Journal of Air Transportation World Wide **Vol. 5, No. 2 – 2000**

STRATEGIC ALLIANCES OF AIRLINES AND THEIR CONSEQUENCES

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ABSTRACT

This article will examine the semantics of strategic airline alliances and the manner in which such alliances overcome bureaucratic obstacles to gain access to open competition. The conclusion will address the issue of aviation safety, which has been inextricably linked by some to the proliferation of air transport activity envisioned in the near future.

INTRODUCTION

Today's commercial competition has transcended the past era, where dominant markets protected their established market shares. Most mega commercial activity was then the purview of governmental control under instrumentalities of State which were mostly cumbersome bureaucracies at best. Perhaps the best analogy is the biggest commercial market—the United States—which had, until recently, extensively regulated larger commercial activities pertaining to energy, transportation and telecommunications.

Happily, over the past decade, commercial air carriers have broken the shackles of rigid regulation to form strategic alliances among themselves. These alliances have been formed in the realization that the performance of an airline can be affected by two factors: the average performance of all competitors in the airline industry; and whether the airline concerned is a superior or inferior performer in the industry. Michael Porter[1] encapsulates these two factors in the single premise that any business achieves superior profitability in its industry by attaining either higher prices or lower costs than rivals. Curiously, in the airline industry, it is the latter—lower costs—which has been the cornerstone of strategic alliances.

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The reason for airlines banding together is to share an otherwise wasted market which is still regulated by bilateral governmental negotiations. This unfortunate state of affairs has been brought about by a lacuna in the Convention of International Civil Aviation[2] (Chicago Convention) which leaves the absolute prerogative of allowing air carriers to carry passengers, cargo and mail into and out of their territories to States.[3] This privilege has encouraged the protective instincts of States to ensure that their national carriers obtain optimum market share *belonging* to them, based on a now antiquated belief that all passengers, cargo and mail destined to a particular State or leaving that State, is the birth right of the national carrier of that State. This stifling phenomenon has encouraged airlines to think more strategically over the past two decades, resulting in the pursuit of improved operational effectiveness in their activities.

The seminal response of most strategic airlines to the interference of governments was to *share* each others' resources, including air traffic rights, thus gaining access to what was disallowed under bilateral governmental agreement. Recently, airlines have become more aware than ever that they are becoming an increasingly capital intensive industry and have a compelling need to reduce costs in order to survive. The end result has been an array of commercial arrangements between airlines—from statements of common interests to block space arrangements, code sharing and coordination of frequent flyer programmes—to name just a few.[4]

This article will examine the semantics of strategic airline alliances and the manner in which such alliances overcome bureaucratic obstacles to gain access to open competition. The conclusion will address the issue of aviation safety, which has been inextricably linked by some to the proliferation of air transport activity envisioned in the near future.

THE PHILOSOPHY OF STRATEGIC ALLIANCES

Arguably, the most spectacular strategic airline alliance so far is the "Star" Alliance, which was launched in 1997 by Lufthansa, SAS, United Airlines, Thai Airways International and Air Canada. Brazilian carrier Varig joined later, and it is expected that Ansett Australia and Air New Zealand would join the alliance in 1999. Recently, Singapore Airlines signed a commercial agreement with SAS—one of the "Star" Alliance members—which will bring Singapore Airlines inextricably close to the alliance itself.[5] It is evident that the carriers of North America, Europe and the Asia Pacific regions, which form the Star Alliance have skillfully maneuvered their dominance of the regions they represent. The direction in which the alliance is heading, with the possible future membership of Japan's All Nippon Airways (ANA), is incontrovertibly to assert its

presence in the burgeoning Asia Pacific market, in particular the Pacific Region.

The underlying philosophy of the airline alliances, typified by a "Star" Alliance, is not so much an emphasis on the more effective use of resources such as labour, capital and national resources (which are inevitably important factors) but rather an overall reliance on the strategy of location, where the sharing of locations represented by the various airlines have enabled them to produce their goods and services in a consistent manner, thus achieving the status equivalent to a cartel, while still retaining their individual identities.

Airlines have developed both a corporate strategy and a competition strategy to cope with competition. Both these strategies are becoming increasingly complementary rather than being mutually exclusive, which they were at the inception of airline competition 50 years ago. As airlines began to compete with each other across the borders, they acquired the ability to locate themselves overseas—creating a compelling need for commercial airlines to be fully acquainted with locational strategy and competitive advantages of various locations. Very early in the game, giants such as Pan Am and TWA began to realize that even the strongest company with an established position in the airline industry unthreatened by competition from new entrants or smaller airlines, would start losing business if they faced a better or lower cost product. The threat of new entrants, the bargaining power of supplies and customers and the superior quality or low cost of substitute products were arguably the underlying reasons for established airlines to begin experiencing a downturn in the sixties, which was exacerbated through the seventies and eighties. These threats could not be effectively circumvented or overcome by the established carriers, partly because of the sustained circumscription of market entry imposed by Article 6 of the Chicago Convention.

