, and Art. 12, para. 3 of the air services agreement with Hungary, supra note 89.

tribunal shall be borne by both parties equally.[133] However, even in the absence of express provision concerning the expenses of arbitral tribunals, parties generally bear their own costs and share equally any other expenses.[134]

To conclude this section, it is worth to point out that a large number of bilateral air transport agreements contain arbitration clauses for the settlement of disputes. Such provisions have been utilized in only two cases, the France-U.S.A. air transport arbitration,[135] and the Italy-U.S.A. air transport arbitration.[136]

The failure to use arbitration cannot be regarded as a result of lack of disputes, but as a result of the fact that States prefer to settle their disputes by consultation.[137]

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133. See Art. 12, para. 4 of the air services agreement with Yugoslavia, supra note 62.

134. Bin Cheng, supra note 162, Sec. IV, Chap. I, p. 464.

135. For the decision of the Arbitration Tribunal decided at Geneva on Dec. 22, 1963, see International Legal Materials, Vol. 3 (Washington, D.C.: American Society of International Law, July 1964), pp. 668-720.

136. For the decision of the Arbitration Tribunal, decided on Dec. 22, 1963, see ibid., pp. 1001-1003.

137. Bradley, M.A., "International Air Cargo Services: The Italy-U.S.A. Air Transport Agreement Arbitration", McGill University Law Journal, Vol. 12 (1966-1967), p. 312.

The reasons for this are:

1. States have often little to gain politically and a lot to lsoe economically by entering in lengthy litigation of air transport disputes.

2. A large number of States doubt that the International Civil Aviation Organization Council is able to exercise adjudicatory functions with the requisite judicial impartiality.

3. The ICAO Council has shown very little enthusiasm for the exercise of the functions that has been conferred upon it.

4. The dispute-settling machinery established by the Chicago Convention is by no means a model of legal draftsmanship; it leaves many important questions unsolved, which may have discouraged States from resorting to it.[138]

Section VI: Entry into force, Modification, and Termination

I. Entry into force

Neither the Chicago Standard Form nor the ECAC Standard Clauses contain any provision dealing with this matter, due to the fact that it is not possible to standardize a provision dealing with the entry into force, since each treaty or agreement comes into force according to its own terms, as agreed between the contracting parties pursuant to the constitutional or the legal requirement of each State.

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138. Burgenthal, T., Law-Making in the International Civil Aviation Organization (1969), pp. 123-124.

Bin Cheng describes the parties of any agreement as the masters of its contents, which means that they have full freedom to decide when such agreement is to come into force.[139]

All the bilateral air transport agreements concluded by Libya contain provisions dealing with the entry into force, but the methods used vary from an agreement to another. However, these methods can be put as follows:

A. Agreements which apply provisionally as from the date of its signature, and enter into force when the contracting parties have notified each other, that their constitutional formalities, with regard to the entry into force have been fulfilled.[140]

B. Agreements which come into force upon the exchange of diplomatic notes between the governments of the contracting parties, in accordance with the constitutional procedure of each State.[141]

C. Agreements which come into force after the expiration of specific period following the date on which the contracting

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139. Bin Cheng, supra note 162, Sec. IV, Chap. I, p. 468.

140. See Art. 17 of the air services agreement with the Swiss Confederation, supra note 5, and Art. 17 of the air services agreement with Iraq, supra note 32.

141. See Art. 19 of the air services agreement with the U.S.S.R., supra note 4, and Art. 17 of the air services agreement with Bulgaria, supra note 76.

parties have notified each other, by the exchange of diplomatic notes of the completion of their respective constitutional requirements.[142]

Finally, it is worth to point out that Libya-United Kingdom air transport agreement of 1953 provided that the exchange of the instrument of ratification should take place within six months from the date of signature, and if such ratifications have not been received during this period, either contracting party may terminate the provisional application of the agreement by a six-month notice.[143]

II. Modification

Both the ECAC Standard Clauses and the Bermuda Agreement of 1946, contain provisions dealing with modification of the terms of the bilateral agreements or modification of the annexes to the agreements,[144] but no similar provision is found in the Chicago Standard Form.

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142. In the agreement with Austria, a period of sixty (60) days must expire following the exchange of diplomatic notes, in order that the agreement enter into force.

