

1967

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Recommended Citation

Oliver J. Lissitzyn, *International Aspects of Air Transport in American Law*, 33 J. AIR L. & COM. 86 (1967)
<https://scholar.smu.edu/jalc/vol33/iss1/6>

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INTERNATIONAL ASPECTS OF AIR TRANSPORT IN AMERICAN LAW†

BY OLIVER J. LISSITZYN††

I. INTRODUCTION

LIKE ALL NATIONS, the United States possesses complete and exclusive sovereignty over the airspace above its territory, including its territorial sea.¹ Control over the entry and operation of foreign aircraft is exercised by the Federal Government. While commercial air transport enterprises are privately owned and operated, air transport, being an activity "affected with a public interest," is one of the most closely regulated of industries. Under its constitutional power to regulate interstate and foreign commerce² Congress has enacted the Federal Aviation Act of 1958³ which establishes the general framework of safety and economic regulation of civil aviation. Various other federal legislation, notably anti-trust (anti-monopoly) laws, have an important bearing on air transport. The federal power to make treaties and agreements with foreign states has also served as a basis for legal regulation of international aviation. The Government, however, has not fully utilized its constitutional powers in the field of aviation. In the absence of applicable federal legislation, the states retain important functions with respect to regulation of ancillary services and facilities (airports, travel agents, etc.); and most of the private law of international aviation, including the norms governing the liability of operators to passengers, shippers, and third parties, is state rather than federal, except insofar as it has been modified by treaties.

Within the federal regulatory scheme, the responsibility for *safety* regulation of civil aviation is lodged primarily in the Federal Aviation Agency (FAA). Created by the Federal Aviation Act of 1958, the FAA was headed by an Administrator who was appointed by the President with the advice and consent of the Senate. He reported directly to the President and Congress, and was not subject to the authority of any other agency or department.⁴ But an act of Congress, approved on 15 October 1966, provides for a new Department of Transportation which is to absorb the FAA.⁵

† This report was prepared for the Seventh Congress of Comparative Law held at Uppsala, Sweden, in August 1966. It was, therefore, primarily addressed to readers with little or no knowledge of the American legal system. It is printed here with some revisions (as of October 1966).

¹ Convention on International Civil Aviation (Chicago Convention), 7 Dec. 1944, art. 1, 61 Stat. 1180, T.I.A.S. 1591 (effective 4 April 1947) [hereinafter cited as Chicago Convention].

² U.S. CONST., art. 1, § 8.

³ 72 Stat. 731, 49 U.S.C. § 1301-1542 (1964) [hereinafter cited solely to 49 U.S.C.].

⁴ 49 U.S.C. §§ 1341-54 (1964).

⁵ Department of Transportation Act, 80 Stat. 931 (1966).

The organ primarily responsible for the *economic* regulation of air transport is the Civil Aeronautics Board (CAB). Originally established pursuant to the Civil Aeronautics Act of 1938,⁶ the Board consists of five members appointed by the President for six-year terms with the advice and consent of the Senate, of whom not more than three may be of the same political party. The CAB is an independent regulatory agency and as such is not subject to formal control by the President. Certain of the Board's decisions with respect to international operating rights, however, require presidential approval.

In this article only the most important of the economic regulatory powers of the CAB will be described.

II. AUTHORIZATION AND PROMOTION OF INTERNATIONAL AIR TRANSPORT SERVICES

Neither domestic nor foreign enterprise may establish and operate an air transport service open for the use of the general public between the United States and a foreign country without authorization by the CAB. Such authorization may take several forms.

A. *American Air Carrier Authorization*

An American enterprise may not engage in "air transportation" between the United States and a foreign country without a valid certificate of public convenience and necessity issued, after notice and public hearing, by the Board with the approval of the President.⁷ The Board must find that

the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.⁸

The certificate may be either of indefinite or limited duration.⁹ The Board

⁶ 52 Stat. 973 (1938).

⁷ 49 U.S.C. §§ 1301(21), 1371, 1461 (1964). A certificate of public convenience and necessity must not be confused with an "air carrier operating certificate," which is issued by the FAA and attests the technical fitness of a carrier. 49 U.S.C. § 1424 (1964).

