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INTERNATIONAL AIRLINE CODE-SHARING

by

Senarath Devapriya Liyanage
Attorney-At-Law and State Counsel, Sri Lanka
Solicitor, England and Wales

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements of the degree of Master of Laws (LL.M.)

The Institute of Air and Space Law
McGill University
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ABSTRACT

Code-sharing agreements between international airlines are designed to address passenger preferences, structural impediments, and in some situations, bilateral restrictions, through a cost efficient system of operations.

In most instances, code-sharing operations divert traffic from other carriers rather than stimulating and generating new traffic. If the parties were direct competitors prior to code sharing operations, the resulting harm on competition will undoubtedly negate the benefits which may accrue towards passengers.

However, the main concerns, from the passenger's viewpoint, are that of disclosure of the operating carrier and the certainty of the applicable liability regime. Furthermore, the passenger must receive clear details of the joint product without being deprived of information concerning other available options.

The growing use of international code-sharing has resulted in airlines searching for potential partners without proper evaluation of the consequences. Similarly, regulators face the daunting task of defining, articulating and enforcing a clear, consistent policy on the matter.

This paper will initially examine the nature of code-sharing, its perceived benefits and thereafter discuss the prevailing regulatory regimes. Subsequently, a detailed discussion on the probable legal implications will be undertaken and finally concerns of the airlines will be addressed in order to identify essential elements which should be dealt with by the agreement.

RESUMÉ

Les ententes de code-sharing entre les lignes aériennes internationales sont conçues afin de répondre, par un système efficace du point de vue économique, aux attentes des passagers, aux contraintes structurelles et, dans certaines situations, aux restrictions bilatérales.

Dans la plupart des cas, les opérations de code-sharing ne font que détourner le trafic des autres transporteurs plutôt que de stimuler et de générer du trafic additionnel. Si les parties se voulaient des concurrents directs avant les opérations de code-sharing, le tort qui en résultera sur la concurrence annulera sans aucun doute les avantages dont pourraient bénéficier les passagers.

Cependant, les principales préoccupations, du point de vue du passager, portent sur la divulgation du transporteur effectif ainsi que sur la certitude du régime de responsabilité applicable. Le passager devrait recevoir davantage de détails précis quant au produit conjoint sans se voir privé de l'information concernant les autres options disponibles.

L'usage toujours croissant du code-sharing international a fait en sorte que les lignes aériennes ont recherché des partenaires potentiels sans pour autant faire une évaluation appropriée des conséquences. D'une façon similaire, les autorités réglementaires font face à la tâche contraignante de définir, articuler et mettre en oeuvre une politique claire et cohérente sur le sujet.

La présente thèse examinera tout d'abord la nature du code-sharing ainsi que ses avantages perçus et, par la suite, discutera des principaux régimes réglementaires. Subséquemment, elle entreprendra une discussion détaillée des implications légales probables et, finalement, les préoccupations des lignes aériennes seront analysées dans le but d'identifier les points importants devant être traités dans les ententes.

ACKNOWLEDGEMENTS

It is impossible to faithfully and comprehensively acknowledge all the assistance that I received during my research. The dearth of legal publications compelled me to constantly bother some, who, in spite of my repeated requests, were kind enough to provide me with materials and information on the elusive and highly-confidential practice of code-sharing. Therefore, it would be rather presumptuous to attempt to list all to whom I am intellectually indebted.

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This leaves the people in my life who had to face the brunt of the whole episode. My wife Lakshmi, and daughter Vindhya, from whom I had to separate initially due to my studies here, and who were thereafter neglected because of my preoccupation with studies and work. Let me express my indebtedness for having tolerated me (or was it *vis-à-vis*?); and for their patient suffering, loving care and concern; and for the tedious task of typing done by my wife without which this exercise would not have been accomplished in this manner.

Last and not at the least, my deepest appreciation and tribute is to my mother and to the loving memory of my father, for all their efforts to inculcate the value of learning and the relentless support, guidance and prayers of my mother.

Thank you all!

Senarath D. Liyanage

Montreal, Canada.

March 1996.

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This thesis is dedicated
to the most important people
in my life
whose unselfish support, encouragement,
and guidance
have helped me to come this far.

My Parents
&
Professor Dr. Michael Milde

If I have, by this exercise, lived up to your expectations,
that would be my greatest achievement.

INTRODUCTION

One of the most talked about topics at present in the sphere of commercial air transport is undoubtedly about airline "code-sharing". Many fact-finding studies have been produced, some with the primary objective of ascertaining the effect of code-sharing on the profitability of airlines; and some concerning the protection of the consumer in such agreements.

In an extensive study undertaken on behalf of the US Department of Transport (DOT), a detailed assessment was done regarding the impact of code-sharing on the market share; cost and profitability of airlines; and its effects on the consumer.[1] This study, established with an objective to project the future use and impact of code-sharing over the period 1994-2014, recommended a methodology developed by them to assess the effects of code-sharing on the level and distribution of traffic amongst carriers. This methodology would enable the DOT to measure the effect of, existing as well as prospective code-sharing agreements, on airlines and consumers. A separate study undertaken by the US General Accounting Office (GAO), which was presented to the US Congress, considered the inadequacies of the GRA Study.[2]

In Europe, the first detailed study on code-sharing was undertaken by the Federal German Transport Ministry through a quasi-independent research institute (DLR) which published its report in July 1995.[3] The aim of the study was to analyze code-sharing from a transport policy viewpoint. The DLR Study calls for a Europe-wide legislation in order to ensure that the consumers are well-informed of the code-shared flights and

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[1] "A Study of International Airline Code-Sharing" (Washington, DC: Gellman Research Associates Inc., December 1994) [hereinafter *GRA Study*].

[2] "International Aviation Airline Alliances Produce Benefits, But Effects on Competition Uncertain", GAO/RCED-95-99, (Washington, DC: United States General Accounting Office, April 1995) [hereinafter *GAO Study*].

[3] This study was done by the Transport Group of the German Aerospace Research Establishment - Deutsche Forschungsanstalt fur Luft-und Raumfahrt eV (DLR); S. Beyhoff, H. Ehmers & R.D Wilken "Code Sharing in the International Air Transport of The Federal Republic of Germany" DLR-Forschungsbericht 95-23, (Bonn: DLR, July 1995) [hereinafter *DLR Study*].

suggests that it should be harmonized with US regulations in respect of disclosure. Following this report, which is considered to be more critical than the studies published in the United States, the European Civil Aviation Conference (ECAC) established a task force to study code-sharing and report on the consumer protection issues relating to the practice. Draft recommendations of this task force are presently under review by the ECAC.[4]

Though the European Commission (EC) has been contemplating undertaking a similar study of its own for quite some time, the EC postponed it until they had the opportunity to study the outcome of the studies which were already in progress. The EC, finding that these studies had not considered the competition aspects in-depth, called for a detailed study to be done with special emphasis on competition.[5] This study has been entrusted to a UK-based team of consultants, whose report is expected by May 1996.[6]

At the Fourth "World-Wide" Air Transport Conference convened by the International Civil Aviation Organization (ICAO) in November 1994, the conference recommended that ICAO study the implications of "air carrier code-sharing agreements for international air transport regulation" and that it should "develop recommendations for the consideration of the member states".[7]

The practice of code-sharing has now gained so much popularity within an industry constrained by operational and ownership limitations that it is often mooted as the stepping stone towards achieving total liberalization of international air transportation and globalization of the aviation industry.[8]

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[4] Draft recommendations are reproduced in Annex 4.

[5] M. Odell, "Germans Win Out on Codes" [August 1995] Airline Business 8.

[6] See ECAC, "Report from the Task Force on Code-Sharing", DGCA/95-DP/5 (29 November 1995) at 4.

[7] ICAO Doc. AT-Conf 4-WP/104 (1994) at 4:4.

[8] See generally E. Chiavarelli, "Code-Sharing: An Approach to the Open Skies Concept?" (1995) XX:I Ann. Air & Sp. L. 195.

In almost all strategic alliances between international airlines prevalent today, the dominant and common feature is code-sharing.[9] One commentator considers that, in spite of the call for banning by the consumer groups and airlines which oppose it, code-sharing has become an integral part of international aviation relationships and as such it is "here to stay".[10]

At the Fifty-first Annual General Meeting of the International Air Transport Association held in October 1995, the member airlines unanimously approved and adopted an "inter-carrier agreement on passenger liability" by which they agreed to take steps to waive limitation of liability in claims of death, wounding, or other bodily injury, subject to the condition that recoverable compensatory damages would be determined by referring to the law of the domicile of the passenger; and to waive the defence available under the Warsaw Convention up to specified monetary amounts as the circumstances would warrant.

The degree of liberty given to the airlines in order to act on the above resolution and develop flexible terms suitable to itself and their respective governments, will create a magnitude of different conditions of carriage and tariffs. One legal scholar questions this proposed action in the light of code-sharing, where it could be possible that the partners have not adopted similar terms,[11] resulting in a situation where passengers would seek to avail special contract terms to which they are not contractually entitled.

At this juncture, a careful consideration of the probable implications of this practice is of utmost importance, equally to the regulators who have a daunting task of weighing the pros and cons of the practice prior to giving their approval, and to the

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[9] J.M. Feldman, "Alliances - Are We Making Money Yet?" [October 1995] Air Transport World 25. Yet, the possibility of having extensively co-operative agreements without code-sharing exist. In July 1993, Continental and Air France announced an extensive marketing agreement which did not include code-sharing. However, both carriers failed to fully implement their arrangement. See *GRA Study*, *supra* note 1 at 8.

[10] H. Shenton, "Code Sharing - Is Airlines Gain Consumers Loss?" [October 1994] Avmark Aviation Economist 13 [hereinafter Shenton, "Airlines Gain"]; F. Sorensen, "Code Sharing: The Issues", Paper (presented to the Symposium on Code Sharing of the European Aviation Club, Brussels, October 1994).

[11] M. Milde, "Warsaw Requiem or Unfinished Symphony", manuscript (31 January 1996) [unpublished] at 10.

industry itself which hitherto has resorted to code-sharing, apparently without due consideration to its legal implications.

CHAPTER ONE

PRACTICE OF CODE-SHARING

1:1 Scope of the Study

In a recent survey done by Airline Business Magazine on airline alliances, over 320 airline alliances were reported, and a majority of the agreements included sharing of the designator code on flights.[12] A previous survey by the same magazine in July 1994 found 280 different airline alliances involving 136 airlines and there too, most involved code-sharing.

Even though code-sharing is so widely practised, such agreements, which are primarily marketing strategies, contain information of a sensitive nature and are kept confidential because such information would undoubtedly be of interest to their competitors. The nature of code-sharing agreements being such, access to code-sharing agreements is very restricted, if not denied. This thesis would be mainly focus on the international practice but, in instances where information is not available regarding international operations, resort has been made to illustrate the practice as followed in domestic code-sharing within the US due to easy accessability to such information. The discussion will not encompass the transport of cargo on code-shared flights, and is also limited by the fact that implications of charter carriage and the legal position under Civil Law will not be discussed.

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[12] [June 1995] 27. This compilation has been reproduced as Annex One.

1:2 Definition of a Code-Sharing Agreement

Several definitions of the practice of code-sharing exist, but there is no universally accepted or applicable definition. Basically, code-sharing is the identification of a flight operated by a particular airline with the designator code(s)[13] of another airline(s) even though the latter does not operate the flight themselves. By doing so, two or more airlines could, each under its own[14] (or combined) designator code(s) and/or flight number, market seats on the same flight. The agreement between airlines in this respect is called a "dual designator" agreement or, more frequently, a "code-sharing" agreement.[15]

Legal scholars have defined code-sharing in many different ways.[16] The main trade association in the aviation industry, IATA, initially followed its Passenger Services Conference Resolution 766, paragraph 1, which states,

> "Shared Airline Designator (code-sharing)" means a designator used when an airline holds out, by means of an airline designator code published in

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[13] Each airline has been allocated an unique designator code comprising of two letters of the English alphabet. This assignment is done by the International Air Transport Association [hereinafter IATA] in accordance with its Resolution 762 for non-US-based airlines, and by the Air Transport Association of America [hereinafter ATA] for US based airlines. See IATA, PSC(14)762, reproduced in Airline Coding Directory, 34th ed., effective 1 April 1994, published by IATA.

[14] Though designator codes were initially allocated in an exclusive basis to each airline, due to the increased number of airlines in existence which led to the depletion of assignable codes, IATA Resolution 762 allowed "controlled duplication" where the same code was assigned to more than one airline. Yet, in practice, the same designator code was not assigned to airlines which operate in common markets so as to retain the exclusiveness.

[15] The term "code sharing" is a misnomer, as it is not the code which is shared but rather the capacity of the aircraft in a particular flight. J.C.E de Groot "Code Sharing-US policies and Lessons for Europe" (1994) XIX:2 Air & Sp. L. 62 at 63; see also GRA Study, *supra* note 1 at 7.

[16] "Code sharing means that an air carrier, by agreement uses its two letter designator code on flights operated by another carrier". de Groot, *supra* note 15 at 62; "Code Sharing is based on a contract between air carriers, enabling one of them ... to extend its scheduled international air services *as published under its own code and line numbers and operated by itself,* to a point or points not served by it and situated beyond a point, which it serves with own services, by including in the publication of its network, connecting services of another carrier or of air carriers, [...] *as a service of its own,* to such beyond points". See H.A. Wassenbergh, *Principles and Practice in Air Transport Regulation* (Paris: Institut Du Transport Aerien, 1993) at 165.

> industry accepted methods such as printed airline guides and/or SCIP/SSIM transmittals, that it is providing transportation and such transportation is provided by another carrier.[17]

US courts have summarized code-sharing to mean "scheduled airline passenger service between cities, all or part of which is operated by one airline but which is identified with the airline designator code of another airline".[18] The US Department of Transport gives a more technical definition by stating that code-sharing is

> a common airline industry practice where, by mutual agreement between co-operating carriers, at least one of the airline designator codes used on the flight is different from that of the airline operating the flight.[19]

The DLR Study adopted a definition which they anticipated would be applicable across the whole spectrum of different code-sharing agreements. The English translation reads,

> Code-sharing is a co-operation agreement between two or more air carriers, by which at least one of the carriers sells the seats of another carriers flight partly or wholly under its own name and its own IATA code.[20]

The use of the designator code on flights operated by the other partners could be in either a mutual/reciprocal manner or a selective or even unilateral manner.

Code-sharing agreements by airlines are invariably confidential and set out in detail the manner in which the dual designated flights are to be operated and the contractual obligations of each party. They outline the intrinsic details of co-operation between the "operating partner" and the "code-sharing partners", including the extent of

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[17] IATA, Res. PSC1(10)766, effective 1 April 1989. At present, IATA Passenger Services Conference Resolution PSC(16)766 states that "Code sharing exists when: (a) one carrier operates a flight on behalf of another, using that carrier's airline designator in the flight number; (b) two or more carriers jointly operate a flight under one or more airline designators."

[18] See *US* v. *USAir Group* Cir. A No. 93,0530 - 1993 WL 523459 (DDC).

[19] Shenton, "Airlines Gain", *supra* note 10.

[20] DLR Study Report Summary, (submitted for the ECAC Task Force on Code-Sharing, Paris, 11-12 May 1995) at 3; *DLR Study*, *supra* note 3 at 97.

agreements in joint marketing, reservations, lease of facilities and equipment, financial management etc.[21]

Since code-sharing arrangements are an integral part of a comprehensive alliance between major international carriers, one cannot adequately evaluate the full impact and implications of the code-sharing arrangement without reviewing the other aspects of the overall relationship between the partners.

[21] Code-sharing has been described as "little more than a glorified interline agreement". See M.F. Goldman, "Coded Warnings" [January 1995] Airline Business 26. It is sometimes correctly called interlining under the airlines own code. See de Groot, *supra* note 15. A copy of a code-sharing agreement in conjunction with a blocked space arrangement is reproduced in Annex Five. Clauses to which confidentiality treatment was sought by the partners have been redacted.

1:3 Initial Occurrence and Subsequent Usage of Code-Sharing

The practice of code-sharing initially occurred in 1967, within US domestic air transport, when the "Allegheny Commuter System" created by Allegheny Airlines (the predecessor to USAir) to feed traffic into Allegheny Hubs, carried the same designator code as Allegheny Airlines.

At this point in time, the Civil Aeronautics Board (CAB) had the statutory duty of regulating the US aviation industry including subsidising thin routes to smaller communities. The regulations in force did not facilitate a carrier to withdraw from such routes at will. Allegheny Airlines, which was re-fleeting and transforming itself from a local service to a major international airline, wanted to shed these thin routes, mainly because servicing them with its large jets was not commercially viable, but was prevented from doing so due to the rigid regulatory regime in force.[22]

Due to this dilemma, Allegheny came up with a proposal, to which the CAB was agreeable, to create a series of marketing and operational alliances with smaller independent commuter carriers, [branded as "Allegheny Commuters"] to serve these thin routes instead. This was a concept similar to a Franchise Operation. Arrangements were made to ensure that the service offered by the Allegheny Commuters would resemble as closely as possible that offered by Allegheny. The commuter planes were painted in Allegheny colours, the crew wore Allegheny uniforms, the flights used Allegheny gates and terminals. Thus, the commuter airlines lost their individual identity and from a passenger viewpoint became indistinguishable from Allegheny. Further, to some extent Allegheny became a surrogate licensing authority, deciding which of its partners would operate which route as well as setting the marketing and operational standards.

The most innovative component of this concept was the use of the same designator code [AL] assigned to Allegheny, by the commuters instead of their own in the routes

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[22] H. Myers, "Code Sharing - What Are the Primary Causes Creating this Widely Used Practice?" [June 1986] Commuter Air 48; see also B.K. Humphreys, "Implications of International Code Sharing" (1994) I:4 Journal Air Transport Management 195 at 196 [hereinafter Humphreys, "Code Sharing"]; M.S. Roberts, "Code Sharing" [Summer 1994] Transport. Prac. J. 466.

so operated. It appears that this co-use of the same designator code was done in order to enable through fares & ticketing and establish recognition with the travel agents and the passengers.[23] Therefore it is clear that the original incentive for code-sharing was to overcome the rigid regulatory system,[24] while maintaining the identity of the airline and also inspiring consumer confidence in the commuter system.

Though the Allegheny Commuter concept was successful,[25] it was not initially imitated on a large scale.[26] For many years, the practice remained restricted to the Allegheny Commuter Network.[27]

Two developments in the world of aviation changed this and propelled code-sharing from being a marginal innovation to a major marketing initiative which now has wide-ranging implications.

1:3:1 Hub-and-Spoke Route Structures

The first was the development of "hub-and-spoke" route structures in the US after deregulation, at which point the importance of feeder traffic was particularly felt. Carriers without large domestic networks consisting of strategically located hubs were not in a position to operate commuter-type services to feed its flights, and thus were compelled to seek an alternate means of doing so.[28]

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[23] Humphreys, *ibid.*

[24] Myres, *supra* note 22.

[25] By 1979, there were ten airlines in the Allegheny Commuter network serving approximately forty US cities. In total they carried 2.4 million passengers, of whom 34% connected with USAir (Allegheny) flights. Humphreys, *supra* note 22 at 196; see also [January 1981] Air Transport World.

[26] A few years later in the UK, British Caledonian launched its BCal Commuter network on a limited scale to counter the BA's dominance at London Heathrow Airport. Humphreys, *supra* note 22 at 196.

[27] J.M. Feldman, "US Inconsistencies Cloud International Code Sharing" [April 1988] Air Transport World 20 at 22 [hereinafter Feldman, "Inconsistencies"]. Though sharing of designator codes was done by Allegheny for a long time in respect of the US regional airline industry, Delta and Eastern must be credited for springing the shared designator concept to the airline world. D. Massey, "SDD Concept First Flew in Atlanta" [May 1986] Commuter Air 28 at 29.

[28] R. Mark, "CRSs Open a Wealth of Opportunity" [May 1986] Commuter Air 37.

Hub operations reduce costs and increase load factors due to economies of scope and density associated with this practice. Economies of scope occur because an existing airline can expand and serve new routes at a lower cost than a new airline. Economies of density occur because it is less expensive to increase service on an existing schedule of operations than a new airline to provide the additional flights.

1:3:2 Computer Reservation Systems

The second development was the rapid and extensive use of Computer Reservations Systems (CRS) in airline marketing. CRS are considered as a marketing tool of considerable power, especially since most of the major US airlines had developed CRS of their own. Of critical importance was ensuring that the flights offered were displayed as closely as possible to the top of the first screen, since surveys showed that 80% of all bookings made were from the first six lines of information and no less than 50% from the first line itself.[29]

Both these developments kindled renewed interest in code-sharing through which the air carriers were able to achieve their objectives.

1:3:3 Differences in Domestic and International Practice

In international aviation, establishment of an efficient hub would normally be restricted to an airport in the home country of the airline. Furthermore, with code-sharing, economies of scope would occur because serving new markets does not require a proportional increase in inputs[30] due to the use of shared facilities. Economies of density would occur due to increased feed traffic, which would in turn allow the airline to upgrade to larger, more economical aircraft.

However, in analyzing the growth of international code-sharing agreements, the establishment of hubs and the impact of CRS cannot be considered as the main inducing

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[29] Humphreys, "Code Sharing", *supra* note 22 at 197.

[30] See generally *GRA Study*, *supra* note 1 at 55.

factors since additional issues are apparent and need careful consideration.[31] Whereas almost all US domestic code-sharing took place in a deregulated environment, international code-sharing is taking place in a highly-regulated environment. Since such services are provided within the constrains of bilateral air service agreements, and due to inconsistent approaches adopted by states in regulating them, such agreements must be viewed in the context of a complex practice. The main factors are:

(i) market access granted to each participating carrier;

(ii) the route network of each participating carrier; and

(iii) the extent to which each carrier is co-operating with each other.

Another difference is that in domestic code-sharing, the commuter partner does not directly compete with the major airline with whom it code-shares. In international code-sharing, the partners are even compelled by antitrust laws and regulations to compete with each other.

Early international code-sharing agreements tended to involve individual routes. However, the most recent trend has been towards agreements which involve total route systems.[32] In this respect it must be noted that a higher degree of potential is achieved when the route networks of the participating carriers are complementary rather than overlapping.[33]

Such broad alliances incorporating code-sharing has taken air transport to hitherto unknown practices, an example being "third country code-sharing" - which occurs when air carriers from different countries team up to offer air services to a third country due to the establishment of global alliances between them.[34] Therefore, to best identify the

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[31] "It is reasonable to conclude that CRS advantage has not been a significant factor in the overall growth of International code sharing". Humphreys, "Code Sharing", *supra* note 22 at 201.

[32] For example the extensive co-operative agreement between KLM and Northwest.

[33] P.P.C. Hannappel, "Cooperation and Strategic Alliances in the Airline Industry" - lecture to the European Air Law Association, Amsterdam, 4 November 1994 [hereinafter Hannappel, "Lecture"].

[34] In recent times, regulatory authorities in many European, Middle Eastern and African countries have balked at allowing such practices. One such instance is the position taken by Finland in respect of the proposed code-sharing flights between US and Helsinki by Northwest with KLM for the Helsinki - Amsterdam sector. Though this route is allowed under the 1980 US - Finland Aviation Agreement, Finland

extent to which code-sharing has been used in international air transport, it is prudent to discuss at the outset, types of code-sharing prevalent today, during which the extent of its use will be evident.

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objected on the basis that the agreement does not expressly allow to do so via the "relatively new phenomena of code sharing". See B. Poling;" Global Airline Alliances Put Code Sharing Policies to Test"; *Travel Weekly* (7 February 1994) at 10.

1:4 Types of Code-Sharing Agreements

Though code-sharing was a common feature in US domestic air transport during the last two decades, it is a relatively new phenomenon in international air transport. US domestic code-sharing occurs primarily between a major airline and its commuter partners. In most of these instances, the commuter partner would not be holding out the service in his name. Therefore, the codes on the passenger tickets would solely be the designator code of the major airline on whose behalf the commuter carrier operates the flight. There are many instances where the commuter has code-sharing agreements with a number of major airlines. In these cases, the flight operated by the commuter will be simultaneously displayed under the designator codes of all such partners. In certain instances, the commuter might also hold out the service under his own designator code.

However, in international airline code-sharing, the majority of the code-sharing airlines would be inclined to use their designator code as much as possible. The nature of a code-sharing agreement could range from a basic code-sharing agreement, which merely involves use of the airline designator code on a flight operated by another airline, to an extensively co-operative airline alliance.

Based on the nature of the route operated, the international code-sharing practice could be further classified into categories. Difficulties arise when one has to consider the traffic rights needed to offer such flights for sale because some countries classify traffic movements by "true origin and destination", whereas others do it by "flight sector origin and destination".[35] However, in the following **theoretical classification**, the consideration is the true origin and destination under the same flight number. Given the marketing ingenuity related to air transport, there will undoubtedly be many other variations. Therefore, based on the route structure, the classification would be:

(1) Code-sharing on direct sectors between points in the home countries of its participating carriers

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[35] For an explanation of the difference between the two approaches see ICAO, *Manual on Regulation of International Air Transport*, Part 4:1, ICAO Doc. 9626 [hereinafter *Manual*] at 10-11.

(2) Code-sharing on direct sectors between points in the home countries of participating carriers, which continue on a domestic sector in one or more participating carriers' home country

(3) Code-sharing on a route or a sector between points in countries of the participating carriers, via intermediate point/s in a third country/s

(4) Code-sharing on a route or a sector via points in the countries of the participating carriers, which extend to beyond point/s in third country/s

(5) Code-sharing on routes or a sector which doesn't include a point in the country/s of a participating carrier/s

(6) Code-sharing on a route or a sector which does not include any point in any of the countries of the participating carriers

(7) Variations of any type mentioned above
e.g., above (2) where code-sharing is only on the domestic sector

(8) Combinations of any two or more types mentioned above
e.g., above (3) with a domestic sector

In addition to the variations and combinations envisaged in (7) and (8) above, the manner of operation will create further variations. For instance, code-shared sectors could be restricted to a portion of a flight or to one direction; the operating carrier could change during the same flight, and thus the code-sharing carrier would alternate; the same flight could serve as a code-shared flight for different participating carriers, that too in different sectors;[36] and additional flight options would be offered using double connections.[37] Further variations are possible with practices such as funnel flights and star burst flights. A funnel flight involves a series of flights, each with its own separate flight number, which converge on a hub and then continues as a single flight with several flight numbers. A star burst flight is the reverse of this concept, when the flight number of a single flight is continued simultaneously on several independent flights.

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[36] See generally Shenton, "Airlines Gain", *supra* note 10.

[37] For a discussion on double connect flight options see *GRA Study*, *supra* note 1 at 10.

Furthermore, the above-mentioned types of code-sharing will take different forms depending on the nature of the agreement between the participating carriers as to the marketing of the flight. Therefore it could be:

(1) Code-sharing with free sale of inventory

(2) Code-sharing with blocked space

(3) Code-sharing in joint ventures

(4) Code-sharing with wet lease

(5) Code-sharing in franchise operations

1:4:1 Code-Sharing with Free Sale of Inventory

In such agreements, the flight will carry the designation codes of all participating carriers, but with no firm allocation of seats to the code-sharing partners. The code-sharing partners do not run the risk in respect of the unsold tickets as they all sell under the same inventory, but under its individual codes. In certain instances, the code-sharing partners receive a commission similar to a sales agent commission rate from the operating partner, in respect of the seats sold by each of them.

1:4:2 Code-Sharing with Blocked Space

Here the operating partner has complete operational control of the flight, but would share the seat inventory with the code-sharing partners according to a pre-arranged procedure.[38] The code-sharing partners in turn run the financial risk for any unsold tickets from his block. Each party sells tickets under its own tariff.

1:4:3 Code-Sharing in Joint Venture Operations

Here the code-sharing partners share operations of the aircraft. An example would be an agreement where one partner would provide an aircraft which will be flown between two countries via an intermediate point at which the crew of the other partner

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[38] This could include the amount of seats allocated in each class, and also provisions to swap unsold seats closer to the date of departure. A copy of a code-sharing agreement in conjunction with blocked space is reproduced in Annex 5.

will take over the operation of the flight to its final destination. Normally both carriers will have inventory for the whole flight, operational control and the revenues will be shared in pre-arranged manner.

1:4:4 Code-Sharing with Wet Leasing

In this case the operating partner uses an aircraft obtained on a wet-lease (aircraft with crew) from its partner for the code-shared services. Such arrangements are often seen in US domestic code-sharing where the major airline uses the equipment and crew of the regional commuter carrier to perform the services under its code. The economic risk is shouldered by the major airline who pays the commuter carrier a fixed leasing fee.

1:4:5 Code-Sharing under Franchise Operations

This type differs from wet-lease operations because the economic risk is borne by the franchisee. The franchisee is granted the right to operate under the corporate identity of the franchiser. The marketing of the flight is done by franchiser who also controls the standard of the quality of services offered by the franchisee. The franchisee doesn't appear in the market as an independent seller.

1:4:6 Blocked Space Agreements

Blocked space agreements, which is a parallel concept to code-sharing, is used as a method of gaining access to new markets without incurring the expense of establishing its own operations. Due to the similarity and the concurrent use of code-sharing and blocked space, one must be mindful of the difference in nature between the two. The difference, according to de Groot, is that the block space arrangements are physical in nature, whereas code-sharing is a marketing agreement along the lines of interlining.[39] In such agreements, an airline would purchase a determined number of seats from the other for the carriage of its own traffic and often with an option to add to its requirements if there is increased demand. The seats are traded close to the

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[39] de Groot, *supra* note 15 at 63.

departure date according a pre-arranged procedure. This type of agreement is widely used on thin routes which do not generate sufficient traffic to support more than one airline.

The nature of the code-sharing practice would differ according to the extent of co-operation between the partners. A very basic code-sharing agreement would simply involve the assignment of an additional designator code(s) in respect of a flight operated by another carrier without any further co-operation. Since there are no supplementary actions by either party to co-ordinate the service, this is commonly called a "naked" code-sharing agreement and is no different in practice from a connecting interline service.[40] Such agreements are reached because of the perceived marketing advantages of an on-line service option over an interline service option.[41]

A more complex code-sharing agreement would have the attributes of a seamless service[42] where there would be through ticketing, flight schedule co-ordination to minimize transit time, single check-in, through baggage handling, proximate gates at terminals, interchange of Frequent Flyer Programs, common passenger service standards, joint marketing, shared personnel, joint maintenance and servicing, etc. These added services make a code-shared flight more attractive than an interline travel option because the code-shared flight carries the notion of more convenient service.

International code-sharing arrangements could also be classified according to the type of traffic it carries. When the code-sharing flight is operated between the home countries of the participating carriers, the traffic carried is the Third and Fourth Freedom traffic of those carriers and thus could be categorized as Third and Fourth Freedom code-sharing. In code-sharing flights which involve third countries, the participating carriers would carry Fifth Freedom traffic in addition to their respective Third and Fourth

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[40] See *GRA Study*, *supra* note 1 at 7.

[41] *Ibid.*

[42] This does not connote that the partners offer a single product. The partners continue to offer their own brandmark products, in a coordinated manner so as to provide the customer an overall level of quality services. See Haanappel, "Lecture", *supra* note 33.

Freedom traffic. In such instances, since the code-sharing partners hold out the flight to their Fifth Freedom traffic, it is differentiated from the rest and is called "third country code-sharing".[43]

When the participating carriers code-share on a route or a sector of a route which is via an intermediate point/s in a third country/s, depending on the traffic rights each carrier enjoy in such country/s, the traffic carried on the code-shared flight could, in addition, include Sixth Freedom traffic.

In a situation where the code-shared flight doesn't include a point in a country of one or more participating code-sharing partners, depending on the traffic rights such code-sharing carriers enjoy in the countries between which the code-shared flight is operated, the traffic could, in addition, include Seventh Freedom traffic.

Code-sharing is commonly used by international airlines to increase their domestic feed and by niche carriers when unable to invest the additional expenses needed to launch a new service. Most of the US domestic carriers have existing code-share agreements with major airlines entered for mutual benefit, under which they feed passengers to the latter's hubs. Denied cabotage rights in the US, many European airlines are adding their designator code to domestic flights operated by US airlines and have thereby achieved ability to market its product in the vast US domestic market. In such cases, if the code-sharing foreign airline is granted authority to hold out the domestic sector under its designator code, it could involve Eighth Freedom traffic.

The practice of code-sharing has, in recent times, grown rapidly.[44] The three-way code-sharing agreement involving Delta, Austrian Airlines and Swissair authorized in early 1995 was the industry's first such agreement.

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[43] The term third country code-sharing is used if the code-shared services, depending on the angle of observation, either touch a third country or involve a carrier from a third nationality. de Groot, *supra* note 15 at 63.

[44] From January 1992 to December 1994, the number of alliances between US and foreign airlines increased from 19 to 61 - "Better Data on Code Sharing Needed by DOT for Monitoring and Decisionmaking", GAO/T-RCED-95-170, Washington, DC (May 1995), at 4.

1:5 Reasons for Code-Sharing

A complex web of treaties, international agreements, domestic regulations and inter-airline agreements (some public but mostly confidential), limit the type and the amount of services an airline could offer internationally.

At the Chicago Conference in November 1944, which led to the signing of the Convention on International Civil Aviation,[45] signatory parties failed to reach an agreement regarding the extent to which commercial freedoms could be granted multilaterally in international air transport. Article 6 of the Chicago Conference created the need for bilateral agreements by which each state would grant another state permission for scheduled air services between their countries. This system allowed states which sought to protect its airlines from competition to do so by entering into restricted agreements frustrating the objective of fostering competition and increased efficiency. Thus, bilateralism was used as a weapon of choice by countries bent on protectionism. Undoubtedly this system was not capable of creating a highly competitive global air transport industry.

In the latest US International Aviation Policy Statement,[46] the US DOT takes the view that code-sharing can,

> provide a cost efficient way for carriers to enter new markets, expand their systems and obtain additional flow of traffic to support their other operations by using existing facilities and schedule operations.[47]

This policy statement also predicts that,

> Although code-sharing has become a widely used marketing device for airlines, and is currently the most prevalent form of commercial agreement, further evolution of the industry and its regulatory

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[45] *Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 295, ICAO Doc. 7300/6 [hereinafter *Chicago Convention*].

[46] US International Aviation Policy Statement (1 November 1994) docket #49844. See 60 FR 21841 dated 3 May 1995 for final statement.

[47] *Ibid.* at 5.

> environment may lead to new marketing practices that would supplement or supplant code-sharing.[48]

On the other hand, even air carriers themselves admit that the practice of code-sharing adulterates the schedule information provided by CRS and that it confuses and deceives passengers. According to American Airlines, virtually every party now participating in or promoting the practice of code-sharing had, at one time or another, condemned it as being unfair and misleading.[49]

If this is so, why do such agreements often occur? The reasons are not always the same, and as the following analysis will show, there are various underlying reasons. It is likely that code-sharing would increase in popularity in the short term but, as the practice becomes wide-spread, it is more probable than not that its value to the participants would diminish. One analyst predicted that,

> code-sharing, as a product innovation, will evolve as any other product develops, following a S-shaped curve known as the product life cycle. This cycle consists of four, and occasionally five stages: emergence, growth, maturity, decline, and renewal. The ability of the partnership to anticipate and manage the various stages of this cycle will in large measure determine the future of code-sharing relationships.[50]

Code-sharing is, amongst other relationships such as joint ventures, alliances, franchises and mergers, another facet of emerging trends in the industry's move towards globalization and increased transnational ownership. Some of the more recent code-sharing agreements are in fact tactical moves by airlines with ulterior motives and thus do not last long.[51]

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[48] *Ibid.*

[49] American Airlines submission to DOT in docket # 49523 (18 May 1994); see also submissions of BA and KLM to the US Civil Aeronautics Board Docket # 42199 submissions dated 30 November 1984 and 26 November 1984 respectively where both these airlines opposed code-sharing as being "intrinsically deceptive" and as "an unfair and deceptive practice."

[50] J. Spear, "Code Sharing Life Cycle" [August 1986] Commuter Air 2.

[51] Use of code sharing to drive a competitor away is not uncommon. See below, para 1:5:8.

Yet, many airlines are forging ahead with new alliances in spite of the fact that some of the agreements reached in the past have failed to achieve their objectives.[52] The main reason for such failures could be the lack of direction.

1:5:1 Code-Sharing as a Means to Overcome Regulation

Code-sharing, initially considered as a marketing tool, is also used to overcome the rigid restrictions of a bilateral agreement. For instance, where market access was confined by a bilateral agreement to specific gateways in the foreign country, airlines, through international airline alliances which included code-sharing operations, integrated their networks and thus sought access to markets beyond its gateway. This was the only option available to them as foreign ownership of air carriers was restricted by the nationality clause[53] of the bilateral agreements, thus compelling them to resort to alliances short of mergers. Code-sharing was the ideal way to advertise, as well as bond, such alliances.[54]

1:5:2 Optimum Utilization of Capacity

Code-sharing allows carriers to develop economies of scope in airline networks without creating overcapacity. In addition, code-sharing is also a solution for unutilized capacity. The real benefit of code-sharing is the cost reductions that arise from greater efficiency and better economic operations of the airline.[55]

This reason cannot be dismissed as being unacceptable, especially in a circumstance where the route generates losses during the off-peak season due to

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[52] The GRA Study found that many carriers would not undertake excessively co-operative arrangements without code-sharing and that some view code-sharing is the "glue" that hold such co-operative agreements. See *GRA Study*, *supra* note 1 at 4.

[53] Nationality clause in a bilateral air service agreement require that the carriers exercising rights under such bilateral be substantially owned and effectively controlled by citizens of that country. Different countries have different standards to assess such requirement.

[54] See generally de Groot, *supra* note 15.

[55] H. Shenton, "GRA Report Sanctifies DOT policy" [December 1994] Avmark Aviation Economist [hereinafter Shenton, "GRA Report"] 2 at 3.

overcapacity. In such a situation airline resources are not wasted as code-sharing assures minimum year-round revenues.

1:5:3 Maintain Growth

The airlines also reason that code-sharing could lead to increased market share and thereby maintain growth. However, to ascertain the true impact of a code-share agreement on the airlines increased market share, an efficient way of tracking the transfer of passengers has to be developed. Undoubtedly code-sharing allows medium and small airlines to compete effectively with mega-carriers by providing alternative competing networks, but code-sharing does not usually generate incremental traffic. Rather, it redistributes traffic from non-code-sharing routes.[56] Therefore, it is also claimed that the reason for code-sharing is to protect market share.[57] Further, the synergy of having two organizations, each good at different aspects of the industry, makes code-sharing successful and attractive to the consumer, thus generating growth.

1:5:4 Passenger Preference for On-line Services

Research has shown that passengers prefer on-line service to interline service.[58] Code-sharing arrangements are designed to cater to the passengers' preference for an on-line service for their entire journey. In code-sharing agreements, this is achieved by coordinated scheduling and baggage handling, single check-in facilities and having services similar to a single carrier service which is, in the passengers' perception, superior to an interline service.

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[56] A GRA study report assumed that the total market size remained constant after the introduction of code-sharing, *GRA Study*, *supra* note 1.

[57] Shenton, "GRA Report", *supra* note 55.

[58] W. Davis, W. Landes & R.A.Posner, "Benefits and Costs of Airline Mergers - A Case Study" [Spring 1990] Bell Journal of Economics 68 cited in the *GRA Study*, *supra* note 1.

1:5:5 Introduction of New Services[59]

Code-sharing is also beneficial when a foreign carrier wants to operate a route for which it is designated under a bilateral agreement, but to which it doesn't want to commit its own aircraft.[60] Most bilateral agreements are negotiated on the basis of the future projections made by its national carriers and depend on their fleet capability. Even though consumers of an unserved market would benefit from a new service, if such would be beyond the projected capabilities of the national carriers, a new route would not even be considered during bilateral negotiations in the absence of the possibility for code-sharing.

In a situation where the bilateral allows the airline to serve several cities in a particular country, it could well be that the airline will be confined to one city as it may be uneconomical to serve all of them. In such a situation, code-sharing could be used as the module to achieve feed traffic from these cities to connect with the direct service from one gateway.

In some instances, the aviation market between two countries will be dominated by Fifth and Sixth Freedom carriers. In such an event, code-sharing between the designated carriers of the two countries would be the ideal method to ensure the benefits of their legitimate home market is shared in a mutually beneficial manner.[61]

There have been instances when extra bilateral approval has been granted to code-shared flights, thereby allowing additional flights.[62]

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[59] Contrary views in respect of this is also expressed: "An important characteristic of code sharing is that it does not involve the introduction of new flights as such. Each partner continues to operate the same flights as they did prior to the code-sharing agreement. The *only difference* is at a marketing level, where each partner is able to offer more destinations and/or frequencies." Chiverelli, *supra* note 8 at 198.

[60] Delta and Sabena initiated a service between Atlanta and Brussels which would not have been started if not for a code sharing agreement. See R.W. Allen, Chairman, Delta Airlines (Statement at the International Aviation Club of Washington, 9 March 1994); The non-stop Cincinnati-Zurich service would not have been offered except that it connected the hubs of the code-sharing partners Delta and Swissair. See *GRA Study*, *supra* note 1 at page 22; for more examples see *GAO Study*, *supra* note 2 at 44.

[61] *Aviation Daily* (14 March 1988) at 390. See also *infra* note 202.

[62] Continental/Alitalia code sharing was approved on a extra bilateral basis. Delta/Varig code-sharing agreement was also approved in the same manner. See *GRA Study*, *supra* note 1 at 44.

1:5:6 Passenger Comfort and Convenience

Another reason given for code-sharing is the increase in convenience and comfort afforded to passengers through coordinated scheduling with other airlines. This would undoubtedly enhance convenience, even though such co-ordination would be restricted to the schedules of the code-sharing partners. However, code-sharing is the impetus to do so whereas in a situation of interlining no such incentive would be present. In addition, code-sharing would lead to expanded route networks, single check-in and reservation facilities, combined Frequent Flyer Programs, shared utilities such as airport lounges, through baggage handling, proximate gates at transfer points, etc., all of which would enhance passenger comfort and convenience than in a interline flight option.[63]

1:5:7 Competitive Advantage

Many code-sharing agreements are reached when one partner has a competitive advantage and wants to retain this position through code-sharing, and equally by airlines wanting to achieve such a position. When the extensive BA/USAir code-sharing agreement was announced, the three major US carriers formed an alliance to campaign against the approval of the deal. Their argument, though unsuccessful, was that the carriers should not be permitted to code-share when one had a financial stake in the other because they could exercise undue influence over the schedules of the other. The objection was qualified by stating that permission should be withheld until US airlines had similar rights in Europe.[64] It is clear from that qualification that their objection was made to stall another carrier from having an advantage over them.

The proliferation of code-sharing agreements is mainly due to the airlines' use of code-sharing to retain their competitive position by trying to entice passengers to remain within the code-sharing partners. Each new code-sharing agreement by different airlines is reached to counter such advantage by providing a more attractive alternative. In this

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[63] See also US DOT Order 92-8-13 which acknowledges that "code-sharing arrangements improve the variety and convenience of service options available to the public".

[64] L. McNeil, "Code Sharing and Block Spacing - Maximum Advantage from a Minimum Investment" [April 1993] Avmark Aviation Economist 14 at 15.

process, every new partnership is worth less than the previous one.[65] So it could be safely said that code-sharing is not a mere marketing tool but a broader medium through which participating airlines strive to achieve a competitive advantage.

1:5:8 Drive a Competitor Away

Code-sharing has been used to drive a competitor away from the market. For example, in 1991, Quantas and Air New Zealand reached a three year code-sharing agreement between Australia and New Zealand, mainly to be competitive with Continental Airlines which was offering very low fares in this market. Subsequently when Continental Airlines withdrew, the code-sharing agreement was discarded as the load factor increase no longer justified the shared operation.[66]

1:5:9 Infra-Structural Impediments and Operational Costs

Economic factors such as reduced operational costs justify the airlines' decision to embark on a novel venture like code-sharing. The operating carrier will benefit because it will increase the load factor on the code-shared flights and thus allow the use of larger aircraft (generally cheaper to operate per seat/mile) which will, in turn, spread the operational costs over more passengers. The code-sharing partner is also able to serve a destination which would otherwise be uneconomical if it had to use its own aircraft.[67] Other reasons put forward by airlines are infra-structural impediments, such as airport congestion and scarcity of slots and gates, which could be overcome to a certain extent by code-sharing.

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[65] Shenton, "Airlines Gain", *supra* note 10 at 17.

[66] "Quantas/Air New Zealand Code Share Deal Scrapped" *Air Letter* (31 January 1994) at 4.

[67] See generally U. Schulte-Strathaus, "Code Sharing - A Vehicle for Airline Globalization", Paper (presented at the Symposium on Code Sharing of the European Aviation Club, Brussels, October 1994).

1:5:10 Industry Practice

Finally, the desire not to be left behind in the growing practices of the industry is another reason why code-sharing is practised by many airlines. Most airlines believe that they will be better off by participating in code-sharing agreements than staying out of them.[68]

In a study undertaken in respect of the US regional airlines, it was found that once one commuter in a region began operating as a partner to a major carrier, the remaining commuters had no choice but to join the code-sharing programs of other majors or get blown out of the market. However, the same study cautions that "[a] code-sharing arrangement today is no guarantee for survival tomorrow."[69]

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[68] Shenton, "Airlines Gain", *supra* note 10 at 17; see also M. Saint-Yves, "Partages et échange code sharing" AviMag 964 (15 June 1988) 49 at 50.

[69] "Study by Regional Airline Management Systems, Golden, Colo.", reported in *Aviation Daily* (4 August 1986) at 191.

1:6 Advantages and Disadvantages of Code-Sharing

Most of the topics discussed under the previous heading could be considered as advantages derived from code-sharing. The success of a code-sharing agreement depends heavily on the ability of the marketing divisions of both airlines to synchronize and achieve the goals of both partners.[70] It must be kept in mind that code-sharing is only one facet of an airline alliance which may cover many other elements in addition to code-sharing. Therefore, it is unrealistic and unfair to ascribe the total benefit to code-sharing.[71]

Another positive aspect of code-sharing is that it has facilitated development in areas such as inter-carrier communication, agency relationships and standard procedures, where the industry has, historically, been weak. These areas have seen uniformity and development due to mutual co-operation espoused by code-sharing.

The users of air transport, especially in Europe, are able to choose from a range of services offered by competing suppliers, partly due to the present trend of extensive code-sharing and airline alliances.[72]

However, it is often mooted that code-sharing leads to the development of inferior international services; those which cannot boast of non-stop services or single aircraft operations, characteristics of a quality service.[73]

Surveys have shown that most passengers on code-shared flights are not fully aware of the true nature of the flight and, in some cases, are deceived. Passenger deception arises due to CRS bias and non-disclosure of the actual operator of the flight before the passenger makes his choice.

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[70] K.L. Green, III, "Marketing a Shared Code" [February 1986] Commuter Air 2. See Annex 6 for a diagram depicting the profits from code-sharing on variable marginal costs.

[71] See generally Humphreys, "Code Sharing", *supra* note 22 at 24.

[72] J. Parr, "The Customer of the Future" (1995) XX Air & Sp. L. 97 at 98.

[73] See generally J. Ott, "Airport Officials Blast Carrier Marketing Tactics for Connecting Flights" (17 December 1990) Av. Wk. & Sp. Tech. 33.

Due to implied understandings which might arise between the code-sharing partners, for instance to limit seat capacity in the code-shared market, code-sharing agreements could be to the detriment of the consumer.

Similarly, there is a possibility that code-sharing might distort the applicable liability regimes. According to de Groot, the authorization requirement of the DOT that the contracting carrier retains responsibility *vis-à-vis* the passenger for the entire journey consistent with the contract of carriage is also a benefit accrued towards the passenger, rather than the practice in interlining where the operating carrier takes over liability.[74]

The consequences of passenger deception, antitrust implications and applicable liability regimes are discussed in detail at Chapter 3.

There is no concrete data which shows the impact code-sharing has on passenger fares. The GAO Study states that due to the insufficiency of data, it cannot determine whether code-sharing leads to higher fares or not.[75]

A previous GAO fare study has shown that in the US, code-sharing agreements have been a factor linked with higher fares, where carriers with code-sharing agreements at one of the airports on a route charged almost 8% more than they do on a route on which they do not have code-sharing agreements.[76] However, the latest study indicates that code-sharing would, in the long run, lead to lower fares, due to cost efficiencies which will be passed on to the consumer and competition.[77]

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[74] *Supra* note 15 at 65 citing DOT Order 88-5-15 Docket # 45396.

[75] *Supra* note 2 at 44.

[76] *Aviation Daily* (10 April 1990) 67.

[77] *GAO Study*, *supra* note 2 at 45.

1:7 Current Trends

Code-sharing has now become one of the main areas of concentration at bilateral negotiations, elevated from being considered initially as a inter-carrier agreement to be now considered as an important bargaining tool.[78] It appears that governments are more willing to grant foreign carriers authority for code-sharing than to remove the existing limitations within the bilateral framework. For instance, at the US-German bilateral negotiations of 1994, code-sharing was the key issue. Negotiations centred around six variations of code-sharing agreements, namely

1. Trans Atlantic;
2. Access to US points beyond German gateway points;
3. Access to points in Germany beyond US gateway points;
4. Third country access beyond the US;
5. Third country access beyond Germany; and
6. Fifth Freedom rights between London and Frankfurt.[79]

Since its failure at the Chicago Conference to push through a multilateral agreement where complete commercial freedom of the air is granted to the signatories, the US has pressed the rest of the world to open up routes, rates and capacity. The most recent call, for the same purpose, is for Open Skies.[80]

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[78] In November 1994, the DOT approval for certain BA/USAir code-sharing routes were given for only 60 day periods with a warning that it may disapprove the code-sharing arrangement thereafter. This temporary and hazy approval was linked, according to their own admission, to the US efforts to obtain a less restrictive bilateral agreement with UK. *GAO Study*, *supra* note 2 at 35 and note 9 therein.

[79] M. Jennings, "The Code War", Airline Business: (The Skies in 1994) [hereinafter Jennings, "Code War"] 12 at 13.

[80] US DOT defined open skies to include

1. Open entry on all routes
2. Unrestricted capacity and frequency on all routes
3. The right to operate to any point in the other country without restriction including service to intermediate and beyond points, and the right to transfer passengers to an unlimited number of smaller aircrafts at the international gateway.
4. Flexibility in setting fares
5. Liberal charter arrangements
6. Liberal cargo arrangements

The first open skies agreement between the US and a European country was the US-Netherlands Open Skies Agreement. The notable aftermath of this is undoubtedly the KLM-NorthWest alliance. The success of this partnership, which would not have occurred had it not been for extensive code-sharing, has been used as a lever by the US to reach similar open skies agreements with the rest of Europe.[81]

The efforts of the EU and ECAC are to ensure that practices like code-sharing be considered within the broader framework of regional negotiations in order to obtain an even trade-off with the US.[82] However, in the meantime the US has sought and secured advantageous open skies agreements with a number of individual EU states. These countries, in their eagerness to eke out an economic advantage over other European countries in the same manner as the Dutch, have tacitly weakened the overall bargaining position of the region. For instance, code-sharing within Europe could have been traded in return for US domestic code-sharing rights.

As aviation markets grow competitive, airlines have established links with selected partners in order to ward off competition. These links are generally in the form of blocked space agreements; joint ventures; sharing of airport facilities; joint marketing, ticketing and handling; schedule co-ordination and agreements to provide feed exclusively into another airline's flights; joint maintenance and aircraft servicing operations; shared personnel; joint catering facilities; etc. Code-sharing is the "wrapping on the product"

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7. The ability of the carriers to convert earnings in to hard currency and return those earnings to their homelands promptly and without restrictions

8. Open code sharing opportunities

9. The right of a carrier to perform it's own ground handling in the other country

10. The ability of carriers to freely enter in to commercial transactions related to their flight operations

11. A commitment for non-discriminatory operation of and access to CRS

See DOT Final Order 92-8-13 on Docket # 48130, 5 August 1992.

[81] J.M. Feldman, "It's Time to Lead DOT" [October 1994] Air Transport World 59.

[82] "Resolution of the European Parliament on the bilateral "Open Skies" agreements concluded by several member states with the US", Official Journal of the European Communities, No. C109/325 dated 7 April 1995. This calls for a mandate to be given to the commission to draw up negotiating directives.

so offered.[83] This is because airlines believe that code-sharing is the only way they can appropriate to themselves the benefits of an alliance and at the same time make the travel agents and the general public aware that their product differs from a traditional interline arrangement.

An international presence is considered as a useful marketing tool by airlines today, especially due to Frequent Flyer Programs. The fact that an airline could offer flights to destinations all over the world would mean that the Frequent Flyer Program they offer is attractive to a larger clientele. Therefore, even if a remote exotic destination is offered using double-connect code-shared flights, the promotional reach gained by adding such a destination is valuable.[84]

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[83] "[Code sharing] is relatively a cheap way of advertising that some form of airline cooperation exist, or put another way, is the cherry on the cake on an airline alliance", Humphreys, "Code Sharing", *supra* note 22 at 204.

[84] *GRA Study*, *supra* note 1 at 54.

CHAPTER TWO
REGULATORY CONTROL

2:1 Characteristics of Code-Sharing

Prior to a discussion on the regulatory control exercised on code-sharing, it would be prudent to briefly outline various characteristics of code-sharing in order to define the areas where regulations are necessary. The main characteristics seen in the practice of international code-sharing are:

1. the possibility to use code-sharing to by-pass the applicable bilateral regime and aviation policy of a state;
2. the monopolistic and anti-competitive nature of the practice;
3. the possibility of consumer deception due to non-disclosure of the actual carrier, and through CRS bias;
4. the possibility of a conflict in the applicable liability regimes, and other domestic regulations.

