Second Opinion on Article 9.2 of the Air Services Agreement between the Netherlands and the United Arab Emirates

Introduction

1. This Opinion is submitted in response to the request of the Ministry of Infrastructure and Water Management of the Kingdom of the Netherlands (hereinafter the "Ministry") for a second opinion regarding the interpretation of parts of Article 9 of the Air Services Agreement between the Netherlands and the United Arab Emirates (1990)[1] (hereinafter the "Agreement").

2. The request for this Opinion stems from a difference in interpretation between the Ministry and KLM, a designated airline of the Netherlands (hereinafter "KLM"), regarding Article 9.2 of the Agreement and, in particular, whether that provision permits the designated airlines of each Contracting Party to exercise unrestricted sixth freedom traffic rights through their own States of registry.

3. KLM bases its view of restricted sixth freedom operations on Article 9.2, first sentence, according to which services provided by the designated airlines of each Contracting Party must bear "close relationship" to the requirements of the public for transportation on the specified routes and must have, "as their primary objective," carriage of passengers and cargo "originating from or destined for the territory of" a Contracting Party. As will be seen, these requirements were significantly modified by the Confidential Memorandum of Understanding (hereinafter the "CMOU") entered into between the Contracting Parties to supersede Article 9.2 of the Agreement.[2]

4. KLM further bases its view of restricted sixth freedom operations on Article 9.2, second sentence, whereby carriage of passengers discharged at points on specified routes in third countries shall comply with three conditions, namely, that it should be related to traffic requirements to and from the territory of the designating State, to traffic requirements of the area through which the agreed service passes, and to the requirements of through airline operation.

5. Each of the two sentences of Article 9.2 of the Agreement will now be treated in turn.

6. Note that, as an international agreement, the Agreement must be interpreted in accordance with customary rules of international law with respect to the interpretation of international treaties, as crystallized in Article 31 of the 1969 Vienna Convention on the Law of Treaties (hereinafter "VCLT").[3] Among the provisions in Article 31 is the requirement that interpretation shall focus primarily on the "ordinary meaning to be given to the terms of the treaty," that account shall also be taken of any "subsequent agreement" relating to interpretation, and that any relevant rules of

[1] Agreement between the Kingdom of the Netherlands and the United Arab Emirates for the purpose of establishing air services between and beyond their respective territories, 31 July 1990.
[2] Furthermore, in accordance with Article 31 of the VCLT (Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, entered into force 27 January 1980, UNTS 1155, p. 331), the CMOU must be taken into account when interpreting article 9.2.
[3] VCLT, *supra* note 2.

international law applicable in the relations between the parties must be applied. As to the latter, this Opinion assumes that both the Netherlands and the UAE comply with the general rules of international law applicable to the substantive terms used in bilateral air services agreements including (without limitation) the U.S./UK Air Transport Agreement of 1946, popularly known as the Bermuda I Agreement in tribute to its place of negotiation and signature.[4]

1. Article 9.2 – First Sentence

7. The first requirement in the first sentence of Article 9.2 is that "[t]he agreed services provided by the designated airlines of the Contracting Parties shall bear close relationship to the requirements of the public for transportation on the specified routes".

8. The second part of Article 9.2's first sentence introduces a second requirement, namely that "[t]he agreed services provided by the designated airlines of the Contracting Parties (…) shall have as their primary objective the provision, at a reasonable load factor, of capacity adequate to carry the current and reasonably anticipated requirements for the carriage of passengers and cargo including mail originating from or destined for the territory of the Contracting Party which has designated the airline."

9. According to these requirements, the services offered by designated carriers of both Contracting Parties must be assessed in the light of the demand from the public for transportation between the Contracting Parties (i.e. "(…) originating or destined for the territory of the Contracting Party (…)"). The requirement of the public for transportation must thus be assessed on the basis of the exercise by the designated airlines of the Contracting Parties of their third and fourth freedom traffic rights between the Contracting Parties.

10. In the view of this Opinion, the difference in interpretation between the Ministry and KLM can be attributed primarily to a different understanding of certain of the freedoms of the air. That conceptual schema originated at the 1944 Chicago Conference on International Aviation, which culminated in the signing of both the Convention on International Civil Aviation[5] as well as the International Air Services Transit Agreement (IASTA) or "Two Freedoms Agreement,"[6] the latter of which granted all contracting parties the right to transit across each other's airspace, as well as the right to make a non-traffic stop for refueling or technical purposes. The "Five Freedoms

[4] Agreement Between the Government of the United States of America and the Government of the United Kingdom Relating to Air Services Between Their Respective Territories, reprinted in [Apr. 2008] 3 Av. L. Rep. (CCH) ¶26,540a, at 23,219 (Feb. 11, 1946).
[5] Convention on International Civil Aviation, opened for signature Dec. 7, 1944, 61 Stat. 1180, 15 UNTS 295.
[6] International Air Services Transit Agreement, opened for signature Dec. 7, 1944, Stat. 1693, 84 UNTS 389.