⁸ 49 U.S.C. § 1371(d)(1) (1964). The Board is guided by the following standards of § 1302:

In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

⁹ 49 U.S.C. § 1371(d) (1964).

may attach to the certificate "such reasonable terms, conditions, and limitations as the public interest shall require."¹⁰ To the extent the operation is to take place outside the United States, the certificate must designate terminal and intermediate points only insofar as the Board deems practicable, and otherwise may designate only the general route or routes to be followed.¹¹

Although certain categories of air carriers are treated differently, in general:

No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require . . .¹²

However, this restriction on the powers of the Board does not apply to certificates of "supplemental air carriers," *i.e.*, air carriers authorized solely to perform charter trips as distinguished from regularly scheduled services or the carriage of individually ticketed passengers.¹³ "Indirect air carriers," such as air freight forwarders, may be relieved by the Board from the provisions of the act as required by the public interest.¹⁴ An air carrier may be authorized to transport persons, property, and mail or any combination of these categories of traffic. The Board, furthermore, is empowered to establish classifications or groups of air carriers, and to prescribe rules and regulations for each of them.¹⁵

Once issued, a certificate may be revoked only after notice and hearing "for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate," but it may be amended or suspended, after notice and hearing, if the public convenience and necessity so requires.¹⁶ No certificate may be transferred nor an authorized route abandoned without the approval of the Board after notice and hearing.¹⁷

The actions of the Board with respect to certificates for foreign air transportation are not final until they have been approved by the President.¹⁸ The President's power is not merely that of a veto, since he can disapprove the denial as well as the issuance of the certificate. It has been uniformly treated in practice as a power to direct the Board's action. It

¹⁰ 49 U.S.C. § 1371(e)(1) (1964).

¹¹ 49 U.S.C. § 1371(e)(2) (1964). For supplemental carriers the certificate must designate the geographical area or areas to be served.

¹² 49 U.S.C. § 1371(e)(4) (1964).

¹³ 49 U.S.C. §§ 1301(32), (33), 1371(d)(3) (1964).

¹⁴ 49 U.S.C. § 1301(3) (1964).

¹⁵ 49 U.S.C. § 1386(a) (1964).

¹⁶ 49 U.S.C. § 1371(g) (1964).

¹⁷ 49 U.S.C. § 1371(h), (j) (1964).

¹⁸ 49 U.S.C. § 1461 (1964):

The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation . . . or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof.

is the President, therefore, who ultimately decides whether a certificate should be issued to an American enterprise authorizing an air transport service between the United States and a foreign country; what terms, conditions, and limitations should be attached to the certificate; and whether the certificate should be amended, suspended, or revoked. The Board's function is recommendatory, but the President cannot initiate a decision—he can exercise his power of approval or disapproval only if there is a tentative decision of the Board before him. The President's actions cannot be reviewed in the courts.¹⁹

The issuance of a certificate by the Board with the approval of the President is the normal but not the exclusive method by which an American enterprise may be authorized to operate an air transport service between the United States and a foreign country. The Board has the power to exempt any air carrier or class of air carriers from most of the economic regulatory provisions of the act:

if it finds that the enforcement of this title or such provision . . . is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.²⁰

This power is not unlimited, and exemption orders of the Board can be struck down by the courts.²¹ It continues, however, to be frequently used in order to facilitate the speedy establishment of new services pending the outcome of certification proceedings, to permit the operation of special services for limited periods of time, and to make possible the carriage on a limited basis of classes of traffic which an air carrier is not authorized by his certificate to transport (*e.g.*, transport of passengers by an all-cargo airline). The exemption procedure is speedier and less formal than the certification procedure, and exemption orders do not require the approval of the President. The Board, furthermore, has wide discretion with respect to the termination of exemptions and the terms and conditions attached to them.

Most of the American air carriers operating scheduled international services are entitled in certain circumstances to receive a federal subsidy in the form of payments for the carriage of mail. This ensues from the provision that in determining rates payable for the carriage of mail the Board shall consider, among other factors,

the need of each such air carrier (other than a supplemental air carrier) for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.²²

¹⁹ *Chicago & So. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 114 (1948).

²⁰ 49 U.S.C. § 1386(b)(1) (1964).

²¹ *Pan American World Airways v. CAB*, 261 F.2d 754, 756 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 912 (1959).

²² 49 U.S.C. § 1376(b) (1964).

It is further provided, however, that payments for the carriage of mail fall into two categories: (1) the amount of compensation determined without regard to the foregoing provision, which is to be paid by the Postmaster General out of postal appropriations; and (2) the remainder of the total compensation, which is to be paid by the CAB out of appropriations for that purpose.²³ It is the latter category of mail payments that is generally referred to as subsidy. This subsidy has thus been almost completely divorced from actual compensation for the carriage of mail, except in one respect: An airline, in order to be eligible for the subsidy, must be authorized to carry mail. It is, furthermore, possible for an airline to accept a certificate authorizing it to carry mail on the express condition that it does not thereby become entitled to subsidy.

In deciding whether to grant a subsidy to an eligible airline, and in determining the amount, the Board has a wide latitude in ascertaining whether the need for it arises from required operations under honest, economical, and efficient management. It may disallow costs of operations which it does not regard as necessary and economical. Consequently, it may exercise effective control over the frequencies of service and the type of aircraft employed by an airline dependent on subsidy. No American air carrier with major international services has actually received a subsidy under the act since 1958. The extent to which certain governmental policies with respect to allocation of military traffic (which is heavy) to commercial airlines (including "supplemental air carriers" and all-cargo carriers not entitled to a subsidy under their certificates) may operate as a form of public aid to air transport is difficult to determine.

