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NATIONALITY OF AIRCRAFT AND NATIONALITY OF AIRLINES AS MEANS OF CONTROL IN INTERNATIONAL AIR TRANSPORTATION

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THE Chicago Convention,¹ following the pattern laid down in the Paris Convention of 1919,² and the Protocol amending this Convention,³ contains certain limitations which have the effect of preventing undesirable aliens from gaining control over aircraft, or airlines, and from enjoying the benefits of the commercial privileges granted to contracting States of the Convention.

It is not necessary here to go into the background and history of the developments of these controls. This has already been done extensively.⁴

It is proposed only to bring out the apparent anomaly in the present forms of these controls as they affect private aircraft and airlines operating international air services.⁵ In order to do this, it will be necessary to mention that the Chicago Convention distinguished between non-scheduled flights and scheduled international air services.

With respect to non-scheduled flights, broad privileges are granted

¹ Convention on International Civil Aviation, signed at Chicago, on December 7, 1944.

² Convention Relating to the Regulation of Aerial Navigation, opened for signature at Paris, October 13, 1919.

³ Article 7 was amended by Protocol of June 15, 1929, to read as follows: "The registration of aircraft referred to in the last preceding Article shall be made in accordance with the laws and special provisions of each contracting State."

⁴ John C. Cooper, "Legal Status of Aircraft," study prepared for the Air Law Committee of the International Law Association, Princeton, New Jersey, September 1st, 1949; John Nemeth, "Nationality of Aircraft," unpublished essay, McGill University, Institute of International Air Law, Montreal, (1953); De Visscher, "Annuaire de l'Institut de Droit International, (1927), p. 368.

⁵ State aircraft are not dealt with in this paper.

under Article 5 of the Convention to aircraft "of the other contracting States."⁶

With respect to scheduled international air services, the *Convention* requires the special permission or other authorization of the State over which, or into whose territory, the services are operated.⁷

The *Convention* requires that the aircraft which may take advantage of the privileges contained in Article 5 should be registered in one of the other contracting States and provides that such aircraft have the nationality of the State in which they are registered.⁸ This is the basic control which parties to the *Chicago Convention* imposed as the prerequisite of flying into or through territories of contracting States. The *Convention* also provides that the registration or transfer of registration of aircraft in any contracting State shall be made in accordance with its laws and regulations.⁹

It would follow that, if and where the national laws and regulations of a contracting State do not prevent it, foreign owned aircraft may be registered in, and may therefore obtain the nationality of, a contracting State. Accordingly the basic control has been somewhat lessened by Article 19 of the *Convention*. In fact, certain States have registers open to foreign owned aircraft,¹⁰ and in other States, the registry is open to certain owners; e.g., in France, aircraft owned by individuals or companies, domiciled in the French Union, may be registered. In the U.K., Union of South Africa, Pakistan, India and New Zealand, aircraft

⁶ Article 5, *Chicago Convention*: "Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights."

Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, 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 or limitations as it may consider desirable."

⁷ Article 6, *Chicago Convention*: "No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization."

⁸ Article 17, *Chicago Convention*: "Aircraft have the nationality of the State in which they are registered."

⁹ Article 19, *Chicago Convention*: "The registration or transfer of registration of aircraft in any contracting State shall be made in accordance with its laws and regulations."

¹⁰ Australia, Colombia, El Salvador, Greece, Guatemala, Honduras, Iceland, Italy, Mexico, Netherlands, Sweden and Uruguay. In addition thereto, three Scandinavian States, namely Denmark, Finland and Sweden, will permit such registration of charter after the coming into force of the Common Scandinavian Air Law quoted by the Rapporteur in para. 31 of LC/SC/CHA WD No. 14. (ICAO Doc. LC/SC/CHA WD No. 20—December 4, 1956.)

owned by individuals or companies established in a Dominion of the British Commonwealth may be registered.

In some States, the registry is open only to aircraft owned by individuals or corporations established in the State of registry.¹¹

In Canada, the rule is that registration is limited to aircraft owned by Canadian nationals.¹² However, the Canadian Air Regulations permit registering a private aircraft belonging to a foreign citizen or corporation, provided that its State reciprocally grant privileges in like terms to Canadian citizens or corporations.¹³

The foregoing seems to indicate some lack of uniformity with which contracting States under the *Convention* control the aircraft engaged in non-scheduled flying. The object of this control is to confer responsibility on one of the States for the compliance with the requirements and conditions of the *Convention*. States may accept this responsibility by their own prerogative, with respect to aircraft not owned by their nationals.