The above topics will be dealt with in detail in Chapter 3 when the legal implications of code-sharing are discussed. Suffice it at this point to note these characteristics since addressing such concerns will be the priority of the regulators.

2:2 Studies Undertaken

In order to assess the real impact of international code-sharing, many fact-finding studies have been undertaken around the world. In the US, the DOT engaged Gellman Research Associates Inc. (GRA), whose report was released in December 1994. At the request of the US Senate Sub Committee on Aviation, the GAO examined the inadequacies of the GRA Study and recommended changes to the prevailing regulations to address these shortcomings.

In Europe, the first extensive study was done by the German Aerospace Research Establishment (DLR) on behalf of the Federal German Transport Ministry. This study was released in July 1995. The ECAC set up a task force in late-1994 to study the practice of code-sharing and their recommendations are still under review. As well, the EC has initiated a separate study through a UK-based team of consultants, who are expected to submit their report by May 1996.

The Air Transport Bureau of the ICAO Secretariat has commenced a study on code-sharing and hopes to submit its report to the Air Transport Committee by mid-1996.

Due to the different objectives and political motivations behind initiating the above-mentioned studies, the conclusions reached sometimes differ. Therefore, it is prudent to consider each study separately.

2:2:1 GRA Study

Reasons for the Study

The approval policy adopted by the DOT in respect of international airline code-sharing has been criticized by many. The essence of these objections was that increased access to the US market for foreign carriers, even using the mode of code-sharing with US carriers, would, for the most part, place the US carriers at a disadvantage because foreign markets are often restrictive. In any event, since no single foreign country has a market comparable in size to that of the US, there will not be an equal exchange of benefits even if the foreign market is open.

The DOT was also criticised for approving code-sharing agreements without fully understanding their effects.[85] Therefore, the US DOT engaged Gellman Research Associates, Inc. (GRA) to conduct a study, with the main objective being the development of a methodology by which the DOT would have the capacity to measure the effects of existing, as well as future code-sharing agreements.

Objective of the Study

The study was directed at examining effects of code-sharing on the profitability of the carriers; assessing the effects of code-sharing on the consumers of airline services; and projecting the future use and impact of code-sharing over the next twenty years (1994-2014).

The Approach

The study, after defining the practice of code-sharing, used US origin and destination (O & D) survey ticket sample data from the first quarter of 1994 and flight alternatives as depicted in the Official Airline Guide (OAG), to develop an economic market share model. The model identified how consumers choose among compelling flight alternatives by estimating a "discrete choice" conditional logit model over a sample of city pair markets, where passengers must make a choice between two or more flight options. Those results were used to generate estimates of the market share impact of code-sharing.[86] The considerations were confined to code-sharing agreements that involve travel to or from the US.

Drawbacks

One of the drawbacks of this study is that it did not have adequate data regarding the O & D traffic in respect of code-shared flights considered, because the non-US

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[85] In May 1994, the US Secretary of Transportation acknowledged during testimony before the US Senate that the DOT had not conducted sufficient analysis on code sharing prior to key bilateral negotiations. See *GAO Study*, *supra* note 2 at 48.

[86] *GRA Study*, *supra* note 1, Executive Summary at 10.

partner to the code-sharing agreement was not required by the then-prevalent regulations to submit detailed particulars to the DOT.

The other limitations of this study were that

1. it had to presume the market size to be static;
2. it had to exclude markets which offered only a single alternative;
3. it did not measure any response by the competing carriers; and
4. it did not consider the difference of the revenue prorates applicable between interline and code-sharing flights.

Conclusions

The study results indicated that code-sharing had a significant impact on market share. According to the study, if the "effectiveness" of a code-sharing alliance is viewed as the ability of the partners to offer a service resembling an on-line service, the BA/USAir code-sharing achieved fifty percent effectiveness whereas the more extensively co-operating agreement between North West/KLM was almost ninety percent.[87]

The study highlighted areas where the practice raised concerns. Consumer deception, equal opportunities for US carriers in foreign markets, market distortions caused by practices of foreign carriers involved in code-sharing, anti-trust implications and the concern of the US Department of Defence that code-sharing would lead to foreign carrier dominance on long-haul flights, were addressed in this study.

In conclusion, the study called for expanded reporting requirements on code-sharing flights, particularly by foreign carriers, in order to continue monitoring effects of international code-sharing. It also predicted that:

1. the attractiveness of code-sharing would decrease due to low-cost niche operations which would emerge when the route density increased to an extent where point to point services would be feasible;[88]

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[87] *Ibid.* at 13.

[88] *Ibid.* at 18.

2. economies of scope and density, marketing advantages and increasing congestion at airports would, at the same time, reinforce the benefits of code-sharing;[89]
3. code-sharing would lead to fewer, larger airline networks which would increasingly compete with each other and thereby pass on benefits of reduced costs to the passenger, as well as improve the quality of service;[90]
4. the structure of bilateral air service agreements and foreign ownership laws cause carriers to code-share. If the environment was liberalized, carriers would attempt to expand via cross-border mergers and acquisitions. To the extent that such means are foreclosed by regulation, code-sharing would be used as the alternative to achieve same results;[91]
5. Asia, currently the fastest growing aviation market, would become the next arena where code-sharing would become more prevalent;[92] and
6. Code-sharing partners would increasingly sell their coordinated service through common branding.

2:2:2 GAO Study[93]

In this study, done by the GAO for the Subcommittee on Aviation of the US Senate Committee on Commerce, Science and Transportation, it was recommended to require all code-sharing carriers in the US (including foreign carriers) to report in detail

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[89] *Ibid.*

[90] *Ibid.* at 19.

[91] *Ibid.*

[92] *Ibid.* at 20.

[93] *Supra* note 2.

on code-sharing traffic to the DOT. According to the GAO evaluation of code-sharing, there is ample evidence of traffic redistribution but not of traffic stimulation.[94]

Objective of the Study

The Senate Committee on Commerce, Science and Transportation and its Subcommittee on Aviation directed the GAO to determine

1. the extent to which US and foreign airlines participating benefit from those alliances in terms of added passengers and revenues; and
2. the effect that alliances have on other US airlines and consumers.[95]

In addition, they were required to identify and address the issues not dealt with by the US International Aviation Policy Statement issued in November 1994.[96]

Background

The growth of international air transport in respect of US airlines had, during the period of 1987-1993, increased by 47 percent, while the domestic traffic increased by only six percent. Furthermore, international air transportation was considered as the key growth area for US airlines. For example, total passenger traffic between the US and foreign destinations increased by 134 percent between 1980 and 1993, and the US carriers market share in respect of such traffic grew from 49 to 54 percent.

Unlike US domestic air transport, international air transport is heavily regulated and, due to cost constraints and bilateral restrictions, US airlines have entered into more alliances. The number of international code-sharing agreements has tripled since 1992.

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[94] For a comment on the GAO Study see H. Shenton, "Code Sharing Only Part of the Big Picture" [May 1995] The Avmark Aviation Economist 2-3; E.H. Phillips, "GAO Urges Stringent Oversight of Code Sharing" (22 May 1995) Av. Wk. & Sp. Tech. 31.

[95] *GAO Study*, *supra* note 2 at 2.

[96] *Ibid.*

It was also observed that foreign governments have been willing to grant US airlines authority to code-share rather than to remove restrictions on direct access.[97] Similarly, foreign airlines have used code-sharing to seek increased access to US domestic markets.

The Approach

The GAO analyzed the data provided by US and foreign airlines on passenger traffic and revenue and relied more on internal data rather than that collected by the DOT. In addition, the GAO interviewed representatives from the airlines, officials from the DOT, the Department of Justice's anti-trust division, the International Airline Passenger Association, and representatives from airport authorities.

Conclusions

(a) Findings in Respect of Benefits

The GAO study found that the benefits derived by the code-sharing partners vary depending on the

1. geographic scope of the code-sharing agreement;
2. level of operating and marketing integration; and
3. agreement between the airlines on how to divide revenues.

They also found that the extent to which airlines in such alliances benefit in terms of added revenues vary depending on the details of each agreement. For example, if the agreement is to divide revenues on the basis of an agreed prorated formula that accounts for the miles each airline flies, the carrier who flies the long-haul sector generally accrues more of the resulting revenues.[98]

The study found that the benefits derived from point-specific alliances varied and that some failed because they had to compete with each other rather than integrating their operations.

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[97] *Ibid.* at 15.

[98] *Ibid.* at 28. See also Feldman, "Alliances", *supra* note 9 and Annex 6.

In respect of benefits to consumers, the study found that there were several apparent benefits for the consumer (such as coordinated schedules, shorter lay over time, one-stop check-in and additional flight choices) but stated that due to insufficiency of data, the impact of code-sharing on fares as uncertain.

In conclusion, the study stated that the gains achieved by code-sharing partners were at the expense of competing US and foreign carriers.

(b) Findings in Respect of Key Issues in Code-Sharing

The main issue discussed in the report was the limitations on the current traffic-reporting requirements.

The GAO believed that the DOT had not examined the role of anti-trust immunity during bilateral talks. Due to the success of the North West/KLM alliance they felt that the DOT could use it to entice foreign governments to liberalize their bilateral agreements with the US.[99]

The study noted the absence of any US regulation which would limit the number of times a flight could be listed, and stated that triple-listing of the same flight would limit competition as well as decrease the efficiency of travel agents. Outside of the concern expressed regarding the potential effect on a possible three-way alliance, the study found that even the industry agreed in principle to prohibit more than two listings per flight.[100]

Recommendations[101]

1. to require US airlines to identify passengers who travelled on code-shared flights in regular traffic data reports, with accurate information as to who operated such flights;
2. to require foreign airlines involved in code-sharing to report similar traffic data;

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[99] *GAO Study*, *supra* note 2 at 57.

[100] *Ibid.* at 60.

[101] *Ibid.* at 60-61.

3. for the DOT to determine the impact on US carriers and the passengers prior to the re-approval of existing code-sharing agreements;
4. to consider whether anti-trust immunity should be potentially available for code-sharing alliances; and
5. to prohibit more than two listings of the same code-shared flight in CRS.

2:2:3 DLR Study[102]

Reasons and Objectives of the Study

In 1994, the Federal German Transport Ministry, realizing the growing importance of code-sharing in international air transport, entrusted the German Aerospace Research Establishment (DLR) with the task of studying code-sharing practices. The aim of the study was to analyze the impact made on air transport and to assess it from a transport policy viewpoint.

Findings

The study classified the different types of code-sharing according to

1. the purpose of the code-sharing co-operation between partners;
2. the type of commercial co-operation between the partners; and
3. the complexity of the air service.

The fact that code-sharing is done in order to overcome regulatory obstacles in EU and IATA rules, which prevent the sale of airport slots, is a notable finding which had not been addressed in other similar studies.

The study analyzed the main advantages and disadvantages of code-sharing classified under the groups - airlines, passengers, travel agents, airports and the general public.

In respect of **airlines**, the expansion of route network and market presence without incurring the respective costs, as well as the advantage of having priority on CRS display, were considered as the main advantages with no comparable disadvantages.

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[102] *Supra* note 3.

In respect of **passengers**, the advantages were the coordinated schedules and the special fares offered, whereas the most significant disadvantage was passenger deception.

In respect of **travel agents**, the study identified the added burden to inform passengers about the actual carrier, and the difficulty of fathoming the CRS displays, as negative aspects of code-sharing.

In respect of the **general public**, matters such as environmental effects were considered to be negligible.

Traffic Rights

The study found that the existing bilateral framework did not cater to new developments such as code-sharing and suggested that the most appropriate procedure would be to seek multilateral agreements which allowed greater freedom to airlines with regard to safety, competition and consumer protection. The study also suggested that, with regard to routes, only the actual carrier should need traffic rights.

Computer Reservation Systems

The study found that the advantages accrued to code-sharing airlines by obtaining higher screen position were considerable in situations where the route consisted of several connections. Since screen padding violated the EU CRS code, the study called for effective control by the regulators. It also raised issues of user friendliness in CRS displays and the need to eliminate the necessity of making additional queries to ascertain the actual carrier in respect of code-shared flights.

Competition Policy

Recognizing that code-sharing has positive as well as negative effects on competition, and the fact that each agreement must be analyzed individually, the study suggests that instances where existing competitors code-share on non-stop city pair markets will cause the largest negative impact on competition since it will create absolute or very high barriers to entry. This is due to the bilateral regime and the scarcity of slots. Therefore the study recommends such agreements be reviewed on a regular basis even after approval is given.

Consumer Protection

To ascertain firsthand the extent to which passengers are deceived regarding code-shared flights, the DLR conducted a telephone survey, where 40 travel agents were asked for details concerning a specific code-shared flight. The travel agents were given sufficient time to respond about the actual carrier, and then were specifically asked about it if the information was not forthcoming. The results were: 80% of the agents did not give the correct answer and of the 20% who did provide the correct information, only four agents gave the information without being explicitly asked.[103] Therefore, the study recommended that airlines and travel agents should be obliged to do so by way of a Europe-wide regulation which is in harmony with US disclosure rules.

There are a few observations made in the DLR study which need special mention. The study observed that when the passenger is confronted with a code-shared service which he did not bargain for, he is placed in a situation where he has no other option but to use the service offered. This, the study observed, frustrates the relief the passenger is entitled by discouraging him to seek a remedy.[104]

The study also identified the misconception of consumers that the issue was not worthy of complaint, especially since there was an inadequacy of recoverable compensation.[105] Uncertainty exists among passengers regarding whether they have the right to obtain information about the actual carrier, and whether they can prove it. Furthermore, the matter is aggravated due to the fact that most of such complaints will be directed to the travel agents who have no control over such situations. The study states that unless "additional consideration" by increased commissions is granted to travel agents who are involved in the sale of code-shared flights, there is no incentive for the travel agents to undergo the additional trouble of finding out who the actual carrier is and advising the passenger of the probable consequences.

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[103] *Ibid.* at 90-91.

[104] *Ibid.* at 92.

[105] *Ibid.*

The DLR study contains explicit graphics of CRS display screens which shows the bias code-sharing creates. These are reproduced as Annex Three.

2:2:4 ECAC Study

The ECAC task force[106] entrusted with the study of code-sharing, submitted its interim report to the Directors General at their June 1995 meeting in Monaco. In this report, the task force gave a brief overview of the issues associated with code-sharing and made tentative conclusions, especially in the areas of consumer information and protection. The study concentrated on these specific areas in their subsequent work.

In its report submitted to the 95th Meeting of the Directors General of Civil Aviation, the task force outlined the outcome of its study and forwarded its recommendations.[107] The study, which viewed code-sharing from the angle of consumer protection, categorized its findings as arising at different stages of a journey.

Firstly, Information Needed Before Booking

In this regard, the study identified that, even though as a general rule code-shared flights are identified by special means in airline timetables and CRS displays, due to time constraints prevailing during booking and ticketing, the passenger could be sold code-shared flights without being made aware of its significance.[108]

To rectify this situation it has been suggested that data should be presented in a more user friendly way on CRS and more detailed information should be included in the itinerary document or the passenger ticket. This suggestion was made in spite of the fact that such will not provide the information to the passenger *prior* to making his choice. The task force considered it important that the name of the actual operator of each

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[106] This task force was set up in late-1994 under the chairmanship of O. Rambech, Civil Aviation Administration of Norway, charged with preparing a report and recommendations.

[107] *Supra* note 6. Draft recommendations are produced as Annex Four.

[108] *Ibid.* at 1.

segment of the flight be identified in the itinerary document and further stated that automated tickets provided the best means for including this information.[109]

Secondly, Information Needed During the Journey

In order to clarify what the passenger should do in the case of mislaid baggage, denied boarding, missed connections, etc. the task force was of the view that such information could best be provided in the itinerary document.[110]

Finally, Information Needed After a Journey

The task force recognized that the passenger's legal entitlements under the Warsaw liability system is uncertain when code-sharing is practised and urged the industry and governments to resolve the issue as quickly as possible.[111]

Other Issues Discussed

The task force considered the pros and cons of regulating code-sharing and the alternative of leaving it to be done through resolutions at the industry level. Its recommendation was, to allow the industry to self-regulate at the initial stage, where a review clause would be an adequate safeguard, and to decide by 30 June 1997 whether more binding regulatory measures are needed.[112]

A commendable feature of the study is the desire of the task force to achieve a worldwide uniformity in respect of the issue. Unlike the other studies done, the ECAC

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[109] *Ibid.* at 2. The IATA submitted that only 20% of tickets worldwide are issued on Automated ATB tickets stock and that the remaining 80% are still printed on carbonized ticket stock which can not be modified to provide such notice. It further submitted that inclusion of the designator codes of both carriers on the ticket was not feasible as the space could only accommodate three characters and that redesigning and implementing a new ticket format would take several years. See "IATA Reply to ECAC Questionnaire on Code Sharing" (16 March 1995).

[110] *Supra* note 6 at 2.

[111] *Ibid.* at 2.

[112] *Ibid.* at 3.

task force had communicated its thinking and progress to the US authorities with a view to harmonize regulations on this issue.[113]

Unfortunately due to the restraints caused by the Notice of Proposed Rule Making (NPRM) process[114] under way in the US, the task force was not able to co-ordinate and develop the study with US counterparts. No decision has yet been taken on the report and the draft recommendations. It is likely that some changes will be required, including the need for the establishment of safety policies with regard to code-sharing.[115]

[113] See V.K.H. Eggers, ECAC President, (Letter to J.R. Tarrant, Deputy Assistant Secretary, Transportation Affairs US Department of State dated 27 June 1995).

[114] Docket # 49702 & # 48710.

[115] See A. Kupka, ECAC Information Officer (Letter received by author dated 5 February 1996).

2:3 Multilateral Regulatory Regimes

2:3:1 Chicago Convention and ICAO Assembly Resolutions

The Preamble to the Chicago Convention[116] declares,

> Therefore, the undersigned governments having agreed on certain principles and arrangements in order that International Civil Aviation may be developed in a safe and orderly manner and that international air transport service may be established on the *basis of equality of opportunity and operated soundly and economically*;... (emphasis added)

Certain articles of the Chicago Convention address the fundamental issues concerned with traffic rights in international air transport. Article 1 recognizes the complete and exclusive sovereignty of each state in the airspace above its territory. Art 5 deals with the right of non-scheduled air services, and Article 6 states that scheduled air services must obtain prior approval from the state and operation of such service be in accordance to the terms of such provisions. Article 96 defines the expression "air service" to mean "any scheduled air services performed by aircraft for public transport". Article 7 respects the right to refuse cabotage rights and stipulates that such privilege should not be granted on an exclusive basis.

Another relevant provision is contained in Article 44 which states:

> 44. The aims and objectives of the Organization to [...] foster the planning and development international air transport so as to:
> .....(f) ensure that the rights of contracting states are fully respected and that every contracting state has a *fair opportunity to operate international airlines*". (emphasis added)

It must be noted that the Chicago Convention is silent on the question of nationality of airlines. In view of the practice of code-sharing, the present-day requirement of national ownership of airlines, which has arisen due to nationality clauses included in the bilateral agreement, should be reconsidered.[117]

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[116] *Chicago Convention*, *supra* note 45, Preamble.

[117] For a discussion on this matter see D. Fiorita, "Comments on Arnold Kean's Presentation" (1992) XVII:I Ann. Air & Sp. L. 29 at 30ff.

Article III of the International Air Transport Agreement,[118] though not widely adhered to, states:

> Each contracting state undertakes that in the establishment and operation of through services, due consideration shall be given to the interests of the other contracting states so as not to interfere unduly with their regional services or to hamper the development of their through services.

The ICAO Assembly has adopted resolutions in respect of commercial rights in air transport, some of which should be mentioned here due to their relevance.

The Assembly has declared that multilateralism in commercial rights continue to be its objective to the greatest extent possible and that the Council keep possibilities of partial solutions to this objective under review.[119]

It has also accepted that the strict application of the criterion of nationality clauses will impede developing states from optimizing benefits from air transport, and has called to recognize the concept of community of interest within regional economic groupings as a valid basis for designation of airlines.[120]

The definition given to "a scheduled international service" by the ICAO in its guidelines on the regulation of international air transport is also relevant. In the Notes on the Application of the Definition, it is explicitly stated that it is possible for more than one operator to participate in the operation of the service, thereby encompassing code-shared flights within its definition.[121]

The Chicago Convention, Articles 77, 78 and 79, deals with joint operating organizations and pooled services. In 1967, the ICAO Council adopted a resolution

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[118] *International Air Transport Agreement*, 7 December 1944, 171 UNTS 387, US Department of State Publication 2282.

[119] Assembly Resolution A7-15 - ICAO, *Assembly Resolutions in Force*, ICAO Doc. 9602 [hereinafter *Assembly Resolutions*] at III-3.

[120] Assembly Resolution A24-12, *ibid.* at III-5.

[121] ICAO, *Policy and Guidance Material on the Regulation of International Air Transport*, ICAO Doc. 9587, [hereinafter *Guidance Materials*], Part 1B at 10.

prescribing the manner in which such operations should be done.[122] This resolution doesn't apply in the case of an international operating agency whose aircrafts are registered on a national basis like the Scandinavian Airline System (SAS). By this resolution, the concepts of "jointly registered" and "internationally registered" aircraft are forwarded and the obligations of the States in such situations are defined.

Joint ownership and operation of international air services was considered by the 16th ICAO Assembly, which resolved that the ICAO Council must offer assistance when requested to develop such arrangements.[123]

In respect of lease, charter and interchange of aircraft, Article 83*bis*, an amendment to Chicago Convention has been adopted though it is still not in force.

It must be noted that Article 83*bis* provides the necessary framework to overcome some of the shortcomings which arise due to code-sharing. For instance, the provision which enables transfer of responsibilities from the state of registry to the state where the operator of the aircraft is established, will allow a state to ensure that the aircraft used by its carriers, even by means of code-sharing, comply to the applicable regulations.[124]

The Third Air Transport Conference recommended that states should ensure that their national competition laws are not applied to international air transport in such a way that there is a conflict with their obligation under the Chicago Convention or the bilateral agreements and also prevent the extra territorial application of such laws to situations which have not been agreed upon by the countries concerned.[125]

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[122] See ICAO, Legal Committee (1967) ICAO Doc. 8704-LC/155, Annex C on the subject. See also M. Milde, "Nationality and Registration of Aircraft Operated by Joint Air Transport Operating Organization or International Operating Agencies" (1985) X Ann. Air & Sp. L. 133 at 151, with regard to traffic rights to be enjoyed by such aircraft, and safeguards against monopolies.

[123] Assembly Resolution A16-33, *Assembly Resolutions*, *supra* note 119 at III-5.

[124] See also Assembly Resolution A23-13 in respect of lease, charter and interchange of aircraft in international operations which resolved that states should be urged to act according to the process of Art 83 bis pending entering into force of such provisions. *Ibid.* at III-5.

[125] Third Air Transport Conference, Recommendation 5, *Guidance Materials*, *supra* note 121 at 28.

The main challenge faced by ICAO is to adjust and adopt a system which was laid down in an era when the practices and approaches were quite different, to suit the needs of the present.[126]

2:3:2 Code of Conduct on CRS

The ICAO Code of Conduct on CRS sets out, *inter alia*, the obligations of the CRS vendors. This is in order to promote desirable practices worldwide.[127]

Article 6 of the ICAO Code of Conduct on CRS deals with the obligations of the system vendor regarding the information displays provided to subscribers. Accordingly, a fully-functional "neutral" display which is not influenced directly or indirectly by the identity of participating carriers should always be presented unless a specific request for another display has been initiated.

Article 6(h) obliges the system vendors to:

> In any neutral display of schedule and/or space availability information,
> (i) Clearly identify scheduled en-route changes of equipment, *use of the designator code of one airline by another air carrier*, the number of scheduled en-route stops and any surface sectors or changes of aircrafts requested; and
> (ii) Clearly indicate that the information displayed regarding direct services not comprehensive, if information on participating carriers' direct services is incomplete for technical reasons or if any direct services operated by non participating carriers are known to exist and are omitted; (emphasis added)

Article 6(g) states that the system vendors must ensure that no carrier obtains an unfair advantage through misrepresentation of services.

It has been noted that depending on the methodology used to differentiate on-line connections and interline connections, code-sharing flights will be treated differently. The Notes on the Application of the Code of Conduct recognize that in some code-sharing agreements, the operations are fully integrated and that those flight options are

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[126] See generally J. Gunther, "Multilateralism in International Air Transport - the Concept and the Quest" (1994) XIX:I Ann. Air & Sp. L. 259 at 268.

[127] *Guidance Materials*, *supra* note 121, Part 1, s. E, at 30ff.

indistinguishable from on-line connections. Therefore, it states that allegations of misrepresentation arise when vendors treat all code-sharing arrangements as on-line connections.[128]

With regard to multiple listing of the same flight, the Notes on the Application of the Code of Conduct recognize that in instances where "different services at distinct prices for seats subject to different yield management are offered on the same aircraft by different carriers or when each carrier in a joint operation wish to maintain market identity", the duplication of the flight option as justified.[129] Therefore in a case of a code-sharing arrangement where the partners market different inventories, the ICAO code of conduct on CRS recognize the justification of multiple displays of the flight.

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[128] *Ibid.* at 43.

[129] *Ibid.*

2:4 Conformity to Applicable Domestic Regimes

2:4:1 Regulatory Control in the US

The Changes to the Regulatory Regime

Consideration of the development of code-sharing in the US gives an evolutionary perspective of the regulations applied to code-sharing.[130] As stated in detail earlier, the first occurrence of code-sharing was in 1967 when Allegheny Airlines (now USAir) used its two letter designator code on the commuter airlines to provide services to small communities to which Allegheny discontinued its operations.[131]

Until deregulation, and the extensive use of CRS facilities by travel agents, this practice of sharing codes remained restricted to Allegheny. Realizing the advantage of code-sharing coupled with the use of CRS, US domestic airlines scrambled to benefit from this innovative practice.

In 1985, the position taken by the DOT regarding code-sharing was to accept it provided that the consumers were notified of the true airline which operated the flight. At that stage, the DOT considered code-sharing as a private deal which didn't warrant its intervention. This position was prior to the emergence of international code-sharing agreements.

The practice of code-sharing in the US domestic aviation sector created nationwide code-sharing franchises, guaranteeing the major US flag carriers with a stable feeder network directed to their hubs. In addition, the main US carriers had controlling interests in the CRS.[132]

This placed them in a fructuous position *vis-à-vis* their international counterparts with whom they competed in the international market, within the constrained framework of the bilateral air transport agreements. The advantage enjoyed by US carriers is their

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[130] Further discussion on this will be done in Chapter 3:1.

[131] Chapter 1:3; see DOT Order E25834 dated 13 October 1967.

[132] See generally B.K. Humphreys, "Do Airlines Still Need to Own CRSs" [April 1994] Avmark Aviation Economist; see B.K. Humphreys, *The CRS*, ITA Documents & Reports, vol. 18 (90/1) (Paris: ITA, 1990).

ability to offer on-line connections to a large number of non-gateway cities in the US whereas foreign airlines are not permitted to offer such services due to bilateral and cabotage restrictions.

The benefit derived of from being CRS vendors was that, since it was unregulated at that stage, they were able to devise their CRS algorithms in order to obtain an advantageous position for their flights in the early display screens. Code-shared flights were considered as on-line connections which were given priority over the interline connections, the latter being the only option available to the foreign competitors to market destinations beyond their US gateway.

Initial DOT policy was to prohibit foreign carriers from entering into code-sharing agreements with US carriers unless the foreign carrier had been designated to serve such cities under the bilateral agreement.[133] Naturally, the international airlines serving the US complained that they did not have an equal opportunity to compete for international carriage because their operations (even code-sharing) were restricted to the designated gateway cities. Since the notion of "equal opportunity" is the gist of any bilateral bartering exercise, the agitation by the foreign airlines was to obtain the opportunity to serve cities beyond their gateways, in the same manner as their US counterparts.

The matter was deliberated extensively at the 1986 bilateral talks between the US and the UK. Thereafter, the US agreed to permit British carriers to use code-sharing in order to access the US market beyond the designated gateway cities, provided it was within the boundaries of US law (*e.g.*, anti-trust) and subject to the restrictions on cabotage.

Accordingly, the DOT said that foreign airlines which possessed underlying route authority, could code-share with US airlines on such specific routes. Subsequently, it further held that if the bilateral allowed the foreign carrier access to the US at several US gateways, the US partners could offer domestic flights connecting these points on behalf of the foreign carrier and use the designator code of the foreign carrier in doing so. Though referred to in speeches, this policy was never incorporated in any policy

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[133] *Travel Weekly* (23 July 1987).

statement, nor was it ever stated in black and white by either the DOT or the US Department of State.[134]

The true impact of this decision was seen when, in December 1987, United Airlines and British Airways made public the extensive co-operation agreement reached between the two airlines. This agreement, which also included code-sharing, sent ripples in the aviation world in view of the fact that,

1. British Airways (which at that stage was considered as the No 8 airline in the Western World) and United Airlines (considered as the largest airline outside the Soviet Union) had twenty gateways from where it could code-share automatically; and
2. the possibility of expanding BA's current routes to reap the benefits of the extensive feed potential of United Airlines domestic system.

Even though both airlines had the underlying route authority, the DOT wanted both parties to seek specific permission for their agreement and also to submit copies of the agreements. At that stage there was no prescribed procedure for the authorization of code-sharing agreements. The US DOT was itself in two camps as to whether the existing regulations required filing of the code-sharing agreement with the DOT for approval.[135] Initially both airlines were hesitant; BA was even ready to challenge the validity of the requirement in court. After deliberations, both carriers filed for exemptions from seeking a "statement of authorization" which was normally needed for blocked space agreements, charter type agreements and wet leases.[136]

Meanwhile, American Airlines used the opportunity for its personal gain by persuading US officials to use approval as leverage to force BA to permit its

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[134] *GRA Study*, *supra* note 1 at 29. This issue will be further elaborated in Chapter 3:1.

[135] Feldman, "Inconsistencies", *supra* note 27 at 21.

[136] *Ibid.* at 20.

(American's) Sabre CRS to issue BA tickets in England. Legal action was pending in the UK and appeals had been made to the EEC in respect of this issue at that time.[137]

In March 1988, when DOT approved the code-sharing agreement between BA and United they stated that though the regulations were not clear, the agreement was in the public interest, and therefore the request was granted.[138] However, considering the reasons given by the DOT, it was clear that international code-sharing would not have been allowed unless the route was covered in the bilateral, or otherwise brought benefits to the US and unless the foreign country allowed US carriers similar rights in their markets.[139]

Yet this approach was soon abused by the airlines which unscrupulously tried to enlarge its network by code-sharing on routes not specifically covered the bilateral.[140] Therefore, subsequent criteria adopted by the DOT included consideration of the following factors.

1. Whether the route authority required in respect of the proposed code-sharing agreement is provided for in the governing bilateral agreement - All partners must have economic authority for all services operated or held out to the public.
2. The positive impact of the "overall balance of benefits" under such an agreement.
3. Whether the proposed code-sharing agreement would result in substantial public benefits.
4. Whether the grant of the request will be consistent with the department policy and precedents.

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[137] *Ibid.*

[138] DOT Order No. 88-3-38 on Docket # 45396; *GRA Study*, *supra* note 1 at 29.

[139] See *GRA Study*, *ibid.* at 29, referring to "Code Sharing: An Evolutionary Outline" fact sheet provided by KLM Royal Dutch Airlines (dated 21 June 1994), at 5.

[140] See generally Feldman, "Inconsistencies", *supra* note 27 at 22.

5. Whether the partner airlines agree to comply with the DOT policies and rules governing code-sharing agreements.
6. Whether it will not adversely affect competition in the given market, by setting up substantial barriers to new entry.[141]

The need for a coherent policy on code-sharing has been emphasized by many who criticised the DOT for not following a well-defined approach to code-sharing.[142] The debate on the matter continued for some time without a solution in sight. Some believed that foreign carriers enjoyed many advantages over US carriers when the two competed on international routes to and from the US, and that the result was often a serious imbalance of traffic in favour of the foreign carrier.[143] These people advocated a complete ban on foreign carrier code-sharing.

But the final decision was that it should be permitted, provided that the foreign government gave US airlines benefits of comparable value.[144] Although the DOT began requiring such reciprocity, a change in policy occurred in 1991. The UK-US bilateral was amended to allow a British carrier to code-share from its US gateway to any US city where a US airline offered services to the UK by direct or connecting flight.[145] In

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[141] But when the bilateral agreement doesn't limit the number of carriers that may provide the agreed services between the countries, there could not be such a barrier to enter.

[142] Much of the confusion in the area of code-sharing is due to the fact that the US is developing its strategy in response to individual cases rather than a part of a long term strategy Humphreys, "Code Sharing", *supra* note 22 at 200.

[143] House Appropriations Committee Report on fiscal year of 1988 cited in *GRA Study*, *supra* note 1.

[144] Senate Appropriation Committee disagreed with the House Appropriation Committee suggestion of a blanket prohibition on code-sharing. *Ibid.*

[145] US-UK 1991 Bilateral Air Service Agreement, para. 11, s. 5, Annex 1 - Memorandum of Consultations between the UK and the US provided,

> Any UK designated airline may enter in to a commercial arrangement with any US airline or airlines under which that other airline's flight carry the designator code of both airlines and may be held out by the designated airline as services to a point in US territory as though those services were it's own, provided that:
>
> 1. the sector between the US gateway point for which the UK airline is designated and the point in US territory to which the service is held out in one for which the other airline has authority to provide service; and

effect, this allowed BA to code-share in a star burst fashion to 104 US cities from its gateways.[146] A graphical illustration of this situation is reproduced in Annex Two.

In June 1995, the US and UK reached a "mini" air services agreement which further relaxed restrictions on trans atlantic air services between US and UK. One notable feature of this agreement was that airlines of both countries were no longer prevented from "Star burst code-sharing" within and beyond the UK and beyond the US.[147] Furthermore, the stipulation that applications for code-sharing authority in the US shall be acted upon within 28 calender days of filing, paved the way for smooth and prompt implementation of future code-sharing agreements.[148]

There was widespread belief that by allowing foreign countries to code-share, they were permitting such airlines to attract an even larger proportion of the international traffic away from US carriers, which would in turn diminish jobs available on US carriers.

Even though the code-sharing agreement with the foreign carrier could be devised in such a manner to balance the benefits, it was argued that such agreements would create an irresistible precedence to dozens of other foreign countries which would then seek, and would undoubtedly obtain, similar code-sharing rights in the US to the overall

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2. the sector is between two cities, one of which is a gateway point for which the UK airline is designated and the other is a city which is held out by any designated US airline for service in conjunction with it's flights to or from the UK, such service being: on-line connecting and non stop behind its gateway point in the US; or a connecting service operated by another airline on which that airline's designator code appears;or a through-plane service (i.e. a service which uses the same aircraft throughout, irrespective of the number of stops);

Cited in de Groot, *supra* note 15 at 71. This was mainly in consideration for allowing the succession to TWA and PanAm held Heathrow slots by United and American Airlines. See R.L. Clark and K.N. Gourdin, "European Aviation Reform and US International Airlines" [Summer 1994] 48:3 Transportation Quarterly 267 at 270.

[146] *GRA Study*, *supra* note 1 at 38. This was conditional upon the divesture of the US-UK route rights possessed by USAir. See *US* v. *USAir Group* (Cir. A No. 93,0530) 1993 WL 523459 (DDC).

[147] Under the 1991 bilateral agreement, UK Airlines already had the opportunity to Star burst within the US.

[148] "TransAtlantic Bilaterals - US-UK Mini Deal Set Pattern" [June/July 1995] Avmark Aviation Economist 2 at 3.

detriment of the US carriers.[149] The US Air Transport Association (ATA) felt that this would result in foreign carriers obtaining cabotage rights in US.[150]

The Present US International Aviation Policy and its Effect

In November 1994, the US DOT released its International Aviation Policy, setting out in detail its objectives and the criteria it hoped to adopt in granting approval for code-sharing agreements.[151]

Based on that, American Airlines objected to the DOT's approval of the Continental-Alitalia code-sharing agreement, pointing out that such approval was inconsistent with the US policy of not granting authority to foreign carriers whose governments impose restrictive policies on US carriers.

In response, the DOT ruled that the deciding issue was not whether the underlying bilateral agreement was liberal or restrictive but on whether the code-sharing pact furthers the US international aviation objectives and on that basis it held that the pact significantly improved competition in the US-Italy market.[152] The approval was given on a extra bilateral basis.[153]

One commentator is of the view that the present "policy" of the US DOT is to approve a code-sharing agreement after using approval as a bargaining lever to obtain increased rights for US carriers generally; or to grant approval if there isn't vigorous complaints by other airlines, making the grant of authority, an exercise of politics and opportunism.[154]

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[149] *Ibid.*

[150] J. Gallacher, "US Gateways" [August 1987] Airline Business 24; see also M. Lyon "The Foreign Connection" [September 1987] Commuter Air 21 at 25.

[151] See *supra* note 46.

[152] P. Takemoto, "Continental-Alitalia Set to Launch New York-Rome Route" *Travel Weekly* (27 October 1994).

[153] Chiverelli, *supra* note 8 at 201.

[154] Goldman, "Coded Warnings", *supra* note 21.

Effects of the Fly America Policy

This policy requires employees of federal agencies and government contractors to use US airlines if available. Travel agents with government accounts are required to book such employees on US carriers that have contracts with the General Services Administration (GSA) and offer federal discounts in specific city pair markets.

In 1991, the US GAO decided that government employees may take international flights which are operated by foreign carriers under a code-sharing agreement with a US carrier that has a city pair contract, as long as the ticket is issued in the name of the US carrier.

Though twenty three foreign airlines who were code-sharing with US carriers became eligible to carry such traffic due to this interpretation, foreign carriers who were not code-sharing or who did not carry the US carrier's designator were unjustly deprived of catering to this traffic on certain routes.[155]

Other Applicable Regulations

Another regulation which has a bearing on code-sharing is the regulations made by the US Department of Commerce in respect of its general licence to US manufactured aircraft on a temporary sojourn to another country.[156] This regulation (GATS) identifies and issues sanctions against certain countries which they consider as supporting international terrorism. If a foreign carrier wet leases US manufactured aircraft or use them in code sharing operations with an airline from such a country, the regulation has established procedures to bring enforcement action against such foreign carrier or to remove export privileges from it.[157]

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[155] For example, under the BA/USAir code-sharing agreement, BA used USAir aircraft and crew for the trans Atlantic services taken over from USAir, but were denied of this traffic as the USAir designator was not used on such service. See *supra* note 148 at 4.

[156] General Aircraft on Temporary Sojourn.

[157] *Aviation Daily* (15 September 1992) at 460.

A DOT inquiry revealed that the most significant area where airlines failed to follow the DOT rules was the failure to disclose code-sharing agreements.[158] A detailed discussion on this matter and the regulations in respect of CRS will be done in Chapter Three.

The applicability of the Clayton Act, and the Sherman Act is discussed in Chapter Three during the discussion on anti-trust laws and anti-corporative behaviour.

Due to state policy, the US prohibits its airlines to overfly certain countries, and such prohibitions have an effect on code-shared flights as well. For example, when overflying Afghanistan was prohibited by the FAA due to civil conflicts in that country, the DOT issued an order that US carriers should not continue code-sharing on flights which, even when operated by the foreign partner, overfly these prohibited areas.[159]

Present Application Procedures and Requirements

Initially, the DOT did not clearly specify a procedure which should be followed in order to get authorization for a code-sharing agreement. There have been instances where the DOT has allowed the code-sharing operations to proceed based on equitable considerations since there was no clearly established regulatory requirements at the time when operations begun.[160]

The DOT regulates code-sharing arrangements between the US and foreign carriers under Parts 207 and/or 212, as appropriate, of its Regulations.[161] Under these rules, the Department will issue a statement of authorization to the extent consistent with the applicant's underlying economic authority, if the proposed arrangement is in the public interest. In determining the public interest under these rules, a number of factors,

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[158] *Aviation Daily* (30 November 1987) at 308.

[159] *Aviation Daily* (17 February 1995).

[160] When the BA/United code-sharing agreement was announced on 10 December 1987, the Code Sharing partners were not aware about the necessity of obtaining authority from the DOT to code share until the General Counsel informed them by his letter dated 18 December 1987. Therefore such equitable considerations were taken into account in authorizing the code sharing agreement subsequently. See DOT order no: 88-3-38 Docket # 45396.

[161] 14 CFR, Parts 207 and 212 regulations apply in this case.

among which are the extent to which the authority involved is consistent with any applicable bilateral aviation agreement; or, in the absence of a bilateral aviation agreement, whether reciprocity exists on the part of the homeland of the foreign carrier participant; the benefits which would accrue to US carriers, passengers and shippers under the proposed arrangement, are considered.[162]

The application process at the DOT is a public proceeding and a public notice of each application is included in the DOT weekly list. The DOT regulates code-sharing, considering it as a practice similar to a wet lease and a charter operation.

Initially, each party to the code-sharing agreement must posses underlying economic authority to conduct scheduled operations in the market involved.[163]

In addition, the code-sharing partner must hold underlying charter authority, and must obtain an additional statement of authorization in order to conduct code-sharing operations which will last more than sixty days.

The code-sharing partner must comply with the requirements stipulated in 14 CFR 212.5. The application must be filed by letter at least forty-five calender days prior to the date of commencement of the code-sharing operations. An actual copy of the code-sharing agreement between the parties need not be filed.[164]

The DOT regulations require that a copy of the application be filed with the US Department of Justice (DOJ) in order to review anti-trust implications. The US DOJ analyzes the agreement to see whether it will affect competition in the code-shared routes. The considerations here would be whether the route is between the hubs of the partners; whether they were direct competitors in the market; whether the agreement has limitations as to who is going to operate the flights; and whether their capacity, schedule

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[162] See DOT Order 88-6-3, 2 June 1988.

[163] See 401 of the Federal Aviation Act and 14 CFR, Part 211, Sub-Part C of the regulations set out the requirements (14 CFR 211.20).

[164] If the airline application for authorization made to the DOT is detailed so as to set out all relevant elements, there has been instances where the DOT has not insisted on the code-sharing agreement to be filed. See generally *Aviation Daily* (25 March 1988) at 458.

and pricing decisions remain independent.[165] The guidelines followed by the DOJ will be discussed in Chapter Three.

If the US partner to the code-sharing agreement is a participant in the Civil Reserve Air Fleet (CRAF) program and if the proposed code-sharing agreement was not encompassed in a bilateral aviation agreement, the application must show the impact the proposed code-sharing agreement would have on their CRAF commitments. Such applications should be served on the US Department of Defence at Scott Air Force Base.[166]

Since the application process is a public proceeding, any interested party may file its objections or support within seven days. Courts are prevented by statute from reviewing an order made by the DOT, unless the party seeking the intervention had initially taken the same objection in its submissions to the DOT.[167] Therefore, it is necessary that all probable objections are taken during the DOT inquiry.[168] DOT orders are upheld by courts if its consideration of the various statutory ingredients of public interest is not so far out of balance as to be arbitrary, capricious or an abuse of discretion.[169] The DOT could, if acceptable reasons are forwarded, shorten the procedural time periods.

For authority to be granted the proposed code-sharing must be in the public interest. The DOT will consider, *inter alia*,

1. The extent to which the authority is covered by and is consistent with the bilateral agreement.

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[165] See A.K. Bingaman address on 25 January 1996, *infra* note 294.

[166] "DOT Code-Sharing Requirements - An Overview", prepared by the DOT Office of International Aviation, Foreign Carrier Licensing Division, July 1995 at 2.

[167] 49 U.S.C 1486(e) (1982).

[168] See *Airline Pilots Association* v. *DOT*, 838 F 2d 563, 567 (DC cir. 1988); *Horizon Air Industries* v. *US DOT*, 850 F 2d 775, 780 (DC cir. 1988).

[169] *City of St. Louise* v. *DOT* - 23 Avi 17752; *Delta Airlines Inc.* v. *DOT*, 51 F. 3d 1065, 1072 (DC Cir. 1995).

2. If no bilateral agreement exists, it would be on a basis of comity and reciprocity.
3. The potential benefits to passengers, shippers and the participating carriers.
4. Consistency with the US aviation policy.
5. If the code-sharing agreement has not been included in a bilateral, the effect on the CRAF program.

Authorization is normally granted for a period of one year but may vary depending on the application. The decision is communicated by public notice.

If approval is granted, such is conditional upon "Standard Code-Sharing Conditions" such as identification of code-sharing flights with an asterisk in all written or electronic schedules distributed by the carriers, OAG and CRS's, and informing customers of the operating carrier. DOT policy regarding code-sharing arrangements between the US and foreign carriers require that the contract of carriage and ticket reflect the carrier that is holding out the service (whether in the CRS or elsewhere); and that the carrier holding out the service accept its responsibility to its passengers according to the terms of that contractual relationship.[170]

Confidential Treatment

The DOT also considers applications requesting confidential treatment for information and documents submitted.[171] Carriers make such requests since most of the clauses in the code-sharing agreement contain commercially sensitive materials. The DOT evaluates such requests in accordance with the standard of disclosure found in the Freedom of Information Act,[172] which allows withholding business information if it is

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[170] See *e.g.*, DOT Order 88-3-38, 15 March 1988, and DOT Order 88-3-51, 24 March 1988.

[171] The applicable regulations are contained in 14 CFR 302.39 and 49 USC s. 40115; see Annex 5 for an example for a code-sharing agreement, portions of which have been redacted, on the request of the code-sharing partners.

[172] 5 USC, s. 552, exemption 4.

1. commercial and financial;
2. obtained from a person outside government; or
3. privileged and confidential.

With respect to whether information is privileged and confidential, in *Gulf & Western Industries, Inc.* v. *US*[173] it was held that such information must not be the type usually released to the public.

2:4:2 Regulatory Control in Canada

License for International Scheduled Services

The National Transportation Act, 1987 (Act),[174] Part II deals with air transportation. Section 6 of the Act establishes the National Transportation Agency (Agency), which by virtue of the powers vested in it under Section 102 of the Act, has promulgated regulations in respect of air transportation.[175]

Part II of the Air Transport Regulations (ATR)[176] issued by the Agency deals with licensing. Section 88 of Act sets out the requirements to be fulfilled in order to obtain a license to operate a scheduled international service. Section 15 of the ATR, is also along the same lines. Accordingly, an applicant for a scheduled international services must:

1. hold a Scheduled International License according to Section 89 of the Act;[177]

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[173] 615 F.2d. 527 at 530.

[174] RSC 1985 c. 28 [3rd supp.] as amended.

[175] For a detailed discussion on the relevant regulations and procedures regarding Canadian Air Transport Regulations and designation of carriers see D. Fiorita, "Safety and Economic Regulation of Air Transportation in Canada" (Montreal: Institute of Air and Space Law, McGill University, 1995) [unpublished thesis] 118ff.

[176] SOR/88-58, 31 December 1987, Canada Gazette, Part II, vol 122 No 2 at 361-461 as amended.

[177] The designation in respect of Canadians is given by the minister in writing. In respect of non-Canadian requirements are: (1) Designation by the foreign government, under the terms of the agreement between the counties. (2) Hold a document equivalent to a scheduled International License issued by the foreign government.

2. hold a valid Canadian Aviation Document issued by the Minister under the Aeronautics Act;[178] and

3. hold prescribed liability insurance coverage according to Sections 6-8 of ATR.

A license so issued will be subject to the specific conditions set out in the license which will be in addition to the general conditions set out in ATR.[179]

In *Air Atonabee Limited*[180] it was held that,

> for the Agency to approve a proposed code-sharing program, the applicant would have to submit all necessary documentation including in this case, evidence of the underlying authority for Continental to operate the routes in question under the relevant "Canada United States Air Agreements"[181]

It should be noted that licences issued of late have a specific condition which states:

> Subject to normal regulatory requirements, the licensee may sell transportation in its own name on up to (amount) flights a week in each direction operated by a designated airline of (country).[182]

This clause appears to be a form of pre authorization for code-sharing, and one wonders how such a clause could be complied with as a condition of the licence. The question here is whether the licensee is compelled to code-share or alternatively enter in to a blocked space agreement without code-sharing with a foreign carrier in order to fulfil such licensing conditions. However, that would be an absurd interpretation of the terms and conditions. In any event, it is clear that the licensee could code-share at his option, provided that he complies with the normal regulatory requirements. Whether he should request an exemption from the requirements in Section 18(a) & (c) at that stage is not clear.

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[178] RSC 1985 c. A-2 amended RSC 1985, c. 33 (1st supp.), as amended.

[179] See s. 102 of Act.

[180] (1990) N.T.A.R. 115.

[181] *Ibid.* at 116.

[182] For example see Agency decision 790-A-1995 dated 27 November 1995.

At present, the airlines seeking to code-share must obtain exemption from Section 18 of the ATR, which states:

> 18. Every licence, other than a domestic licence issued pursuant to subsection 72(1) of the Act, shall be subject to the following conditions.
>
> (a) the licensee shall, on reasonable request therefor, provide transportation in accordance with the terms and conditions of the licence and shall furnish such service, equipment and facilities as are necessary for the purpose of that transportation;
>
> (b) the licensee shall not make publicly any statement that is false or misleading with respect to the licensee's air service or any service incidental thereto; and
>
> (c) the licensee shall not operate a domestic service or an international service or represent by advertisement or otherwise, the licensee as operating such a service under a name and style other than that specified in the licence.

Approval for a Code-Shared Flight

The Canadian authorities consider that a code-shared operation does not fulfil the requirements of Section 18(a) and 18(c) of ATR. Therefore, the approval process is to grant exemption to the requirements of Section 18(a) & (c). The Agency has the power to do so under Article 70 of the Act which reads

> 70.(1) The Agency may by order, on such terms and conditions as it deems appropriate, exempt a person from any of the requirements of this Part or a regulation or order made under this Part where the Agency is of the opinion that
>
> (a) the requirement has been substantially complied with in the case of the person;
>
> (b) an action taken or a provision made by the person respecting the subject-matter of the requirement is as effective as actual compliance with the requirement; or
>
> (c) *compliance with the requirement in the case of the person is unnecessary, undesirable or impractical.*
>
> (2) No exemption shall be granted under subsection (1) that has the effect of relieving a person from any provision of this Part that requires a person to be a Canadian and to have a Canadian aviation document and

> prescribed liability insurance coverage in respect of an air service. (emphasis added)

At this stage, discussion on the powers of the Minister of Transport is appropriate. According to Article 86 of the National Transportation Act, the Minister has the power to issue directions to the Agency in respect of the exercise or performance of its powers/duties or functions, on the basis of

1. Safety and security of International Civil Aviation
2. Implementing international agreements / conventions / arrangements to which Canada is a party.

and, with the approval of the Governor in Council, and on the recommendation of the Minister of Foreign Affairs, on the basis of

3. International comity and reciprocity
4. Enforcing an international objective or right
5. Public interest

Such directions could be

a. As to when licenses should be granted and

b. to the nature of the terms and conditions of such licenses.[183]

If the National Transportation Agency has been designated as the aeronautical authority for Canada in the convention/agreement/arrangement *or* has been directed by the Minister to act on his behalf, the powers bestowed on the Minister will be exercised by the National Transportation Agency.[184]

In practice, the participating airlines would have already obtained relevant licenses under Section 88 of the Act and Section 15 of ATR, and the application with regard to code-sharing will be for a exemption from the conditions set out in see 18 (a) & (c) of ATR.

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[183] Art. 86(2)(a).

[184] Art. 86(4).

Therefore at this stage, the Agency, acting under Article 70(1) (and Article 91 if additional terms are incorporated), guided by any directions it has received under Article 86, would, if satisfied that compliance with such requirements set out in Section 18(a) & (c) ATR are unnecessary, undesirable or impractical, give its approval to code-sharing by granting the requested exemptions.

Several authorizations granted by the Agency have erroneous details as to the law from which it derives the authority. For instance, in their decision dated 29 June 1995, in respect of the Air Canada-United code-sharing agreement, the Agency quoted Subsection 74(4) of the Act, which does not even exist! A similar error appears on the authority granted to Air Canada-Continental agreement by decision dated 29 June 1995.

Air Canada and Continental, by their joint letter dated 6 June 1995 requested broad authority to code-share to the extent allowed by the US-Canada Open Skies Agreement. This, in effect, would encompass routes which were not expressly mentioned in the code-sharing agreement submitted for approval. Yet, the Agency by its reply dated 29 June 1995, granted the said authority provided that any amendment to the agreement altering the transportation should be submitted 45 days prior to its effective date. By such procedure, the Agency appears to have given a broad authority to the partners to code-share.

Air Transport Regulations Having a Bearing to Code-Sharing

Section 18(b) of the Air Transportation Regulations[185] states:

> The licensee shall not make publicly any statement that is false or misleading with respect to the licensee's air service or any service incidental thereto.

Deciding on a complaint against Canadian Airlines for advertising and selling space through German CRS on flights to destinations for which it did not hold a license to operate, the Agency held that such practice was in violation of Section 18(b) of the Air Transportation Act. It held further, that even if a caveat is displayed alongside that

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[185] SOR/88-58. The relevant Canadian Computer Reservations Systems Regulations are discussed at *infra* note 257 and accompanying text.

such transportation was subject to governmental approval, it was misleading to the general public.[186]

The Agency requires the code-sharing partners to possess underlying route authority to serve the destination according to the applicable air services agreements even in respect of advertising such flights on CRS displays.