Under existing law, the federal government has no special economic, regulatory, or promotional powers with respect to two kinds of international air transport services in which an American enterprise may be engaged. First, no special United States authorization is required for the establishment by an American enterprise of air transport services wholly between or within foreign countries.²⁴ Second, no special United States authorization is required for an American enterprise operating as a private or contract carrier by air provided its services are limited to the carriage of cargoes or personnel for a particular shipper or shippers and it does not hold itself out to the public as being willing and able to transport other passengers or goods for hire. This limitation on activities is due to the definition of "air transportation" (which is subject to economic regulation under the act) as "the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft. . . ."²⁵

B. *Foreign Air Carrier Authorization*

A foreign enterprise may not engage in scheduled or non-scheduled "air

²³ 49 U.S.C. § 1376(c) (1964).

²⁴ The use of American aircraft in such services, however, may be subject to export control legislation.

²⁵ 49 U.S.C. § 1301(21) (1964). There is no statutory definition of a "common carrier." *But see, e.g.,* Transocean Air Lines, Inc., Enforcement Proceeding, 11 C.A.B. 350, 352 (1950).

transportation," as defined in the act, between the United States and a foreign country without a permit issued by the CAB with the approval of the President.²⁶ The procedure and the general standards under which such permits are issued are similar to those governing the issuance of certificates to American enterprises, but the following differences should be noted:

(1) A permit, unlike a certificate, may contain restrictions with respect to the frequency of service and the equipment operated.

(2) In proceedings for the issuance of a permit, the provisions of any applicable international agreement are given great, perhaps controlling, weight.

(3) A permit, unlike a certificate, may be revoked on the ground that the public interest so requires, even if the carrier has committed no violation of the law.

The Board has no power to exempt a foreign air carrier from the requirement that the operation be authorized by a regularly issued permit, or from any other economic regulatory provision of the act. The unavailability of the expeditious exemption procedure to take care of special situations imparts unnecessary rigidity to the control of the operations of foreign air transport enterprises. An amendment to extend the exemption power of the Board to foreign air carriers would be desirable.

The act makes special provision for international agreements. The Secretary of State is directed to consult with the Board, as well as with the Administrator of the FAA and the Secretary of Commerce, "as appropriate," concerning "the negotiations of any agreement with foreign governments for the establishment or development of air navigation, including air routes and services."²⁷ The Board is directed to exercise and perform its powers and duties "consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries."²⁸

Some sixty bilateral air transport agreements between the United States and foreign nations were in force in 1965.²⁹ Under United States law, they are executive agreements rather than treaties, since they are concluded without the advice and consent of the Senate.³⁰ In these agreements, the United States has generally avoided the insertion of clauses providing for rigid controls over international traffic through predetermination of capacity to be operated by the carriers or rigid limitations on so-called Fifth Freedom traffic. Instead, the agreements normally contain the well-known Bermuda clauses which establish certain broad standards with re-

²⁶ 49 U.S.C. §§ 1372(a), 1461 (1964).

²⁷ 49 U.S.C. § 1462 (1964).

²⁸ 49 U.S.C. § 1502 (1964).

²⁹ The number of such agreements in force cannot be stated with certainty, since the succession of some new states to such agreements made by their predecessors has not been clearly determined. For a collection of the texts of most of the agreements, see 3 SENATE COMM. ON COMMERCE, 89TH CONG., 1ST SESS., *Air Laws and Treaties of the World* (Comm. Print 1965). For the 5 May 1964 Agreement with the United Arab Republic, see [1964] 2 U.S.T. & O.I.A. 2202, T.I.A.S. 5706.

³⁰ See Lissitzyn, *The Legal Status of Executive Agreements on Air Transportation*, 17 J. AIR L. & COM. 436 (1950) (pt. 1), 18 J. AIR L. & COM. 12 (1951) (pt. 2).

spect to capacity and the kinds of traffic to be carried, and provide for *ex post facto* determination, through consultations between the parties, of any failure to comply with these standards.³¹

The CAB has been reluctant to hold that the provisions of an air transport agreement are absolutely controlling with respect to the issuance of a foreign air carrier permit, and, although it generally attaches great weight to the agreement, has uniformly considered other factors in reaching the conclusion that the issuance of the permit was required by the public interest.³² The failure of the CAB to comply with the terms of an agreement can be corrected by the President in the exercise of his power to approve or disapprove the decision of the Board.