The genesis of airline alliances therefore was a contrived symbiosis or coexistence between the new entrants or new competitors—who had the clout of resources but not the dimensions of a larger carrier—and the larger carrier itself who had an established product to offer. Together, these two types of carriers could eradicate such obstacles as product differentiation (which was a distinct disadvantage to carriers which did not have an established brand); capital requirements (which again was a disadvantage faced by a smaller carrier); economies of scale (which forced a smaller carrier to compete on a large scale); and government policy (which affected both types of carriers—particularly the larger carrier which had the resources to operate air services but not the market access to a given region).

Another type of commercial alliance is the *mega* alliance referred to earlier in analogy typified by the Star Alliance. The precursor to this type of alliance could have been the modest *pool agreement* between two carriers operating third and fourth freedom traffic, that is, traffic purely originating and ending in each others' territories. The pool agreement was written into a bilateral air services agreement between two States in order to ensure equal enjoyment of market share between their carriers in the route between their States' territories. This notion gave rise to an extension of the principle of pooling, which was to share locational traffic on a fifth freedom, that is, traffic which is picked up at intermediate or beyond points on services between two States, and, more importantly, sixth freedom—traffic to which a carrier had no right but could operate under the air traffic rights of another carrier, through a commercial arrangement such as a code share agreement signed by and between the carriers.

SOME TYPES OF STRATEGIC ALLIANCES

Airline alliances, particularly code sharing agreements, add destinations to a route network and offer more frequencies of service to customers. With such arrangements, an airline can add on flights using its code sharing partners flight entitlement and operate to additional destinations without adding any resources. Of course, such an arrangement would create a duopoly, depriving customers of the benefit of competition, pricing, etc., if the airlines concerned were in competition on a given route. Code sharing not only affects passenger traffic, but influences the consolidation of cargo carriage as well, as was seen in the Swissair-Delta Airlines cargo alliance across the Atlantic.[6]

In Europe, the *open skies* concept, introduced by the European Union as legislator, in 1977, was meant to open competition between European carriers in Europe in order to offer competitive airline services to customers. However, this has not had the desired effect, owing largely to airlines forming alliances under the umbrella of the open skies legislation. In particular, the four alliances, headed by British Airways, Lufthansa, KLM and Swissair, have vigorously entered into alliances with smaller carriers under franchising agreements in order to gain access to markets they have not obtained in their air services agreements.

There are approximately 1,200 scheduled air carriers in the world. It is estimated that there are approximately 10,000 aircraft in the air at any given moment. Excluding China and the countries of the former Soviet Union, approximately 380,000 civil aircraft are registered in International Civil Aviation Organisation (ICAO) States. Of these, 45,000 are used by commercial operators.[7] Forecasts of the number of passengers carried on

scheduled services in nine intercontinental route groups show the transpacific and Europe-Asia markets as the fastest growing, at 8 percent and 7.5 percent per annum, respectively, for the forecast period through to the year 2003.[8] International scheduled passenger traffic is forecast to grow at an average rate of 6.5 percent per annum compared with 4 percent per annum for domestic traffic.[9] These rapidly evolving trends will no doubt be accommodated by equally rapidly developing technology and economic norms of the airline industry. Incontrovertibly, code sharing and computer reservation systems (CRS) are at the helm of this process.

Although technically, code sharing and functions of computer reservations systems are two different activities of the air transport industry, they become inextricably linked to each other when two air carriers who share each others' codes may wish to have their shared flights displayed in each of their CRS. The placement of a code-shared flight in one CRS of a code sharing partner, differently from the system of the other, would make no commercial sense both to the air carrier concerned and the consumer. Thus, multiple listings of the same flight may appear in CRS and airline schedules, often misleading the potential passenger, but certainly drawing an identifiable link between the two systems. Both activities, therefore, which have undergone a significant exponential growth over the past few years, warrant a close analysis in view of their inextricable link to each other and joint quest for commercial credibility and consistency. An inexorable implication of this symbiosis is the impact the two activities may bring to bear on the principles of the law of contract. This paper will discuss code sharing and CRS against the backdrop of contractual liability principles of air carriers and CRS users obtaining at international law and common law jurisdictions as they relate to the carriage by air of persons.