Agreement," officially the International Air Transport Agreement,[7] was also signed at the Conference but did not receive enough signatories to enter into force. The Five Freedoms Agreement would have allowed airlines of a given State the right to fly outgoing passengers on scheduled flights to another contracting State (third freedom), to fly incoming passengers from another contracting State (fourth freedom), or to fly passengers between two other contracting States on a flight beginning or ending in the flying State (fifth freedom). Note that the ability to sell a round-trip ticket, making use of both third and fourth freedoms on one itinerary, was not conceived of as a separate freedom, or as a privilege that would need to be explicitly bargained for or contained in the terms of the Air Services Agreement. Accordingly, it is clear that each of the freedoms was conceived as independent and autonomous, negotiable and exercisable without any necessary correlation to any other or additional rights and in some cases (such as fifth freedom) dependent on negotiation of further and separate bilateral air services agreements with third countries. As a corollary of that autonomy, and following the failure of the Five Freedoms Agreement, third, fourth, and fifth freedoms were regularly and explicitly exchanged by States under a patchwork system of bilateral air services agreements. In the way that the bilateral system evolved, States did not typically make the grant of any traffic right in one agreement dependent upon or correlated to the grant of any equivalent traffic right under any other bilateral agreement.

11. This original catalogue of international traffic rights did not include a sixth freedom, although it would not take long for that term to enter the lexicon of international aviation. While some experts referred to cabotage as the "sixth freedom,"[8] the term came to be commonly understood as a descriptor for the practice by which an airline would offer connecting flights between two stops via a stop-over in its home State where all passengers are discharged and then some or all of those passengers board *another* aircraft with a different flight number.[9]

12. For purposes of this Opinion, however, it is important to emphasize that the term "sixth freedom" has indeed served more as a descriptor than a legal term, although it is certainly included in the later open skies agreements negotiated by the United States. Moreover, the United States argued historically that traffic of this kind was actually a subset of the fifth freedom.[10] Nevertheless, the dominant view today in the global air transport community reflects that of the International Civil Aviation Organization (ICAO), which has declared that the sixth freedom is in reality a legal exercise of a State's

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[7] International Air Transport Agreement, opened for signature Dec. 7, 1944, Stat. 1701, 171 UNTS 387.

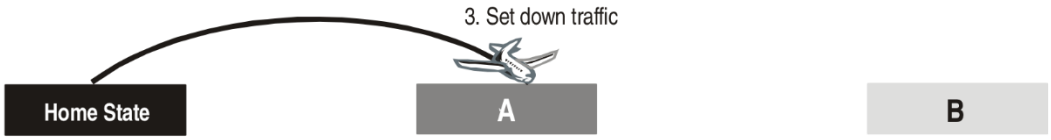
[8] Sir George Cribbet, *Some International Aspects of Air Transport*, Royal Aeronautical Society, p. 7 (1950).

[9] Albert W. Stoffel, "American Bilateral Air Transport Agreements on the Threshold of the Jet Transport Age" (1959) 26(2) *Journal of Air Law and Commerce* 119.

[10] Henri Wassenbergh Post-War International Civil Aviation Policy and the Law of the Air (1957): "In the U.S. commentary (Doc. AT-WP/380 of 22 (11/54, Appendix) on an ICAO questionnaire concerning stop-overs, on the other hand, it is stated that 'It should be noted that in the U,.S. view, Sixth Freedom is merely the designation given to a specific type of Fifth Freedom traffic and it is subject to any provisions of bilateral agreements which relate to the Fifth Freedom.'"