In *Air Atonabee Limited*,[187] "City Express" requested approval for a code-sharing agreement with Continental Airlines. The agency in its decision, denying authority to code-share, held that,

> ... [T]he code-sharing arrangement proposed between City Express and Continental would entail the use of the Continental Code (CO) and relevant flight numbers on the routes in question. In the view of the agency, *the use of this airline code and flight numbers on a flight operated by City express means that Continental express is in fact, providing an air service*. (emphasis added)

An application by Air Canada to code-share with Cathay Pacific was turned down by the Agency by their letter dated 28 May 1990 (File No. 4820-2H2) on the basis that the bilateral between the countries did not allow a change of aircraft in Vancouver. The proposal was to provide a blocked space / code-share service on Air Canada flights between Vancouver and Toronto for Cathay's Hong Kong-Toronto traffic.

Proposed New Regulations

Bill C-101, cited as the Canada Transportation Act (CTA), has been tabled in the House of Commons, containing revisions to the National Transportation Act, 1987. The proposed amendment includes provisions to continue the National Transportation Agency as Canadian Transportation Agency and to retain the present Air Transport Regulations with modifications. Section 61(1) of CTA empowers the agency to enact specific regulations regarding block space, code-sharing and wet lease of aircraft. Accordingly,

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[186] See *Re Canadian Airlines International Ltd.*, 1989 NTAR 3 at 4, date of decision at 25, 1989 file No. D2230-C14-6.

[187] *Supra* note 180.

new regulations have been proposed in respect of use of aircraft, with the flight crew provided by another person, for the purpose of providing an air service.

This new regulation is somewhat the codification of the present practice followed by the Agency, and it also prescribes the required degree of disclosure in respect of the actual carrier.

According to the proposed regulations[188] the approval of the Agency is required in cases where an air service is offered by a licensee, using all or part of an aircraft with a flight crew provided by another; and where a person provides such service to a licensee; *except* when such involves a situation where,

1. Both the provider of the service and the licensee are Canadian, and are licensees, and the air service is domestic or between US and Canada.[189]
2. In respect of an international service, where a temporary and unforseen circumstance has necessitated use of such service for a period less than one week, provided prior notice has been given to the Agency with reasons and explanations, and has received an acknowledgment that conditions under Section 8.3(1) have been met.[190]

For approval, the licensee and the person who is providing the service must apply to the Agency for approval at least 45 days[191] prior to the first flight. Such applications must include:

a. Evidence of appropriate license, permit or authorization, Canadian aviation document and liability insurance coverage
b. License authority of the proposed service
c. Name of the licensee
d. If applicable, name of the charterer and permit

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[188] See Sec. 8.2(1).

[189] Sec. 8.3(1).

[190] Sec. 8.3(1)(b).

[191] Sec. 8.2(2).

e. Name of the person providing the service

f. Aircraft type to be provided

g. The maximum capacity of seats/cargo provided for the use of the licensee

h. Points to be served

i. Frequency of service

j. Period of the proposed operation

k. Explanation as to why such service is necessary

A point which needs clarification is the resulting situation if the flight crew is, by contract, under the authority of the licensee. Furthermore, since the emphasis in Section 61 and proposed Regulation 8.2(1) is on flight crew, if air carrier "**A**" uses carrier "**B**"'s aircraft, with carrier "**B**"'s cabin crew but operates with carrier "**A**"'s flight crew, such operations will not fall within the scope of the regulations.

According to the proposed Regulation 8.4, when the approval of the agency is granted, the licensee is automatically exempted from the requirements of Regulations 18(a) and 18(c).

Public Disclosure

Section 8.5 of the proposed regulations defines the degree of public notice required in respect of an air service which is provided using all or part of an aircraft, with a flight crew provided by another. Notice requirement is three fold.

1. The licensee must identify the flights so operated and give the identity of the operator and the aircraft type in all its service schedules, time tables, electronic displays and in any other public advertising.

2. The passengers must be informed prior to reservation (or if the arrangement was due to an unforseen circumstance arisen after reservation, at such time) and also upon check-in regarding the identity of the operator and the aircraft type.

(But if such arrangement was due to an unforseen incident as contemplated in Section 8.3(1)(b), the licensee will be exempted from complying with the said

requirements provided that he has made every effort, but he must inform the passenger upon check-in.)

3. The operator of the each segment of the journey and the aircraft type must be identified in all travel documents, including itineraries if such is issued.

Regulation 8.5(5) permit the licensee to include information that such flight will be operated by another, on schedules etc., provided that a caveat to the effect that such is subject to the approval of the agency is included.[192]

Shortcomings

The proposed regulation is welcome in order to ensure a simplified regulatory regime and to provide additional protection to the passenger. Yet some shortcomings in the proposed regulations are identified.

1. Approval process

Though an explanation as to why service is to be provided in such a manner is required, no provision has been made to solicit and consider the views of other interested parties prior to granting approval, other than from persons from whom such is solicited by the Agency. Such a clause would enable the Agency to have a more open policy and would also strengthen its decisions, especially in view of the eventualities which may arise in the future. At present, under the General Rules of the Agency, notices sent out by the Agency will require the recipients to intervene if they so wish within 30 days. The applicants are afforded a further 10 days to file answer to such objections.

Another matter which needs clarification is whether a licensee could advertise proposed air services using aircraft with flight crew provided by another, even prior to making an application to the Agency. This would prevent a carrier from publishing an extensive network to test the market prior to genuinely committing itself.

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[192] This appears to be contradictory to a previous decision by the Agency. See *supra* note 186 and accompanying text.

2. Form of notice

The regulations do not specify whether notice to passengers should be oral or written. Even though 8.5(3) states that the travel documents should include such information, in an era where the practice of ticketless travel is catching on, the ability to effect such notice is doubtful.[193] Furthermore, the ECAC study mentioned in Chapter 2:2:4 and the IATA report submitted to the ECAC have shown that including more information in the present form of tickets is restrictive unless automated tickets are used.

2:4:3 Regulatory Control in the EU

It was debated in Europe after the implementation of the Third Package of air transport liberalization in January 1993, as to whether individual states could continue to regulate a code-shared flight between points within the community, *which continues to a point outside the community*. States such as the UK and the Netherlands maintain that the removal of most regulatory control over intra-community air services allows such code-sharing. Germans oppose such interpretation because, in their view, when the code-share involves a route to a point outside the community, the Third Package does not apply, and the states have to act within the constrains of the relevant bilateral agreements.[194]

In the report issued by the committee set up by the European Commission to look into air transportation in the EU, it was declared that the concept of national carrier no longer fits into the regulatory pattern of the third liberalization package of the EU.[195] The Committee felt that airline co-operative agreements such as code-sharing promote and accelerate the restructuring process and provide significant cost savings. Therefore,

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[193] P. Martin, "Phone In, Turn Up, Take Off - A Look at the Legal Implication of Self Service Ticketing" (1995) XX:4/5 Air & Sp. L. 189 at 195.

[194] Humphreys, "Code Sharing", *supra* note 22 at 198.

[195] Comité des Sages for Air Transport, "Expanding Horizons - Civil Aviation in Europe, an Action Programme for the Future" (Brussels: European Commission, 1994); see also Chiavarelli, *supra* note 8 at 197.

it proposed that the EC should consider such agreements favourable and as such airlines should be given the opportunity to decide on their own the extent of the co-operation, provided that such agreement does not lead to the creation of a dominant position.[196]

With regard to intra community services, there are no specified rules and the European Commission does not examine code-sharing as such, but rather its impact on competition. Thus, community carriers are allowed to enter into code-sharing agreements provided that they do not create a monopolistic situation which is prohibited by Section 86 of the Treaty of Rome.

With regard to international routes, community carriers could code-share on services to destinations where they hold traffic rights, but they cannot use code-sharing to gain entry to markets which were previously closed to them.[197]

In the European Union, Regulation 3975/87 provides exemptions for joint promotion and advertising, joint ground handling services, joint Frequent Flyer Programs and interlining. Block space agreements with code-sharing do not need specific approval.

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[196] *Ibid.*

[197] See "Maximum Advantage from a Minimum of Investment" [April 1993] Avmark Aviation Economist 14.

2:5 Regulatory Control in Other Jurisdictions

Dutch Position on Code-Sharing

According to the Dutch position, code-sharing is purely a "doing - business" item that needs no further involvement or approval by national governments. The Dutch aviation policy is aimed at achieving an efficient and extensive network of airline connections to, from and via the Netherlands and consider code-sharing to be a first step towards globalisation of the air transport industry.[198]

The Dutch authorities consider that, in view of the current framework of bilateral agreements, it is sufficient if actual carrier operating the code-sharing service have obtained a licence from relevant authorities.

In the event that a third country curtails such activity, the Netherlands government will, out of necessity, insist on reciprocity and would use the issue of code-sharing purely as a defensive instrument. With regard to consumer aspects and competition law, they believe that the code-sharing partners and their agents must clearly and emphatically inform passengers that code-sharing is involved, as to who the actual carrier is, and whether there is a change of aircraft or operator.

While deploring the practice of CRS screen padding, the policy statement goes on to state that they would support any changes to the CRS regulations and the Code of Conduct, to prevent such occurrence within multilateral fora. It also states that the first responsibility of ensuring that code-sharing is practised according to the EU Competition Law lies with the EU and national authorities.[199]

United Kingdom Position on Code-Sharing

The UK have claimed that code-sharing is a private marketing right,[200] a position similar to that taken by the Dutch.

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[198] DGCA Netherlands, Policy Paper on Code Sharing, (presented to the ECAC task force on code-sharing dated October 1994).

[199] *Ibid.*

[200] Feldman, "Inconsistencies", *supra* note 27 at 24.

South African Position on Code-Sharing

South African authorities follow the following criteria to approve code-sharing applications

1. There should be underlying traffic rights.
2. The service should be in a developmental market.
3. The routing must follow a reasonably straight line and not involve excessive circuiting.[201]

[201] Shenton, "Airlines Gain", *supra* note 10 at 18.

CHAPTER THREE
LEGAL IMPLICATIONS

3:1 Conformity to the Applicable Bilateral Regime

International air transport is governed by a mass of bilateral agreements which are based on the premise of equal opportunity to compete, a concept also acknowledged by the Chicago Convention. A bilateral agreement is the outcome of intense negotiations held in order to balance the benefits between the negotiating countries and guarantee to the states its legitimate share of the market.[202] It is therefore fundamental that the foreign carriers should have an equal opportunity as home carriers to compete for international passengers in the market common to them. Code-sharing, in some situations, seems to disturb this balance.

3:1:1 Traffic Rights Involved

The policy of most governments is to require that all partners to a code-sharing arrangement have economic authority for all services, either operated or held out to the public. The initial issue which arises in such code-sharing agreements is whether there is a bilateral treaty which governs air transportation between the two countries. If so, the next issues to consider are:

1. whether the route contemplated for code-sharing has been specified in the bilateral; and
2. if so, whether the participating carriers have been designated to serve the route.

In the event that there is no bilateral agreement between the states, or if the route has not been contemplated in the bilateral, or if other carriers are designated to serve the

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[202] For a definition of the legitimate share of a state in the international air transport market, see H.A. Wassenbergh, "Future Regulations to Allow Multi-national Arrangements Between Air Carriers (Cross Border Alliances), Putting An End to Air Carrier Nationalization" (1995) XX:3 Air & Sp. L. 164 at 166. For a discussion on the historical development of the law relating to bilateral air services agreements see R.I.R. Abeyratne, "The Air Traffic Rights Debate - A Legal Study" (1993) XVIII:I Ann. Air & Sp. L. 3.

route, further considerations arise. These considerations and the above-mentioned issues will be dealt with later in this chapter. Considering the classification of the different types of code-sharing agreements described in Chapter 1:4, the economic authority or the traffic freedoms needed for each classification would be:

1. Code-sharing between points in the countries of the participating airlines.

This involves Third and Fourth Freedom traffic.

2. Code-sharing on a route between points in the countries of participating airlines which include a domestic sector/s in one or more participating country.

This mainly involves Third and Fourth Freedom traffic, but could also involve Eighth Freedom rights if the foreign carrier is granted cabotage rights. In addition to the matters stated under (1) above, one must consider whether the domestic destination on which the international segment is extended is a city to which the foreign carrier has traffic rights.[203]

3. Code-sharing on a route between points in the countries of participating airlines via intermediate point/s in third country/s.

This involves Third, Fourth and Fifth Freedom traffic. Additional authorization from the third country is required in respect of Fifth Freedom traffic.

4. Code-sharing on a route via points in the countries of the participating airlines which extend beyond point/s in third country/s.

This involves Third, Fourth, Fifth and Sixth Freedom traffic. Additional authorization from the third country is required in respect of Fifth and Sixth Freedom traffic.

5. Code-sharing on sectors on a route which doesn't include a point in the country of one or more participating code-sharing airline/s.

This involves Third, Fourth, and in applicable circumstances, Fifth and Sixth Freedom rights in respect of the operating airline. In the case of an airline of a country

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[203] For a detailed discussion see Chapter 2:4:1. See also P.M. de Leon, *Cabotage in the Air Transport Regulation* (Boston: Martinus Nijhoff Publishers, 1992) 55ff in respect of the practice adopted by states in granting cabotage rights on a bilateral basis.

where the route does not have a stop, Seventh Freedom rights would be needed. Additional authorization from third countries are needed.

6. Code-sharing on a route which does not include any point in any of the countries of the participating airlines.

Theoretically this is a situation where all participating carriers use their individual Seventh Freedom rights simultaneously. Depending on the means adopted, this type of code-sharing could result in a situation where even the operating carrier is not a partner to the code-sharing agreement. (This could truly be called the *Ultimate Freedom of the Air!* - where an airline of country **A** offers code-shared flights, in a route between countries **B** and **C**, using aircraft of an airline from country **D**).

The initial matter to consider is whether code-sharing is a traffic right *per se*. Any government's position whether code-sharing is a traffic right or not depends on its overall aviation policy.[204] Traffic rights are a commercial freedom granted by one state to another, or in other words, a market access right which is expressed through agreed physical or geographical specifications (or a combination of such specifications) concerning who and what may be transported over an authorized route or parts thereof in the authorized aircraft.[205]

One commentator considers that questions of whether both code-sharing carriers should have all relevant traffic rights or whether it is sufficient that each airline has the traffic rights for the leg of the journey which it operates are irrelevant because, in either case, the code-sharing must be authorized by the relevant authorities, at which stage due consideration will be given to all aspects of the agreement and if satisfactory, even extra bilateral approval is a possibility.[206]

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[204] One commentator believes that this seems to be closely related to how many attractive traffic points it has to offer in trade. See Feldman, "Inconsistencies", *supra* note 27 at 25.

[205] *Manual*, *supra* note 35 at 10.

[206] Chiverelli, *supra* note 8 at 199.

Once again, discussing the practice of code-sharing within the US will illustrate the evolution of views on this matter. According to de Groot[207] the evolution of international code-sharing can be classified into five different stages.

1. Code-sharing considered as a marketing instrument:

Code-sharing was considered as a variation of normal interlining which did not need specific approval other than the operating carrier having authority to operate the flight.

2. Code-sharing needed underlying traffic rights:

Between 1985 and 1988, there were many proposed code-sharing agreements. US policy required carriers to have underlying route authority for all sectors of the route to which the code-sharing applied irrespective of who was carrying the traffic on any given segment.

This was based on the consideration that code-sharing operations, where a foreign carrier holds out destinations to which it has no traffic rights *per se*, were deceptive to the public. Furthermore, the US took the position that the carrier could not advertise or sell such services unless a specific right to code-share had been granted. This stipulation was:

> based on the reasoning that code-sharing is a competitive tool, and it increases the revenues of the foreign carrier concerned more than the code-sharing may increase the revenues of the partner,... and therefore should be compensated by the foreign state concerned, instead of it being allowed as a matter of course.[208]

3. Code-sharing needs specific authority:

When BA and United announced their proposed code-sharing agreement, the US authorities viewed it as requiring specific authority in addition to the underlying route authority which both airlines had. This was based on the view that when the bilateral is silent on the issue, the government is free to regulate and approve such agreements, after giving consideration to the public interest aspects. This included considering the impact

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[207] de Groot, *supra* note 19 at 74.

[208] Wassenbergh, "Principles", *supra* note 16 at 166.

on competition, the overall balance of benefits and the possibility of using such approval as a negotiating tool.

This policy was adopted by many other countries when confronted with similar situations.

4. Traffic rights for sole purpose of code-sharing:

At the 1991 UK-US bilateral negotiations the parties made provision for exclusive code-sharing operations in certain categories of routes. The recipient airlines could not offer regular service on these routes, other than code-shared flights on such routes.[209]

5. Code-sharing as a quasi-traffic right:

This is the stage where countries, confusing code-sharing with traffic rights issues such as capacity and market access, started treating code-sharing as a quasi-traffic right because it could be used to circumvent the conditions placed on market access by the bilateral agreement.[210]

The US position on this issue is now clear. According to a DOT order,[211] "the display in CRSs of flights that connect with the code-sharing services, in no way increase the capacity provided in these services."

However, in 1993, the German authorities held a different view during their bilateral negotiations with the US. They considered attempts by US airlines to code-share with British and Dutch carriers to Germany as cutting the bilateral capacity controls. Greece, Israel and Saudi Arabia are some of the other countries with similar views.[212]

Authorization for code-sharing could be given in different forms. For example the bilateral agreement could either:

1. grant complete freedom to the carriers of either party to jointly offer code-shared flights;

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[209] See *supra* notes 145 & 147.

[210] According to de Groot, this is an erroneous reasoning as code-sharing does not entail additional operations and does not introduce additional capacity into the market. See *supra* note 15.

[211] DOT Order 94-1-23.

[212] Humphreys, "Code Sharing", *supra* note 22 at 201.

2. allow the specifically designated carriers of each party the right to code-share on designated routes;
3. allow code-sharing with any Third/Fourth Freedom carrier operating to and from the territory of the other party; or
4. allow code-sharing with any carrier operating to and from the territory of the other party.

3:1:2 The Carrier Must Have Underlying Route Authority

The development of code-sharing in the US clearly illustrates the various issues needed to be considered. These developments were discussed earlier in Chapter 2:4:1. Absence of route authority is usually the first objection made regarding code-sharing agreements. Even where the code-sharing partner utilizes a predetermined block of seats, competitors have objected on the basis of the absence of an underlying route authority.[213]

At this time it would be appropriate to consider the exact nature of the rights exchanged by a bilateral air transport agreement. One must consider whether the agreement grants rights to designated carriers as *operators* of specified routes and agreed services or whether it does so on the basis that the designated carrier is to be considered as the *carrier* in respect of such specified routes and agreed services. In the latter case, consideration must be given as to whether being the contractual carrier would suffice.[214]

Ideally the right to operate a designated service in any manner it chooses should be the privilege of the designated carrier. Bilateral agreements contain provisions regulating the nationality of the carrier designated for the services mentioned in the

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[213] When the TWA-Air India code-sharing agreement was proposed in 1988, wherein Air India would be buying a block of seats on TWA's Chicago-London flight which would in turn connect at Heathrow with Air India's own service to Bombay and New Delhi, three carriers, namely PanAm, North West and American Airlines, objected to the proposed agreement on the basis that Air India had not until then received authorization to service Chicago. See "TWA's Air India Pact Sparks Protests" *Travel Weekly* (7 April 1988).

[214] See Wassenbergh,"Principles", *supra* note 16 at 168. See also P.P.C. Haanappel, *Pricing and Capacity Determination in International Air Transport* (Deventer: Kluwer Law & Taxation Publishers, 1984) at 145ff.

bilateral. That condition having met, such a carrier should be free to obtain the necessary equipment to operate the services allocated to it. It should be able to operate the designated service even with an aircraft that it does not own. The nationality of the aircraft should not be an obstacle.

3:1:3 Code-Sharing to a City to which Route Authority is Held

Initially code-sharing was restricted to points where the non-US carrier had traffic rights. For example, when Quantas and American Airlines proposed to code-share, where Quantas would purchase blocked space on American Airlines' flights to New York from the Quantas gateways on the west coast, the DOT had no hesitation in granting its approval since Quantas already had rights to New York. The traffic carried by the code-shared flight did not originate in the US, and the code-shared flight was used instead of regular service to the New York gateway. In any event, foreign carriers were not permitted to code-share in a "star burst" fashion from its gateway to other points in the US.

3:1:4 Code-Sharing Between Designated Cities

In 1987, when BA and United Airlines proposed code-sharing operations between Seattle and Chicago, the DOT did not initially raise any objections since BA was authorized to serve both Seattle and Chicago, and as such it was deemed legal for Seattle-Chicago-London connections to be offered under the BA code. The reasoning here was that, if a bilateral permits a foreign airline to fly to different US markets, it tacitly permit US airlines to fly domestic connecting services between these markets for that foreign carrier, and use that foreign carrier's code on that sector.[215]

The difference between this operation and the one mentioned earlier is that in the present situation the foreign carrier continues to offer regular flights to all gateways in the US, and in addition, is offering code-shared flights connecting such gateways.

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[215] Feldman, "Inconsistencies", *supra* note 27 at 22.

3:1:5 Complying with the Route Specified

The objection taken by Continental Airlines regarding the proposed BA/United code-share was that its implementation would allow BA to subvert a provision in the US/UK bilateral. The bilateral specified that the Denver-London service was to be provided to Gatwick. Therefore, Continental argued, any BA service in that market should serve Gatwick and not Heathrow as proposed by the code-sharing agreement.[216]

There have been instances when a gateway assigned by the bilateral was switched in order to facilitate code-sharing. For instance, under the US-UK bilateral in force during 1988, the UK had the authority to change some of its gateway points. Therefore, in January 1988, BA notified the DOT of its intention to switch one of its gateway points from St. Louis to Denver in order to facilitate its proposed code-sharing agreement with United Airlines.[217] This shows the importance placed by airlines on code-sharing.

3:1:6 Changes in the Aviation Policy

As described in detail in Chapter Two, US policy in respect of code-sharing has changed in a evolutionary manner to its present status. Though countries with one national carrier will not encounter similar criticism from domestic quarters, in countries such as the US, which has to walk a tightrope to ensure that all its national carriers are satisfied with the opportunities available to them, changes in the aviation policy draws immediate criticism and opposition. To some extent the attitude toward code-sharing in the US arises from their dissatisfaction with the progress of their bilateral negotiations with the UK.[218]

Therefore defining, articulating and enforcing a clear, consistent policy on code-sharing would be the most difficult and contentious task such countries face because of

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[216] "Five Airlines Battle United-BA Code Sharing" *Travel Weekly* (15 February 1988) at 3. See DOT Order No. 88-8-27, Docket # 45585 where the DOT in its decision considering the public benefit and an omnibus clause in the Air Services Agreement, overruled the objection.

[217] B. Polling, "United and BA's Code Sharing Proposal Stirs Furor" *Travel Weekly* (28 January 1988).

[218] See "Regulatory Developments in 1994", Report of the 7th Meeting of the IATA Regulatory Watch Group, February 1995 at 42.

the divergent interests of their carriers.[219] Consistency in policy would ensure a better bargaining position at bilateral negotiations.

3:1:7 Code-Sharing by Carriers who are not Designated

When a country has more than one national carrier, objections to code-sharing are frequently made by the airline designated for that route under the bilateral air services agreement. The designated airlines believe that any code-sharing agreement by any other carrier in that market will undermine its operation.

In 1993, on an initial complaint by Lufthansa, the Administrative Court of Cologne issued an injunction prohibiting NorthWest from offering flights between Amsterdam and six cities in Germany, via code-sharing with KLM. The court ruled that NorthWest required express approval from the German government to offer such flights.[220] In this case the administrative tribunal, citing Section 21 of the Aeronautics Act which requires carriers who do not have their principal place of business within Germany to have a licence according to the governing bilateral, went on to state that performance of flights between the US, Amsterdam and Germany under the NW (NorthWest) designator code could be considered as an establishment of new flights in certain designated sectors.

The tribunal also drew authority from Schwenk,[221] and stated that the designator code is more than just a designation for administrative convenience, and it could not be changed. The designator code is used to show passengers and aviation authorities that the carrier to whom the code is assigned is responsible for legal and technical requirements in respect of the flight, and as such, is even more important in situations of co-operation or new alliances.

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[219] *Supra* note 60. See also the recommendations made by the National Commission to ensure a Strong Competitive Airline Industry to the US President and Congress (August 1993) *Change, Challenge and Competition* (Washington: US Government Printing Office, 1993) at 21.

[220] Verwaltunsgericht Koln, Beschluss vom 1. Oktober 1993 (4 L 1236/93) reported in (1994) 43 ZLW at 363.

[221] W. Schwenk, *Handbuch des Luftverkahrsrechts - Handbook on Air Law*, (Cologne: Carl Heymanns, 1981) s. 328.

This was the first time that a country barred a US carrier from offering code-shared connections in such a manner.[222]

3:1:8 Third Country Code-Sharing

This occurs when two airlines (**a** & **b**) from different countries (**A** and **B**) team up to offer air services to a third country (**C**). In such a situation, the airline which is the code-sharing partner [for example (**a**) as opposed to the airline (**b**) which is actually operating its aircraft to country (**C**)] is considered to be involved in third country code-sharing operations.[223] In this situation the code-sharing partner (**a**) would either:

(i) have the right to fly to the third country (**C**) by itself, but instead would be using the services of an airline of another country (**B**); or

(ii) would not have route authority at all.

It must be considered whether designation would imply that the carrier has the authority to offer services in any manner it chooses. Another matter which needs consideration is the effect such code-sharing would make on the capacity and frequency restrictions found in the bilateral. Depending on such considerations, code-sharing to third countries is normally prevented.

3:1:9 Code-Sharing when there is No Bilateral Agreement

When there is no bilateral between the states or if the bilateral is silent on the matter, and if there is no established procedure in respect of approval of code-sharing agreements, states do so on the basis of comity and reciprocity.

Airlines have stated that even when there is no bilateral in existence, allowing a foreign carrier to enter into code-sharing agreements with *more than one* of its carriers

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[222] Note "US-Germany Relations Take a Nose Drive" *Intravia Air Letter* (4 August 1993) at 3; the Israeli government also refused NorthWest permission to serve Israel via Amsterdam through a code-sharing agreement with KLM.

[223] "The term third country code-sharing is used if the code-shared services, depending on the angle of observation, either touch a third country or involve a carrier from a third nationality". See de Groot, *supra* note 15 at 63.

would not be an equal exchange of benefits as the foreign carrier could play the interests of one carrier against the other, thus keeping them at its mercy.[224]

United Airlines was critical of the then-proposed plans of NorthWest to operate code-sharing flights with KLM to Guinea, Malawi, Sierra Leon, Sudan, Tanzania, Tunisia and Zimbabwe, with whom the US did not have bilateral air service agreements at that stage. Their objection was on the basis that the DOT should not approve until it was formally decided to allow similar agreements by any other US carrier.[225]

3:1:10 Present Trends

A few years ago, the belief was that the true value of code-sharing would not exist for long and as such, code-sharing would not need to be negotiated and traded in a bilateral. For example, in 1988 KLM expressed the view that it was rather unlikely that foreign governments would trade actual route rights or other economic benefits in return for code-sharing opportunities as the value of code-sharing would certainly diminish in the event that US CRS vendors change their listing habits.[226]

However, in recently concluded bilateral agreements express provisions as to the code-shared operations have been specified. Such provisions normally deal with the restrictions placed on code-shared operations. For example, in some bilateral agreements, code-sharing frequencies are limited to half the level of regular flights.[227]

In some instances states trade the Fifth Freedom rights it already hold for code-sharing privileges. For instance, according to the Dutch-Japanese Air Transport Agreement of 1992, Japan Airlines could code-share on services from Tokyo to

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[224] *Aviation Daily* (16 May 1988) at 253.

[225] Note "United Airlines' "Concern" Over NorthWest/KLM" *Air Letter* (17 January 1994) at 3.

[226] "Five US Airlines Battle United-BA Code Sharing" *Travel Weekly* (15 February 1988) at 3.

[227] For example, US-Russia Bilateral of 1993.

Amsterdam, and use KLM flights to Zurich and Madrid in place of its Fifth Freedom traffic. [228]

In the present Transitional Air Services Agreement between the US and Germany, authorization for the Fifth Freedom code-sharing opportunities between, through and beyond the two countries is expressly mentioned, which would in effect allow a virtually infinite array of code-shared services.[229]

In a market where airlines of many nationalities compete on the basis of their Third, Fourth, Fifth or even Sixth Freedom rights, the collaboration between two airlines by way of a code-sharing agreement would certainly tilt the balance in their favour.

International aviation has witnessed situations where many airlines clamour to strike a code-sharing agreement. The airlines which fail to secure a code-sharing agreement have, on many occasions, ended up as losers. For example, TWA ultimately had to abandon its service to Switzerland since it was unable to compete with the daily non-stop Delta/Swissair service from New York to Zurich and Geneva.[230]

Harrold Shenton, a prolific commentator on code-sharing, proposes the establishment of some kind of "most-favoured-airline clause" to address this problem.[231] By such an arrangement, any airline could apply to code-share with another on terms that similarly-placed airlines have negotiated.

Finally, the importance of following a consistent policy in respect of code-sharing must be emphasized. On one hand, a country should not look inconsistent in front of its international negotiating partners. On the other, a consistent policy would place the country in a better bargaining position.

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[228] F. Njio, "KLM Pushes Ahead with Global Alliances" [February 1988] Intravia/Aero-space World 38 at 40.

[229] See *supra* note 79 and accompanying text; see also Schulte-Strathaus, *supra* note 67.

[230] Shenton, "Airlines Gain", *supra* note 10 at 19.

[231] *Ibid.*

3:2 Consumer Deception

The main accusation against code-sharing has been the deceptiveness of the practice. The passenger is sold the services of a particular airline, and by the time the passenger becomes aware that he is to be given a different product, he has no choice other than to accept it.[232] Passenger deception with respect to code-sharing could arise in the following areas:

Standard of Service

The passenger would be under the mistaken belief that the code-sharing flight on which he booked passage is equivalent to a true on-line flight. In such a situation the passenger would not have expected to make an interline connection mid-way or, even if he knew that, he would have been under the false impression that the service provided would be an equivalent alternative to a single carrier service. Another would be the discovery at the last moment that he has to travel on an airline which he would prefer not to use. Furthermore, he would find that he has to travel by a smaller turbo-prop aircraft, rather than the jet aircraft he expected and thus be denied the inflight comfort (leg room, seat width, separate cabin) he was expecting.[233]

Communication difficulties may also arise between the passenger and the operating staff of the operating carrier, when the latter is not fluent in the principal language used by the code-sharing carrier.

Safety and applicable liability regime

By not providing a clear idea of the carrier and the aircraft types which will be used, code-sharing will impair the passenger's ability to select a flight option with which he feels safe. Furthermore, many international airlines have adopted different conditions of carriage and by doing so have accepted liability limits more favourable to the passenger than made mandatory by the Warsaw System conventions. In such instances,

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[232] See *Aviation Daily* (23 March 1993) at 456; see also P.S. Dempsey, "Airlines in Turbulence" (1995) 23 Transport. L. J. at 15ff.

[233] Policy Statement of the International Chamber of Commerce - Doc. No. 310/385, Rev. 2 dated 15 July 1991; see also *Aviation Daily* (25 July 1991) at 157.

code-sharing between carriers who adopt two different limits would mislead the passenger in respect of such issues or, could create conflicts at the point of claim.

The main causes for passenger deception are:

1. CRS bias; and
2. non-disclosure of the actual carrier.

One of the main reasons for the growth of code-sharing is the expanding market power of airline CRS. Prior to US deregulation in 1978, less than 5% of US travel agents were connected to airline CRS. By 1988 the figure was 95%. Elsewhere in the world the trend, though the same, occurred at a slower pace.[234]

Other reasons for the growing use of CRS is the liberalization of air transport in most parts of the world. When the market is liberalized, travel agents find it difficult to keep abreast of the enormous amount of fare structures and flight options which change daily unless they are connected to a CRS display.

Other Information Which Should be Disclosed

Ideally, the consumer should be made aware of any differences in pricing between code-sharing partners at the time of booking, because the end product which he is going to purchase is the same. It is natural for a passenger to expect to be notified about different fares being offered by the different carriers, and to know that they have a different space availability at each fare level. Being aware that even though one inventory is sold out, unsold space from other inventories will be transferred closer to the departure date could also benefit the consumer. In this respect, consideration must be made as to whether the travel agent should find this out and inform the passenger because the advertisements depicting a code-sharing alliance invariably creates a misconception that the partners are acting in unison.

Passengers would also like to know what type of aircraft is used. In the domestic sector where turbo-props are often used, the passenger's preference for jet aircraft over turbo-props makes such disclosure important. Yet, such information would only make

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[234] *Ibid.*

a decisive impact on a certain group of passengers who are capable and/or desirous of knowing it. The passive customers do not need such information. On the other hand, airlines, as any producer, would like to provide minimum disclosure so as to have space for change.

The function of a governmental regulatory authority is to strike a balance between the airline and the concerned consumer by determining how much disclosure is necessary; and also changing their requirements depending on the public demand.

Due to these reasons, regulations have addressed the aspect of consumer protection within the practise of code-sharing by requesting notification to the passenger of the actual carrier.

3:2:1 CRS Bias

CRSs are undoubtedly an intrinsic part of code-sharing. If not for the marketing advantages of CRS, namely by obtaining higher listings and possibilities of having multiple listings on CRS screens, the growth of code-sharing would not be as astronomical as it is.[235] A "joint operation", where the designator codes of both airlines are displayed, is not given similar preference on many CRS.

The ability of the carriers of each party to inform the public of its services in a fair and impartial manner is the most critical aspect of becoming competitive in the market. Therefore, the quality of the information made available to the travel agents through the CRS is of paramount importance to the carrier.

One has to accept the value of code-sharing when it is considered in conjunction with CRS. One commentator considered that "(code-sharing) would not exist without the emphasis on computer screen display position in travel agents CRS sets."[236]

According to Dempsey, the practice of code-sharing is driven by the opportunities for consumer deception afforded by fraudulently manipulating the computer reservation

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[235] For a detailed discussion on the regulatory development of CRS see B.K. Humphreys, *New Developments in CRSs*, ITA Documents & Reports, vol. 32 (94/4) (Paris: Institute of Air Transport, 1994) [hereinafter Humphreys, "New Developments"] at 29ff.

[236] Feldman, "Inconsistencies", *supra* note 27 at 91.

systems.[237] He goes on to state that code-sharing obfuscates the service actually provided and induces the consumer to purchase a product inferior to what he would have normally bought, by deceiving him to believe that he bought passage on an "on-line connecting service", whereas in fact, it is similar to a interline service.[238] His comments are based on the premise that traditionally, airline passengers tend to believe a single flight number means that they would be flying a single aircraft with or without stops, but without changing planes.[239]

However, it has also been argued that since no CRS vendor has been challenged so far, the indication of code-shared flights by an asterisk should be considered as adequate notice.[240]

(a) Development in the United States

The whole argument on CRS bias can be traced back to 1984 when the largest US CRS, Sabre and Apollo, dominated the market. Sabre was owned by American Airlines and Apollo was initially fully-owned by United Airlines. Originally the airlines who owned the CRS favoured their own flights.[241]

The US DOT, realizing the strategic importance of the CRS in airline ticket distribution, made a joint ruling along with the Department of Justice outlawing bias against specific carriers. The rule stated that the display algorithm should not favour any individual airline.[242] Each CRS vendor was permitted to adopt any display algorithm

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[237] Dempsey, *supra* note 232 at 61.

[238] *Ibid.* at 63.

[239] *Ibid.* at 66.

[240] *GRA Study*, *supra* note 1 at 49.

[241] Humphreys, "Code Sharing", *supra* note 22 at 197.

[242] 49 FR 12675 (30 March 1984).

provided it followed such broad constraints, whereas in Europe, the regulations specified in detail the order in which such flights should be displayed.[243]

This rule made an opening for yet another kind of bias, namely favour of on-line and against interline connections, a bias which grew rapidly, leading in turn to the artifice of code-sharing.

One of the objections to code-sharing is that it misleads travel agents and the consuming public through multiple listings in CRS. Such multiple listing creates display bias in favour of carriers participating in code-sharing, by "padding" the direct flight and connecting flight displays of the CRS with flights which do not exist.[244]

Such duplication result in the relegation of services offered by competitors to lower display positions, or to subsequent display screens. A petition to the US DOT by USAir called for the adoption of a "one flight, one listing" policy. In support of their objections, USAir illustrated the then-prevalent situation in the Buffalo-New York market where USAir operated 31.3% of the actual non-stop flights and Peoples Express operated 68.8%. Subsequent to the code-sharing agreement between Peoples Express and Britt Airlines, the double listing in the Sabre CRS created a situation where USAir flights were reduced to 18.5% of the listings, and the Peoples Express/Britt Airlines flight listing increased to 81.5%.[245]

Subsequent to the USAir's objection to double listing, TWA proposed to the DOT, a quick and easy way to eliminate duplicate listings on CRS called the "L-code". This L-code was basically a traffic restriction code or a suppression code which restricted its PARS CRS to list flights under a shared designator only for on-line connecting

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[243] Humphreys, "New Developments", *supra* note 235 at 35.

[244] See Annex 3 for graphical illustrations of CRS bias.

[245] USAir went on to threaten that if this deceptive practice was ignored by the DOT, it would be compelled to consider adopting such practice themselves for competitive reasons. See generally "USAir's statement to DOT Spells Out its Opposition to Code Sharing" *Travel Weekly* (1 May 1986) at 18.

services. TWA contended that this system eliminated the problems cited by USAir while presenting the benefits of code-sharing.[246]

PanAm, on the other hand, did not object to the prevalent practice and advised the DOT that double listing would provide additional information for the system user. They stated that an intelligent agent would invariably figure out that it was one flight which was operating when he saw two entries with similar times of departure show up on adjacent lines. PanAm further suggested that the best solution would be a double code (XX/YY) but unfortunately CRS systems were only capable of handling two letter designators.[247]

Normally, CRS systems are designed and its display algorithms programmed to list on-line connections above interline connections within certain parameters. American Airlines' Sabre system gave on-line connections a ninety minute advantage whereas the TWA's PARS system gave a hundred and twenty minutes advantage to ensure that an on-line flight within that time period would be listed prior to any other flight option. This, according to the respective airline officials, was programmed in that manner because customers preferred on-line connections.[248]

In subsequent years some major CRS's removed the on-line preference, so that the display position would be solely determined on the basis of elapsed flight time.

The prevailing rules applicable in the US in respect of CRS are contained in 14 CFR, Part 255 which were issued in September 1992. Unless extended, these rules will terminate at the end of 1997. Section 14 CFR 255.4(c) specifically state that CRS systems should not use any factors directly or indirectly relating to the carrier's identity in constructing the display of connecting flights in an integrated display.

The shortcomings of the rules are that it does not:

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[246] B. Polling, "TWA Proposes Use of L-code to Eliminate Double Listing" *Travel Weekly* (5 June 1986).

[247] It has been now suggested that such a double code is feasible and the possibility of identifying the actual operating carrier by underlying its designator code. See Sorensen, *supra* note 10.

[248] "Economics, Code Sharing Threaten Survival of Commuter Airlines" (27 April 1987) Av. Wk. & Sp. Tech. 57 at 59.

1. ban on-line preference, change of gauge flights and padding of displays;
2. code-sharing flights are considered as on-line services; and
3. no ranking criteria is prescribed.[249]

The aforesaid screen bias, which was prevalent in the US CRS initially, was subsequently curtailed to a minimum due to the dual display system adopted. Accordingly, the two largest CRS systems - Apollo and Sabre (which collectively account for almost 80% of the market) provided one display for services within North America in which on-line preference was retained, and another display for all other services where rules similar to the European Display Rules were followed.[250]

(b) Development in the EU

In Europe, the present EC Code of Conduct on CRS[251] and the ECAC Code of Conduct on CRS, both of which are couched in similar language, specifically prevent display preference from being given to on-line services over interline services irrespective of whether such on-line services are genuinely on-line services operated by a single carrier, or pseudo on-line service such as services through code-sharing.[252] Therefore in this aspect, there is no preferential benefit gained by code-sharing.[253] Earlier, European regulations required that all CRS operating in Europe rank all connections according to the objective criteria of elapsed time.[254]

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[249] See Humphreys, "New Developments", *supra* note 235 at 41.

[250] Humphreys, "Code Sharing", *supra* note 22 at 201.

[251] Council Regulations (EEC) No. 3089/93 of 29 October 1993 (O.J. L278/1) [hereinafter *EC Code*].

[252] See generally M. Rich, "How to Crack the Code Sharing Deals" *Financial Times* (19 September 1994). See also [August 1995] Avmark Aviation Economist 2.

[253] Humphreys, "Code Sharing", *supra* note 22 at 201.

[254] Goldman, "Coded Warnings", *supra* note 21 at 29.

The present operative EEC regulations further amended the earlier regulation to extend its scope and clarify certain provisions in respect of CRS.[255] The ranking criteria was expanded according to which airlines could list a single flight number no more than twice in CRS.

Section 10 of the Annex to the EC Code of Conduct on CRS, which deals with ranking criteria, states:

> 10.(1) Where participating carriers have joint venture or other contractual arrangements requiring two or more of them to assume separate responsibility for the offer and sale of air transport products on a flight or combination of flights, the term "flight" (for direct services) and "combination of flights" (for multi-sector services) in paragraph 9 shall be interpreted as allowing each of the carriers concerned - up to a minimum of two - to have a separate display using its individual carrier designator code.
>
> (2) Where more than two carriers are involved, designation of the two carriers entitled to avail themselves of the exception provided for in subparagraph 1 shall be a matter for the carrier actually operating the flight.

In addition, the Council has granted a block exemption under Article 85(3) of the Treaty of Rome to agreements relating to CRS.[256]

(c) Development in Canada

Canadian Computer Reservations Systems Regulations

With regard to the developments and the regulations governing the Canadian CRS, suffice to mention the present regulations which require the operating carrier to be clearly identified in situations of code-sharing. The regulations established pursuant to Sections 4.3(2) and 4.9 of the Aeronautics Act state:

> 14(2) Each participating carrier shall ensure that flights involving stops, en route changes of aircrafts, carrier or airport or segment carried out by other modes of transport are clearly identified for the system vendor and ...

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[255] Council Regulation (EEC) No 2299/89 dated 24 July 1989 (O.J. L220/1) was amended by 3089/93.

[256] Regulation No. 3652/93 of 22 December 1993.

> 14(3) Where flights are operated by a carrier other than the carrier identified by the carrier designator code, the carrier whose designator code is being used shall ensure that the carrier operating the flight is, except in the case of short term ad hoc arrangements, clearly indicated to the system vendor....[257]

The obligation to ensure that such information is displayed has been placed on the code-sharing partner. Other applicable regulations contained in ATR were discussed in Chapter 2:4:2.

(d) Other Related Issues

The "screen padding" caused by the multiple listings of code-shared flights has also caused quite concern. This occurs because the code-sharing partners list a code-shared flight as interline and also as individual flight options offered by each partner. This multiple listing forces other flight alternatives to lower positions on the CRS display screens. It also achieves a higher probability of being chosen by a travel agent due to repetitive listings.

Recently, American Airlines, TWA and the American Society of Travel Agents (ASTA) filed petitions to the DOT, renewing their agitation and calling for a ban on multiple listing of code-shared flights on CRS. They stated that it creates screen clutter which in turn adversely effect consumer choice by making it difficult for a travel agent to consider the full range of available flight options.[258]

In response Delta and NorthWest submitted that such a ban would effectively eliminate code-sharing between major airlines since the practice necessarily involves the publication of at least two airline codes in respect of a single flight segment.[259]

In some situations explicit disclosure of the operating carrier is done, and such information utilizes space in the CRS screen which causes competing interline

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[257] SOR/95 - 275, *Gazette* (28 June 1995) at 1686. For a critical analysis of CRS Regulations in Canada see Fiorita, *supra* note 175 at 152ff; see also *supra* note 185 and accompanying text.

[258] *Air Letter* (23 June 1994) at 3; see also Humphreys, "Code Sharing", *supra* note 22 at 202.

[259] *Aviation Daily* (22 June 1994); *Air Letter* (7 July 1994) at 2; see also Humphreys, "Code Sharing", *ibid.* at 202.

connections to be pushed further down to subsequent screens. This matter is graphically shown in Annex Three.

Another matter which needs to be addressed is the exclusion of the details of the operating carrier when a PNR (Passenger Name Record) is created by the CRS. PNR is the origination from which all subsequent documentation, tickets and itineraries are produced and is the only recognized record of the contract with the passenger prior to a ticket being issued. It is essential that information regarding the operating carrier are retained in the PNR in order to be transferred to the passenger ticket and itinerary.[260]

3:2:2 Non-Disclosure of the Actual Carrier

Code-sharing activities could confuse and mislead the consumer (passenger) unless he is made aware of the nature of the arrangement prior to selection of the particular flight. However, it must be understood at the outset that it is impractical and disruptive to require full disclosure when the code-sharing agreement is for a short duration or where substitute transportation has been arranged at the last minute. Furthermore, code-sharing carriers are hesitant to be completely transparent when they wish to benefit from holding out their individual brand names to attract passengers.[261]

The Official Airline Guide (OAG) indicates a code-sharing flight by placing an asterisk[262] alongside any segment which is not operated by the airline whose designator code is displayed. That indicates that any other airline, other than the one whose designator code it is, will be operating the flight. The front section of the OAG identifies the actual airline.

Another matter which needs to be mentioned is the resemblance between the flight numbers. In most code-sharing agreements, the flight number used by the code-sharing

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[260] See "Code Sharing: A Code of Conduct", Proposals issued by British Midland, June 1995 at 5.

[261] ECAC, CSTF/2 Report dated 17 March 1995 at 5.

[262] In the US edition it is an asterisk, and in the European edition it is a diamond.

partner closely resembles the actual flight number of the operating partner.[263] This practice of retaining a "family resemblance" between the two flight numbers would also deceive the passenger.

The CRS displays an identification mark that denotes code-shared flights but this does not inform the user of the identity of the actual carrier unless he takes further steps to find that out from another screen. Furthermore, different kinds of marks placed in CRS displays add to the confusion. A graphical explanation of this situation is shown in Annex Three.

(a) US Regulations in respect of Code-Sharing Disclosure

The US legislation requiring notification to the passenger regarding the actual carrier was initially made in 1985. The DOT disclosure rule required carriers and travel agents to give timely notice to potential passengers by direct oral communications[264] before the reservation was made, to the effect that the carrier actually operating the flight was not the same carrier whose designator code or name appeared in schedule listings and in the passenger ticket. It had been the policy of the DOT to consider the practice of code-sharing as unfair and deceptive and therefore in violation of the regulations in force[265] unless the consumers were given *reasonable and timely notice* of the code-sharing agreement.[266] On various occasions, the DOT imposed fines and penalties on airlines for not complying with the rule.[267]

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[263] See Annex 3, example F.

[264] Including information/reservations calls.

[265] 49 USC, s. 41712.

[266] 14 CFR, s. 399.88 - Docket #42199, 50 FR 38508 (23 September 1985).

[267] See "Carrier Fined for Violating Code Sharing Disclosure Rule" *Travel Weekly* (22 July 1991); See also "DOT Fines Midway Air $30,000 for Various Consumer Infractions" *Travel Weekly* (17 October 1991). Here the airline initially defended its action on the basis that "the other airline" is a wholly-owned subsidiary and therefore the DOT rule doesn't apply. For relevant orders see, DOT Order 89-8-50 (30 August 1989) Eastern Airlines- a fine of US $75,000 was assessed for violations of the rules; see DOT Order 91-10-1 (2 October 1991) Midway Airlines Inc.- US $30,000 penalty for failure to reveal code-sharing arrangements; see DOT Order 91-11-4 (6 November 1991) USAir Inc.- US $35,000 penalty for violation of the rules.

For instance, a three month investigation into the prevalent practice showed the DOT that more than 30% of international air travellers from US who booked code-shared flights did not know with whom they were flying. This prompted the DOT to adopt new rules to address the shortcoming.[268]

The regulations require that air carriers ensure, at a minimum to:

1. identify in written or electronic schedule information with an asterisk or other means, such flights in which the airlines code is different from the code of the airline actually providing the service;
2. provide information in any direct oral communication with the consumer concerning a code-sharing flight, sufficient to alert the consumer that the flight will occur on an airline different from the airline whose code is shown on the ticket and identify the airline(s) actually providing the service; and
3. provide frequent and periodical notices in the advertising media of the existence of a code-sharing relationship and the identities of the airlines actually providing the service.[269]

This rule applies only to US carriers because at the time of its adoption there were only a few code-sharing agreements between US carriers and foreign carriers and the regulation did not expressly address such agreements. However, the DOT subsequently moved to address this matter and required adherence to the conditions of this regulation (14 CFR 399.88) as a condition for its approval of code-sharing agreements which involve a foreign carrier.[270]

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[268] No. 13053, *Air Letter* (8 August 1994); see also US Department of Transport, Press Release (5 May 1994).

[269] 14 CFR 399.88 (Docket No. 42199) 50 FR 38508 (23 September 1985). International Airline Passenger Association wanted a last chance announcement to be made on-board the aircraft and allow passengers to transfer without penalty. See *Aviation Daily* (17 October 1994) at 80.

[270] See "Disclosure of Code Sharing Agreements and Long Term Wet Leases", (4 August 1994) Docket No. 49702 & 48710, Notice 94-11; see also Humphreys, "Code Sharing", *supra* note 22 at 203.

It was thereafter felt that this regulation was inadequate since it did not apply to ticket agents doing business within the US and, as stated earlier, to foreign air carriers in a direct manner.

Therefore, the DOT has proposed to expand the rule to cover these classes too. The proposed rule[271] (NPRM) would replace the earlier regulation and would be applicable to:

1. direct air carriers and foreign air carriers that participate in code-sharing arrangements or long term wet leases involving scheduled passenger air transportation; and
2. ticket agents doing business in the US that sell scheduled passenger air transportation services involving code-sharing arrangements or long-term wet leases.[272]

The notice requirements set out in this rule are four-fold.[273]

1. Notice in schedules: requires that an easily recognizable mark should identify a code-shared flight in written or electronic schedule information provided by carriers to the public, in OAG or comparable publications, and in CRS systems.

2. Oral notice to prospective consumers: requires that such persons be informed in any direct, oral communication by the ticket agent before booking the transportation that the transporting carrier is not the carrier whose designator code appears in the ticket.

3. Written notice: requires that a clear, written notice specifying the actual carrier who will be operating the flight in each flight segment be provided by the ticket agent to the consumer either in the itinerary or separately.

4. Advertising: requires that, in any advertisement concerning services which involve a code-sharing agreement, the advertiser must clearly indicate the nature of the services and the actual transporting carrier.

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[271] 14 CFR, part 257.

[272] See 14 CFR 257.2 (applicability).

[273] See 14 CFR 257.5 (notice requirement).

In respect of US domestic code-sharing, the DOT doesn't require the disclosure of the corporate name of the actual operator of the commuter service and thus a generic network name could be used. Therefore, in such a situation the consumer is denied knowledge of the actual operator of the flight unless he undertakes a detailed investigation himself.

(b) EC Regulations in respect of Code-Sharing Disclosure

Section 7 of the Annex to the currently operative Regulation on the Code of Conduct on CRS states:[274]

> 7. Where flights are operated by an air carrier which is not the air carrier identified by the carrier designator code, the actual operator of the flight shall be clearly identified. This requirement shall apply in all cases, except for short-term ad hoc arrangements.

But it must be noted that this is only in respect of CRS. There has been no attempt to enforce such disclosure through ticket agents. The proposed recommendation of the ECAC Task Force on Code-sharing has set out the acceptable criteria in respect of code-sharing disclosure, but such is still being contemplated.[275]

(c) Other Applicable Domestic Laws

UK Domestic Laws

Section 14 of the Trade Descriptions Act of 1968 provides, *inter alia*, that:

> it shall be an offence for any person in the course of any trade or business -
> a. to make a statement which he knows to be false; or
> b. recklessly to make a statement which is false; as to any of the following matters, that is to say,
> (i) the provision in the course of any trade or business of services;
> (ii) the nature of any services [...] provided in the course of any trade or business; and
> (iii) the time at which, *manner in which or persons by whom any services are so provided.* (emphasis added)

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[274] *Supra* note 251.

[275] Draft recommendations are reproduced in Annex 4.

In *R* v. *Avro plc*[276] the defendant was a "flight only" tour operator who issued a "flight only" return ticket from Gatwick to Alicante to the complainant, his wife and mother-in-law. The ticket stated that the carrier was DanAir and the return flight was to take off at 12:55 p.m. on a certain day. However, on the out-bound journey, they were given a replacement ticket issued on a different carrier for the return flight which was to leave at 12:00 noon on the same agreed date. On the date of departure, the complainant found out that the substituted flight was not destined to Gatwick and moreover that the original flight which was indicated to him did not exist at 12:55 p.m.

On his complaint, the company was prosecuted and convicted after pleading guilty on two counts under Section 14(1)(a) of the Trade Descriptions Act. The charges related to the statement contained in the original ticket relating to the time of the return flight, and the statement contained in the substituted ticket relating to the scheduled destination.

