

# **The legal regime of air charter in china**

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## I. Introduction

Scheduled and Non-scheduled international air services have been the dichotomy of international air transport elaborated by the Chicago Convention of 1944. The distinction to be made in air transport is that a scheduled international air service is a series of flights that it passes through the airspace over the territory of more than one State. Certain conditions must be complied as required by the ICAO and the practice.<sup>87)</sup> While non-scheduled international service was to indicate “the purchase of the whole capacity of an aircraft for a specific flight or flights for the use of the purchaser (individual or group). It is, sometimes, concerned the humanitarian or emergency flight, taxi-class passenger flights of occasional character, flight hired by a single person, single flights of no operator or group of operators.

From contractual point of view, charter agreement may be standardized into three types: passenger ‘charter flight contract (voyage charter or flight charter); time charter contract (wet charters); and dry charter (bare hull charter) contract.<sup>88)</sup> However, these contracts are not related directly to the operation of charter-designated airlines within framework of private international air law.

Air charter is used here in the special sense that it has acquired in bilateral, regional multilateral and practice. In its narrower sense, charter traffic, in many occasions, replace, the scheduled traffic in certain situation to meet the demand for air transport services at the lowest possible level of fares and/or at the promotion of local tourism. In normal situation for expanding commercial operation of national carriers, it is always operating as an incidental

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87) It possesses other conditions: 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; it is operated so as to serve traffic between the same two or more points, either 1) according to a published timetable, or 2) with flights so regular or frequent that they constitute a recognizable systematic series. See ICAO Doc. 7278-C/841, at p. 3, cited by Diederiks-Verschoor, loc. cit., p. 16.

88) Martin, P., McLean, J.D., Monlaur Martin, Ede, and other, Shawcross and Baumont, Air Law, 4th edition, Butterworths, London, 1996, p. V -50-53 at V/59c-V63.

commercial operation complimented to scheduled international air transport either regulated by bilateral air transport agreement or unilaterally by national administrative decision. Currently, the operation of charter flights by scheduled and chartered airlines has become a part of regular commercial services complimented to scheduled air traffic within the framework of bilateral and regional multilateral agreements, particularly under the framework of “open skies” agreement.<sup>89)</sup>

Liberalization and deregulation of charter rules and the elimination of restrictions on charter rights is the result of the globalization of international trade and commerce within the framework of the WTO. There is a tendency on different levels, states are applied the model agreement of ‘open skies’, while developing countries are tended to accept a restrictive or limited ‘open skies’ agreement. Positive international air law has adopted different rules regulating air charter on multilateral, regional, and national levels.

### **1) Air Charter in Multilateral Treaty**

Charter flight in international air law has, from very beginning, not precisely defined by the International Civil Aviation Organization (ICAO) since 1947 when it came into being. Ordinarily, scheduled international air transport is the most important sector of international civil aviation, while non-scheduled international air transport is only complimentary, governed by Article 5 of the

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89) The “open skies” policy was initiated by President Carter in 1978 which aims at providing “maximum consumer benefits... through the preservation and extension of competition between airlines in a fair market place”. The following objectives are formulated: 1) creation of new and greater opportunities for innovative and competitive pricing; 2) liberalization of charter rules and the elimination of restrictions on charter operations; 3) elimination of restrictions on capacity, frequency and route operating rights; 4) elimination of discrimination and unfair competitive practices faced by US airlines in international transportation; 5) flexibility for multiple designation of US airlines; 6) authorization of more US cities as international gateways; and 6) facilitation of competitive air cargo services, see Doganis, R., “The Bilateral Regime for Air Transport: Current Position and Future Prospects”, in OCED, *International Air Transport: The Challenges Ahead*, Paris, 1993, p. 52.

Chicago Convention, 1944, particularly the paragraph 2 which provides “aircraft engaged in the carriage of passengers, cargo or mail for remuneration or hire...shall also...have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions of limitations as it may consider desirable.”

Of course, Chicago Convention did not foresee the rapid development of commercial charter flight for holiday purpose in Western Europe after the 1950. By practice, the operation of charter traffic is, in its very beginning, the subject to the regulations of national rules and bilateral charter agreements (charter annex clause) within the framework of normal bilateral agreement of international air services.<sup>90)</sup> Any attempt at a universally multilateral agreement on traffic rights, pricing and capacity of both scheduled and non-scheduled traffic was failed,<sup>91)</sup> but regional arrangement in Europe was achieved in various stages of its regional integration

## **2) Air Charter in Regional Multilateral Treaty**

### **a) In Europe**

Europe is the region where charter flights prevail after the World War II. Chicago Convention could not provide adequate legal instrument to regulate increasing number of air charter operation, but rely on national administrative law. On 30 April 1956 the Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe was adopted by the European Civil

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90) Diederiks-Verschoor, I.H.Ph., *An Introduction to Air Law*, 7th Revised Edition, Kluwer Law International, The Hague/London/New York, 2001, p. 16.

91) According to the International Air Services Transit Agreement signed on 7 December, 1944, the first two Freedoms of traffic rights, namely, the right to overfly while on an agreed service and the right to land in each other's country, were included. Third, fourth and fifth freedoms are contained in the International Air Transport Agreement, 7 December 1944, which was not adhered by major aviation nations. A further attempt at a multilateral agreement on the exchange of traffic rights, pricing and capacity was also failed at the Geneva Conference of 1947. See Doganis, R., *loc. cit.*, p. 46.