Code Sharing

Code sharing between two airlines is essentially two different airlines posing as one, sharing or rotating aircraft crew and responsibility.[10] It has been called a little more than a glorified interline agreement which occurs when one airline operates a flight but both its and another carrier's codes are used.[11] Thus, for example, a passenger who contracts with airline A to travel from Canada to Australia may find himself in the same aircraft with a passenger who contracted with airline B for the same journey.

The United States Department of Transportation (DoT) uses a somewhat technical definition for code sharing which it calls, "…a common airline industry marketing practice where, by mutual agreement between cooperating carriers, at least one of the airline designator codes used on a flight is different from that of the airline operating the flight."[12] The DoT then classifies code sharing under this definitive structure into

two types: the first being the typical international airline operation where two or more airlines each use their own designator codes on the same aircraft operation; and, the second enunciating the domestic code shared flight where the code on the passenger's ticket is not that of the operator of the flight, but where the operator does not offer the service in his own name. DoT goes on to bifurcate international code sharing, where, in the first category, only one segment of the journey—which usually involves a connection—operates under two different codes, one used by an airline for its local traffic, and the other used by its partner for the entire journey, and in the second, the entire journey is advertised and displayed under the codes of the two airlines which share the flight concerned.[13]

The marketing benefits of code sharing have been identified as the ability of airlines to: coordinate schedules; transfer baggage easily; maintain common marketing activity by the sharing air carriers; use through fares; use single check-ins; share airport lounges; share frequent flyer programmes; and, agree upon exactly which airline is legally responsible for the passenger's whole journey by air. American Airlines, one of the early proponents and participants in the code-sharing concept, adds the safeguarding of traffic rights to this list, where it is claimed that a stronger carrier in the market could be forced to code share with a weaker national carrier, thus spreading commercial benefits on a given route among two carriers equitably.

One of the most scathing attacks on code sharing is that it seeks to create the illusion that interline connections between code sharing partners are the equivalent of on-line connections, which is not so. It is claimed that this alleged illusion is successfully carried out because passengers prefer on-line to interline connections by a ratio of approximately four to one, fooling them to believing that a code-share is an on-line service. Robert Crandall, Chairman, American Airlines, is of the view that allowing foreign carriers to deceive consumers into believing that a domestic code-shared service is really an extension of an international service of a foreign carrier, effectively precludes genuine carriers from building strong, dependable on-line services.[14] Crandall also believes that code sharing is an anti-consumer marketing activity in that it causes multiple listings of the same flights in computer reservations systems and printed multi-airline schedules, thus debasing the quality of the information available to consumers.[15]

Code sharing really gathered momentum with the introduction of computer reservations systems. Major United States airlines found it attractive to engage in code sharing in relation to CRS as it provided them a better exposure on the CRS screen. Although a code shared flights may not yet appear on a computer screen in its pristine form to be identified as such,

code shared flights now appear in CRS as on-line connections and are thus given priority over interline connections, giving them an overall higher profile in the CRS and making them more likely prospects for booking by a travel agent.[16] These code-shared flights which appear as connections with aircraft change on the screen would enable such flights to appear at least four times on the same screen. Some countries therefore view code shared agreements as efficacious marketing tools and dissociate the concept entirely from the issue of traffic rights.

In January 1995, United States' Secretary of State for Transportation, Fedrico Pena announced the International Aviation Policy Statement of the United States which primarily endorsed code sharing as a cost efficient way for carriers to enter new markets and expand their systems.[17] Earlier, in December 1994, the U.S. Department of Transport had released its report on international code sharing which it had commissioned from Gellman Research Associates.[18] Secretary of State Fedrico Pena referred to the study as follows:

> This study fully supports the department's international aviation policy statement. It demonstrates that the movement towards globalization and transnational alliances through code sharing and liberalized bilateral arrangements delivers benefits not only for United States consumers but for the United States airline industry as well.[19]

One of the issues that emerged from the study was that the critical factor in code sharing is not whether it is good or bad, but whether it has certain undesirable effects that need to be addressed by policy makers. Based on an econometric consumer choice model that was applied to certain code sharing agreements, as against non-code shared flights, the study concludes that the negative impact on consumers as a result of potential deception is inconsequential as any impact of such misleading practices would be cushioned by existing DoT safety nets. The GRA study's findings were also consistent with the overall DoT perception that all international traffic will ultimately be restructured into long haul services linking inter continental hubs, with intra regional spokes feeding traffic—leading to the proliferation of airlines and the expansion of code sharing.[20]

The study concluded that benefits to consumers, estimated at $37.4 million were minuscule compared to approximately $10 billion that passengers spend each year on transatlantic tickets. Even if one were to assume, as the study suggests, that the number should be doubled, a gain of around $75 million was comparatively inconsequential. Another conclusion was that consumer benefits of code sharing was not so much quantifiable in fiscal terms but rather in terms of higher convenience, higher quality of airline service, and time savings generated through the faster elapsed time offered by code shared flights.

