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978-1-107-02052-8 - The Principles and Practice of International Aviation Law

Brian F. Havel and Gabriel S. Sanchez

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## THE PRINCIPLES AND PRACTICE OF INTERNATIONAL AVIATION LAW

*The Principles and Practice of International Aviation Law* provides an introduction to, and demystification of, the private and public dimensions of international aviation law. Unlike other global sectors, the air transport industry is not governed by a discrete area of the law but rather by a series of disparate transnational regulatory instruments. Everything from the routes that an international air carrier can serve to the acquisition of its fleet and its liability to passengers and shippers for incidents arising from its operations can be the object of bilateral and multi-lateral treaties that represent diverse and often contradictory interests. Beneath this multilayered treaty infrastructure are hundreds of domestic regulatory regimes that also apply national and international rules in disparate ways. The result is an agglomeration of legal cultures that can leave even experienced lawyers and academics perplexed. By combining classical doctrinal analysis with insights from newer disciplines such as international relations and economics, this book maps international aviation law's complex terrain for new and veteran observers alike.

Brian F. Havel is Distinguished Research Professor of Law, Associate Dean for International Affairs, and Director of the International Aviation Law Institute at DePaul University College of Law. From 2011 through 2013, Professor Havel served as the Keeley Visiting Fellow at the University of Oxford, Wadham College. He also holds appointments as visiting professor of law at Leiden University and University College Dublin. His publications have an interdisciplinary focus and include *Beyond Open Skies: A New Regime for International Aviation* (2009) and *In Search of Open Skies: Law and Policy for a New Era in International Aviation* (1997).

Gabriel S. Sanchez is Senior Research Fellow at the International Aviation Law Institute and previously served as the Institute's FedEx/United Airlines Resident Research Fellow from 2007 to 2011. His most recent work on international aviation law and policy has featured in the *Catholic University Law Review*, the *Virginia Journal of International Law*, and the *Harvard Environmental Law Review*.

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# The Principles and Practice of International Aviation Law

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Contents

<i>Preface</i>	<i>page</i> ix
<i>Acknowledgments</i>	xiii
<i>List of Abbreviations and Acronyms</i>	xv
<b>1 What Is International Aviation Law?</b>	<b>1</b>
1.1. Introduction: A Book About International Aviation Law	1
1.2. The Distinctiveness and Content of International Aviation Law	4
1.3. A Quick Look at Legal Theory	7
1.4. Public and Private International Aviation Law	11
1.5. The Sources of International Aviation Law	16
1.6. The Role of International (and a Few National) Organizations	23
<b>2 The Foundations of Public International Aviation Law</b>	<b>28</b>
2.1. Introduction to the Chicago Convention	28
2.2. The “Prehistory” of the Chicago Convention	30
2.3. The Cosmopolitanism of the Chicago Convention	33
2.4. The Historical Impact of the Chicago Convention	36
2.5. The Core Elements of the Chicago Convention	40
2.6. The International Civil Aviation Organization	55
<b>3 The International Law Regime for Trade in Air Services</b>	<b>69</b>
3.1. Introduction to the Bilateral System	69
3.2. Aviation Trade After the Chicago Convention	72
3.3. The Freedoms of the Air	76

3.4.	The Nationality Rule	86
3.5.	The Core Elements of Air Services Agreements: The Open Skies Model	95
3.6.	Looking Beyond Bilateralism	109
3.7.	Remaining Challenges to Trade in Air Services	115
3.8.	Some Concluding Comments on Trade in Air Services	122
4	<b>The International Law Regime for Airline Investment and Global Alliances</b>	123
4.1.	Introduction	123
4.2.	The (Airline) Nationality Rule in Action	125
4.3.	A Quick Look at How International Law (Normally) Regulates Foreign Investment	131
4.4.	An Emerging International Investment Regime for Airlines	137
4.5.	Circumventing the Nationality Rule: Global Alliances	148
4.6.	The Legal (and Policy) Framework for Global Alliances	151
4.7.	Ongoing Issues of Law and Policy for Alliances: “Metal Neutrality” and “Spillover”	159
4.8.	A Survey of U.S. and EU Antitrust Oversight of the Three Global Alliances	163
4.9.	Beyond the Alliance System	171
4.10.	Conclusion: A New EU Initiative	172
5	<b>The International Law Regime for Aviation Safety and Security</b>	173
5.1.	Introduction	173
5.2.	The Basic Principles of International Air Safety Regulation	175
5.3.	Ensuring International Aviation Safety Through ICAO Harmonization and State Obligations	176
5.4.	The Basic Principles of International Aviation Security Regulation	182
5.5.	The Role of ICAO in International Aviation Security	185
5.6.	Exercising State Criminal Jurisdiction in International Law	189
5.7.	The Tokyo Convention (1963)	194
5.8.	The Hague Convention (1970)	201
5.9.	The Montreal Convention (1971)	205
5.10.	Beyond the ICAO Treaty Regime	208

