AIRLINE POOLING

by

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Today we have had the great privilege of hearing the Director General of the International Air Transport Association discuss the role of the Association in the world aviation community and outline the challenges that that community presents to jurists everywhere. He referred not only to the legal objective of the Association but emphasized the necessity for collaboration by air transport enterprises engaged directly or indirectly in international air transport. It is my intention in the short time available to direct your attention to one aspect of airline operations where there is already major collaboration but where the well being of the industry and the public it serves dictates even greater association. I refer of course to the subject and title of my paper, "Airline Pooling".

In some quarters in the aviation community there is unquestionably an aversion to the terms "Pool" and "Pooling" when used with respect to the sharing by operators of either traffic and the revenue derived thereform or the facilities and services of the operators. This, I think, is based on a misconception of the term as it relates to current undertakings, this misconception flowing from past practices of certain industries including the transportation industry before the days of Government regulation. For example, one well known law dictionary defines a "Pool" as being "a combina-

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tion of persons or corporations engaged in the same business where all contribute to a common fund with the object of eliminating competition as between the several members of the Pool". However, the same dictionary alternatively establishes the intent of pooling to be "simply with a view to the successful conduct of an enterprise too great for the capital of any member individually" or again "simply the elimination of destructive competition between the members". In any event the terms "Pool" and "Pooling" as used in the aviation industry today relate to the sharing under an agreement of the markets of the parties to the pool or certain of their resources or both, with a view to producing an economically sound operation.

The sharing of markets and ultimately the revenue derived therefore is generally referred to as a route pool and the sharing of the resources of the airlines as a technical pool. Between them these two types of pools, separate or combined, can embrace almost as many functions as there are in an airline.

If the public is aware at all of the practice of pooling, its knowledge is most likely to be limited to route pools. In the simplest terms, under these agreements the carriers forecast the traffic potential on a particular route, determine the amount of aircraft capacity required to serve that traffic and agree to share the revenues derived therefrom. However, the contracts themselves are far from simple and their successful negotiation calls on all the resources of the parties.

Some of the more obvious objectives of pooling are :

1. The provision of better service to the travelling public by the separation of flights which would otherwise be duplicated in an effort to capture the peak period markets.
2. The elimination of wasteful competition which would flow from the provision of excessive capacity and standards of passenger service.
3. The reduction of operating costs by better utilization of equipment as well as traffic and operational resources such as facilities, staff and capital.

Although the major benefit of pooling is the curtailment of wasteful competition, for which the public would ultimately pay,

most pool agreements are constructed to ensure that financial benefits still flow to the carrier that maintains the operating initiative. Thus eliminating one of the main criticisms of pooling.

The other major form of pooling currently practiced is that which relates to the sharing of equipment, facilities and services. These can range from a local arrangement between two airlines at an airport to share the use of a baggage cart to the international Consolidated Agreement for Pooling Technical Facilities and Services. This latter Agreement has been entered into by no less than fifty-eight major airlines from forty-three countries and covers the handling of aircraft at several hundred airposts. Under this contract the airlines provide each other with aircraft spare parts, ground equipment, maintenance services and ground handling. When it is recognized that a power-plant for a modern jet aircraft can cost as much as $500.000, the capital cost savings from non-duplication of inventory at critical points around the world can be readily appreciated. Similarly, the sharing of manpower availability and aircraft handling equipment at airpost can result in major reductions in operating costs. Apart from the more obvious benefits of such cooperation there are numerous ones that may not be quite so apparent. For example, it is estimated that the space required at an airport for the equipment to be used in handling a Boeing 747 will be 20,000 square feet, almost half as much as for the aircraft itself. It does not take much imagination to foresee the tremendous congestion that would develop at airposts if every carrier operating these huge jets was determined to service them with its own ground crews and equipment.

In considering a pooling agreement proposal, the lawyer must look to a number of fields of law. These may include international law both public and private, domestic administrative law, the law of contract and the law of tort, and as our thoughts are directed primarily to international services consideration must embrace all the jurisdictions involved, which at a minimum will be two but frequently will be greater.