Computer Reservation Systems (CRS)

Airline computer reservation systems is one of the most rapidly developing industries today. This development is being driven in part by the enormous strides made by industrial technology. Traditionally, airlines have been at the helm of computer usage and their sustained use goes back 30 years. In the sixties, the airlines inaugurated high speed real-time reservations systems, and today, these systems use some of the most sophisticated computer software in the world. CRS, which began as a simple means of placing an order for a seat on a plane, has now developed to add various new dimensions to the carriage of persons and goods from one point to another by air—such as hotel reservations, car rentals authorization of credit facilities to customers and theatre reservations—all of which cumulatively make CRS an effective marketing tool.

Inevitably, from progress and development emerges the immutable fact that while some may benefit from the whole process of development, others may feel left behind, even to the extent of being run out of business. One of the corollaries to the phenomenal growth and development of the CRS process is the plight of airlines and travel agents who do not have the ability to participate actively in sophisticated and widespread CRS programmes.

A travel agent usually gains access to a CRS through a terminal consisting of a key board and a visual display unit. The first step is usually to enter the key data—such as the departure and arrival points relating to an air journey. The system then responds by reflecting on the screen various flight options called upon by the system according to the requested data and time of travel and adjusted according to the priority criteria used in the reservations system concerned. Although CRS have the capacity to list all possible flight options between city pairs concerned, they usually display merely a small number of options, necessitating a search for others. In view of pressures brought upon time and other resource constraints, the tendency is usually to settle for what is displayed on the screen. Needless to say, this process effectively precludes those options offered by airlines enjoying less priority than others from being made known to the prospective airline customer.[21]

The importance of code sharing in this process becomes all the more significant, since, a flight jointly served by two airlines who share each other's codes would have the leverage of both those airlines in the CRS to be displayed more prominently than a flight which is served by a single carrier. In other words, it is claimed that code sharing by airlines may ipso facto aggravate any imbalance that may already exist in the CRS in favour of those airlines which are prioritized in the systems for other commercial reasons. Barry Humphreys observes: "The exclusion of an airline's services

or the failure to show its correct fares or seat availability status can have a disastrous effect on its ability to compete effectively, and numerous cases have been documented to show that these are not merely hypothetical examples of anti-competitive behaviour."[22]

Franchising

One of the more recent marketing initiatives to emerge in the airline industry is franchising. In its contemporary business garb, franchising has permeated a wide spectrum of businesses, introducing a sophisticated business relationship between two parties, thereby creating a contractual relationship. The franchisor, who develops a unique and individual way of conducting business, permits the franchisee to make use of the franchisor's business name and use his business methods in the franchisee's business, subject to controls imposed by the franchisor.

The application of the principles of franchising fits in well with the modern exigencies of airline business, where the personality developed and projected by a highly successful airline has become of increasing importance to passengers, thus making an airline's image a marketable quantity. Some major airlines have indeed capitalized on this commercial possibility by developing much vaunted and attractive consumer based brand personalities and using them as key marketing tools towards attracting potential franchisees from whom they derive independent income by selling their names and business methods.

A fundamental advantage offered by franchising is the attraction for airlines to allow them to protect and extend their brand to routes (which are otherwise commercially unviable) without actually operating air services to such routes. This is done by getting a franchisee to operate on such routes while using the name and livery of the franchisor, whereby the latter skillfully avoids the risk of capital investment but still derives income in the shelter of a franchise agreement.

A notable example of franchising in the airline business can be seen in Europe in British Airways which had six franchising agreements in the year ending March 1996.[23] The six franchisees, most of whom operated under the name British Airways Express (with the exception of two who operated under the name British Airways) carried in 1996 a combined capacity of 3.4 million passengers to 80 destinations. The franchisees paid British Airways a fixed fee for the use of services they were obliged to use—such as reservations systems—and a fixed royalty for the use of the brand of the airline.[24] The franchisees could also offer their passengers air miles on British Airways in the latter's frequent flyer scheme.