	<i>Contents</i>	vii
5.11.	Preventing Aviation Crimes and Other Hostile Incidents Within the Limits of Law	212
<b>6</b>	<b>The International Law Regime for Aviation and the Environment</b>	217
6.1.	Introduction	217
6.2.	An Overview of International Environmental Law	222
6.3.	The Role of ICAO in Environmental Issues Affecting International Aviation	228
6.4.	The Chicago Convention and Aviation Emissions Regulation	235
6.5.	The Role of Air Services Agreements in Environmental Regulation	241
6.6.	The Legal and Political Prospects for a Multilateral Aviation Emissions Treaty	242
6.7.	The International Regulation of Noise Abatement	246
6.8.	Conclusion	249
<b>7</b>	<b>The International Law Regime for Air Carrier Liability and Surface Damage</b>	251
7.1.	Introduction	251
7.2.	The Choice Between Private and Public Oversight of Air Carrier Liability	255
7.3.	The Warsaw System	257
7.4.	Reforming the Warsaw Convention (1): The Treaty Instruments	262
7.5.	Reforming the Warsaw Convention (2): Government and Non-Government Initiatives	268
7.6.	The Warsaw Convention: Conclusion	274
7.7.	The Montreal Convention (1): Introduction	275
7.8.	The Montreal Convention (2): The Basic Principles	277
7.9.	The Montreal Convention (3): Activating the Liability Regime (Accidents, Death, Injury)	283
7.10.	The Montreal Convention (4): The New Liability Regime	293
7.11.	The Montreal Convention (5): Expanding the Bases for Jurisdiction	303
7.12.	The Montreal Convention (6): A Final Miscellany of Provisions	306
7.13.	Conclusion	313
7.14.	The International Law Regime for Surface Damage Liability	315

<b>8</b>	<b>The International Law Regime for Aircraft Financing and Aircraft Nationality</b>	<b>325</b>
8.1.	Introduction	325
8.2.	A Quick Look at International Aircraft Financing	328
8.3.	The Third-Party Effects of Secured Financing of Aircraft	332
8.4.	An Overview of International Aircraft Leasing	337
8.5.	The International Law Regime for Aircraft Nationality	340
8.6.	An Overview of International Aviation Law and Aircraft Financing	345
8.7.	The Geneva Convention (1948)	347
8.8.	The Cape Town Convention (2001) (1): Background and Overview	351
8.9.	The Cape Town Convention (2): Application and Scope	358
8.10.	The Cape Town Convention (3): The Registration and Priority System	363
8.11.	The Cape Town Convention (4): Remedies in Default	366
8.12.	The Cape Town Convention (5): Insolvency	371
8.13.	The Cape Town Convention (6): Jurisdiction and Choice of Law	375
8.14.	The Cape Town Convention (7): The Convention's Impact on Aviation Financing and on International Law	377
8.15.	An Overview of the Governmental Role in Aircraft Financing	380
	<i>Afterword</i> by Ulrich Schulte-Strathaus	393
	<i>Select Bibliography</i>	399
	<i>Table of Authorities</i>	417
	<i>Index</i>	435

Cambridge University Press

978-1-107-02052-8 - The Principles and Practice of International Aviation Law

Brian F. Havel and Gabriel S. Sanchez

Frontmatter

[More information](#)