The court held that such statements were statements of fact which the appellant knew it be false, and that it was *not* a promise or a statement of a future interest which would make the charges under the Act inappropriate.[277]

In *British Airways* v. *Taylor*[278] which concerned of airline overbooking, the House of Lords held that the circumstances could show that an assertion of existing fact and a promise of future conduct could co-exist in the same statement.

This dicta was followed in the *Avro* case which held that the appellant was in breach of Section 14, notwithstanding that there were *"provisions in the contract evidenced by the ticket that the time of the flight could be altered or flight cancelled without warning"*. The court also considered whether the statement was false at the time of representation, and followed the decision in *Wings Ltd.* v. *Ellis*.[279] In this case the appellant company issued a travel brochure describing a hotel in a tourist resort situated

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[276] (1993) 157 JP 759.

[277] In such cases the remedy available is damages for breach of contract.

[278] (1975) 1 WLR 1197.

[279] (1984) 3 ALL ER 577 at 592.

in the tropical paradise, Sri Lanka, as having air-conditioned rooms. Since the rooms were not so, the statement was false and the company, as soon as it knew about it, took remedial action. However, complainant read the brochure and booked the holiday with the expectation of such comfort in the hotel without being aware of the mistake and was totally disappointed. The appellant was charged under Section 14. Here the House of Lords held that it is irrelevant that the company was unaware of the falsity at the time the brochure was published, because the statement is considered as being made continuously until effective correction is made.

The *Avro* case could be considered as an important precedent considering similar situations which exist in code-sharing, especially considering the wording of Section 14(1)(a)(III).

3:2:3 Actionable Non-Disclosure

In transactions and relationships governed by law, the parties owe each other a general duty of truthfulness. Any shortfall from such duty will constitute a misrepresentation which is actionable. There are specific types of transactions wherein complete disclosure of all material facts is necessary. One such type of transaction is where one party is presumed in law, or proven in fact, to have an influence or advantage over the other.[280]

In *Lloyds Bank Ltd.* v. *Bundy*,[281] Lord Denning put forward the concept of "equality of bargaining power" in deciding whether there was undue influence or advantage used by one party.

This dictum has been disapproved in *National Westminster Bank plc* v. *Morgan*[282] by Lord Searman (with all other Law Lords concurring). The House of

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[280] For detailed discussion on the topic see A.K. Turner & R.J. Sutton, *The Law Relating to Actionable Non-disclosure*, 2nd ed. (London: Butterworths, 1990), ch. XXIII.

[281] (1974) 3 WLR 501 at 509.

[282] (1985) 1 AC 686, 708.

Lords made it clear that courts will not "add" to the agreement the parties have made by implying a term merely because it is reasonable to do so.

Therefore, even in the absence of a general doctrine along the lines suggested by Lord Denning, inequitable bargaining power can be considered as a matter which will support an allegation of undue influence or unfair advantage.

In *Nader* v. *Allegheny Airlines Inc.*[283] the plaintiff brought a common law action based on fraudulent misrepresentation due to the airlines failure to apprise him regarding its deliberate overbooking practice.

The gravamen of the plaintiff's complaint was *non-representation* rather than misrepresentation. The issue deliberated by the court was whether due to the impression created by airline advertising, a duty was cast upon the airline to disclose whatever may lead to the alteration of such expectations.

It was held that the elements needed to be proved by a plaintiff in order to recover as:

1. that a false representation was made;
2. that it was in reference to a material fact;
3. that it was made with the knowledge of its falsity;
4. that it was made with the intent to deceive; and
5. that he took action in reliance upon the representation.

Even though the plaintiff knew from his prior experiences with other airlines about the practice of "bumping", since he was unaware of an *intentional practice* followed by the defendant, the court held that non-disclosure by the airline made it liable for the common law tort of misrepresentation.

In *Wasserman* v. *TWA*[284] the court held that if the passenger who was "bumped" had accepted alternative transportation he would not be able to maintain an action under the common law tort of fraudulent misrepresentation based on the airlines failure to disclose its practices.

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[283] 14 Avi 18312.

[284] 632 F.2d 69 (1980).

Given the inequality in bargaining power of an airline passenger, it could be said that a cause of action will arise for non-disclosure and misrepresentation under Common Law, in a case where the identity of the actual carrier has not been revealed, even though the code-sharing agreement between the contracting carrier and the actual carrier has been advertised.

3:3 Effect on Competition

3:3:1 Anti-Trust Laws in US

The deregulation of the air transport industry in the US took effect with the passage of the Airline Deregulation Act of 1978[285] and the International Air Transportation Competition Act of 1979.[286] This moved air transport away from the protection of economic regulation to the free forces of the marketplace where the sole guardian of control is the anti-trust laws.[287]

Section 1 of the Sherman Act[288] stipulates the basic anti-trust prohibitions against contracts, combinations and conspiracies in restraint of trade or commerce. Section 2 of the Act prohibits monopolisation. Violations of the provisions of the Sherman Act may be prosecuted as civil or criminal offenses.

The Clayton Act[289] expands the general prohibitions of the Sherman Act and addresses anti-competitive problems at their initial stages. Accordingly, it prohibits any sort of merger or agreement if it lessens competition or creates a monopoly.

Since code-sharing is a competitive tool used by an alliance, practice of it naturally raises doubts as to its effect on competition. In aviation, competition is important because of the benefits it produces to the consumer. The level of competition in an aviation market can be measured by indications such as the number of airlines offering flights in the market and the relationship between price and cost.

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[285] 92 Stat. 1705 (1978).

[286] 94 Stat. 35 (1980).

[287] For a detailed discussion on the effect of US anti-trust laws on international air transportation see P.M. Barlow, *Aviation Antitrust* (Deventer: Kluwer Law & Taxation Publishers, 1988); see also US Department of Justice & Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations* (April 1995). For a detailed discussion on the application of US anti-trust laws on IATA activities see Haanappel, *supra* note 214 at 81ff.

[288] 15 U.S.C. 1.

[289] 15 U.S.C. 12.

If competing airlines exchange current information on matters such as cost, prices, customers, routes and disclose associated data, any parallel action taken thereafter by such carriers could amount to a violation of anti-trust laws. For example ticket pricing made by carriers must be an independent decision by the airline and not an explicit or implicit agreement.[290]

Aircraft wet lease agreements, pooling agreements, blocked space agreements, sub leasing of slots, collective advertising and information displayed on CRS are further examples of practices which have anti-competitive elements. Most of these practices are followed by code-sharing partners. If such an agreement or conduct is within the confines of the statutory exception in Section 414 of the Federal Aviation Act, the general rule is that it will be beyond the reach of anti-trust laws. The immunity embodied in that provision can be either expressly or impliedly conferred within the parameters of judicially-defined standards.[291]

In enforcing the anti-trust laws, the US enforcement agencies[292] consider international comity. Thus, prior to determining whether to assert jurisdiction to investigate, to seek a remedy or to bring an action, the agencies would consider whether significant interests of any foreign sovereign would be affected.[293]

A code-sharing agreement is a form of integration between the partners and would, as in the case of mergers, raise the traditional horizontal and vertical merger concerns. The anti-competitive nature of code-sharing is seen when the partners allocate markets, limit capacity, raise fares or foreclose rival airlines from that market.

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[290] Barlow, *supra* note 287 at 65-69.

[291] *Ibid.* at 14.

[292] Department of Justice and the Federal Trade Commission.

[293] See US Antitrust Guidelines, *supra* note 287 at footnote 73 and accompanying text.

If the partners are not direct competitors or they are unlikely to become so in the foreseeable future, code-sharing agreement between such partners would not raise great concern.[294]

The guidelines which are followed in considering the anti-trust implications of international code-sharing agreements are:[295]

1. whether the partners are actual or potential direct competitors on the route which is code-shared;
2. whether the code-sharing route is between the hubs of the partners (if such is necessary to achieve pro-competitive efficiencies of serving beyond hub city pairs, the potential competitive harm must be clearly outweighed);
3. whether there will be limitations on who will be operating the flights;
4. whether capacity, schedule and pricing decisions will be made independently;
5. if operations are not independent, whether any of the partners would not be likely to enter (or is likely to exit) the market in the absence of the code-sharing agreement;
6. whether the setting of fares by the partners independent of IATA is a less anti-competitive alternative; and
7. whether the bilateral between the countries allows new carriers to enter to the code-sharing market without restrictions (a restrictive bilateral will increase the threat to competition whereas a open skies regime will reduce anti-trust concerns[296]).

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[294] A.K. Bingaman, "Consolidation & Code Sharing: Antitrust Enforcement in the Airline Industry", paper presented to American Bar Association forum on Air & Space Law, Washington, DC on 25 January 1995 [hereinafter Bingaman, "Consolidation"].

[295] For a detailed discussion on anti-trust and airline merger analysis see C.F. Rule, "Antitrust and Airline Mergers: A New Era" (1989) 57:1 Transport. Prac. J. at 62ff.

[296] This does not mean that open skies agreement will completely eradicate the anti-competitive effect of a hub to hub code-share agreement. See Bingham, "Consolidation", *supra* note 294.

(a) Characteristics of a Horizontal Merger

Competing airlines are considered as horizontal competitors because they offer a similar product to the same passenger. Section 1 of the Sherman Act, Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, are some of the applicable statutory provisions which are concerned with the enforcement of US anti-trust laws in this respect.

The 1992 Horizontal Merger Guidelines[297] provided a clear framework to determine whether the practice was likely to reduce competition significantly. The main concern being with respect to market power, the analysis concentrates on city pair routes where code-sharing is practised.

As stated earlier, in international code-sharing, the greatest concern in respect of anti-competitive behaviour arises in situations where the code-sharing is between the gateways used by code-sharing partners. Therefore, the 1991 UK-US bilateral agreement stipulated that "airlines designated on and serving the same gateway route segment can *not* enter into such (*i.e.*, code-sharing) arrangements with each other for service on that gateway route segment".[298]

The most serious threat to competition is presented when two carriers enter into a code-sharing agreement which includes service between their hubs.[299] If one carrier withdraws its operations due to the code-sharing agreement such action will undoubtedly decrease the level of competition. The DOT has often considered that code-sharing with a blocked space arrangement maintains competition even if one partner withdraws from operating flights in the market as each partner has to compete anyhow to market his block of the inventory.

In most cases code-sharing links a dominant foreign carrier in the market with a carrier with an extensive domestic network. Therefore the code-sharing partner (domestic

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[297] Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (2 April 1992)[hereinafter "Merger Guidelines"].

[298] See Humphreys, *supra* note 22 at 204.

[299] Bingaman, "Consolidation", *supra* note 294.

carrier) can not be considered as being a potential direct competitor in the market. But this provides the dominant carrier with a substantial competitive advantage due to its enhanced dominant position and, therefore, creates substantial barriers to new entry.

In *Horizon Air Industries* v. *US Dept of Transportation*[300] the plaintiff wanted to revise the decision of the DOT to take away exclusive route authority initially granted to the plaintiff, which was subsequently awarded to San Juan Airlines who was a competing carrier. The plaintiff averred that the code-sharing agreement between United Airlines and San Juan Airlines effectually lowered intra-gateway competition.

The court observed that in spite of the code-sharing agreement, San Juan remained an independently-owned and operated airline with a separate identity; that it retained sole authority to set its schedules and fares; and that the agreement gave United neither a financial interest in San Juan nor any control over it.

The court approved the DOT's reasoning that, in such a situation, "service in small, plodding prop-driven planes would not in any event impose a severe competitive constraint or pricing or service by jet setters United and Pacific Western" and denied the petition for review.

(b) Vertical Competition

The practice of interlining by airlines causes vertical competition. This is because on the routes which they do not operate, airlines select the services of other airlines for its passengers who are continuing to destinations beyond their network. Ideally, such selection of another service will depend on the efficiency, price and service options offered by the other airline.

However, when two airlines, which previously fed each other a portion of such interline traffic, enter into a code-sharing agreement it is similar to an exclusive interlining agreement. Due to this, other airlines who used to receive a portion of the interline passengers are deprived of such traffic and, thus, their ability to compete in that market is impeded. In such instances, code-sharing effectively kills the general interline

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[300] See *supra* note 168.

system.[301] The US Department of Justice has not yet challenged any code-sharing agreement on the basis of such vertical foreclosure.[302]

(c) Pro-Competitive Nature

Code-sharing has a pro-competitive nature as well as an anti-competitive nature. Pro-competitive potential of code-sharing would occur if code-sharing encourages participating carriers to offer better service at the same fare or the same service at a lower fare, new services, lower costs and/or increased efficiency, all which are to the benefit of the passenger.

In some situations code-sharing will increase competition indirectly. For instance, the example of British Midland Airways, in respect of short-haul flights from Heathrow could be shown. In order to generate feed, British Midland entered into several code-sharing agreements with foreign carriers serving Heathrow and thus achieved sufficient extra traffic to become a major competitor to BA, who dominated Heathrow in respect of short haul flights.[303]

Furthermore, existence of several code-shared flight options via third countries will ensure that competition takes place over such intermediate points.

(d) International Air Transport Competition Act of 1979

The International Air Transportation Competition Act of 1979 (IATCA)[304] substantially expanded the ability of the DOT to deal with allegations of unfairly restrictive and discriminatory practices by foreign governments and foreign airlines. Through amendments to Section 402 of the Federal Aviation Act and Section 2 of the International Air Transport Fair Competition Act of 1974 (IATFCPA), the DOT now

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[301] See generally Sorensen, *supra* note 10.

[302] Bingham, *supra* note 294.

[303] Humphreys, "Code Sharing", *supra* note 22 at 204.

[304] 94 Stat. 35 (1980).

possesses the power to respond quickly to such practices which permit them to deny, alter, amend, modify, suspend, cancel, limit or condition any foreign air carrier's permit or tariff if they find such action to be in the public interest. They can do so on written evidence and arguments submitted by interested parties, and even without a hearing in appropriate circumstances.

This regulation could be used to litigate any unfair competition caused by code-sharing.

(e) Anti-Trust Immunity

The receipt of anti-trust immunity in the US would permit such participating carriers to discuss and arrive at mutually-acceptable fares, capacity, frequency determinations, etc., which are crucial to the profitability of the operations. Without such immunity, code-sharing partners would have to deal with each other at arms-length negotiations which are cumbersome, especially when the combined networks of the partners offer numerous permutations of flights.[305]

Anti-trust immunity also allows the participating carriers to share the profits equally, thus ensuring balanced benefits to all. In addition, it allows the partners to develop, without fear of legal reprisals, a joint identity and also common incentives for travel agents, in order to market the flights of both airlines throughout the world.

Anti-competitive conduct which affects US domestic or foreign commerce may violate the US anti-trust laws regardless of where such conduct occurs or the nationality of the parties involved.[306] The courts in the US have held that actions of carriers even outside the US could be considered as in violation of US anti-trust laws.

The court in *Virgin Atlantic* v. *British Airways plc*[307] held that

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[305] The authority to grant anti-trust immunity is given pursuant to 49 USC ss. 41308 & 41309. This is considered as the advantage possessed by the KLM/NorthWest alliance above other similar alliances. See *GRA Study*, *supra* note 1 at 35; *GAO Study*, *supra* note 2 at 29.

[306] See generally J. Goh, "Fear and Loathing in the Air" (1992) 142 New Law Journal 822.

[307] No 93 Cir 7270 (MGC) S.D.N.Y. (3 January 1995) 872 F. Supp. 52; 24 Avi 18329 at 18,335.

> (t)he complaint alleges violations of the United States anti trust laws that have had a significant impact on customers and competition in the United States. The markets at issue are various permutations of trans atlantic air passenger services. That is not a market that exists only in the United States or only in the United Kingdom. It touches both countries. Thus, even though some of the conduct alleged in the complaint occurred in the United Kingdom, there is a strong interest in having the case decided in the United States because that conduct is alleged to have had an effect here and to have violated the laws of this country.

At present, the KLM/NorthWest alliance has received anti-trust immunity.[308] Delta Airlines and three of its code-sharing partners, Sabena, Austrian and Swissair,[309] as well as American Airlines and its code-sharing partner, Canadian Airlines, have requested similar immunity, the decision regarding which is still pending.[310]

3:3:2 Competition Laws in the EU

Competition in European Union is governed by a system of Supranational Competition Laws. The Treaty of Rome[311] Articles 85 and 86 are the main legislative provisions which set out the general principles applicable. There are supplementary legislation by way of Council and Commission Regulations which define the procedural rules to be followed for the implementation, of the competition principles set out in Articles 85 and 86. Article 85 deals with prevention, restriction or distortion of competition in the EC, and Article 86 deals with the abuse of a dominant position.

The Council Regulations relate to the complaints, requests for individual exemptions, investigations, fines and interim measures. The Commission Regulations implement the above stated Council Regulations with procedural rules, concerning the complaints and the hearings.

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[308] See DOT Order Nos. 92-11-27 & 93-1-11.

[309] See DOT Order No. 95-11-5 dated 3 November 1995 on Docket # OST-95-618.

[310] See DOT Order No. 96-1-6 dated 11 January 1996 on Docket # OST-95-792.

[311] *Treaty Establishing the European Economic Community*, 1 January 1958, 298 UNTS 11 (1958) [hereinafter Treaty].

According to the Council Regulations[312] the commission is authorized to grant block exemptions from the general prohibition under the competition rules to certain categories of agreements and concerted practices between airlines in respect of intra community air transport. Commission Regulations[313] stipulate the terms and conditions of the block exemption concerning schedule planning, traffic consultations, joint operations, slot allocations and CRS. The block exemption for joint operations is limited to new small routes operated by small to medium-sized airlines.[314]

Proposals are being made seeking to extend the above rules to air transport between community and third countries.[315]

The third package of air transport liberalization in the EU is also relevant to this discussion.[316] A paper from DG VII[317] describes in detail the views of the commission on interpretation of the safeguards against very high basic fares and fare wars. This paper sets out matters relevant to code sharing such as the isolation of basic fare related costs by a method called "fare operating ratio".

There are a few other EC laws which needs to be mentioned even though the first does not directly apply to air transport.

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[312]Council Regulations 3976/87 of 14.12.87 - 1987 O.J.(L 374) 9 ; 2411/92 of 23.7.92

[313] Commission Regulation 1617/93 of 25 June 1993 - 1993 O.J.(L 155)18 ; Commission Regulation 3652/93 of 22 December 1993.

[314] For a discussion on legal constraints on joint operations see J. Balfour, "Airline Mergers and Marketing Alliances - Legal Constraints" (1995) XX:3 Air & Sp. L. 112. See also Haanappel, *supra* note 214 at 86ff.

[315] Commission Proposal for a Council Regulation COM (89) 417 Final of 8 September 1989. See also P.P.C. Haanappel, "Multilateralism and Economic Block Forming" (1994) XIX:I Ann. Air & Sp. L. 279 at 298 for a discussion on the impact of the EU Competition Rules on Inter-carrier Agreements.

[316] Council Regulation 2407/92 of 23 July 1992 - 1992 O.J.(L 240)1 - Licensing of Air Carriers; 2408/92 of 23 July 1992 - 1992 O.J.(L 240)8 - Market Access; and 2409/92 of 23 July 1992 - 1992 O.J.(L 240)15 - Fares and Rates.

[317] No. VII/C/2 - 363/92*bis* of 28 March 1994.

They are the Council directive on "Unfair terms in consumer contracts"[318] and "Denied boarding compensation scheme".[319]

The decisions of the European Court of Justice (ECJ) also has a bearing. In *Ministere Public* v. *Asjes and others*[320] popularly known as *Nouvelles Frontieres case*, the ECJ was asked to decide on the applicability of the competition rules of the treaty. The court decided that the principles of the Treaty, and in particular the competitions provisions, applied unequivocally to air transport sector and that in the absence of specific regulations governing air transport adopted by the Council under Art 87 of the Treaty, articles 85 and 86 could be applied by a competent authority of a member state of the EU or by a reasoned decision on the matter by the commission.

In *Ahmed Saeed Flugreisen et al* v. *Zentale Zur Bekampfung Unlauteren Weltbewerbs e.V*,[321] popularly known as *Ahmed Saeed Case*, the ECJ held that the competition rules of the Treaty directly applied to the air transport sector and that the competition rules applied to all EC air transport flights, whether domestic, inter EC or between member states and a non EC country, eventhough the method of application will be different depending on the type of flight and type of violation. As a response to the recommendations made by the Comité des Sages, the European Union Commission has issued a communication setting out an agenda for a concerted action in respect of civil aviation in Europe, by which the Commission undertakes to examine the possibility of establishing guidelines for the application of Article 85 and 86 of the Treaty to different types of inter-carrier co-operation.[322]

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[318] Council Directive 93/13 of 5 April 1994.

[319] Council Regulation 295/91 of 4 February 1991.

[320] Case No 209-213/84, 1986 E.C.R. 1425.

[321] 1989 E.C.R. 838.

[322] See "Expanding Horizons", *supra* note 195 at 22, reproduced in 1994 ETL 136. For a discussion on the recent developments see L. Weber, "Modern Trends in Antitrust/Competition Law Governing the Aviation Industry" (1995) XX Air & Sp. L. 101 at 106.

3:3:3 Other Reasons which Affect Competition

There are a few other aspects of CRS which are of an anti-competitive nature. These are due to:

1. travel agent behaviour;
2. fees paid by participating airlines;
3. vendor market share;
4. incremental revenues that accrue to the CRS vendors (airlines) due to agents use of their systems; and
5. agents' contracts.

In *Burnap & Boston* v. *Tribeca Travel*[323] the court held that the travel agent bears a greater responsibility than the airline to inform the passenger of the correct particulars regarding the flight.

Travel agents undoubtedly have a significant role in influencing the consumer's decision during selection of an airline. What CRS essentially do is manipulate the information in a manner which ensures that agents are more apt to select an early display entry as their choice. This is done by manipulated algorithms which are normally designed to favour the sponsoring airlines of the CRS.

For example, the "look-back" feature incorporated into some systems first displays a sponsoring airline's departure up to two hours prior to the required time, ahead of a competitor's flight, which is subsequent to the requested time, even though its departure time is nearer.

The commissions paid to travel agents compel and significantly encourage a travel agent to direct consumers toward a particular airline. This is even more so when the payment of commissions is linked to targets which, when reached, trigger bonus payments, commonly called TACO (Travel Agents Commission Override).

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[323] 21 Avi 17321 at 17323.

3:4 Conflict in Applicable Liability Regimes

3:4:1 Applicability of the Warsaw System of Liability

The Warsaw System Conventions and Agreements,[324] which were adopted in order to achieve uniformity, consist of eight international instruments and an inter-carrier agreement (some of which are not yet in force), each with its own group of adhering states. This in itself has created conflict situations where the application of the law is uncertain.

The scope of application of the above conventions and agreements depends on

1. satisfaction of the individual requirements in each convention/agreement;
2. the adherence by the states concerned to the different convention/agreement;
3. the status of the convention/agreement (whether in force or not); and
4. the scope of applicability of the convention.

The Warsaw Convention does not govern all questions related to international carriage by air, but merely unifies certain issues relating to it. The convention is intended to provide for damage arising from the risks of carriage by air. All other areas not governed by it come under national laws applied in accordance to the rules of conflicts of laws.[325]

The areas in which the conventions apply are:

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[324] 1. Warsaw Convention of 1929
2. Warsaw Convention of 1929 as amended by Hague Protocol of 1955
3. Guadalajara Supplementary Convention of 1961
4. Montreal Agreement of 1966
5. Guatemala City Protocol of 1971 (Not in force)
6. Montreal Additional Protocol 1 of 1975 (Not in force)
7. Montreal Additional Protocol 2 of 1975 (Not in force)
8. Montreal Additional Protocol 3 of 1975 (Not in force)
9. Montreal Additional Protocol 4 of 1975 (Not in force)

[325] See J.W.F. Sundberg, *Air Charter* (Stockholm: P.A. Norstedt & Söners Förlag, 1961) at 242ff.

1. death or wounding of a passenger or any other bodily injury suffered on board the aircraft or in the course of any operations of embarking or disembarking;[326]
2. destruction, loss or damage to checked baggage or goods during transportation by air;[327] and
3. damage caused by delay in transportation by air of passengers, baggage and goods.[328]

For the applicably of the Warsaw system of liability, the decisive factor is *the nature of carriage* described in the contract, or intended by the parties. Any deviation in the actual performance or the non-completion of the contemplated carriage would not alter its character. Even carriage performed by a domestic carrier entirely in the territory of a state constitutes international carriage if such carriage continues, by means of code-sharing, beyond international gateways to other destinations.[329]

The Warsaw Convention ordains that the contract of carriage should be viewed in its totality even when performed by several successive carriers, provided that it was so agreed by the parties. When the flight offered through code-sharing include a connection and carriage is performed by more than one carrier, it could, in certain situations, amount to successive carriage as defined in the Warsaw Convention. This issue will be discussed in detail later in this chapter. Even in situations where the entire carriage is undertaken by a single carrier under a code-sharing arrangement, liability of both such carrier and that of the contracting carrier must be determined.

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[326] *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 12 October 1929, ICAO Doc. 7838 [hereinafter *Warsaw Convention*], Art. 17.

[327] Warsaw Convention, Art. 18(1).

[328] Warsaw Convention, Art. 19.

[329] See generally *Grey* v. *American Airlines* (1950) US Av. R. 507 at 509; for a detailed discussion with cases cited in different Jurisdictions on the matter see H. Booysen, "When is a Domestic Carrier Legally Involved in International Carriage in terms of the Warsaw Convention" (1990) 39 ZLW 329-344.

The consideration of whether the applicability of the Warsaw System is threatened by the practice of code-sharing, is undertaken by the examination of the following factors:

1. Does definition of "carrier" encompass code-sharing?
2. Should the contents of a "passenger ticket" indicate the carrier who is actually operating and, does the failure to do so deprive the carrier the limitation of liability set out in the convention?
3. does code-sharing affect the choice of forum?
4. Is code-sharing successive carriage?
5. Is code-sharing addressed by the Gaudalajara Convention?

3:4:2 Does the Definition of "Carrier" Encompass a Code-Sharing Partner?

It must be noted at the outset that neither the Warsaw Convention nor the Hague Protocol have assigned an interpretation to the word "carrier", even though many attempts have been made. A proposal to define the expression of "carrier" was rejected by the delegates during deliberations prior to the signing of the Warsaw Convention.[330] At the First Assembly of ICAO, where revision of the Warsaw Convention was discussed, a draft convention to supersede the Warsaw Convention was presented by Major L.M. Beaumont of the British Delegation. In this draft, the definition of "carrier" was included as "the owner or the operator of an aircraft *who enters in to a contract of carriage* with a passenger or consignor."[331]

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[330] See IIe Conference Internationale de droit prive aerien, Varsovie 1930, at 97 as reported in R.H. Mankiewicz, *Liability Regime of the International Air Carrier* (Deventer: Kluwer Law & Taxation Publishers, 1981) at 37.

[331] Doc. 4003 (A1-LE/3 21.3.47) Commission No. 4, Legal Questions at 80. At the same discussion comments made by the International Union of Aviation Insurers on successive carriers is worthy of mention. It was suggested that it would be much simpler to limit the right of action to a claim against the carrier with whom the original contract was made, giving him in return a right of recovery against the carrier actually responsible for the damage: A1-LE/3 21.3.47. Doc. 4003, 12 at 19.

As it stands, since the Warsaw Convention presupposes the existence of a contract of carriage, the "carrier" within its meaning should initially be the person who has entered into a contract of carriage in his own name.[332]

Is an agent or independent contractor of the carrier, a "carrier" under the Warsaw Convention?

In *Reed* v. *Wiser*,[333] the question before the court was whether the term "carrier" was limited to corporate entities (*i.e.*, airlines) or whether it was intended to embrace the group or community of persons actually performing the corporate entities function. The court considered this question from two angles.

Firstly, the court was concerned that claimants could break the limits of liability by suing employees rather than the carrier and thus subvert the intention of the treaty. This would happen because carriers, in all likelihood, would have to indemnify their employees.

Secondly, the court looked at the fundamental purpose of the Warsaw Convention and was of the view that allowing passengers to sue employees outside the Convention would thwart the treaty's fundamental objectives.[334]

Accordingly the court held that "plaintiffs may not recover from an air carrier's employees or, from the carrier and its employees together, a sum greater than that is recoverable in a suit against the carrier itself as limited by the Warsaw Convention with its applicable agreements and protocols".[335] It must be noted that this court drew a difference between the Convention and the Carriage of Goods by Sea Act which explicitly defines the term "carrier".

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[332] See generally Mankiewicz, *supra* note 330 at 37.

[333] (1977) 555 F.2d 1079.

[334] *Ibid.* at 1092.

[335] *Ibid.* at 1093.

In *G.P. Johnson et.al.* v. *Allied Eastern States Maintenance Corporation*[336] the court held that the purposes underlying the Warsaw Convention would best be served by a construction which brings under its aegis, not only the carriers employees, but also those agents who perform services in furtherance of the contract of carriage.

In *Re Air Disaster at Lockerbie, Scotland on December 21 1988*,[337] the court recalling the decision in *Reed*, considered whether non-employee agents of the carrier are likewise protected. The court considered a number of cases where the agents were considered as carriers[338] and held that an independent agent who provided security is entitled to the defence available under the Convention. An important consideration in this case was that the contracting carrier (PanAm) had an independent duty under FAA rules to provide security measures for passengers.

In *Lillian Garlitz* v. *Allied Aviation Services International Corp*,[339] the court held that the:

> [d]efendant, as an independent contractor providing services for the airline, *which the airline could have provided itself*, and which, indeed, it was bound to provide under the contract of carriage, is protected by the same statute of limitations under the Warsaw convention as is the airline.

This dicta is relevant in the consideration of code-sharing practice. A similar view was held by the court in *Re Aircrash Disaster at Gander, Newfoundland*[340] when faced with a situation where action had been brought against the air carrier and the companies that serviced and maintained the aircraft. It held that "[c]learly, the framers of the

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[336] 488 A. 2d 1341 (D.C.App 1985) at 1345.

[337] 776 F Supp. 710.

[338] See *Julius Young Jewellery Manufacturing Co.* v. *Delta Airlines* 414 N.Y.S. 2d 528 (Independent contractor who performed baggage transfer included); *Baker* v. *Lansdell* 590 F Supp. 165 (airline security agent included); *G.P. Johnson et.al.* v. *Allied Eastern States Maintenance Corp* 488 A.2d 1341 (a corporation providing sky-cap services included as it is an agent who performs services in furtherance of the contract of carriage); *Lerakoli* v. *Pan American Airways Inc* 783 F.2d 33.

[339] 17 Avi 17,238 at 17,239.

[340] 660 F. Supp 1202 at 1220.

Warsaw Convention intended to include all those concerned with the enterprise of air carriers' international air travel within the scope of the convention."

In *Demarco* v. *Pan American World Airways Inc*[341] the court held that the travel agency could not seek refuge in the limitations set fourth in the Convention when it was not engaged by the airline to actively perform any part of the contract of carriage of the plaintiffs, relative to international air transportation.

In *Kapar* v. *Kuwait Airways Corp*[342] and *Stanford* v. *Kuwait Airlines Corp*[343] the courts took a narrower view and held that the airline which issued a ticket on behalf of another carrier could not be considered as a "carrier" within the meaning of the Convention.

In *Jayanthilal Lathigra and Others* v. *British Airways plc*[344] the court was faced with a situation where the defendant airline had confirmed onward connections on another carrier (Air Mauritius) even though the flight was discontinued by that time. The court in this case differentiated the relationship between the two carriers (who under an "interline agreement" contract to serve as one another's ticketing agents) from that of an airline and a travel agency as discussed in *Demarco*. Since the defendant had acted in furtherance of the contract of carriage (confirming flights, etc.), the court held that in such situations defendant falls within the meaning of "carrier".[345]

The court in *Lathigra* distinguished *Kapar* and *Stanford* from the other decisions which followed *Reed*. In *Kapar* and *Stanford* the claims were for injuries sustained due to a hijacking on-board *Kuwait Airways*. The plaintiffs also sued PanAm, who issued the tickets. The court held that the important distinction was the fact that the injuries suffered

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[341] (1982) 459 N.Y.S. 2d 655 at 656.

[342] (1988) 845 F 2d 1100 at 1103.

[343] (1989) 705 F. Supp. 142 at 144.

[344] 41 F. 2d 535; 23 Avi 17343; 2 S&B AvR VII/139.

[345] 2 S&B AvR VII/139 at 142.

by the plaintiffs were in no way connected to the agency's relationship with Kuwait Airways and PanAm.[346]

Therefore, following the decision in *Lathigra*, it could be said that in a code-sharing arrangement, where partners have integrated their services to offer a common product, any partner irrespective of the actual performance of the carriage can fall within the meaning of "carrier" in the Convention. The effect of any clause to the contrary included in the code-sharing agreement will be considered in Chapter 3:5.

3:4:3 Should the Contents of a "Passenger Ticket" Indicate the Carrier who is Actually Operating and does the Failure Deprive the Carrier the Limitation of Liability Set Out in the Convention?

It is the passenger ticket which evidence the contract made between the passenger and the carrier. The passenger ticket is issued by the carrier, in consideration of the fare paid, which authorizes the person whose name appears on the ticket for the travel stipulated therein, subject to the compliance of other regulations on formalities prescribed by the carrier or enjoined by public authorities of the state.[347]

Article 3(d) of the Warsaw Convention states that the passenger ticket should contain, *inter alia*, the name and address of the carrier or carriers. Article 4(c) of the convention, which deals with the baggage check also stipulates the particulars which should be contained in the document. One matter expressly mentioned therein is the name and address of the carrier or carriers.

Comparison of Articles 3 and 4 shows that the sanctions in those sections in respect of the failure of the carrier to adhere to the requirements are different. The requirements in Article 4 are considered to be more strict than the particulars required in Article 3. This is because there is no specific mention of matters which are considered as fundamentally required in the passenger ticket, whereas Article 4 specifically states

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[346] *Ibid.*

[347] G.S. Sachdeva, *International Transportation - Law of Carriage by Air.* (New Delhi: Deep & Deep Publications, 1987) at 78.

that if the baggage check doesn't contain particulars regarding the number of the passenger ticket, number and weight of the packages, and a statement that the transportation is subject to the rules relating liability established by the Warsaw Convention, the carrier is not entitled to avail himself to the provisions of the Convention which exclude or limit his liability.

Therefore, it was initially suggested that the legal effect of Article 3(2) is that, if the prescribed requirements therein are not met, the carrier is deprived not only of his right under Article 22 limiting his liability, but also his rights under Articles 20 and 21, which excludes his liability either fully[348] or partially.[349]

Upon reading Article 3 it can be said that, unless a ticket incorporating all the particulars mentioned in Article 3(1) is delivered, the carrier is subject to unlimited liability, even though it is a trivial ground.[350]

In *Mertens* v. *Flying Tiger Lines*[351] the court, denying a motion by the plaintiffs for a new trial, considered the requirements of Article 3 of the Warsaw Convention. The court held that the name of the passenger is not particularly required to be included in the passenger ticket and reiterated that an irregularity in the passenger ticket does not effect the existence or the validity of the contract of carriage which would nevertheless be subject to the Convention.[352] Such irregularity has been considered condonable.

In *Preston* v. *Hunting Air Transport Ltd.*,[353] Ormerod J., following *Grey* v. *American Airlines*,[354] opined that in the case of a passenger ticket, the wording of

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[348] If he proves that he or his agents took all necessary measures.

[349] If there is contributory negligence.

[350] See K.M. Beaumont, "Some Anomalies Requiring Amendment in the Warsaw Convention of 1929" (1947) 19 J. Air L. & Comm. 30 at 34.

[351] 8 Avi 18023; see also *Grey* v. *American Airlines* (1950) US Av R 507 at 511.

[352] *Ibid.* at 18025.

[353] (1956) 1 QB 454.

[354] (1955) U.S.C. Av. R 626.

Article 3(2) is clear, and that the omission of any required particulars does not disentitle the carrier as it would in respect of the matters mentioned in Article 4(4).

McNair, commenting on the above judgement states that "conceivably the document could contain so few particulars that it could not be said to be a passenger ticket at all.... The judge did not speculate on what would be the minimum requirements of a ticket".[355]

Beaumont considered that the carrier, in order to preserve his rights limiting liability, could deliver any form of a ticket to comply with the section; it would suffice if a ticket with the printed rubics for the particulars in Article 3(1)(a) to (e) is delivered but without the necessity to have any of these completed, except perhaps requirement 3(1)(e) (notice of limitation liability) which would obviously be printed in any case.[356] He admitted that the Warsaw Convention must be amended to satisfy not only the legal aspect but also the practical considerations which effect carriers and their clients and suggested that a redraft of Article 3(1) read:

> For the carriage of passengers carrier must deliver a passenger ticket specifying *the name of the carrier who enters in to the contract of carriage*, the places of departure and destination and a statement that the contract of carriage is subject to the rules relating to liability established by the convention.

and that Article 3(2) read:

> Nevertheless, if the carrier accepts a passenger without *a passenger ticket completed as aforesaid* having been delivered he shall be liable for the damage which the passenger (or in the event of his death, his representatives) shall prove to have been sustained by him (or them) consequent upon the non-delivery of a ticket completed as aforesaid.[357] (emphasis added)

In *Ludecke* v. *Canadian Pacific Airlines*[358] McIntyre J. held that, according to the clarity of Article 3(2), it did not provide any sanction for breach *other than* in cases where the airline accepted a passenger without a ticket.

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[355] M.R.E. Kerr & A.H.M. Evans, *Lord McNair's The Law of the Air*, 3rd ed. (London: Stevens, 1954) at 200.

[356] *Supra* note 350.

[357] *Ibid.*

[358] (1979) 78 DLR (3d) 52 at 56.

In *Chan* v. *Korean Airlines*[359] the Supreme Court of the United States held that an "irregularity" does not prevent a document from being a "passenger ticket". The court observed that the "proposition that, for purposes of Article 3(2), delivering a defective ticket is equivalent to failure to deliver a ticket, produces absurd results".

To illustrate this opinion, the example used was whether the failure to comply with Article 3(1)(d) by not stating the name and address of the carrier eliminated the liability limitation. This decision clearly shows that the name and address of the carrier is not of material importance to be included in the passenger ticket.

Miller[360] considers that if there is a failure to comply with the particulars described in Article 3(1), there is no sanction at all. Goldhirsh,[361] discussing "Warsaw Passenger Particulars", holds a similar view.

Therefore, as the section stands, it is seen that failure to provide accurate particulars as to the name and address of the carrier or carriers would not necessarily result in a sanction against the carrier. Whether or not the person is actually operating an air transport undertaking is irrelevant.[362]

Effect of the Hague Protocol

The Hague Protocol[363] changed the required particulars of Articles 3 and 4 of the Warsaw Convention. Therefore, for instances where the Warsaw Convention as

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[359] (1989) 21 Avi 18 228 at 18231.

[360] G.M. Miller, *Liability in International Air Transport* (Deventer: Kluwer, 1977) at 83.

[361] L.B. Goldhirsh, *The Warsaw Convention Annotated: A Legal Handbook*, (Dordrecht: Martinus Nijhoff, 1988) at 22.

[362] See *Style* v. *Braun* (9 December 1958) 1961 R.G.A.E 675 (Revue generale de droit aerian et Spatial) reported in Mankiewicz, *supra* note 330 at 37.

[363] *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929*, 28 September 1955, ICAO Doc. 7632 [hereinafter *Hague Protocol*].

amended by the Hague Protocol is applicable, the passenger ticket need not specify the name and address of the carrier or carriers.[364]

3:4:4 Does Code-Sharing Affect the Choice of Forum?

One intention of the Warsaw drafters who sought to achieve uniformity of procedures and remedies, was to limit the jurisdictions in which action can be instituted, while preserving reasonable flexibility and choice to the claimant. The main reason for this was that many countries at that stage did not have well-developed legal systems. Therefore, the Convention, by Article 28(1), explicitly states that action can be instituted in a maximum of one of the four locations stated therein, being:

1. the domicile of the carrier;
2. the principal place of business of the carrier;
3. the place of business of the carrier through which the contract was made; and
4. the destination.

In view of the matters discussed earlier regarding the meaning of the term "carrier", it must be noted at this stage that such interpretation becomes the fundamental factor in deciding the forum.

However, in construing Article 28(1) of the Warsaw Convention, courts have on many occasions imported the concepts of agency in to its meaning. In *Windsor* v. *United Airlines*[365] the court interpreted the term "principal place of business" to mean "a principal place", but this decision was later reversed in *Nudo* v. *Societe Anonyme Belge D'Exploitation de la Navigation Aerienne*,[366] which held that there would only be one principal place of business and that the third location mentioned in the article is based

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[364] Mankiewicz, *supra* note 330 at 58.

[365] 153 F.Supp 244 (EDNY-1957).

[366] 207 F.Supp 191 at 192.

on the place where the contract of carriage was made, and therefore relates to a personal relationship between the passenger and airline.

In *Berner* v. *United Airlines*[367] the court accepted that in some cases a foreign airline could be regarded as having a "place of business" in the territory of a high contracting party through which the contract was made, even though the airline had no office in the country, and instead, transacted all its business in that country (including ticket sales) through an agent.

However, in *Eck* v. *United Arab Airlines*,[368] where the meaning of the phrase "has a place of business through which the contract has been made" was discussed, the New York Court of Appeals held that the changes and advancements in booking practices of airlines since 1928 must also be taken into consideration. It went on to state that provisions of Article 28(1) do not require a literal interpretation and thus when a ticket for passage on a foreign carrier engaged in international flight was purchased in the US, the Warsaw Convention was satisfied if the suit was brought in a state where the airline had an office, notwithstanding the fact that the office took no part in the processing of the ticket.

This decision has been criticised on the basis that the court should have considered whether an agency relationship existed.[369] In the federal proceedings of the case, the Court of Appeals held that Article 28(1) should be interpreted so as to effectuate its purpose, even if it is required to depart from the literal meaning to a practical meaning, especially when conditions have changed in the area to which the words of the provision refer. The court held that even though interline agreements were, at the time of signing the Warsaw Convention, by no means as ubiquitous as they are at present, the intention of the Warsaw Convention framers was to permit, at least in some

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[367] 157 N.Y.S. 2d 884 affirmed in 170 N.Y.S. 2d 340.

[368] 255 N.Y.S 2d 249 (1965).

[369] S.F. Hefner, "Case Notes" (1966) 32 J. Air L. & Comm. 285 at 290.

instances, the maintenance of suits even in the courts of the country where the ticket was purchased.[370]

It can be argued that another purpose of Article 28(1) of Warsaw Convention is to prevent the maintenance of suits even in the courts of the country where the ticket was purchased if the airline has no ticketing or booking office there. But does this position also prevent the maintenance of the suits in the courts of the country where the ticket was purchased, when the airline does not have a place of business in that country, but the passenger had purchased his ticket at the office of another airline who has a code-sharing agreement with the former?

There is no indication in the language of Article 28(1) or in the relevant legislative history that the framers intended the scope of this provision to vary depending on the ticketing practices and booking practices of international air carriers. However, the decision in *Eck* v. *United Arab Airlines Inc*,[371] which held that when an air ticket is sold by another airline based on a interline agreement, that such establishes a tacit agency relationship between the airlines, is relevant to the consideration. The fact that the ticket was issued from the office of one party situated in the country was sufficient to hold that the contract was made through a place of its business because marketing practices of international airlines should be taken into account.

This position previously forwarded by McKenry[372] was also used by the court in *Eck* to justify its decision. It also used the proposition that such interpretation does not impose *any unanticipated burden* on foreign airlines and travel agencies that do business in a territory of a high contracting party. Therefore, it could be said that in situations of code-sharing, an action could be instituted against the actual carrier on the same basis, as would be done if the contracting carrier undertook the carriage himself. But equally,

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[370] 360 F. 2d 804 at 812, 813.

[371] *Supra* note 368.

[372] C.E.B. McKenry, "Judicial Jurisdiction Under Warsaw Convention" (1963) 29 J. Air L. & Comm. 205, 212-214 quoted in 360 F. 2d. 804 at 815.

if the actual carrier is considered as the carrier within the meaning of Section 28(1), different forums would be available to the passenger.

But in *Vienna Symphony Orchestra* v. *Trans World Airlines Inc*[373] the Tribunal de Grande Instance de Paris held that in order to confer jurisdiction under Article 28 of the Convention, there should be a "meetings of minds" between the parties. In a situation of code-sharing, there will not be such a situation present possibly until the operating carrier accepts the passenger holding a ticket issued by the code-sharing partner.

3:4:5 Is Code-Sharing Successive Carriage?

The Warsaw Convention is unquestionably premised upon a contract based on a promise or undertaking of the carrier to transport the passenger and the reciprocal consent of the passenger.[374] According to Article 1 of the Convention, in order for a flight by successive carriers to be considered part of undivided transportation under the Warsaw Convention, it must be shown that the parties regarded it as a single operation. A unilateral expectation of one party cannot be deemed to be controlling.[375] The meaning of "parties" is not defined. Whether it should be between the original contracting carrier and the passenger or whether it should include the subsequent carrier is not clear.[376]

According to Sachdeva, when the provisions of the Warsaw Convention are applied, the successive carriage, whether performed under a single contract or a series of inter-connected contracts, when not undertaken by a single carrier in its entirety but performed by different carriers in respect of different portions, would still remain

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[373] *IATA Air Carrier Liability Reports*, No. 418, (decided on 22 March 1971).

[374] See *Block* v. *Compagnie Nationale Air France* (5th Cir. 1967) 386 F. 2d 323, 333.

[375] *Ibid.*; see also *P.T. Airfast Services* v. *Superior Court for Siskiyou Country* 188 Cal. Rptr. 628 at 634.

[376] For a discussion on this matter see Booysen, *supra* note 329 at 335.

international carriage and all the carriers are *assumed* to be partners to the contract entered by the first carrier.[377]

The main consideration here should be the intention of the parties as gathered from the contract, bearing in mind that the wording of the Warsaw Convention also implies an element of "futurity" in such contracts. Therefore, the decisive factor is the intention of the parties and not the manner of actual performance of the carriage[378] or the manner in which the contract was formed.

Shawcross states that there would be no successive carriage if the contract specified a single carrier who, without the agreement of the passenger, engaged another carrier to perform the whole or part of the carriage.[379] This position has been acknowledged as being correct in *Briscoe* v. *Compagnie Nationale' Air France.*[380]

This means that the whole journey, if it is to be considered as a single journey, must have been contemplated by the parties, including each part of such journey, prior to the commencement. Shawcross does not consider that *all* parties must necessarily be involved in the formation of the contract. Shawcross considers that, if the journey involves two or more carriers, but due to marketing reasons the whole journey is identified as a single flight bearing a joint designation code identifying all carriers involved, such requirement is fulfilled.[381] Even if the flight is identified by the designator code of one carrier, it would remain a case of successive carriage if the passenger was made aware that more than one carrier would perform the carriage.[382]

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[377] Sachdeva, *supra* note 347 at 193.

[378] *Ibid.* at 195.

[379] P. Martin et.al., *Shawcross and Beaumont Air Law*, vol. 1, reissue, (London: Butterworths, 1977) at para. VII/105.

[380] 290 F Supp. 863 (SDNY 1968); 10 Avi 18,108.

[381] Shawcross, *supra* note 379 at VII/104.

[382] *Ibid.*, specifically note 8a.

The Warsaw Convention, Article 30(2) states that, in the case of successive carriage, action can be taken only against the carrier who *performed* the transportation during which the accident or the delay occurred unless the **first** carrier has, by express agreement, assumed liability. But in the case of baggage or cargo, it is dual liability of the carriers (jointly and severally). Therefore, does the Warsaw Convention imply that in respect of carriage of passengers, only one carrier could be made liable?

This matter is relevant to the discussion on the legal implications of code-sharing. For instance, in situations where the actual carrier could be considered as a successive carrier (in cases where the passenger has been notified of the code-sharing agreement and the identity of the actual carrier and provided that the contracting carrier has undertaken the first segment of the carriage), if the contracting carrier had assumed responsibility for the full carriage (as required by many regulatory authorities as a pre-condition to grant approval), the passenger will have a cause of action only against the contracting carrier. He will not be able to recover from the successive carrier (actual carrier) even if it is favourable to him.

In *Pimentel* v. *Polskie Linie Lotnicze (LOT Polish Airlines)*[383] the US Court of Appeal observed that Article 30(1) of the Convention subjects each successive carrier to the Convention rules and, as such, each successive carrier must deliver an appropriate ticket according to Article 3(1).

At the discussion by the EURPOL-II (Intra-European Air Transport Policy) working group of the ECAC, the general opinion was that the notion of successive carriers as understood in Article 30 of the Warsaw Convention did not apply to code-shared flights.[384] It is not clear whether the discussion took into account the positions expressed above.

When the actual operating carrier is disclosed to the passenger, either by way of notification prior to reservation or by way of written notice contained on the itinerary document, such disclosure must be considered as incorporating a term into the contract

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[383] 748 F. 2d 94 (1984) at 97.

[384] Working Group Report EURPOL-II/10 report 1 June 1995, para. 49.

of carriage, that the carriage, in its entirety or specific portions of it, will be undertaken by the code-sharing partners of the contracting carrier. Therefore, since such term in the contract of carriage acknowledges the existence of a successive carrier, it should be governed by the provisions relating to successive carriage as stated in the Convention.

3:4:6 Is Code-Sharing Addressed by the Guadalajara Convention?

Since the meaning of "carrier" is not explicit in the Warsaw Convention, two alternative views were expressed. One was that the carrier is the person who contracted, as principal, to perform the carriage.[385] The other was that the carrier is the person who actually performed the carriage whether or not contracted to perform it.[386] According to Shawcross, the "carrier (is) the person who agreed, as principal, either directly or through an agent, to perform the international carriage in question". The basis for this is the importance given in paragraph 2 of Article I of the Convention, to the contract made by the parties. Therefore, an airline which merely issues a ticket using its own ticket stock for carriage on another airline acts only as an agent and will not be regarded as a carrier.[387]

Such an interpretation leaves the actual carrier, in those situations where he was not the contracting carrier nor the successive carrier, unprotected by the provisions of the Convention.

In *Kaper* v. *Kuwait Airways Corp*[388] the court held that an agency relationship could exist between the issuing airline and the actual carrier even in the absence of a formal, interline agreement. It was also of the view that the "contract", as used in the Convention, refers to a passenger's travel arrangements on an actual carrier and not the insignificant relationship between the passenger and the issuing airline. This view was

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[385] H. Drion, *Limitation of Liabilities in International Air Law* (The Hague: Martinus Nijhoff, 1954) at 134-135.

[386] Shawcross, *supra* note 379 at para. VII/44.

[387] *Ibid.*

[388] *Supra* note 342 at 1104; 21 Avi 17336.

based on the principle that when an agent makes a contract for a disclosed party, it becomes neither a party to the contract nor liable for the performance of the contract.

In *Independent Air Inc* v. *Tosini*[389] action was brought against the owner of the aircraft and the second defendant operator who leased it to provide air transport to the passengers. Neither defendant entered into contracts with the passengers who contracted with the airline (Aerolineas Dominicanas) who was not made a party. During the trial, all parties agreed that the carriage could be considered as international carriage. On appeal, the court held that when all parties are so agreed as to the nature of the carriage, in light of the fact that the second defendant was the person who actually operated the flight, that such person should be considered as a carrier under the intent of the Convention.

But in *Tokio Marine and Fire Insurance Co Ltd* v. *KLM Royal Dutch Airlines*[390] the Tokyo District Court interpreted "the carrier" as set forth in Article 28 of the Convention to mean contracting carriers only, and not actual carriers.

The Guadalajara Convention provided the actual carrier the same rights and liabilities as a contracting carrier under the Warsaw Convention. Accordingly,

> the "actual carrier" means a person, other than the contracting carrier, who by virtue of the authority from the contracting carrier, performs the whole or part of carriage in respect of which the contracting carrier has made an agreement governed by the Warsaw Convention but who is not, with respect to that part, a successive carrier within the meaning of the Warsaw Convention. The authority is presumed until proven otherwise.[391]

One must be mindful of the distinction between an actual carrier and a successive carrier in the Warsaw System of Liability. If the carrier who is guilty of the misconduct

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[389] 600 S. 2d. 3 (Fla Ca 1992); 23 Avi 18,344 at 18,345.

[390] Discussed by Hayashida, *infra* note 418 at 251.

[391] *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*, 18 September 1961, ICAO Doc. 8181 [hereinafter *Guadalajara Convention*] Art. 1.

is considered as an actual carrier, then the passenger has the option either to sue him or the contracting carrier. But if he is a successive carrier as defined by the Warsaw Convention, the passenger has no option but to sue the actual successive carrier if the incident complained of arose during his performance of the contract of carriage unless the contracting carrier has taken responsibility for the whole flight, in which case he has no cause of action against the former.

The Guadalajara Convention is helpful to ascertain the liability of carriers involved in code-sharing in cases where:

(1) the contracting carrier has not assumed liability for the whole carriage; and

(2) the actual carrier has not been disclosed to the passenger prior to entering into the contract of carriage.

Application of Guadalajara Convention

The Convention, adopted as a separate convention supplementary to the Warsaw Convention and Warsaw Convention as amended by Hague Protocol, entered into force on 1 May 1964. At present the Convention has been ratified by 70 countries.[392]

It has been held that the Guadalajara Convention will apply only if the place of departure and the place of destination are in a state which is party to the Convention.[393]

In *Alliance Assurance Co Ltd and Others* v. *Air Express International (a corporation) and Others*[394] a carrier employed a sub-carrier for the carriage of goods by air. The plaintiff subsequently claimed damages from both the contractual carrier and the actual carrier. The Belgian Court held that the Guadalajara Convention is applicable if either the country of departure or that of destination has been in a state which has ratified the Convention.