Extending its franchising agreements to international operations outside of Europe, British Airways has also signed an agreement with Comair of

South Africa, which has been obliged under the franchise provisions in the agreement to repaint its livery in British Airways' livery, outfit its cabin and customer service staff in British Airways uniforms who would offer a typical British Airways in-flight service on Comair's franchised flights. In addition, Comair agreed to transfer its reservations systems to British Airways' systems and offer its passengers membership in the British Airways frequent flyer programme.[25]

The other large British carrier, Virgin Atlantic, has also been reported to consider the extension of its short haul franchise operations to longer routes. In 1994, Virgin Atlantic was operating two extremely profitable franchised flights between London and Athens and London and Dublin respectively, where the two routes were operated by independent carriers which used the Virgin brand name and livery on their aircraft.[26]

Another significant example of franchising agreements in the airline business is the one signed by Air France and BritAir—when BritAir placed its entire staff and 23 aircraft under the brand name of Air France[27]—in exchange for Air France granting a dozen of its routes to BritAir which operated 150 daily flights on these routes. Encouraged by the commercial efficacy and profitability of this agreement, Air France has been seeking additional franchising accords with smaller airlines in order to maximize the passenger flow into its hub at Roissy Charles de Gaulle Airport in Paris.[28]

In October 1996, Lufthansa entered into a unique franchising agreement with Augsburg Airways, forming a partnership named *Team Lufthansa* whereby Augsburg Airways operated, at its own cost, three German domestic routes with Lufthansa flight numbers and under quality control by Lufthansa.[29]

One of the compelling reasons for franchising to emerge as a marketing tool in the airline industry, particularly in Europe, is the European air travel market's polarization between scheduled and unscheduled (charter carriers). European charter carriers have grown prolifically in the last two decades as a backlash to increasingly high scheduled fares. In 1996 it was reported that in the United Kingdom alone, 14 million persons used charter flights on their vacation.[30] The growing disparity between the fares of scheduled carriers and the low package fares offered by charter carriers have released in Europe the franchisee—hybrid carriers in the form of a compromise between scheduled and unscheduled carriage—where a small airline can offer competitive fares under the ever important brand name of a large, prestigious carrier. The franchised flight therefore offers the traveling public a *via media*—of a comparatively low fare for a customized flight under the brand name of a large carrier.

The major concern caused by franchising is that major airlines use the services of smaller airlines to carry out franchise services by using a mix of franchise-code share agreements in order to obviate the necessity for operating on revenue losing routes themselves, while retaining their presence on these routes through the franchisees' operations. The European Union has claimed that, by using franchising agreements in the above manner, major airlines have retained their unprofitable routes and also the valuable slots that go with such operations.[31]

Franchising, which as frequently been described as "one of the greatest inventions of western capitalism…"[32] [and the] "…dominating force in the distribution of goods and services"[33] is perhaps best described as the only form of business organization, which, by its very nature, creates business units providing new entrepreneurs, new jobs, new services and new export opportunities.[34] The symbiotic relationship forged between the franchisor and the franchisee blends harmoniously to form a mutually convenient commercial arrangement between the parties: "Franchising has provided the means for merging the seemingly conflicting interests of existing businesses with those of aspiring entrepreneurs in a single process that promotes business expansion, entrepreneurial opportunity and shared cost and risk."[35] Be that as it may, one of the most serious shortcomings of the commercial relationship established by the franchise contract is the oft-experienced imbalance in the power between the franchisor and the franchisee in favour of the former, and the lack of information exchange between the parties to the contract. These factors have given rise to the suggestion that the traditional freedom of contract principles which obtain at common law be modified to accommodate the franchise phenomenon. This call for modification of contract law principles to accord with the synergic relationship created by a franchise agreement is primarily based on the concern that the time and money invested by a franchisee in the promotion of the franchisor's trade name and trade marks can be jeopardized, and even forfeited by, the arbitrary action of the franchisor.[36]

In the context of franchise agreements between airlines, the personality of the franchisor, who lends his goodwill to the franchisee, plays a key role. The traditional view that goodwill is retained by, and belongs to, the franchisor also applies in the commercial aviation context where the franchisee simply acquires a right to participate in a business system for a term and in a manner prescribed by the franchise agreement. The franchisee usually does not retain a right to assign the franchise to a third party; have the agreement reviewed on termination; or demand compensation upon non-renewal of the contract. However, there have been instances, particularly in the United States, where courts have been favourable towards protecting a franchisee's investment from forfeiture

through the arbitrary and capricious action of a franchisor.[37]

The observation of Lord McNaughten in 1901 about goodwill, that it is a thing very easy to describe, but very difficult to define,[38] applies even today to the personality of an airline which is franchised.