Turning now to scheduled international air services, we find that in view of the general prohibition under Article 6, certain States concluded sets of bilateral air transportation agreements,¹⁴ in which they allocate certain international routes to "designated airlines" and which generally provide that they reserve the right to withhold or revoke a certificate or permit to such designated airlines of the other States in cases where they are not satisfied that the substantial ownership and effective control of the airline are vested in nationals of the contracting State. Thus the bilateral agreements impose a control on the nationality of the "designated airline" which is not necessarily the same as the control of the aircraft mentioned heretofore.

This is somewhat surprising in view of the fact that the *Convention* contains Chapter 3, dealing exclusively with the nationality of aircraft, and granting a distinct nationality to the aircraft. One might have expected that any right granted under the *Convention*, or in subsequent bilateral agreements in connection with participation in international air transportation, would be made dependent on the nationality of the aircraft.¹⁵

¹¹ Argentina, Belgium, Bolivia, Burma, Canada, Chile, Dominican Republic, Ecuador, Egypt, India, Lebanon and Switzerland. ICAO Document prepared by Subcommittee on the Hire, Charter and Interchange of Aircraft, Caracas, June 1956. *Extracts from National Legislations Concerning Registration of Aircraft*, LC/SC/CHA WD No. 20.

¹² With regard to individuals or corporations—in case of a corporation, by the Chairman, or Acting Chairman, and at least two-thirds of the Directors must be Canadian citizens and at least three-quarters of the shares must belong to Canadian citizens or a corporation which is controlled by Canadian citizens.

¹³ ICAO LC/SC/CHA WD No. 20, p. 23; P.C. 1954-1821: November 23, 1954; P.C. 1956-190: February 2, 1956.

¹⁴ E.g. see the *Bermuda Agreement*, signed between the U.K. and the U.S.A. on February 11, 1946. (An agreement between the two governments relating to air services between their respective territories.)

¹⁵ The *Convention* does not seem to take advantage of the stated fact that aircraft have nationality. There is no consistency in the use of this expression. Article 5 refers to "aircraft of the other contracting States"; Article 6 refers to "scheduled international air services"; Article 9(a) again uses the expression

Instead, however, the control is imposed with respect to designated airlines; and the bilateral air transport agreements refer to the persons who own or substantially control such airlines. A cursory review of the bilateral agreements does not indicate any desire by contracting States to control the aircraft which the designated airlines put into operation on the agreed routes.

The definitions, in Article 96 of the *Chicago Convention*, of "air service," "international air service" and "airline" are not really helpful and the *Chicago Convention* is silent as to when an airline or a service may be considered to be a national of a State and what its relationship is to the aircraft which it uses. The first of these questions is effectively treated in the bilateral agreements but the second remains uncontrolled, presumably to be dealt with by the individual States as they see fit.

In view of this, it may be safe to say that a designated airline has substantial freedom to choose its equipment. Unless the State into which the service is operated has specific requirements to the contrary, it is conceivable that a designated airline can operate a scheduled international air service by making use of aircraft which are registered in another State and therefore have a nationality other than that of the designated airline. Such arrangement may take the form of what is sometimes referred to as "interchange of aircraft" between two international airlines,¹⁶ or a lease or charter. It may also happen that

"international scheduled airline services" and Article 9(b) refers to "nationality to aircraft" in connection with restrictions and prohibitions on flying; Article 11 speaks about "international air navigation" and again "all contracting States without distinction as to nationality"; Article 12 speaks about "aircraft carrying its nationality mark"; Article 15 then refers to "national aircraft" and in another place to "national aircraft engaged in similar international air services"; Article 20 refers to "aircraft engaged in international air navigation"; Article 25 refers to "assistance to aircraft in distress"; Article 26 refers, in connection with investigation of accidents, to "aircraft of a contracting State" and later "the State in which the aircraft is registered"; Article 27, in connection with the exemption from seizure of patent claims, refers to "aircraft of a contracting State"; Articles 30 and 31, on aircraft radio equipment and on certificates of airworthiness respectively, refer to "the State in which it is registered"; Article 67 states that "each contracting State undertakes that its international airlines"; Article 68 refers to "international air service"; Article 69 refers to "international air services"; Article 71 refers to "international air services of other contracting States"; Article 73 states "contracting States consenting thereto whose airlines use the facilities"; Article 87 speaks about "the operation of airlines of a contracting State."

