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### International Law – Chicago Convention Interpreted – Discriminatory Airport Charges to Foreign Airlines

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INTERNATIONAL LAW—CHICAGO CONVENTION  
INTERPRETED—DISCRIMINATORY AIRPORT  
CHARGES TO FOREIGN AIRLINES

The defendant, Dade County Port Authority, owns and operates Miami International Airport. The plaintiffs, ten Latin American airline corporations which have made substantial use of the airport facilities in international operations during recent years, sought recovery of alleged excessive charges for airport use, and injunctive relief, premised on Article 15 of the Convention on International Civil Aviation. The trial court decreed that the charges could be no higher to the plaintiffs than the lowest charges paid by American nationals, no matter what the classification. On appeal, *held*, reversed: the Convention on International Civil Aviation, providing that each public airport in contracting states was to be open under uniform conditions to aircraft of other contracting states, did not entitle foreign airlines to the benefit of lower charges fixed by contract to certain domestic airlines before the effective date of the treaty. *Board of County Comm'rs v. Aerolineas Peruanasa*, 307 F.2d 802 (5th Cir.), *cert. denied sub nom.*, 371 U.S. 961 (1962).

The Convention on International Civil Aviation,<sup>1</sup> the "Chicago Convention," became effective as a treaty<sup>2</sup> between the contracting states<sup>3</sup> on April 4, 1947 by ratification of more than the required number of nations, including the United States.<sup>4</sup> As a treaty, the Chicago Convention is binding on all courts, state and national, as the supreme law of the land.<sup>5</sup> Therefore, whenever its provisions prescribe a rule by which the rights of private citizens or subjects may be determined, and

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1. "International agreements assume various forms and are given various descriptive designations, such as treaties, conventions, . . ." 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 1 (1943). See generally SCHENKMAN, INTERNATIONAL CIVIL AVIATION ORGANIZATION 68-106 (1955). For historical aspects of the Convention, see Sand, Lyon & Pratt, *An Historical Survey of International Air Law Since 1944*, 7 MCGILL L. REV. 125 (1961).

2. "In the United States Constitution the term 'treaty' is applied to any international agreement, however denominated, which becomes binding upon the United States through ratification by the President with the advice and consent of the Senate, two thirds of the Senators present concurring therein." BISHOP, INTERNATIONAL LAW 86 (1962).

3. The nations of which plaintiffs are subjects are ratifying states. The plaintiffs are Aerovias Interamericanas de Panama, S.A. ("APA"), Aerolineas Peruanas, S.A. ("APSA"), Compania Ecuatoriana de Aviacion, S.A. ("CEA"), Empresa Guatemalteca de Aviacion, S.A. ("AVIATECA"), Empresa de Transportes Aerovia Brasil, S.A. ("REAL"), Guest Aerovias Mexico, S.A. ("GUEST"), Lloyd Aereo Colombiano ("LLOYD"), Rutas Aereas Nacionales, S.A. ("RANSA"), Transportes Aereos Nacionales, S.A. ("TAN"), and Lineas Aereas de Nicaragua, S.A. ("LANICA").

4. Convention on International Civil Aviation, 61 Stat. 1180 (1947) [hereinafter cited as Convention].

5. The United States Constitution expressly defines the status of treaties of the United States in the following provision:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S. CONST. art VI, § 2.

when those rights are of the nature to be enforced in a court of justice, the court resorts to the treaty as it would to a statute, for a rule of decision applicable to the case before it.<sup>6</sup> Article 15 of the Chicago Convention<sup>7</sup> provides that charges for the use of a domestic airport to the nationals of all other contracting states shall not be higher than those that would be paid by domestic aircraft engaged in similar international air services. Article 15, in stating this rule, provides for "national treatment,"<sup>8</sup> meaning that the nationals of one of the contracting states shall be treated in the territory of the other contracting state as if they were nationals of that state.<sup>9</sup>

The difficulty encountered in the instant case is inherent in the interpretation of the Article 15 phrase, "shall not be higher . . . than those that would be paid by its national aircraft . . .,"<sup>10</sup> because not one, but two separate schedules of charges were effective at the airport. One schedule was based on contracts<sup>11</sup> made at or near the time the airport opened for business in 1946, and the other on Resolution 56<sup>12</sup> of the

6. *Maiorano v. Baltimore & Ohio R.R.*, 213 U.S. 268 (1909), *affirming* 216 Pa. 402, 65 Atl. 1077 (1907); *United States v. Rauscher*, 119 U.S. 407 (1886); *Edey v. Robertson*, 112 U.S. 580 (1884).

7. Convention, *supra* note 4, at 1184 provides in Article 15:

Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher,

(a) As to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engaged in similar operations, and (b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services.