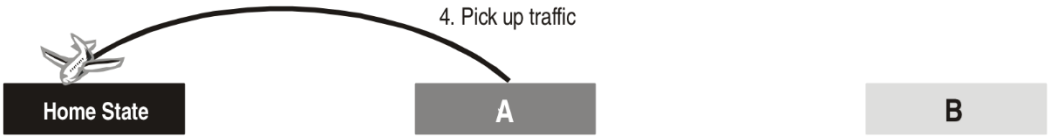
third and fourth freedoms in combination. This is the view adopted for purposes of this Opinion.[11]

13. The third freedom enshrines the principle that "[a]n airline has the right to carry traffic from its country of registry to another country".[12] Third freedom traffic, for purposes of the matter at hand, applies when a designated airline of the Netherlands (e.g. KLM) or of the UAE (e.g. Emirates Airlines) carries traffic from its country of registry to another State with which its country of registry has a bilateral air services agreement.



Source: Civil Aviation Organization (ICAO), *Manual on the Regulation of International Air Transport* (2nd ed., ICAO Doc. 9626, ICAO, 2004) at 4.1-9.

14. The fourth freedom enshrines the principle that "[a]n airline has the right to carry traffic from another country to its own country of origin".[13] Fourth freedom traffic, in the matter at hand, applies when a designated airline of the Netherlands (e.g. KLM) carries traffic from the UAE to the Netherlands and, conversely, when a designated airline of the UAE (e.g. Emirates Airlines) carries traffic from the Netherlands to the UAE.



Source: Civil Aviation Organization (ICAO), *Manual on the Regulation of International Air Transport* (2nd ed., ICAO Doc. 9626, ICAO, 2004) at 4.1-9.

15. It is widely accepted, as noted above, that sixth freedom traffic, which accords an airline "the right to carry traffic between two foreign countries via

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[11] ICAO, Working Paper ECAC/1-WP/3 of 17/8/55 ("Legally, ... the sixth freedom is a combination of a fourth freedom transportation inbound to the country of the aircraft's nationality, followed by a third freedom transportation outwards beyond that country"). As Rigas Doganis noted, States decades ago tried to negotiate royalty payments for sixth freedom flights or to impose minimum durational requirements on stop-overs, but those efforts yielded to gradual acceptance that sixth freedom traffic inevitably flows from a grant of third and fourth freedom rights,. Rigas Doganis, *Flying Off Course: The Economics of International Airlines* (1991). As a result, despite the U.S. model open skies practice mentioned in the main text, sixth freedom rights are rarely explicitly granted in air services agreements because they are understood to have already been obtained by third and fourth freedom privileges that are present in every bilateral air services agreement.

[12] Paul Stephen Dempsey, *Public International Air Law* (Institute and Center for Research in Air & Space Law, McGill University 2008) at 24.

[13] *Id*., at 24.

its own flag State or State of registry",[14] can be "viewed as a combination of third and fourth freedoms secured by the State of registry from two different countries".[15]

Source: Civil Aviation Organization (ICAO), *Manual on the Regulation of International Air Transport* (2nd ed., ICAO Doc. 9626, ICAO, 2004) at 4.1-9.

16. Accordingly, the requirement that the services offered by designated carriers of both Contracting Parties must be assessed in light of the demand from the public for transportation between the Contracting Parties must take into account the portion of sixth freedom traffic which falls under the scope of Article 9 of the Agreement.

17. The fact that the concept of sixth freedom is not explicitly provided in the Agreement (in fact, bilateral air services agreements typically do not use the "freedom" terminology at all), therefore, does not mean that it does not exist.[16] As the earlier discussion has indicated, sixth freedom is indeed often implied and "flow[s] from having open third, fourth, and fifth freedoms agreed with several countries".[17]

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[14] Dempsey, *supra* note 12, at 25. *See also* Rigas Doganis, *Flying Off Course: The Economics of International Airlines* (2nd ed., Routledge 1991) at 324 (defining the sixth freedom as "[t]he use by an airline of country A of two sets of third and fourth freedom rights to carry traffic between two other countries but using its base at A as a transit point").

[15] Dempsey, *supra* note 12, at 25. *See also* Brian F. Havel and Gabriel S. Sanchez, *The Principles and Practice of International Aviation Law* (Cambridge University Press 2014) p. 81 (observing that "[t]his complex of access privileges, known as the sixth freedom, conflates the fourth and third freedoms (in that order)"); International Civil Aviation Organization (ICAO), *Manual on the Regulation of International Air Transport* (2nd ed., ICAO Doc. 9626, ICAO, 2004) at 4.1-13 ("The creators of this new concept [i.e. sixth freedom of the air] maintained that the so-called "Sixth Freedom" consisted of a combination of the Fourth and Third Freedoms. Thus, by this definition, the traffic originating in a second State moved as Fourth Freedom traffic to the homeland of the carrier, then as Third Freedom traffic to the State of final destination"); and, Henri Wassenbergh, *Post-War International Civil Aviation Policy and the Law of the Air* (Springer 1962) at 71, fn. 3 ("[I]n a Working Paper (ECAC/1-WP/3 of 17/8/55) for the First Civil Aviation Conference of 29th November, 1955, the ICAO concluded that 'Legally ...the (6th freedom) transport is a combination of a 4th freedom transportation inbound to the country of the aircraft's nationality, followed by a 3rd freedom transportation outwards beyond that country.'").