143. See Art. 15 of the air services agreement with the U.K., supra note 31. This agreement was terminated by the conclusion of another agreement on July 13, 1971.

144. See Art. 10 of the ECAC Standard Clauses, supra note 83, Sec. III, Chap. I, and Art. 13 of Bermuda I Agreement, supra note 149, Sec. IV, Chap. I.

All the bilateral air transport agreements concluded by the Libyan Arab Jamahiria contain provisions dealing with the modification of the terms of the agreement itself and the modification of the annex to the agreement.[145] As a general rule, modification to the terms of the agreement or the annex to it can only be made by consultation between the contracting parties.[146]

In some agreements, modification to the annexes may be made by an agreement between the aeronautical authorities of the two contracting parties.[147] The consultation between the contracting parties shall begin within a period of sixty days.[148] In some agreements this period is reduced to thirty days in regard to modification to the annexes.[149] Any

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145. See Art. 13 of the air services agreement with the Swiss Confederation, supra note 5, and Art. 16 of the air services agreement with Austria, supra note 33.

146. See Art. 13 of the air services agreement with Syria, supra note 18, and Art. 14 of the air services agreement with Sudan, supra note 19.

147. See Art. 13, para. 2 of the air services agreement with the Swiss Confederation, supra note 5, and Art. 14, para. 2 of the air services agreement with Turkey, supra note 51.

148. See Art. 13 of the air services agreement with Yugoslavia, supra note 62, and Art. 15 of the air services agreement with the U.S.S.R., supra note 4.

149. See Art. 16, para. 2 of the air services agreement with Austria, supra note 33, and Art. 13, para. 2 of the air services agreement with Morocco, supra note 88.

modification to the terms of an agreement, as agreed upon, shall come into force, in some agreements, as soon as the instruments of ratification have been exchanged between the contracting parties.[150] In others, such modification shall come into force when confirmed by the exchange of diplomatic notes.[151]

With regard to the modification to the annexes, most bilateral air transport agreements concluded by the Libyan Arab Jamahiria provide that any amendment to the annexes as agreed upon, shall come into force after it has been confirmed by the exchange of diplomatic notes.[152] Others require, in addition to the above conditions, the expiration of specific period.[153] In the bilateral air services agreement with Sudan, any amendment to the annex to the agreement shall come into force from the date in which an agreement was reached between the aeronautical authorities

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150. See Art. 13, para. 1 of the air services agreement with Syria, supra note 18, and Art. 14, para. 1 of the air services agreement with Sudan, supra note 19.

151. See Art. 14, para. 1 of the air services agreement with Bulgaria, supra note 76, and Art. 6, para. 3 of the air services agreement with Chad, supra note 20.

152. See Art. 13, para. 1 of the air services agreement with the Swiss Confederation, supra note 5, and Art. 14, para. 2 of the air services agreement with France, supra note 38.

153. Art. 16, para. 2 of the air services agreement with Austria, supra note 33.

of the two contracting parties.[154]

Finally, we must point out that a bilateral agreement can be modified by the conclusion of a general multilateral convention concerning air transport, if the contracting parties of a bilateral agreement become bound by it.[155]

III. Termination

All the bilateral air transport agreements concluded by the Libyan Arab Jamahiria contain clauses dealing with the termination of the agreements.[156] According to these clauses, either contracting party may at any time terminate the agreement by a written notification.[157] Such notification shall simultaneously be communicated to the International Civil Aviation Organization (ICAO).[158] In the air services agreement with Iraq, the notice of termination shall be

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154. See Art. 14, para. 2 of the air services agreement with Sudan, supra note 19.

155. See Art. 12, para. 2 of the air services agreement with the U.K., supra note 31, and Art. 13, para. 3 of the air services agreement with Hungary, supra note 89.

156. See Art. 16 of the air services agreement with the U.K., supra note 27.

157. See Art. 15 of the air services agreement with Bulgaria, supra note 76, and Art. 15 of the air services agreement with Turkey, supra note 51.