Air transport operations by a foreign enterprise between the United States and a foreign country do not require a foreign air carrier permit under section 402 of the act if they do not constitute "air transportation" as defined in the act, *i.e.*, if they are not common carrier services. Such operations, however, must be authorized by the Board.³³ The requisite authorization may be granted or denied expeditiously, and the decision of the Board is not subject to presidential approval. As a party to the Chicago International Air Services Transit Agreement of 1944,³⁴ the United States grants the privileges of non-stop transit and of landing for non-traffic operational reasons to the aircraft of the other parties to the Agreement which are operated in a scheduled international air service across the United States.³⁵ A similar privilege exists pursuant to Article 5 of the Chicago Convention for aircraft of the other parties to the Convention which are not engaged in scheduled services.³⁶

The Federal Aviation Act forbids foreign civil aircraft to engage in cabotage in the United States, *i.e.*, to take on "at any point within the United States, persons, property, or mail carried for compensation or hire and destined for another point within the United States."³⁷ An aircraft may be registered in the United States, and thus not be foreign, only if it is owned by a citizen of the United States or by an American corporation in which at least seventy-five percent of the voting interest is owned or controlled by citizens of the United States.³⁸ These provisions, which are more rigid than comparable provisions in the legislation of many other nations, impose barriers to arrangements for lease or interchange of aircraft between a domestic airline and a foreign airline, and may thus interfere with the most economic utilization of equipment by the world's air transport enterprises.

³¹ See Lissitzyn, *Bilateral Agreements on Air Transport*, 30 J. AIR L. & COM. 248, 261 (1964).

³² See British Overseas Airways Corp., Foreign Air Carrier Permit, 29 C.A.B. 583, 586 (1959).

³³ 49 U.S.C. § 1508(b) (1964); and CAB Economic Regulations, 14 C.F.R. § 375.42 (1965). The authorization is granted in the form of a "foreign aircraft permit."

³⁴ Chicago Convention.

³⁵ CAB Economic Regulations, 14 C.F.R. § 375.45 (1965).

³⁶ CAB Economic Regulations, 14 C.F.R. §§ 375.10 & 375.33 (1965).

³⁷ 49 U.S.C. § 1508(b) (1964). For interpretation, see *Petition of Qantas Empire Airways, Ltd. for Interpretative Rule*, 29 C.A.B. 33 (1959). The term "United States" includes all the possessions of the United States and the Panama Canal Zone. 49 U.S.C. § 1301(29), (35) (1964).

³⁸ 49 U.S.C. §§ 1301(13), 1401 (1964).

III. ACQUISITIONS, MERGERS, INTERLOCKING RELATIONSHIPS, AND METHODS OF COMPETITION

The Federal Aviation Act makes unlawful a large variety of transactions involving air carriers or foreign air carriers unless such transactions are approved by the Board. The Board must not approve a transaction which would create a monopoly. The transactions covered by this provision include consolidations, mergers, purchases, leases, operating contracts, and acquisitions of control. Certain of these transactions with "any other common carrier" or "any person engaged in any other phase of aeronautics" (e.g., foreign airlines not operating to the United States and aircraft manufacturers) are also covered by the prohibition.³⁹ In practical effect, the following transactions or relationships, among others, require the approval of the Board:

(1) Acquisition of control by an American air carrier of another American air carrier or of a foreign airline, even if the latter does not operate to the United States.

(2) The purchase, lease, or operation of a substantial part of the properties of an American air carrier or of a foreign airline (even if it does not operate to the United States) by an American air carrier.

(3) Consolidation or merger of an American air carrier and another American air carrier or a foreign airline (even if it does not operate to the United States).

(4) Acquisition of control by a foreign airline (even if it does not operate to the United States) of any American air carrier.

(5) The purchase, lease, or operation of a substantial part of the properties of an American air carrier by a foreign airline (even if it does not operate to the United States).

Transactions or relationships between foreign airlines, whether or not they operate to the United States, are not covered by this provision. Moreover, certain interlocking relationships between an American air carrier on one hand, and another American air carrier or "any other person who is a common carrier or is engaged in any phase of aeronautics" (including a foreign airline) on the other hand, are also unlawful unless approved by the Board.⁴⁰

Every air carrier is required to file with the Board every agreement into which it enters with any other carrier

for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.⁴¹

Approval by the Board of these agreements and the transactions and rela-

³⁹ 49 U.S.C. § 1379 (1964).

⁴⁰ *Ibid.*

⁴¹ 49 U.S.C. § 1382 (1964).

tionships described in the previous paragraphs exempts them from the operation of anti-trust laws to which they might otherwise be subject.⁴³

There is no provision in the act for the filing and approval by the Board of an agreement between two or more foreign airlines unless an American air carrier is also a party. Agreements between foreign airlines, insofar as they affect the air commerce of the United States, thus remain fully subject to the prohibitions and penalties of anti-trust laws.⁴⁴ It would seem desirable, in the interest of greater effectiveness and flexibility of regulation of air transport, to provide for the filing, perhaps on a confidential basis, of pooling agreements between foreign air carriers insofar as they directly relate to air transportation to and from the United States, and to give the Board the power to approve such agreements and thereby exempt them from the operation of anti-trust laws.