Presumably, whenever reference is made in the *Convention* to the expressions "aircraft of a contracting State" or "State in which the aircraft is registered" or "aircraft of other contracting States," national aircraft of that State are meant. The situation becomes most complex when in some Article reference is made to "airlines of the State of which it is a national" (Article 82 of the *Chicago Convention*), or "international air services of a contracting State" (Articles 68, 69 and 71 of the *Chicago Convention*) or "international airlines of a State" (Article 67 of the *Chicago Convention*).

¹⁶ E.g. Sabena (Belgian World Airlines), Swissair (Swiss Air Lines) and KLM (Royal Dutch Airline) operate certain routes with aircraft owned by the other airlines or, as was recently reported, Sabena Belgian World Airlines signed a lease agreement with Seaboard and Western Airlines (a U.S. operator) under which the latter will provide 1049-H Super Constellation aircraft to be utilized by Sabena on the Transatlantic Service.

an airline undertakes to operate with its own equipment all scheduled air services of another airline of a different nationality.¹⁷

The Legal Committee of ICAO indirectly dealt with this matter in Tokyo in 1957 when it stated that hire, charter and interchange of aircraft with crew raises no problem as regards the application of the *Chicago Convention*.¹⁸ Moreover, the Committee did not consider that it was necessary to amend the *Chicago Convention* to permit the use of foreign registered aircraft without crew by an airline of another State.

It would appear that in case the designated airline desires to make use of foreign aircraft with foreign crew, the certificates of airworthiness and of crew competency issued by the State of registry, which are entitled under the *Convention* to recognition by the other contracting States when the aircraft is operated by or on behalf of a person of the State of registry, remain so entitled when the aircraft is in the service of a designated airline of some other contracting State. Similarly, under the *International Telecommunications Convention*¹⁹ the radio station and the radio operators both continue to be licensed by the State of registry, irrespective of the nationality of the operator who makes use of the aircraft. The revalidation of airworthiness certificates and certificates of crew competency during the term the foreign aircraft is used by the designated airline under some lease arrangement may pose some difficulty but in practice these matters are worked out with the aeronautical authorities of the State in which the aircraft is registered.

If the aircraft is leased without crew, the certificate of airworthiness issued by the State of registry continues to be entitled to international recognition and its revalidation, as in the case of lease of aircraft with crew, is a matter for practical handling between the lessor and its own aeronautical authorities. Certificates of crew competency are entitled to international recognition if they are "issued or rendered valid by the Contracting State in which the aircraft is registered,"²⁰ and the licenses of the radio personnel are entitled to recognition if they are "issued or recognized by the government to which the station is subject."²¹ If the State of registry "renders valid" or "recognizes" the certificates and licenses of the State of the designated airline (lessee), such certificates and licenses have to be recognized everywhere. The *Convention*²² expressly permits the State of registry to render valid certificates issued by another contracting State, the State of registry can "adopt measures to insure that every aircraft . . . carrying its nationality mark, wherever such aircraft may be, shall comply with the rules

¹⁷ BEA (British European Airways), for instance, operates all Cyprus Airways' routes granted to this latter in bilateral agreements.

¹⁸ ICAO Doc. 7822: LC/141: September 9, 1957, pp. 9 and 10.

¹⁹ Atlantic City, 1947.

²⁰ *Chicago Convention*, Article 33.

²¹ Article 24 of the *Radio Regulations Annexed to Atlantic City Telecommunications Convention*, 1947.

²² *Chicago Convention*, Article 33.

and regulations relating to the flight and maneuver of aircraft there in force."²³

If the State of registry were unwilling to render valid or recognize the certificates or licenses of the State of the designated airline (lessee), the problem might be overcome by relying on a commonly used provision found in many bilateral agreements that "certificates of airworthiness, certificates of competency and licenses shall be issued or rendered valid by one contracting party and still in force shall be recognized as valid by the other contracting party for the purpose of operation of the agreed services." This would mean that an aircraft registered in State A and leased to a national of State B and operated by a crew licensed in State B, both parties to the *Chicago Convention*, could be operated in service to any other State party to the *Convention* with which State B had such a bilateral agreement.