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[392] ICAO 31st Assembly Working Paper A31-WP/26 LE/2, Attachment 2 at 12.

[393] See Decision, Landgericht Offenburg (IS 356/84) (14 January 1986).

[394] (1991) 2 S&B AvR VII/29.

Shawcross, quoting the above two cases, states that there is no clause in the Convention which would support such limitation of applicability, and goes on to state that in the case of England, the Guadalajara Convention will be applied whenever the carriage is governed by the Warsaw Convention in its amended or unamended form.[395]

Accordingly, when the actual carrier performs the whole or part of the carriage which, according to the agreement for carriage is governed by the Warsaw Convention, the contracting carrier is liable for the whole carriage contemplated in the contract of carriage and the actual carrier is liable only for the portion he performs.

However, normally a carrier performs a variety of services, only one of which is the carriage by air. It is not clear whether the term "perform" in the Guadalajara Convention means all such services or only the carriage by air. McNair acknowledges that such a distinction is important and states that the failure of the actual carrier to perform will amount to a breach of his agreement with the contracting carrier, but in no way will be liable to the passenger.[396]

Therefore, even when the Guadalajara Convention is applied to a code-sharing situation, there would be a lacuna because, if the actual carrier has not performed the carriage by air at the time of the occurrence of the incident complained, he cannot be held liable even if the damage caused to the passenger would, in normal situations, be attributed to the carrier.

Another important provision in the Guadalajara Convention is that it stipulates that the acts and omissions of the contracting carrier are deemed, in respect of the carriage performed by the actual carrier, to also be those of the actual carrier but such will not subject the actual carrier to liability in excess of the limits specified in Article 22 of the Warsaw Convention.

Another matter which has a bearing on the topic discussed is the effect of Article III which states that any special agreement by the contracting carrier to increase liability

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[395] *Supra* note 379, para. VII/255, at note 1.

[396] McNair, *supra* note 355 at 231, 232.

limits, or to assume obligations not imposed or waive rights conferred by the Warsaw Convention has no effect on the actual carrier unless he has agreed to it.

Normally a code-sharing agreement will have a indemnity clause which will dispose of the relationship between the contracting carrier and the actual carrier in the event of an accident. But if the special contract terms of such carriers differ, there could be a conflict. The interpretation given in the Guadalajara Convention will not address all situations which arise in air transport today. For instance, if the actual carrier as defined in the Guadalajara Convention subsequently subcontracted with another carrier to perform the carriage, that other carrier might not have a Warsaw System relationship with the passenger since there is no Guadalajara relationship with the contracting carrier.[397] Such a situation could arise in the practice of code-sharing.

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[397] See generally IATA, *Report of the Legal Committee*, submitted at the 22nd Annual General Meeting in Mexico 31.10.66-4.11.66 - reproduced in (1967) 33 J. Air L. & Comm. 138 at 143.

3:5 The Contract of Carriage

3:5:1 Applicability of "Lex Fori"

The rules of common law are of minimal importance in the law of carriage by air in respect of international carriage because it is regulated by the international conventions mentioned in Chapter 3:4. Since the Warsaw Convention is to apply in respect of "all international carriage", whether the action is framed in contract or in tort, the rules of the Convention will apply.

However, these international conventions do not apply to air carriage which doesn't encompass their scope, nor do they provide for all the issues which could arise concerning international air carriage. Carriage which is not international carriage within the meaning of the amended or unamended Warsaw Convention is governed by the general principles of contract law.

As stated before, the Warsaw System conventions do not exclusively regulate the relationship between passengers and carriers on international flights. They regulate certain aspects of such activity but where they do not apply, they leave such areas to be regulated according to the law of the court seized of the case.

Therefore, national laws are replaced only when the Convention and its supplementary conventions contain regulations which are also matters of national law.[398] "Lex fori" is directly applicable to cases which are not expressly governed by the Convention, whose silence must be taken as consent.[399]

Matters which are not governed by the Convention are:

1. the legal capacity of the parties to the contract;
2. the form, validity, cancellation, voiding, violation and non-execution of contract;
3. the negotiability of the air way bill; and

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[398] The Warsaw Convention being a sovereign treaty, is the supreme law of the land and as such preempts local law when applicable. See *Bianchi* v. *United* 15 Avi 17,427 at 17,428.

[399] E. Giemulla et.al., *Warsaw Convention* (Deventer: Kluwer Law and Taxation Publishers, 1992) [hereinafter Giemulla] Scope of Application at para. 19.

4. the legal status of the carrier, his agents and servants and their liability.[400]

The following discussion will be in respect of such matters which do not fall within the ambit of the Warsaw Convention. Purchase of an airline ticket creates a contract between the parties. The ticket itself doesn't constitute contract of carriage, it constitutes a memorialisation of the contract of carriage, which proves the relationship between the carrier and the purchaser.[401] There are diverse views regarding as to what stage the contract of carriage is concluded between the passenger and the carrier.[402]

3:5:2 Contractual Terms

Undoubtedly, the carriers are free to structure agreements as they see fit, and the allocation of rights and responsibilities between the carriers *per se*, is not a matter within the purview of aviation authorities. They are, however, concerned if that interferes with the relationship between the carriers and the passenger, and will therefore require that the contract of carriage and ticket reflect the carrier who is holding out the service, and that the carrier accepts its responsibility to its passengers according to the terms of that contractual relationship.

It is customary to distinguish between conditions of contract - those printed in the ticket and the conditions of carriage which are incorporated by reference.

Air carriers who are members of IATA are obliged by resolution to use the standard form of conditions of contract as specified in IATA Resolution 724 in respect of passenger tickets. This resolution requires governmental approval and reservations can be made in respect of its provisions.[403]

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[400] Mankiewicz, *supra* note 330 at 13.

[401] *Supra* note 374 at 336 & 353.

[402] For a detailed discussion on the formation and the conclusion of a contract of carriage air, see Martin, *supra* note 193 at 190.

[403] Shawcross, *supra* note 342 at para. VII/46. For a detailed discussion on the evolution of the terms of the conditions of contract see J.G. Gazdik, "Uniform Air Transport Documents and Conditions of Contract" (1952) 19 J. Air L. & Comm. 184 [hereinafter Gazdik, "Uniform"]. See also Sundberg, *supra* note 325 at 102ff.

The expression "conditions of carriage"[404] refers to the conditions and terms upon which a carrier accepts passengers, baggage and cargo for transport. The expression "conditions of contract"[405] refers to the abstract of such terms and conditions reproduced on the actual traffic document. The IATA Conditions of Contract have the status of a traffic conference resolution and are thus binding on IATA members. The IATA General Conditions of Carriage have the status of a recommended practice and are, though widely used, not binding on IATA members.[406]

These conditions form the core of the contract between the IATA airline and the passenger and are in the form of a *standardized contract*. The passenger has no freedom of contract, nor any bargaining power; he has to either take it on the terms presented or leave it.

Such contracts are called *adhesion contracts*, which are "unilaterally imposed by one of the contracting parties upon the other, either due to the economic preponderance of the former, or due to the lack of insight or to indifference on the part of the latter".[407] The special disadvantage faced by an air traveller is that whatever carrier he chooses, he is confronted with almost the same conditions of contract.

According to the General Conditions of Carriage, the "carrier includes the air carrier issuing the ticket, and all air carriers that carry or undertake to carry the passenger and/or his baggage thereunder". The standard form of *conditions of contract* specifies that the "carrier means all air carriers that carry or undertake to carry the

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[404] IATA, Recommended Practice 1724.

[405] IATA, Resolution 724, Art. 1 of Attachment A.

[406] P.P.C. Haanappel, "The IATA Conditions of Contract and Carriage for Passengers and Baggage" 9 European Trans. L. 650 at 651 [hereinafter Haanappel, "IATA Conditions]; see also Gazdik, "Uniform", *supra* note 403 at 191ff.

[407] The term "adhesion" is derived from the French word "contrat d'adhésion", used to describe those contracts whose conditions are fixed in advance by one party and which is open for acceptance in that form alone. See P. Aronstam, *Consumer Protection, Freedom of Contract and the Law* (Cape Town: Juta & Company, 1979) at 16-18; for discussions on the matter see Haanappel, "IATA Conditions", *ibid.* at 652.

passenger or his baggage hereunder or performs *any other service incidental to such air carriage*".

Therefore, on a code-shared flight, when the operating carrier is not the contracting carrier in respect of some of the passengers it carries, it will fall within the definition of "carrier" in respect of such passengers. Any carrier who provides services such as ground handling, ticketing, passenger handling, etc., could also be construed to mean a "carrier" under the conditions of contract, even though they do not provide or undertake to provide air transport to the passenger. This interpretation is important to the discussion on code-sharing, as alliances between carriers in most instances call for shared responsibilities with regard to passenger services.

Article 3 of the Conditions of Contract state that the carriage and such other services performed by each carrier is subject to, *inter alia*:

1. the provisions of the ticket;
2. the applicable tariff; and
3. the carriers' conditions of carriage and related regulations which are made a part thereof.

By these provisions the complete conditions of carriage are incorporated by reference. Article 4 states that the carrier's name may be abbreviated in the ticket. Another important provision for consideration is Article 5, which states that "an air carrier issuing a ticket for carriage over the lines of another air carrier does so only as its agent."

Shawcross considers that the purpose of this provision in Article 5 is to prevent liability from attaching to a carrier who merely issues a ticket for transportation which is to be undertaken by another carrier.

Article 9 warrants consideration. It states that the

> carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and form no part of this contract. Carrier may without notice substitute alternate carriers or aircraft, and may alter or omit stopping places shown on the ticket *in case of necessity*. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections. (emphasis added)

According to Article 11 of the Conditions of Contract, no agent, employee or representative of the carrier has the authority to alter, modify or waive any of its provisions. There is a similar provision in Article 18 of the General Conditions of Carriage. The above conditions of contract were emphasized in order to ascertain the applicability of the conditions of contract to a situation where code-sharing has been practised.

Relief Available

The main concern is to consider the effect of limitation of liability conditions in favour of the carrier included in the contract. The protection available to the passenger regarding such conditions is either from judicial interpretation of such conditions or through statutory protection.

Judicial Interpretation

According to English common law, such conditions will not protect the carrier in the event of a fundamental breach of contract such as failure to perform the basic undertaking of the contract. In American jurisprudence, the courts have inquired whether adequate notice was given to the passenger, and failure to do so resulted in holding that the conditions in the contract were not applicable.[408]

According to Drion, most courts around the world construe limitation of liability clauses contained in the conditions of carriage against the person by whom it was drafted.[409]

Statutory Protection

The other form of protection available to the passenger is statutory protection. In respect of the carriage by air, the Warsaw Convention itself, by Article 23, provides that

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[408] See *Lisi* v. *Alitalia US CA* (2nd cir) 16 December 1966 9 Avi 18,375 at 18378.

[409] *Supra* note 385 at 287.

in air transportation governed by the Convention, a carrier cannot relieve its liability or fix a lower limit than stipulated, and that any such condition is null and void.

The tariff system adopted by the US also provides statutory protection to the passenger by ruling that tariffs of every airline operating to/from those countries should be pre-authorized by the aeronautical authorities.[410]

When such tariffs are approved, they become part of the contract of carriage between the passenger and the airline, and as such binding on all parties irrespective of actual knowledge.[411]

In Europe, apart from domestic laws, the Council Directive on Unfair Terms in Consumer Contracts applies.[412] For example in the UK, the Unfair Terms Act of 1977, the Consumer Protection Act of 1987, the Misrepresentation Act of 1967, the Trade Description Act of 1968, and the Contract of Misleading Advertisements Regulations of 1988 are some of the applicable statutory protection available.[413]

Does the Validity of Exemption Clauses in Favour of the Carrier Extend to the Acts of His Servants and Agents?[414]

Even though the Convention makes reference to the "servants and agents of the carrier" at Articles 16, 20 and 25, it does not make any provisions as to their liability. Therefore, the liability of such a category should be considered as governed by "lex

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[410] Canada also has a tariff system but the statutory requirements in respect of approval of international fares in Canada is not similar to that in the US. For a discussion on the differances see J.G. Gazdik, "The New Contract Between Air Carriers and Passengers" (1957) 24 J. Air L. & Comm. 151 at 155.

[411] *Tishman & Lipp, Inc.* v. *Delta Airlines* 11 Avi 17,152 at 17,155; *Mao* v. *Eastern Airlines* 11 Avi 17,400 at 17,401; for a discussion on the advantages of the statutory protection over judicial protection, see Haanappel, "IATA Conditions", supra note 406 at 658.

[412] Council Directive 93/13 (5 April 1994).

[413] See generally M. Briggs, "Regulation of Travel Promotions - A "Free For All"?" (1995) 145 New Law Journal 554.

[414] For detailed discussion on this issue see G.N. Pratt, "Tariff Limitations on Air Carriage Contracts" (1963) 29 J. Air L. & Comm. 14 at 46; see also G.N. Pratt, *Contractual Limitation of Servant's Liability in Air Carriage* (Montreal: McGill University, Institute of Air & Space Law, 1962) [unpublished thesis] at 168.

fori". In such instances, their liability will not be subject to a regime of presumed fault, nor will the specific defences in Articles 20 and 21 be available to him. Jurisdiction and limitation of actions will be governed by those which are generally applicable to civil actions.

As a general rule, an air carrier is considered a common carrier at Common Law. Therefore, when the transport of passengers and goods is undertaken for hire, he cannot exclude or limit his liability or that of his servant or agents in respect of negligence by an exemption clause contained in the contract.[415]

In *New York and Honduras Rosairo Mining Co* v. *Riddle Airlines Inc*[416] the court considered the effect of a clause in the tariff filed by the air carrier which stipulated that whenever the liability which is excluded or limited by the conditions of carriage favoured the carrier, that it also applied in respect of any of its agents, servants or representatives of the carrier, or any carrier whose aircrafts were used for the carriage and to the agents of such other carrier. The court held that such a clause would be binding only when an interline agreement stipulating the agreement between the carriers had been duly filed.

In *Weeks* v. *The Flying Tiger Line Inc*[417] the court held that a provision in the conditions of carriage (tariff) which expressly said that the carrier is not liable for the negligence of any other connecting carrier was a valid clause.

3:5:3 Changes Incorporated through Contract Terms

The waiver of liability limits in respect of passengers in airlines, registered in Japan, was accomplished through an amendment to the conditions of carriage. This

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[415] Shawcross, *supra* note 379 at para. VII/199; see also cases discussed under ch. 3:4:1 above.

[416] 152 N.Y.S 2d 753 (NY Supp ct 1956).

[417] 4 Avi 17,679.

makes it applicable to carriage where such conditions apply.[418] Therefore, in respect of a flight ticketed by a Japanese airline, the waiver of liability is effective only in respect of the position of carriage actually performed by the Japanese airline and would not have any effect on successive carriers.[419] A contrary view has also been expressed that the waiver of liability will be applicable throughout the flight, wherein the successive carriers are entitled to claim indemnity from the Japanese airline for excesses above its own contractual liability limit.[420]

In *Thai Airways International Ltd* v. *Antoon Van Eeckhout e.a.*[421] it was held that the issuing of a ticket subject to a reservation is contrary to the intended purpose of the issue of a travel ticket, and that the ticket proves only the existence of a contract of carriage. In the lower court case between the same parties,[422] the court held that the obligation of the carrier to perform the journey is an essential element in the contract to the extent that a reservation mentioned by the carrier on the ticket must be considered as non-existent.

(a) Whose Contractual Terms Should Apply?

The importance of this issue in view of the proposed "IATA Inter-carrier Agreement on Passenger Liability" was mentioned earlier.[423] The practice of code-sharing exposes the passengers ticketed by the non-operating carrier to different conditions of carriage. The questions here are whether the operating carrier performs the

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[418] K. Abe, "The So-called Japanese Initiative" (1994) 6 Korean J. Air & Sp. L. 160. Disparity as to the liability between Japanese carriers and non-Japanese carriers has increased due to this. See also K. Hayasida, "Waiver of Warsaw Convention and Hague Protocol Limits of Liability on Injury or Death of Passengers by Japanese Carriers" (1993) 42 ZLW 144.

[419] T. Sakamoto, "Air Carriers Passenger Liability in Japan" (1985) X Ann. Air & Sp. L. 227.

[420] Abe, *supra* note 418 at 161.

[421] Decision of a Brussels court dated 11 January 1995, reported in (1995) 30:4 European Trans. L. 546.

[422] Decision dated 30 October 1991, reported in (1992) 27 European Trans. L. 131.

[423] *Supra* note 11 and accompanying text.

carriage under his terms or whether, by accepting (by uplifting the relevant potion of the ticket) a passenger ticketed by his code-sharing partner, he indicates his agreement to carry such a passenger under those terms of his partner; and, in any case, whether the passenger has adequate notice of the conditions of carriage of the operating carrier.

In *Stratis* v. *Eastern Airlines Inc*,[424] the plaintiff was injured during the domestic leg prior to continuing on an international flight. The ticket for the international sector was not delivered to him as he was to collect it at the airport on completion of his domestic carriage. However, the accident occurred during the domestic carriage. The US Court of Appeals held that the airline could rely on limitation of liability based on the Montreal Agreement even though a ticket for international carriage was not given to the plaintiff because similar information was included in the ticket issued for the domestic carriage.

In *Pimentel* v. *Polskie Linie Lotnicze (LOT Polish Airlines)*[425] the same court disallowed the defendant to invoke Convention limitations when its own ticket did not give adequate warning, even though the passengers had taken domestic flights on other airlines and were issued domestic tickets by those airlines which included such information as to the limitation of liability.

Therefore, it could be argued that the passenger will not be bound by conditions which he has not been made aware of even though similar conditions appear in the conditions of carriage of the contracting carrier.

(b) Duty Owed to the Passenger

In *United Airlines Inc* v. *Lerner*[426] the court held that there is a fiduciary duty owed by the airline to its passengers when it resorts to act as the agent of the passenger

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[424] 682 F. 2d 406 (1982).

[425] *Supra* note 383.

[426] 15 Avi 18429.

even while being a common carrier. However, in *Karkomi* v. *American Airlines Inc*[427] the court held that the airline, as a common carrier, does not owe a fiduciary duty to the passengers, and differentiated the *United Airlines* v. *Lerner* case on the basis that fiduciary duty arises only in situations where a principal-agent relationship exists between the parties.

In code-sharing, it could be argued that the contracting carrier takes on the position as an agent of the passenger. Therefore such an air carrier has a fiduciary duty to disclose all information within its knowledge which is material to the object of the agency. Disclosure of the actual carrier, type of aircraft, and even whether a better alternative flight option is available to the passenger must be considered as a necessity. Failure to do so could be considered as fraudulent misrepresentation.

(c) Non-Performance of Contract of Carriage

A matter which needs examination is the responsibility for delay and the guarantee of a seat on the flight. The airline practice of denied boarding (commonly know as "bumping") in the context of code-sharing must be addressed.[428]

On the fourth day of deliberations at the Diplomatic Conference on Private Aeronautical Law convened in Warsaw 1929, the delegates discussed Article 21, the predecessor to the present Article 19 of the Warsaw Convention.

The Italian delegates' remarks show that the article did not provide a remedy for non-performance. The minutes show that even after further deliberation the majority view was that there need not be a remedy in the Warsaw Convention for total non-performance because in such a case the injured party had a remedy under the law of the home country.[429]

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[427] 22 Avi 17653 at 17656.

[428] For a detailed discussion on non-performance of contract of carriage see Sundberg, *supra* note 325 at 399ff.

[429] Second International Conference on Private Aeronautical Law Minutes 76 -77, R. Horner & D. Legrez translation (1975).

In *Harpalani* v. *Air India*,[430] where the plaintiff was stranded in India for six days due to "bumping", the court held that the Warsaw Convention provided exclusive cause of action in cases of such non-performance of the contract of carriage on the basis that it falls under Article 19 describing delay.

In *Hill* v. *United Airlines*[431] the plaintiff was inconvenienced because of re-routing. The action was for damages arising due to intentional misrepresentation by the airline with regard to a connecting flight and the accessability to the airport. The court held that the Warsaw Convention is irrelevant to the issue and the cause of action would be outside the Warsaw Convention. The court considered the claim as based on an intentional tort. The plaintiff had not, in this case, based his action on non-performance.

In *Wolgel* v. *Mexicana Airlines*[432] the court dismissed the decisions in both *Hill* and *Harpalani* and held that the Warsaw Convention did not provide for a cause of action for "bumping".

Falcons v. *Lan-Chile Airlines*,[433] in an action where one count was for damages resulting from a breach of contract by the carrier, the court held that the Warsaw Convention applied and allowed a motion for summery judgement to dismiss the case. Unfortunately, the court based its decision on the first few words of Article 1(1) of the Convention which reads: "This convention will apply to all international transportation of persons, baggage or goods performed by aircraft for hire ...".

Shawcross considers that the totality of the facts will decide whether the incident could be classified as a non-performance of the contract or a situation of delay. He states that since both types are mutually exclusive, the courts would not allow the passenger

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[430] 622 F. Supp. 69 (1985) at 73.

[431] 550 F. Supp 1048 (1982).

[432] 821 F. 2d 442 (1987) at 445.

[433] 13 Avi 18,366 at 18,367.

to have the option of suing for delay under Article 19 or basing his case on non-performance.[434]

The carrier holding out and selling the service accepts responsibility for passengers on their entire journey consistent with the terms of the contract of carriage (*i.e.*, the ticket). It is axiomatic that the carrier holding out the service by means of advertising, the OAG listing, the CRS listing, etc., must ensure that the service given to the consumer is consistent with the terms of that holding out.

In the Notice of Proposed Rule Making (NPRM) for a new policy statement on code-sharing, the Civil Aeronautics Board then noted that "the carrier whose code is used on the contract (*i.e.*, the passenger's ticket) may indeed be liable for the actions of its partner under general contract law"[435] and in promulgating the final rule, noted that enforcement action would be taken "to respond to complaints that an airline whose code appears on a ticket is denying responsibility for failure to provide the service and refusing to make passengers whole."[436]

(d) Fundamental Breach

In the law of carriage by land and sea, any unjustified deviation is considered to be a fundamental breach of contract. Accordingly, if a carrier commits a fundamental breach of the contract of carriage, the passenger has the right to rescind the contract and the carrier will not be able to rely on any exemption clauses in the contract.[437]

In *Garnham, Harris & Elton Ltd* v. *Alfred W. Ellis (transport) Ltd*,[438] where the carrier sub-contracted the contract of carriage to another carrier of whom he must have

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[434] *Supra* note 379 at para. VII/198.

[435] 14 CFR 399.88 see PSDR - 85, (23 October 1984) at 6.

[436] 50 FR 38508 (23 September 1985) at 38511.

[437] *Chitty on Contracts*, 27th ed., vol. 2 - Specific Contracts, (London: Sweet & Maxwell, 1994) at para. 35-021.

[438] (1967) 1 W.C.R. 940.

known his customer would not approve, the carrier was held to have caused a fundamental breach.

McNair, discussing the effect of deviation in contracts of carriage by sea and land, stated that there is no reason why such a practice should not apply to carriage by air as well.[439]

Shawcross also discussing the effect of deviation considers that the common law doctrine may operate to deny the carrier of the benefits of the exemptions contained in the conduct of carriage.[440]

Chitty considered that even if unauthorized sub-contracting amounted to a fundamental breach on the facts of a particular case, that it was doubtful whether it would disqualify the contracting carrier from relying on the defence and limitations of liability contained in the Warsaw Convention.[441]

(e) The Effects of a Contract of Charter

Consideration of this issue is relevant as code-sharing arrangements have characteristics of a charter. Under a charter agreement, the owner of an aircraft may make it available for the purposes of the charterer. In common law, even in the absence of an express term, the owner is duty-bound to take reasonable care to provide an aircraft fit for the purpose.[442]

In the case of a *wet lease*, the owner of the aircraft (since the aircraft is also operated by him) has the control of the crew in respect of the manner in which they are to carry out their duties. Therefore, in wet lease agreements, the owner could be considered as the actual operator of the flight.

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[439] *Supra* note 355 at 156-158. He states that the dissenting judgement of Frank J in *Lichten* v. *Eastern Airlines Inc* (1951) US.AV.R 310 which held that such principle should be applied equally to all forms of carriage should be preferred.

[440] *Supra* note 379 at para. VII/112.

[441] Chitty, *supra* note 437 at para. 34-028.

[442] *Fosbroke-Hobbes* v. *Air Works Ltd.* (1937) 1 ALL ER 108. For a detailed discussion on the legal regime associated with air charter contracts see Sundberg, *supra* note 325 at 187ff.

The difference between a contract of charter and a contract of carriage is that the latter is for the carriage of particular persons whereas the former is for the hire of the aircraft, with or without crew, even though it may amount to a contract of carriage.[443] There have been instances where a scheduled carrier has contemplated code-sharing with a charter carrier. Iberia, Spain's flag carrier and Carnival Airlines, a US charter carrier, contemplated code-sharing between them.[444] The legal implications in such practices are beyond the scope of this thesis.

(f) Custom and Usage

It must also be considered whether the existence of the practice of code-sharing is such a well-known and wide-spread industry practice, that a change of operator of the aircraft from what has been stated in the ticket should be considered as acceptable on the basis of custom and usage. There has not yet been any discussion on this but considering the use of this principle in other areas of the law, it could be safely said that this is a matter to be taken into consideration in construing the conditions of contract.

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[443] Shawcross, *supra* note 379 at para. VII/64.

[444] Commercial Aviation News (July 1993).

3:6 Apparent Agency

It could be argued that the principal duty of the carrier is to ensure that the carriage is performed as agreed, and that there is no obligation tc perform it himself. He may arrange such carriage to be performed by another person but will remain liable for its performance.[445]

When the contracting carrier has all or part of the carriage performed by another carrier, and if the latter cannot be considered as a successive carrier, the carrier could be considered as a substitute carrier for whom the contracting carrier assumes vicarious liability.

If the substitution is made with the knowledge of the passenger (*i.e.*, by endorsement), the original contract is replaced by a new contract (novation of contract) and the new carrier becomes the contracting carrier, while the original carrier is relieved of all duties and obligations.[446]

In the authentic French text of the Warsaw Convention, the expression "préposé" of the carrier was used. This has been translated to mean "agent" in the English text. The Hague Protocol substituted the term "servant and agent". However, this doesn't mean the same as that of "préposé". According to legal doctrine in civil law jurisdictions, "préposé" may be an employee of a carrier or an independent carrier. However, in common law, the former is a "servant or agent" of the carrier, and an independent carrier is an independent contractor to whom rules of agency will not apply.[447]

In *Wanderer* v. *Sabena and PanAmerican Airways Inc*,[448] the plaintiff's contract of carriage was with Sabena and was flown by an aircraft owned by them. The accident occurred at Gander Airfield, where Sabena operations were controlled by PanAmerican Airways. An application to join PanAmerican on this basis as a co-defendant after the

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[445] See generally Mankiewicz, *supra* note 330 at 37; see also Supreme Court of Federal Republic of Germany (20 May 1974) ULR (uniform law reports) at 204 cited therein.

[446] Mankiewicz, *ibid.* at 45.

[447] *Ibid.*

[448] (1949) US Av R 25.

two year limitation period was disallowed in this case on the basis that agents of the carrier could rely on the limitations contained in the Convention.

The court in this case interpreted the Warsaw Convention to apply not only to the carrier but also to the totality of the carriage by air and thus, the agencies employed to achieve the carriage, such as air traffic control agency of the airport, were also considered to fall within its scope.

In *Monique Nahm* v. *SCAC Transport Inc and Flying Tigers Inc*[449] the defendant air carrier was sued jointly as the "successive carrier" for damages arising from loss of cargo. The court entered summary judgement in favour of the defendant air carrier as there was no evidence to establish that they (Flying Tigers) *knew* that the plaintiff's cargo was included in the consolidated shipment of the first defendant.

In a South African case, the court held that when the original contracting carrier concluded a contract for domestic carriage with a domestic airline, that it acted as the agent of the passenger and not as the agent of the domestic airline.[450]

A written clause in the Contract of Agency between the parties is not controlling. In *Samuel Shaw and Lola Shaw* v. *Delta Airlines, Skywest Airlines and Another*[451] the District Court of Nevada found an apparent agency relationship between the major airline (Delta) and its associated regional carrier (SkyWest). The facts of the case show characteristics similar to a code-sharing agreement present between them. However, Delta argued that SkyWest was not Delta's agent, partner or joint venturer. It stated that, in accordance to the clauses in the "Delta-connection" agreement between them, Delta acted as the ticketing and marketing agent for SkyWest and since both partners were independent contractors, action for damages for injuries arising out of an accident would only lie against the carrier on whose aircraft such an incident occurred.

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[449] 21 Avi 17478 at 17481.

[450] *Bafana and Another* v. *Commercial Airways (Pty) Ltd* (1990) (1) SA 368 (WLD) cited by Booyen supra note 311 at 339.

[451] 24 Avi 17270.

The court, basing its decision on uncontroverted evidence that Delta possessed the right to control the printing and distribution of the timetables of SkyWest, assigning flight numbers, and the fact that Delta effectually managed to "equate Skywest with Delta in the minds of the travelling public" through joint advertising, found an "apparent agency" relationship between them. The court disallowed a motion for summary judgement moved by Delta and held that in the circumstances of the case, the matter would have to be resolved by jury. Therefore, any provision in the code-sharing agreement which expressly recognizes and acknowledges the relationship between the partners to be that between independent contractors, will not have any force or avail in law, in situations where the relationship appears to be that between a principal and agent, to the consuming public.

3:7 Privity of Contract

Since there is no direct contract between the actual operator of the aircraft and the passenger, in case of passengers who have being ticketed by a code sharing partner, its likely that the actual carrier will claim that the passenger lacks standing to sue due to privity of contract.

In *Neal et.al.* v. *Republic Airlines Inc*[452] the court recognized that intended third party beneficiaries of the performance of the contract of carriage by air, as having the right to sue.

In *Gatewhite Ltd and Another* v. *Iberia Lineas Aereas de Espana SA*[453] the court analyzing many decisions in various jurisdictions held that there is nothing in the convention to prevent the owner of the goods from bring an action in his own name against an air carrier if goods are lost or damaged, for had that been the draftmans' intention it could have easily excluded the rights of the real party in interest by specific provisions in the convention. Chitty, commenting on this case states that in these circumstances the *lex fori* can fill the gaps and allow a right of action to those who are entitled to sue the carrier at common law.[454]

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[452] 19 Avi 17499,at 17503

[453] [1989] 1 ALL ER 944

[454] Chitty, *supra* note 437 at para. 34-052.

3:8 Implications on Aviation Security, Facilitation and Slot Allocation

It is considered that the responsibilities placed on states under the Chicago Convention with regards to standards will not be affected due to the practice of code-sharing.[455] According to the provisions of the Article 26 of the Chicago Convention, the state of registry of the aircraft has the right to appoint observers at an inquiry into an accident involving its aircrafts which has occurred in another contracting state.

In a flight used for international code-sharing, both partners could be equally eager to ascertain the cause of the accident and also to ensure that a proper investigation would be carried out. Therefore, it would be unfair to shut out one partner on the basis that the aircraft used was not registered in that country.

Thus, it is suggested that the state of the code-sharing partner must also be given the opportunity to appoint observers to accident inquiries involving aircrafts used on its code-sharing operations.

Another matter which should be considered is the responsibility of the non operating carrier for the airport charges, etc. Most of the applicable tariffs do not contain provisions to charge a non operating carrier. However, in the circumstance of a code-shared flight, both airlines use the facilities afforded. Even though there could be a settlement scheme between the parties, that would not compensate the airport for the additional services rendered. For instance, even indicating the code-sharing carriers' particulars in the airport schedule boards, baggage reclaim areas, etc., could be considered as an additional service offered by an airport which would not be needed if not for the code-shared flight.

In addition, it is important to consider the obligation of the non-operating carriers in respect of security measures. Code-sharing could lead to confusion in such situations. For example, if information regarding a security threat were received, a person who is unaware of the practice of code-sharing could confuse the matter or might not take it seriously, all of which would lead to the loss of vital time needed to prevent a disaster.

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[455] See ECAC, CSTF/2-Report, *supra* note 261 at 6.

The ECAC task force on code-sharing was concerned with pressure applied by US FAA on European carriers who were code-sharing with US carriers. The FAA required that even transatlantic code-shared flights originating in Europe, operated by European carriers adhere to its regulations in respect of aircraft security. This was not received favourably since, due to airport capacity restrictions, some were unable to follow them.[456]

It must be acknowledged that the scarcity of slot and gates at congested airports can be overcome by code-sharing to a certain extent.

The EU Code of Conduct on common rules for the allocation of slots at community airports allow slot *exchange* between carriers, but doesn't allow the unilateral transfer of slots.[457] This regulation poses an obstacle for code-sharing partners since it prevents a partner from utilizing the slot held by the other unless he has a slot to offer in exchange. There is a loophole in this regulation which could be used by code-sharing partners. By structuring their agreement as a wet-lease arrangement where the aircraft of the non-slot holder is used, the prohibition of the Article 8(4) could be overcome.[458]

Finally, consideration must be made whether the approving authority of a code-sharing agreement could be held liable for doing so if the passenger is deceived due to the practice.

The Japanese Ministry of Transport considered the probable legal implications in authorizing joint services such as code-sharing. It was suggested that, since JACB had to license the joint operations, the said authority could ultimately be held liable if anything went wrong.[459]

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[456] *Ibid.* at 5.

[457] Council Regulation 95/93, 1993 (O.J. L14), Art. 8(4).

[458] This is because in such a situation, the slot holder is considered to be still using the slot. See Haanappel, "Lecture", *supra* note 33.

[459] H. Nuutinen, "Japan Airlines - The Worst is Still to Come" [April 1992] Avmark Aviation Economist 15.

CHAPTER FOUR

ESSENTIAL ELEMENTS OF A CODE-SHARING AGREEMENT

4:1 Concerns of Code-sharing Airlines

The main concern of the airlines is the legal limitations placed on code-sharing. These can be categorized as follows:

(a) Local laws in the code-sharing partner's country
- applicability of special regulations which govern its national carriers
- competition/anti-trust legislation

(b) Bilateral air services agreements between the countries
- designation
- nationality clauses
- capacity and frequency limitations
- traffic freedom

(c) Multilateral agreements
- international (*e.g.*, Chicago Convention, CRS Code of Conduct)
- regional (*e.g.* EU legislations)

The implications of the above have been discussed in earlier chapters. Suffice it at this stage to reiterate that there is no uniformity in respect of the possible implications which might arise. For example, the Japanese Transport Ministry ordered Nipon Airways (ANA) and Japan Airlines (JAL) to discontinue their international flights that were jointly-operated with foreign carriers, based on the reasoning that the countries of the foreign airlines with whom the joint operations were carried out followed different guidelines for compensation in the case of accidents. The Ministry was concerned with the adverse reaction of passengers who purchased tickets to fly on a Japanese airline and were carried by foreign carriers.[460] This was in spite of the fact that the Policy Council

[460] See "ANA and JAL Forced Abandon Joint Flights" *Air Letter* (5 December 1991).

of the Japanese Ministry of Transport was encouraging more code-sharing and co-operative agreements with foreign carriers.[461]

The ban was not to apply to joint services operated using the Japanese carriers' aircraft. The Ministry of Transport justified its concern over foreign carriers' safety and service standards by citing that 80% or more passengers on the joint services were Japanese and that many complained that they booked with JAL or ANA and found themselves with foreign carriers who often had inferior service standards.[462]

In some instances, airport authorities have objected to the presence of the code-sharing partners name on airport signs. For example, the Metropolitan Washington Airport Authority objected to displaying BA name on signs outside USAir's terminal at Washington National Airport.[463]

It is, therefore, essential that the partners undertake a complete assessment of the regulations and obtain specific approval and firm assurance from the relevant authorities prior to commencing operations.

A code-sharing arrangement requires, from the outset, a great degree of co-operation between the partners in the joint planning and development of a common strategy. In this respect, the fact that the partners have not been significant competitors has been proven to be an important factor.[464]

As in any commercial transaction, the partner is usually wary of the intentions of the other. This is prudent in light of the numerous instances where an agreement does not fulfil expectations due to extraneous matters.[465] If the international sector is

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[461] Nuutinue, *supra* note 459.

[462] *Ibid.*

[463] See *GRA Report*, *supra* note 1 at 37.

[464] The success of the KLM/Northwest alliance is partly credited to this fact. Code sharing will make no sense when the partners are compelled to compete. Another reason for the success of KLM / North West Alliance is the antitrust immunity it has received. See H. Shenton, "Code sharing Only a Part of the Big Picture" [May 1995] Avmark Aviation Economist 2.

[465] For example, United did not pursue the code sharing agreement with BA no sooner it received the authority to purchase PanAm's Heathrow routes.

exclusively operated by one of the partners, the code-sharing partners would be concerned with being prone to sacrifice the "carrier identity", they had acquired over the years. This could be addressed by ensuring that staff wear uniforms of all the partners; having joint livery as in the case of the Alitalia-Continental code-sharing agreement where half the aircraft is painted in each of the partner's colours; or by offering a new "joint product" which is advertised as common to all partners.

The delay and/or uncertainty of obtaining up-to-date feed-back from the other partner's marketing department is another matter of concern. In view of the fact that the operating partner would have better access to material facts, the code-sharing partner is unable to address short-term operational requirements arising in the market. This is due to the disadvantage of being unable to monitor yields and overbooking patterns beforehand. In addition, it is disadvantageous to rely on data provided by another carrier in evaluating crucial decisions such as expanding, adding a new destination or even in developing local origin and destination traffic.

Differences in the methods of management between the establishments is certainly be a matter of paramount importance, especially if the code-sharing agreement calls for extensive co-operation between the partners.

Another matter which concerns airlines contemplating a code-sharing agreement is the overall fear that, henceforth, they will not have the ability to make decisions on their own; that they will be influenced by the partners in such decisions and will always have to rely on joint efforts; for example, one partner might be pressured by its code-sharing partner not to introduce additional frequencies on the code-shared route even though the demand exists.

In *Re Fairchild Aircraft Corporation*[466] AirKentucky was a commuter airline operating as a part of the USAir System pursuant to a code-sharing agreement. The Fairchild Aircraft Corporation, a manufacturer of commuter aircraft, invested in AirKentucky. USAir, as a matter of policy, did not want an aircraft manufacturing company controlling a commuter airline to which it was affiliated. For that reason,

[466] 6 F 3d 1119 (5th cir. 1993) at 1123.

AirKentucky was informed by USAir that the code-sharing agreement would be terminated.[467] In addition, it did not permit the transfer of the code-sharing agreement in the event that AirKentucky was purchased by a new corporation. This example illustrates how the commuter airline's plans for injecting finances into its operations was thwarted by its code-sharing partner.

Another factor which is very critical to the smooth operation of joint services is the fact whether the partners use compatible computer systems.[468] *PanAm Corporation et. al.* v. *Delta Airlines Inc.*[469] illustrates a situation where dual designator code-sharing was not possible due to technical incapabilities. It was submitted that if the airlines were to go ahead with such an arrangement, they would have to resort to manual processing, whereas the existing computer system of Delta was capable of accommodating the single designator code-sharing with ease.

In order to prevent deception and CRS bias, some have suggested the use of a joint code, like those used on joint-venture flights, rather than the present practice of single designator codes.[470] In July 1993, KLM announced it had agreed with its US code-sharing partner, NorthWest, to code-share on all flights to the US from Amsterdam under a new flight number combining both airline codes. This move was part of an effort to create a single global route network.[471]

4:1:1 Is There a Duty to Code-Share?

Code-sharing, in certain instances, tends to disturb the balance of benefits achieved by a bilateral agreement. This happens when:

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[467] *Ibid.* at 1124.

[468] The British Midland and SAS code-sharing did not produce satisfying results due to a computer mismatch. See Feldman, "Alliances", *supra* note 9 at 32. The Thai/Lufthansa code-sharing agreement faced delayed implementation due to technical problems with the booking systems. See *Aviation Daily* (13 April 1995).

[469] 175 B.R. 438.

[470] See ICC Policy Statement, *supra* note 233.

[471] "KLM-NorthWest Flights Deal" *Travel Weekly* (21 July 1993).

1. carriers of one country have no reciprocal code-sharing opportunity;[472]
2. there is a capacity restriction on the code-shared route; and
3. code-sharing is used to circumvent a bilateral provision.

When the US CAB was in existence, it actually required US airlines to interline in order that smaller airlines could benefit. At that stage the CAB recognized interlining as being critical to the survival of smaller airlines. This policy expired along with the sunset of the CAB.[473] Now, code-sharing has caused the virtual disappearance of overt interlining.

In *British Midland Airways Ltd* v. *Aer Lingus plc*[474] the European Commission held that Aer Lingus abused its dominant position and contravened Article 86 of the EEC by refusing to interline with British Midland as it hindered development or maintenance of the competition. It opined:

> [w]hether a duty to interline arise depends on the effects on competition of the refusal to interline; it would exist in particular when the refusal or withdrawal of interline facilities by a dominant airline is objectively likely to have a significant impact on the other airlines ability to start a new service or sustain any existing service on account of its effects on the other airlines costs and revenue in respect of the service in question, and when the dominant airline cannot give any objective commercial reason for its refusal (such as concerns about creditworthiness) other than its wish to avoid helping this particular competitor. It is unlikely that there is such a justification when the dominant airline singles out an airline with which it previously interlined, after that airline starts competing on an important route, but continues to interline with other competitors.[475]

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[472] For example, if country A has a vibrant domestic market and country B is a country without a similar domestic market, the designated carrier of country A, though given the authority to code share beyond its gateway in country B would not be able to reap benefits *vis-à-vis* the other carrier from country B who could do so in country A.

[473] Humphreys, "Code Sharing", *supra* note 22 at 202.

[474] (1993) 4 CMLR 596.

[475] *Ibid.* at 607.

This decision, which acknowledged interlining as an accepted industry practice, went on to state that "refusal to interline ... has up to now not been considered by the European airline industry as a normal competitive strategy".[476]

The issue to be considered is whether a correlated duty which requires a carrier to code-share with another carrier from another state would be justified if imposed by the bilateral. If this happens, it would be the start of a new process toward liberalization of international air transport.[477]

It has been found that carriers with code-sharing agreements charge 8% higher fares.[478] In light of this, consumer groups will certainly object to future code-sharing agreements unless the industry, by example, proves otherwise. Therefore, this matter should also be kept in mind by the partners at all stages of decision-making throughout the partnership contemplated by the partners throughout the partnership.

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[476] *Ibid.*

[477] See generally Haanappel, "Lecture", *supra* note 33; see also *supra* note 182 and accompanying text.

[478] P.S. Dempsey, "The Prospectus for Survival and Growth in Commercial Aviation" (1994) XIX:II Ann. Air & Sp. L. 176.

4:2 Some Issues that Should be Ironed Out in the Agreement

4:2:1 Coordinated Schedules

Due to the value of coordinated flight schedules, code-sharing agreements should contain a clause to delay connecting flights for a certain time, thus providing sufficient time to cushion delays and avoid missing the connecting flight.

The agreement between Malev Hungarian Airlines and PanAm had a clause where Malev agreed to delay its eastbound flights (Frankfurt-Budapest) to accommodate delayed PanAm passengers.

4:2:2 Overbooking

In the event of overbooking, there should be an agreement to treat all passengers equally irrespective of whether they have purchased their tickets from the code-sharing airline or not, and on a first-come first-serve basis. The airline, whose actions result in such a situation, should ideally bear the cost of reaccommodating off-loaded passengers.[479]

4:2:3 Exclusivity

There could be indirect repercussions on the other partners when one party to a code-sharing agreement negotiates another code-sharing agreement with a third party. Therefore, provision should made for a consultation process between the code-sharing partners prior to such negotiations in order to exchange their respective positions. This would enable the party to be equipped with the position of its code-sharing partners during the negotiations with the third party and thus circumvent subsequent misunderstandings between them.

When an airline has more than one other airline as its code-sharing partner, the obvious question is how it should keep all such competing partners happy at the same

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[479] *Aviation Daily* (25 March 1988) at 465.

time. It could stipulate to each partner that certain resources are solely dedicated to a particular operation.

Air Midwest's co-current code-sharing agreement with Ozark, Eastern and American is an example of such a situation. To ensure smooth relationships with all their partners, Air Midwest dedicated certain resources solely for a particular operation.[480] They painted some of their aircrafts in the appropriate colours of the respective partners and used them exclusively on the relevant routes. They also ensured that they did not fly for more than one affiliate on any given route.[481]

Another example would be the British Midland operations out of Heathrow, where it carries codes of several carriers on the short-haul flights. According to the agreement between Lufthansa & United, Lufthansa is to operate code-sharing flights from Heathrow to German cities on behalf of United, and as a result, United Airlines stopped operating its London-Germany services. However, they continued to code-share with British Midland on the same London-Germany sectors. Such a practice could defeat the objectives of the code-sharing agreements and might also lead to mistrust between the partners.

4:2:4 Labour Protective Provisions

The main concern of labour unions with regard to a code-sharing agreement is to safeguard the interests of their members. Though equity agreements between carriers from different nationalities generally must be made public, there is no such requirement for marketing pacts such as code-sharing.[482] The main fear is that the code-sharing partner will exert influence on the scheduling of its partner which will, in turn, have an impact on the labour force.

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[480] J. Selman, "The Three Faces of Air Midwest" [October 1986] Commuter Air 22 at 24.

[481] *Ibid.*

[482] M.O. Lavitt, "Pilots Review Marketing Agreements to Ensure Carrier Paths are Preserved" (26 November 1990) Av. Wk. & Sp. Tech. at 85.

The airline pilot unions are concerned with the possibility of interchange of the operating crew on code-shared flights. The pilot contracts with an airline, in most cases, stipulate either that the crews from other airlines cannot operate its flights or that prior consent of the union must be obtained to do so.[483] Therefore, this is a matter which should be taken into consideration when formulating an extensive code-sharing agreement because, in such situations, interchanging of operating crew greatly enhances the ability to co-ordinate an extensive web of operations and is mutually beneficial to both partners.

Code-sharing may cause wide-ranging consequences on airline labour since there is a duplication of personnel where operations have been consolidated. Furthermore, employees are exposed to drastic changes in their work environment, which might lead to dissatisfaction, thereby negating the purpose of the alliance. Therefore, it is of utmost importance that the interests of the employees are taken into account by ensuring that adequate safeguards are incorporated into the agreement. This should ideally be done by the code-sharing partners or could be imposed on them by the regulating authority as a precondition for approval. The latter would be necessary if the airline was reluctant to voluntarily set-up such a mechanism due to the fear that it would not be in the best interests of profitability. One should be mindful that if there is no consensus between the airlines and their respective employees the resulting restlessness might disrupt the labour peace.

The possibility of increased use of international code-sharing agreements by airlines posed a major challenge during the negotiations for a new contract between American Airlines and its Pilots Union.[484] At the time of these negotiations American Airlines had not resorted to international code-sharing, but were aggressively searching for a likely partner. Being aware of the fact that code-sharing agreements would logically allow the airline to conduct more international operations with fewer pilots, the negotiators toiled to reach a flexible contract capable of covering all the pitfalls that might arise in a code-sharing agreement. In another instance, United Airlines called off

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[483] *Ibid.*

[484] J.T. McKenna, "Code Sharing Creates Hurdles in Pilot Talks" (24 April 1994) Av. Wk. & Sp. Tech. at 33.

their proposed code-sharing agreement with USAfrica because of its "owner" pilots objected.[485]

(a) Relevant Legislation in the US

The regulations with regard to airline mergers could be considered relevant in the absence of specific legislation in respect of code-sharing because both practices were regulated in a similar manner. Prior to its sunset in January 1985, the CAB was empowered by the Federal Aviation Act to consider the suitability of proposed mergers. Though the act didn't require the CAB to consider the interests of employees in such an event, the CAB considered a number of factors, one of which was whether labour were protected, on the basis that protection of labour interest form a part of the larger public interest.[486]

In *Kent* v. *CAB*[487] the court held that although there was no express statutory provisions to impose conditions in relation to labour, such power is implicit as the public interest required achieving stability in air transportation by eliminating industrial strife.

The Airline Deregulation Act of 1978 which brought about the sunset of the CAB, reassigned certain functions to the Department of Transportation and to the Department of Justice. It also made express provisions to institute an employee protection program.[488]

The present approval process within the DOT includes a public notice requirement, and the consideration of public benefits in reaching its decisions on proposed code-sharing agreements ensure that labour considerations are adequately addressed.

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[485] Feldman, "Alliances", *supra* note 9 at 26.

[486] P.D. Zook, "Recenting the Air Route Patter by Airline Consolidations and Mergers (1954) 21 J. Air L. & Comm. 293, 295.

[487] (1953) 204 F. 2d 263 at 265.

[488] See s. 43.

(b) Relevant Legislation in Canada

The Air Transport Committee of the Canadian Transport Commission has followed a strict policy, refusing to exercise jurisdiction over labour matters and, as well, refusing to endorse the imposition of labour protective provisions as a pre-condition for approval in similar situations.[489] It has left the resolution of labour matters to the parties or deferred them to the Canada Labour Relations Board.[490] However, the Canada Labour Relations Board, established by the Canada Labour Code,[491] does not have *express authority* to impose labour protective provisions as a pre-condition for its approval.

4:2:5 Other Issues

Passenger complaints regarding the denial of whole entitlement of benefits under Frequent Flyer programs should be examined.[492] The code-sharing agreement must ensure that passengers are credited with full benefits of the flight, irrespective of whether it was on a segment where the code-sharing operation was done.

When airlines from countries where the languages spoken are different offer code-shared flights, they should at least ensure that announcements are made in the principal languages concerned, and that staff members are fluent in such languages.[493]

Joint livery and joint signs at airports, the importance of which was reiterated above, are matters which should be specifically dealt with in the agreement.

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[489] P.D. Nesgos, "A Call for Labour Protective Provisions in Canadian Aviation" (1982) VII Ann. Air & Sp. L. 127 at 148.

[490] *Ibid.*

[491] RSC 1970 c. L-1.

[492] For an instance where passenger was deprived of his milage entitlement because he had booked on the code-shared flight operated by Lufthansa rather than the one actually operated by United Airlines see generally, "Code Sharing: If It's Tuesday, This Must be Aeroflot" [January/February 1995] Airways 19 at 20.

[493] See generally Parr, *supra* note 72 at 100.

The use of similar types of aircraft and equipment will facilitate the smooth operation of joint services but would result in code-sharing having an impact on aircraft manufacturers. For instance, when one code-sharing partner uses a particular type of aircraft, the other could be persuaded by that fact to opt for same because the alliance between them could be made more productive by sharing and interchanging equipment and crew, and furthermore, it would facilitate reservation procedures, etc.

4:3 Global Standard on Code-Sharing

Given the growing interest worldwide, a global standard on the requirements and opportunities in respect of code-sharing is ideal, so that a conscious balance between consumer protection and a flexible environment for airlines to undertake profitable marketing practices is achieved. The crux of such a multilateral agreement should be that, among signatory states, the only regulatory requirement on code-sharing would be consumer notice requirements.[494]

Such a code of conduct should ensure that code-sharing:

1. increases the range of choice and competition;
2. is clear and transparent;
3. is fully explained to airline staff in order for them to advice passengers;[495]
4. booking and fare practices in the separate blocks (inventory) of seats should not be significantly difficult;
5. is an industry standard which combines the individual airline designator codes in an uniform and transparent manner, indicating the joint operation of the flight;[496] and
6. the identity of all carriers are retained, mainly in respect of the displays in CRS.[497]

Early in 1995, British Midland, the UK-based airline, in order to forestall legislative concerns about the practice, initiated a consultation process with the public and the industry, hoping to formulate a voluntary code of conduct to govern code-sharing.

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[494] C. Murphy, extract of speech made to Airports Council International Conference December 1993 as reported in [February 1994] Airline Business 47; see also M. Jennings, "Coded Warnings" Airline Business (The Skies in 1994) 15.

[495] "On the Attack" [April 1995] Airline Business 33.

[496] See Haanappel, "Lecture", supra note 33. See also ICC Policy Statement, *supra* note 233.

[497] The main argument in favour of dual listing is that it is the only way to display services equivalent to "on-line service "whilst retaining the identity of both carriers". See *Aviation Daily* (16 July 1986) 85.

The idea was to confront the allegations of anti-competitiveness and passenger deception by following such a code and thereby ensuring that the perceived negative effects would not overshadow the real benefits. The ten points set out in the guidelines are:

1. code-sharing must increase competition and passenger choice;
2. the partners must work towards delivering service levels compatible with on-line operation;
3. all advertising material, timetables must indicate the involvement of a code-sharing partner;
4. passengers must be informed of the operator of the code-shared flight;
5. the passenger ticket must carry the identity of the code-share partner;
6. the identity of the code-sharing partner must be in the passenger name record;
7. details of the code-sharing partners must be printed on the itinerary;
8. boarding card and baggage tags must have code-share flight prefix number printed on them;
9. code-sharing partners must maintain responsibility for customer service at all times; and
10. the staff of the code-sharing partners must be fully briefed and trained to support all aspects of the joint product.[498]

[498] "Code Sharing: Moving Towards Consumer Protection" [August 1995] Avmark Aviation Economist 2 at 5.