Aviation Conference in Paris, which declared that "it is the policy of each of the States parties to the Agreement that aircraft engaged in non-scheduled commercial flights within Europe which do not harm their scheduled services may be freely admitted to their territories for the purpose of taking on or discharging traffic."<sup>92)</sup> The charter traffic is thus conditioned by Article 1<sup>93)</sup> and 2 of the Paris Multilateral Agreement and limited to humanitarian or emergency flights; taxi-class passenger flights of occasional character; flights on which the entire space is hired by a single person (individual, firm, corporation or institution); and single flights, no operator or group of operators being entitled...to more than one flight per month between the same two traffic centres for all aircraft available to him.<sup>94)</sup> It is without any doubt that the Agreement was a restrictive in character.

Since the creation of the European Economic Community in 1958, it has gained momentum for the liberalization of air traffic in accordance with principles of the free movement of goods, persons, services and capital as well as a common policy in the sphere of transport.<sup>95)</sup> Thus a new Community aviation policy was adopted after the formulation of the 'first package' on air transport in 1988,<sup>96)</sup> 'the second package' in 1990,<sup>97)</sup> and the 'third package'

92) See the Preamble of the 1956 Paris Agreement, cited by Cheng, B., loc. cit. p. 209.

93) It stipulates as following: This Agreement applies to any civil aircraft: a. registered in a State member of the European Civil Aviation Conference, and b. operated by a national of one of the Contracting States duly authorized by the competent national authority of that State, when engaged in international flights for remuneration or hire, other than scheduled international air services, in the territories covered by this Agreement...

94) Diederiks-Verschoor, I.H.Ph., loc. cit., p. 17.

95) Steiner, J. & Woods, L., Textbook on EC Law, 6th edition, Blackstone Press, London, 1996, p. 14.

96) The first EEC Memorandum on air transport, adopted in July 1979, resulted a Council Directive (EEC) 83/416, see OJ L237 26.8.83, p. 19.; The second Memorandum on air transport, adopted in March 1984 resulted in Council Decision (EEC) 82/602, known as the 'first package', which became effective from 1 January 1988, see OJ L374 31.12.87, p. 19.

97) The 'second package' resulted in Council Regulation (EEC) 2343/90, with

in 1993.<sup>98)</sup> The ‘third package’ has taken the measures to implement the final phase of liberalization of European air transport covering both scheduled and charter flights.<sup>99)</sup> Henceforth, charter airlines are given the same freedom of access as scheduled carriers and member States may no longer impose on charter services the type of restriction within the framework of European air law.<sup>100)</sup>

Furthermore, the creation of ‘a single European Sky’ was announced by the Commission of the European Communities (EC) in October 2001, which was operated on December 31, 2004.<sup>101)</sup> Within the framework of the EC liberalized open sky policy, European Union’s citizens will at last be able to fly in a European Sky unhampered by frontiers while enjoying the highest possible level of aviation safety, in spite of it is scheduled or non-scheduled charter flights.

#### **b) In Asia**

##### **i) In ASEAN**

Association of Southeast Asian Nations (ASEAN) has set a target towards Open Sky which has been set for 2015 in “The Roadmap for the Integration of ASEAN: Competitive Air Services Policy”. Before that date, ASEAN countries, the first Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services among the Association of South-East Asian Nations,

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effect from 1 November 1990, see OJ L217 11.8.190., p. 8.

98) The ‘third package’ with effect from 1 January 1993 replaced previous Council Regulation by Council Regulation (EEC) 2408/92, see OJ L240 24.8.92, p. 8.

99) It was reported that “the 40 European charter companies alone carry more than 50 million passengers annually, accounting for 67 per cent of all international EC passenger-kilometres flown in the EC”, see Diederiks-Verschoor, I.H.Ph., *An Introduction to Air Law*, 7th revised edition, Kluwer Law International, The Hague/London/New York, p. 48.

100) Balfour, J., *European Community Air Law*, Butterworths, London, 1995, p. 61.

101) Shrewsbury, S.M., “September 11th and the Single European Sky: Developing Concepts of Airspace Sovereignty”, *The Journal of Air Law and Commerce*, vol. 68, No. 1, Winter 2003, p.148.

was signed at Manila on March 13, 1971, liberalized non-scheduled air services within the subregion. The second one on Air Freight Services was signed in September 2002 which is the first step towards the full liberalization of air freight services in ASEAN. The ultimate goal of ASEAN Open Sky Policy would entail a phased and progressive approach to liberalizing 1) Air Freight Services; 2) Non-scheduled Passenger Services; and 3) Scheduled Passenger Services, initially within the ASEAN Growth Areas and between Growth Areas.

