

1947

PICAO and the Development of Air Law

Edward Warner

Follow this and additional works at: <https://scholar.smu.edu/jalc>

Recommended Citation

Edward Warner, *PICAO and the Development of Air Law*, 14 J. Air L. & Com. 1 (1947)
<https://scholar.smu.edu/jalc/vol14/iss1/1>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

THE JOURNAL OF AIR LAW AND COMMERCE

Volume 14

WINTER, 1947

Number 1

PICAO AND THE DEVELOPMENT OF AIR LAW

By EDWARD WARNER

President of the Interim Council of the Provisional International Civil Aviation Organization; formerly: Vice Chairman of the Civil Aeronautics Board; Assistant Secretary of the Navy for Aeronautics, 1926-29; Professor of Aeronautical Engineering, M.I.T.; Vice Chairman of the Federal Aviation Commission, 1934-35. Author of many papers on varied aspects of aeronautics, technical, political, economic, and legal.

ALTHOUGH the Council of the Provisional International Civil Aviation Organization is not primarily a legal or judicial body, from the very beginning of its work it has had legal responsibilities. The subjects of primarily legal character upon which the Council has been most engaged during the first year of PICAO's existence have been:

- (a) The determination of conditions governing the filing with PICAO, and subsequent disposition, of agreements relating to international air transportation.
- (b) Development of rules and procedures for conducting arbitration proceedings, or taking other action as indicated by the Interim Agreement in issues arising among Member States.
- (c) The study and further development of international conventions relating to air law.

To permit the proper study of such problems by a small panel of its members, the Council created a legal subcommittee of the Air Transport Committee, with Colonel Gerald B. Brophy, representative of the United States on the Council and a member of the New York bar active in practice with the Civil Aeronautics Board before the war, as its chairman. As it subsequently became apparent that not all of the Organization's legal work belonged in the field of the Air Trans-

port Committee, some of the business being more closely related to air navigation, the legal subcommittee was replaced by a Legal Committee of the Council. The present chairman is Dr. T. Furtado Reis of Brazil; the other members; Dr. Josef Kalenda of Czechoslovakia, Mr. Henri Bouché of France, Dr. F. H. Copes van Hasselt of the Netherlands, and Dr. L. Alvarado of Peru — three of them being members of the bar, and Messrs. Bouché and Kalenda having an active though non-professional interest in the development of air law. A further development in the Organization's machinery for working on legal problems is now in early prospect, as I shall explain in a later paragraph.

I

The most difficult questions presented by the requirements of the Interim Agreement on Civil Aviation with respect to the filing of air transport agreements with PICAO concerned the definition of the types of agreements to be filed, and the treatment to be given them by PICAO thereafter. Under the Interim Agreement "each member undertakes to transmit to the Council copies of all existing and future contracts and agreements relating to routes, services, landing rights, airport facilities, or other international air matters to which any Member State or any airline of a Member State is a party." The Council is enjoined to: "receive, register, and hold open to inspection by Member States" all such agreements. The language is very broad. "International air matters" takes in a vast territory; and the preceding clauses might take in even more, since their effort is not even limited to international services unless the word "other" in the omnibus clause is considered to reflect the application of the adjective "international" back on to the earlier clauses.

It might have been argued that the language obligated states to file any agreements with their own airlines relative to services to be rendered by the latter, or agreements between airlines and municipal governments with respect to the landing fees to be paid for the use of airports.

The Council has applied a rule of reason, rather than one of maximum inclusion under the most literal interpretation of the wording. In establishing specifications on the matter of filing agreements it specifically excluded from the obligation to file certain classes of agreement, such as those relating to "local transportation and ground services of all kinds for passengers and cargo" or to "agency agreements providing only for advertising, — taking of reservations, or similar services."