The Board is empowered to conduct investigations in order to determine whether any "air carrier," "foreign air carrier," or "ticket agent" has engaged "in unfair or deceptive practices or unfair methods of competition," and to issue cease-and-desist orders against such practices or methods.⁴⁴

IV. TARIFFS AND RATES

Every air carrier and foreign air carrier must file with the Board and publish its tariffs showing all rates, fares, and such additional information concerning its rules, practices, and services as the Board may require. Any tariff not conforming to the requirements may be rejected by the Board; if so rejected, it is void. No air carrier or foreign air carrier may charge rates or fares different from those specified in its currently effective tariffs. Rebates are prohibited. No tariff changes may be made without a thirty day notice filed and published as required; but the Board may in the public interest allow a change upon shorter notice, either in particular instances or by a general order applicable to special circumstances.⁴⁵

The act forbids air carriers and foreign air carriers to give any undue or unreasonable preferences or advantages to particular persons, localities, or types of traffic, or to subject them to "unjust discrimination or any undue or unreasonable prejudice or disadvantage."⁴⁶ The power of the Board over rates and fares in foreign air transportation is limited to the removal of unjust discrimination, undue preference, or undue prejudice.⁴⁷ In this respect, its power falls far short of the control which it possesses over domestic air transportation, where it is authorized to prescribe just and reasonable rates and fares and to suspend new rates and fares for a maximum of one hundred and eighty days pending decision as to their lawfulness.⁴⁸

The extent of United States governmental power over rates and fares

⁴² 49 U.S.C. § 1384 (1964).

⁴³ See 40 Ops. ATT'Y GEN. 335 (1944).

⁴⁴ 49 U.S.C. § 1381 (1964).

⁴⁵ 49 U.S.C. § 1373 (1964).

⁴⁶ 49 U.S.C. § 1374(b) (1964).

⁴⁷ 49 U.S.C. § 1482(f) (1964).

⁴⁸ 49 U.S.C. § 1482(d) (1964).

is significantly related to the operation of relevant provisions in many bilateral air transport agreements. Although such provisions vary somewhat in content, they take cognizance of the rate-making function of the International Air Transport Association (IATA) where an IATA agreement is applicable. Many of them specify that pending the settlement of a dispute between the two governments as to whether a rate proposed to be charged by one of their carriers between their respective territories is fair and economic, one of two alternatives may be utilized depending on whether or not power has been conferred on the CAB to fix fair and economic rates and to suspend proposed rates in a manner comparable to that in which the Board is empowered to act with respect to domestic air transportation:

(1) If such power has been conferred on the Board, the proposed rate may go into effect provisionally.

(2) If such power has not been conferred, the objecting government may prevent "the inauguration or continuation of the service in question at the rate complained of."⁴⁹

A bill recommended by the President and the CAB which would give the CAB the requisite power was passed by the Senate in November 1963,⁵⁰ but has not been acted upon by the House. The failure of the bill to be enacted leaves the United States at a disadvantage vis-à-vis the many nations whose governments have the power to prescribe international airline rates. This was demonstrated in 1963 when the United Kingdom threatened to prevent the operation of United States services to the United Kingdom at rates below those regarded by the British government as fair and economic.⁵¹

V. INTERNATIONAL ASSOCIATIONS OF AIRLINES

Most of the international airlines of the United States are members of the International Air Transport Association. Many of the resolutions of IATA organs, particularly those of traffic conferences which represent agreements between member airlines on rates and related matters, would constitute violations of anti-trust laws unless approved by the CAB under section 412 of the act.⁵² IATA rate resolutions generally provide that disapproval of a resolution by the government of any one carrier to which it applies is sufficient to invalidate it. Therefore, rate resolutions disapproved by the CAB have no legal force by their own terms. Approved resolutions are generally regarded as lawful and valid,⁵³ but there appears to have been no case in which enforcement of such resolutions was sought through

⁴⁹ This is a concise paraphrase of the gist of provisions contained in many agreements.

⁵⁰ See Lissitzyn, *supra* note 31, at 262-63.

⁵¹ See Goodwin, *The Role of the United States in the 1963 Transatlantic Air Fare Crisis*, 30 J. AIR L. & COM. 82 (1964); *Hearings Before the House Committee on Interstate and Foreign Commerce on Rates, Fares, and Practices in Foreign Air Transportation—1964*, 88th Cong., 2d Sess. (1964).

⁵² For initial approval by the CAB of the IATA rate-fixing machinery, see IATA Traffic Conference Resolution, 6 C.A.B. 639 (1946).

⁵³ Cf. *infra* note 65.

proceedings in American courts. IATA resolutions are not binding on airlines which are not IATA members, and the CAB has no direct legal power to compel an airline to charge rates equal to those fixed by IATA. The IATA traffic conference machinery through which these resolutions are adopted is recognized in a large number of bilateral air transport agreements made by the United States, but the latter is not bound, by the terms of these agreements, to approve the rate resolutions concluded through this machinery.