#### **ii) In Asia-Pacific Rim Region**

In Asia-Pacific Rim region, regional economic cooperation has extended, *inter alia*, to air transport sector within the framework of Asian-Pacific Economic Cooperation (APEC). The liberalization of air transport in ASEAN was developed in the mid 1990s. The APEC Air Services Group (ASG) identified eight options for regional aviation liberalization at the meeting in Singapore in October 1995. These were enforced by the APECF Transportation Ministers in 1997. ASG achieved consensus, among other options, ASG recommends that APEC economies facilitate the operation of both passenger and freight charter services to supplement or complement scheduled services.<sup>102)</sup> Thus, the decision made by the APEC was to liberalize the operation of traffic rights from I to VI freedoms. The VII freedom is for cargo and the option for VII/pax.<sup>103)</sup>

The other factors which exert considerable influence over the APEC region come from the pressure made by the United States over open market bilateral agreement. The first multilateral open skies agreement within the frame of the APEC was concluded the negotiations for the Multilateral Agreement on the Liberalization of International Air Transportation (MALIAT) to replace the

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102) Forsyth, P. and others, *Preparing Asean For Open Sky - AADCP Regional Economic Policy Support Facility Research Project 02/008, Final Report*, February 2004, <http://www.aadcprrpsf.org/docus/02-008-Final Report. pdf>

103) Mendes de Leon, Pablo, "Three Avenues to the Liberalisation of International Air Services - A European Viewpoint," Vol. II, No. 1, *Soochow Law Journal*, January 2005, p. 225.

bilateral agreements between Brunei, Chile, New Zealand, Singapore and the United States which was signed on May 1, 2001, in Washington, DC.<sup>104)</sup> Samoa and Tonga have also acceded to the MALIAT.<sup>105)</sup> The agreement reached in Brunei provides for similar liberalization for all flights both scheduled and non-scheduled among the five countries for those countries carriers.

#### **d) In Other Regions**

While other regional or sub-regional arrangements on liberalized operation of traffic rights are gradually discussed and adopted in a number of models: Trans-Tasman Arrangement (Australia and New Zealand),<sup>106)</sup> the Agreement of Fortaleza (in MERCOSUR of Latin America),<sup>107)</sup> Andean Open Skies Pact,<sup>108)</sup>

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104) See, <http://www.state.gov/e/eb/tr/c661.htm>. (2006/3/19)

105) See, [http://ostpxweb.dot.gov/aviation/X-40%20Role\\_Files/multilateralosagreement.htm](http://ostpxweb.dot.gov/aviation/X-40%20Role_Files/multilateralosagreement.htm). (2006/3/19); <http://www.state.gov/e/eb/tr/c661.htm>. (2006/3/19)

106) The Single Aviation Market (SAM) arrangements in 1996, which was incorporated into the Australia-New Zealand Closer Economic Relation Trade Agreement (known as the CER Agreement) came into effect in 1983. The arrangements allowed a "SAM carrier" to operate without restrictions trans-Tasman and domestic services in either State (effectively, cabotage). Excluded were unlimited beyond rights, which continued to be governed by the bilateral air services agreement and the 1992 MOU. In 2002, two States concluded an "open skies" agreement, which formalized the provisions of SAM arrangements, eliminated the limitation of beyond rights, and allowed Seventh Freedom rights for all-cargo services. See, Secretariat of ATC, "Worldwide Air Transport Conference: Challenges and Opportunities of Liberalization", Montreal, 24 to 29 March 2003, ATConf/5-WP/5, 17/2/03, p. 6

107) The Agreement on Sub-Regional Air Service between Member States and Associates was signed at Fortaleza, on December 17, 1996. Within the framework of the Fortaleza Agreement, it is intended to standardize the granting of operation permits for all sub-regional flights. As to the progress is made with respect to sub-regional service, consideration is being given to eliminating the overlap of two regulatory frameworks: bilateral agreements and the sub-regional system; likewise, it has been deemed advisable to liberalize traffic rights. Nevertheless, the Agreement "consists practically in an incipient positive landmark with scarce mechanisms" and "it is based on the discretionary acting of the aeronautical authorities of the member states", see Candido da Silva, F.,



**Common Commercial Air Transport Policy in Caribbean States,<sup>109)</sup> and Yamoussoukro Declaration in Africa.<sup>110)</sup> Except to restrictive bilateral**

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“Air Transport in the MERCOSUR” , Airlines Magazine e-zine edition, Issue 31; ICAO, Status of the International Air Transport Services Regulation in the Latin American and Caribbean States, Economic Commission, Assembly – 35th Session, A 35-WP/196, EC/28, 20/9/04, p. 3.

