

1955

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P. Van Adriani Tuuk

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Recommended Citation

P. Van Adriani Tuuk, *The Bermuda Capacity Clauses*, 22 J. AIR L. & COM. 406 (1955)
<https://scholar.smu.edu/jalc/vol22/iss4/2>

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THE "BERMUDA" CAPACITY CLAUSES

BY P. VAN DER TUUK ADRIANI

Head of the Bureau for Air Policy of the Juridical and Political
Department of the Netherlands Civil Aviation Administration.

SINCE 1946 the name Bermuda has taken on a very specific meaning in all circles related to civil aviation. Not so much for the touristic charms of these islands in this case—however wonderful they may be—but for reasons which have an immediate bearing on the very fundamentals of commercial airline operation.

As a matter of fact it was on the Bermuda islands that the United States and the United Kingdom negotiated a civil aviation agreement in February 1946. The fact that a treaty or an agreement bears the name of the place where it was concluded is not unusual at all. Yet one could wonder why a simple bilateral air agreement—even between two very important countries—could not only become so renown, studied and discussed, and set a pattern to be followed all over the world, but could even become quite a definite conception.

How is this to be explained? By the mere fact that the Final Act of the negotiations—not even the agreement itself—contained a few paragraphs on how competition between the airlines of both parties should be kept within reasonable limits? This is really the case, but still one could wonder why these few clauses found such a world wide application.

In dealing with these "Bermuda" clauses, however, one should never forget that they were drawn up as a compromise between two conflicting philosophies, i.e. on the one hand, a strong desire for a large amount of freedom for commercial activity, and on the other hand, an equally strong desire for protection of national civil aviation interests. It seems that these compromise-clauses were in accord with vague and lingering thoughts in many other countries all over the world, which countries however had not been able to formulate them clearly.

Still another question arises, namely how it was possible, that the Bermuda clauses, drafted in a very special case, could be copied on so many other occasions. This should be attributed to the fact that these Bermuda clauses were drafted in general terms, just formulating some broad ideas and are therefore to a certain extent vague and flexible, creating possibilities for protection as well as for a necessary amount of freedom.

Two Categories of Stipulations

In themselves the so-called Bermuda clauses could be divided into two categories of stipulations. On the one hand there are some general rules as to competition, the most widely known and copied of which

state "that the air transport facilities available to the traveling public should bear a close relationship to the requirements of the public for such transport," "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," and "that in the operation by the air carriers of either government of the trunk services, the interest of the air carriers of the other government shall be taken into consideration so as not to affect unduly the services which the latter provides on all or part of the same routes."

On the other hand there is a clause which deals more closely with competition in so far as it sets rules as regards the capacity which the designated air carriers of the contracting parties are allowed to provide, thereby stating that this capacity should in the first place have a bearing on third and fourth freedom traffic. As a matter of fact the rule in question runs as follows:

"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 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 Governments subscribe and shall be subject to the general principle that their 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."

After having reproduced the wording of the principle Bermuda clauses it seems interesting to try and interpret them, beginning with the last mentioned clause. A first glance at its wording reveals, that it is beyond doubt that the capacity cannot be tied down to what is called the primary objective but that the capacity required for this traffic may be augmented by a supplementary capacity for the carriage of fifth freedom traffic.

First of all, if there is a *primary* objective, there should also be room for *other* objectives, otherwise the provision of capacity for 3rd and 4th freedom should have been made the only object to be dealt with.

In the second place the clause explicitly mentions the *right* to embark or disembark (at a point or points) in the territory of the other contracting party international traffic destined for and coming from third countries. This right is, however, not unlimited; it shall be applied in accordance with the general principle of *orderly develop-*

ment. When putting the question on which of these two words the stress should fall, it seems that they should be stressed as even here the conflicting philosophies have come to a compromise; the word "orderly" clearly pointing into the direction of protection and of proceeding step by step after careful consideration of all aspects and more or less implying something static in this way, whereas the word *development* on the contrary points into the direction of commercial and dynamic enterprise.

General Principle of Capacity

Finally and as a sort of summing up, a general principle as regards capacity is given, containing three elements to which this capacity should be related.

Item (a) seems a repetition, though in other words, of the above-mentioned "primary objective." Yet the difference in wording makes this stipulation less tight; it seems beyond doubt that the traffic requirements mentioned here may be taken in a broader sense than the capacity adequate to the traffic demands between the country of which such air carrier is a national and the country of ultimate destination and so may also comprise—as the case may be—some transit traffic.

Item (b) even puts forward the carriage of fifth freedom traffic as essential to the economic operation of air routes which consist of more than one stage; at the intermediate landing-points passengers and goods coming from the starting point of the line are disembarked. If it should not be allowed to fill these vacant places with passengers and goods, picked up at these intermediate stopping places, the airline would certainly work at a loss.

Item (c) states through its very wording clearly and rightly that countries or peoples do have traffic requirements and that foreign airlines calling there—after taking account of local and regional services—should meet these requirements. For these foreign airlines this local and regional traffic will in many cases be fifth freedom carriage of an "en route" nature, which could hardly be coped with if no additional capacity can be provided.