The second question was that of publication after filing. The ordinary presumption is that a document is filed with an international organization in order that it may be made known to the world. It was, however, argued before the Legal Committee that the injunction of the Council to "hold [contracts and agreements] open to inspection by Member States" was so specific as to exclude the possibility of doing

anything more than that; and the argument was accepted as a compelling one. There has accordingly been no publication by PICAO of international agreements, or even of summaries thereof. They are in PICAO's archives, to the number of 346 filed up to 31 December 1946, awaiting the calls of Member States; and frequent requests for copies of particular agreements are received from the members.

The present conditions will be substantially changed upon the coming into effect of the permanent Convention on International Civil Aviation, now scheduled for 31 March 1947.

The provisions of the Convention (Articles 81 and 83) are that:

ARTICLE 81

"All aeronautical agreements which are in existence on the coming into force of this Convention, and which are between a contracting State and any other State or between an airline of a contracting State and any other State or the airline of any other State, shall be forthwith registered with the Council.

ARTICLE 83

". . . . any contracting State may make arrangements not inconsistent with the provisions of this Convention. Any such arrangement shall be forthwith registered with the Council, which shall make it public as soon as possible."

The first of the articles quoted is substantially co-extensive with the filing requirement of the Interim Agreement, despite its quite different language. It is, if anything, narrower, in that it is unmistakably limited to international arrangements and that it excludes agreements between states or airlines and any parties other than another state or airline (excluding, for example, an agreement between an airline and the management of a municipal or privately-owned airport). It will be noted that both the Interim Agreement and the Convention require the filing of agreements between Member and non-Member States; and imply an obligation upon a Member State to refuse to accept from a non-Member State any proposal that the terms of an agreement between them should be confidential.

The language of the second of the articles quoted is vaguer in one respect, and narrower in another. The reference to the registration of "arrangements not inconsistent to the provisions of this Convention" does not even specify that the "arrangements" are to be aeronautical in character. A reasonable interpretation, however, would no doubt establish the obligation to file future agreements as substantially identical in character with the obligation imposed by the earlier article with respect to existing agreements, with one important exception. The reference in the second article is limited to the registration of arrangements made by contracting states; and would appear to impose no obligation with respect to agreements between an airline of a contracting state and the government of a non-contracting state. The forthcoming Assembly may wish to express some judgment upon the proper interpretation of the two articles quoted, independently and in relation to one another.

In one other respect there is a very explicit change. The Convention is silent on the subject of publicity for agreements which are in existence on the date when the Convention comes into force; but it is specific that all future agreements are to be made public upon filing. It may be argued that the very fact that one article is explicit upon this point, while the other makes no mention of it, implies that the publicity that is specified for future agreements is to be withheld from the existing ones. Conversely it may be argued that Article 81, unlike the terms of the Interim Agreement already referred to, gives no indication whatever of what the Council is to do with agreements after they have been registered with it; and thereby leaves the Council completely free to decide upon the degree of publicity that they should receive. Should the matter be contested, it will presumably be for the Council to decide — although the Convention is not absolutely explicit with respect to the Council's status as the Convention's authorized interpreter except in the case where there has been a "disagreement between two or more contracting states relating to the interpretation or application of this Convention" (Article 84). Following any such disagreement, the Council is to determine the correct interpretation of the contested clauses. The manner of interpretation of the Convention in a case where there is no dispute between states is not explicitly defined; but it may logically be inferred from the language of Article 84, and from the absence of any contrary provision, that the power of interpretation rests with the Council in all cases.

In summary it appears that certain agreements which airlines of contracting states would be obligated to file at present will be the subject of no such obligation after March 31; and the change will be of considerable statistical significance. Only twelve of the agreements so far filed have been between an airline of a Member State and the government of a non-contracting state; but 95 have been between airlines of two different states, and 16 between an airline and some party other than a state or an airline. There will be another change in that agreements entered into in future, at least, will be published by the international organization; and, if the Council so decides, those which are in effect at the time when the Convention enters into force as well.