4:4 Terms and Clauses of the Code-Sharing Agreement

Though there are standard elements generally related to marketing and public contract performance, due to varying priorities amongst carriers there can be no standard format for a code-sharing agreement. Added to this, the confidentiality attached to code-sharing agreements makes it almost impossible to ascertain the ideal features of the code-sharing agreement. Reproduced in Annex Five is a copy of a code-sharing/blocked space agreement as made public. Most of the clauses which are of commercial importance have been redacted.

The code-sharing agreement shouldn't contain clauses which contain unfair contract terms, such as conditions which allow one partner preferential treatment with regard to the services offered by each.[499]

4:4:1 Nature and Extent of Co-Operation

As shown in Annex One, the majority of existing code-sharing agreements are in combination with block space arrangements. One commentator considers that code-sharing involving blocked space agreements offer the greatest promise as well as the greatest threat to the development of international air transport.

The threat is mainly because in a blocked space agreement only one partner is actually operating the route, and as such, with tacit consent of its partner, can keep competition away for a long time.[500] It also tends to restrict the capacity available on the route, to the detriment of consumers,[501] though this is true only if there aren't any other carriers competing in the market. When code-sharing is through a blocked space agreement, normally the participating carriers have to compete with each other. Therefore such agreements do not produce as many benefits as a strategic alliance would.

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[499] For example, Precision Airlines' (US domestic commuter airline) code-sharing agreement with its major airline partner had a clause allowing access for cheaper fuel. See E.W. Basset, "Commuters Flight Fare Wars" [May 1986] Commuter Air 25 at 28.

[500] Shenton, "Big Picture", *supra* note 465 at 3.

[501] *Ibid.*

The advantages were considered earlier in Chapter 1:4:6. In block space agreements, the competition between the participating carriers is favourable to passengers as it creates lower fairs, but it has, more often than not, led to the breakdown of the code-sharing. For example, the Cathay Pacific and American Airlines code-sharing arrangement between Hong Kong and Los Angeles collapsed because American Airlines was unable to match the low fares offered by Cathay Pacific.[502]

Initially Delta, Swissair and Austrian had code-sharing agreements between each of them bilaterally, and later transformed their alliance to a trilaterally structured code-sharing agreement. This is considered by one commentator as the precursor of things to come.[503]

4:4:2 Revenue Settlement Procedures

In Chapter 1:4 the different types of code-sharing agreements were discussed. In any such category, the airlines could agree either to divide the revenues of the code-shared flight in accordance to a prorate agreement, or could agree to a blocked space arrangement.[504] The nature of a block space agreement was discussed in Chapter 1:4.

In code-sharing without blocked space the operating partner retains all revenues from the operation of the code-shared flight. The code-sharing partners will pay the operating partner, through standard industry interline procedures, for all ticket coupons which were issued by them, and will retain only the revenues which pertain to the prorated share of the itinerary beyond the code-shared segment. The operating partner is normally authorized to act on behalf of the code-sharing partners. This means that the operating partner is able to collect revenues directly from any other airline who issues a ticket with the designator of the code-sharing partners. The operating partner is

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[502] *GAO Study*, *supra* note 2 at 41.

[503] M. Jennings, "Japan Alters Code Policy" [December 1994] Airline Business 11. See also *Aviation Daily* (14 November 1994) at 241.

[504] For a detailed discussion on the advantages of blocked space agreements see Shenton "Big Picture", *supra* note 465 at 3.

responsible for all expenses incurred during the operation of the flight. Each partner is responsible for their non-marketing expenses. Marketing expenses will normally be shared depending on the nature of the services offered. The IATA Bank Settlement Plan (BSP) would be incorporated by reference to ensure a smooth revenue settlement procedure.

In some US domestic code-sharing agreements, a new payment scheme has evolved where, instead of the pro-rated system of revenue sharing, the partners negotiate a flat mileage fee. The system would be more suited in a code-sharing arrangement between a regional and a major carrier, like in US domestic code-sharing. Though this scheme will be beneficial to the regional carrier during off-peak periods, it would not be so during times where discounting doesn't prevail.[505]

4:4:3 Confidentiality

When the DOT restricted access to passenger traffic data in respect of the NorthWest-KLM and the USAir-BA code-sharing alliances on the application of the code-sharing partners, American Airlines objected to the confidentiality on the basis that "public analysis" of this data is important in determining whether these code-sharing agreements served the national interest. According to American Airlines, this data should be made public as the public's right to know clearly outweighs claims by NorthWest and USAir for secrecy.[506]

In certain instances the DOT has allowed confidentiality to those portions of the code-sharing agreement for which such treatment was requested by the partners.[507] In Re *Domestic Airport Antitrust Litigation*,[508] which was an anti-trust litigation in respect of US domestic air transport, a motion was made to compel USAir to produce all code-

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[505] *Aviation Daily* (15 January 1993).

[506] Note "Code Sharing Data Should be Made Public" *Air Letter* (13 September 1994) at 3.

[507] See DOT Order 88-1-51; see also agreement reproduced in Annex Five in which most clauses are granted confidential treatment and are therefore redacted.

[508] 141 F.R.D. 556 at 565.

sharing agreements it had entered into with other airlines. The court over-ruled the objection that such agreements relate to non-defendants and allowed the request for discovery on the basis that code-sharing partners are potential co-conspirators in the alleged anti-trust violations. It went further and agreed with the plaintiff's argument that the production of all agreements would assist further understanding of the alleged price-fixing conspiracy.

In the UK, civil aviation is regulated by the Secretary of State for Trade and the Civil Aviation Authority.[509] When information is in the hands of the former (*i.e.*, the Crown), it is entitled to claim Crown privilege for it, in which case it is up to a competent court to decide as to whether the damage to public interest is greater in the event of such disclosure or not.

In the case that information is in the hands of the Civil Aviation Authority, the applicable provisions are found in Regulation 12 of the Civil Aviation Authority Regulation of 1972.[510] By this regulation, the Authority is not to provide any information which, in its opinion, relates to commercial or financial affairs of the body who has provided it, unless such disclosure is warranted by comparison of the advantage to the public.[511]

4:4:4 Jurisdiction and Choice of Law

If action is brought against a code-sharing partner, jurisdiction would certainly be objected to initially on the basis of justiciability doctrines such as:

1. Forum non conveniens; and
2. Act of State (when the partner is a national carrier being owned by state).

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[509] See generally A. Kean, "Confidentiality of Civil Aviation Information in the UK" (1976) I Ann. Air & Sp. L. 83 at 84.

[510] *Ibid.* at 94.

[511] *Ibid.* at 95.

Forum Non Conveniens

Forum non conveniens analysis is done in two stages. Initially, it must be demonstrated that an adequate alternative forum is available.[512] The burden of proving this is on the party moving for it.[513] If such a threshold requirement is established, then the court will consider the pros and cons of the relevant private and public interest factors to decide whether the balance of convenience tilts strongly in favour of trial in a foreign forum.[514]

In *Gulf Oil Corp.* v. *Gilbert*, the court formulated a series of conditions which were later referred as "Gilbert Factors", which have been considered by subsequent US courts when deciding on "Forum Non Conveniens" objection.[515] These factor are:

1. the ease of access to the sources of proof;
2. the availability of compulsory process for attendance of unwilling witnesses;
3. the cost of obtaining attendance of willing witnesses;
4. the practical problems involving the efficiency and expense of a trial;
5. the enforceability of judgements;
6. the administrative difficulties flowing from the court congestion;
7. imposing jury duty on citizens of the forum;
8. the local interest in having controversies decided at home; and
9. avoidance of unnecessary problems in the applications of foreign law.

In *Laker Airways Ltd* v. *Pan American World Airways*[516] the court took judicial notice of the fact that both partners to the action were international airlines, and assumed

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[512] *Blanco* v. *Banco Industrial de Venezuela*, SA 997 F. 2d 974,980 (2d cir. 1993).

[513] *R. Maganlal & Co* v. *M.G. Chemical Co Inc.* 942 F. 2d 164, 167 (2d cir 1991).

[514] *Gulf Oil Corporation* v. *Gilbert* 330 US 501, 509.

[515] See *Virgin Atlantic Airways* v. *British Airways* 872 F. Supp. 52 at 61: also *Allstate Life Insurance Co*, 994 F. 2d at 1001.

[516] 568 F. Supp. 811, 814.

that the inconvenience to transport documents and witnesses would be minimal. A similar position would undoubtedly be taken in respect of a code-sharing situation.

Act of State Doctrine

This precludes courts from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory.[517]

Courts cannot inquire into acts and conduct of the officials of the foreign state, their affairs, their policies or the underlying reasons and motivations for the actions of the foreign government.[518]

Therefore, the code-sharing agreement should specifically address this issue and specify in no uncertain terms, as to the jurisdiction where any litigation should take place.

4:4:5 Validity, Termination and Breach

In the light of the recent trends in the practice of code-sharing, it would be prudent for the airlines to consider beforehand the repercussions it might have to face in the event of termination.

The most important point to keep in mind is that, in the event of terminating the agreement, the code-sharing partners would not hold the same market positions which they held prior to the code-sharing agreement.[519] It could also lead to situations where the code-sharing partner is better prepared to pick-up any flights dropped by its partner. Furthermore, the stronger partner would have gained expert knowledge of the weaker partners marketing strategies prior to dissolution of the partnership.[520] Finally, the

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[517] *Banco National de Cuba* v. *Sabbatino* 376 US 398, 401.

[518] *O.N.E. Shipping Ltd* v. *Flota Mercante Grancolombiana*, SA 830 F. 2d 449, 452.

[519] For an example from US domestic code-sharing it is reported that Ransome Airlines traffic dropped sharply after the carrier left USAir's network. See "Commuters Flight Fare Wars" [May 1986] Commuter Air 25.

[520] Shenton, "Airline's Gain", *supra* note 10 at 18.

possibility of suffering repercussions from whatever misfortune which might fall on the other is a matter the code-sharing partners should be prepared for.

In the US domestic air transport industry, there have been a few legal actions between code-sharing partners in respect of violated code-sharing agreements.[521]

Atlantis Airlines claimed US $20 million from Eastern Airlines and Metro Eastern Express on the basis that Eastern violated its contract by giving Metro Eastern Express the right to serve some routes, despite the exclusive agreement between Eastern and Atlantis.

Fisher Brothers Aviation instituted an action for $50 million in damages from NorthWest Airlines and Simmons Airlines, where Fisher Brothers claimed that in spite of their exclusive right to serve some routes for NorthWest, that the latter had subsequent to its merger with Republic, given those lucrative routes to Simmons, who had been a code-sharing partner of Republic. In both these actions, the plaintiffs claimed that the provisions of the Sherman Act had been violated, and that the passengers were deprived of the right to the best possible services and fares.[522]

4:4:6 Remedies and Settlement of Disputes

The agreement must ensure that all partners endeavour to settle all disputes mutually. The agreement could specifically provide for the adoption of IATA's arbitration rules, and ideally set out the jurisdiction where such arbitration proceedings should be held, and under what law.[523]

4:4:7 Contractual Exclusion and Limitation of Liability

It is important to all partners that an appropriate liability and indemnity clause is incorporated in the code-sharing agreement. Ideally, such a provision should be

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[521] See generally "Economics, Code Sharing Threaten Survival of Commuter Airline" (27 April 1987) Av. Wk. & Sp. Tech. 57 at 58.

[522] *Ibid.*

[523] See Article 15 of Annex 5 for an illustration of such a clause.

formulated in such a manner that neither party bears any risk in the operations of another partner, in circumstances where it is not at fault. The operating partner would indemnify the code-sharing partner for any accident, damage, injury or death relating to the operation of the code-sharing flight.

CHAPTER FIVE

CONCLUSION

Code-sharing is only one facet of an alliance between airlines and isn't necessarily at its core. It is, as shown earlier, the "glue" that holds such alliances together, and as such, it is unfair to credit the practice of code-sharing with all the anti-competitive aspects arising from an alliance. Therefore, it must be understood that whatever implications result due to an airline alliance, the implications caused by the code-sharing aspect will be less than the implications caused by the totality of other forms of co-operation.

The majority opinion among airlines has been to favour code-sharing because it achieves both the long-term and short-term objectives of a carrier. Furthermore, airlines consider code-sharing as an essential tool for participating in international networks, entering new markets, competing more effectively, reducing costs, optimizing use of capacity, etc.

The policy of each state undoubtedly has a persuasive influence on international air transport's ability to grow and seize new competitive opportunities. Therefore, it is of paramount importance that such policies be coherent and imposed without discrimination instead of a changing policy depending on the country or on a case by case method.

As pointed out earlier, the benefits derived from code-sharing by the airlines depend mainly on the position it holds on the CRS displays. Therefore, due to this intrinsic relationship, any future regulation on CRS should not in any way preclude the full display of code-shared flights. In any event, since code-sharing agreements would have been authorized by the respective governmental authorities after due consideration to the bilateral agreement, pro-competitiveness and passenger benefits, a CRS Code of Conduct should not inadvertently prescribe the ability of carriers to continue code-sharing agreements. Code-sharing arrangements, even in their most basic form, offer a product which is distinguishable from a interline connection. Therefore, that in itself is an ample reason for such a flight option to be listed ahead of an interline flight option.

The main obstacle in achieving the globalization of the air transport industry is the nationality clause incorporated in bilateral air services agreements. The rejection of the notion that an airline is a citizen of one country and an alien elsewhere is very important if states are to proceed from the current deadlock. Therefore, international code-sharing could be used to achieve a degree of globalization in the air transport industry, within the existing framework of bilateral air transport agreements. To ensure that code-sharing is not used to circumvent the bilateral regime, states should insist that all carriers who hold out services to, from or via its territory, even through the mode of code-sharing, have the necessary economic authority to offer such a service.

The main legal implications caused by code-sharing are non-disclosure of the actual carrier and the uncertainty of the applicable liability regime. Therefore, it is imperative that the passenger is adequately advised at the time of contracting, details of the operating carrier for each segment of the flight, and other relevant matters in order to avoid any misconceptions. That being done, any such carrier other than the contracting carrier who performs the carriage, would fall into the category of a successive carrier as defined in the Warsaw Convention. Yet, the wording of articles 30(2) and 30(3) of the Warsaw Convention create a restrictive application of the provisions in those articles to the practice of code-sharing. The use of the term "first carrier" in these articles makes its provisions inapplicable to code-sharing scenarios where the contracting carrier is not the first carrier. If the term used was "contracting carrier", it would have provided an uniform basis to assign liability, in all possible situations of code-sharing.

Therefore, regulatory authorities should, ideally, prescribe that the contracting carrier assume liability for the whole journey. This would, in effect, entitle the passenger, or those who legally represent his estate, to take action against the contracting carrier in respect of the whole carriage.

The responsibility for situations which occur during the contracted carriage which are beyond the control of the contracting carrier and which occur before the performance by the successive carrier (such as "bumping" by the successive carrier or incidents at the terminal), are left without being addressed. This could prevented by adopting an interpretation to the term "carrier" as done by the Guadalajara Convention. This would

also allow maintenance of suits against the actual carrier who performed the carriage during which an accident or a delay occurred. If the quest for a revision of the Warsaw Convention is successful, these matters could also be included in such a convention to ensure uniformity.

Ideally, IATA, being the worldwide industry association committed to develop and maintain cost-effective standards and procedures to facilitate the operation of international air transport, should take an active role in developing standards in the practice of code-sharing. This is also necessary as any legislation which would require additional disclosure will have a direct implication on the current standards formulated through IATA.

Most who espouse code-sharing attempt to justify their position by illustrating the benefits of code-sharing. In Chapter 1:5 such matters were discussed in detail as being the main reasons for code-sharing. However, almost all such benefits could be achieved by the airlines concerned without resorting to code-sharing.

Similarly, most of the disadvantages which are coupled with code-sharing could arise when interlining or even in the course of on-line carriage.

The fear of an aftermath when a code-sharing agreement is terminated should be addressed. One commentator suggests governmental intervention as the only viable solution for such a situation where the authorities could tie the retention of traffic rights to the continuation of the partnership.[523] Furthermore, initial emphasis should be on achieving precise and definite agreements on co-operation in respect of relatively narrow areas rather than reaching comprehensive strategic alliances. The prudence to do so is seen in the light of the pending court hearings on the allegations made by KLM and NorthWest against each other. The KLM/NorthWest partnership, which was the model and the envy of all, is showing signs of collapse, and according to KLM officials, gradual extension of the co-operation program will be the best solution for the

[523] See C.M. Allen, "Code Sharing - The Need for Changed Perceptions" Paper (presented to the Symposium on Code Sharing by the European Aviation Club, Brussels, October 1994) [unpublished].

continuation of the alliance.[524]

Another safeguard would be to suspend traffic rights for a determined period subsequent to the dissolution of the partnership in order to facilitate the weaker partner to regain its market share.

Hitherto, the US experience has been the foremost illustration for predicting the success or failure of most practices connected to air transport and as such, lessons from code-sharing in US domestic air transport could be used in order to prepare for any pitfalls which may arise. However, it must be kept in mind that the approach in American jurisprudence is sometimes parochial and, therefore, is not appropriate for the solution of all conflicts that may arise in respect of international code-sharing.

There is a natural inclination of airlines to devise ingenious methods to maximize their profitability. As well, there exists the quest of the users, who are unconcerned about esoteric concepts such as the Freedoms of the Air, to obtain maximum benefits and convenience in their travels. Finally, there are rigid and sometimes unpredictable requirements of regulatory authorities. The practice of code-sharing is capable of addressing all these needs.

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[524] *Air Letter* (15 February 1996) at 1.

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ANNEX ONE

A. COMPILATION OF AIRLINE ALLIANCES INCLUDING CODE-SHARING AGREEMENTS 1995

Source:
Adopted and Reproduced from *Airline Business* (June 1995 issue).

B. COMPILATION OF AIRLINE CODE-SHARING AGREEMENTS IN 1994

Source:
Adopted and Reproduced from *Avmark Aviation Economist* (October 1994 issue).

Carrier/Partner	Equity	Date started	Details
Adria Airways			
Air France	No	Jun 89	Joint venture on Ljubljana-Paris.
Inoimpex	No	Mar 95	Codesharing on Skopje-Ljubljana.
Lufthansa	No	Oct 93	Codesharing on Frankfurt-Ljubljana.
Aer Lingus			
British Airways	No	1993	General sales agency. Connections with Aer Lingus to Ireland. Worldwide cargo cooperation.
Aeroflot			
Austrian	No	1990	Codesharing on Vienna-St Petersburg.
Cyprus Airways	No	Mar 94	Twice weekly joint service on Larnaca-Moscow.
Delta Air Lines	No	1991	Block space agreements and codesharing on Moscow-New York/JFK.
Lufthansa	No	1989	Cooperation on the expansion of Moscow/Sheremetyevo airport.
Aerolineas Argentinas			
Iberia	Yes	Nov 90	Comprehensive marketing alliance and joint frequent flyer plan.
Ladeco	No	1993	Codeshare and freight cooperation on Miami-Buenos Aires-Santiago route.
Malaysia Airlines	No	Feb 95	Block space agreement on Johannesburg-Cape Town-Buenos Aires.
Pluna	No	1986	Ground handling joint venture on Montevideo-Buenos Aires shuttle.
Varig	No	1986	Ground handling joint venture.
Viasa	No	1994	Codeshare on Buenos Aires-Caracas route.
Aeromexico			
AeroPeru	Yes	Apr 93	Codeshare on Mexico City-Lima, Joint FFP.
Air France	No	Nov 94	Air France has put plans for a full marketing agreement on hold. FFP partnership and shared terminal at Paris/CDG2.
America West	No	Feb 93	Codeshare on Mexico-Phoenix route, FFP partnership, sales agreement.
British Airways	No	Apr 95	Proposed codesharing and FFP partnership, focusing on Mexico-London.
Delta Air Lines	No	Sep 94	Codeshare/block space agreement between Mexico City and Atlanta and Dallas-Fort Worth.
Japan Airlines	No	Jan 94	Joint marketing and connection service on Mexico-Tokyo/Narita, FFP partnership.
Mexicana	Yes	Sep 93	Joint scheduling, CRS, yield management, purchasing and labour agreements.
AeroPeru			
Aeromexico	Yes	Jan 94	Codeshare on Mexico City-Lima, Joint FFP.
Aeropostale			
Air France	Yes	Jul 91	Aircraft sharing.
Air Afrique			
Air Algerie	No	Apr 95	Planned joint venture.
Air France	Yes	1963	Schedule coordination and ground handling by Air France at Paris/CDG and by Air Afrique in its owner states. Through fares. Management contract. Catering joint venture in Dakar and Abidjan. Joint management of freight return pool on African network.
TAP Air Portugal	No	Mar 95	Codesharing on Lisbon-Abidjan.
Iberia	No	Apr 95	Planned joint venture.
Kenya Airways	No	Oct 95	Planned joint venture.
South African AW	No	Nov 92	Codeshare and joint service on Johannesburg-Abidjan-Brazzaville. Schedule coordination, ground handling by SAA in Johannesburg, prorate agreement.
Saudia	No	May 94	Self ticketing agreement for staff travel.
Swissair	No	Oct 1991	Codesharing on Zurich-Geneva-Dakar-Abidjan.
Air Algerie			
Air Afrique	No	Apr 95	Planned joint venture.
Royal Air Maroc	No	–	Joint purchasing. Plans for codesharing on routes such as Algiers-Sharjah. Possibility of developing joint long-haul routes.
Tunis Air	No	–	Joint insurance purchasing.
Air Aruba			
KLM	No	Nov 94	Joint flights between Amsterdam and Aruba with plans to extend cooperation to other areas.
USAir	No	Jun 95	Planned codeshare.
Air Austral			
Air France	Yes	Nov 90	Pool agreement on Reunion-Antananarivo and Paris-Antananrivo, with Air France and Air Madagasca, and on Paris-Mauritius and Reunion-Mauritius with Air France and Air Mauritius.
Air Madagascar	Yes	Nov 90	Joint venture on Reunion-Antananarivo with Air France and Air Austral. B747 aircraft maintenance. Passenger and freight handling. Codesharing on four routes.
Air Mauritius	No	Dec 67	Pool agreement on Paris-Mauritius and Reunion-Mauritius with Air France and Air Mauritius.
Air Canada			
Air France	No	Sep 92	Schedule coordination, codesharing and shared terminals on Paris/CDG to Europe, Africa and the Middle East, and in Montreal and Toronto to western Canada and North America. Reciprocal ground handling and FFP cooperation. Block space agreement on Paris-Montreal.

Carrier/partner	Equity	Date started	Details
Air Canada continued			
Air New Zealand	No	Dec 90	Joint marketing, codesharing and FFP cooperation on 15 flights a week between Canada and New Zealand and Fiji.
All Nippon	No	Sep 94	General sales agency in Canada. With the planned implementation of its Toronto-Vancouver-Osaka route, Air Canada is in talks with ANA over a strategic alliance.
British Midland	No	Jun 94	Codesharing through London/Heathrow to five points in the UK.
Continental AL	Yes	Apr 93	Comprehensive marketing agreement with connections through Continental's Newark, Houston and Cleveland (Air Ontario) hubs to and from other US points. Reciprocal ground handling and general sales services. Joint FFP participation. Maintenance cooperation and joint purchasing and inventory sharing.
Finnair	No	Apr 92	Block space agreement on Helsinki-Toronto.
Iberia	No	Apr 92	Codesharing on Madrid-Montreal-Toronto.
Korean Air	No	Sep 93	Codesharing and freight block space agreement on Seoul-Vancouver-Toronto.
United Airlines	No	Oct 92	Increased connections between Toronto, Montreal, Calgary and Winnipeg via Chicago to other US points. Connections in Miami to South America, in San Francisco to South Asia and South Pacific, and in Los Angeles. FFP cooperation. Joint promotions and advertising.
Air China			
Asiana	No	Jan 95	Revenue sharing on Seoul-Beijing.
Austrian Airlines	No	1995	Cooperation on Vienna-Beijing.
Finnair	No	Apr 92	Block space agreement on Helsinki-Beijing.
Korean Air	No	Jan 95	Revenue sharing on Seoul-Beijing.
Lufthansa	No	1989	Ameco joint maintenance venture in Beijing.
Air France			
Adria	No	Jun 89	Joint venture on Ljubljana-Paris.
Aeroflot	No	–	Pool agreement on Paris-Moscow and Paris-St Petersburg.
Aeromexico	No	Nov 94	Air France has put plans for a full marketing agreement on hold. FFP partnership and shared terminal at Paris/CDG2.
Aeropostale	Yes	Jul 91	Aircraft sharing.
Air Afrique	Yes	1963	Schedule coordination and ground handling by Air France at Paris/CDG. Through fares. Management contract. Catering joint venture in Dakar and Abidjan.
Air Austral	Yes	Nov 90	Pool agreement on Reunion-Antananarivo and Paris-Antananrivo, with Air France and Air Madagascar. Pool agreement on Paris-Mauritius and Reunion-Mauritius with Air France and Air Mauritius.
Air Canada	No	Sep 92	Ground handling and FFP cooperation. Block space agreement and winter codeshare on Paris-Montreal. Shared terminal at Paris/CDG.
Air Gabon	Yes	1977	
Air Inter	Yes	1995	Air France plans to merge Air Inter with its result centre for Europe while mainly domestic Air Inter operates a limited number of routes on the group's behalf to Europe and North Africa.
Air Madagascar	Yes	Nov 90	Joint venture on Reunion-Antananarivo with Air France and Air Austral. Pool agreement on Paris-Antananarivo. B747 aircraft maintenance. Passenger and freight handling.
Air Mauritius	Yes	Dec 67	Pool agreement on Paris-Mauritius and Reunion-Mauritius with Air France and Air Austral.
Air Seychelles	No	1990	Revenue pool and codeshare on twice weekly joint Paris/CDG-Mahe services operated by Air Seychelles aircraft.
Austrian Airlines	Yes	May 89	Block space agreement on Vienna-Paris/Orly.
Balkan Bulgarian	No	–	Joint venture on Paris-Sofia.
Cameroon Airlines	Yes	Jul 71	
Croatia Airways	No	–	Joint venture on Paris-Split.
CSA	No	May 80	Joint services on Prague-Paris.
Japan Airlines	No	May 94	Seven joint codeshared non-stop weekly services between Paris/CDG and Osaka/Kansai. Reciprocal passenger handling in Paris and Kansai. Air France and JAL already cooperate on cargo and are building, with Lufthansa, a joint terminal at New York/JFK.
Korean Air	No	Jan 91	Joint services on the Seoul-Paris route.
LOT Polish	No	–	Joint venture between Paris, Lyon, Nice and Warsaw and between Paris and Krakow.
Lufthansa	No	1989	Plans for a strategic alliance have not materialised but the carriers share ownership of the Amadeus CRS with Iberia and of the European arm of the cargo computerised tracking system Traxon. They also have joint cargo flights, are participants in the Atlas maintenance combine, and have plans for joint airport terminals,including New York/JFK's T1 due to open in mid-1998.
Malev	No	Apr 78	Joint operations on Paris-Budapest.
Middle East AL	Yes	Jul 49	
Royal Air Maroc	Yes	1947	Joint flights on Paris-Casablanca.
Sabena	Yes	Apr 92	Cooperation on sales and reservation, handling, information systems, freight and FFPs. Block space agreement on Paris-Brussels.
Tarom	No	1969	Pool agreement.
Tunis Air	Yes	1948	Commercial agreement France-Tunisia.
Ukraine Int'l	No	–	Commercial agreement on Paris-Kiev.
Vietnam Airlines	No	Aug 93	Aircraft leasing, training of pilots, cabin crew and mechanics.

Carrier/partner	Equity	Date started	Details
Air Gabon			
Air France	Yes	1977	
Air Hong Kong			
Cathay Pacific	Yes	May 94	Management contract.
Air India			
Air Mauritius	Yes	Jan 86	Joint route development.
Canadian Int'l	No	End 95	Planned joint venture on Vancouver-Hong Kong-Delhi.
Ethiopian Airlines	No	Nov 93	Block seat arrangement on routes between Bombay and Beijing.
Gulf Air	No	Dec 89	Joint route development.
Indian Airlines	No	1994	Plans for joint FFP and computer reservations system. Codesharing on 12 weekly Indian Airlines flights from Calicut to Muscat, Dubai and Abu Dhabi. Codesharing on domestic Indian Airlines flights from three destinations into Delhi.
Lufthansa	No	Apr 94	Lufthansa was to pay Air India a fee for every passenger above an agreed level on its proposed Frankfurt-Madras service.
Malaysia Airlines	No	Dec 90	Joint services on Kuala Lumpur-New Delhi. Pool agreement on Kuala Lumpur-Madras and Penang-Madras.
Air Inter			
Air France	Yes	1995	Air France plans to merge Air Inter with its result centre for Europe while mainly domestic Air Inter operates a limited number of routes on the group's behalf to Europe and North Africa.
AirLanka			
Gulf Air	No	May 89	Codesharing on joint operations to Bahrain and Muscat.
Indian Airlines	No	Jun 80	Revenue pooling on Colombo to Madras, Tiruchirapally, Trivandrum, Bombay and Delhi.
Malaysia Airlines	No	Feb 85	Codesharing on joint operations between Colombo and Kuala Lumpur.
Middle East AL	No	Nov 93	Codesharing and joint operations on Colombo-Beirut.
Pakistan Intl AL	No	Jul 90	Revenue pooling on Colombo-Karachi, Karachi-Bombay and Male-Colombo.
Air Madagascar			
Air Austral	No	Apr 93	Codesharing on four routes including Antananarivo to Reunion, Paris, Singapore and Mauritius.
Air France	Yes	Nov 90	Joint venture on Reunion-Antananarivo with Air France and Air Austral. Pool agreement on Paris-Antananarivo. B747 aircraft maintenance. Passenger and freight handling.
Air Mauritius	No	Apr 93	Codeshare on one route.
Kenya Airways	No	1979	Royalties paid with regard to one destination.
Swissair	No	Jul 86	Royalties paid with regard to one destination.
Air Mauritanie			
Iberia	No	Oct 87	Codesharing on Las Palmas-Nouakchott-Nouabibou.
Royal Air Maroc	No	-	Joint insurance purchasing.
Air Mauritius			
Air Austral	No	Dec 67	Pool agreement on Paris-Mauritius and Reunion-Mauritius with Air France and Air Mauritius.
Air France	Yes	Dec 67	Pool agreement on Paris-Mauritius and Reunion-Mauritius with Air Austral.
Air India	Yes	Jan 86	Joint route development.
Air Madagascar	No	Apr 93	Codeshare on one route.
Cathay Pacific	No	Feb 94	Joint flight between Kong Kong and Mauritius.
Malaysia Airlines	No	Mar 88	Joint services on Kuala Lumpur-Mauritius.
Air New Zealand			
Ansett Australia	Yes	1995	Air New Zealand was on the verge of buying a 49 per cent equity stake in Ansett to give it access to the Australian market.
Canadian Airlines	No	Dec 90	Codeshare between New Zealand and Canada.
EVA Airways	No	Nov 93	Codeshare agreement between Taipei and Auckland.
Japan Air Lines	No	Dec 89	Codeshare flight on Kansai and Tokyo/Narita to Auckland. FFP participation.
Korean Air	No	Nov 93	Codesharing and passenger block space agreement on Seoul-Auckland.
Mandarin Airlines	No	Aug 91	Codeshare between Taipei and Auckland.
Qantas	Yes	Nov 89	Codesharing on trans-Tasman routes, particularly between Christchurch/Wellington and Sydney/Melbourne/Brisbane, using both Qantas and Air NZ aircraft.
SAS	No	1990	Hub coordination in southeast Asia for onward travel to points in New Zealand. FFP cooperation.
Air Niugini			
Philippine AL	No	Dec 84	Joint services on Port Moresby-Manila using Air Niugini aircraft and crew.
Singapore Airlines	No	Aug 87	Joint service between Port Moresby and Singapore with Air Niugini aircraft and crew.
Solomon Islands AW	No	Oct 94	Joint service between Port Moresby and Honaria.
Air Pacific			
Qantas	Yes	Nov 87	Codesharing on Australia-Fiji with Qantas and Air Pacific aircraft.
Air Seychelles			
Air France	No	1990	Revenue pooling and codesharing on joint services from Paris/CDG to Mahe, operated by Air Seychelles.

Carrier	Equity	Date started	Details
Air Seychelles continued			
Gulf Air	No	Dec 93	Codesharing on Bahrain-Seychelles route.
Iberia	No	Apr 93	Codesharing on Madrid-Nairobi-Mahe.
Air UK			
KLM	Yes	Jan 80	FFP partnership, codeshare through Amsterdam, KLM ground handling on behalf of Air UK.
Northwest AL	No	Oct 94	Codeshare through London/Gatwick.
Alaska Airlines			
Northwest Airlines	No	Dec 93	Codesharing on Seattle-Los Angeles.
Alitalia			
British Midland	No	July 94	Codesharing from Rome, Milan, Venice, Bologna and Pisa to Glasgow, Belfast, Teesside, Leeds-Bradford and Dublin, via London/Heathrow.
Continental	No	May 94	Codeshare, joint marketing and FFP cooperation on 140 connecting flights a day from US domestic points through New York/Newark to Rome. Newark-Mexico to be added from April. Plans to add Milan-Newark service. The Newark-Rome sector is operated by a Continental DC-10 painted in both airlines' colours.
Gulf Air	No	Mar 95	Codeshare and block space agreement on Abu Dhabi-Bahrain.
Korean Air	No	Sep 91	Freight joint venture on Milan-Seoul via Anchorage. Codesharing on passenger services on Rome-Seoul.
Malev	Yes	Mar 93	Codesharing on Rome and Milan to Budapest with flights operated by Malev. Joint purchasing in areas like insurance and catering. FFP link. Management contract.
Nippon Cargo AL	No	Feb 92	Freight cooperation on the Tokyo-Milan route.
Varig	No	Nov 95	Varig still hopes to conclude a comprehensive marketing agreement with Alitalia.
Alliance			
South African AW	Yes	Dec 94	Alliance began by operating charters on behalf of equity holder SAA last December.
All Nippon Airways			
Air Canada	No	Aug 94	General sales agency in Canada. Signed letter of intent to pursue joint cooperation in marketing and other services.
Austrian Airlines	Yes	Jul 89	Joint operations on Tokyo/Narita-Vienna. Austrian participates in ANA's FFP.
Delta Air Lines	No	Jun 94	Signed letter of intent to pursue joint cooperation in marketing and other services.
Japan Airlines	Yes	Feb 94	Joint purchase and repair of spare parts for the B777, shared use of hangars and engine test cells, and joint development of technical and staff training manuals for the 777.
USAir	No	Dec 90	Block space agreement and connecting service to Orlando for ANA's services to Washington/Dulles and New York/JFK. ANA also participates in USAir's FFP.
Aloha Airgroup			
United	No	Apr 93	Marketing and codeshare agreement to destinations such as Maui and Kauai via Honolulu.
ALM Antillean			
KLM	Yes	1981	Codesharing and comprehensive marketing agreement on the Atlantic.
United	No	Nov 93	Marketing and codeshare agreement on US destinations to Curacao via Miami.
American Airlines			
British Midland	No	Nov 93	Codeshare on London/Heathrow to Amsterdam, Glasgow and Brussels.
BWIA	No	1995	Codesharing alliance in Miami. Shared terminal at New York/JFK.
Canadian AL Intl	Yes	Apr 94	Comprehensive transborder North American codeshare agreement, beginning June 1995. American also provides Canadian with a range of services including accounting, data processing and communications, operations planning, pricing and yield management, international services, passenger services training and US originated reservations. The two carriers' FFPs are linked.
Gulf Air	No	Feb 94	Codesharing between London/Heathrow and Abu Dhabi, Muscat, Doha and Bahrain.
LOT Polish Airlines	No	Jan 95	Joint operation and codeshare on Warsaw-New York/JFK-Miami and Warsaw-Chicago/O'Hare-Los Angeles.
Qantas	No	1986	Codesharing between Sydney and Los Angeles on Qantas aircraft and between LA and Chicago, Washington DC, New York and Boston on American aircraft. FFP cooperation.
Reno Air	No	Jan 93	Airport slot sharing, FFP cooperation, cooperative advertising, coordinated promotions, financial/capital access arrangement.
South African AW	No	Nov 92	Codesharing and joint flights on New York/JFK-Johannesburg. FFP cooperation.
America West			
Aeromexico	No	1992	Codesharing on Phoenix-Mexico City and FFP partnership.
Continental	Yes	Aug 94	Codesharing between 59 US airports, ground handling and frequent flyer cooperation, joint marketing.
Mesa Air Group	Yes	Aug 94	Codesharing at the Phoenix and Columbus hubs under the America West Express franchise, frequent flyer cooperation.
Northwest Airlines	No	1991	Codesharing from Las Vegas and Phoenix to San Francisco and Los Angeles, and on Tucson-San Francisco.

Carrier/partner	Equity	Date started	Details
Ansett Australia			
Air New Zealand	Yes	1995	Air New Zealand was on the verge of buying a 49 per cent equity stake in Ansett to give it full access to the Australian market.
Lufthansa	No	1993	Connecting service from Frankfurt via Melbourne to Sydney and Brisbane. Shared passenger lounges in Melbourne, Sydney and Brisbane.
Malaysia Airlines	No	Oct 94	Codesharing, via Melbourne and Sydney, to Adelaide, Cairns, Canberra and Hobart.
United Airlines	No	Sep 92	Codesharing on numerous points including Sydney and Melbourne to the Gold Coast.
Virgin Atlantic	No	Sep 94	Marketing agreement and joint fares between the UK and Australia via Hong Kong.
Ansett New Zealand			
Malaysia Airlines	No	Jun 94	Codesharing on Auckland-Christchurch.
Asiana			
Air China	No	Jan 95	Revenue sharing on Seoul-Beijing.
China Eastern	No	Jan 95	Revenue sharing on Seoul-Shanghai.
Northwest Airlines	No	Aug 94	Codesharing from Seoul to Los Angeles, New York/JFK, Detroit, San Francisco, Honolulu and Saipan. FFP cooperation. Shared terminals and lounge facilities at four of the US destinations. Shared cargo space on US-Seoul flights.
Turkish Airlines	No	Nov 93	Joint services on Istanbul-Sofia.
Austrian Airlines			
Aeroflot	No	1990	Codesharing on Vienna-St Petersburg.
Air China	No	1995	Cooperation on Vienna-Beijing.
Air France	Yes	1982	Block space agreement on Vienna-Paris/Orly.
All Nippon AW	Yes	Jul 89	Joint operations on Tokyo/Narita-Vienna. Austrian participates in ANA's FFP.
British Midland	No	1994	Codesharing between Vienna and Belfast, Dublin, Edinburgh, Glasgow, Leeds-Bradford, and Teesside via London.
CSA	No	1990	Codesharing on Vienna-Prague.
Delta Air Lines	No	Jul 94	Codeshare and block space arrangement on Vienna-New York and Vienna-Washington.Trilateral codeshare and block space agreement on Vienna-Geneva-Washington with Swissair.
Finnair	No	1990	Block space agreement on Vienna-Helsinki with Finnair aircraft.
Iberia	No	1994	Codesharing on Vienna-Barcelona.
KLM	No	Apr 93	Codesharing on Amsterdam-Vienna.
LOT	No	1994	Codesharing on Vienna-Krakow.
Lufthansa	No	1992	Codesharing and block space agreement on Linz-Frankfurt. Catering joint venture.
Malev	No	Mar 94	Block space agreement on Vienna-Budapest with Austrian aircraft and Malev code.
SAS	No	1990	European Quality Alliance partner. Codesharing on flights from Vienna to Copenhagen, Stockholm and Gothenburg. Connections via Vienna to Eastern Europe, MiddleEast and Africa. FFP cooperation.
South African AW	No	Mar 93	Codesharing on Johannesburg-Vienna.
Swissair	Yes	1990	European Quality Alliance partner. Codesharing from Vienna to Zurich and Geneva; from Zurich to Linz, Salzburg, Graz, Klagenfurt and Innsbruck; and on Zurich-Vienna-Minsk. FFP cooperation. Catering and maintenance joint ventures. Trilateral codeshare agreement on Vienna-Geneva-Washington with Delta.
Tarom	No	1993	Codesharing on Vienna-Timisoara with Austrian aircraft.
Ukraine Intl AL	No	1993	Codesharing on flights from Vienna to Kiev and Odessa.
Aviaco			
Iberia	Yes	1948	Operates many routes on behalf of Iberia.
Avianca			
Saeta	No	Jul 93	Route specific codesharing agreement.
Aviateca			
Taca	Yes	1989	Joint purchasing, fleet rationalisation and cooperation on support services including maintenance, ground handling and catering.
Balair/CTA			
Swissair	Yes	1993	Joint FFP and regular flights on behalf of Swissair to Palma de Mallorca and Valencia. Operation will close down towards year end with flights reverting to Swissair and Crossair.
Balkan Bulgarian			
Air France	No	–	Joint venture on Paris-Sofia.
Iberia	No	Apr 82	Codesharing on Madrid-Sofia.
Bouraq			
Philippine AL	No	Oct 93	Joint services on Davao-Manado using Bouraq aircraft and crew.
Braathens			
Finnair	No	–	Route specific agreement.

Carriers	Equity	Date Started	Details
British Airways			
Aer Lingus	No	1993	General sales agency. Connections with Aer Lingus to Ireland. Worldwide cargo cooperation.
Aeromexico	No	Apr 95	Proposed codesharing and FFP partnership on Mexico-London.
Deutsche BA	Yes	Mar 92	Joint FFP. Worldwide marketing and sales representation. Cooperation on engineering, purchasing and information technology.
GB Airways	Yes	Feb 95	British Airways franchise with joint marketing, frequent flyer plan and freight cooperation.
Korean Air	No	Feb 93	Joint freight flights on Seoul-London.
Qantas	Yes	Mar 93	Joint FFP, airport lounges and sales offices. Round the world fare with BA and USAir. Reciprocal ground handling and catering. Global freight cooperation. Minor maintenance work on stopovers in each other's country. Joint purchasing. Codesharing between Auckland and LA on Qantas aircraft. A proposal for closer codesharing cooperation on UK-Australia services is subject to the approval of Australia's Trade Practices Commission.
TAT	Yes	Jan 93	Joint FFP and codesharing. Worldwide marketing and sales representation. Cooperation on engineering, purchasing and information technology.
USAir	Yes	Jan 93	Joint FFP. Wet leasing from London/Gatwick to Pittsburgh, Charlotte and Baltimore. Codesharing to 64 US destinations. Round the world fare with British Airways and Qantas. Plans for joint marketing, purchasing and information technology. Engineering cooperation.
British Midland			
Air Canada	No	May 94	Codesharing from Halifax, Ottawa, Montreal, Toronto and Vancouver, through London/Heathrow, to five points in the UK.
Alitalia	No	Jul 94	Codesharing from Rome, Milan, Venice, Bologna and Pisa to Glasgow, Belfast, Teesside, Leeds-Bradford and Dublin, via Heathrow.
American Airlines	No	Nov 93	Codesharing through Heathrow on flights from nine US points to Brussels, Amsterdam, Glasgow and Frankfurt.
Austrian Airlines	No	1994	Codesharing between Vienna and Belfast, Dublin, Edinburgh, Glasgow, Leeds-Bradford, and Teesside via Heathrow.
BWIA	No	1995	Planned codeshare and marketing alliance.
Iberia	No	Apr 95	Codesharing between seven UK regional airports and five key Spanish destinations.
Malaysia Airlines	No	Oct 94	Codesharing from Kuala Lumpur to Glasgow, Edinburgh, Belfast, Teesside and Leeds-Bradford via Heathrow. Onward travel to more than 40 destinations in Southeast Asia, Australia and New Zealand.
SAS	Yes	Feb 94	Connections via Heathrow to British Midland's domestic UK destinations. Codesharing on Copenhagen-Glasgow and Bergen-Heathrow. FFP cooperation.
TAP Air Portugal	No	Apr 95	Codesharing from Lisbon, Faro, Oporto and Madeira to six UK points, via Heathrow.
United Airlines	No	Apr 92	Codesharing on nine US destinations through Heathrow to Frankfurt, Glasgow, Amsterdam, Nice and Brussels. FFP reciprocity.
BWIA			
American Airlines	No	1995	Codesharing alliance in Miami. Shared terminal at New York/JFK.
British Midland	No	1995	Planned codeshare and marketing alliance.
Cameroon Airlines			
Air France	Yes	Jul 71	
Nigeria Airways	No	–	Cooperation on the Paris route. Proposals for joint operations to Far East.
Canadian Airlines International			
Air India	No	End 95	Planned joint venture on Vancouver-Hong Kong-Delhi.
Air New Zealand	No	Dec 90	Joint marketing, codesharing and FFP cooperation on 10 flights a week between Canada and New Zealand and Fiji.
American Airlines	Yes	Apr 94	Comprehensive transborder North American codeshare agreement, beginning June 1995. American also provides Canadian with a range of services including in accounting, data processing and communications, operations planning, pricing and yield management, international services, passenger services training and US originated reservations. The two carriers' FFPs are linked.
Lufthansa	No	1989	Codesharing and FFP cooperation on up to 16 weekly flights between Canada and Germany.
Mandarin	No	Nov 91	Codesharing on Canada-Taiwan.
Qantas	No	1991	Codesharing on Sydney-Honolulu with Qantas aircraft, and from Honolulu to Vancouver and Toronto on Canadian Airlines aircraft.
Varig	No	Oct 91	Canadian codeshares on Varig flights to Chile and Argentina.
Vietnam Airlines	No	–	Codesharing on Ho Chi Minh City-Paris-Toronto.
Cargolux			
China Airlines	No	May 82	Exchange of space on Taipei-Luxembourg.
Lufthansa	Yes	Oct 93	Codeshare on Frankfurt-Luxembourg and San Francisco-Los Angeles cargo flights.
Carnival Air Lines			
Iberia	No	–	Codesharing out of Miami to US points.
Ladeco	No	Apr 95	Joint flight on Miami-New York/JFK.
Cathay Pacific			
Air Hong Kong	Yes	May 94	Management contract.
Air Mauritius	No	Feb 94	Joint flight between Kong Kong and Mauritius.

Carrier	Equity	Date started	Details
Cathay Pacific continued			
Dragonair	Yes	Jan 90	Fifteen year management contract.
Japan Airlines	No	Jun 93	10 per cent equity share in Taeco maintenance venture.
Korean Air	No	May 90	Joint freight operations on Seoul-Hong Kong.
Lufthansa	No	1982	Joint freight services.
Singapore Airlines	No	Jul 93	Founder partner of joint passages FFP. 10 per cent equity share in Taeco maintenance venture.
Vietnam Airlines	No	Dec 91	Codesharing and joint services on Hong Kong-Ho Chi Minh City.
Cayman Airways			
United Airlines	No	Dec 94	Comprehensive marketing and codeshare agreement on flights connecting with Cayman Airways between Miami and Tampa and Grand Cayman and Cayman Brac in the British West Indies. FFP cooperation. Joint advertising and promotion, schedule coordination.
China Airlines			
Cargolux	No	May 82	Exchange of space between Taipei and Luxembourg.
Garuda	No	Oct 90	Codesharing on the Taipei-Denpasar route. Immediate plans for joint service on Taipei-Jakarta. Plans for joint cargo venture with China Airlines aircraft on Jakarta-Taipei-US services.
Japan Asia AW	No	Jul 87	Purchase of space on Taipei-Tokyo route from Japan Asia Airways.
Martinair	No	Aug 87	Purchase of space on Taipei-Amsterdam from Martinair.
Vietnam Airlines	No	Aug 92	Codesharing on Kaohsiung-Ho Chi Minh City, Taipei-Ho Chi Minh City and Taipei-Hanoi.
China Eastern			
Asiana	No	Jan 95	Revenue sharing on Seoul-Shanghai.
China Southern			
United	No	–	Exploring shedule coordination, joint marketing and codesharing.
Cityjet			
Virgin Atlantic	No	Jan 94	Route franchise agreement between London and Dublin.
Continental Airlines			
Air Canada	Yes	Apr 93	Comprehensive marketing agreement including codesharing and joint FFP with links through Continental's Newark and Houston hubs to other US points. Reciprocal ground handling and general sales. Maintenance cooperation. Joint purchasing. Inventory sharing.
Air France	No	–	Continental says it still has plans to close the loop by finalising a passenger and cargo agreement with Air France. Air France already has such an agreement with Air Canada but has put its plans with Continental on hold.
Alitalia	No	May 94	Codeshare, joint marketing and FFP cooperation on 140 connecting flights a day from US domestic points through New York/Newark to Rome. Newark-Mexico to be added from April. Plans to add Milan-Newark service. The Newark-Rome sector is operated by a Continental DC-10 painted in both airlines' colours.
America West	Yes	Aug 94	Codesharing between 59 US airports, ground handling and frequent flyer cooperation, joint marketing.
SAS	No	1988	Joint marketing and FFP on flights connecting to Scandinavia through Newark.
Copa			
Taca	No	1992	Comprehensive marketing agreement plus joint purchasing, fleet rationalisation, and cooperation on ground handling and support services.
Croatia Airways			
Air France	No	–	Commercial agreement on Paris-Split.
CSA Czech Airlines			
Air France	No	May 80	Joint services on Prague-Paris.
Austrian Airlines	No	1990	Codesharing on Vienna-Prague.
Iberia	No	Apr 94	Joint services from Prague to Madrid, Barcelona and Palma de Mallorca.
KLM	No	May 94	Block space agreement on Prague-Amsterdam.
LOT Polish AL	No	Aug 93	Block space agreement on Prague-Warsaw.
Lufthansa	No	Oct 93	Block space agreement on Prague-Munich.
Turkish Airlines	No	Apr 92	Joint services on Prague-Istanbul.
Cyprus Airways			
Aeroflot	No	Mar 94	Twice weekly joint service on Larnaca-Moscow.
KLM	No	Jun 91	Codesharing on Amsterdam-Larnaca.
Gulf Air	No	Jul 94	Codesharing on both carriers' services between Cyprus and the Gulf and on two weekly services operated by Gulf Air between Abu Dhabi and Doha via Larnaca to New York. Plans to expand the agreement to Cyprus Airways' European network and to Gulf Air's operations in the Indian sub continent, the Far East and Australia.
Saudia	No	–	Block space agreement on Jeddah-Larnaca and Riyadh-Larnaca.
United Airlines	No	–	Commercial agreement involving joint sales and promotions.
Cyprus Turkish			
Turkish Airlines	Yes	Feb 75	Operates some Turkish Airlines aircraft on routes between Northern Cyprus and Turkey.

Carrier/partner	Equity	date started	details
Delta Air Lines			
Aeroflot	No	1991	Block space agreements and codesharing on Moscow-New York/JFK.
Aeromexico	No	Jun 94	Codeshare on key Mexico-US routes and FFP partnership.
All Nippon Airways	No	Jun 94	Signed letter of intent to pursue joint cooperation in marketing and other services.
Austrian	No	Jul 94	Codeshare and block space arrangement on Vienna-New York and Vienna-Washington.Trilateral codeshare and block space agreement on Vienna-Geneva-Washington with Swissair.
Korean Air	No	Mar 94	Signed letter of intent for a comprehensive marketing agreement; details to be elaborated.
Malev	No	May 94	Codesharing on New York-Budapest using Malev aircraft.
Sabena	No	93/94	Block space agreement and codesharing from Brussels to Atlanta, New York, Chicago and Boston, and on flights to Germany via Brussels.
Singapore Airlines	Yes	1989	Global Excellence partner with Swissair. Codesharing on Singapore-Tokyo-Los Angeles, Los Angeles-Dallas, and Los Angeles-New York. Codeshare and block seat arrangement on SIA's Singapore-New York service via Europe from April 1995.
Swissair	Yes	Sep 89	Global Excellence partners with SIA. Codesharing from Zurich to New York, Atlanta and Cincinnati. Schedule coordination. FFP cooperation and joint handling. Trilateral codeshare agreement with Austrian Airlines on Vienna-Geneva-Washington.
TAP Air Portugal	No	1994	Codesharing on the North Atlantic.
Varig	No	Jun 94	Letter of intent for a comprehensive alliance with FFP cooperation and codesharing.
Vietnam Airlines	No	–	Signed letter of intent for joint marketing pact.
Virgin Atlantic	No	Apr 95	Codeshare and block space marketing agreement between Newark, New York/JFK, San Francisco, Los Angeles and London/Heathrow, and between Boston, Orlando, Miami and London/Gatwick.
Deutsche BA			
British Airways	Yes	Mar 92	Joint FFP. Worldwide marketing and sales representation. Cooperation on engineering, purchasing and information technology.
DHL			
Japan Airlines	Yes	Aug 92	Scandinavian cargo delivery by DHL. Use of DHL for inter-US cargo shipments.
Lufthansa	Yes	–	
Dominicana			
Iberia	No	Aug 88	Codesharing on Madrid-Santo Domingo-Bogota-Rio.
Dragonair			
Cathay Pacific	Yes	Jan 90	Fifteen year management contract.
Malaysia Airlines	No	Oct 93	Joint services on Kota Kinabalu-Hong Kong and cost and revenue sharing on Kuching-Hong Kong.
Royal Brunei AL	No	Sep 94	Cost and revenue sharing on Bandar Seri Begawan-Hong Kong.
Ecuatoriana			
Varig	No	Apr 83	One joint weekly flight on Rio-Sao Paulo-Guayaquil-Quito-San Jose.
Egyptair			
Kuwait Airways	No	–	The carriers are 50/50 shareholders in Cairo-based Shorouk Air.
Philippine Airlines	No	Jun 90	Joint services on Manila-Cairo using Egyptair aircraft and crew.
Emirates			
KLM	No	Aug 94	Codeshare and cost sharing on a B747F weekly cargo service between Dubai and Amsterdam. May be increased to three times a week.
United Airlines	No	Nov 93	Codesharing and block space arrangement on Emirates flights between Dubai and London/Heathrow.
Ethiopian Airlines			
Air India	No	Nov 93	Block seat arrangement on routes between Bombay and Beijing.
Nigeria Airways	No	–	Commercial agreement on Lagos-Nairobi.
EVA Air			
Garuda Indonesia	No	Sep 94	Joint pool agreement on Kaohsiung-Denpasar.
Federal Express			
TNT	No	1992	TNT provides intra-European service to FedEx in 10 European countries.
Finnair			
Air Canada	No	Apr 92	Block space agreement on Helsinki-Toronto.
Air China	No	Apr 92	Block space agreement on Helsinki-Beijing.
Austrian	No	1990	Joint flights with Finnair aircraft on Helsinki-Vienna.
Braathens	No	–	Route specific agreement.
Iberia	No	Apr 94	Codesharing on Helsinki-Gothenburg-Amsterdam-Madrid/Barcelona.
Lufthansa	No	Dec 91	Joint venture flights on Hamburg-Turku. Block space agreements on Helsinki-Berlin, Stockholm-Berlin and Stockholm-Stuttgart. Joint FFP.
Maersk Air	No	–	Marketing agreement.