[16] Doganis, *supra* note 14, at 32 and 324. *See also* the following comments by the Organization for Economic Co-operation and Development (OECD) and International Transport Forum (ITF), *Air Service Agreement Liberalisation and Airline Alliances – Country-Specific Policy Analysis* (OECD/ITF2014) at 16-17:

> It should be noted that generally sixth freedoms are not singled out in bilaterals; in fact they are rarely mentioned. Sixth freedoms flow from having open third, fourth, and fifth freedoms agreed with several countries. Airlines combine these rights to create a sixth freedom, the ability to pick up passengers in one country, bring them to your home country, and provide a connecting flight to a third country.

[17] OECD/ITF, *supra* note 16, at 16. *See also* Havel and Sanchez, *supra* note 15, at 96 ("(…) legal capacity to offer those services already exists under third and fourth freedoms that are

18. In the matter at hand, if a designated airline from one of the Contracting Parties (e.g. Emirates Airlines) takes on board passengers in one of the Contracting Parties (i.e. the Netherlands), stops in its own flag State (i.e. the UAE) and then continues to a third State, with or without a change of gauge and flight number, that designated airline essentially exercises the fourth freedom of the air in carrying traffic from the Netherlands. This segment of the route is thus covered under the Agreement with respect to determining the requirements of the public.

19. The segment of travel which takes place between the Contracting Party where the designated airline (Emirates Airlines) stopped (the UAE) and the third State comprises the exercise of the third freedom of the air in that it allows carriage of passengers and cargo from the country of registry to a third country and is thus not regulated at all by the Agreement. Because it is governed by a separate bilateral treaty between the designating Contracting Party and the third country, this third freedom segment is not taken into account in evaluating the public demand for transportation between the Contracting Parties under Article 9.

20. The same assessment can be made if traffic originates in a third country (e.g. a KLM flight from the United States), moves to a Contracting Party (e.g. the Netherlands) under the fourth freedom, and continues to the other Contracting Party (e.g. the UAE) using the third freedom. Here, however, the fourth freedom traffic, rather than traffic generated from exercise of the third freedom, is excluded from evaluation of the public demand.

21. By taking into account the "the ordinary meaning"[18] of the terms used in the first part of Article 9.2's first sentence, the exercise by a designated airline of its fourth freedom traffic between the Contracting Parties cannot be excluded for the purpose of determining the public demand for transportation and thus adequate capacity and the number of frequencies which may be operated by the designated airlines. This is true even if the designated airline continues its journey beyond the territory of one of the Contracting Parties. Similarly, the exercise by a designated airline of its third freedom traffic between the Contracting Parties must not be excluded when assessing the demand of the public for transportation even where the designated airline started its journey in a third State before exercising the said freedom between the Contracting Parties.

22. In the context of the exercise of sixth freedom traffic by a designated airline, the second requirement of article 9.2's first sentence makes it explicit that the segment of travel between a Contracting Party and a third State (or

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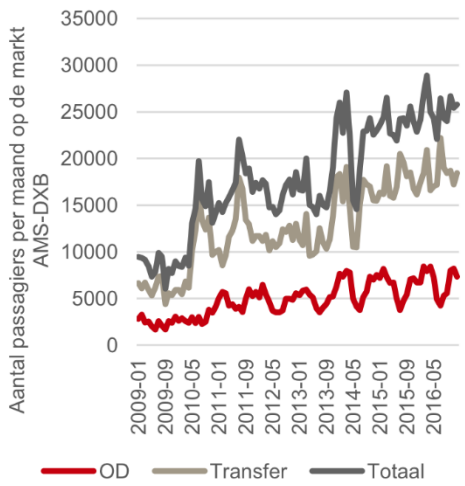
granted separately and independently of any effort to exchange (or withhold exchange of) a sixth freedom" [footnote omitted]) and 82 ("Although it is conceivable that a State could insist on sixth freedom limitation in its ASAs, international aviation's present trade regime has, for better or worse, made peace with the existence of this "rogue" freedom even if a select number of air carriers have not" [footnote omitted]) and ICAO, *supra* note 15, at 4.1-10. It is noteworthy that some agreements explicitly address sixth freedom rights (*see e.g.* the US Model Open Skies Agreement (Air Transport Agreement between the Government of the United States of America and the Government of [country], Jan. 12, 2012, Art. 2) and agreements subsequently negotiated on the basis of the Model Agreement).