- 108) The “Andean Group” was founded by five South American States in 1969 under the Cartagena Agreement (more often called “Andean Pact” ). The original Member States were Bolivia, Chile, Colombia, Ecuador and Peru, Venezuela joined the Group in 1973, while Chile withdrew in 1976. In 1991, the Andean Commission adopted Decision 279 “Integration of Air Transport in the Andean sub-region” , which established an “open skies” air transport policy on a sub-regional basis. As regards scheduled passenger and cargo services and non-scheduled cargo operations, exercise of unrestricted Third, Fourth and Fifth Freedom Rights was permitted without limitation on the number of airlines, capacity and frequency. Multiple designation for scheduled passenger and cargo services was added by the Decision 320 in 1992. Decision 297 and 320 were amended for clarification in 1994 by Decision 360 and 361, respectively. Airlines’ pricing activity was also liberalized by introducing a country of origin tariff regime. Non-Scheduled passenger services were authorized automatically between points without scheduled services. On scheduled services routes, the authorization would be granted provided that the non-scheduled services did not jeopardize the economic stability of existing scheduled services. *Ibid.*, p. 7.
- 109) See Association of Caribbean States Sixth Ordinary Meeting of the Ministerial Council, at San Pedro Sula, Honduras, December 7, 2000, adopted the Principles for a Common Commercial Air Transport Policy in the Association of Caribbean States, in which non-scheduled flights for the promotion of tourism and non-scheduled cargo flights were listed as principles 5 and 6. Member and Associate Member States are required to grant authorization to companies from Member and Associate Member States to provide non-scheduled charter flights with third and fourth freedom rights to promote tourism and to consider in a flexible manner to offer non-scheduled cargo flights within the ACS. See [http://www.acs-aec.org/Legal/2000/Agr5Air\\_policy-eng.doc](http://www.acs-aec.org/Legal/2000/Agr5Air_policy-eng.doc).
- 110) The Yamoussoukro Declaration was adopted in Lome, Togo, on July 12, 2000. Its goal is to: 1) Create a conducive environment for the development of intra-African air services; 2) Liberalise exchanges of air traffic rights; 3) Eliminate (nonphysical) barriers to free trade in air transport service; 4) Ensure regular and orderly air transport in a safe environment; 5) Improve quality services to consumers; 6) Encourage cooperation among African airlines, airports and regulatory agencies; &) Improve competition and operational innovation. See, “FG endorses Yamoussoukro Air Liberalization agreement” , [http://www.nigeriafirst.org/printer\\_1054.shtml](http://www.nigeriafirst.org/printer_1054.shtml); “Progress Report on the Implementation of the Yamoussoukro Declaration on a New African Air Transport

agreements, all services both scheduled and non-scheduled as well as cargo are liberalized without any restriction in designation (multiple), traffic rights (free from I-VI), pricing (free), capacity (free), and code sharing (allowed).<sup>111)</sup> Charter flights are now deemed as scheduled commercial operation.

### 3) Air charter in bilateral treaties of international air service

In practice, multilateral treaties on universal and regional level are supplemented by the bilateral treaty of international air service in commercial operation. The model treaty, the so-called Bermuda Agreement I, was formulated by the United States and the United Kingdom on February 11, 1946, in which was concerned only with scheduled international services and no charter clause was inserted in. Air charter flights are “mostly performed on the basis of unilaterally issued Government permits or occasionally pursuant to separate charter bilateral or memoranda of understanding.”<sup>112)</sup>

It was the Bermuda II Agreement signed between the U.S. and the U.K. on July 23, 1977, which listed the first time in a bilateral air service agreement a number of provisions relating to charter air services. From time to time, charter clause is contained in other treaties of international air service signed between other countries.

A new model of Open Skies agreements introduced by the United States since 1982 have conquered nearly all major aviation powers although there are various types of models applied with different countries and regions. For Asian countries and regions it is the type of restrictive open skies agreements, while in Europe is liberalized ones, more liberal than U.S. type.<sup>113)</sup>

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Policy” ,  
<http://www.uneca.org/itca/yamoussoukro/Progress%20Report%2000n%20The%20Implement...> (2006/3/26)

111) Mendes de Leon, P., loc. cit., p. 225.

112) Haanappel, P.P.C., “Bermuda 2: A First Impression,” *Annale of Air Law*, McGill Institute of Air and Space Law, Vol. ,1980, p.

113) Dagonis, R., loc. cit., pp. 51-56.

In Latin America, it is the Latin American Civil Aviation Commission (LACAC) which has focused its work programme aiming at liberalizing the provision of commercial air transport services in the region.

In Central America, it is the “open skies” agreement signed between Central American States and the United States may be the best illustration of bilaterally liberalized model agreements which dominate. The agreements provided for full market access without restrictions on designations, route rights, capacity, frequencies, code-sharing and tariffs for scheduled and non-scheduled flights<sup>114</sup>). Four of the six agreements also granted Seventh Freedom rights for all-cargo services, and further agreement granted Seventh Freedom rights for charter all-cargo services.

#### **4) Air Charter in National Administrative Laws and Regulations**

Exceptionally, a number of countries which do not signed mutually bilateral agreement of international air service may approve, from time to time, the application of non-scheduled traffic for various reasons based on political, humanitarian, commercial considerations.

## **II. Air Charter within the Framework of Bilateral Air Transport Agreements in the PRC**

After the PRC and U.S.S.R. signed the Agreement Concerning to the Establishment of Sino-Russian Civil Air Transport Limited Company on March 27, 1950, the first three international routes between Beijing-Chita, Beijing-Irkutsk, and Beijing-Alma Ata, were operated. From 1954 to 1971, it was the first stage of civil aviation development in PRC, a series air traffic agreements

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114) See, ATCCConf/5-WP/5, 17/2/03, loc.cit., p. 4.

were signed with neighboring countries, including U.S.S.R., Burma, Vietnam, Mongolia, North Korea, Ceylon, Laos, Pakistan and France. It was the Sino-Ceylon air agreement which stipulated scheduled and non-scheduled air traffic in a bilateral air agreement between China and a foreign country. Two routes were designated between China and Ceylon: Guangzhou-Colombo for China: Colombo-Singapore/Ragoon-Guangzhou for Ceylon.<sup>115)</sup> These agreements are the type of predetermination bilaterals which reflect protectionist policy. It is by prior agreement by two contracting parties concerned on the capacity to be provided on the route (i.e. predetermination) and also specify that the agreed capacity should be shared equally by the designated carriers of the two states.