## Preface

In the age of online search engines, virtually all of international aviation law's primary (and many secondary) materials are now only a few keyboard clicks away. Nevertheless, given the fact that international aviation law, particularly in its private dimension, is also bound up with more than 190 domestic legal systems, the sheer amount of documentation to be sifted through can quickly prove overwhelming to even the most curious and enterprising individual. Of course, there is nothing wrong with getting into the details, and for practitioners, it is a necessity; but without first having a sure guide to the whole terrain, it is all but impossible to find one's way to the proper sources. With that in mind, *The Principles and Practice of International Aviation Law* is set primarily at a cruising altitude of 30,000 feet. By taking the reader from one end of international aviation law's "cosmos" to the other (and all necessary points in between), we hope to satisfy the need for an overview before the detailed work of specialization begins.

In addition to breadth of coverage, however, we seek to give the reader a broader conceptual *context* for every area of international aviation law that we consider. Thus, on the public side, we present the regulatory structure of the international air transport industry against the backdrop of economic and political history as well as insights from general doctrines of public international law and from rational choice theory (Chapters 1, 2, and 3). We look at the highly charged issues of foreign investment in airlines and the emergence of global airline alliances by exposing the reader to the governing principles of modern international investment law (Chapter 4). We frame international safety and security issues in the wider context of the effectiveness of certain kinds of multilateral collaboration, and we analyze security issues in particular within current understandings of the nature of global piracy and evolving concepts of State criminal jurisdiction (Chapter 5). We examine the impact of climate change issues on the global aviation industry as part of the wider

Cambridge University Press

978-1-107-02052-8 - The Principles and Practice of International Aviation Law

Brian F. Havel and Gabriel S. Sanchez

Frontmatter

[More information](#)

evolution of international environmental law (Chapter 6). On the private side, we scrutinize airline passenger and cargo liability law through lenses of corrective justice and the rise of consumerism (Chapter 7). And finally, still on the private side, we offer a solid foundation in transnational aircraft financing law and practice that reveals how and why international treaty making in this area is focused primarily on the protection of creditors (Chapter 8). As we progress through these discussions, the reader will notice that we also engage critically with the present state of international aviation law in the hope of igniting further debate about its future development.

There are two further dimensions to our study. A glance at such important collections as the *United Nations Treaty Series* or *International Legal Materials* reveals only that international law (including international aviation law) *exists*; what is not revealed in their pages is the question of how international law *functions*, particularly in a State-centric world that lacks strong, centralized mechanisms of oversight and enforcement. We will keep that question in mind and study it from a number of perspectives including theories of international relations, rational and public choice, and economics. But we will not neglect more traditional doctrinal approaches as typified by comparative, historical, and teleological analysis. Indeed, our approach to the subject does not mean that we have dispensed with detailed exegesis of particular treaties – on the contrary, too abstract a view of the Cape Town Convention on aircraft security interests, for example, would leave the reader more puzzled than enlightened as to why its drafters pursued its completion with such ardor. Nor does it mean that we have not on occasion landed in a particular national (or regional) legal system in order to provide a closer look at how it has influenced the development of the international order. That is true, for example, of the open skies policy of the United States as well as of the grant of antitrust immunity to global alliances involving a U.S. airline, and also of the wholesale replacement of Member State control over national market access attempted by the European Union. We also take careful note of innovations and developments in other regions, including some dramatic shifts in thinking about the issue of foreign investment in national airlines that are taking place in Latin America, the Middle East, and Australasia. Once the reader has completed the journey with us through any of the eight themed chapters that make up the book, further voyages lie ahead using the guideposts placed in the notes, the tables of abbreviations and authorities, and the detailed bibliography.