[18] VCLT, *supra* note 3, Art. 31.

between a third State and a Contracting Party) will (a) be governed by separate treaty arrangements, (b) does not fall within the scope of the Agreement, and (c) cannot be excluded from the calculation of adequate capacity for purposes of the exercise of third and fourth freedoms between the Contracting Parties.

23. The SEO Monitor 2018 compiled the following graph measuring the number of passengers per month on the AMS-DXB market.



Source: SEO Economisch Onderzoek, *Monitor karakteristieken luchtvaartmarkt Nederland – Verenigde Arabische Emiraten (2009-2017)* (SEO 2017) at 18.

24. The red line (OD – Origin-Destination) tracks the exercise of third and fourth freedom traffic between the Contracting Parties. The light gray line (Transfer) shows the exercise by the designated airlines of the Contracting Parties of their third or fourth freedom traffic *between the Contracting Parties* which forms part of sixth freedom services. The dark gray line (Total) must be taken into account to assess the public demand for transportation under Article 9 in order to determine the "capacity adequate to carry the current and reasonably anticipated requirements for the carriage of passengers and cargo including mail originating from or destined for the territory of the Contracting Party which has designated the airline" (Article 9.2).

25. Irrespective of the foregoing, designated airlines under the Agreement could continue to augment their third/fourth/sixth freedom frequencies on foot of the CMOU which the Contracting Parties entered into to modify and/or supersede certain provisions of the Agreement. In particular, Chapter B.2. of the CMOU provides that

    The designated airline(s) of each Contracting Party shall have the right to operate any number of frequencies on the specified routes with passenger, all cargo and combined passenger and cargo aircraft.

26. Applying Vienna Convention interpretive rules, this provision applies notwithstanding the condition in Article 9.2 regarding public demand for transportation and in legal effect supersedes the latter provision.

27. Any argument that such third and fourth freedom rights between the Contracting Parties cannot be used if the journey starts in the territory of a third State or continues beyond the territory of a Contracting Party without an explicit grant of sixth freedom rights is belied by a simple survey of air services agreements and route networks from around the globe, which would clearly demonstrate how pervasive the practice is. Had the parties desired to limit the reach of Article 9 by excluding sixth freedom traffic from its scope of application, they could have done so explicitly. In particular, the Contracting Parties could have imposed the need to make stop-overs for a certain duration of time in intermediate points or provided for royalty payments for sixth freedom traffic.[19] On the face of the Agreement (and the CMOU), the Contracting Parties decided not to do so.

28. In light of what has been explained above, it is abundantly evident that the first sentence of Article 9.2 does not prohibit (or restrict) a designated airline from taking passengers on board in its flag State even if the designated airline continues its travel to or from a third State. As explained above, the segment of the travel which takes place between the Contracting Parties consists of the exercise by the designated airlines of their third or fourth freedom traffic, thus meeting the condition in Article 9.2, first sentence, that "the carriage of passengers (…) originat[es] from or [is] destined for the territory of the Contracting Party which has designated the airline". This is the only possible understanding of the terms "from or destined for the territory of the Contracting Party" when interpreted in accordance with their ordinary meaning pursuant to Article 31 of the VCLT.

29. Accordingly, consistently with what has been explained above, the assessment for the public demand for transportation must take into account the total number of passengers on the market between the Contracting Parties, including those that subsequently continue their travel beyond one of the Contracting Parties to a third State (or travel from a third State through a Contracting Party to the other Contracting Party).

30. This interpretation , as noted above, must be considered also in light of the CMOU, which effectively removes the condition of meeting the demand of the public for transportation between the Contracting Parties to assess the permissible number of frequencies operated by the designated airlines between the Contracting Parties.

