

## Pricing and Capacity Determination in International Air Transport: a Legal Analysis, by P. P. C. Haanappel

Seth E. Lipner

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mjil>



Part of the [International Law Commons](#)

---

### Recommended Citation

Seth E. Lipner, *Pricing and Capacity Determination in International Air Transport: a Legal Analysis*, by P. P. C. Haanappel, 9 Md. J. Int'l L. 339 (1985).

Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol9/iss2/33>

This Article is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Journal of International Law by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

**PRICING AND CAPACITY DETERMINATION IN INTERNATIONAL AIR TRANSPORT: A LEGAL ANALYSIS.** By P.P.C. Haanappel. Deventer, The Netherlands: Kluwer Law and Taxation Publishers, Inc., 1984, 210 pp.

When I first opened *Pricing and Capacity*, and began to leaf through its pages, the first thing to catch my eye was a table of abbreviations.<sup>1</sup> A stranger to the chaotic system of international regulation of commercial aviation might consider this an unusual way to start a book. This reviewer, however, reacted differently, for I had had the good fortune to study this fascinating subject some years ago. I looked at the table of abbreviations with the anticipation of renewing an old friendship.

As I made my way through the Introduction and first chapter I wondered whether and, if so, how fast, the subject would come back to me. Fortunately, the answer was "not long," for Professor Haanappel gives the reader little time to prepare. Take a deep breath, this book dives right in — and head first at that.

The beginning of *Pricing and Capacity* reveals much about the nature of aviation law. The subject is incredibly complex, involving the interplay of governments, international organizations, private businesses and the consuming public. This complexity is compounded by a unique vocabulary, unmatched in any other area of legal literature.<sup>2</sup> Accordingly, an author's first task when writing about aviation law must be to introduce the neophyte to such terms and concepts as the five (eight?) freedoms,<sup>3</sup> special and excursion fares, bilateralism, load factors, passenger-miles, traffic conferences, and so on and so on.

It is not clear that Professor Haanappel successfully overcomes this initial difficulty. Because the author is extremely concise, and because few concrete examples are provided (this is a problem that plagues the entire

---

1. P. HAANAPPEL, *PRICING AND CAPACITY DETERMINATION IN INTERNATIONAL AIR TRANSPORT* at xi (1983). It is interesting to note that Professor Matte, also of the faculty of Law and The Institute of Air and Space Law at McGill University, begins his treatise on the same subject with a similar table. N. MATTE, *TREATISE ON AIR-AERONAUTICAL LAW* (1981).

2. The air law vocabulary may even be responsible, at least in part, for that complexity, as well as for a certain amount of confusion. For an illustration, see A. LOWENFELD, *AVIATION LAW* at 1-166 to 1-187 (2d ed. 1981).

3. At the seminal Chicago Conference of 1944, the governments involved identified five kinds of international air transport. Some authors have, since then, identified additional types of traffic. Professor Haanappel states those variations, but does little to explain their significance, either theoretical or actual. See P. HAANAPPEL, *supra* note 1, at 11-12. But see A. LOWENFELD, *supra* note 2, at 2-28 to 2-42, where the tension between these variations is considered.

work), there is little opportunity for the reader to pause and get his bearings and the beginner may surrender early on. The curious, however, will continue.

Substantively, the book begins with a discussion of the role governments play in international aviation policy and decision-making. The text inevitably takes the form of a chronicle, beginning with the Chicago Convention of 1944<sup>4</sup> and continuing through the various Bermuda regimes<sup>5</sup> and beyond, to the so-called Liberal Bilaterals.<sup>6</sup> Interspersed are excerpts from relevant legal documents; each excerpt is followed by a fairly cogent explanation and an analysis, albeit a brief one.

The author then turns to what is, perhaps, the most interesting, and undoubtedly most challenging aspect of aviation law: deregulation. In 1977, domestic deregulation in the United States forever changed the character of all commercial aviation.<sup>7</sup> Under the stewardship of its newly-appointed chairman, Alfred E. Kahn, the U.S. Civil Aeronautics Board set in motion a series of events which would literally reach around the world.

Kahn remains a unique and colossal<sup>8</sup> figure in the annals of commercial aviation. Neither a lawyer nor a flier, Kahn nevertheless profoundly influenced both professions. We lawyers learned a great deal from Kahn, and Kahn was anxious to teach us. His approach to aviation is best summarized in one phrase. He was responding to a question by an interviewer, shortly after he was confirmed Chairman of the CAB. The question concerned his experience in formulating commercial aviation policy. Kahn told the New York Times that he had no experience and that to him "airplanes are nothing but marginal costs with wings."<sup>9</sup> Most importantly, once confirmed as Chairman, Kahn practiced what he preached: *competition* must make the basic decisions about prices and output (capacity). Kahn, at first singlehandedly,<sup>10</sup> and then with Congressional guidance,<sup>11</sup> plotted aviation's

4. P. HAANAPPEL, *supra* note 1, at 14-18. For a detailed discussion, see N. MATTE, *supra* note 1, at 127-227.

5. P. HAANAPPEL, *supra* note 1, at 24-42. The book contains only selected portions of the various treaties. For full text see A. LOWENFELD, AVIATION LAW 371-415, 601-86 (Document Supp. 1981).