As to international public law, one looks of course to the Convention on International Civil Aviation signed at Chicago on December 7, 1944, which is popularly referred to as the Chicago Convention and which provided for the establishment of the Interna-

tional Civil Aviation Organization. As the Republic of Turkey was one of the original signatories to this Convention it is unnecessary for me to comment on it in detail here other than to remind you that it recognized the practice of pooling, as is evident in Chapter XVI, thereof. Article 77 states, inter alia, that nothing in the Convention "shall prevent two or more contracting States... from pooling their air services on any routes or in any regions" only requiring that such services should be subject to the provisions of the Convention. Article 79 provides that "A State may participate... in pooling arrangements, either through its government or through an airline company or companies designated by its government. The companies may, at the sole discretion of the State concerned, be state-owned or partly state-owned or privately owned". I am sure that many of you are conversant with the discussions that have been carired on during the last few years relating to Article 77. However, to the best of my knowledge, at no time was the right to pool as provided for in the Convention raised in these discussions on the interpretation of that Article. In fact the Council of ICAO has recently taken action that will facilitate the sharing of aircraft by two or more parties.

Once it has been determined that the operation of a pool is compatible with the applicable international law, the lawyer must then look to the domestic administrative law of the jurisdictions in which the contract for pooling will be entered into or where all or part of its provisions will be met. The extent to which this domestic law is relevant depends upon the general legal philosophy of the State or States involved. In some jurisdictions a laissez faire attitude is prescribed for transportation enterprises. In others there is close government control of public utilities. An example of the latter is the Federal Aviation Act of 1958 of the United States of America. Section 412 of that legislation requires that every air carrier shall file with the Civil Aeronautics Board "every contract... affecting air transportation... between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment... or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition...". The C.A.B. is required to disapprove any such contract that it finds to be adverse

to the public interest and it is equally required to approve such contract that it does not find to be adverse to the public interest. Although on the face of it this might appear to be an undue intrusion on the managerial prerogatives of the air carriers, it is important to note that if the C.A.B. does approve such a contract then the parties to it are relieved from the operations of the anti-trust laws of the United States, which can be very restrictive.

Let us now consider briefly a hypothetical case that might flow from a technical pool and assume that under it Airline A is required to borrow an engine from Airline B and that its aircraft is subsequently given line maintenance by Airline C. Thereafter the aircraft is involved in an accident which is attributed to a malfunction of the borrowed engine. Assuming that the malfunction was due to the negligence of the employees of Airline C, Airline A under most law could look to Airline C for its direct loss and possibly for indemnification for any damages it was obliged to pay to its passengers or other third parties. Airline B would normally look to Airline A in contract for the loss of its engine but it might also be able to look to Airline C in tort or delict.

The international Consolidated Agreement for Pooling Technical Facilities and Services has foreseen this possibility and provided as follows :

"*Article 13 :*

1. The Servicing Company shall not be liable to the Operating Company either in contract or in tort for damage sustained by or claims lodged against the Operating Company in accordance with or resulting from the rendering of services or the furnishing of goods pursuant to this Agreement whether or not such damage was sustained or such claims were lodged due to the negligence of the Servicing Company, its servants or agents, unless the same result from or are caused by acts or omissions amounting to wilful mirconduct of the management of the Servicing Company.

2. The Operating Company shall indemnity, and save free and harmless the Servicing Company, its employees, servants and agents from any liability towards third parties (other than the Servicing Company's employees, servants and agents), including costs and expenses incident thereto, arising in connec-

> tion with or resulting from the rendering of services or the furnishing of goods pursuant to this Agreement, unless due to the wilful misconduct of the management of the Servicing Company".

Under Paragraph 1, Airline A would be obliged to waive any claims it might have against Airline C, and hold it harmless against claims of its passengers and other third parties which would, of course, include Airline B. All, of course, assuming that the malfunctioning of the engine was not caused by the "wilful misconduct of the management" of either Airline B or Airline C. Further with respect to the loss by Airline B of its engine, the pooling agreement provides elsewhere that the risk of loss of or damage to items which are borrowed shall pass to the Operating Company, that is in this case to Airline A, therefore Airline A would be obliged to make good the loss of the engine to Airline B.

