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BOOK REVIEWS

AIR CHARTER, A STUDY IN LEGAL DEVELOPMENT†

BY JACOB W. F. SUNDBERG

In the scarce literature of comparative aviation law a study of the air charter is most welcome. Both the aviation industry and the law have, for some time, attempted to cope with the elusive and complex features of this multiform phenomenon to which comparative jurisprudence may contribute valuable analysis and clarification.

The phenomenon may be identified with ease and accuracy. One party to the arrangement, usually the owner of the aircraft, enters into an agreement with the operator to give him the use of the aircraft for a period of time or for one or more flights, for a consideration. Such arrangements may be varied by including the crew as well as supplies and other services. This basic scheme may undergo further variations according to the status of the parties to it, such as inter-carrier or carrier-passenger agreements. Further modifications may be added by agreements as to the control over operations as well as to the account for which the operations will be conducted. These arrangements result largely in the following legal relations: between the owner and the operator; between the operator and his customers; between the owner (and original employer) and the operator, and the members of the crew; and finally, between the owner and operator on the one hand, and third persons, on the other, regarding claims arising out of operation (*e.g.*, damages on surface, air collisions).

The book under review has arranged materials and discussions under the following chapters: a historical introduction entitled "A Piece of Aviation History" followed by "Air Charter as a Problem of Administrative Regulation," and "The Charter as a Problem of Legal Construction." Chapter four is dedicated to the Warsaw Convention and subdivided into "Distribution of Warsaw Rules," "Warsaw Charters and Non-Warsaw Charters," and ending with "Effects Related to the Insufficiency of the Warsaw Convention." The final chapter appears under the heading "The Air Charter Notion."

It is indeed difficult to assess fairly and at the same time briefly this extensive study. In order to give some idea of the approach and methods used by the author, let us take two basic problems. One is the problem designated by the author as the "principal subject of his study," namely: "What is an Air Charter?" In the same introduction the author offers the answer that it is "essentially a notion of form," referring to "contracts concluded by means of a certain type of document, the charterparty. As attached to the charterparty document, the notion of the air charter is contrasted only with the contract concluded by ticket or air waybill." This introductory definition remains unfinished throughout the study, including the final chapter dealing especially with the notion of the air charter. Attempts are made to reach a definition by deductive and inductive methods, with additional explorations into forms and tariffs. A negative definition is again attempted, by including "contracts which are not

† Stockholm, P.A. Norsted & Söners Förlag (n.d.), XXII & 587 p., with annex.

formed by the use of tickets and air waybills" (p. 503). In the final chapter the air charter as a term of "international distribution" is said to refer to the "use of aircraft and does not transfer title" (p. 501), while elements contained in different local laws only "explain limitations" as "reflections of national law conceptualism." After suggesting that the "limitations imported into the air charter notion must be stripped of their international character and should not be permitted to influence the framing of a definition" (p. 502), the reader is given the final definition to the effect that the air charter "is to be defined as relating to contracts which have been entered into by means of a special document, the charter-party, exactly in the same way as the maritime charter notion is believed to once have arisen (*carta partita*)" (p. 503). However, such definition relying on a historically conditioned *idem per idem* remains unsatisfactory and, as the final product of the massive study, strangely disappointing.

Difficulties in grasping the scope as well as the methods of the work are further exemplified by the discussion of the air charter in relation to the Warsaw Convention. The preliminary question as to whether or not the Convention applies to air charters generally or only to certain types or not at all, is discussed earlier in the book. In chapter four dealing especially with the Convention (p. 241), the author, under the subtitle "Distribution of Warsaw Rules," plunges into a prolonged excursion on the question involved in the fact that the authentic text of the Convention is French, without showing a particular connection between the discussion of the air charter and this facet of the Convention, despite the opportunity to attempt a solution by showing that the English translation of the French "contre remuneration" (art. 1, para. 1) by "for hire" is inaccurate, that it should be "for a consideration," which could alleviate the tedious discussions, at least within the scope of the Warsaw Convention, of bailment and *locatio rei*. Then a prolonged discussion of the methods used by various countries in adopting the Convention follows (p. 250-255), again with no apparent bearing on the air charter. Still within the discussion of the Warsaw Convention, the Wrongful Death Statute and the Kilberg case appear followed by a discussion of "remedies in tort," "vicarious fault liability" in France, Germany, Scandinavia, Anglo-Saxon law, and the *res ipsa loquitur* doctrine (p. 337). Under the subheading of "Convention Insufficiency" again the "ambit of tort remedies" is treated, including what is termed "defensive measures," turning mainly around Article 24 of the Convention.