VI. SETTLEMENT OF INTERNATIONAL DISPUTES

The fifty-five bilateral air transport agreements of the United States in force in 1965 fall into the following broad categories with respect to general provisions concerning settlement of disputes which the parties are unable to resolve through consultation or negotiation:

(1) Five agreements, made between 1944-1946, contain no such provisions.

(2) Twenty-one agreements, made in 1946 or 1947, provide for reference of the dispute to the Provisional International Civil Aviation Organization (PICAO) or its successor, the International Civil Aviation Organization (ICAO), for an advisory report⁵⁴ and several mention arbitration as an alternative which may be employed by agreement between the parties. Nine of the agreements provide, in effect, that the executive authorities of the parties will use their best efforts within their powers to give effect to the advisory report.⁵⁵ Twelve agreements contain no such provision.

(3) Twenty-nine agreements provide for reference of the dispute to an arbitral tribunal for an advisory report. The tribunal is to consist of three members: One member to be appointed by each of the parties, and the third member to be selected by agreement of the other two. The agreements fall into three subcategories with respect to provision for the contingency of a failure by one of the parties to appoint an arbitrator or the failure to agree upon the third member: (a) twelve agreements, made between 1947-1953, provide that the President of the Council of ICAO is to make the necessary appointments; (b) sixteen agreements, beginning in 1951, provide that the President of the International Court of Justice is to make the necessary appointments; (c) one agreement, made with Spain in 1950, contains no provision for this contingency. All of the twenty-nine agreements provide, in effect, that the executive authorities of the parties will use their best efforts within their powers to give effect to the advisory report.

The provisions for the settlement of disputes have been utilized in only

⁵⁴ The organ of PICAO or ICAO specified in most of the agreements is the Council. The present effectiveness of these provisions is doubtful, since ICAO, unlike its provisional predecessor (PICAO), is not expressly empowered to issue such advisory reports in disputes arising under bilateral agreements between its members. See Larsen, *Arbitration in Bilateral Air Transport Agreements*, 2 *ARKIV FOR LUFTRETT* 145 (1964).

⁵⁵ This appears to be the intended meaning of all such provisions, although they vary in language.

two cases. A dispute between France and the United States over the interpretation of their air transport agreement of 27 March 1946, was submitted to arbitration by an agreement signed on 22 January 1963, in conformity with Article X of the air transport agreement as amended in 1951. The two governments agreed to consider the decision of the arbitral tribunal as binding. The two arbitrators appointed by the parties were unable to agree on the choice of the third arbitrator. Consequently, the latter was designated at the request of the parties by the President of the International Court of Justice after consultation with the President of the Council of ICAO.

The questions submitted to the tribunal were as follows:

(1) Under the provisions of the Air Transport Services Agreement between the United States of America and France, and in particular the terms of Route 1 of Schedule II of the Annex to that Agreement, does a United States airline have the right to provide international aviation services between the United States and Turkey via Paris and does it have the right to carry traffic which is embarked in Paris and disembarked at Istanbul, Ankara or other points in Turkey, or embarked at Istanbul, Ankara or other points in Turkey and disembarked at Paris?

(2) Under the provisions of the Air Transport Services Agreement between the United States of America and France, and in particular the terms of Route 1 of Schedule II of the Annex to that Agreement, does a United States airline have the right to provide international aviation services between the United States and Iran via Paris and does it have the right to carry traffic which is embarked in Paris and disembarked at Tehran or other points in Iran, or embarked in Tehran or other points in Iran and disembarked at Paris?

In the course of the proceedings, the parties consented to empower the tribunal to take into account not only the 1946 agreement, "but also all the formal and informal agreements which followed, as well as the conduct of the parties."

The unanimous decision of the tribunal, rendered on 22 December 1963, was to the following effect:

On Question 1: A United States airline had the right to provide services between the United States and Turkey via Paris, but it did not have the right to carry traffic embarked in Paris and disembarked in Turkey, or embarked in Turkey and disembarked at Paris.

On Question 2: A United States airline had the right to provide services between the United States and Iran via Paris, and it also had the right to carry traffic embarked in Paris and disembarked in Iran, or embarked in Iran and disembarked at Paris.