8. See Bayitch, *Conflict Law in United States Treaties*, 8 *MIAMI L.Q.* 501, 516 (1954).

9. See McNAIR, *THE LAW OF TREATIES* 273 (1961).

10. "When it is provided by treaty that certain acts shall not be done, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action . . ." *Commonwealth v. Hawes*, 76 Ky. (13 Bush) 697 (1878). See also Annot., 4 *A.L.R.* 1377, 1387 (1919). An interesting interpretation of the self-executing nature of Article 15 is developed by Rijks, *Airport Charges Under Judicial Review*, 9 *NETH. INT'L L. REV.* 50, 59 (1962). See generally 5 *HACKWORTH, DIGEST OF INTERNATIONAL LAW* 177-85 (1943); Henry, *When is a Treaty Self-Executing*, 27 *MICH. L. REV.* 776 (1929); Comment, 48 *MICH. L. REV.* 852 (1950).

11. Pan American Airlines, Inc., Eastern Airlines, Inc., National Airlines, Inc., Delta C & S Airlines, Inc., and TACA Airways Agency, Inc., a corporation of El Salvador, all accepted identical leases which provided in part, for similar schedules of landing charges. Rental for space used was on a square foot basis and was equal for all airlines including the plaintiffs. TACA Airways Agency, Inc. terminated Miami service on February 10, 1948.

12. The Airport Manager on March 18, 1946, publicly announced the opening of operations on March 23, 1946, for aircraft in domestic service only. Attached was a schedule of tariffs applicable to those airlines who would not commit themselves to the comprehensive long-term contracts. On September 24, 1946, the Authority, by its Resolution 56, issued a permanent schedule of tariffs applicable to all aircraft "except aircraft of lessees whose charges have been established by contract prior to the adoption of this Resolution." The resolution reduced the prior schedule of landing charges. However, under Resolution 56 and the prior schedule other airport charges are imposed which are not imposed on the aircraft of the contracting lessees. They are:

- (1) \$.50 per passenger terminal charge,
- (2) \$2.00 per ton cargo terminal charge,

Port Authority setting charges applicable to all aircraft except those of the "Big Four," the carriers who were parties to the contracts. The question arises whether foreign carriers invoking national treatment must accept local law as they find it, including discriminatory<sup>13</sup> provisions applicable to domestic carriers. "The other alternative would be to treat the foreign carriers as belonging to the most favored class of domestic carriers automatically, despite the fact that under local law they might not fit in this class."<sup>14</sup> There appears to be no previous judicial interpretation of Article 15 of the Chicago Convention, nor of Article 82.<sup>15</sup> Therefore, in construing the Convention, the court followed the rules of treaty interpretation promulgated by the United States Supreme Court.<sup>16</sup>

The court, in the instant case, in determining that the cause of the foreign air carriers must fail, rested its rationale on two grounds. First, Article 82 of the Convention<sup>17</sup> recognized the possibility of outstanding inconsistencies at the time the treaty would take effect and required the use of the best efforts by the contracting states to secure their elimination.<sup>18</sup> The court observed that there was nothing in the Convention which would deprive the contracting air carriers of the fruits of their bargain made "before" the treaty became effective, nor which would require the Port Authority to afford the same bargain to the foreign air carriers. Therefore, it reasoned, in applying Article 82 to the instant

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(3) 5% indirect surcharge on all aviation gasoline and oil, and

(4) 5% indirect surcharge on all meals to be served aloft, and purchased at the airport.

The judgment entered by the trial court for "excess airport charges" paid by plaintiffs and their suppliers since 1955 aggregated approximately \$748,800.

13. Article 44 of the Convention provides, as one of the duties of the International Civil Aviation Organization, that it operate to "avoid discrimination *between contracting States*." (Emphasis added.) Convention, *supra* note 4, at 1193.

14. Bayitch, *International Law*, 16 U. MIAMI L. REV. 240, 259 (1961).

15. See text accompanying note 17 *infra*.

16. *E.g.*, *Santovincenzo v. Egan*, 284 U.S. 30 (1931); *Asakura v. City of Seattle*, 265 U.S. 332 (1924); *Wright v. Henkel*, 190 U.S. 40 (1903); *United States v. Texas*, 162 U.S. 1 (1896); *Geofroy v. Riggs*, 133 U.S. 258 (1890). See RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES § 154 n.1 (Proposed Official Draft, 1962).

17. Convention, *supra* note 4, at 1203 provides in Article 82:

The contracting States accept this Convention as abrogating all obligations and understandings between them which are inconsistent with its terms, and undertake not to enter into any such obligations and understandings. A contracting State which, before becoming a member of the Organization has undertaken any obligations toward a non-contracting State or a national of a contracting State or of a non-contracting State inconsistent with the terms of this Convention, shall take immediate steps to procure its release from the obligations. If an airline of any contracting State has entered into any such inconsistent obligations, the State of which it is a national shall use its best efforts to secure their termination forthwith and shall in any event cause them to be terminated as soon as such action can lawfully be taken after the coming into force of this Convention.