Just after joining the United Nations in September in 1971, China opened its second stage of air service expansion policy. The PRC's international air services was intended to establish air links with the United States, Europe, Africa and certain Asian countries. During this period of time, the PRC signed air traffic agreements with a number of countries, such as Romania, Yugoslavia, Afghanistan, Ethiopia, Turkey, in 1972; Iran, Greece, Italy, Switzerland, Norway, Denmark, Sweden and Canada in 1973; Japan and Albania in 1974.

The "Open Door Policy" of China in 1978, China signed air traffic agreements nearly with all major air transport countries of the world. These agreements are divided into three types of exchange of non-scheduled (charter) air traffic rights: special charter clause within the article of authority of Bermuda I type; charter provisions in Annex of Bermuda II type and "open skies" type of agreement.

Traditional Bermuda I agreement is used by the PRC with certain number of countries. Air charter flights, such as with Yemen in 1982, Oman in 1983; Poland in 1986; Czechoslovakia in 1988; Democratic Republic of Germany in 1987, Czechoslovakia in 1988, the United Arab Emirates in 1989, were regulated always under the Article II of Authorization.<sup>116)</sup>

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115) Article 1, Air Traffic Agreement between the Government of the PRC and the Government of Ceylon, signed at Beijing, on March 26, 1956, see, The Collection of China Civil Aviation Laws and Regulations, edited by the Committee of The Collection of China Civil Aviation Laws and Regulations, Beijing, 1997, p.1456.

Bermuda II type agreement was also occasionally used by the PRC with foreign government. The first of such an agreement was signed with Switzerland in 1973. Others were signed with the U.K in 1979 and the United States in 1980. In Annex II of Air Service Agreement between China and the U.S. signed on September 17, 1980, stipulated the traffic right of charter flight on passengers, cargo and mixed passengers/cargo services.

Open skies type agreement has recently accepted by the PRC in a restrictive form. With strong promotion of the adoption of American type of open skies model agreement, China and the U.S. successfully amended the 1980 Bermuda type agreement in 1999 amendment, providing that each side may designate four airlines to serve the market with a grand total of 54 roundtrip flights per week. The 1999 amendment could not claim itself as open skies agreement, rather a step further toward that goal.

Finally, the “open skies” agreement to expand air services was reached on July 24, 2004 and it opens new path for American expansion aviation industry into China. The agreement will allow a total of 195 new weekly flights for each country -111 by all-cargo carriers and 84 by passenger airlines - growing to a total of 249 weekly flights at the end of a six-year phase-in period. A total of 14 of these flights will be available for new U.S. passenger services on Aug. 1, 2006. It also allows five additional airlines from each country to serve the US-China market, in addition to existing Northwest and Federal Express Airlines.<sup>117)</sup> It is expected that further open the PRC’s skies will be further pushed from other trading nations of the PRC after it has gained the number one nation in the world in terms of foreign currency reserve in 2006.

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116) For example, see Article II (4) Authorization, Civil Aviation Transport Agreement between the Government of the PRC and the Government of the UAE, signed on September 14, 1989, at Abu Dhabi, The Collection of China Civil Aviation Laws and Regulations, loc. cit., p. 1479-80.

117) Press Release, U.S. Department of Transportation, July 24, 2004, <http://usinfo.state.gov/eap/Archive/2004/Jul/26-372077.html>.

### III. Air Charter within the Framework of Bilateral Administrative Agreement and Contractual Agreement between Taiwan and Third States

Taiwan had signed a series of bilateral air service agreement under the name of the Government of the Republic of China when Taiwan was recognized by the United Nations and major members of international community as the sole legal government representing China before 1971, but that situation was changed since then. Taiwan has only maintained diplomatic relations with 25 States, but maintained semi-official relations with major powers of the world. The former agreements were signed within the framework of the Vienna Convention on the Law of Treaties of 1969 while the latter agreements were signed within the framework of administrative and civil law of two countries which were not in the form of bilateral treaty signed by two sovereign States in its proper sense of international law.

So far as the legal regime of air charter is concerned, it is regulated by three different models: bilateral air service agreement; administrative agreement; and contractual agreement.

First, bilateral air service agreements were always signed between Taiwan and third States with whom Taiwan has kept diplomatic relations. Air charter clause may or may be included therein but the distinction between scheduled and non-scheduled international air service is maintained. Charter flights are required to be authorized in advance and sometimes charter company has to be designated on a particular route.

Secondly, administrative agreement has played a significantly important role in establishing international air services between Taiwan and third countries. In this case, Taiwan Civil Aviation Bureau signed certain simplified form of bilateral agreements establishing air services with Nauru in 1975; Saudi Arabia in 1986; Dubai of The Emirate of Abu Dhabi in 1990<sup>118)</sup>; Singapore in 198

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118) Agreement on Exchange of Traffic Rights between The Aeronautics

9<sup>119</sup>); Bulgaria in 1992; The Emirate of Abu Dhabi of United Arab Emirates in 1995; and Brunei in 2001.