Carrier	Equity	Date started	Details
Finnair continued			
Transwede	No	Apr 85	Maintenance joint venture and marketing agreement.
Gambia Airways			
Air Afrique	No	Feb 94	Block space agreement and codeshare on Banjul-London. Negotiations with a view to a possible management contract.
Garuda Indonesia			
Aeroflot	No	May 90	Joint flight with Aeroflot aircraft on Jakarta-Moscow.
China Airlines	No	Sep 91	Codesharing and pool on the Taipei-Denpasar route. Immediate plans for joint service on Taipei-Jakarta. Plans for joint cargo venture with China Airlines aircraft on Jakarta-Taipei-US services.
EVA Air	No	Sep 94	Joint pool agreement on Kaohsiung-Denpasar.
Iberia	No	May 93	Codesharing and joint operation on Madrid-Jakarta, Madrid-Singapore and Madrid-Abu Dhabi.
Japan Airlines	No	Apr 70	Services pool on Denpasar-Tokyo and Jakarta-Tokyo.
KLM	No	Apr 95	Joint freighter service with KLM aircraft on Jakarta-Amsterdam. Aircraft maintenance and overhaul. Plans for comprehensive passenger alliance on sectors between Indonesia and Europe.
Korean Air	No	Jan 91	Joint freighter service on Seoul-Jakarta with Korean Air aircraft. Plans for passenger codesharing and block seat arrangement on Seoul-Denpasar.
Lufthansa	No	1991	Technical cooperation.
Malaysia Airlines	No	Mar 88	Joint services on Kuala Lumpur-Denpasar.
Saudia	No	Apr 92	Pool agreement between Jakarta and Riyadh, Jeddah and Dhahran.
GB Airways			
British Airways	Yes	Feb 95	British Airways franchise with joint marketing, frequent flyer plan and freight cooperation.
Ghana Airways			
Nigeria Airways	No	–	Plans to cooperate on Harare-Johannesburg and for joint operations to New York.
Gulf Air			
Alitalia	No	Mar 95	Codeshare and block space agreement on Abu Dhabi-Bahrain.
Air India	No	Dec 89	Joint route development.
AirLanka	No	May 89	Codesharing on joint operations to Bahrain and Muscat.
Air Seychelles	No	Dec 93	Codesharing on Bahrain-Seychelles route.
American	No	Feb 94	Codesharing between London/Heathrow and Abu Dhabi, Muscat, Doha and Bahrain.
Cyprus Airways	No	Jul 94	Codesharing on both carriers' services between Cyprus and the Gulf and on two weekly services operated by Gulf Air between Abu Dhabi and Doha via Larnaca to New York. Plans to expand the agreement to Cyprus Airways' European network and to Gulf Air's operations in the Indian sub continent, the Far East and Australia.
Saudia	No	–	Joint venture air bridge on Dhahran-Bahrain.
Tunisair	No	–	Prorate agreements on fares and schedule coordination. Possibility of codesharing in future.
Iberia Airlines			
Aerolineas Arg	Yes	Mar 94	Management contract plus comprehensive marketing agreement involving codesharing, joint routes, joint FFP.
Air Afrique	No	Apr 95	Planned joint venture.
Air Canada	No	Apr 92	Codesharing on Madrid-Montreal-Toronto.
Air Mauritanie	No	Oct 87	Codesharing on Las Palmas-Nouakchott-Nouabibou.
Air Seychelles	No	Apr 93	Codesharing on Madrid-Nairobi-Mahe.
Austrian Airlines	No	1994	Codesharing on Vienna-Barcelona.
Aviaco	Yes	1948	Aviaco operates many routes on behalf of Iberia.
Balkan Bulgarian	No	Apr 82	Codesharing on Madrid-Sofia.
British Midland	No	Apr 95	Codesharing between seven UK regional airports and five key Spanish destinations.
Carnival Air Lines	No	–	Codesharing out of Miami to US points.
CSA	No	Mar 82	Codesharing on Madrid-Prague.
Dominicana	No	Aug 88	Codesharing on Madrid-Santo Domingo-Bogota-Rio.
Finnair	No	Apr 94	Codesharing on Helsinki-Gothenburg-Amsterdam-Madrid/Barcelona.
Garuda	No	May 93	Codesharing and joint operation on Madrid-Jakarta, Madrid-Singapore and Madrid-Abu Dhabi.
Lufthansa	No	1994	Codesharing on Vienna-Barcelona.
Kuwait Airways	No	Jan 87	Codesharing between Madrid and Kuwait.
Ladeco	Yes	Apr 91	No management contract but comprehensive marketing agreement.
Lacsa	No	–	Talks are in progress to develop an agreement.
LOT	No	Jul 74	Codesharing on Madrid-Warsaw.
Lufthansa	No	–	Partner in the Amadeus computer reservations system with Air France.
Malev	No	Nov 87	Codesharing on Madrid-Budapest.
Middle East AL	No	Jun 75	Codesharing on Madrid-Beirut.
Royal Air Maroc	No	Mar 88	Codesharing and pooling agreement on Madrid-Casablanca-Barcelona-Tangier-Malaga.
TAP Air Portugal	No	End 94	Memorandum of understanding to pursue cooperation with possible codesharing to African destinations.
Tarom	No	Apr 83	Codesharing on Madrid-Bucharest.
United Airlines	No	Jul 94	Discussions over codesharing with United have so far led nowhere.
Viasa	Yes	Aug 91	Management contract and comprehensive marketing agreement including joint routes, codesharing, freight cooperation, joint FFP and schedule coordination.

Carrier	Equity	Date started	Details
Icelandair			
SAS	No	1993	Connects with SAS in Copenhagen on flights from Iceland and northern Germany.
Indian Airlines			
Air India	No	1994	Plans for joint FFP and computer reservations system. Codesharing on 12 weekly Indian Airline flights from Calicut to Muscat, Dubai and Abu Dhabi. Codesharing on domestic Indian Airlines flights from three destinations into Delhi.
AirLanka	No	Jun 80	Revenue pooling on Colombo to Madras, Tiruchirapally, Trivandrum, Bombay and Delhi.
Iran Air			
Malaysia Airlines	No	Jan 90	Joint services on Kuala Lumpur-Tehran.
Inlcimpex			
Adria Airways	No	Mar 95	Codesharing on Skopje-Ljubljana.
Japan Airlines			
Aeromexico	No	Apr 94	Connection service on Mexico-Tokyo/Narita and FFP partnership.
Air France	No	Apr 93	Three joint freight flights per week between Paris/CDG and Tokyo/Narita. Joint daily passenger flight between Osaka/Kansai and CDG from September 1994.
Air New Zealand	Yes	Aug 88	Joint weekly flight on Tokyo-Christchurch-Auckland.
All Nippon	Yes	Feb 94	Agreement for the joint purchase and repair of aircraft parts; shared hangars and engine test cells; and joint development of technical and staff training manuals for the B777.
Cathay	No	Jun 93	10 per cent equity share in Taeco maintenance venture.
DHL Intl	Yes	Aug 92	Scandinavian cargo delivery by DHL. Use of DHL for inter-US cargo shipments.
KLM	No	Apr 93	Codesharing on Amsterdam-Madrid and Amsterdam-Zurich.
Lufthansa	No	1992	Joint freight flights on Narita-Frankfurt and various joint ventures in areas such as maintenance Shared cargo facility at Chicago/O'Hare. Joint terminal at New York/JFK with Air France.
Thai Int'l	No	1985	Joint operations on Nagoya-Bangkok and Fukuoka-Bangkok with plans to inaugurate Osaka/Kansai-Bangkok from November 1995.
Varig	No	Mar 88	Codesharing and block space agreement on flights from Tokyo and Nagoya via Los Angeles to Rio de Janeiro and Sao Paolo.
Japan Asia AW			
China Airlines	No	Jul 87	Purchase of space on Taipei-Tokyo route from Japan Asia Airways.
Kenya Airways			
Air Afrique	No	Oct 95	Planned joint venture.
Air Madagascar	No	1979	Royalties paid with regard to one destination.
KLM			
Air Aruba	No	Nov 94	Joint flights between Amsterdam and Aruba with plans to extend cooperation to other areas.
Air UK	Yes	1987	Codesharing, comprehensive marketing agreement and FFP participation on routes between th UK and Amsterdam.
ALM Antillean	Yes	1981	Codesharing on the Atlantic.
Austrian Airlines	No	Apr 93	Codesharing on Amsterdam-Vienna.
CSA	No	May 94	Block space agreement on Prague-Amsterdam.
Cyprus Airways	No	Apr 91	Codesharing on Amsterdam-Larnaca.
Emirates	No	Aug 94	Codeshare and cost sharing on a B747F weekly cargo service between Dubai and Amsterdam. May be increased to three times a week.
Garuda Indonesia	No	Apr 95	Joint freighter service with KLM aircraft on Jakarta-Amsterdam. Aircraft maintenance and overhaul. Plans for comprehensive passenger alliance on sectors between Indonesia and Europ from mid-1996.
Japan Airlines	No	Apr 93	Codesharing on Amsterdam-Madrid and Amsterdam-Zurich.
Nippon Cargo AL	No	–	Codesharing and joint venture on Tokyo-Amsterdam.
Northwest Airlines	Yes	1989	Codesharing and comprehensive marketing agreement on the North Atlantic, in the domestic I and in Europe; joint flights and FFP. Cooperation on ground handling, sales, catering, informati services and maintenance. Joint purchasing.
Saudia	No	–	Revenue sharing on Jeddah-Amsterdam.
Singapore Airlines	No	–	Freight joint venture.
Vietnam Airlines	No	–	Vietnam Airlines purchases block seats on KLM flights.
Korean Air			
Air Canada	No	Sep 93	Codesharing and freight block space agreement on Seoul-Vancouver-Toronto.
Air China	No	Jan 95	Revenue sharing on Seoul-Beijing.
Air France	No	Jan 91	Joint freight flights on the Seoul-Paris route.
Air New Zealand	No	Jan 94	Codesharing and passenger block space agreement on Seoul-Auckland.
Alitalia	No	Sep 91	Freight joint venture on Milan-Seoul via Anchorage. Passenger codesharing on Rome-Seoul.
British Airways	No	Feb 93	Joint freight flights on Seoul-London.
Cathay Pacific	No	May 90	Joint freight operations on Seoul-Hong Kong.
Delta Air Lines	No	Mar 94	Signed letter of intent for a comprehensive marketing agreement; details to be elaborated.
Garuda Indonesia	No	Jan 91	Joint freighter service on Seoul-Jakarta with Korean Air aircraft. Plans for passenger codeshari and block seat arrangement on Seoul-Denpasar.

Carrier/partner	Equity	Date started	Details
Korean Air continued			
Lufthansa	No	Mar 86	Joint freight flight on Seoul-Frankfurt.
Malaysia Airlines	No	Jul 91	Joint freight flights on Kuala Lumpur-Seoul and Johor Bahru-Seoul.
Philippine AL	No	Dec 89	Joint freighter services on Seoul-Manila with Korean Air aircraft and crew.
Saudia	No	–	Block space agreement on Jeddah-Seoul.
Vietnam Airlines	No	Jul 93	Codesharing and passenger block space agreement on Seoul-Ho Chi Minh City.
Kuwait Airways			
Egyptair	No	–	The two carriers are 50/50 shareholders in Cairo-based Shorouk Air.
Iberia	No	Jan 87	Codesharing between Madrid and Kuwait.
Philippine AL	No	Nov 81	Joint services on Manila-Kuwait with Kuwait Airways aircraft and crew.
LAB Airlines			
Varig	No	Apr 94	Codeshare agreement between Santa Cruz and La Paz.
Lacsa			
Iberia	No	–	Talks are in progress to develop an agreement.
Taca	Yes	1992	Joint purchasing, fleet rationalisation and cooperation on support services including maintenance, ground handling and catering.
Varig	No	Apr 83	Joint flights.
Ladeco			
Aerolineas Arg	No	1993	Codeshare and freight cooperation on Miami-Buenos Aires-Santiago route.
Carnival Air Lines	No	Apr 95	Joint flight on Miami-New York/JFK.
Iberia	Yes	Apr 91	No management contract but comprehensive marketing agreement.
Lauda Air			
Lufthansa	Yes	Nov 92	Codesharing on Munich-Miami. European sales and marketing cooperation and codesharing to 15 European destinations out of Vienna, Salzburg and the new Milan/Malpensa hub, as part of the regional jet joint venture based in Vienna.
Libyan Arab Airlines			
Royal Air Maroc	No	–	Joint insurance purchasing.
LOT Polish			
Air France	No	–	Joint venture between Paris, Lyon, Nice and Warsaw and between Paris and Kracow.
American Airlines	No	Jan 95	Joint operation and codeshare on Warsaw-New York/JFK-Miami and Warsaw-Chicago/O'Hare-Los Angeles.
Austrian Airlines	No	1994	Codesharing on Vienna-Kracow.
CSA	No	Aug 93	Block space agreement on Prague-Warsaw.
Iberia	No	Jul 74	Codesharing on Madrid-Warsaw.
Lufthansa			
Adria Airways	No	Oct 93	Codesharing on Frankfurt-Ljubljana.
Aeroflot	No	1989	Cooperation on the expansion of Moscow/Sheremetyevo airport.
Air China	No	1989	Ameco technical joint venture in Beijing.
Air France	No	1989	Plans for a strategic alliance have not materialised but the carriers share ownership of the Amadeus CRS with Iberia and of the European arm of the cargo computerised tracking system Traxon. They also have joint cargo flights, are participants in the Atlas maintenance combine, and have plans for joint airport terminals, including New York/JFK's T1 due to open in mid-1998.
Air India	No	Apr 94	Lufthansa was to pay Air India a fee for every passenger above an agreed level on its proposed Frankfurt-Madras service.
Ansett Australia	No	1993	Connecting service from Frankfurt via Melbourne to Sydney and Brisbane. Shared passenger lounges in Melbourne, Sydney and Brisbane.
Austrian Airlines	No	1992	Codesharing and block space agreement on Linz-Frankfurt. Catering joint venture.
Canadian AL Intl	No	1989	Codesharing and FFP cooperation on up to 19 weekly flights between Canada and Germany.
Cargolux	Yes	Oct 93	Codeshare on Frankfurt-Luxembourg and San Francisco-Los Angeles cargo flights.
Cathay Pacific	No	1981	Cargo cooperation through Traxon Europe and Traxon Asia.
CSA	No	Oct 93	Block space agreement on Prague-Munich.
Finnair	No	1991	Strategic marketing alliance between Germany and Finland.
Garuda	No	1991	Technical cooperation.
Iberia	No	1994	Partner in the Amadeus computer reservations system with Air France.
Japan Airlines	No	1991	Joint freight flights on Narita-Frankfurt and various joint ventures in areas such as maintenance. Shared cargo facility at Chicago/O'Hare. Joint passenger terminal at New York/JFK with Air France. Joint stake in DHL International.
Korean Air	No	Mar 86	Joint freight flight on Seoul-Frankfurt.
Lauda Air	Yes	Nov 92	Codesharing on Munich-Miami. European sales and marketing cooperation and codesharing to 15 European destinations out of Vienna, Salzburg and the new Milan/Malpensa hub, as part of the regional jet joint venture based in Vienna.
Luxair	Yes	1993	Codesharing, through ticketing and joint FFP.
Modiluft	No	1993	Wet leasing of B737-200s and aircraft technical support contract.

Carrier/partner	Equity	Date started	Details
Lufthansa continued			
Swissair	No	1989	Joint shareholders in Shannon Aerospace maintenance company.
Thai International	No	Oct 94	Codesharing between Thailand and Germany and beyond the two countries to other points. Shared passengers lounges and terminal facilities, advanced seat reservation and through check-in on codeshare flights. Joint FFP and development of Bangkok as a cargo hub with joint cargo services through Southeast Asia, Australia and New Zealand. Both carriers also have an alliance agreement with United Airlines.
Turkish Airlines	No	1990	Shareholders in charter carrier Sun Express.
United Airlines	No	1993	Comprehensive marketing and multiple codeshare agreement between Germany and the US.
Varig	No	1993	Codesharing on Frankfurt-Rio de Janeiro and Frankfurt-Sao Paulo. General sales and marketing cooperation.
Vietnam Airlines	No	–	Joint flights between Vietnam and Germany.
Luxair			
Lufthansa	Yes	Dec 92	Codesharing, through ticketing and joint FFP.
Maersk Air			
Finnair	No	–	Marketing agreement.
Malaysia Airlines			
Aerolin Argentinas	No	Feb 95	Block space agreement on Johannesburg-Cape Town-Buenos Aires.
Air India	No	Dec 90	Joint services on Kuala Lumpur-New Delhi. Pool agreement on Kuala Lumpur-Madras and Penang Madras.
Air Lanka	No	Feb 85	Joint services on Kuala Lumpur-Colombo.
Air Mauritius	No	Mar 88	Joint services on Kuala Lumpur-Mauritius.
Ansett Australia	No	Oct 94	Codesharing, via Melbourne and Sydney, to Adelaide, Cairns, Canberra and Hobart.
Ansett New Zealand	No	Jun 94	Codesharing on Auckland-Christchurch.
British Midland	No	Oct 94	Codesharing from Kuala Lumpur to Glasgow, Edinburgh, Belfast, Teesside and Leeds-Bradford via Heathrow. Onward travel to more than 40 destinations in Southeast Asia, Australia and New Zealand.
Dragonair	No	Oct 93	Joint services on Kota Kinabalu-Hong Kong and cost and revenue sharing on Kuching-Hong Kong
Garuda	No	Mar 88	Joint services on Kuala Lumpur-Denpasar.
Iran Air	No	Jan 90	Joint services on Kuala Lumpur-Tehran.
Korean Air	No	Jul 91	Joint freight flights on Kuala Lumpur-Seoul and Johor Bahru-Seoul.
Myanmar Airways	No	Dec 94	Block space agreement on Yangon-Kuala Lumpur.
Royal Brunei	Yes	May 83	Block space arrangement on Kuala Lumpur to Zurich, Bahrain and Cairo.
Royal Jordanian	No	Jun 85	Joint services on Kuala Lumpur-Amman.
SilkAir	No	Oct 83	Joint services on Kuala Lumpur-Singapore and Langkawi-Singapore.
Singapore Airlines	No	Jun 93	Joint shuttle services on Kuala Lumpur-Singapore. Founder partner of Passages FFP.
Thai International	No	Dec 82	Joint services from Kuala Lumpur to Bangkok, Phuket and Hat Yai; and from Penang to Bangkok and Phuket.
Vietnam Airlines	No	Nov 90	Joint services on Kuala Lumpur-Ho Chi Minh City.
Virgin Atlantic	No	1995	Codesharing between the UK, Malaysia and Australia was due to commence this year.
Malev			
Air France	No	Apr 78	Joint services on Budapest-Paris.
Alitalia	Yes	Mar 93	Codeshare on Budapest to Rome and Milan with flights operated by Malev. Joint purchasing in areas like insurance and catering. FFP links. Management contract.
Austrian	No	Mar 94	Codesharing on Budapest-Vienna with Austrian aircraft and Malev code.
Delta Air Lines	No	May 94	Codesharing on Budapest-New York using Malev aircraft.
Iberia	No	Nov 87	Codesharing on Madrid-Budapest using Malev aircraft.
Mandarin Airlines			
Canadian AL Intl	No	Nov 91	Codesharing on Canada-Taiwan.
Martinair			
China Airlines	No	Aug 87	Purchase of space on Taipei-Amsterdam from Martinair.
Mexicana			
Aeromexico	Yes	Sep 93	Joint scheduling, CRS, yield management, purchasing and labour agreements.
Middle East Airlines			
Air France	Yes	Jul 49	
AirLanka	No	Nov 93	Codesharing and joint operations on Colombo-Beirut.
Iberia	No	Jun 75	Codesharing on Madrid-Beirut.
Midwest Express			
Virgin	No	1992	Codeshare via Boston to Milwaukee.
Modiluft			
Lufthansa	No	1993	Wet leasing of B737-200s and aircraft technical support contract.

Carrier/partner	Equity	Date started	Details
Myanmar Airways			
Malaysia Airlines	No	Dec 94	Block space agreement on Yangon-Kuala Lumpur.
Nica			
Taca	Yes	1992	Joint purchasing, fleet rationalisation and cooperation on support services including maintenance, ground handling and catering.
Nigeria Airways			
Cameroon Airlines	No	–	Cooperation on the Paris route. Proposals for joint operations to Far East.
Ethiopian Airlines	No	–	Commercial agreement on Lagos-Nairobi.
Ghana Airways	No	–	Plans to cooperate on Harare-Johannesburg and for joint operations to New York.
Nippon Cargo Airways			
Alitalia	No	Jan 93	Joint freight operation on Tokyo/Narita-Milan.
KLM	No	Jun 88	Joint freight operation on Tokyo/Narita-Amsterdam.
Northwest Airlines			
Air UK	No	Oct 94	Codeshare through London/Gatwick.
Alaska Airlines	No	Dec 93	Codesharing on Seattle-Los Angeles.
America West	No	1991	Codesharing from Las Vegas and Phoenix to San Francisco and Los Angeles, and on Tucson-San Francisco.
Asiana	No	Aug 94	Codesharing from Seoul to Los Angeles, New York/JFK, Detroit, San Francisco, Honolulu and Saipan. FFP cooperation. Shared terminals and lounge facilities at four of the US destinations. Shared cargo space on US-Seoul flights.
KLM	Yes	1989	Codesharing and comprehensive marketing agreement on the North Atlantic, in the domestic US and in Europe; joint flights and FFP. Cooperation on ground handling, sales, catering, information services and maintenance. Joint purchasing.
USAir	No	1986	Codesharing on San Francisco-Los Angeles. FFP cooperation in the Pacific.
Olympic Airways			
Saudia	No	Dec 91	Block space agreement on Athens-Jeddah and Athens-Riyadh, operated by Olympic Airways.
Pakistan International AL			
AirLanka	No	Jul 90	Revenue pooling on Colombo-Karachi, Karachi-Bombay and Male-Colombo.
Philippine Airlines			
Air Niugini	No	Dec 84	Joint services on Port Moresby-Manila using Air Niugini aircraft and crew.
Bouraq Indonesia	No	Oct 93	Joint services on Davao-Manado using Bouraq aircraft and crew.
Egyptair	No	Jun 90	Joint services on Manila-Cairo using Egyptair aircraft and crew.
Korean Air	No	Dec 89	Joint freighter services on Seoul-Manila with Korean Air aircraft and crew.
Kuwait Airways	No	Nov 81	Joint services on Manila-Kuwait with Kuwait Airways aircraft and crew.
TWA	No	Jul 89	Codesharing on Manila-San Francisco and Los Angeles operated by PAL, and on TWA flights from San Francisco or Los Angeles to New York/JFK. FFP partnership.
Pluna			
Aerolineas Arg	No	1986	Ground handling joint venture on Montevideo-Buenos Aires shuttle.
Qantas			
Air New Zealand	Yes	1990	Codesharing on some trans-Tasman routes, particularly between Christchurch/Wellington and Sydney/Melbourne/Brisbane, using both Qantas and Air NZ aircraft.
Air Pacific	Yes	Nov 87	Codesharing on Australia-Fiji with Qantas and Air Pacific aircraft.
American	No	1986	Codesharing between Sydney and Los Angeles on Qantas aircraft and between LA and Chicago, Washington DC, New York and Boston on American aircraft. FFP cooperation.
British Airways	Yes	Mar 93	Joint FFP, airport lounges and sales offices. Round the world fare with BA and USAir. Reciprocal ground handling and catering. Global freight cooperation. Minor maintenance work on stopovers in each other's country. Joint purchasing. Codesharing between Auckland and LA on Qantas aircraft. A proposal for closer cooperation on UK-Australia services is subject to the approval of Australia's Trade Practices Commission.
Canadian AL Intl	No	1991	Codesharing on Sydney-Honolulu with Qantas aircraft, and from Honolulu to Vancouver and Toronto on Canadian Airlines aircraft.
SAS	No	1983	Joint fares between Australia and Scandinavia via Japan and Asia. FFP cooperation.
USAir	No	1994	Round the world fares with BA. Codesharing services between Los Angeles and San Francisco.
Reno Air			
American Airlines	No	–	Airport slot sharing, FFP cooperation, cooperative advertising, coordinated promotions, financial/capital access arrangement.
Riga Airlines			
Transaero	No	Apr 95	Same plane connection to Moscow on Riga Airlines flights from London/Gatwick to Riga.
Royal Air Maroc			
Air Algerie	No	–	Joint purchasing. Plans for codesharing on routes such as Algiers-Sharjah. Possibility of developing joint long-haul routes.

Carrier/partner	Equity	Date Started	Details
Royal Air Maroc continued			
Air France	Yes	1947	Joint flights on Paris-Casablanca.
Air Mauritanie	No	–	Joint insurance purchasing.
Iberia	No	Mar 88	Joint flights on Madrid-Marrakech, Malaga-Casablanca and Barcelona-Casablanca.
Libyan Arab AL	No	–	Joint insurance purchasing.
Tunisair	No	–	Joint purchasing; plans for schedule coordination and codesharing via Tunis to Eastern Europe. Possibility of developing joint long-haul routes.
Royal Brunei Airlines			
Dragonair	No	Sep 94	Cost and revenue sharing on Bandar Seri Begawan-Hong Kong.
Garuda	No	–	Proposed codesharing arrangement.
Malaysia Airlines	Yes	May 83	Block space arrangement on Kuala Lumpur to Zurich, Bahrain and Cairo.
United Airlines	No	Mar 95	Marketing agreement including codesharing on services between the US and Brunei; one stop check-in, schedule coordination, joint fares and promotions and advertising.
Royal Jordanian			
Malaysia Airlines	No	Jun 85	Joint services on Kuala Lumpur-Amman.
Sabena			
Air France	Yes	Apr 92	Cooperation on sales and reservations, handling, information systems, freight and FFPs. Block space agreement on Paris-Brussels.
Delta Air Lines	No	93/94	Block space agreement and codesharing on Brussels to Atlanta, New York, Chicago, Boston, ar on flights to Germany via Brussels.
Saeta			
Avianca	No	Jul 93	Route specific codesharing agreement.
Sahsa			
Taca	Yes	–	Joint purchasing, fleet rationalisation and cooperation on support services including maintenance, ground handling and catering.
SAS			
Air New Zealand	No	1990	Hub coordination in southeast Asia for onward travel to points in New Zealand. FFP cooperatio
Austrian Airlines	No	1990	European Quality Alliance partner with SAS and Swissair. Connections via Vienna to Eastern Europe, the Middle East and Africa. Codesharing on flights from Vienna to Copenhagen, Stockholm and Gothenburg.
British Midland	Yes	Feb 94	Connections via Heathrow to British Midland's domestic UK destinations. Codesharing on Copenhagen-Glasgow and Bergen-London. FFP cooperation.
Continental	No	1988	Joint marketing and FFP on connections via New York/Newark to Continental's North, Central and South American destinations.
Icelandair	No	1993	Connects with SAS in Copenhagen on flights from Iceland and northern Germany.
Qantas	No	1983	Joint fares and promotions between Australia and Scandinavia and connections in southeast A for onward travel to points in Australia. FFP cooperation.
Swissair	Yes	1990	European Quality Alliance partner. Connections via Zurich and Geneva to the Middle East, As Africa and South America. FFP cooperation. Dual designated flights between Zurich and Oslo. Copenhagen and Stockholm.
Thai Intl	No	1987	Connections from Bangkok to other major cities in the Far East.
Varig	No	May 92	Codesharing on Copenhagen to Rio de Janeiro and Sao Paulo.
Saudia			
Air Afrique	No	May 94	Self ticketing agreement for staff travel.
Cyprus Airways	No	–	Block space agreement on Jeddah-Larnaca and Riyadh-Larnaca.
Garuda Indonesia	No	Apr 92	Pool agreement between Jakarta and Riyadh, Jeddah and Dhahran.
Gulf Air	No	–	Joint venture air bridge on Dhahran-Bahrain.
KLM	No	–	Revenue sharing on Jeddah-Amsterdam.
Korean Air	No	–	Block space agreement on Jeddah-Seoul.
Olympic Airways	No	Dec 91	Block space agreement on Athens-Jeddah and Athens-Riyadh, operated by Olympic Airways.
Sempati Air			
SilkAir	No	Apr 95	Four joint weekly services from Singapore to Lombok with a SilkAir Fokker 70.
SilkAir			
Malaysia Airlines	No	Oct 83	Joint services on Kuala Lumpur-Singapore and Langkawi-Singapore.
Sempati Air	No	Apr 95	Four joint weekly services from Singapore to Lombok with a SilkAir Fokker 70.
Singapore Airlines	Yes	Feb 89	Marketing cooperation, member of Passages FFP.
Singapore Airlines			
Air Niugini	No	Aug 87	Joint service between Port Moresby and Singapore with Air Niugini aircraft and crew.
Cathay Pacific	No	Jul 93	Founder partner of joint passages FFP. 10 per cent equity share in Taeco maintenance venti
Delta Air Lines	Yes	1989	Global Excellence partner with Swissair. Codesharing on Singapore-Tokyo-Los Angeles, Los Angeles-Dallas, and Los Angeles-New York. Codeshare and block seat arrangement on SIA's Singapore-New York service via Europe from April 1995.

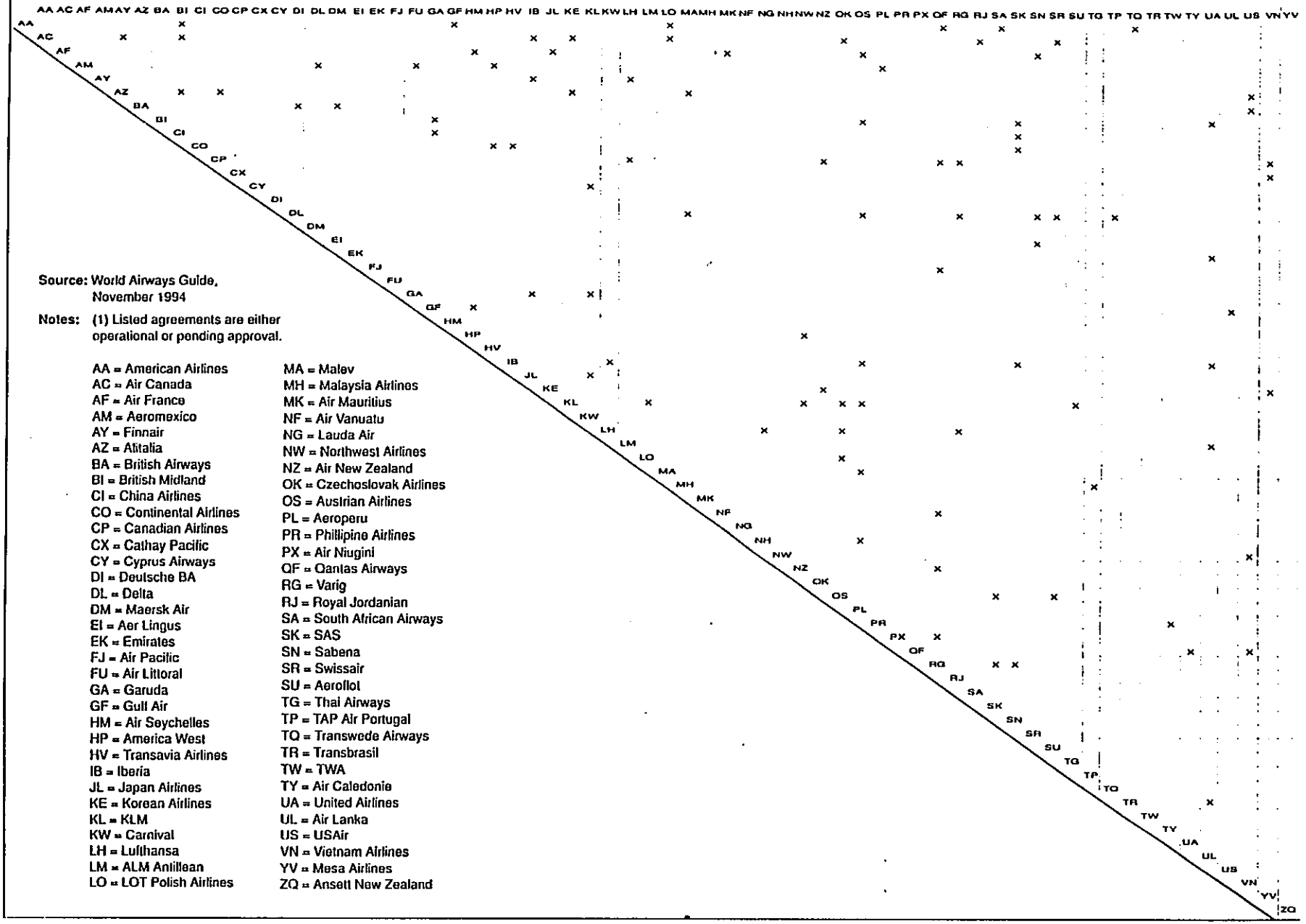
Carrier/partner	Equity	Date started	Details
Singapore Airlines continued			
KLM	No	–	Freight joint venture.
Malaysia Airlines	No	Jun 93	Joint shuttle services on Kuala Lumpur-Singapore. Founder partner of Passages FFP.
SilkAir	Yes	Feb 89	Marketing cooperation, member of Passages FFP.
Swissair	Yes	1989	Global Excellence partner with Delta. Schedules coordination, codesharing, FFP, joint handling.
Vietnam Airlines	No	–	Joint flights between Ho Chi Minh City and Singapore.
Solomon Islands AW			
Air Niugini	No	Oct 94	Joint service between Port Moresby and Honaria.
South African Airways			
Air Afrique	No	Nov 92	Joint service and codeshare on Johannesburg-Abidjan-Brazzaville.
Alliance	Yes	Dec 94	Alliance began services by operating charters on behalf of SAA.
American	No	Nov 92	Codesharing on Johannesburg-New York/JFK. FFP cooperation.
Austrian Airlines	No	Mar 93	Codesharing on Johannesburg-Vienna.
Swissair			
Air Afrique	No	1991	Codesharing on Zurich-Geneva-Dakar-Abidjan.
Air Madagascar	No	Jul 86	Royalties paid with regard to one destination.
Austrian	Yes	Oct 90	European Quality Alliance partner. Codesharing from Vienna to Zurich and Geneva; from Zurich to Linz, Salzburg, Graz, Klagenfurt and Innsbruck; and on Zurich-Vienna-Minsk. FFP cooperation. Catering and maintenance joint ventures. Trilateral codeshare agreement on Vienna-Geneva-Washington with Delta Air Lines.
Balair/CTA	Yes	1993	Joint FFP and regular flights on behalf of Swissair to Palma de Mallorca and Valencia.
Delta Air Lines	Yes	Sep 89	Global Excellence partner. Codesharing from Zurich to New York, Atlanta and Cincinnati. Schedule coordination. FFP cooperation. Joint handling. Trilateral codeshare agreement on Vienna-Geneva-Washington with Austrian Airlines.
Lufthansa	No	1989	Shareholders in Shannon Aerospace maintenance company.
SAS	No	Jun 90	European Quality Alliance partner with traffic coordination; dual designated flights between Zurich and Oslo, Copenhagen and Stockholm; joint handling; and FFP cooperation.
SIA	Yes	1989	Global Excellence partner. Coordination of schedules, codesharing, joint handling and FFP cooperation.
Ukraine Int'l	No	1994	Block space agreement on Swissair's Zurich-Kiev flights.
Taca Group			
Aviateca	Yes	1989	Joint purchasing, fleet rationalisation and cooperation on support services including maintenance, ground handling and catering.
Copa	No	1992	Comprehensive marketing agreement plus joint purchasing, fleet rationalisation,and cooperation on ground handling and support services.
Lacsa	Yes	1992	Joint purchasing, fleet rationalisation and cooperation on support services including maintenance, ground handling and catering.
Nica	Yes	1992	Joint purchasing, fleet rationalisation and cooperation on support services including maintenance, ground handling and catering.
Sahsa	Yes	–	Joint purchasing, fleet rationalisation and cooperation on support services including maintenance, ground handling and catering.
USAir	No	May 95	Plans to establish joint venture on one route.
TAP Air Portugal			
Air Afrique	No	Mar 95	Codesharing on Lisbon-Abidjan.
British Midland	No	Feb 95	Codesharing from Lisbon, Faro, Oporto and Madeira to six UK points, via Heathrow.
Delta Airlines	No	1994	Codesharing on the North Atlantic.
Iberia	No	End 94	Memorandum of understanding to pursue cooperation with possible codesharing to African destinations.
Varig	No	May 95	Plans for a comprehensive marketing alliance.
Tarom			
Air France	No	1969	Pool agreement.
Austrian Airlines	No	1993	Codesharing on Vienna-Timisoara with Austrian aircraft.
Iberia	No	Apr 83	Codesharing on Madrid-Bucharest.
Turkish Airlines	No	Apr 94	Joint services on Constanta-Istanbul.
TAT			
British Airways	Yes	Jan 93	Joint FFP. Worldwide marketing and sales representation. Cooperation on engineering, purchasing and information technology.
Thai International			
Japan Airlines	No	1985	Joint operations on Nagoya-Bangkok and on Fukuoka-Bangkok with plans to inaugurate Osaka/Kansai-Bangkok from November 1995.
Lufthansa	No	Oct 94	Codesharing between Thailand and Germany and beyond to other points. Shared passenger lounges and terminals, advanced seat reservation and through check-in. Joint FFP and development of Bangkok as a cargo hub with joint cargo services throughout Southeast Asia, Australia and New Zealand. Both carriers have an alliance agreement with United Airlines.

Carrier/partner	Equity	Date started	Details
Thai International continued			
Malaysia AL	No	Dec 82	Joint services from Kuala Lumpur to Bangkok, Phuket and Hat Yai; and from Penang to Bang and Phuket.
SAS	No	1987	Connections from Bangkok to other major cities in the Far East.
United Airlines	No	1994	Thai has signed an initial marketing agreement with United but details have yet to be finalise
TNT			
Federal Express	No	1992	TNT provides intra-European service to FedEx in 10 European countries.
Transaero			
Riga Airlines	No	Apr 95	Same plane connection to Moscow on Riga Airlines flights from London/Gatwick to Riga.
Transbrasil			
United Airlines	No	Jul 93	Codesharing and block space agreements on Sao Paulo-Porto Alegre and Sao Paulo-Brasilia.
Varig	No	Mar 93	Codesharing and block space agreements including Sao Paulo-Foz, Sao Paulo-Goiania and Ric Janeiro-Brasilia.
Transwede			
Finnair	No	Apr 85	Maintenance joint venture and marketing agreement.
Tunisair			
Air Algerie	No	–	Joint insurance purchasing.
Air France	Yes	1948	Commercial agreement France-Tunisia.
Gulf Air	No	–	Prorate agreements on fares and schedule coordination. Possibility of codesharing in future.
Royal Air Maroc	No	–	Joint insurance purchasing. Possible joint marketing on routes from Tunis to Eastern Europe. Prorate agreement on RAM's New York-Montreal service.
Turkish Airlines			
Asiana	No	Nov 93	Joint services on Istanbul-Sofia.
CSA	No	Apr 92	Joint services on Prague-Istanbul.
Cyprus Turkish AL	Yes	Feb 75	Operates some Turkish Airlines aircraft on routes between Northern Cyprus and Turkey.
Lufthansa	Yes	Apr 90	Shareholders in charter carrier Sun Express.
Tarom	No	Apr 94	Joint services on Constanta-Istanbul.
TWA			
Philippine Airlines	No	Sep 89	Codesharing on Manila-San Francisco and Los Angeles operated by PAL, and on TWA flights fr San Francisco or Los Angeles to New York/JFK. FFP partnership.
Ukraine International Airlines			
Austrian Airlines	No	1995	Plans for joint venture handling company.
Air France	No	–	Commercial agreement on Paris-Kiev.
Swissair	No	1994	Block space agreement on Swissair's Zurich-Kiev flights.
United Airlines			
Air Canada	No	Oct 92	Increased connections between Toronto, Montreal, Calgary and Winnipeg via Chicago to othe US points. Connections in Miami to South America, in San Francisco to S Asia and South Pacific, and in Los Angeles. FFP cooperation. Joint promotions and advertising.
ALM Antillean	No	Nov 93	Marketing and codeshare agreement on US destinations to Curacao via Miami.
Aloha	No	Apr 93	Marketing and codeshare agreement to destinations such as Maui and Kauai via Honolulu.
Ansett Australian	No	Sep 92	Marketing and codeshare agreement to selected destinations in Australia via Sydney, Melbo and Auckland.
British Midland	No	Apr 92	Codesharing via Heathrow to UK and European destinations including Amsterdam, Glasgow a Brussels.
Cayman Airways	No	Dec 94	Comprehensive marketing and codeshare agreement on flights connecting with Cayman Airw between Miami and Tampa and Grand Cayman and Cayman Brac in the British West Indies. F cooperation. Joint advertising and promotion, schedule coordination.
China Southern	No	–	Exploring shedule coordination, joint marketing and codesharing.
Cyprus Airways	No	–	Commercial agreement involving joint sales and promotions.
Emirates	No	Oct 93	Codesharing on London/Heathrow-Dubai.
Iberia	No	Jul 94	Discussions over codesharing with United have so far led nowhere.
Lufthansa	No	Oct 93	Comprehensive marketing agreement with codesharing on flights through Frankfurt to points Germany, Europe, Africa and Asia.
Royal Brunei	No	Mar 95	Agreement to launch a marketing agreement including codesharing on services between the and Brunei; one stop check-in, schedule coordination, joint fares and promotions and advertising.
Thai International	No	Dec 93	Initial marketing agreement and plans for comprehensive cooperation, including codesharing
Transbrasil	No	July 93	Marketing and codeshare agreement to Brasilia and Porto Alegre via Sao Paulo.
USAir Group			
Air Aruba	No	Jun 95	Planned codeshare.
All Nippon Airways	No	May 90	Initial agreement for block space purchase and connecting service on three weekly flights between Washington/Dulles and Orlando. Subsequent Nov 1992 accord for similar arrangem on five flights a week between New York/JFK and Orlando. ANA also participates in USAir's

Carrier/partner	Equity	Date Started	Details
USAir Group continued			
British Airways	Yes	Jan 93	Joint FFP. Wet leasing from Pittsburgh, Charlotte and Baltimore to London/Gatwick. Codesharing to 64 US destinations. Round the world fare with USAir and Qantas. Plans for joint marketing, purchasing and information technology. Engineering cooperation.
Mesa Air Group	No	–	Codesharing and feeder operation in Pittsburgh, Wichita and the southeast.
Northwest	No	1986	Codesharing on San Francisco-Los Angeles. FFP cooperation in the Pacific.
Qantas	No	1994	Round the world fares and FFP cooperation with BA. Codesharing services between Los Angeles US Air Group and San Francisco.
Taca Int'l Airlines	No	May 95	Plans to establish joint venture on one route.
Varig			
Aerolineas Arg	No	1986	Ground handling joint venture.
Alitalia	No	Nov 95	Varig still hopes to conclude a comprehensive marketing agreement with Alitalia.
Canadian AL Intl	No	Oct 91	Canadian codeshares on Varig flights to Chile and Argentina.
Delta Air Lines	No	Jun 94	Letter of intent for a comprehensive alliance, with FFP cooperation and codesharing on Varig flights between Brazil and the US.
Ecuatoriana	No	Apr 83	One joint weekly flight on Rio-Sao Paulo-Guayaquil-Quito-San Jose.
Japan Airlines	No	Mar 88	Codesharing and block space agreement on Rio-Sao Paolo-Los Angeles-Narita and Sao Paulo-Los Angeles-Nagoya.
LAB Airlines	No	Apr 94	Codeshare agreement between Santa Cruz and La Paz.
Lacsa	No	Apr 83	Joint flights.
Lufthansa	No	1993	Codesharing on Frankfurt-Rio de Janeiro and Frankfurt-Sao Paulo. General sales and marketing cooperation.
SAS	No	May 92	Codesharing on three weekly Varig frequencies on Rio-Sao Paulo-London-Copenhagen.
TAP Air Portugal	No	May 95	Plans for a comprehensive marketing alliance.
Transbrasil	No	Mar 93	Codesharing and block space agreements including Sao Paulo-Foz, Sao Paulo-Goiania and Rio de Janeiro-Brasilia.
Viasa			
Aerolineas Arg.	No	1994	Codeshare on Buenos Aires-Caracas route.
Iberia	Yes	Aug 91	Management contract and comprehensive marketing agreement including joint routes, codesharing, freight cooperation, joint FFP and schedule coordination.
Vietnam Airlines			
Air France	No	Aug 93	Aircraft leasing, training of pilots, cabin crew and mechanics.
Canadian Int'l	No	–	Codesharing on Ho Chi Minh City-Paris-Toronto.
Cathay	No	Dec 91	Codesharing and joint services on Hong Kong-Ho Chi Minh City.
China Air Lines	No	Aug 92	Codesharing on Taipei-Ho Chi Minh City and Taipei-Hanoi.
Delta Air Lines	No	–	Signed letter of intent for joint marketing pact.
KLM	No	–	Vietnam Airlines purchases block seats on KLM flights.
Korean Air	No	Jul 93	Codesharing and passenger block space agreement on Seoul-Ho Chi Minh City.
Lufthansa	No	–	Joint flights between Vietnam and Germany.
Malaysia Airlines	No	Nov 90	Joint services on Kuala Lumpur-Ho Chi Minh City.
Singapore Airlines	No	–	Joint flights between Ho Chi Minh City and Singapore.
Virgin Atlantic			
Ansett Australia	No	Sep 94	Marketing agreement between the UK and Australia via Hong Kong.
Cityjet	No	Jan 94	Route franchise agreement between London and Dublin.
Delta Air Lines	No	Apr 95	Codeshare and block space marketing agreement between Newark, New York/JFK, San Francisco, Los Angeles and London/Heathrow and between Boston, Orlando, Miami and London/Gatwick.
Malaysia Airlines	No	1995	Codesharing between the UK, Malaysia and Australia was due to commence this year.
Midwest Express	No	1992	Codeshare via Boston to Milwaukee.

Note: This table was compiled from airline responses to an *Airline Business* questionnaire, and from other *Airline Business* sources. Some alliances were only mentioned by one partner, and some carriers gave more details than others. The alliances have therefore been cross-checked and cross-referenced. For space reasons, and unless there is cross-border cooperation, only jet operators are included which rules out most regional airline partners. Alliances involving frequent flyer plans only, subcontracting, aircraft leasing and standard interline agreements have also been excluded.

CODESHARING AGREEMENTS



Source: World Airways Guide, November 1994

Notes: (1) Listed agreements are either operational or pending approval.

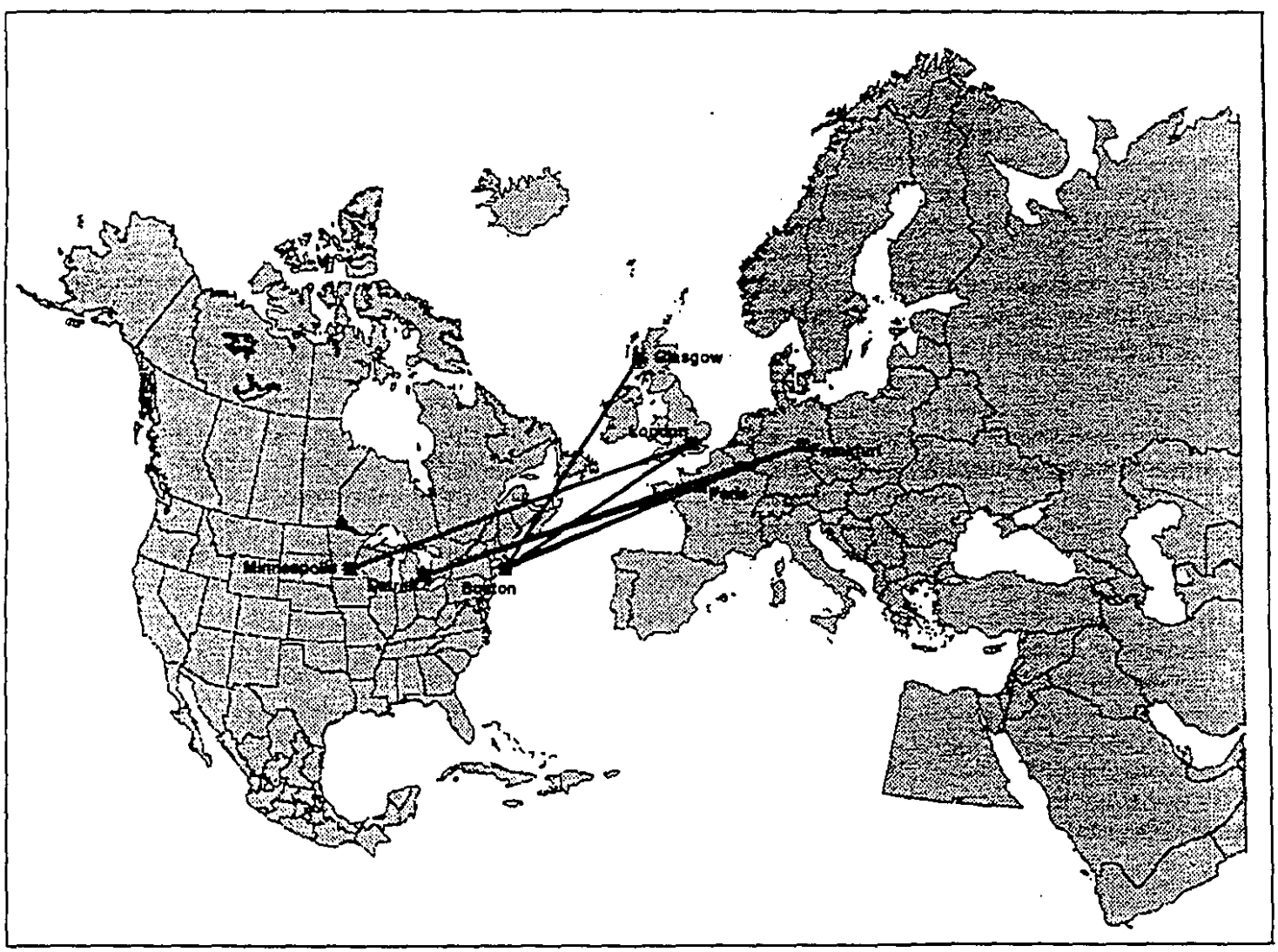
AA = American Airlines
AC = Air Canada
AF = Air France
AM = Aeromexico
AY = Finnair
AZ = Alitalia
BA = British Airways
BI = British Midland
CI = China Airlines
CO = Continental Airlines
CP = Canadian Airlines
CX = Cathay Pacific
CY = Cyprus Airways
DI = Deutsche BA
DL = Delta
DM = Maersk Air
EI = Aer Lingus
EK = Emirates
FJ = Air Pacific
FU = Air Littoral
GA = Garuda
GF = Gulf Air
HM = Air Seychelles
HP = America West
HV = Transavia Airlines
IB = Iberia
JL = Japan Airlines
KE = Korean Airlines
KL = KLM
KW = Carnival
LH = Lufthansa
LM = ALM Antillean
LO = LOT Polish Airlines
MA = Malev
MH = Malaysia Airlines
MK = Air Mauritius
NF = Air Vanuatu
NG = Lauda Air
NW = Northwest Airlines
NZ = Air New Zealand
OK = Czechoslovak Airlines
OS = Austrian Airlines
PL = Aeroperu
PR = Phillipine Airlines
PX = Air Niugini
QF = Qantas Airways
RG = Varig
RJ = Royal Jordanian
SA = South African Airways
SK = SAS
SN = Sabena
SR = Swissair
SU = Aeroflot
TG = Thai Airways
TP = TAP Air Portugal
TO = Transwede Airways
TR = Transbrasil
TW = TWA
TY = Air Caledonie
UA = United Airlines
UL = Air Lanka
US = USAir
VN = Vietnam Airlines
YV = Mesa Airlines
ZQ = Ansett New Zealand

ANNEX TWO

GRAPHICAL ILLUSTRATIONS OF EXPANSION OF ROUTE NETWORKS DUE TO CODE-SHARING

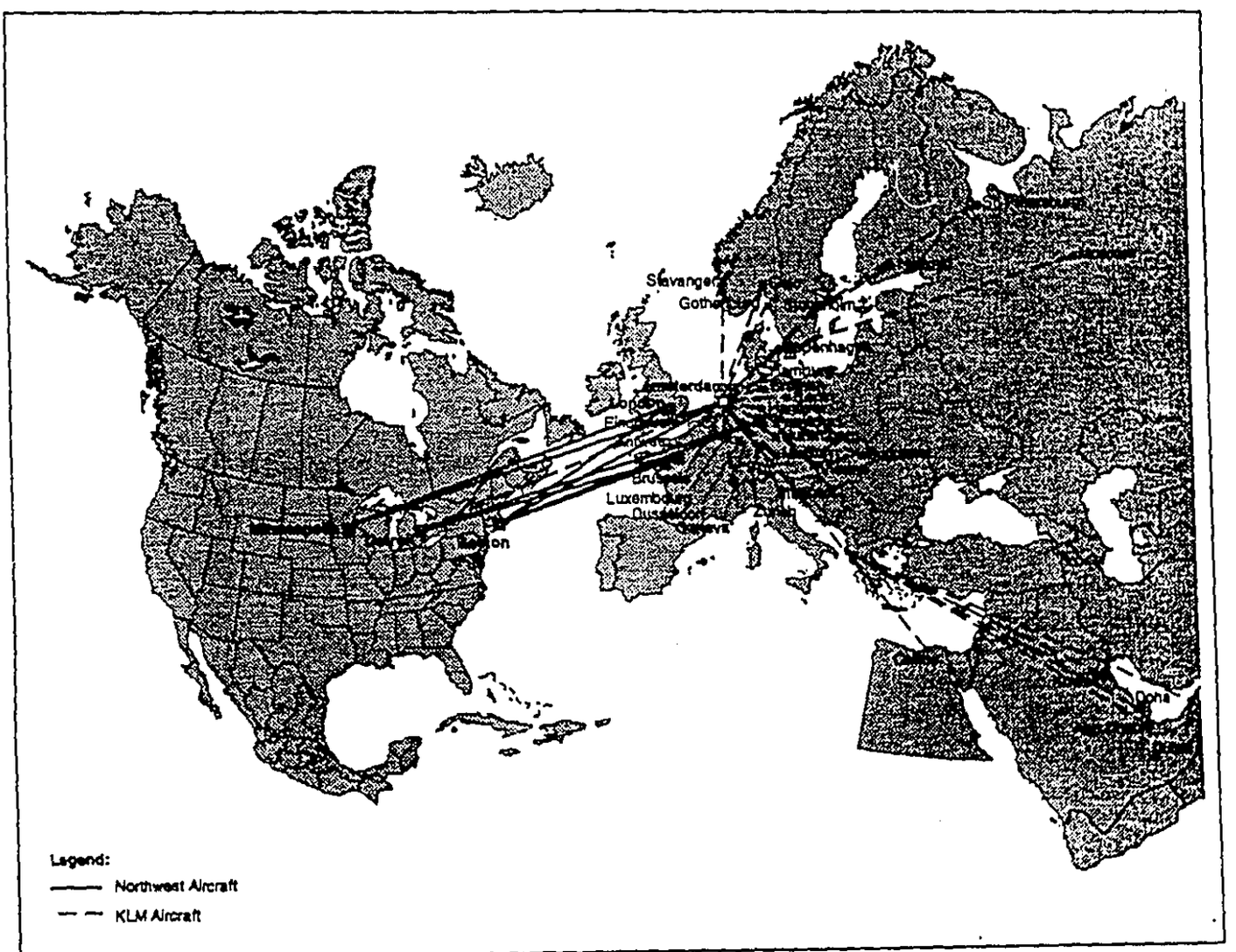
Source: GAO Study

. Northwest's Flights to Europe and the Middle East Prior to Alliance With KLM



Source: GAO's illustration of information provided by Northwest.