II

The Council of PICA0 has not yet been called upon to act in a judicial role, but the latent possibilities are large. Both under the Interim Agreement and under the Convention the Council must be ready to act quickly on call in a variety of cases. Under the Interim Agreement it has an expressly arbitral function "when expressly requested by all the parties concerned, . . . on any differences arising among Member States relating to international civil aviation matters which may be submitted to it." It has the quasi-judicial and fact-finding function of reviewing "upon representation by an interested Member State, the charges imposed for the use of airports and other

facilities [by any state],” and, after the review, of making “recommendations [on the airport charges] for the consideration of the state or states concerned.” The last phrase quoted is typical of a general reluctance to give the Council any powers of actual decision binding on states; and the emphasis upon the purely recommendatory nature of its conclusions will be noted.

The same language with regard to the review of airport charges and the making of recommendations thereon appears in the Convention. The Convention contains no provision like that in the Interim Agreement, empowering the Council to act as an arbitral body upon the request of the parties to a dispute; but it does contain (Article 55) an authorization for the Council to “investigate, at the request of any contracting state, any situation which may appear to present avoidable obstructions to the development of international air navigation; and, after such investigation, issue such reports as may appear to it desirable.” It also provides, as already noted, that “if any disagreement between two or more contracting states relating to the interpretation or application of this Convention and its annexes cannot be settled by negotiation, it shall, on the application of any state concerned in the disagreement, be decided by the Council.” Such decisions are subject to appeal; either to an *ad hoc* arbitral tribunal or to the Permanent Court of International Justice; but unless appealed, or if sustained, they are final and binding and supported by very drastic sanctions both against an airline found to be transgressing or falsely interpreting the Convention (Article 87) and against a state doing so (Article 88).

ARTICLE 87

“Each contracting State undertakes not to allow the operation of an airline of a contracting State through the airspace above its territory if the Council has decided that the airline concerned is not conforming to a final decision rendered in accordance with the previous Article.

ARTICLE 88

“The Assembly shall suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under the provisions of this Chapter.”

Finally under the terms of the Transit Agreement, which is in force among 29 states now and will be unaffected by the advent of the Convention, the Council is obliged to “enquire into the matter” whenever it is advised by a contracting state that it “deems that action by another contracting state under this agreement is causing injustice or hardship to it.” The Council is empowered, after inquiry and attempted mediation, to “make appropriate findings and recommendations to the contracting states concerned”; and if they should be ignored by either state, to recommend to the Assembly that it suspend the transgressing state from its rights and privileges under the Transit Agreement. That, like the provisions of the Convention previously cited, should be a very powerful discouragement of any disregard of

the rights of neighbour states; but matters would be unlikely ever to reach the stage at which such a penalty would be imposed, in view of the several procedural steps that would precede its imposition.

The greatest likelihood that the Council may be called upon to act in a judicial capacity may be found in the terms of the Bermuda Air Transport Agreement between the United Kingdom and the United States and of the numerous recent agreements that have followed the same general pattern. The Bermuda agreement provides at several points that any differences between the parties that they cannot resolve by direct negotiation will be referred to PICAQ or its successor. Most of these provisions call only for recommendations by PICAQ, with no absolute assurance that they would be accepted; but in the particular case of the fixing of rates for transportation the Bermuda agreement provides that upon the rendering of "an advisory report" by PICAQ or its successor "each party will use its best efforts under the powers available to it to put into effect the opinion expressed in such report."