The goodwill which is traded in a franchise agreement is essentially the benefit and advantage derived from the use of a good name, reputation and connections of a business. Goodwill or personality of an airline is the one attractive force that brings in customers and clientele. In the same case Lord Lindley added that goodwill includes: "Whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers and agreed absence of competition, or any of these things, and there may be others which do not occur to me."[39] One of the salient features of a franchise agreement is that goodwill or personality, which is the pivotal ingredient and the main attraction which draws in money to the franchisor, does not act to the benefit of the franchisee at the termination or non renewal of a franchise agreement. In other words, the franchisee airline cannot claim compensation from the franchisor for goodwill accrued to the latter during the period of the franchise agreement due to the operation of services by the franchisee. This traditional view was confirmed in the 1989 Australian case of *Kanoa Ply Ltd.* V. *BP Oil Distribution Ltd*.[40] Where the Court held that an oil company franchisee had no right of compensation for good will lost when a service station lease and dealer trading agreement were not renewed. It was the Court's view that on expiry of the Statutory tenure there was no further obligation to renew the contract and no requirement to pay compensation in respect of goodwill acquired by the oil company through non renewal of the franchise agreement. Lockhart, Wilcox and Grammon JJ held:

> Under the general law, in the absence of any special covenant and any other applicable statute, upon the tenancy of the appellant coming to an end, the benefit of any goodwill of the character described above would ensure to the benefit of the first respondent as lessor… Where a franchisor elects to grant a new lease the franchisee has the benefit of continued exploitation of the goodwill of the site… But where a franchisor elects not to grant a new lease, the franchisee is turned from the site without compensation for any goodwill which it may have developed during its period of occupancy. A franchisee, such as the appellant, may regard this result as harsh, the harshness being exacerbated if it should be the case-we do not know whether it is so-that franchisors are more likely to decide themselves to operate sites to which substantial goodwill attaches. But if this result is harsh, it is a product of the circumstance that the law does not require the franchisor who elects not to renew to pay any compensation to the franchisee.[41]

CONCLUSION

Strategic alliances of the airline industry is but a natural corollary to the exponential growth of international air transport as an industry. The concept itself is based on the theory that with rapid demand for air transport, requiring a doubling of the 16,000 world aircraft fleet by the year 2015, these would be a compelling need for new connections between points and more frequencies to serve these connections. There is no stopping this trend, which has already swept the aviation industry. There is, however, one point of caution. The fundamental postulate of air transport has been, and remains to be, safety of passengers. The proliferation of aircraft in the skies may challenge airline safety, if parallel measures are not set in motion to ensure the safe passage of the thousands of aircraft in the sky.

In 1997, the total scheduled international flights operated by the 705 carriers of the 185 Contracting States of ICAO carried a total of approximately 1,448 million passengers and 26 million tonnes of freight. In the same year, there were an estimated 16,993 operational aircraft (each carrying more than a maximum take off weight of 9,000 kg), which was a 59 percent increase from 10,712 aircraft operating a decade ago. Also, in 1997, 1,309 jet aircraft were ordered (as against 1,003 in 1996) and 674 were delivered in the same year.

If this were not sufficient to reflect the gigantic proportions to which international air transport has grown, more daunting figures loom ahead. For instance, it is estimated that the worldwide jet transport fleet will double through 2015. With the current aircraft accident rate at 1.76 accidents per million departures—which is the safest statistical record of accident rates in all modes of transportation—there are aggressive calls to reduce this rate by half, to 0.88 accidents per million departures by the year 2015. Moreover, the Gore Commission of the United States has bettered this figure by calling for an 80 percent reduction in fatal aircraft accidents.

In 1995, 19 Western built jet aircraft were totally destroyed in air crashes, which killed 383 passengers and 39 crew members.[42] Although this rate of loss has been steady for the past 10 years, there were three major losses in 1996—the famous Valujet and TWA aircraft in the United States and the world's worst midair collision in history new New Delhi, India, where a Saudia Boeing 747 with 312 persons aboard collided with a Kazak aircraft carrying 37 passengers and crew. All on board were killed. More recently, in early 1998, the loss of a Swissair MD 11 aircraft off the coast of Nova Scotia in Canada reiterated with monotonous regularity the enormity of the problem posed to aviation safety and brought to bear the compelling need for the international community to continue to take energetic and

vigilant measures to curb the problem, if not totally eradicate it. International dimensions of aviation safety are all encompassing, and are not limited to attacks on aircraft but include the management of airspace in order to prevent accidents caused by inadequate air navigation systems or human error. It is therefore prudent to address aviation safety within all its parameters, particularly in the context of the crowding of airspace brought about by the proliferation of aircraft movements.

In order to address the issue of aviation safety, the Council of the International Civil Aviation Organization (ICAO) convened in Montreal, from 10 to 12 November 1997, an international conference for Directors General of Civil Aviation to review the ICAO Safety Oversight Programme and to consider its expansion.[43] Almost simultaneous with this event, ICAO released its preliminary accident and security statistics for 1996, which reflect that scheduled air carriers from the 185 ICAO Contracting States reported 23 fatal aircraft accidents in 1996, compared with 26 in the previous year.[44] Although the incident rate declined in 1996, the number of passenger deaths reported rose dramatically in 1996 to 1,135, compared with 710 in 1995.