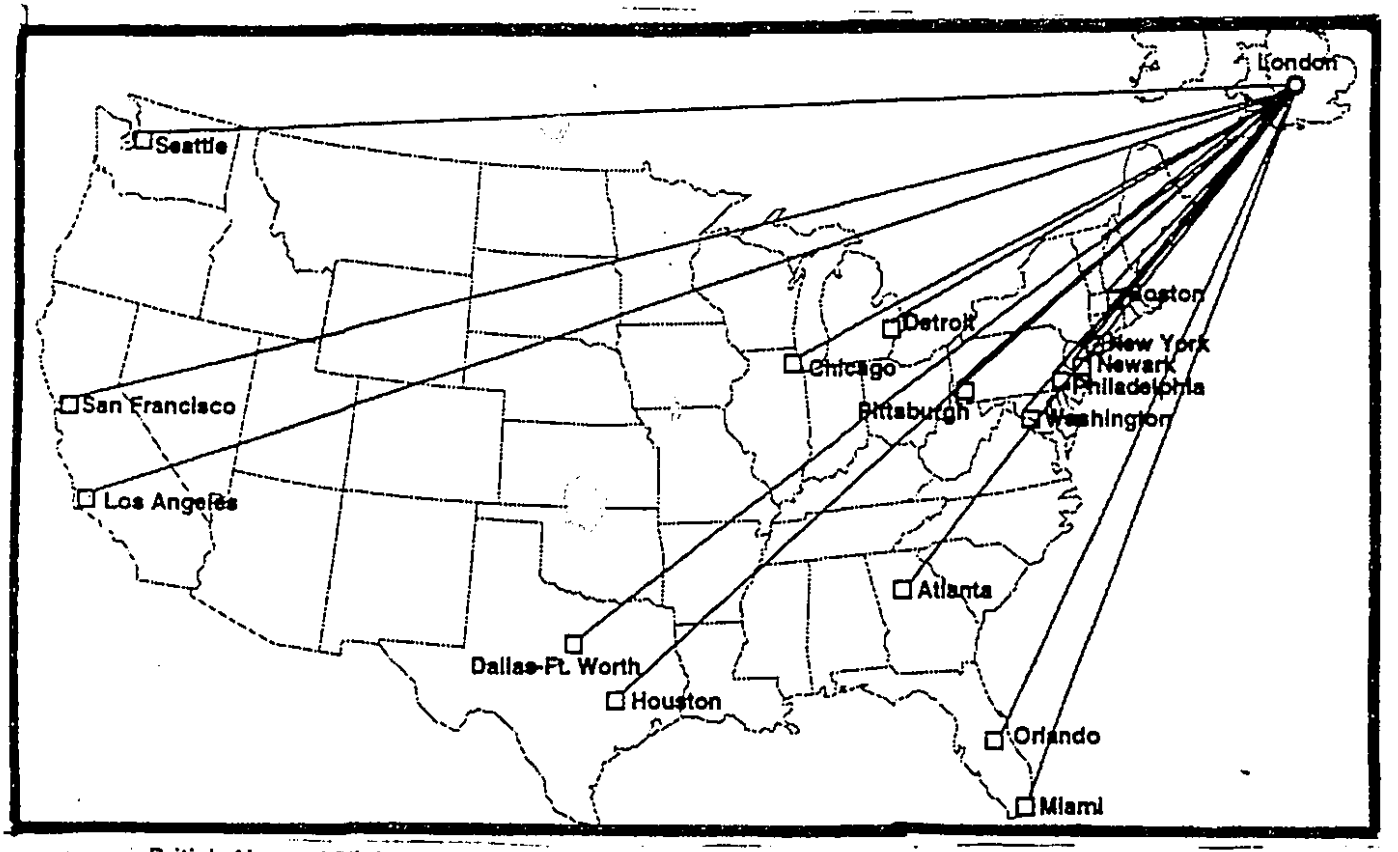
: Northwest's Flights to Europe and the Middle East and Code-Share Flights Operated by KLM as a Result of Their Alliance



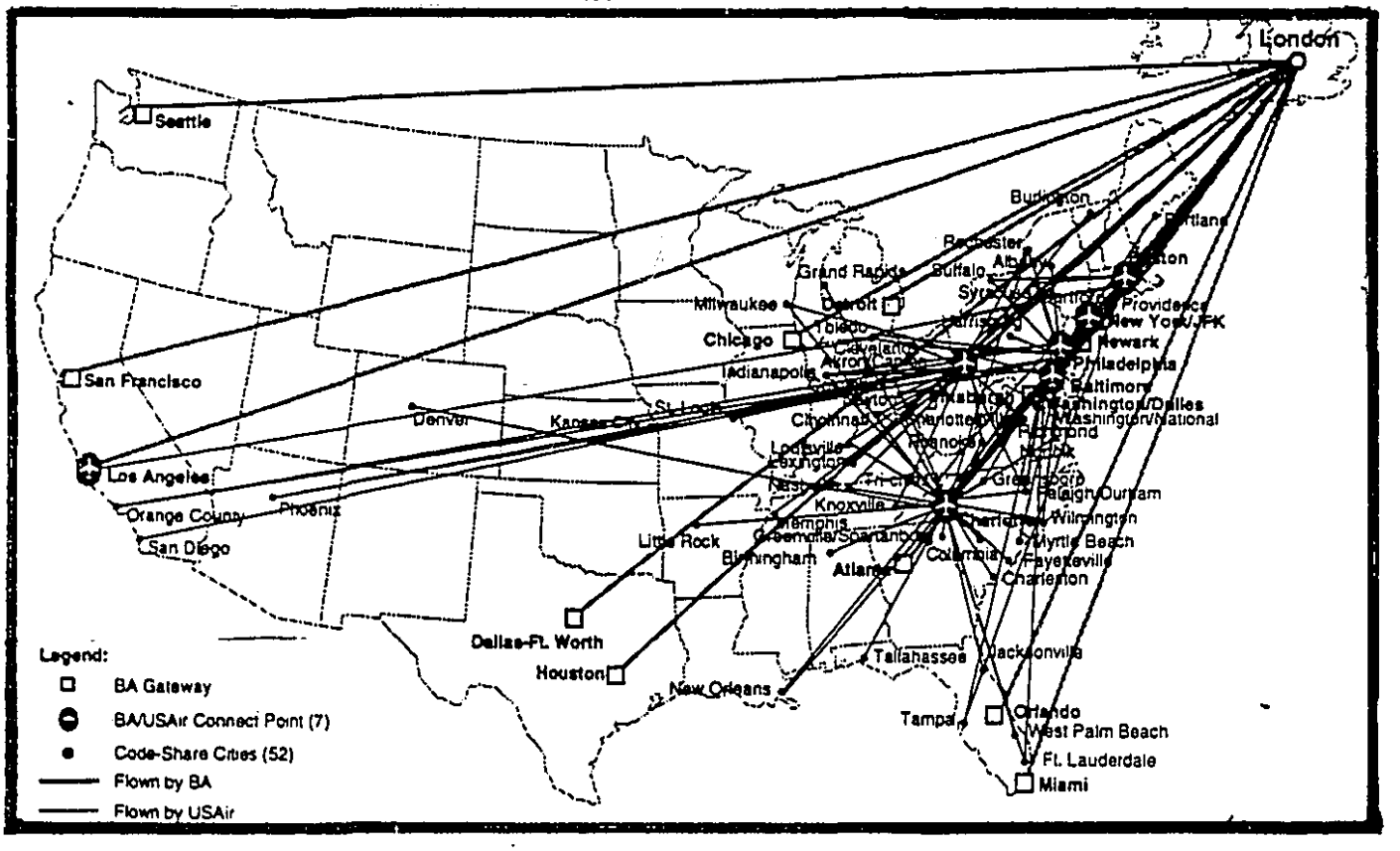
Note: Northwest flies passengers between the United States (via Boston and Minneapolis hubs) and Amsterdam, and KLM flies passengers between Amsterdam and the other cities. However, through code-sharing, Northwest is able to market in CRSs service between the United States and these foreign destinations. Finally, Northwest also markets KLM's flights between Detroit and Amsterdam as its own.

Source: GAO's illustration of information provided by Northwest.

British Airways' Flights Between London and the United States Prior to Alliance With USAir



British Airways' Flights Between London and the United States and Code-Share Flights Operated by USAir Within the United States as a Result of Their Alliance



Source: GAO's illustration of information provided by USAir

ANNEX THREE

CRS SCREENS

Translated and Adopted from the DLR Study

A. MANNER OF IDENTIFICATION OF CODE-SHARED FLIGHTS ON CRS DISPLAYS

CRS Vendor	Identification mark	Worldwide market share
Amadeus	*	14%
Galileo	@	22%
Abacus	operating carrier by name	2%
Apollo	*	8%
Sabre	*	29%
System One	*	9%
Worldspan	operating carrier by name	12%
		total 96%

B. INSTANCES WHERE NO SPECIFIC IDENTIFICATION OF CODE-SHARED FLIGHTS ARE MADE ON CRS

Route - Dublin - Brussels

System - Amadeus

```
SN1A01NOVDUBBRU
** AMADEUS SCHEDULES - SN **                    19 TU 01NOV 0000
 1    SN 630   C9 M9 Q7 K9 L9 DUB BRU 0700   0925   0/735      1:25
               T8
 2    EI 630   C4 M4 H4 V4 L4 DUB BRU 0700   0925   0*735      1:25
               KC T4
 3    AZ1227   C4 WC YC BC KC DUB BRU 1300   1545   0*M80      1:45
               LC MC
 4    EI 636   C4 M4 H4 VC L4 DUB BRU 1620   1850   0*737      1:30
               K4 TC
 5    SN 636   C6 M0 QC KC LC DUB BRU 1620   1850   0/734      1:30
               TC
 6    EI 668   C4 H4 M4 TC K4 DUB MAN 1540   1630   0*735
               L4
      BA5020   C9 S9 B9 M9 L9 MAN BRU 1710   1930   0.737      2:50
               Q9 V9
 7    EI 156   C4 D4 M4 HC VC DUB LHR 0900   1010   0*734
               LC KC T4
      BD 147   C4 D4 M4 S4 L4 LHR BRU 1055   1255   0*735      2:55
               Q4 V4 K4
```

In the above display, flights listed as Sabena SN 630 and SN 636 are code shared flights, but no specific identification is shown. The actual flight is operated by Air Lingus flights EI 630 and EI 636 (display was shown on 1 November 1994).

C. INSTANCES WHERE OPERATING CARRIER IS EXPLICITLY STATED

Route :- Brussels - Paris System - "Worldspan"

```
01NOV-TU-0639 BRUCDG(BRUPAR) ** ** -
1*SN 911 C4 Q4 M4 T4 K4 L4 BRUCDG 0715 0810      737 SS0 -
2*AF2911 C2 M4             BRUCDG 0715 0810      733 SS0 -
  AF2911 SABENA BELGIAN -
3*AF2915 C2 Q4 M4 T4 K4    BRUCDG 0900 0955      735 SS0 -
4*SN 915 C4 Q4 M4 T4 K4 L4 BRUCDG 0900 0955      737 SS0 -
  SN 915 AIR FRANCE -
5*SN 917 C4 Q4 M4 T4 K4 L4 BRUCDG 1100 1155      737 SS0 -
6*AF2917 C2 M4             BRUCDG 1100 1155      733 SS0 -
  AF2917 SABENA BELGIAN -
7*SN 919 C4 Q4 M4 T4 K4 L4 BRUCDG 1300 1355      737 SS0 -
  SN 919 AIR FRANCE -
8*AF2919 C2 Q4 M4 T4 K4    BRUCDG 1300 1355      733 DS0 -
```

In the above example, the fact that AF 2911 and AF 2917 which are Air France flights are operated by Sabena is explicitly stated. Similarly Sabena flights SN 915 and SN 919 are shown as operated by Air France.

D. INSTANCES WHERE MANY DIFFERENT IDENTIFICATION MARKS CONFUSE THE USER

Route :- Boston - Dusseldorf

System - "Apollo"

```
ES DENVER * TWICE THE HOTELS-FOUR LOCATIONS * FROM 98 USDAH*1:
TU 01NOV  E                                  \
1# DL4834 Y7 B7 M7 H7 Q7 K7 L7     BOSJFK  230P  340P JET ---- *0
2@ LH 409 F4 C4 B0 M0 R0 L0 V0 G0    DUS  500P  610A#310 D-D-  0
3# DL4834 Y7 B7 M7 H7 Q7 K7 L7     BOSJFK  230P  340P JET ---- *0
4# UA3526 F4 C4 Y0 B0 M0 H0 Q0 V0    DUS  500P  610A#310 D-D-N*0
5* TW7709 Y4 B4 Q4 M4 T0 K4 V0     BOSJFK  200P  315P ATR ---- *0
6@ LH 409 F4 C4 B0 M0 R0 L0 V0 G0    DUS  500P  610A#310 D-D-  0
7* TW7709 Y4 B4 Q4 M4 T0 K4 V0     BOSJFK  200P  315P ATR ---- *0
8# UA3526 F4 C4 Y0 B0 M0 H0 Q0 V0    DUS  500P  610A#310 D-D-N*0
```

In above example there many identification marks used on the CRS screen (*, @, #), and due to the fact that the same sign is used to denote more than one meaning, the result is very confusing.

E. INSTANCES WHERE SCREEN PADDING CAUSED BY CODE-SHARING RELEGATE ALTERNATE INTERLINE FLIGHT OPTION TO THE SECOND SCREEN

1. On direct flights and where mutual code-sharing is present

Route :- Dublin - Brussels

System - "Worldspan"

screen one

```
01NOV-TU-0913 DUBBRU ** **
1*SN 630 C4 Q4 M4 T4 K4 L4     DUBBRU 0700 0925      737    0
  SN 630 AER LINGUS
2*EI 630 C4 H4 M4 T4 K. L4 V4  DUBBRU 0700 0925      735 MM0
3*AZ1227 C4 W. Y. B. M. K. L.  DUBBRU 1300 1545      M80    0
4*EI 636 C4 H0 M4 T. K4 L. V.  DUBBRU 1620 1850      737 MM0
5*SN 636 C4 Q- M- T- K- L-     DUBBRU 1620 1850      737 SS0
  SN 636 AER LINGUS
```

screen two

```
01NOV-TU-0913 DUBBRU ** **
1 BD 122 C4 D4 S4 M4 K4 L4 V4     DUBLHR 0845 1000      733    0
2 BD 147 C4 D4 S4 Q4 M4 K4 L4 V4     BRU 1055 1255      735    0
3*EI 156 C4 D4 H. M4 T4 K. L. V.  DUBLHR 0900 1010      734 MM0
4 BD 147 C4 D4 S4 Q4 M4 K4 L4 V4     BRU 1055 1255      735    0
5 BD 124 C4 D4 S4 M4 K4 L4 V4     DUBLHR 1045 1200      733    0
6 BD 149 C4 D4 S4 Q4 M4 K4 L4 V4     BRU 1300 1500      735    0
7*EI 622 C4 H4 M4 T. K. L.        DUBMAN 0910 1000      737    0
8*SN 616 C4 Q4 M4 T4 K- L4           BRU 1115 1330      737 SS0
```

As depicted above, the duplication of the flight cause the competing flight options to be relegated to subsequent screens.
Furthermore, it is seen that the requirement to indicate the operating carrier aggravates the problem as it takes additional space on the screen.

2. On routes which require one intermediate stop and provided that the code shared flight offers the shortest flight available on that route

Route :- Bremen - Minneapolis System - "Amadeus"

```
SN1A01NOVBREMSP
** AMADEUS SCHEDULES - SN **                    19 TU 01NOV 0000
 1*  KL 042   Y7 S7 MW BW LW BRE AMS 1135   1240   0.F50
             VW HW QW
     NW 055   F4 C4 Y4 BW MW AMS MSP 1455   1650   0*747    12:15
             HW QW VW
 2*  NW8042  Y4 BW MW HW QW BRE AMS 1135   1240   0*F50
             VW
     NW 055   F4 C4 Y4 BW MW AMS MSP 1455   1650   0*747    12:15
             HW QW VW
 3*  KL 042   Y7 S7 MW BW LW BRE AMS 1135   1240   0.F50
             VW HW QW
  *  KL 655   C7 S7 M7 B7 VC AMS MSP 1455   1650   0.747    12:15
             H7 QW
```

In such situations, the code-shared flight totally occupies the first screen simply because it is shown thrice.

3. On flights with two intermediate stops

Route :- Nuremberg - Tampa

System - "Amadeus"

screen one

```
3N1A01NOVNUETPA
** AMADEUS SCHEDULES - SN **                    19 TU 01NOV 0000
 1    LH 367   C9 Z9 H9 V9 B9 NUE FRA 1050   1140   0/737 UP
               L9 T9 K9 G9 Q9 M9
      LH 418   F6 C9 Z9 H9 V9 FRA IAD 1300   1610   0/340
               B9 L9 K9 M9 G9 Q9 W9
  *   LH6414   F4 C4 H4 V4 B4 IAD TPA 1750   2005   0/727     15:15
               L4 K4 M4 Q4 G4
 2    LH 367   C9 Z9 H9 V9 B9 NUE FRA 1050   1140   0/737 UP
               L9 T9 K9 G9 Q9 M9
      LH 418   F6 C9 Z9 H9 V9 FRA IAD 1300   1610   0/340
               B9 L9 K9 M9 G9 Q9 W9
      UA 917   F4 C4 Y4 B4 H4 IAD TPA 1750   2005   0.72A     15:15
               Q4 M4 V4
 3    LH 367   C9 Z9 H9 V9 B9 NUE FRA 1050   1140   0/737 UP
               L9 T9 K9 G9 Q9 M9
  *   UA3503   F4 C4 Y4 B4 H4 FRA IAD 1300   1610   0.343
               QC MW VW
      UA 917   F4 C4 Y4 B4 H4 IAD TPA 1750   2005   0.72A     15:15
               Q4 M4 V4
```

screen two

```
** AMADEUS SCHEDULES - SN **                    19 TU 01NOV 0000
 1*   UA3629   C4 Y4 B4 H4 Q4 NUE FRA 1050   1140   0.733
               M4 V4
  *   UA3503   F4 C4 Y4 B4 H4 FRA IAD 1300   1610   0.343
               QC MW VW
      UA 917   F4 C4 Y4 B4 H4 IAD TPA 1750   2005   0.72A     15:15
               Q4 M4 V4
 2    LH 363   C9 Z9 H9 V9 B9 NUE FRA 0700   0750   0/310
               L9 T9 K9 G9 Q9 M9
      DL 041   F4 C4 YW BW MW FRA MCO 1100   1520   0*L15
               HW QW KW
      DL1914   F4 Y4 B4 M4 H4 MCO TPA 1625   1701   0*M88     16:01
               Q4 K4 L4
 3    LH4036   C9 Z9 H9 V9 L9 NUE LHR 0955   1045   0/737
               B9 G9 K9 W9 Q9 M9
      BA 217   F9 J9 S9 B9 M9 LHR IAD 1255   1625   0.747
               K9 L9 Q9
      UA 917   F4 C4 Y4 B4 H4 IAD TPA 1750   2005   0.72A     16:10
               Q4 M4 V4
```

The code share flight occupies the 1st screen completely and also 30% of the second screen.

F. ADDITIONAL REASONS FOR CRS BIAS

(1) Route :- Nuremberg - Minneapolis System - "Amadeus"

```
SN 22AUGNUEMSP
** AMADEUS SCHEDULES - SN **                    3 MO 22AUG 0000
 1*  KL 032   Y7 S7 M7 B7 L7 VW Q7   NUE   AMS    1140   1320   0*SF3
  *  NW8548  C4 S4 L4 B4 M4 Q4 V4   AMS   MSP M 1455   1620   0*312      11:40
 2*  NW8032  S4 L4 Y4 B4 M4 Q4 VW   NUE   AMS    1140   1320   0*SF3
  *  NW8548  C4 S4 L4 B4 M4 Q4 V4   AMS   MSP M 1455   1620   0*312      11:40
 3*  KL 032   Y7 S7 M7 B7 L7 VW Q7   NUE   AMS    1140   1320   0*SF3
  *  KL 655   C7 SW MW BW VW QW     AMS   MSP I 1455   1640   0*747      12:00
 4*  KL 032   Y7 S7 M7 B7 L7 VW Q7   NUE   AMS    1140   1320   0*SF3
     NW 055   F4 C4 Y4 BW MW HW QW  AMS   MSP I 1455   1640   0*747      12:00
              VW
 5*  NW8032  S4 L4 Y4 B4 M4 Q4 VW   NUE   AMS    1140   1320   0*SF3
     NW 055   F4 C4 Y4 BW MW HW QW  AMS   MSP I 1455   1640   0*747      12:00
              VW
```

(2) Route :- Vienna - Miami System - "Amadeus"

```
SN1A20SEPVIEMIA\
** AMADEUS SCHEDULES - SN **              12 TU 20SEP 0000\
 1*  LH6868  C9 Z9 H9 V9 B9 VIE MIA 0920   1600   1/763    12:40\
            L9 K9 M9 G9 Q9 W9\
 2   NG6868  C4 D4 H4 B4 K4 VIE MIA 0920   1600   1*763    12:40\
            M4 V4 L4 W4 Q4 G4\
 3 NGLH6868 C4 D4 H4 B4 K4 VIE MUC 0920   1020   0*763\
            M4 V4 L4 W4 Q4 G4\
  * LH6868  C9 Z9 H9 V9 B9 MUC MIA 1120   1600   0/763    12:40\
            L9 K9 M9 G9 Q9 W9\
 4*  LH6868  C9 Z9 H9 V9 B9 VIE MUC 0920   1020   0/763\
            L9 K9 M9 G9 Q9 W9\
   NGLH6868 C4 D4 H4 B4 K4 MUC MIA 1120   1600   0*763    12:40\
            M4 V4 L4 W4 Q4 G4\
 5   LH6091  C9 Z9 H9 V9 L9 VIE MUC 0905   1030   0/DH3\
            B9 G9 K9 W9 Q9 M9\
  * LH6868  C9 Z9 H9 V9 B9 MUC MIA 1120   1600   0/763    12:55\
            L9 K9 M9 G9 Q9 W9\
 6   LH6091  C9 Z9 H9 V9 L9 VIE MUC 0905   1030   0/DH3\
            B9 G9 K9 W9 Q9 M9\
   NGLH6868 C4 D4 H4 B4 K4 MUC MIA 1120   1600   0*763    12:55\
            M4 V4 L4 W4 Q4 G4\
MD\
** AMADEUS SCHEDULES - SN **              12 TU 20SEP 0000\
```

In the above examples, additional details regarding the flight, the aircraft type, information on other connecting code-sharing flights, and insignificantly different flight times has caused the first screen to consist solely of single code-shared flight.

ANNEX FOUR

DRAFT ECAC RECOMMENDATION ON CONSUMER INFORMATION/PROTECTION NEEDS IN CONNECTION WITH CODE-SHARED AIR SERVICES

APPENDIX 1

DRAFT ECAC RECOMMENDATION ON CONSUMER INFORMATION/PROTECTION NEEDS IN CONNECTION WITH CODE-SHARED AIR SERVICES

Whereas code-sharing typically involves one carrier using its designator code on a service operated by another partner carrier;

Noting that code-sharing is becoming a more common practice between carriers;

Recognizing that the practice has the potential to bring benefits to consumers through increasing the range of travel options and enhancing product quality in areas such as connecting service arrangements, passenger check-in and baggage handling;

Being satisfied that consumer protection measures are needed to guard against deceptive and misleading practices;

Acknowledging that many code-sharing carriers wish to ensure transparency as regards their operations;

Believing that in order to ensure transparency, code-shared services demand the provision of adequate information to the consumer at all key points in a transaction from the initial enquiry to completion of the final segment of the journey;

Considering that regulatory measures are already applicable with regard to the display of code shared flights in Computer Reservation Systems;

Considering that the contracting carrier must maintain the ultimate responsibility for passenger satisfaction at all times;

Concluding that in many cases there are deficiencies in the information currently provided to consumers as regards code-shared services;

Recognizing that carriers alone cannot overcome all of the shortcomings and that co-operative efforts are called for on the part of all involved, including, in addition to the carriers, travel agents, CRS vendors, other data providers, airport authorities and handling agents;

Conscious of the world-wide nature of code-sharing and of the merits of developing a consistent global approach concerning these arrangements;

Wishing to encourage in the first instance an industry-based solution,

the CONFERENCE:

A. **RECOMMENDS** that

1) Carriers holding out code-shared services to the public should ensure that before making a booking or reservation, potential passengers are made aware of the existence of the codeshare and given additional information on the main features of the arrangement, including in all cases the name of the actual operator of each segment of a flight;

2) Ways and means should be found to ensure that, before travelling, and at the latest at the time of ticket issue, the passenger is given in written form confirmation of the actual operator for each segment of a flight and other information (e.g. airport

terminal(s), check-in area(s), transfer point(s)) that will facilitate the passenger's travel;

3) Airport authorities, in co-operation with code-sharing carriers and handling agents, should take all possible measures through information displays on Arrivals and Departure Boards, Signposting, Check-in Displays etc. to assist the passenger's travel;

4) Where necessary during a journey (e.g. in the case of denied boarding, missed connections, delayed departures, mislaid baggage) appropriate measures should be taken to ensure that passengers are fully informed and given clear guidance and support by the contracting carrier, or, in his name, by the operator or their agents;

5) Where matters remain to be resolved after a journey has been completed, the passenger should be given clear information as regards the carrier with whom communications should be pursued; in any event the passenger should be given the opportunity to appeal to any of the carriers participating in the flight (either contracting carrier or operator) according to choice;

6) In view of the complementary roles played by airlines, travel agents and CRS vendors and other data providers in the marketing and selling of code share products, all concerned should cooperate in finding effective and cost efficient arrangements to ensure that passengers are not misled about the nature of the services being offered. The industry should take advantage of the opportunities becoming available to provide more accurate and user-friendly information and, in particular, give urgent and serious consideration to implementing the following: -

   a) presentation of data in a more user-friendly way - for example by including the codes of both code share partners in the same entry on the CRS screen;

   b) greater provision of information on code share products, both by carriers and by CRS operators to enable sales personnel to describe services accurately;

   c) provide information on code shares on the face of the ticket where economically and practically feasible;

   d) where electronic means are used to store or transfer travel information, data on code shares should be included so that the operator of a code-shared flight can be clearly shown on any subsequent display of the information.

B. EXPRESSES ITS CONCERN that:

the display of code share flights in CRSs does not in all cases comply with the criteria set down in the ECAC and EU codes of conduct; and

URGES that:

Means of conforming with the requirements of the codes are quickly found and implemented.

C. RECOGNIZES

the uncertainty surrounding passenger legal entitlements under the Warsaw liability system in respect of code-shared flights and calls on the industry and governments to resolve the issue as quickly as possible;

D. RESOLVES

1) to have a review undertaken of progress made in implementing the various provisions in this Recommendation;

2) to decide in the light of that review, which should be completed by 30 June 1997, whether more binding regulatory measures are called for.

ANNEX FIVE

COPY OF A CODE-SHARING AGREEMENT

REDACTED COPY

CODE-SHARING/BLOCKED-SPACE AGREEMENT

[Delta purchasing a block of seats on Virgin]

Table of Contents

CODE-SHARING/BLOCKED-SPACE AGREEMENT

This agreement ("Agreement"), effective the 12th day of April, 1994, is

between Virgin Atlantic Airways, Limited having its principal office at Ashdown House, High Street, Crawley, West Sussex, RH10 1DQ, England, (hereinafter referred to as "Virgin")

and Delta Air Lines, Inc., having its principal office at 1030 Delta Boulevard, Hartsfield Atlanta International Airport, Atlanta, Ga., 30320, USA (hereinafter referred to as "Delta").

WHEREAS, Virgin and Delta (the "Parties") desire to enter into a cooperative arrangement in respect of scheduled services operated over the city pair routes described in Exhibit A (the "Routes"); and

WHEREAS, Delta wishes to acquire seat capacity on Virgin's flights operating on the Routes to offer competitive non-stop service over the Routes, and Virgin is willing to sell such capacity to Delta on the terms and conditions hereinafter contained; and

WHEREAS, by virtue of the Agreement, Delta will be able to offer new service over the Routes which Delta would not be able provide absent this Agreement; and

WHEREAS, this Agreement will enhance the ability of Virgin and Delta to offer increased air transportation services to the public and the communities that they serve or may choose to serve;

NOW THEREFORE, Virgin and Delta agree to enter into this Agreement offering code-share flights to the traveling public on the Routes, all on the terms set forth below:

Article 1

Purpose and Scope of the Agreement

Delta will purchase from Virgin seats on services over the Routes as specified in Exhibit A.

Article 2

Main Principles

2.1 The air services shall be operated with the greatest possible regularity and efficiency.

2.2 The services shall be identified by each carrier's own flight designators and flight numbers in both directions. Each carrier will use its own flight designators and flight numbers in all publications. The ticketing carrier's designator shall be shown in the carrier box of the flight coupon.

2.3. The parties shall ensure that in all such publications there is an indication that the flights are operated by Virgin, subject to applicable government regulations.

2.4. REDACTED

2.5. All applicable government rules and regulations shall be strictly observed by both parties.

2.6. All items of this Agreement which are subject to changes (such as, but not limited to, routes, schedules, seat allotments, reservation and passenger handling procedures, and prices) shall be specified in an Exhibit (see also Article 10).

Article 3

Commercial Cooperation

In the interest of cooperation, both parties shall:

3.1. Advise their personnel of the advantages resulting from this Agreement;

3.2. Consult with each other as necessary; and

3.3. Implement such procedures at their respective reservation and sales offices as are necessary to implement the code-share flights.

3.4 Advise passengers through on-board announcements that the services over the Routes are operated as code-share flights of Delta and Virgin. In addition, the parties agree that

Delta may place mutually agreed literature on-board Virgin aircraft and display Delta's logo on interior and exterior signage.

Article 4

Technical and Operational Requirements

4.1. The aircraft shall be supplied by Virgin in an airworthy and operable condition, duly manned and equipped for the operation of the services. It shall remain under Virgin's technical and operations control and shall be operated in accordance with Virgin's operational requirements.

4.2. Virgin shall have the absolute right to delay the departure of an aircraft, to decrease its authorized payload, to substitute aircraft, or to divert, interrupt or cancel a flight whenever operational, technical or safety reasons so require. Where Virgin desires to take such actions for commercial reasons, Virgin shall consult with and obtain Delta's consent where commercially practicable. REDACTED

4.3. In case of flight irregularities (as mentioned under Article 4.2, above), Delta shall be notified accordingly. REDACTED

4.4. REDACTED

4.5. Virgin shall operate the services set forth in Exhibit A in accordance with all applicable laws of the United Kingdom and the United States.

4.6. REDACTED

4.7 Unless agreed otherwise in writing in an amendment to this Agreement, the security regulations and emergency and accident procedures of Virgin shall apply.

REDACTED Both parties shall ensure conformance by their respective employees with the same.

Article 5

Routes, Schedules and Seat Allotments

5.1. Applicable routes and schedules of the services covered by this Agreement shall be as specified in Exhibit A.

5.2. The number of seats allotted by Virgin to Delta for each route in each class of service shall be as specified in Exhibit A.

Article 6

Reservation and Passenger Handling Procedures

6.1. Reservation procedures shall be mutually agreed to by the parties, and once agreed, shall be attached as Exhibit B to this Agreement.

6.2. Passenger handling procedures shall be mutually agreed to by the parties, and once agreed, shall be attached as Exhibit C to this Agreement.

Article 7

Free and Reduced-Fare Tickets for Airline Staff (Industry Discount)

7.1. Each Party shall accommodate within its own allotment, and at its own discretion, passengers holding free or reduced fare tickets allowing firm (positive space travel) bookings.

7.2. Delta and Virgin shall agree on procedures for the acceptance of free or reduced fare tickets not allowing firm bookings (space available/subject-to-load travel)..

Article 8

Seat Purchases

8.1. The prices for seats acquired by Delta from Virgin shall be as specified in Exhibit A. For periods after those specified in Exhibit A, (a) on or before March 31 of each year the parties shall meet and negotiate seats and fares for the following November-March IATA winter season, and (b) on or before September 30 of each year the parties shall meet and negotiate seats and fares for the following April-October IATA winter season.

8.2. The applicable conditions to such prices, if any, shall be as specified in Exhibit A.

Article 9

9.1.

9.2.

9.3.

9.4. REDACTED

9.5.

9.6.

Article 10

Annexes, Attachments and Amendments

10.1. All details in respect of the operation of this Agreement which are subject to regular changes (such as, but not limited to routes, schedules, seat allotments, and prices) shall be as specified in Exhibit A to this Agreement for each IATA timetable period, signed by both Parties.

10.2. All details in respect of the operation of this Agreement which are subject to occasional changes (such as, but not limited to reservation and passenger handling procedures and, conditions of carriage) shall be specified in an Exhibit to this Agreement, signed by both Parties.

10.3. Modifications to this Agreement shall be specified in an amendment signed by both Parties.

Article 11

11.1. Virgin and Delta each will issue tickets in accordance with all applicable laws, rules and regulations. Accordingly, carriage performed pursuant to the provisions of this Agreement will be subject to (among other things):

(A) the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw, October 12, 1929, or said Convention as amended at the Hague, September 28, 1955, as such is amended from time to time; and

(B) with regard to passengers on a journey, to, from, or with an agreed stopping place in the United States, the provisions of the Montreal Agreement, effective May 16, 1966, as such is amended from time to time.

11.2. REDACTED

11.3

11.4. REDACTED

11.5.

11.6.

11.7.

11.8.

REDACTED

11.9. The following documents are to be exchanged by the parties and made an integral part of this Agreement:

(A) Virgin's Conditions of Carriage (Exhibit D);
(B) Delta's Conditions of Carriage (Exhibit E).

Article 12

Insurance

12.1. Commencing on the date of the initial flight operation hereunder and continuing thereafter during the term hereof, Virgin will carry or cause to be carried at its own expense aircraft public liability insurance (exclusive of manufacturer's product liability insurance but including war and allied perils coverage) with respect to Claims (as such term is defined in Article 11.3 above) relating to the flight operations contemplated under this Agreement, in an amount not less than the public liability and property damage insurance from time to time carried by airlines of similar size operating passenger aircraft of the similar types on similar routes.

Said liability insurance shall:

(A) be maintained in effect with insurers of recognized responsibility (including captive insurance affiliates),

(B) be amended to name the Indemnitees (but without imposing any liability on the Indemnitees to pay the premiums for such insurance) as additional insureds as their respective interests may appear;

(C) provide that regarding the respective interests of the Indemnitees in such policies the insurance shall not be invalidated by any action or inaction of Virgin; and

(D) provide that if the insurers cancel such insurance for any reason whatsoever (other than due to lapse at the normal expiration date), or if any material change is made in such insurance which adversely affects the interests of any Indemnitee, Delta shall be provided with 30 days prior written notice of such cancellation or change ; provided however, that if any such notice period is not reasonably obtainable (such as war risk insurance which shall be subject to seven calendar days prior written notice to Delta), such policies shall provide for as long a period of notice as shall then be reasonably obtainable and notice to Delta hereunder shall be deemed notice to all Indemnitees.

(E)

(F)

REDACTED

(G)

12.2

REDACTED

12.3 Virgin shall file a certificate with Delta evidencing all the insurance provisions required in Article 12.1 above.

Article 13

Force Majeure

13.1. Neither Party shall be liable in respect of any failure to fulfill its obligations under this Agreement if such failure is due to reasons beyond its reasonable control, including but not limited to governmental interference, direction or restriction, war or civil commotion, strikes, lock-out, labor disputes, public enemy, blockade, insurrections, riots, acts of nature, accidents to the aircraft in the course of operating, epidemics or quarantine restrictions.

13.2. In any such case this Agreement shall be considered inoperative and neither Party shall be held to pay any damage or cost of whatever kind except for any accrued rights and liabilities. In such case the Parties shall discuss and agree on the action to be taken.

Article 14

Communication Between the Parties

All matters relating to the present Agreement and its Exhibits, and all correspondence relating to their implementation, including but not limited to the exchange of statements and notices, etc. shall exclusively be dealt with between the head offices of the Parties.

Article 15

Consultation and Settlement of Disputes

15.1. Any questions concerning the validity, interpretation or application of this Agreement, its Exhibits and Amendments (if any), at the request of either Party, be subject to consultation

between the Parties and both Parties shall endeavor to settle mutually any dispute or claim which may arise.

15.2. Any dispute between the Parties concerning the validity, interpretation or application of this Agreement and its Exhibits shall be settled in accordance with the terms and procedures of the IATA Arbitration Rules then effective and subject to English law in accordance with Article 17. Any such arbitration procedures shall be held in Amsterdam and in the English language.

Article 16

Government Regulations

16.1. The code-share operation pursuant to this Agreement shall be in accordance with all applicable laws, including government rules, regulations and orders, as well as international conventions.

16.2. This Agreement may be subject to review and approval by applicable government agencies and/or organizations. Both Parties agree to exert their best efforts to satisfy the requirements of any such review. If, as a result of such review, this Agreement is disapproved, or approved and later withdrawn, in any respect by any such governmental agency or organization, then either Party may terminate this Agreement by written notice to the other Party.

Article 17

Applicable Law

This Agreement shall be governed by and interpreted in accordance with English law.

Article 18

Competitive Marketing

Nothing in this Agreement confers any rights on either Party to restrict the other Party's ability:

(A) to maintain or change rates, fares, tariffs, markets, schedules, equipment, services, distribution and marketing methods, competitive strategies or similar matters;

(B) to engage in vigorous and full competition with each other and other entities; or

(C) to do business, or choose not to do business, with other entities.

Article 19

19.1.

19.2.

19.3.

19.4.

REDACTED

19.5.

19.6.

19 7

19 8

REDACTED

Article 20

Miscellaneous

20.1. The descriptive headings of the Articles of this Agreement are inserted for convenience only, confer no rights or obligations on either Party, and do not constitute a part of the Agreement.

20.2. This Agreement (including the Exhibits) constitutes the entire understanding between the Parties with respect to the subject matter hereof, and any other prior or contemporaneous agreements, whether written or oral, with respect thereto are expressly superseded by this Agreement.

20.3. If any part of any provision of this Agreement shall be invalid or unenforceable under applicable law, such part shall be ineffective to the extent of such invalidity only, without in any way affecting the remaining parts of such provisions or the remaining provisions.

20.4. This Agreement is not, and shall not be construed to be, a license for either party to use the trade names, trademarks, service marks, or logos, or descriptions of services or products of the other party without such party's prior written consent; provided, it is acknowledged that Delta advertising will refer to the fact that services over the Routes will be provided by Virgin aircraft.

20.5. This Agreement shall bind and inure to the benefit of the Parties and their respective successors and assigns; provided, however, neither Party may assign or transfer this Agreement or any portion thereof to any person or entity without the express written consent of the other Party. Any assignment or transfer, by operation of law or otherwise, without such written consent shall be null and void and of no force or effect.

20.6. This Agreement may be executed by facsimile or otherwise in counterparts, each of which shall be deemed to be an original and all of which, taken together, shall constitute one and the same document.

20.7. Except as otherwise specified in an Exhibit, all notices, demands, requests or other communications pertaining to this Agreement shall be in writing and shall be deemed given

when delivered personally, telecopied (transmission confirmed) or mailed when received by the other party at the following addresses:

In the case of Delta, to:

Delta Air Lines, Inc.
Hartsfield Atlanta International Airport
1030 Delta Boulevard
Atlanta, Georgia 30320
U.S.A.
Attention: Senior Vice President - Marketing
Facsimile: (404) 715-2596

with a copy to:

Attention: Senior Vice President - General Counsel
Facsimile: (404) 715-2233

and, in the case of Virgin, to:

Virgin Atlantic Airways Limited
Ashdown House
High Street
Crawley, West Sussex
RH10 1DQ, England
Attention: Mr. Paul Griffiths
Commercial Director
Facsimile Number: 011-44-293-561-721 or
Telephone Number 011-44-293-562-2345

ARTICLE 21

Quality of Service

Virgin Atlantic and Delta intend to offer their customers their highest quality of airline services in connection with this Agreement, and each agrees to use best efforts to provide the highest quality of customer service in connection with its services provided pursuant to the Agreement.

Executed in duplicate, both in English.

REDACTED

4. REDACTED

EXHIBIT A-2

Newark (EWR) - London (LHR) Service

1. Schedules and Aircraft for EWR- LHR

LHR	EWR	DATES	EWR	LHR	Day of Week	Equipment
1600	1840	11/1/94 to 05/31/95	2125	0905 +1	1234567	B 747

2. REDACTED

3. REDACTED

REDACTED

4.

REDACTED

EXHIBIT A-3

San Francisco (SFO) - London (LHR) Service

1. Schedules and Aircraft for SFO - LHR

LHR	SFO	DATES	SFO	LHR	Day of Week	Equipment
1115	1405	11/1/94 to 05/31/95	1645	1045 +1	1234567	B 747

2.

REDACTED

3.

REDACTED

REDACTED

4. REDACTED

EXHIBIT A-4

Los Angeles (LAX) - London (LHR) Service

1. Schedules and Aircraft for LAX- LHR

LHR	LAX	DATES	LAX	LHR	Day of Week	Equipment
1200	1510	11/1/94 to 05/31/95	1730	1145 +1	1234567	B 747

2. REDACTED

3. REDACTED

REDACTED

4.

REDACTED

EXHIBIT A-5

Boston (BOS) - London (LGW) Service

1. <u>Schedules and Aircraft for BOS- LGW</u>

LGW	BOS	DATES	BOS	LGW	Day of Week	Equipment
1500	1710	11/1/94 to 05/31/95	2020	0750 +1	1234567	A 340

2.

REDACTED

3.

REDACTED

REDACTED

4.

REDACTED

EXHIBIT A-6

Miami (MIA) - London (LGW) Service

1. Schedules and Aircraft for MIA- LGW

LGW	MIA	DATES	MIA	LGW	Day of Week	Equipment
1115	1545	11/[illegible]/94 to 05/31/95	1820	0725 +1	1234567	B 747

2.

REDACTED

3.

REDACTED

REDACTED

4.

REDACTED

EXHIBIT A-7

Orlando (MCO) - London (LGW) Service

1. Schedules and Aircraft for MCO- LGW

LGW	MCO	DATES	MCO	LGW	Day of Week	Equipment
1230	1640	11/1/94 to --/--/--	1910	0815 +1	1234567	B 747

2.

REDACTED

3.

REDACTED

REDACTED

REDACTED

4.

Exhibit B - Reservation Procedures

Reservations/Seat Handling Procedures

1. Delta shall control its allotted space in accordance with the seat allotments set forth in Exhibit A.

2. Virgin Atlantic shall maintain block seats for Delta in its reservations system for each flight segment in accordance with the seat allotments set forth in Exhibit A.

3. Passenger manifest information (data transfer from Delta to Virgin Atlantic) will be sent from Delta to Virgin Atlantic in two steps:

   .....by PNL in IATA standard format

   .....by ADL in IATA standard format

4. Data transfer for westbound and eastbound flights shall be made prior to departure of the relevant flight in accordance with mutually agreed procedures.

5. Virgin Atlantic will use passenger manifest information to update the Delta allotment in the Virgin Atlantic reservations system.

6. Special passenger requirements shall be honored to the extent reasonably possible by Virgin Atlantic.

7. Advance Seat Selection: In order to enable immediate seat confirmation (seat numbers to Delta passengers upon confirming reservations) the parties will mutually establish a block of seats with seat numbers that will be allotted to Delta on each code-share flight described in Exhibit A.

8. All Delta passengers shall be informed by Delta that the flight is operated by Virgin Atlantic.

Exhibit C - Passenger Handling Procedures

General

1. Virgin shall provide all Delta passengers on code-share flights with service on equal terms with Virgin's own passengers. Virgin shall operate code-share flights, including in-flight service, in accordance with its own service standards as agreed with Delta.

2. The settlement of passenger handling claims relating to delayed flights and flight cancellations shall be dealt with in accordance with the agreement.

Airport Handling Procedures

1. Delta passengers at New York (JFK), Boston (BOS), Miami (MIA), Newark (EWR), Los Angeles (LAX), San Francisco (SFO), Orlando (MCO) airports on the Virgin Atlantic operated flights to those airports will be checked-in through Deltamatic using the Delta flight number on boarding passes and baggage tags.

2. Delta passengers at London (Heathrow) airport traveling on the Virgin Atlantic operated flights will be checked-in through the Virgin Atlantic computer system.

3 Delta passengers at London (Gatwick) airport traveling on the Virgin Atlantic operated flights will be checked in through the Deltamatic computer system.

4. Acceptance of Delta passengers shall be as per PNL and ADL.

5. At JFK, MIA, BOS, EWR, LAX, SFO, LHR, LGW and MCO Delta and Virgin shall provide signage reflecting the joint operation

6. Passenger coupons will be separated between Delta and Virgin Atlantic after departure

7. Flight coupons in excess of Delta allotment shall be endorsed to Virgin Atlantic.

8. Flight coupons in excess of Virgin Atlantic allotment shall be endorsed to Delta.

9. In the event of flight delays or cancellation on the day of departure, Virgin Atlantic shall provide prompt advice to Delta at the following addresses:

   ATLKDDL, ATLDDDL, ATLOZDL, (DEST CITY)OODL, (DEST. CITY)TRDL and (DEST. CITY)TXDL

10. In the event of an accident or incident, Virgin Atlantic shall advise Delta immediately. Messages shall be sent to:

    ATLDDDL, (DEST.CITY)OODL, ATLOZDL, ATLISDL, and ATLRCDL

Exhibit D - Virgin Atlantic's Conditions of Carriage

Virgin Atlantic's contract of carriage for international passengers is available from Virgin Atlantic's offices on request.

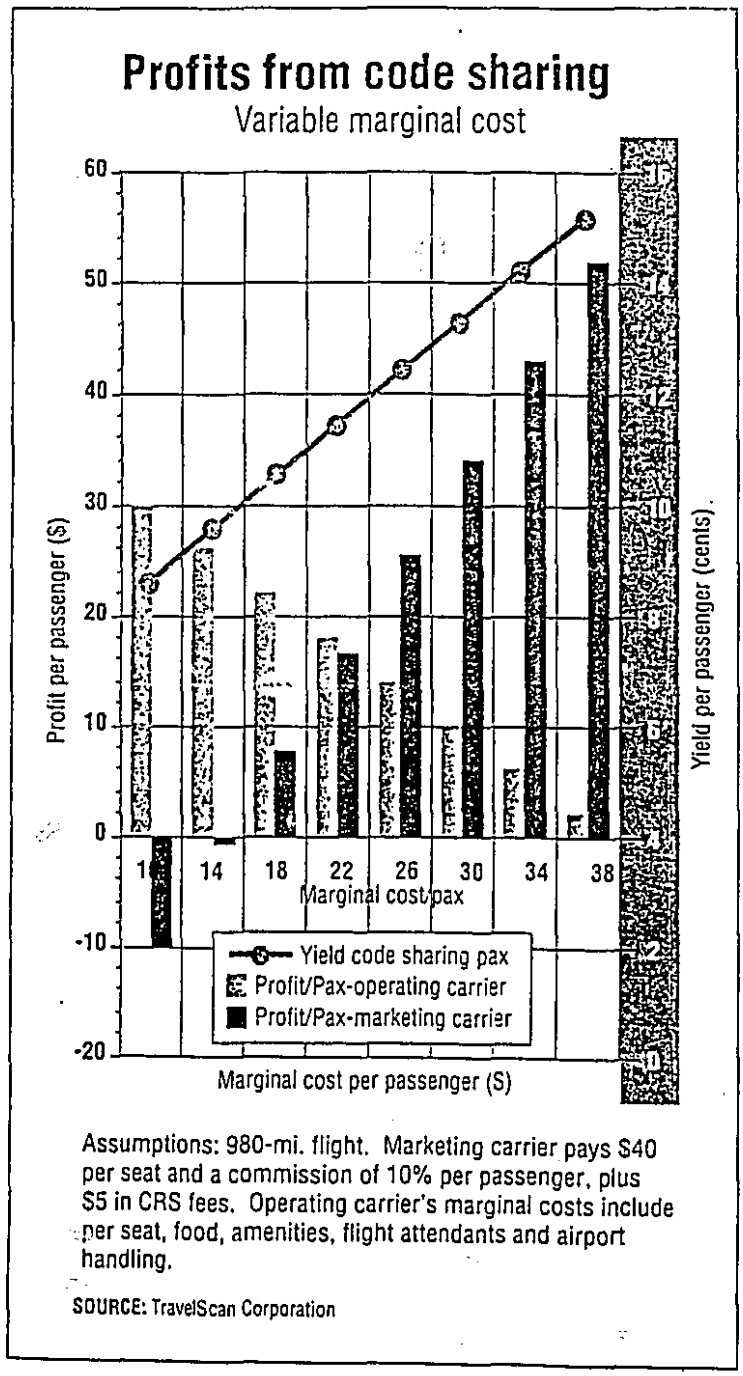
Exhibit E - Delta's Conditions of Carriage

Delta's contract of carriage for international passengers may be accessed via any computerized reservation system through direct access to Delta's internal reservation system. The entry is: *"G*4282"* (See page 2 of Delta's tariff for rules relating to transatlantic flights).

ANNEX SIX

DIAGRAM DEPICTING THE PROFITS FROM CODE-SHARING

Source: Air Transport World (October 1995 issue).



When marginal costs and yields are low, the operating carrier benefits more. When marginal costs and yields rise, the marketing carrier's results outpace those of the operating carrier. But as costs and profits fluctuate constantly, airlines must recalculate their agreements often.