18. The latter two provisions of Article 82, note 16 *supra*, refer to agreements between a state and a private national and between two private nationals. Although there is a dearth of law and writing in this area, a treaty by itself appears not to be self-executing in cutting off private rights arising under contracts. The two provisions are probably only persuasive as they do not specifically call for legislative action.

case, since the treaty was effective immediately except as to outstanding inconsistencies, Article 15 would not become completely effective until the termination of the outstanding contracts. Termination could be accomplished either by action on the part of the United States government or upon the expiration of the contracts under their terms. Since neither of these had transpired, the contracts remained in force.

Second, upon analyses of three decisions of the United States Supreme Court,<sup>19</sup> the court concluded that most-favored-nation clauses<sup>20</sup> were sometimes rendered inapplicable "in situations where exceptions are made for valuable consideration." A most-favored-nation clause in a provision of a treaty between two contracting states permits a national of one contracting state, within the territory of the other party, to be afforded the most favorable treatment in an agreed area of law granted by the other contracting state to nationals of third states with which it has made treaties, simply by invoking these third-nation treaties.<sup>21</sup> The court considered the logic of the cases "compelling" and their opinions "controlling" the instant case to the effect that most-favored-nation clauses were not intended to interfere with special arrangements based upon

19. A treaty between the United States and the king of the Hawaiian Islands provided for the importation of certain Hawaiian products into the United States duty free in exchange for duty free importation of certain United States products into the Islands. Plaintiffs, importers of sugar from a Danish possession, sought a refund of duties paid on sugar based on a favored nation provision in a treaty between United States and Denmark which stated: "no higher or other duties" shall be charged by the United States on the importation of a Danish product "than are or shall be payable on the like article being the product or manufacture of any other foreign country." Plaintiffs claimed to be entitled to the privileges conceded to the Hawaiian Islands. The Court determined that "the treaty with Denmark does not bind the United States to extend to that country, without compensation, privileges which they have conceded to the Hawaiian Islands in exchange for valuable concessions." *Bartram v. Robertson*, 122 U.S. 116, 121 (1887). The court held similarly in *Whitney v. Robertson*, 124 U.S. 190 (1888), and *Kelly v. Hedden*, 124 U.S. 196 (1888), which involved the same question as it related to duty on sugar from the Dominican Republic and a treaty with that country.

20. A most-favored-nation clause in a provision of a treaty between two contracting states makes the nationals of these states third party beneficiaries of other treaties made by each contracting state with third states. The third party beneficiary result obtains whenever the other treaties contain provisions covering the same privileges dealt with in the provision containing the most-favored-nation clause. See Bayitch, *Conflict Law in United States Treaties*, 8 *MIAMI L.Q.* 501, 519 (1954); 2 *HYDE, INTERNATIONAL LAW* § 536 (1947); 5 *HACKWORTH, DIGEST OF INTERNATIONAL LAW* § 501 (1943).

21. This is a general statement of most-favored-nation treatment which impliedly rejects the "view that each State must give some compensation in order that its nationals shall be entitled under the clause to the benefits of concessions made to other States." *McNAIR, op. cit. supra* note 9, at 275. However, the treaty between Denmark and the United States in the *Bartram* case differed, for it provided for conditional most-favored-nation treatment, which is explained in 2 *HACKWORTH, DIGEST OF INTERNATIONAL LAW* 57 (1941):

Favored-nation clauses in treaties . . . may be either . . . conditional or unconditional . . . . "Under the conditional clause, favors which either party to the treaty grant to a third country accrue to the other party to the treaty when the favor to the third country is granted freely, but do not accrue if the favor be granted for a consideration unless the other party to the treaty proffer an equivalent consideration: under the unconditional clause all favors granted by either party to third countries accrue to the other party irrespective of questions of consideration or equivalents."

sufficient consideration with other states. It reasoned that the cases considered together "teach that there may be exceptions to such clauses where based on valuable considerations."<sup>22</sup> The court deemed this consideration to be present in the instant case since the "Big Four" had contracted to share in the profits of the airport, and sustain it in losses for as long as the Port Authority desired. It thereby concluded that the foreign carriers could not invoke rights on a most-favored-nation basis as long as the contracts continued.

It would appear that since the court found Article 82 applicable, it could only have done so by determining that the contracts were agreements inconsistent with the Convention. But to so determine, it should be necessary to show where and in what way the contracts conflicted with the Convention. The point of incidence of the contracts with the Convention is at Article 15, which provides for national treatment with respect to landing charges. The court, however, seems to have placed the cart before the horse by applying Article 82 first; then, reasoning that "having taken this view of the case, we do not reach the question of . . . landing fees . . .,"<sup>23</sup> it failed to show the requisite inconsistency.