The Conference concluded inter alia that ICAO should continue to fulfil its leading role with a view to making the safety oversight programme more assertive and effective; that there should be a harmonized approach in conducting safety audits; and that the ICAO safety oversight programme should be expanded to other technical fields at the appropriate time, initially to include air traffic services, aerodromes, support facilities and services[45].

Although the above figures portend a certain perceived gloom, the silver lining comes with the awareness of the enormity of the problem and identification of contributory factors to the aircraft accident rate. These factors include: underdeveloped aviation infrastructure; poor airline operating practices; inadequate national aviation oversight at varying degrees; poor air traffic control capability; lack of navigational aids and radar coverage; and substandard airport equipment. Unsatisfactory meteorological facilities have also been identified as possible causes of aircraft accidents.

For its part ICAO, through its Air Navigation Commission, completed within the period from 1995 to 1998 the development of a framework which encapsulates the seminal ICAO activities in pursuit of aviation safety. The Commission created a comprehensive document which encompassed a Global Aviation Safety Plan (GASP) which aims at giving ICAO leadership to gain a commitment from States and the industry to enhance aviation safety worldwide.

Safety is the primary concern of the world aviation community at the present time. It is not only because the fundamental postulates of the Chicago Convention of 1944[46] call for the safe and orderly development of international civil aviation[47] and mandate ICAO to insure the safe and orderly growth of international civil aviation throughout the world[48] but also because the aviation world faces a critical era where, in the words of Dr. Assad Kotaite, President of the ICAO Council: "…the international aviation community cannot afford to relax its vigilance…ICAO would continue to take timely action to ensure safety and security standards are in effect, and that deficiencies are properly and efficiently addressed."[49]

The compelling need for higher standards in aviation safety was formally recognized when the ICAO Council adopted ICAO's Strategic Action Plan on 7 February 1997. The basic strategic objective of the Plan is to further the safety, security and efficiency of international civil aviation. ICAO plans to accomplish this task by assisting States in identifying deficiencies in the implementation of Annexes to the Chicago Convention, in particular these words contain provisions which ensure safety in aviation.

One of the core elements of ICAO activity on safety, according to its Strategic Action Plan, is to carry out assessments by teams of experts of the capacity of participating States to control effectively the level of safety for which they have responsibility—ICAO's safety oversight programme, which would implement this activity, extends to personnel licensing, operation of aircraft and aircraft airworthiness. ICAO may, in the foreseeable future, extend ICAO's Safety Oversight Programme to cover areas such as air traffic control and the operation of airports.

ENDNOTES

1. Michael E. Porter, *On Competition*, Harvard Business Review Series: U.S.A. 1996 at p. 4.

2. Convention on International Civil Aviation, signed at Chicago on 7 December 1944, hereafter referred to in this article as the Chicago Convention. See ICAO Doc 7300/7, Seventh Edition: 1997.

3. Article 6 of the Chicago Convention provides: 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, or in accordance with the terms of such permission or authorization.

4. See Russel Miller, International Airline Alliances ? A Review of Competition Law Aspects, *Air & Space Law*, Vol. XXIII, No. 3 1998 at p. 125.

5. *ITA Press*, 16–31 October 1998 at p. 4.

6. Robert Koenig—Swissair; Delta Raise Trans Atlantic Cargo Status, *Journal of Commerce*, 2 June 1998 at p. 8A.

7. Outlook for Air Transport to the Year 2003, *ICAO Circular 252-AT/103* (1995), Chapter 2 at 5.

8. *Id*. Chapter 1, at 2.

9. *Id*. Chapter 5 at 37.

10. Code Sharing: If Its Tuesday, This Must be Aeroflot, *Airways*, January/February 1995 at 19. See also, Is Airline's Gain, Consumer's Loss? *The Avmark Aviation Economist*, Vol. II, No. 8 October 1994 at 13.

11. Coded Warnings, *Airline Business*, January 1995 at 26.

12. *The Avmark Aviation Economist*, October 1994 at 16.

13. *Ibid*.