It would appear that in the present state of international agreements, a designated airline may put into scheduled services aircraft registered in a State other than the State of its nationality. The only impediment in this respect might come from national statutory restrictions or limitations.²⁴

To sum up:

An aircraft which is registered in one of the contracting States and which has its nationality may enjoy certain commercial privileges

²³ *Chicago Convention*, Article 12.

²⁴ *United States Air Commerce Act of 1926, Section 6: Navigation of Foreign Aircraft; Authorization; Applicability of Regulations:*

"(b) Foreign aircraft, which are not a part of the armed forces of a foreign nation, may be navigated in the United States by airmen holding certificates or licenses issued or rendered valid by the United States or by the nation in which the aircraft is registered if such foreign nation grants a similar privilege with respect to aircraft of the United States and only if such navigation is authorized by permit, order, or regulation, issued by the Civil Aeronautics Board hereunder, and in accordance with the terms, conditions, and limitations thereof. The Civil Aeronautics Board shall issue such permits, orders, or regulations to such extent only as the Board shall find such action to be in the interest of the public; Provided, however, That in exercising its powers hereunder, the Board shall do so consistently with any treaty, convention or agreement which may be in force between the United States and any foreign country or countries. Foreign civil aircraft permitted to navigate in the United States under this subsection may be authorized by the Board to engage in air commerce within the United States except that they shall not 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. Nothing contained in this subsection (b) shall be deemed to limit, modify, or amend section 402 of the Civil Aeronautics Act of 1938, as amended, but any foreign air carrier holding a permit under said section 402 shall not be required to obtain additional authorization by said permit."

.01 Foreign aircraft permits. With respect to aircraft regulation, Section 501 (a) of the Civil Aeronautics Act of 1938 indicates that the Congress intended permits issued to foreign aircraft under Section 6 of the Air Commerce Act of 1926 to serve as a substitute for registration required of all aircraft eligible for registration; (*Opinion of the Attorney General of the United States*, 40 Atty. Gen. 136, September 12, 1941).

.02 The function of issuing permits under Section 6 of the Air Commerce Act of 1926, as amended, to foreign airmen and aircraft, authorizing flight into and within the United States, is vested in the Administrator of Civil Aeronautics; (*Opinion of the Attorney General of the United States*, 40 Atty. Gen. 136, September 12, 1941).

under the *Convention* (in non-scheduled services) irrespective of the nationality of its owner;

The same aircraft, however, is not entitled to commercial privileges in scheduled international services unless it is operated under bilateral agreements by a designated airline authorized to fly scheduled services and unless such airline is owned and substantially controlled by nationals of the parties to the agreement;

Nothing in the *Convention* or the bilateral agreements seems to prevent a designated airline from making use of aircraft registered in another contracting State to the *Convention*;

Accordingly it is not inconceivable that, in the absence of national statutory restrictions or limitations, aircraft owned by nationals of State A, registered in State B, should be used in scheduled services by a designated airline of State C, on routes between States C and D, or D and X.

It would appear that the controls of registration of aircraft and nationality of designated airlines are different not only in their nature but also in their purpose. The provision for registration of aircraft in a contracting State is what may be said to be a political control, vesting the State of registry with responsibility for the performance of the aircraft and acceptance of licenses, certificates of airworthiness, crew qualifications by the other contracting States.

The nationality of the designated airline requirement on the other hand is more of an economic control. It is surmised that its purpose is to protect the national airline of the contracting State, if there is one, and it is part of a more complex control of capacity, frequency and route allocations incorporated in the bilateral agreements. As long as there is a tendency to regard commercial international routes and traffic as a potential commodity by the contracting States, it is not expected that States will relax the ownership and control requirements with respect to designated airlines.

The lack of control in the bilateral agreements regarding the aircraft to be used by the designated airline in international air services may be due to the fact that States are confident that their statutes presently in force are sufficient to establish the political control. Alternatively, it may be that States are alert to the necessity of international airlines meeting the rapidly changing technical advances and therefore desire to keep the designated airlines control system flexible. It is, of course, difficult to say whether this really explains the position of States or, for that matter, whether States will continue to maintain their policies presently expressed in the bilateral agreements.