The second ground for reversal appears to be burdened with some misunderstandings by the appellate tribunal. Article 15 provides national treatment (not most-favored-nation treatment) for any national of a contracting state within the territory of the United States. This treatment, in effect, annuls his "alien" status and places him "in the shoes" of a United States national.<sup>24</sup> The trial court in interpreting Article 15 seems not to have placed any of the foreign carriers in the shoes of a United States national. If it had, it would have been faced with fitting the foreign carriers into one of two classes then in existence at the airport and recognized under local law with respect to United States nationals.<sup>25</sup> National treatment does not require slipping a treaty alien into the most favorable class existing under local law. In so doing local law would be rewritten. It would permit a treaty alien to receive the most favorable treatment granted to a national, *i.e.*, greater rights than United States nationals, who must qualify to fall into either class under local laws.<sup>26</sup> The trial court effectively granted admittance to the most favorable class by enjoining the airport from assessing the foreign carriers any charges greater than would be charged had they entered identical contracts,<sup>27</sup>

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22. Board of County Comm'rs v. Aerolineas Peruanasa, 307 F.2d 802, 808 (5th Cir. 1962).

23. *Ibid.*

24. Bayitch, *supra* note 20.

25. One class was a closed class made up of four sustaining domestic carriers under lease contracts, while the other was open to all carriers not under contract but paying uniform charges under Resolution 56.

26. In June, 1955, Braniff International Airway, Inc., a United States airline flying internationally, sought exemption from the provisions of Resolution 56. Its petition to the Port Authority was denied.

27. Aerovias Interam. De Panama v. Board of County Comm'rs, 197 F. Supp. 230, 255 (S.D. Fla. 1961).

and it thereby created a fictitious treatment, which could be termed "most favored national treatment."

The appellate court appears to have searched for some exception to "most favored *national* treatment" and found case law permitting exceptions to most-favored-*nation* treatment. One is hard pressed to find the juncture of most-favored-nation law with the instant case. Neither Article 15 nor any provision of the Convention contain a most-favored-nation clause in its technical sense.<sup>28</sup> Going further, a treaty alien must invoke a third-nation treaty to avail himself of most-favored-nation treatment; the contracts between the "Big Four" and the Port Authority, although providing the "consideration" for the court's *ratio decidendi*, cannot be invoked as if they were a third-nation treaty between sovereign states. Lastly, conditional-most-favored-nation treatment, which permitted exceptions to most-favored-nation treatment when valuable consideration was exchanged<sup>29</sup> in the third-nation treaty invoked, has been abandoned.<sup>30</sup> In contrast, unconditional-most-favored-nation treatment appears to have been the United States policy since 1923.<sup>31</sup>

The result reached in the instant case appears to be sound. The rationale supporting the decision, however, seems to depart markedly from the real issue: whether foreign carriers invoking national treatment must accept local law as they find it, including discriminatory provisions applicable to domestic carriers. It is unfortunate that this issue involving the interpretation of Article 15 was side-stepped and that certain fundamental concepts of international law appear to have been misunderstood. In aviation law, where there are so many international conventions and treaties, it would be indeed desirable if a means of acquiring a uniform interpretation of these agreements were available.<sup>32</sup>

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28. The first draft of Article 15 contained a most-favored-nation clause which appears to have been replaced by the present clause in order to insure a more direct application of the provision. 2 PROCEEDINGS OF THE INTERNATIONAL CIVIL AVIATION CONFERENCE 1383 (1947).

29. Note that it is very difficult to determine the amount and nature of a consideration given in an original treaty in view of the fact that such treaties generally do not contain just one but a number of mutually interconnected privileges. Bayitch, *supra* note 20, at 520.

30. "[T]he doctrine of the conditional most-favored-nation clause was abandoned altogether, starting with the treaty with Gernay (1923) as to commercial matters . . . ." *Ibid.* See 2 HACKWORTH, *op. cit. supra* note 21, at 57.

31. "In 1923 the United States embarked upon a new treaty-making policy by embodying in its treaties subsequently concluded the unconditional most-favored-nation provisions." 2 HACKWORTH, *op. cit. supra* note 21, at 57.

32. "When dealing with the subject of uniform interpretation of *private* air law conventions, H. Drion has drawn attention to the possibility of requesting advisory opinions from the International Court of Justice, to which the International Civil Aviation Organization—as a specialized agency of the United Nations—is entitled. No doubt this possibility also exists with respect to *public* air law conventions like the Chicago Convention . . . ." Rijks, *supra* note 10, at 61. See Drion, *Towards a Uniform Interpretation of the Private Air Law Conventions*, 19 J. AIR L. & COM. 423 (1952). Note, however,