Like all works on law, this book has been written “in the middle of things.” The philosopher Eric Voegelin once likened law to Zeno’s paradox: every time you think you have reached where you think the law has been, you still

Cambridge University Press

978-1-107-02052-8 - The Principles and Practice of International Aviation Law

Brian F. Havel and Gabriel S. Sanchez

Frontmatter

[More information](#)*Preface*

xi

have further to go. International law, no less than domestic law, is constantly expanding. Fresh accords, amendments to shopworn treaties, new interpretations of existing policy, political brinkmanship – the practice of “aeropolitics” keeps international aviation law dynamic. Recognizing these challenges, we cannot do better than to invoke Professor Andreas Lowenfeld’s modest claim, opening the 1981 second edition of his treatise, *Aviation Law*, that although “[y]ou will not find instant answers – and certainly not definitive answers – between these covers[,] . . . you will find a good deal of information, a good many explanations, and [we] hope a few useful insights.”<sup>1</sup>

Finally, we have not included an appendix of documents. As the opening sentence of this Preface implies, and we now confirm, there is no document mentioned in this text that cannot be downloaded by a simple online search.

We have attempted to provide an account of international aviation law as it “rested” on December 31, 2013.<sup>2</sup> Any remaining errors or inaccuracies are entirely the responsibility of the authors.

Brian F. Havel  
Gabriel S. Sanchez

<sup>1</sup> ANDREAS F. LOWENFELD, *AVIATION LAW* xiv (2d ed. 1981).

<sup>2</sup> The book’s cover design, by Wendy Bedenbaugh, juxtaposes a Leonardo da Vinci drawing of a mechanical wing device (circa 1485) with an image of the jet age version.

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Frontmatter

[More information](#)

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978-1-107-02052-8 - The Principles and Practice of International Aviation Law

Brian F. Havel and Gabriel S. Sanchez

Frontmatter

[More information](#)

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We would like to express our sincere gratitude to a number of persons and institutions for their help in bringing this book to fruition. First on the list is our editor, John Berger, whose enthusiasm for the project was boundless and who has kept us to a fairly tight schedule from contract to proofs. Finola O'Sullivan, well known to many Cambridge legal authors, was also solicitous of the book's progress. We offer our appreciation to two deans of DePaul University College of Law, Warren D. Wolfson and Gregory Mark, for their continuing support. Brian F. Havel would also like to acknowledge his colleagues at Wadham College, University of Oxford, where he spent two happy years working on this book as the Keeley Visiting Fellow.

Portions of the book were inspired by lectures we have given at DePaul, at Leiden University's International Institute of Air and Space Law (IIASL), at the International Air Transport Association (IATA) and McGill University's Institute of Air and Space Law (IASL) in Montreal, and under the auspices of the Centre for Aviation (CAPA) in Mumbai. We are especially grateful to Professor Pablo Mendes de Leon, the Director of IIASL, for creating an enduring link between his institute and DePaul's International Aviation Law Institute and for all of the academic opportunities that he has made available to us over the years.

Several leading figures in international aviation law contributed their time and skill to reviewing and critiquing selected parts of the book. For the liability chapter, we had the expert input of Harold Caplan, former Legal Advisor of the International Union of Aviation Insurers, and Richard Gardiner, University College London. On aviation finance, we were able to call on the expertise of Dean N. Gerber (Vedder Price, Chicago), Dr. Donal Hanley (Vice President, Legal Aviation Capital Group Corp., Newport Beach, California), and B. Patrick Honnebier (Of Counsel, Gomez and Bicker, Aruba and Amsterdam).

Cambridge University Press

978-1-107-02052-8 - The Principles and Practice of International Aviation Law

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Frontmatter

[More information](#)

We also wish to recognize the contributions of our colleagues in the International Aviation Law Institute at DePaul. John Q. Mulligan, FedEx/United Airlines Resident Research Fellow, showed his characteristic attention to detail and accuracy in the research and refinement he provided for every chapter of the book, and we owe him prodigious thanks for his dedication. Stephen B. Rudolph, Executive Director of the Institute, served as project manager for the book and was indispensable to its completion. Our peerless proofreader, Alice Rudolph (Steve's wife), cast her usual meticulous eye over the whole text. Our thanks also to our student research assistants, Eli Judge and Jessica Katlin, who gave us many hours of their time and considerable talents.