Thirdly, administrative agreements signed between semi-official diplomatic missions between Taiwan and foreign government were mainly conducted with major powers of the world, such as the United States and Japan. Taiwan and the United States established their semi-official diplomatic missions in their respective capitals after the interruption of diplomatic relations in 1979. The Office of the Coordination Council for North American Affairs and the Office of the American Institute in Taiwan were established in Washington and Taipei thereafter, which were given special status in international law, but they are not diplomatic missions from point of international law. The air service agreement between Taiwan and the US signed on 18 March, 1998, belong to this type of agreement, in which charter air service clause was included in Annex II, which airlines designated to perform charter air service are entitled to perform air transportation to, from and through any point or points in the territory of the other either directly or with stopovers en route, for one-way or roundtrip carriage of (a) any traffic to or from a point or points in the territory of the party which has designated the airline; (b) any traffic to or from a point or points beyond the territory of the part which has designated the airline and carried between the territory of that party and such beyond point or points (i) in transportation other than under this Annex; or (ii) in transportation under this Annex with the traffic making a stopover of a least two consecutive nights in the territory of that party.<sup>120</sup>)

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Administration of the Republic of China and the Civil Aviation Department of the Emirate of Abu Dhabi, *Treaties between the Republic of China and Foreign States*, Vol. XI (1995-1996), published by Ministry of Foreign Affairs, Taipei, pp. 497-500

119) Agreement on Exchange of Traffic Rights between The Civil Aeronautics Administration and The Department of Civil Aviation of the Republic of Singapore, signed on November 4, 1983, entered into force on November 4, 1983, *Treaties between the ROC and Foreign States*, Vol. VII (1982-1985), published by Ministry of Foreign Affairs, Taipei, 1986, pp. 217-219.

120) Section 1, Annex II, *An Air Transport Agreement Between the Coordination Council for North American Affairs and the American Institute in Taiwan* (To

Charter flights are also arranged within the framework of bilateral air service agreements in the form of the exchange of notes between Taiwan and Japan. Charter flights are legally designated previously on the same condition as scheduled flights, but concentrated to middle sized cities where Taiwanese tourists are needed. Recent amended air service agreement signed between East Asia Relations Association (Taiwan) and Interchange Association (Japan), in addition to increase the capacity to Osaka, Nagoya, Sapporo, Sendai and Hiroshima, charter flights are allowed to be operated by two airlines of Taiwan. Mandarin Airlines has operated charter flights between Taipei to Sendai and vice versa since 2000 and the second airline will be allowed to operate charter service between Taipei and city to be designated in Japan.<sup>121)</sup>

Fourthly, exchange of traffic rights between capital airports of two countries is the model of mixed air service agreement of public and private law nature. Taipei International Airport (Chiang Kai-Shek International Airport, Taipei) signed scheduled air service agreement with Vienna International Airport (Flughafen Wien Betriebs-GmbH, Vienna) on July 24, 1990; with Schiphol Airport in the Netherlands in 1995; and with Findel International Airport of Luxembourg in 1997. Under the agreement, scheduled and non-scheduled air services are allowed between two airports only.

Fifthly, a number of air service agreements were signed between trade offices in respective countries. These offices are managed by governmental agencies concerned which were delegated the power to sign the agreements. Both scheduled and non-scheduled air traffic is allowed to be operated.

Lastly, contractual agreement of private law was given the priority in exchanging the traffic rights between Taiwan and foreign countries. Most important organizations are Taipei Civil Air Transport Association and airlines company with their counterparts.

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succeed all previous air transport agreement), signed on March 5, 1980 and entered into force on March 5, 1980.

121) See, United Daily News, March 25, 2006, p. A6



## IV. Air Charter Arrangements between Taiwan and Mainland China

It is sad to note that, after Mainland China and Taiwan, after the civil war in 1949, has been divided into two political entities. All contact between them was interrupted until 1987 when Taiwan abolished the ban on travel to Mainland China. The opening door of people to people contact has not solved so many problems which should be settled through government to government contact and negotiation.

For Mainland China, Taiwan is a part of China and the “three direct links” are necessary to be realized therefore. Transport link in air service is one of priority to be promoted by two sides across Taiwan Strait. Beijing took the initiative of direct air link dated back to 1981 and released the Provisional Regulations on Application and Approval Procedures for Non-scheduled Flights of Civil Aviation Transport Between the China Mainland and Taiwan in 1990. From 1989 to 2005, the civil aviation sectors of both sides each served as sales agencies in passenger and cargo transport for the other, and commenced one-ticked and through baggage services between them. Several agreements on cooperation in the field of ticket-booking, commerce, plane maintenance, aviation and services were signed. Dragonair and Air Macao were allowed to open Hong Kong - Taiwan and Macao - Taiwan air routes, respectively, establishing indirect air links based on fifth and sixth freedoms of traffic between the mainland and Taiwan.

For Taiwan, the reunification with Mainland China was a long term target of government policy between 1987 to 2000 and that policy was based on “The Guidelines for National Unification” and “The Statute Governing Relations Between the People of Taiwan and Mainland Areas” adopted in 1991. Direct air transport links between Taiwan and Mainland China was also a part of principles formulated by these basic documents. It sets three stages of unification procedure, namely the short term, the middle term and the long term of development, reaching the final unification of the two sides. Direct air

transport link would be realized only by the successful completion of the short-term period of exchange and cooperation based on mutual respect and reciprocity. Nevertheless, the opposing party DPP won the general election of in 2000 which has taken a hostile policy again Beijing since then, any possible negotiation with Mainland China faded away, but economic, social and cultural exchanges promoted by private sectors have never stopped. The pressure made by private sectors to government demanding direct air links has been strong, government in Taiwan reluctantly agreed the following patterns to operate indirectly air links between Taiwan and Mainland through third regions (such as Hong Kong, Macau, the Philippines and Korea) and direct air links operated by charter flights during the period of Chinese Lunar New Year.

