Ensuring Foreign Air Carrier Compliance: What Is Cabotage? (March 2011)

Cabotage is the transport of passenger or cargo traffic that originates and terminates within the boundaries of a given country by an air carrier or shipper from another country. Historically, the U.S. has severely restricted cabotage in both air and sea transportation. This article provides a brief overview of the U.S. restrictions on cabotage that are applicable to air transportation.[1]

Cabotage by air transportation typically takes two forms:

- A foreign air carrier transports passengers or goods directly between two points in the U.S. For example, a foreign air carrier may operate a flight from London to New York, which then continues on to Chicago. On the New York – Chicago segment, the carrier can only transport passengers or goods that originated in or are destined for London; the carrier cannot transport "local" (i.e., New York – Chicago) traffic.

- A foreign air carrier transports passengers or goods indirectly between two points in the U.S. For example, a foreign air carrier may operate separate flights from its home country in the Caribbean to both Miami and Puerto Rico. The carrier cannot transport passengers or goods between Miami and Puerto Rico using its homeland as a connecting point.

The United States Department of Transportation ("DOT") considers cabotage to be a serious violation of its rules, and can impose civil penalties of up to $27,500 per violation, per day. Indeed, DOT considers cabotage to violate not just the statute that specifically prohibits the practice, but also the statutes that authorize foreign air carriers to serve the U.S. (which limits their operations to transportation between points in the U.S. and points outside the U.S.)[2] and another statute which prohibits

[1] 49 U.S.C. §§ 40109 and 41703.

[2] 49 U.S.C. §§ 41301 and 41302.

The firm's practice encompasses virtually every aspect of aviation law, including advising foreign airlines on compliance with the DOT's economic regulations and enforcement of cabotage restrictions.

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"unfair and "deceptive" practices by air carriers.[3]

DOT has imposed substantial fines on foreign air carriers that have engaged in cabotage. Most often, the issue has arisen for air transportation from the U.S. mainland and/or Hawaii to the U.S. territories of Guam and Saipan. In 2002, DOT fined five Asian carriers (one of which was a repeat offender) for holding out cabotage itineraries, both directly and through agents. In those cases DOT imposed a total of $915,000 in fines – although half of each fine was suspended on the condition of future compliance. In addition, since 2003 DOT has fined six Canadian charter operators a total of $435,000 (again, half suspended) for operating services involving the carriage of passengers solely between two points in the U.S.[4]

There are several explicit exemptions to the general cabotage prohibition in the underlying laws and regulations:

- DOT may authorize foreign air carriers to engage in cabotage in the event of an "emergency" that cannot be met by U.S.-flag air carriers. For example, DOT periodically has allowed foreign air carriers which operate Antonov 124 and Antonov 225 freighter aircraft to engage in cabotage in order to transport outsize cargo that is urgently needed for military, government, or business purposes, and which is too large to be carried in any aircraft operated by U.S. carriers.

- However, DOT is not inclined to grant "emergency" exemptions other than on a one-off basis. For example, in 1985, a foreign air carrier requested authority to carry passengers between Hawaii and the U.S. mainland during a strike by a U.S.-flag carrier. DOT denied the application, on the basis that adequate capacity remained available from other U.S.-flag carriers, and there was no evidence of passengers being stranded.

- In Alaska, foreign air carriers may "cross-connect" cargo without violating the general cabotage prohibition. For example, foreign air carrier A can transport a shipment between its home country and Anchorage, and transfer the cargo to foreign air carrier B for carriage to a point in the contiguous 48 states. Even though the shipment technically would have been transported by foreign air carrier B between two U.S. points – Alaska and its final destination – a special exception enacted in 2003 has permitted such operations, subject to certain conditions.

- To be precise, the cabotage prohibition only applies to transportation "for compensation." DOT has clarified that under limited circumstances, a foreign air carrier may transport its own employees – or certain other types of passengers[5] – between two points in the U.S. without

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[3] 49 U.S.C. § 41712.

[4] In 2009, DOT briefly prohibited Canadian air carriers from operating season-long charters for U.S. sports teams due to instances of passengers never traveling on a cross-border flight during the course of the season, which DOT considered to be a cabotage violation. After a carrier filed suit, DOT entered into a settlement which allowed such charter programs, subject to safeguards to prevent further occurrences of cabotage.

[5] 14 C.F.R. § 375.35. Examples of other permissible passengers include employees of another air carrier traveling pursuant to a pass interchange agreement; travel agents being transported for the purpose of familiarizing them with the foreign air carrier's services; and witnesses and attorneys attending any legal investigation in which the foreign air carrier is involved.

engaging in cabotage. Although the foreign air carrier may not charge them for the air transportation, it can collect a nominal fee for the value of any meals and beverages that are furnished enroute.

Additionally, although most cabotage scenarios are relatively straightforward, various itineraries can be constructed in which it is not immediately clear if an operation comprises cabotage and thus violates U.S. law. For example, DOT has informally advised that if a foreign air carrier holds out service on a code-share basis between two points in the U.S., the itinerary comprises cabotage, even if the actual flights would be operated by a U.S. carrier. Conversely, if a U.S. carrier holds out service on a code-share basis between two points in the U.S., but the actual flights would be operated by a foreign carrier, DOT will also consider the itinerary to be cabotage.

When DOT last provided public guidance about cabotage in 2002, it explained as follows:

- "[T]he sale or holding out, either explicitly or by course of conduct, of transportation between two points in the United States via an intermediate point or points in a foreign country may be illegal regardless of the duration of the stopover, the passengers immigration status at the intermediate point or points, the number of tickets under which the transportation is conducted, and the number of foreign air carriers under which the transportation is conducted if they are working in concert."

- "However, we are not likely to pursue enforcement action except in straightforward cases, such as those in which the transportation was continuous (including short stopovers that were incidental to or otherwise did not break the continuity of the trip), the transportation was conducted pursuant to a single ticket, the carrier or its agents knowingly sold two tickets covering cabotage service, the carrier or its agents held out cabotage service via the Internet or other advertising media, or the carrier explicitly or tacitly accepted, benefited from, or participated in a substantial arrangement with a third party to conduct cabotage operations."

Although this guidance is valuable, it leaves numerous questions unanswered – for example, how long would a break in travel at a foreign point need to be before DOT would be unlikely to pursue enforcement action? Is there any "safe harbor" that DOT would never consider to be cabotage – for example, if a passenger purchased two entirely separate tickets for an itinerary, without the carrier's knowledge?

Because the U.S. restrictions on cabotage are complex and not often clear, foreign air carriers are advised to consult with counsel to ensure that their practices – and the practices of Global Distribution Systems and agents through which such carriers hold out services – comply with the underlying statutes, regulations, and policy, in order to avoid public and expensive enforcement action.

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