We are indebted to John R. Byerly, former U.S. Deputy Assistant Secretary of State for Transportation Affairs, a loyal friend of our Institute, who has always been available with counsel and support during the writing process. Rush O'Keefe, Senior Vice President and general counsel of FedEx, and Hershel Kamen, Senior Vice President, Alliances, Regulatory and Policy at United Airlines, have also been strong allies of the Institute and of its work, and this book could not have happened without their material and moral encouragement. And our thanks finally to Ulrich Schulte-Strathaus, former secretary general of the Association of European Airlines and now Managing Director, Aviation Strategy and Concepts, for his Afterword to the book – an unflinching view of the economic issues that will influence the future of the international aviation industry and of its governing rules.

Brian Havel dedicates this book to his parents, Miroslav and Betty, to his partner Graeme, and to his family. Gabriel S. Sanchez dedicates this book to his sons Jonah, Manuel, Iohan, and Eliyah, and most of all to his dear wife, Laura, without whose love, patience, and support his contribution to this work would not have been possible.

List of Abbreviations and Acronyms

A4A	Airlines for America (formerly Air Transport Association of America (ATA))
AAPA	Association of Asia Pacific Airlines
ACSA	Central American Agency for Aeronautical Safety
AEA	Association of European Airlines
AFRAA	African Airlines Association
ALTA	Latin American and Caribbean Air Transport Association
APG	Aircraft Protocol Group
ASA	Air Services Agreement
ASAM	ASEAN Single Aviation Market
ASEAN	Association of Southeast Asian Nations
ATAG	Air Transport Action Group
AWG	Aviation Working Group
BAGASOO	Banju Accord Group Safety Oversight Organization
BIT	Bilateral Investment Treaty
BRIC	Brazil, Russia, India, and China
CAA	Civil Aviation Authority
CAEP	Committee on Aviation Environmental Protection
CASSOS	Caribbean Aviation Safety and Security Oversight System
CJEU	Court of Justice of the European Union
COMAC	Commercial Aircraft Corporation of China
DGComp	Directorate General for Competition
DOJ	United States Department of Justice
DOT	United States Department of Transportation
DSB	World Trade Organization Dispute Settlement Body

DVT	Deep Vein Thrombosis
ECAA	European Common Aviation Area
ETS	Emissions Trading Scheme
EU	European Union
ExIm	Export-Import Bank
FAA	Federal Aviation Administration
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GIACC	Group on International Aviation and Climate Change
GRC	General Risks Convention
IACA	International Air Cargo Association
IACA	International Air Carrier Association
IASA	International Aviation Safety Assessments (FAA)
IATA	International Air Transport Association
ICAN	International Commission for Air Navigation
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
IDERA	Irrevocable Deregistration and Export Request Authorization
IGO	International Governmental Organizations
IPCC	Intergovernmental Panel on Climate Change
KLM	Koninklijke Luchtvaart Maatschappij
LAN	Línea Aérea Nacional
MAAS	Multilateral Agreement on Air Services
MALIAT	Multilateral Agreement on the Liberalization of International Air Transportation
MBM	Market-Based Measures
MFN	Most Favored Nation
MOU	Memorandum of Understanding
NASA	National Aeronautics and Space Administration
NGO	International Nongovernmental Organizations
OAA	Open Aviation Area
PANS	Procedures for Air Navigation Services
PNR	Passenger Name Records
RSOO	Regional Safety Oversight Organizations
SAFA	Safety Assessment of Foreign Aircraft
SARI	South Asian Regional Initiative
SARPs	Standards and Recommended Practices
SAS	Scandinavian Airlines
SCM Agreement	Agreement on Subsidies and Countervailing Measures

*List of Abbreviations and Acronyms* xvii

SDR	Special Drawing Right
TACA	Transportes Aéreos del Continente Americano
TFEU	Treaty on the Functioning of the European Union
TSA	United States Transportation Security Administration
UIC	Unlawful Interference Convention
U.K.	United Kingdom
U.N.	United Nations
UNFCCC	U.N. Framework Convention on Climate Change
U.S.	United States of America
USOAP	Universal Safety and Oversight Audit Program
WTO	World Trade Organization