The tribunal rejected the United States contention that the term "Near East," as used in the agreement, included Turkey and Iran. Its decision was based mainly on informal dealings between the parties and their conduct subsequent to the conclusion of the agreement.⁵⁶

⁵⁶ English translation of the decision appears in 3 INTERNATIONAL LEGAL MATERIALS 668 (1964); for the French text, see 18 REVUE FRANCAISE DE DROIT AERIEN 448 (1964); and 69 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 189 (1965). On 28 June 1964, the tribunal, at the request of the parties, rendered a decision interpreting its award to the effect that an Ameri-

On 30 June 1964, the governments of Italy and the United States signed a *compromis* to establish an arbitral tribunal in accordance with Article 12 of their air transport agreement of 6 February 1948. The two arbitrators designated by the parties agreed on the third arbitrator. The question the tribunal decided was:

Does the Air Transport Agreement between the United States of America and Italy of February 6, 1948, as amended, grant the right to a designated airline of either party to operate scheduled flights carrying cargo only?

On 17 July 1965, the tribunal gave an affirmative reply to the question by a vote of two to one. The opinion, upholding the contentions of the United States, was based on the language of the agreement, its historical background, and its application in practice. The arbitrator designated by Italy filed a dissenting opinion.⁵⁷

VII. REGULATION OF ANCILLARY SERVICES AND FACILITIES

Most of the civil airports in the United States are operated by municipalities or special bodies such as the Port of New York Authority. Although the federal power over interstate and foreign commerce undoubtedly extends to the regulation of airports serving such commerce, it has not in fact been exercised for this purpose. The Federal Government makes grants for airport development on certain conditions, which include the requirements that the airport "will be available for public use on fair and reasonable terms and without unjust discrimination," and that the airport operator or owner will submit such financial and operations reports as may be reasonably requested by the Administrator of the FAA, the agency which administers the federal grant program.⁵⁸ Since virtually all of the airports serving international airline operations have been recipients of federal development grants, this provision has given the FAA considerable regulatory power. As yet, however, it has been used sparingly. In particular, the FAA has not attempted to prescribe "fair and reasonable" charges for the use of the airports (and there are large differences in the landing fees charged by the various airports). In principle, some federal regulation of airport charges and financial practices is probably desirable to prevent inequities and undue burdens on the airlines and their users.

As a party to the Chicago Convention, the United States is under a duty not to permit certain types of discrimination in the imposition of charges and conditions for the use of airports and air navigation facilities by the aircraft of other contracting states. This provision is enforceable in

can airline had commercial traffic rights between Paris and Tehran on a route via Rome, Beirut or Damascus, or non-stop, but not on a route via Rome-Istanbul-Ankara; and that on the former route the American airline was entitled to operate not more than four flights a week. 69 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 259 (1965). For comment on the award see Larsen, *Arbitration of the United States-France Air Traffic Rights Dispute*, 30 J. AIR L. & COM. 231 (1964).

⁵⁷ 4 INTERNATIONAL LEGAL MATERIALS 974 (1965). In June 1966 Italy denounced the bilateral agreement with the United States pursuant to Article 9 thereof.

⁵⁸ Federal Airport Act, § 11, 60 Stat. 176 (1946), 49 U.S.C. § 1110(1), (8) (1964).

American courts.⁵⁹ Similar provisions are contained in some bilateral agreements.

The federal power to regulate travel agents and other persons who engage in the sale of tickets for international air travel, which undoubtedly exists as an aspect of the commerce power, has remained largely unused. The CAB is authorized to investigate and eliminate unfair and deceptive practices or unfair methods of competition engaged in by a ticket agent.⁶⁰ Regulation by the CAB of international charter flights restricts the role of travel agents in connection with such flights and is designed in part to prevent or limit the chartering of aircraft by travel agents for groups of passengers.⁶¹ A measure of private regulation of ticket agents has been accomplished by IATA resolutions with the approval of the CAB.⁶² In the absence of federal regulation, the states retain wide powers of licensing and regulating the business of travel agents, but these powers are likewise not used to their full extent.⁶³ It may be desirable to provide for a larger degree of federal control over travel agents, particularly with respect to licensing and financial responsibility.

Exercising its powers under the act,⁶⁴ the CAB has promulgated regulations under which air freight forwarders, including international air freight forwarders, must conduct their business.⁶⁵ Air freight forwarders are required to have authorization by the CAB.

VIII. LIABILITY TO PASSENGERS, SHIPPERS, AND THIRD PERSONS

There is no comprehensive federal law regulating the liability of airlines to private persons for injuries and losses. The CAB has the power to reject tariffs which contain rules and conditions of carriage, including those concerning liability, which it regards as unreasonable and unlawful.⁶⁶ There are three broad categories of legal regimes regulating liability:

(1) In the absence of applicable federal law, including treaties, airline liability is governed by state law, even in actions brought in federal courts. There are numerous variations in the rules applied in the various states,

⁵⁹ Chicago Convention, art. 15. See *Aerovias Interamericanas de Panama, S.A., v. Board of County Comm'rs*, 197 F. Supp. 230, 248 (S.D. Fla. 1961), *rev'd on other grounds*, 307 F.2d 802 (5th Cir. 1962).

⁶⁰ 49 U.S.C. §§ 1301(34), 1381 (1964).