2. Article 9.2 – Second Sentence

31. The last part of Article 9.2 which must be analyzed is its second sentence and associated conditions:

Provision for the carriage of passengers and cargo including mail both taken on board and discharged at points on the specified routes in the territories

[19] *See e.g.* Doganis, *supra* note 14, at 32. *See also* ICAO, *supra* note 15, at 4.1-13.

of States other than that designating the airline shall be made in accordance with the general principles that capacity shall be related to:

9.2.1 traffic requirements to and from the territory of the Contracting Party which has designated the airline;

9.2.2 traffic requirements of the area through which the agreed service passes, after taking account of other transport services established by airlines of the States comprising the area; and

9.2.3 the requirements of through airline operation.

32. The second sentence of Article 9.2 includes three conditions relating to control of capacity that call to mind the old Bermuda I "primary objective" doctrine that required airlines to ensure that their origin/destination capacity was not distorted by the traffic demands of all fifth freedom markets. Thus, rather than implicating sixth freedom operations as described in this Opinion, Article 9.2 second sentence and its associated conditions address the case of fifth freedom traffic, defined as the right of an airline "to carry traffic between two countries outside its own country of registry so long as the flight originates or terminates in its own country of registry".[20]

Source: Civil Aviation Organization (ICAO), *Manual on the Regulation of International Air Transport* (2nd ed., ICAO Doc. 9626, ICAO, 2004) at 4.1-9.

33. As made explicit by the Article 9.2, second sentence, the situation which is targeted is one that involves an aircraft which stops in an intermediate country (which of course may be one of the Contracting Parties) where some passengers are discharged and others taken on board before continuing travel. In its plain words, this provision regulates fifth freedom competition between the designated airlines of the Contracting Parties. Although it does not have the specific regulatory mandate of, for example, the U.S./EU Air Transport Agreement of 2007 – which explicitly prevents intra-EU price leadership by U.S. competitors[21] – the provision is nevertheless a permission to either Contracting Party to monitor fifth freedom capacity and frequency on an *ex post facto* basis. It has no application to the matter at hand.

34. Thus, Article 9.2, second sentence, does not apply to the traffic rights which must be assessed in this Opinion and which involve the exercise of third,

[20] Dempsey, *supra* note 12, at 24.
[21] U.S./EU Air Transport Agreement 2007, art. 13(2)(a), see https://2009-2017.state.gov/e/eb/rls/othr/ata/e/eu/114768.htm.

fourth, and sixth freedom traffic. For example, where an aircraft of a designated UAE airline departs from the Netherlands and is destined for the UAE, discharges all passengers, and then some or all of those passengers board *another* aircraft with a different flight number[22] destined for a third country, this arrangement cannot be considered to be the exercise of a fifth freedom within Article 9.2 of the Agreement or its associated conditions.

35. As explained above, the segment of the trip taking place between the Contracting Parties is the exercise by either of the designated airlines of rights of third or fourth freedom traffic as regulated by the Agreement (and thus falling under the scope of Article 9), while segments of the service taking place between one of the Contracting Parties and a third State, provided that such a service is being operated by a designated airline of that Party, do not fall under the scope of the Agreement.

36. Accordingly, whether or not the conditions stipulated in Article 9.2, second sentence, could be said to apply to sixth freedom traffic, in the view of this Opinion the independent and autonomous nature of the freedoms of the air prevents such an application in the absence of explicit wording to that effect.

Conclusion

37. In conclusion, in interpreting Article 9 of the Agreement and, in particular, the requirement in Article 9.2 that in evaluating the primary objective of providing air services which answer the public demand for transportation when assessing the capacity offered by the designated airlines, the exercises by the latter of their third and fourth freedom traffic rights between the Contracting Parties must be taken into account, including when these rights are part of a larger journey (that is to say, in the context of the exercise of sixth freedom traffic).

38. Furthermore, pursuant to the CMOU which supersedes the Agreement (and thus the requirement of public demand for transportation provided in the first sentence of Article 9.2), the designated airlines are entitled to increase the number of frequencies on the specified routes.

39. Finally, the second sentence of Article 9.2 (together with the associated conditions provided in 9.2.1, 9.2.2, and 9.2.3) targets the case of fifth freedom traffic which is not at issue when passengers or cargo from a Contracting Party or from a third country are discharged in one of the Contracting Parties and continue their travel aboard another aircraft (of a designated airline) destined for the other Contracting Party or a third country.

[22] Thus, change of gauge does not fall under the scope of sixth freedom traffic. *See* Dempsey, *supra* note 12, at 24, fn. 80 (observing, with respect to fifth freedom traffic, that "[s]ubsequent practice has allowed "change of gauge" operations, whereby airlines transfer passengers between aircraft at a foreign point").

Professor Brian F. Havel

Montreal, Canada

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