6. A. LOWENFELD, *supra* note 5, at 42-43. A list of countries which have concluded such agreements with the United States is contained in Appendix III. *Id.* at 189.

7. For an extensive discussion, see A. LOWENFELD, *supra* note 2, at Chs. 4 & 5.

8. *Cf.* W. SHAKESPEARE, JULIUS CAESAR I, ii, 127-8 ("Why, Man, he doth bestrode the narrow world Like a Colossus, and we petty Men Walk under his huge legs, and peep about To find ourselves dishonorable graves.").

9. N.Y. Times, Apr. 23, 1978, § 3, at 7, col. 1.

10. *See generally*, A. LOWENFELD, *supra* note 2, at 4-24 to 4-56. As Kahn told a television interviewer:

I'm sworn to uphold the law, and the Federal Aviation Act does not permit me to deregulate

future course, and it lay not in regulation, but in the economics of the marketplace.

Professor Haanappel, looking at these events from outside the United States, relates them in a matter-of-fact tone. In the end, however, he remains skeptical, not eager to come out of the safe regulatory environment which has for so long dominated commercial aviation.<sup>12</sup> In his discussion of international deregulation, the author, for instance, quotes from President Carter's Policy Statement as well as other legal and quasi-legal documents. But, true to his chosen title, the author confines himself to official statements, legal procedures, rules and regulations, all bearing on institutional decision-making in international aviation.<sup>13</sup> As an American greatly influenced by Kahn, the omission of any detailed discussions about the marketplace and competition leaves this reader with an empty feeling.<sup>14</sup> Further-

late entirely. I think it does offer me a fair amount of scope, however, to regulate more obtrusively, as the Board has in the past, or less obtrusively, as I intend to do.

Interview with Alfred E. Kahn, Chairman of the Civil Aeronautics Board, on the McNeil-Lehrer Report (Jan. 10, 1978), *reprinted in* A. LOWENFELD, *supra* note 2, at 4-25.

11. The Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as scattered sections of 49 U.S.C. app. ch. 20), *reprinted in* A. LOWENFELD, *supra* note 2, at 4-57 to 4-74 (where the Act is discussed at some length).

12. The regulatory-cartelized framework which Professor Haanappel endorses shelters waste, breeds inefficiency and deprives the consumer of free choice. *See* Lowenfeld, *Deregulation - Is It Contagious?*, in *INTERNATIONAL AIR TRANSPORTATION IN THE EIGHTIES* 31 (H. Wassenberg & H. Van Fenema eds. 1982). Professor Haanappel, remains one of IATA's few "friends." The European Commission, whose member countries have been supporters of IATA, has stressed the need for freer competition in international air transport. *See* Memorandum on The Contribution of The Communities to The Development of Air Transport Services, Bulletin of The Community, 5/79.

13. P. HAANAPPEL, *supra* note 1, at 51-59.

14. The book's discussion of economics is, in some instances, quite unsettling. For example, he states: ". . . [N]o pure and simple application of the law of supply and demand is possible in the case of (international) air transport . . . [because the industry is] oligopolistic in character." P. HAANAPPEL, *supra* note 1, at 47. Just the opposite is true. Supply and demand function in the same way in oligopolistic markets as they do in competitive markets. The rules are the same; the outcomes are different because the inputs are different. Regulation (and cartelization to an even greater degree) simply perpetuates these anticompetitive outcomes.

Oligopoly results in higher prices for consumers. Regulation (and cartelization) ensure that these prices will remain high. Accepting Professor Haanappel's assumption, that if you remove the regulation you still have oligopoly, at least then you have interdependence, with occasional outbursts of competition. The consumer is better off. Even if competition doesn't break out, the possibility that it *could* be healthy. Competition means uncertainty. Perhaps that is why the established airlines are the most vigorous proponents of regulation. Professor Haanappel's instant answer is that aviation is a public utility. There are other good arguments. The point merely is that *these* are the exciting issues in aviation today. It is in the resolution of these issues that the future lies. This book barely scratches the surface.

more, in spite of the fact that deregulation occurred some years ago, there is little offered in the way of empirical data on whether deregulation has been a success or a failure.

Instead, the various segments of the book quote large sections of relevant statutory and other material, each section followed by a concise explanation, in understandable terms, and ending with a "Preliminary Evaluation." This "Preliminary Evaluation" is a device which the author uses effectively to pause and summarize. In these "Evaluations," however, a sharp contrast is presented between the detail of the text on the one hand and the superficiality of the evaluation offered on the other. Oversimplification abounds, almost to the point of disingenuousness.