It is true that comparative studies present difficult questions both in terms of the selection of supporting materials as well as the conclusions to be drawn therefrom. The former consists of what legal systems and what materials found in such systems should be included or excluded. It seems that the extent of the present study does not warrant the limitation of materials to a few European legal systems and to that of the United States. The elimination of a full discussion, for example, of the Italian *Codice di Navigazione*, mentioned in the book but not explored, is to be regretted, particularly because the *Codice* represents one of the most complete statutory regulations, even though using the method of simple identification of the *locazione di nave* and *noleggio* with the air charter (art. 929 and 376-395); this applies also to the modern Latin American aviation codes dealing fully with the various aspects of *fletamento* (e.g.,

Argentina, 1954, art. 56-63). It may be added that recently interesting solutions have been suggested in the *Codigo Aeronautico Americano, Anteproyecto Argentino* (1962, art. 85-89).

There can be no doubt that the study is a valuable contribution because of the amount of documentation as well as because of the detail of the work. However, it seems that the author was frequently overpowered by the collected documentation and as a consequence less forceful in his analysis and conclusions. His tendency toward abstractions and flat generalizations, both without exact classifications supported by adequate definitions, do not help to clarify complicated passages. Let us take two examples. On page 198 we read that the Warsaw Convention "if read literally, purports to cover all international carriage by air without any limitation whatsoever." It is elementary that this statement is incorrect, since the Convention applies only to international air transportation involving one or more contracting countries, only to transportation of persons, baggage or goods for consideration (or gratuitous when performed by "air transportation enterprises"), and does not include, for example, transportation of members of the crew. Another example may be found on page 250 with the following statement: "Within the scope of this book's inquiry, Warsaw Acts exist in all countries except the United States." This statement would have to be limited to countries which have ratified the Convention, and even among these countries not all have made the provisions of the Warsaw Convention applicable to other than international air transportation as defined by the Convention. All these observations do not mean that the carefully prepared work, quite unique in the literature of comparative aviation law, is of little value. On the contrary, there are most helpful and interesting discussions interspersed throughout the work, frequently reaching far beyond the scope of the subject. It is only a pity that in a work of such proportions and industry some of the basic rules concerning selection and organization of materials have been disregarded.

One of the added difficulties affecting the reader is the unusual attitude taken by the author in justifying his use of English "in the way in which scholars formerly used Latin" without concern "about the unpopularity of unfamiliar words and phrases with English practitioners." A language, including Latin, is a means of communication only if used as generally accepted. If not, then many terms used have no technical meaning, particularly if the author fails to provide at least an *ad hoc* definition. Unnecessary and long quotations in the text, many in French and German, and the often overwrought style also make reading difficult.

The book has a carefully prepared list of cases (p. 507-521), an extensive bibliography (p. 522-555), and an index (p. 559-587). A pocket-part contains fifteen air charter forms.

This writer is impressed by the amount of learning as well as the massive documentation included in the study. However, these qualities alone do not produce a compact, lucid, and constructive comparative discussion of the air charter.

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POST-WAR INTERNATIONAL CIVIL AVIATION POLICY AND THE LAW OF THE AIR†

By H. A. WASSENBERGH

This second edition of a volume of the same title, published first in 1957, reflects the point of view of the Netherlands.

Reviews accorded the first edition in American journals, included that of general interest;¹ a treatment which would be of good use for further exploration in the field;² and an example of the perils of endeavoring to promote the development of international law in a desired direction in disregard of the realities of State practice.³

The forward to the second edition states that new developments in civil aviation policy and in the legal basis of international civil air transportation will be reflected up to October 1961. The first ten chapters of the second edition are virtually identical with those chapters in the first edition.⁴

The only new material in this second edition is Chapter XI which deals with:

A. *Co-operative Arrangements* (166-69). A review of the 1958 arrangements among five European carriers (Air France, Lufthansa, Alitalia, KLM and Sabena) looking toward establishment of Europair as the sole carrier designated by their governments to operate their international services; the lack of progress followed by formation of Air Union (a co-operative agreement among Air France, Alitalia, Lufthansa and Sabena)⁵ to which KLM is not a party.⁶ A brief discussion of Air Union is followed by a diversion into general matters (pp. 168-69):

In view of the anticipated capital investments entailed by supersonic aircraft, it is highly probable that these can only be put into operation successfully under joint ownership by several airlines of different nationalities. This would force airlines into combinations, not only as a means of providing capital but above all in order to arrive at a pooling of traffic rights.