Reference was made earlier to the pooling of traffic. Although there are variances the general liability principle of these route pools is that each carrier will be responsible for the legal results of its own operation, that is each will be liable or responsible for traffic in its custody. This principle will present few problems as long as the airline that contracted to carry the passenger or cargo maintains the passenger or cargo in its custody. A problem could arise, however, when in order to expedite transportation the passenger or cargo is transferred for carriage by the other party to the route pool, particularly if it is international traffic. In this respect, Dr. Gazdik has already given you an outline of certain aspects of the Warsaw Convention and you will note from that that the Convention governs the relationship between the passenger or shipper and the carrier with which a contract of carriage has been made. It does not cover the relationship of a passenger or shipper with a carrier with whom a contract was not made and therefore it is doubtful, to say the least, if the second carrier could look to Warsaw Convention in the event that a passenger or goods were lost whilst in its custody. This situation has long been a matter of concern in international air law circles and a partial remedy for it has been provided in the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than

the Contracting Carrier(signed at Guadalajara on 18 September 1961. In brief, the Guadalajara Convention extended the liability provisions of the Warsaw Convention, or that Convention as amended by the Haguue Protocol, to a carrier who actually carried passengers or goods but who was not a party to the original contract of carriage. Unfortunately, to date only twenty-two countries have become parties to the Guadalajara Convention. It, therefore, follows that members of a route pool must ensure that if traffic is to be transferred from one carrier to another steps are taken to establish a contractual relationship between the passenger or shipper and the second carrier in such a way to ensure the applicability of the terms of the Warsaw Convention. Alternatively, the carriers should recognize that they may not have the limiations of liability benefits of the Warsaw Convention and take appropriate means to protect themselves financially, either by way of a special indemnification provision in the pooling agreement or through additional financing, such as insurance.

The aforesaid is a very superficial review of the two major types of pool agreement in force in the airline industry today with an even more superficial indication of the legal problems that flow from them.

Before finishing I would like to make reference to a form of pooling that is still in its infancy but which I submit will soon become world wide and which presents a great challenge to the legal profession. I refer to aircraft interchange agreements. Today's intercontinental aircraft cost up to $ 12,000,000 and there are already other subsonic aircraft being built that cost in excess of $20,0.000.000. The value of the supersonic transports, the first of which is scheduled to fly this year, ranges from that figure to an estimated $40,000,000. With these enormous investments maximum utilization of the equipment is imperative. Many airlines find that the traffic flow within their systems is not sufficient to require the maximum utilization of their aircraft that is technically feasible, and their use can be further compromised by airport curfews. For example, London Airport has imposed allowable noise limits between the hours of 23 : 31 and 06 : 00, which for all practical purposes has prohibited the arrival and departure of large jet aircraft during those hours, i.e. 25% of the day. Similar limitations apply to many major airports

around the world. One method of meeting this problem would be for two or more airlines with interlocking route structures to agree to exchange equipment, with or without crews, in such a way that it would not be grounded by these local restrictions. With proper scheduling a supersonic aircraft could literally follow the sun around the world. In fact even subsonic aircraft could do so under some circumstances.

Any such operation will appreciably compound the problems of the lawyer that I have already indicated flow from the wide implementation of Route Pools and Technical Pools. For example, the Chicago Convention requires the State of registration of an aircraft to ensure that that aircraft is operated in compliance with local flight rules wherever it may be, but with aircraft interchange the operator may never come within the jurisdiction of that State! Similar impracticalities flow from other international aviation treaties such as the Rome Convention of 1952 relating to damage caused by foreign aircraft to third parties on the surface, and the Tokyo Convention of 1963 on offences committed on board aircraft, and of course the national law of many countries places restrictions on the operations of foreign aircraft and foreign crews.

In conclusion, I can therefore say with assurance that the aviation community presents jurists of all backgrounds with a great challenge and an enviable opportunity to contribute to the development of a universal rule of law.

Montreal, April 11, 1968