158. See Art. 16 of the air services agreement with Chad, supra note 20, and Art. 15 of the air services agreement with France, supra note 38.

communicated in addition to the International Civil Aviation Organization, to the Arab Civil Aviation Council.[159] The air services agreement with the U.S.S.R. does not require the communication of such notification to the International Civil Aviation Organization or to any other international body.[160]

However, the notice of termination becomes effective after the expiration of twelve months from the date of receipt of the notice of termination by the other contracting party, unless such notice is withdrawn by an agreement between the two parties prior to the expiration of this period.[161] In the air service agreement with the Swiss Confederation, the notice of termination becomes effective at the end of the summer or winter timetable period during which a period of twelve months has elapsed.[162]

In the event that the other contracting party did not acknowledge the receipt of the notice of termination,

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159. See Art. 15 of the air services agreement with Iraq, supra note 32.

160. See Art. 17 of the air services agreement with the U.S.S.R., supra note 4.

161. See Art. 14 of the air services agreement with Morocco, supra note 88, and Art. 16 of the air services agreement with Yugoslavia, supra note 62.

162. See Art. 16 of the air services agreement with the Swiss Confederation, supra note 5.

such notice shall be deemed to be received fourteen days after the receipt of the notice by the International Civil Aviation Organization.[163]

Finally, we ought to mention that even in the absence of a termination clause, an agreement can be terminated by an agreement between the two contracting parties, especially when they decide to conclude a new agreement superseding the existing one.[164]

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163. See Art. 17 of the air services agreement with Austria, supra note 33. In the agreement with Chad the fourteen days period was extended to fifteen days.

164. The air services agreement of 1953 with the U.K., was terminated by the conclusion of a new agreement on July 13, 1971.

CONCLUSION

The above analysis of the bilateral agreements concluded between the Libyan Arab Jamahiria and other nations for the regulation of international air transport illustrates that this country has regarded bilateralism as the appropriate legal instrument for the establishment of international air services, the exchange of transit and traffic rights,[1] and as means for the protection of its economic interests, its sovereignty and its security.

Up to the present day, Libya has concluded more than twenty five bilateral air transport agreements with nations in Africa, Asia and Europe. Most of these agreements were concluded during the years following the September Revolution of 1969.[2]

In the last decade, an important change occurred in Libyan relations with the outside world by the establishment of close contacts with the Eastern Europe countries and more contacts with the Arab countries in Asia and Africa. Consequently, bilateral air transport agreements were concluded

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1. The Libyan Arab Jamahiria is not a contracting party to the International Air Services Transit Agreement nor to the International Air Transport Agreement.

2. During the years following 1969, the Libyan Government concluded more than seventeen (17) bilateral air transport agreements.

with these nations and new air services were inaugurated.[3]

The policy adopted by the Libyan Arab Jamahiria in concluding air transport bilateral agreements may be judged by the writer of this paper as the best possible policy that can be adopted by a small nation with very little experience in the field of the air transport industry and with a young national air carrier.

However, the policy adopted by the Libyan Arab Jamahiria in all its bilateral air transport agreements, applies the principles advocated by the United Kingdom at the Chicago Conference of 1944: predetermination of the capacity to be offered and government control of the tariffs to be charged. The Libyan policy leaves the amount of capacity to be offered in the hands of the aeronautical authorities of the contracting parties who should reach an agreement before the inauguration of the agreed services, after taking into consideration certain general principles inserted in each bilateral agreement.[4] It also leaves the question of tariffs to be charged for carriage of passengers, mail and cargo in the hands of the designated airlines, which have to take into

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3. Before 1969, the Libyan Government did not conclude any bilateral agreements with Eastern Europe countries, and concluded a few agreements with Arab States.

4. See Section III, Chapter III, pp. 135-139.

consideration any resolution adopted by the International Air Transport Association (IATA).[5] And as a safeguard for the national interests and for more protection to the national air carrier, all the Libyan bilateral agreements provide for the approval by the aeronautical authorities of the contracting parties of any agreement reached by the designated air carriers in regard to the question of tariffs.[6]

Finally, the writer of this paper believes that the Libyan Arab Jamahiria is very generous in granting Fifth and Sixth Freedom rights to the air carriers of other nations, without taking into account the fact that the Libyan national air carrier is unable at the present time to exercise as much Fifth and Sixth Freedom as the carriers of those nations, and therefore some adjustment is needed in order to provide more protection to the national air carrier.

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5. See Section IV, Chapter III, pp. 142-144.

6. Ibid., pp. 144-146.

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Niger	Oct. 18, 1971
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Syria	July 26, 1971
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