And indeed, it may be that in the long run the solution to the present problems of the airline industry lies in mergers between airlines, cutting out competition between them and thus reducing the excessively large number of competing carriers, many of which are kept alive through subsidies and protectionism. To ensure fruitful co-operation, it is necessary to eliminate the competition between the partners. To do so effectively a merger is the only workable method. Moreover, it should be noted that due to technical develop-

† 2d. rev. ed., published by Martinus Nishoff, The Hague, 1962. 197 pp., Guilders 15.

¹ Macbrayne, 24 J. Air L. & Com. 499 (1957).

² Guildimann, 6 Am. J. Comp. L. 374 (1957).

³ Lissitzyn, 52 Am. J. of Int'l. L. 153 (1958).

⁴ The only new points reflected in those ten chapters include, a single line, following a table showing an annual growth rate of passenger traffic of approximately 15% per annum in the years 1951 to 1960, stating that a slump developed in 1961 (p. 4). A sequel to this consists of two innocuous paragraphs added at the end of Chapter X (p. 165).

The other changes found in the first ten chapters appear to be at p. 56, n.2 (addition of a citation); p. 68, n.38 (omission of a note); p. 81 (addition of additional carriers as members of the Bureau for Air Transport Research); p. 156, n.1 (reference to signing of the Antarctic Treaty of December 1, 1959); p. 157, n.2 (addition of a footnote reference to articles on space flight); and 165, n.1 (addition of one paragraph to note 1).

⁵ Business Week, May 26, 1962, p. 170; Aviation Daily, Feb. 19, 1963, p. 322.

⁶ As a result of dissatisfaction with the shares to be attributed to KLM, in 1959 it withdrew from negotiations that led to Air Union. In February 1963, following a change in management of KLM, steps were taken looking toward its entry into Air Union. Wall Street J., Jan. 9, 1963, p. 32, col 2; Business Week, Jan. 19, 1963, p. 34; Aviation Daily, Feb. 4, 1963, p. 223.

ments the minimum economic size of an airline company is steadily increasing and this will make it practically impossible for smaller carriers to operate the most modern equipment on their own.

B. *The European Common Market and Civil Aviation* (169-71). Approximately two pages are devoted to the status of European air transport under The Common Market Treaty of Rome, 1957, and the controversy as to whether that Treaty has any application to air transport.⁷

C. *Changes in U. S. Air Policy* (171-74). Four pages are devoted to this challenging topic, but practically the only point discussed is the CAB proceeding (to which KLM was a party) instituted to determine whether foreign air carrier permits should be amended by the imposition of a new condition requiring them to furnish traffic data to, and submit schedules for approval by, the CAB. On June 1, 1962, a recommended decision of the CAB hearing examiner concluded that (a) the proposed action raised questions that were primarily legislative and political in nature, which should be reviewed and be passed upon by Congress and the President; (b) if, after consultation with the Department of State, the CAB should decide not to urge or wait for Congressional action, it should institute individual proceedings against only those foreign air carriers with which the United States has had frequency and capacity difficulties; and (c) the proceeding be terminated.⁸

Project Horizon,⁹ which contains an extended discussion of United States international aviation policy, receives only the briefest of mention.¹⁰

D. *Regional Co-operation* (175-78). From the discussion about CAB's attempt to compel foreign international carriers to file traffic data and submit schedules, there ensues the assertion that national States no longer have the courage to liberalize their own civil aviation policy, various instances being referred to.

E. *Conclusion* (178-81). A four page discussion of the vacillation of States between aviation policies that are "protectionist" or "restrictive," and those that are "liberal."

DeForest Billyou
New York Bar

⁷ See Sand, *Marché Commun et Libéralisation du Transport Aérien*, 13 *Revue Générale de L'Air* 87 (1960); Sand, *Die Air Union and das Wettbewerbsrecht des Gemeinsamen Marktes*, 19 *Zeitschrift für Luftrecht* 111 (Cologne, 1960); Meyer, *L'Applicabilité à la Navigation Aérienne du Traité Créant la Communauté Economique Européenne*, 16 *Rev. Française de Droit Aérien* 211 (1962).

⁸ Foreign Carrier Permit Terms Investigation, CAB Docket 12063, Recommended Examiners' Decision, June 21, 1962.

⁹ FAA, Report of the Task Force on National Aviation Goals: Project Horizon (1961).

¹⁰ That Report is referred to at only two places in the volume under review: p. 165, n.1 (a very general reference) and p. 178, n.5 (the final footnote to the four page discussion on Regional Co-operation).