The legal regime of charter flights between Taiwan and Mainland China is regulated by special arrangements negotiated by delegated airlines and airlines association or private law institutions. The following models were adopted since 1987:

#### **1. Indirect air links through third region airports under the operation of sixth freedom of traffic rights**

Hong Kong and Macau airports play a vital role in transporting millions and millions passengers from Taiwan to Mainland China as a transit points to Mainland China.

Hong Kong is a hub and spoke international air port in the Far East which has become an important transit point of the fifth and sixth freedom traffic operation and is also a significantly important airport of indirect air links between Taiwan and Mainland China since 1987. All passengers and cargoes from Taiwan to Mainland China and vice versa are obliged to change the aircrafts in Hong Kong before flying to any point of Mainland China in the beginning stage of indirect air link. Indirect flight is much time-consuming and much inconvenient for passengers. Several arrangements were involved in such a kind of operation.

It has become a pattern that air services between Hong Kong and Taiwan

are operated on the basis of agreements between airlines of two regions. Such agreements are always negotiated and concluded between China Airlines and Cathay Pacific Airways under the approval by relevant civil aviation authorities of both Hong Kong and Taiwan. These informal agreements stand a yet even more informal arrangement and they are in the form of airlines contracts which include scheduled and non-scheduled air services. After 1998, Eva Airways of Taiwan and Dragon Airlines of Hong Kong joined the competition on the routes between Taipei-Hong Kong and Kaoshiung-Hong Kong, the negotiation and conclusion of such a contract was undertaken by four airlines together. The first Cathay Pacific Airways Limited/China Airlines Limited/Hong Kong Dragon Airlines Limited/Eva Airways Corporation - Commercial Agreement, was signed on June 13, 1996.

From the point of view of administrative law, such an air service agreement signed between privately owned airlines which are registered as private law institutions is of transnational contract of private nature. The agreement provides scheduled air traffic and non-scheduled flights are allowed within the meaning of private international air law.

Macau Airport plays a similar role as Hong Kong in handling transit passengers from Taiwan to Mainland China and vice versa under the operation of fifth and sixth freedom traffic. In recent years, Macao has tried to establish itself as a regional logistics centre in which all-cargo air services is designed as the top priority. Most of the cargo handled by Macao International Airport is shipped via Taiwan. The first All-Freight charter service by Air Macau was launched in October 2002, providing services two flights a day, six days a week from Macao to Taipei and Shenzhen. It is the anterior fifth freedom traffic.<sup>122)</sup>

However, the other airports located in nearby third countries, such as Korea and the Philippine, also play a role as a transit points linking Taiwan and

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122) After the opening of All-Freight service, cargo from the Mainland and Taiwan will no longer need to be unloaded. The aircraft will make a stopover one hour after touching down at Macao Airport and takes off again to Taipei. See, Macao Establishing Itself as a Regional Logistics Centre, <http://www.ipim.gov.mo/en/publication/macauimage/cover/no37-01.htm> (2006/3/30)

Mainland China which are regulated by air charter regime negotiated by airlines concerned approved by competent civil aviation authorities. Chiju Island of Korea as a transit point to Shanghai from Taipei and sometimes, Inchon Airport as a transit point to different points in Northeast China region. From time to time, charter flights are operated from Kaoshiung to Xiamen via Loaoaz, the Philippines.

## **2. Direct air links through third region (Hong Kong and Macao) airports under the operation of the fifth freedom of traffic right**

The fifth freedom is the freedom encroaching upon the grantor and third State's markets causing much commercial and legal difficulty in operation. Prof. Bin Cheng defined it as "the privilege of carrying traffic between the grantor-State (B) and third States situated along an agreed route. It is in fact possible to develop three types of fifth freedom: anterior-point fifth freedom, intermediate-point fifth freedom and beyond-point fifth freedom.<sup>123)</sup>

Hong Kong and Macao air policy is not so liberal in term of fifth freedom of

traffic right. Foreign airlines are difficult to be granted such right in order to protect local airlines, but is opened for fifth freedom traffic between Mainland China and Taiwan. In order to short the flight time, Taiwan and Mainland China agreed to grant Cathay Pacific and Dragonair the fifth freedom traffic right between Taiwan and Mainland China. The revised model of indirect air links, in reality, is the anterior-point fifth freedom for passengers traveling from Taiwan to Mainland China via Hong Kong, namely, "right to fly into the territory of the grantor State and there discharge or take on traffic coming from, or destined for, a third State situated on the agreed route at a point anterior to the flag-State of the carrier."<sup>124)</sup> In this case, Dragonair is allowed to take passengers and cargoes from Taiwan to designated points in Mainland

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123) Cheng, Bin, *The Law of International Air Transport*, Stevens & Sons, London, 1962, pp. 11-12.