14. See Robert Crandall, Chicago's Legacy,, Barriers to Multilateral Liberalization, *Viewpoint*, Vol. 2, No. 1, 1999, 6 at 12. Mr. Crandall cites the example of the British Airways-USAir code sharing agreement which allegedly allows British Airways access to nearly six times as many world city-pair markets as are available to American Airlines. He further claims that since British Airways now has the ability to gather passengers from almost anywhere in the United States and fly them across the Atlantic, and since it has created pseudo-hubs in the United States to connect with its real hub at London Heathrow, neither the British Government not British Airways would have any incentive to let American Airlines or any other US carrier to compete with British Airways for any substantial portion of the traffic flowing across Heathrow from countries around the world to and from the United States. *Ibid*.

15. *Ibid*.

16. See Jan Ernest C. de Groot, Code Sharing—U.S Policies and Lessons for Europe, *Air and Space Law*, Vol. XIX No. 2 April 1994 62 at 64.

17. Coded Warnings, *Airline Business*, January 1995, at 26.

18. The objectives of the study were: to develop a methodology to assess the effects of code sharing on the level and distribution of traffic among carriers, with the capability to measure the effect of future code sharing agreements; to examine the effects of code sharing on the costs and profitability of airlines; to assess the effects of code sharing on consumers of airline services; and project the future use and impact of code sharing over the next twenty years.

19. GRA Report Sanctifies DoT Policy, *The Avmark Aviation Economist*, December 1994 at 2.

20. *Ibid*.

21. For a more detailed analysis of this problem see Chris Lyle, Computer Age Vulnerability in the International Airline Industry, *Journal of Air Law and Commerce*, Vol. 54, 1988, 161-178. See also, Vladimir D. Zubkov, The Development of Computer Reservation Systems: The ICAO Viewpoint, *ITA Magazine*, No. 42, March/April 1987, 3-7.

22. Barry Humphreys, Different Approaches to a Common Problem, *ITA Magazine*, No. 53 – January/February 1989 at 9.

23. These agreements were with City Flyer Express, Maersk Air, Brymon Airways, Loganair, Manx Airlines Europe and GB Airways. See Keeping Up Appearances, *Airline Business*, October 1996 at p. 38.

24. *Ibid*.

25. British Airways signs up Comair of South Africa as Franchise Partner, *Aviation Daily*, June 13, 1996 at p. 434.

26. Virgin long-haul franchise talks, *Travel Weekly*, 2 March 1994 at p. 4.

27. Air France takes over regional Airline under Franchise Deal, *Aviation Daily*, April 29, 1997 at p. 179.

28. See Air France Chairman seeks more Franchises, *Air Letter*, Friday, 17 January 1997, No. 13,661, at p. 2.

29. Lufthansa Announces first Franchise Partner, *Air Letter*, Thursday, 3 October 1996, No. 13,591 at p. 1. See also Lufthansa Signs Augsburg Airways as Franchisee, *Aviation Daily*, October 3, 1996 at p. 19.

30. Never the Twain, *Air Transport World*, 10/96 at page 67.

31. EC Concerned that Franchising in Blocking New Entrants, *World Airline News*, April 17, 1995, at p. 6.

32. U.S. House of Representatives Committee on Small Business, *Franchising in the U.S. Economy: Prospects and Problems*, U.S. Government Printing Office; Washington D.C. 1990 at p. 1.

33. *Ibid*.

34. See *Franchising in the Economy*, 1983-1985, U.S. Department of Commerce: Washington D.C. 1985 at p. vi.

35. U.S. House of Representatives Committee on Small Business, *supra*. Note 10. At p. 12.

36. See By Rau, Implied Obligations in Franchising: Beyond Terminations 1992, 47 *The Business Lawyer* at p. 1053.

37. See *Shell Oil Co.* v. *Merinello*, 63 N.J. 402, also 307 A.2d. 598(1973). See also Pitegoff, *Franchise Relationship Laws: A Minefield for Franchising*, 1989, 45 *The Business Lawyer*, at p. 289.

38. *Inland Revenue Commissioners* v. *Muller and Co's Margarine Ltd*. (1901) AC 217 at p. 223.

39. *Id*. At p. 235.

40. (1989) 91 ALR 251.

41. *Id*. At pp 257-258.

42. *1997 Britannica Book of the Year*, Encyclopaedia Britannica Inc; Chicago 1997, pp 372 and 58.

43. ICAO DOC. P10 16/97 at p. 1.

44. ITA Press 284, 01-05 April 1997 at p. 10.

45. See Directors General of Civil Aviation Conference on a Global Strategy for Safety Oversight, Montreal, 10-12 November 1997 *DGCA/97*, Conclusions and Recommendations.

46. Convention on International Civil Aviation, signed at Chicago on 7 December 1944. See ICAO Doc 7300/6, Sixth Edition, 1980.

47. *Id*. Preamble at p. 1.

48. *Id*. Article 44 (a).

49. *ITA Press*, *supra*, note 43 at p. 10.