⁶¹ CAB Economic Regulations, 14 C.F.R. §§ 207, 212, 295 (1965); and see, with respect to inclusive tours, CAB Docket Nos. 11908 *et al.*, CAB Order Nos. E-24240 & E-24241 (11 March 1966).

⁶² See, *e.g.*, IATA Agency Resolutions Investigation, 33 C.A.B. 157 (1961), 34 C.A.B. 719 (1961). Resolutions of the Air Traffic Conference, an organ of the Air Transport Association of America (an association of United States scheduled airlines), regulating ticket agents have also been approved by the Board. See generally, *McManus v. CAB*, 286 F.2d 414, 419 (2d Cir. 1961).

⁶³ In the state of New York, for example, there are statutory provisions for the licensing, bonding, and regulation of persons selling tickets for passage by railroads and ocean vessels, but there are no comparable provisions applicable to the sale of airline tickets. N.Y. GEN. BUS. LAW §§ 150-54; N.Y. PENAL LAW, §§ 1562-73.

⁶⁴ 49 U.S.C. §§ 1301(3), 1371 (1964).

⁶⁵ CAB Economic Regulations, 14 C.F.R. §§ 296 & 297 (1965). These parts apply only to United States enterprises operating as freight forwarders. A foreign enterprise wishing to operate as an international air freight forwarder in United States commerce must obtain a foreign air carrier permit under § 402 of the act.

⁶⁶ See, *e.g.*, *Continental Charters, Inc., Complaint of Mary Battista*, 16 C.A.B. 772, 774 (1953).

but the law of the different states generally has the following common characteristics: (a) Liability for death is treated as tortious rather than contractual; (b) In principle, liability is based on fault; but in some states liability for injuries and damages to third persons on the ground is absolute; (c) The doctrine of *res ipsa loquitur* is frequently applied but with varying effects; in many states, it serves only to permit (but not to compel) an inference of negligence on the part of the carrier; and (d) Releases or limitations of liability for the death or personal injury printed on airline tickets are invalid, but releases of liability for damages caused by delay are generally valid. In a small and decreasing number of states, statutes creating a cause of action for wrongful death impose limitations on the amount of liability, ranging from \$10,000 to \$35,000.⁶⁷ When a choice of law situation presents itself, American courts until recently adhered generally to the doctrine of *lex loci delicti*. In recent years, however, some courts have begun moving away from this doctrine, indicating a preference for applying the law of the state with which the particular issue was most significantly connected in the light of all the contacts.⁶⁸

(2) Liability growing out of death occurring on or over the high seas is governed by the Federal Death on the High Seas Act.⁶⁹ This act creates a cause of action cognizable in federal admiralty courts, and apparently excludes the application of state laws and the jurisdiction of state courts although this point is not fully settled. Liability is primarily predicated on fault (although liability predicated on unairworthiness of the aircraft, regardless of the carrier's fault, is not clearly excluded) and is limited to pecuniary loss resulting from the death. Some difficult problems of interpretation and application of this act remain unresolved.⁷⁰

(3) The Warsaw Convention⁷¹ governs liability in both federal and state courts where applicable. There has been much dissatisfaction in the United States with the low limitation of liability for death and personal injuries set by the Convention. As a result, the United States has not ratified the Hague Protocol of 1955 amending the Warsaw Convention.⁷² Moreover, the Department of State on 15 November 1965 gave formal notice of denunciation of the Warsaw Convention. The notice of denunciation was withdrawn on 13 May 1966 after most of the major international airlines agreed to raise the limit of liability to \$75,000 per passenger and to accept absolute liability up to this amount for transportation between the United States and other contracting countries. This is regarded as a provisional arrangement pending the conclusion of a new international agreement on the issues dealt with in the Warsaw Convention.⁷³

⁶⁷ For a comprehensive treatment of American aviation accident law, see KREINDLER, *AVIATION ACCIDENT LAW* (1963).

⁶⁸ See *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796, 806 (1964) and cases there cited.

⁶⁹ 41 Stat. 537-38 (1920), 46 U.S.C. §§ 761-67 (1964).

⁷⁰ See 1 KREINDLER, *op. cit. supra* note 67, at 75-84, 511-17.

⁷¹ Convention For Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), 13 Feb. 1933, 49 Stat. 3000, T.S. No. 876 (effective 29 Oct. 1934):

⁷² For text, see 22 J. AIR L. & COM. 460 (1955).

⁷³ 54 DEP'T STATE BULL. 955 (1966).

The regulation of air transportation within the United States is far from uniform. While the CAB has exclusive jurisdiction over such matters as economic and safety regulation, each state retains the ability to directly affect air travel. This is illustrated by the interpretations given to the Warsaw Convention and by the ownership of airports by the several states. This power of the states is a natural consequence of the present American federal system. It may be that in the future the jurisdiction of the federal government will need to be extended in order to promote uniform treatment of air travel.