In anticipation of possible calls upon it to act in such matters, the Council worked from time to time for a number of months on the development of procedures for its judicial or arbitral action. The rules as they now stand, adopted during September 1946, provide for the conduct of proceedings in writing to the greatest practicable extent. The initial complaint, or request to the Council, must present a statement of the nature of the case and of the action which it is desired that the Council take. All parties will thereupon be called upon to submit statements, and any evidence which they may wish to have considered. Reply statements will then be admitted; and resort to oral testimony or argument thereafter will be exceptional, a matter of privilege granted by the Council upon request rather than a recognized right. The Council may supplement the written record and testimony by independent investigation conducted at its direction. The rules anticipate that the initial examination of the record and the hearing of oral testimony and argument (if any) will not ordinarily be by the full Council, but by a group of five Council members or other qualified persons selected by the President of the Council. Any such group will, however, report to the Council; and it will be the Council that will make the final decision, which will be supported by an opinion. The rules provide that the costs of conducting the proceedings, including the cost of any investigation ordered by the Council, will be assessed to the parties in proportions fixed by the Council; and in the absence of specifications to the contrary it will be open to the Council either to decide in advance of the proceeding that such costs will be divided equally, or in accordance with some other simple rule, or to determine upon the conclusion of the proceeding that the major part or all of the costs will be assessed to the party losing the decision.

As previously noted, there has been no employment for all this

machinery as yet. It might easily happen that there will be none for several years, and that a number of cases will then come to the Council within a short time. There is frequent reluctance to be the first to make a complaint under such an agreement; but after the ice has been broken and a few complaints have been made and disposed of, all sense of anything invidious or offensive in the action of complaint may disappear, and reference to the Council may be accepted as a routine way of securing a settlement of questions upon which differences of opinion, of the most completely amicable character, may develop.

III

Two of the resolutions adopted at the Chicago Conference in November 1944 dealt with the need for bringing into force and securing general acceptance of air law conventions developed by CITEJA (Comité International Technique d'Experts Juridiques Aériens). Another concerned the future of the work upon which CITEJA had been engaged since 1925 and recommended "that consideration be given by the various governments to the desirability of coordinating the activities of CITEJA with those of PICAO." During the first months of its existence PICAO's Council sought to promote general acceptance of the existing drafts of conventions relating to mortgages on aircraft and to the establishment of a register of aircraft ownership, but it became apparent that relatively few states were prepared to accept those conventions in their existing form. Correspondence with CITEJA followed, and at the meeting of CITEJA in January 1946 it was decided that a number of draft conventions should be referred to PICAO and: "that the international Conference which will adopt these conventions be convened on the invitation of PICAO and be open to the largest possible number of States."

It had been the practice in the past, as at Warsaw in 1929 and at Rome in 1933, to give final consideration to such conventions at special diplomatic conferences convened independently of any other aeronautical event. It appeared to the Council that the best opportunity of securing attention to the draft conventions by the largest possible number of states would be afforded by the PICAO Assembly; and the states attending the Assembly, either as members of PICAO or as non-member observers, were accordingly asked to equip their delegates with full powers to sign international conventions, including those relating to private air law.

The use of the general meetings of international organizations for the adoption and signature of international conventions is of course a well-established practice. The International Labour Office has developed more than 60 conventions, and presented them to the governments of the world for adoption through its regular meetings; and other organizations have done the same, on a smaller scale, or have been empowered to do so.

Legal members of the delegations of a considerable portion of the 44 states attending the Assembly worked diligently upon the conventions on mortgage and aircraft register, for nearly three weeks. Unfortunately, as has often happened in the development of such conventions in the past, the difficulties grew with closer examination. No draft reached final form. The conventions that were found to be unready for final action at the 1946 Assembly have been circularized since that time to all the states of the world, with a request that they give PICAQ their comments; they have had the special attention of the members of the International Air Transport Association, the International Chamber of Commerce, the International Union of Aircraft Insurers; they are now being taken up for further study by the Legal Committee of the PICAQ Council, and may be referred to a special committee as well; and another Assembly is coming in May.

It appears that the conventions on mortgage and registry of title, which the Legal Commission at the 1946 Assembly decided should be consolidated into a single document, ought to be ready for final action at that time. Nothing of the sort now exists; and there is a strong practical need for such a convention, to increase the readiness with which loans can be secured upon aircraft used in international service, and to give increased certainty to transactions involving the transfer of ownership in aircraft. My only fear of failure to complete a convention on that subject at the coming Assembly is that ambition may over-reach itself, and the problem become over-complicated through trying to accomplish too much in addition to the real essentials.