We may conclude from the above that the Bermuda capacity clauses clearly leave room for fifth freedom. There is, however, no concrete answer to the question of the *quantity* of fifth freedom allowed in relation to the quantity of third and fourth freedom. The fixing of such a relation would be contrary to the very spirit of the Bermuda principles which allow a certain amount of latitude and flexibility, which is a "condition *sine qua non*" for the young and dynamic mode of transport, civil aviation represents. On the contrary the introduction of the idea of promotional traffic in many bilateral agreements was derived from the original Bermuda by stating that the transport facilities should bear a close relationship to the present and *reasonably*

anticipated requirements, clearly indicates that the capacity cannot and should not be tied down to an initially or arbitrarily fixed value.

Although not laid down, in so many words, in the "Bermuda clauses" themselves, the application of these clauses is based on the idea of an *ex post facto* review whereby the air carrier in question should substantiate after a reasonable period that the capacity it has provided in that period reasonably concurred with the Bermuda principles. In applying such an *ex post facto* review ample consideration should be given to the fact that the presence of transport facilities always tends to stimulate the traffic requirements of the public. This means that a foreign line not merely brings about competition but also contributes to building up traffic. From this increased traffic the national carrier as well will certainly reap benefits.

Relationship of Capacity and Traffic Requirements

Another refinement in quite a number of bilateral agreements, otherwise based on the Bermuda principles, is the introduction of the words "at a reasonable load factor" in the clause, requiring a close relationship between the capacity and the traffic requirements.

This insertion seems very much to the point indeed. A strict interpretation of the requirement that there should be a *close* relationship between the capacity provided and the requirements for transportation, could easily lead to a situation whereby the carrier in question would not be allowed to augment its capacity unless its aircraft were permanently loaded to 100% of their capacity.

However, it is a well known fact that operating a transport service at an over-all load factor of more than 65 or 70 per cent of its capacity is not a sound proposition; in these circumstances quite a number of the individual services are fully booked and the operator would on many occasions have to disappoint prospective passengers.

In the long run the passengers will be inclined to turn away from the carrier in question.

As it is beyond any doubt that such a situation was certainly not meant by those who drafted the original Bermuda, but that they on the contrary simply had in mind to avoid a situation whereby one carrier could take for its account too great a part of the traffic to the detriment of the partner by providing excessive capacity, it seems clear that even if the notion of a reasonable load factor is not explicitly introduced, this idea should be kept in mind when considering the capacity which the other contracting party thinks appropriate to introduce or maintain.

The share which the air carriers of each of the two contracting parties may take in the traffic brings us to the clause already mentioned, that there shall be a fair and equal opportunity . . . etc.

Yet it seems necessary to make a very clear distinction between the *opportunity* to operate and the *share* in the operations. Without any doubt it would be a serious mistake to interpret this clause in a

sense as if the carriers of both contracting parties should necessarily take a fair and equal share in the traffic. This could not be the question for the simple reason that when interpreting this clause in this way the words "fair" and "equal" would be conflicting, for in this case neither "fair" would always be identical to "equal" nor would "equality" always be "fair."

On the contrary, except in those special cases of a complete "balance of power," much will depend on the circumstances prevailing. If equality of the share should be sought this would mean that the stronger or more enterprising carrier of one country would have to settle down on the lower level of the carrier of the other country. Such a situation would certainly not be in favor of the needs of the public nor would it be fair towards the other carrier. So one might even be inclined to say that the fairness invoked in reality excludes a complete equality.

But the clause rightly aims at a fair and equal *opportunity* to operate which means that the carrier of one party which happens to be the weaker still has the same—equal—fundamental right to operate as the stronger competitor and should just as well be enabled to have its place under the sun. And this cannot be but fair, even if in practice this place might only be a modest one. This conception also naturally leads to the following clause "that in the operation by the air carriers of either government the interest of the air carriers of the other government shall be taken into consideration so as not to affect unduly the services which the latter provides on all or part of the same routes."

This clause might possibly be considered as the crucial point and the very fundamental idea behind the Bermuda: competition is all right but no cut-throat competition in the sense of striving for a monopoly or the domination by one party over the other. On the contrary this clause seems to revive the old slogan of: "live and let live."

The Load Factor and Fifth Freedom

The acknowledgement of the fact that the over-all load factor should not be required to exceed a reasonable and commercially sound figure should also be taken into consideration by the governments when reviewing the capacity offered by a foreign air carrier for fifth freedom traffic in their countries. When for instance the third and fourth freedom traffic of that carrier would take 40 per cent of the total capacity provided by it, it would seem that the carrier in question offers 60% of its capacity for fifth freedom traffic which would not seem to be in accordance with the primary place the third and fourth freedom traffic should take. Yet considering that a transport service filled for 65 or 70 per cent is a commercially sound proposition, the average room available for fifth freedom traffic is no more than 25 or 30 per cent, which is only half the space seemingly offered at first sight.