And perhaps herein lies one problem: after reading this book, I simply cannot decide to what audience it is addressed. If it is intended as a scholarly treatise, it lacks sufficient insight and innovation.<sup>15</sup> If it is intended as a teaching tool, it lacks the incisive questions, the nagging problems, and the troubling solutions which pervade this subject.<sup>16</sup> Most of all, it lacks the concrete examples of actual successes and failures of the system, the stuff that brings a law book to life.<sup>17</sup>

Instead, this book is simply a snapshot of the international regulatory scheme, a tremendous amalgam of facts and generalities, details and procedures, conclusions and observations. An example is the chapter on the IATA,<sup>18</sup> the cartel-trade association that dominates pricing and capacity determination. The chapter is both detailed and straightforward, and is undoubtedly the most useful part of the book, perhaps because the author is an ardent supporter of the IATA.<sup>19</sup> An attorney confronting IATA deci-

15. See, e.g., A. LOWENFELD, *supra* note 2; N. MATTE, *supra* note 1; SHAWCROSS & BEAUMONT, *AIR LAW* (4th Ed. 1977); A. SAMPSON, *EMPIRES OF THE SKY* (1977) (a critical history of international aviation, written with Sampson's usual panache). See also B. CHENG, *THE LAW OF INTERNATIONAL AIR TRANSPORT* (1962).

16. See, e.g., A. LOWENFELD, *supra* note 2, for the truly definitive work on the subject. The political science, industrial organization or regulated industry course may find interesting a collection of essays, *INTERNATIONAL AIR TRANSPORT IN THE EIGHTIES* (H. Wassenberg & H. Van Fenema eds. 1982).

17. See *infra* text accompanying note 22.

18. *I.e.*, International Air Transport Association. A list of its members, and a good organizational chart, appear in Appendices I & II.

19. Professor Haanappel's views on this subject are made clear at the start: the opening salvo is a quote from Sir William P. Hildred, the first Director-General of IATA, who was, for so many years, the most articulate defender of IATA ratemaking. See, e.g., *Hearings on Monopoly Problems in Regulated Industries before the Antitrust Subcomm. of the House Comm. on the Judiciary, 84th Cong., 2d Sess. (1956)* (testimony of Sir Wm. Hildred), at 1023-54; *reprinted in* A. LOWENFELD, *supra* note 2, at 2-131 to 2-138. Suffice it to say that were it not for Sir William, the IATA probably would not have survived even to this day.

sion-making for the first time may find this portion of the book to be useful.<sup>20</sup> Furthermore, there is some interesting discussion of some subjects not normally found in books on aviation law, such as agency commissions, currency matters and cargo rates.<sup>21</sup>

But, unfortunately, when the book turns to non-IATA traffic,<sup>22</sup> the emptiness of the earlier chapters returns. The Freddie Laker story, filled with adversity and intrigue,<sup>23</sup> receives only minor consideration. Furthermore, the book is weak in economic analysis. For example, in the "Preliminary Evaluation" following this chapter, the author ends by observing that "there are still a considerable number of scheduled international air routes where . . . air tariffs [are determined] without reference to multilateral IATA ratemaking machinery."<sup>24</sup> True enough. But does it work? If so, how? And from whose perspective? The consumers? The governments involved? The carriers? What effect does international diplomacy have on the subject? What about other international considerations? Most of all, what effect does economics have?

*Pricing and Capacity* barely raises these questions, and presents few convincing solutions. In the final six pages, the author does present his conclusions and projections.<sup>25</sup> Unfortunately, I fear that only the most faithful reader (and reviewer) will persevere to that point. Nevertheless, the book was interesting from my own perspective, for it allowed me to receive a long overdue update<sup>26</sup> on this marvelous subject. Yet even that update was bittersweet, for, rather than seeing the old problems solved, I saw new problems with new, untested solutions. Of course, that is probably one of the things that first attracted me to this subject.

*Pricing and Capacity* is an intensive introduction to international, governmental, and industry practice, as well as an overview of the history and

---

20. S. ROSENFELD, *THE REGULATION OF INTERNATIONAL COMMERCIAL AVIATION: THE INTERNATIONAL REGULATORY STRUCTURE* (1984). This book, published by Oceana, would make a far better desk reference for the airline lawyer; it is also written in loose-leaf form — an all-important feature in this constantly changing subject.

21. P. HAANAPPEL, *supra* note 1, at 101-09.

22. P. HAANAPPEL, *supra* note 1, at 117-38. These include non-IATA airlines as well as charter carriers. The latter have, since 1974, been allowed to join IATA. To date, none has done so.

23. For a chronical of the events involved, see A. LOWENFELD, *supra* note 2, at 5-48 to 5-71. A. SAMPSON, *supra* note 15, at 147-62. It is unusual that Professor Haanappel's book hardly mentions the current law suit in Federal District Court in Washington. Certainly that suit merits some discussion in a legal analysis of international commercial aviation.

24. P. HAANAPPEL, *supra* note 1, at 123.

25. *Id.* at 177-82.

26. For example, and true to form, Professor Haanappel leads the reader paragraph by paragraph through the US-ECAC Memorandum of Understanding. *Id.* at 163-67.

procedures of the IATA; a factual statement of who decides, and according to what rules, the prices and capacity in international air transportation. Sadly, however, Kahn's challenge goes unanswered: why can't the marketplace do better?

*Seth E. Lipner\**

---

\* J.D., Albany Law School of Union University; LL.M., New York University School of Law; Assistant Professor of Law, Bernard M. Baruch College, City University of New York.