Another convention which CITEJA believes substantially ready for adoption is that on the legal status of the commander of an aircraft.¹ Although the Council has taken no formal decision, that too will presumably come before the Assembly for a final critical examination and possible clearance for adoption and signature, unless some obstacle not now apparent is raised in the meantime.

The last of the major questions under continuous study is the revision of the Warsaw Convention on the liabilities of international air carriers. The Warsaw Convention, originally adopted in 1929, has been under intensive study during the last two years with a view to revision to take advantage of experience and to take account of the changing character and growing importance of air transportation. Mr. K. M. Beaumont, CITEJA Rapporteur on the Warsaw Convention, developed a complete new draft which formed the basis of discussion of the Experts at the Cairo meeting of CITEJA in November 1946. Subsequently, Mr. Beaumont prepared a second redraft (December 1946 revision) incorporating many changes growing out of the discussions at the Cairo meeting, and has transmitted this draft informally

¹ Resolution adopted by CITEJA at its Cairo meeting and text of draft convention are found on page 84, *infra*.

to PICAO with the suggestion that it form the basis of further discussion.²

Neither at the Assembly nor since, however, has any great urgency for revision of the Convention developed. There is general agreement that it should be revised, and indeed that it should be replaced by a new convention; but the 17-year-old document still meets requirements, and the prevailing preference of airlines, insurers, and governments (so far as they have expressed themselves) is for going very slowly and making very sure that nothing is overlooked. Final acceptance of a revision of the Warsaw Convention seems unlikely to be realized this summer, and indeed, perhaps it may want another two or three years. Work is continuing on the new Beaumont draft as well as on critical analyses of the original, but it may need that long a period of continuous work before there will be general conviction that study of the possibility of improvement has been sufficiently thorough. For myself, I am always very reluctant to admit that so long a period must elapse before completing any piece of work whatever. It is easy to fall into the habit of taking more time than is really necessary; but I am reporting what seems to me the probable course of events, from what can so far be seen of the views and the desires of interested parties. If, in fact, it proves possible to develop an acceptable draft in much less time, everyone connected with PICAO will be delighted.

IV

The 1946 Assembly considered the relations that the permanent International Civil Aviation Organization should have to the further development of the international law of the air, and recommended that it draw heavily upon the experience that CÍTEJA and those who have regularly attended its sessions have accumulated in their twenty years of devoted work. The Assembly resolved that the permanent organization should include a permanent Committee on International Air Law, which would continue the work on air law conventions that has been done by CITEJA and would advise the Council and Assembly on legal questions as they might request. The Assembly further declared that any Member State should have the right of representation on this committee, as on the Divisions which deal with the establishment of technical standards and other specialized questions relating to air navigation and air transport in PICAO's organization. It was contemplated that the Legal Committee would meet intermittently, with work carried on in the intervals by a secretariat; and in that respect it would be unlike the present Council and Air Navigation Committee, which are almost continuously in session.

The Council will probably present detailed recommendations to the next Assembly, in May, upon the character of the Legal Committee thus provided for; the approximate frequency with which it ought

² Text of the Beaumont draft revision of December 1946 is found on page 87 ff., *infra*.

to be expected to meet; the selection of its presiding officers; and other questions that ought to be considered before the committee actually starts work. It can, however, be taken for granted that a committee of the type described will be established during the coming summer. Whether such a committee, meeting from time to time, will meet all the permanent organization's requirements for legal study, or whether the Council will also find it desirable to maintain a small group of its own members to give day-to-day advice on questions of a legal character coming before the Council, such as those relating to the filing of agreements, has yet to be determined. The present Council plans to study the matter in coming weeks, with a view to giving its recommendations to its successor, the permanent Council that will be elected for a three-year term at the coming Assembly.