This simple example may show that (air) transportation should not be approached in an arithmetical spirit but with wide open eyes both for the needs of the air carriers *and* those of the traveling public. That the authors of the original Bermuda principles limited themselves to broad lines and refrained from going into too precise details is an act of wisdom that cannot be overestimated. Too rigid an application of the close relationship-clause might also lead to the danger that the carrier in question would have to use types of aircraft of different capacity on different stages of a single route or aircraft especially adapted to the traffic requirements on each of the routes mentioned in the agreement.

Most airlines strive however for the sound commercial principle of standardizing their fleets to the greatest possible extent. Moreover for the sake of safe operation even on routes where smaller aircraft could be used in view of the traffic requirements, multi-engined aircraft, mostly therefore of a larger carrying capacity, should sometimes be used.

Although in some cases a change of gauge—which means that a further stage of a route is operated with aircraft of smaller capacity connecting with the heavier aircraft operating the initial and more important stage of that route—is applied, this does not occur very often.

Admittedly such a change of gauge may imply that the close relation clause can be applied more accurately. Such a change of gauge requires however that aircraft should be permanently stationed in foreign countries which can never be very profitable unless the traffic on that further stage is relatively heavy, because of which the frequency will be high enough to have these smaller aircraft making their normal share of flying hours. In other cases the aircraft in question—and their crews—would remain idle for long periods which only costs lots of money.

These different examples may show that the Bermuda principles closely bound up with the capacity to be provided can only work properly when traffic is such as to require a carrying capacity which is a multiple of the carrying capacity of a single normal modern aircraft, so that a certain number of frequencies is to be provided.

Only in this case the *ex post facto* review can be applied without endangering a certain minimum of operation which is necessary for an airline from an economic point of view. Only in case there is a rather important traffic the flexibility laid down in the broad Bermuda principles is done full justice. Care should therefore be taken that these principles are not applied too rigidly where traffic is only moderate as yet.

In this connection it should be recognized that most of the air routes mentioned in the original Bermuda agreement are trunkroutes on which heavy traffic was to be expected.

Furthermore the Bermuda agreement was probably drafted with a view to the future development of civil aviation with possibilities

hardly foreseeable at the time of its conclusion and still hardly foreseeable even now.

Effect of Geographic Situations

Another point which may influence the interpretation of the Bermuda principles is the geographical situation of the contracting parties. It goes without saying that the interpretation of these principles is much easier when they would apply to the operation of air services which have their starting point in one contracting country and their terminus in the other, than when the air carriers of both contracting parties or of one of them operate through services to countries beyond. In the first case the primary objective is the carriage of traffic between the two contracting parties and the fifth freedom traffic takes place between the territory of the other contracting party and one or more countries situated on the route.

If, however, the situation of one contracting state is such that it forms an intermediate landing point for the carrier of the other country it sometimes might be difficult to realize that the capacity provided by the air carrier of that other contracting country should be considered in relation to the operation of the *whole* of the route and not to that of the stage between the country and the home country of the carrier in question.

In such a situation the possibility exists without any doubt for the carrier in question to operate fifth freedom traffic not only on one or more stages of the route between the contracting parties but on the stages of the route to the countries beyond as well.

This more complicated situation arises especially on long routes with many intermediate stops. On such routes however the primary objective is not only the carriage between the home country of the air carrier and the other contracting state, but also the carriage between the home country and the various other countries where the airline calls and last but not least the carriage between the home country and the place where the air service finds its terminus.

To operate such routes economically, the requirements of through airline operation, i.e., the ability to pick up en route fifth freedom traffic to fill up vacant places, is a necessity. Perhaps later on when air traffic will have developed to full maturity the air carriers themselves may prefer to operate different services which run parallel to the initial stages on such routes, but which subsequently terminate at what are now only intermediate landing points. In such a system the carriage of fifth freedom traffic might become less important.

Although one could in a few cases already see indications of the commencement of this development, air transport is by no means on a level as yet where such a system could be generally applied. The carriage of fifth freedom traffic is therefore at present essential and should for this reason not be withheld from the operators of trunk services, though in operating such fifth freedom traffic the air carrier

should take account of local and regional services, as the Bermuda agreement rightly states.

Reasonableness of Bermuda Principles

Everything taken together it seems that the Bermuda principles—and such probably owing to the fact that they represent a compromise—have a sound conception of reasonableness as their basis. It seems, therefore, that these principles should be dealt with in a similar spirit. Only in this way can the limitations for which the Bermuda principles leave room be prevented from becoming impediments to the legitimate aspirations of the air carriers.

Let us not forget that another, and in fact the first item of the Final Act of the original Bermuda Agreement, reveals the desire "to foster and encourage the widest distribution of the benefits of air travel for the general good of mankind and to stimulate international air travel as a means of promoting friendly understanding and good will among peoples and ensuring the many indirect benefits of this new form of transportation to the common welfare of both countries."

When copying the Bermuda clauses as has been done in so many cases this statement of policy should be assumed too, for in the first and in the last place air transport has been created and is still further developed for the traveling public's sake.