124) *Ibid.*, p. 14.

China with stopover in Hong Kong without changing aircraft but changing flight number of aircraft.<sup>125)</sup>

Reversely, passengers from Mainland to Taiwan via Hong Kong on the same flight is the beyond – point fifth freedom, namely, the right to carry traffic between the grantor-State and intermediate-point third States en route, for instance, the right of Dragonair carrier vis-à-vis Taiwan to carry traffic between Shanghai and Taipei.<sup>126)</sup>

### **3. Direct air links across Taiwan strait under the operation of charter flights**

#### **1) First Stage of Unilateral Charter Flight from Taiwan to Mainland China**

After 54 years interruption of air transportation between Taiwan and Mainland it was resumed on January, 2003 in its first stage of operation. The first charter flights arrangement was reached by Taipei Airlines Association and China Air Transport Association in Macau on January 2003. The Arrangement allowed six Taiwan airlines to operate charter planes 16 times to carry Taiwan business people to commute between Taipei and Kaohsiung and Shanghai via Hong Kong and Macao air space. Charter flight was limited in the operation during the period of Chinese Lunar New Year between January to February, 2003.

#### **2) Second Stage of Mutual Charter Flights from Taiwan to Mainland China**

By a special arrangement of charter flights between Taiwan and Mainland China was concluded between Taipei Airlines Association and China Air Transport Association in Macau on November 18, 2005, which was announced by The Mainland Affairs Council (MAC) of Taiwan and its counterpart, the Taiwan Affairs Office of the PRC. It was the second charter flight arrangement signed between Taiwan and Mainland China which was still designated as a

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125) Currently, Dragonair (KA 487/800) operates daily flight from Taipei-H.K.-Shanghai and vice versa . Air Macao operates daily flights from Taipei – Macao – Xiamen and Taipei – Macao – Shanghai.

126) Dragonair (KA 488/801) operates daily flight from Shanghai-Hong Kong-Taipei.

contractual agreement between two associations in charge of air transport.

Under the new arrangement, air charter traffic rights were exchanged from January 20 and February 13, 2005 during the period of Chinese Lunar New Year. Six airlines of each side were allowed to operate from four points in Mainland China ( Beijing, Shanghai, Xiamen and Guangzhou Airports) and two points in Taiwan ( Taipei Chiang Kai-shek International Airport and Kaohsiung International Airports) providing a total of 72 non-stop round-trip charter flights between January 20 and February 13, 2005, with each side operating 36 flights during the 25-day period.<sup>127)</sup>

## Conclusion

Non-scheduled international air transport or air charter is a complimentary system to a scheduled international air service which is conditioned by certain requirements defined by the ICAO and bilateral agreements of international air service. While the operation of non-scheduled or charter traffic rests on various legal techniques, but, basically speaking, its legal regime is applied national rules to incoming and outgoing charters within the framework of administrative law.

The operation of charter flights in Mainland China, Taiwan, Hong Kong and Macao, four aviation zones of China, is also based on four set of legal regimes. Their operation is quite different in terms of their aviation policy adopted. Mainland China has relaxed its tightly controlled aviation industry and adopted the restricted form of Bermuda II mode to negotiate with foreign countries. After joining the WTO and its huge foreign currency reserve, China has tended to accept the type of open skies agreements in the future. Charter flights are widely used between China and other countries, particularly on cargo operation.

Charter traffic is also essential for Taiwan because of its arguable political

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127) <http://www.gio.gov.tw/taiwan-website/4-0a/20051129/2005112901.html>  
(2006/3/2)

status in international law. Taiwan has been forced to sign a number of contractual agreements with a number of foreign countries under different governmental and non-governmental agencies. Under the imposition of air link ban from Taiwan Government, charter traffic is the only way to link between Taiwan and Mainland during the period of Chinese New Year since 2003.

Under the impact of liberalization and deregulation of air transport and the forceable promotion to use the American model of open skies agreements, it is foreseeable in the future that air charter traffic will be widely used in the operation to and from airports of tourism of East Asian countries and regions. It is not a peculiar phenomenon that scheduled airline companies also operate charter traffic business, but a few charter companies established by scheduled airlines as their subsidiary companies solely in order to capture the cheap priced tourism markets.

## Abstract

Charter flight in international air law has, from very beginning, not precisely defined by the International Civil Aviation Organization (ICAO) since 1947 when it came into being. By practice, the operation of charter traffic is, in its very beginning, the subject to the regulations of national rules and bilateral charter agreements (charter annex clause) within the framework of normal bilateral agreement of international air services.

Taiwan had signed a series of bilateral air service agreement under the name of the Government of the Republic of China when Taiwan was recognized by the United Nations and major members of international community as the sole legal government representing China before 1971, but that situation was changed since then. Taiwan has only maintained diplomatic relations with 25 States, but maintained semi-official relations with major powers of the world. The former agreements were signed within the framework of the Vienna Convention on the Law of Treaties of 1969 while the latter agreements were signed within the framework of administrative and civil law of two countries which were not in the form of bilateral treaty signed by two sovereign States in its proper sense of international law.

The legal regime of charter flights between Taiwan and Mainland China is regulated by special arrangements negotiated by delegated airlines and airlines association or private law institutions.

Keyword : charter flight, ICAO, taiwan, China, open skies