

Cross-Border Investments

A Canadian Perspective

Fourth ICAO Air Transport Symposium (IATS/4)
Paradise City, Incheon, Republic of Korea
May 9th, 2019

Ownership and Control in Air Transport Agreements

- Canada adheres to the traditional standard that nationals, or the government of the other party to an ATA, should substantially own and effectively control the airlines designated to operate the agreed services.
- It is recognized that many countries rely on cross-border investments or “regional or community” carriers to obtain air transport connectivity.
- To address this, Canada has a long-standing practice of making a commitment to another party not to withhold necessary authorizations for that party’s airline on a case-by-case basis.
 - Canada may commit to ‘waiving’ its right to withhold operating authorizations for some carriers
 - Factors that are considered: actual principle place of business, regulatory oversight, type of investor, circumvention of traffic rights, national/public interests.
- Canada has also adopted the community of interest principle in some cases (e.g., EU, Caribbean region).
- Canada’s practice is consistent with ICAO guidance material and Assembly Resolution A-39-15 (section II).

Variable Voting Schemes

- Prior to the recent changes to Canada's legislation to allow up to 49 percent foreign ownership, some Canadian airlines used variable voting schemes.
- Variable voting schemes are a tool that an airline may use in order to access more capital while meeting national ownership and control legislation.
- Variable voting schemes have allowed foreign investors to buy non-voting shares in a Canadian carrier or invest in a class of shares that have variable voting rights.
- With shares having variable voting rights, a foreign investor is allowed to own an unrestricted percentage. At the time of voting (e.g., at the annual shareholder meeting), the voting interest of these shares is brought down to the level prescribed in the legislation.

Changes in Canadian Carrier Ownership Legislation

- The provisions dealing with foreign ownership of Canadian carriers in the *Canada Transportation Act* were modified with the *Transportation Modernization Act* (TMA) and came into force on June 28th, 2018.
- The new provisions liberalize foreign ownership restrictions from 25 to 49 percent of voting interests for Canadian air carriers, with accompanying safeguards:
 - A single foreign investor cannot hold more than 25 per cent of the voting interests of a Canadian air carrier; and,
 - No combination of foreign air carriers can own more than 25 per cent of a Canadian carrier.
- This liberalization does not apply to Canadian operators of specialty air services (e.g. heli-logging, aerial photography, firefighting, etc.) – 25 percent limit remains.
- Since the entry into force of the TMA, Canadian airlines such as Air Canada, Chorus Aviation, Air Transat and WestJet have announced that they would be taking advantage of the new flexibility by amending their articles of incorporation in 2019.

Changes in Canadian Carrier Ownership Legislation – Cont'd

- The following requirements must be met for an airline to be considered 'Canadian':
 - *Requirement No. 1 – Incorporation or formation requirement*
 - It must be incorporated or formed under the laws of Canada or one of its provinces.
 - *Requirement No. 2 – Voting Interest Requirement*
 - At least 51 percent of the voting interests need to be both owned and controlled by Canadians. No single non-Canadian can control more than 25 percent of the voting interests.
 - *Requirement No. 3 – Control In Fact Requirement*
 - Control in fact is the power, whether exercised or not, to control the strategic decision-making activities of the airline and to manage and run its day-to-day operations. Control in fact must remain with Canadian interests.
- Bottom line: Canadian carriers can now be up to 49 percent foreign-owned.

Thank you !

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