

VOLUME 2. AIR OPERATOR CERTIFICATION

CHAPTER 4. FOREIGN AIR CARRIERS OPERATING TO THE U.S. AND FOREIGN OPERATORS OF U.S.-REGISTERED AIRCRAFT ENGAGED IN COMMON CARRIAGE OUTSIDE THE U.S.

SECTION 4. LEASE, INTERCHANGE, AND CHARTER ARRANGEMENTS

307. GENERAL. The leasing of large transport category aircraft between a U.S. and foreign air carrier or between two foreign air carriers is widely used. The FAA defines an aircraft lease as a contract by which one person grants the right of exclusive possession and use of a certain aircraft to another person for a specified period or a defined number of flights. Lease agreements can be characterized as a *dry lease*, an *interchange agreement*, or a *wet lease*.

309. DRY LEASE. The term *dry lease* means any arrangement whereby a lessor agrees to provide an aircraft without crew to an operator. The lessee operator of the aircraft must hold the necessary economic and operating authority for the aircraft, and it must exercise operational control over the aircraft. Accordingly, the lessee must provide the necessary flight and cabin crewmembers, ground personnel, dispatchers, and ground facilities to operate the leased aircraft.

A. The dry leasing of U.S.- or foreign-registered aircraft (without crewmembers) by foreign air carriers operating to the United States and foreign persons engaged in common carriage outside the United States is a common practice. Where the lessor of the aircraft is a U.S. or foreign air carrier, the FAA must remove the leased aircraft from the lessor carrier's operations specifications (OpSpecs) and list it on the lessee's OpSpecs except when the lease is in the form of an interchange agreement.

B. Any foreign air carrier or any foreign person engaged in common carriage solely outside the United States must conduct operation of a dry lease U.S.-registered aircraft operating to the United States in compliance with the following:

- Appropriate requirements of Title 14 of the Code of Federal Regulations (14 CFR) part 91 (see specifically §§ 91.1 and 91.701 through 91.706.)
- 14 CFR part 129 (foreign air carriers operating to the United States only)
- Part 129 §§ 129.14, 129.16, 129.20, 129.32, and 129.33 also apply to U.S.-registered aircraft operated solely outside the United States in common

carriage by a foreign person or foreign air carrier. (see part 129 § 129.1(b).)

- 14 CFR part 61 §§ 61.3(a), 61.77, and 14 CFR part 63, §§ 63.3(a), 63.23 and 63.42, (personnel licensing requirements for flight crewmembers (pilot, flight engineer, and flight navigator) (See Order 8400.10, volume 2, chapter 4, section 6.)
- 14 CFR parts 21, 43, and 65
- Title 49 of the Code of Federal Regulations (49 CFR) part 175 (rules for loading and carrying dangerous articles and magnetized materials in any civil aircraft in the United States and in civil aircraft of U.S. registry anywhere in air commerce)
- All applicable orders and regulations of other U.S. agencies and courts, and with all applicable laws of the U.S.

C. Foreign air carriers should apply for OpSpecs and amendments that authorize the use of any U.S.-registered aircraft in accordance with part 129 § 129.11. The FAA will process such applications in accordance with Order 8400.10, volume 2, chapter 4, section 2.

311. INTERCHANGE AGREEMENT. An interchange agreement is a form of a dry lease. An interchange agreement permits one operator to dry lease an aircraft to another operator for short periods of time, thereby providing greater operational flexibility and use of large transport category aircraft by the operators.

A. The following definitions apply to interchange agreements:

- The *primary operator* under an interchange agreement is the U.S. or foreign air carrier that would normally operate the aircraft if the interchange were not in effect. The primary operator always retains responsibility for the maintenance control of an aircraft that is the subject of an interchange agreement.

- The *interchange operator* is the other U.S. or foreign air carrier party to the interchange agreement.
- The *interchange points* are those airports where an aircraft may be transferred between the primary operator and the interchange operator. The transfer involves the replacement of the flight crew of one operator with the flightcrew of the other operator.

B. The OpSpecs of both the primary and interchange operator must be amended to reflect any interchange agreement. Both parties to an interchange agreement must submit a copy of the agreement in support of its request for an amendment of its OpSpecs. The OpSpecs of both the primary operator and the interchange operator will list an aircraft used in an interchange agreement.

(1) The following OpSpecs will list the aircraft subject to an interchange agreement in the OpSpecs of the primary operator:

- If a foreign carrier is the primary operator, OpSpec A003, Aircraft Authorization, and OpSpec A029, Aircraft Interchange Arrangements, will list the aircraft. If the aircraft is U.S. registered, OpSpec D085, U.S. Registered Aircraft Listing and Maintenance Requirements will also list it.
- If a U.S. carrier is the primary operator, OpSpec A029 and OpSpec D085 will list it.

(2) The following OpSpecs will list the aircraft subject to an interchange agreement in the OpSpecs of the interchange operator:

- If a foreign carrier is the interchange operator, OpSpec A029 will list the aircraft and, if the aircraft is U.S. registered, OpSpec D085 will list it.
- If a U.S. carrier is the interchange operator, OpSpecs A029 and D085 will list the aircraft.

(3) The parties to the interchange agreement may transfer operational control of the aircraft only at an interchange point the agreement specifies in OpSpec A029 of both operators.

C. Under an interchange agreement, the aircraft may be of either U.S. or foreign registry. However, if the aircraft is foreign registered, it must specifically comply with 14 CFR part 121, 121.153(c) or part 135, § 135.25(d), as appropriate, in order to be operated by a U.S. certificate holder. If the aircraft is of U.S. registry, the foreign operator must comply with the applicable 14 CFR requirements while it has operational control of the aircraft (see paragraph 309 B).

313. WET LEASE. The term *wet lease* means any leasing arrangement whereby a person agrees to provide an aircraft

and at least one pilot flight crewmember to another person. A wet lease does not include a code-sharing arrangement. (See 14 CFR part 119 § 119.3.) When an air carrier provides less than an entire aircraft crew, the wet lease occasionally is referred to as a *damp lease*.

A. A U.S. air carrier may not wet lease an aircraft from any foreign air carrier or foreign person. (See § 119.53 (b), § 121.153(c) and § 135.25(d).) This prohibition is based in part on the prohibition on cabotage under Title 49 of the United States Code (49 U.S.C.) § 41703 and partially on safety oversight considerations under 49 U.S.C. § 44701.

B. Depending on the laws of its flag State, a foreign air carrier may be able to wet lease aircraft from a U.S. air carrier or from another foreign air carrier. Although the FAA permits U.S. air carriers to wet lease aircraft to foreign air carriers and persons, those operators usually prefer to dry lease U.S.-registered aircraft in order to have operational control of the leased U.S.-registered aircraft. FAA policy requires each U.S. air carrier to retain operational control of each wet leased aircraft listed on its OpSpecs regardless of whether the aircraft is U.S.- or foreign-registered. This policy applies to aircraft wet leased to any foreign air carrier and to any foreign person.

C. Prior to engaging in a wet lease operation to or from the United States, a foreign air carrier must seek an amendment of its OpSpecs, to list the aircraft in OpSpec A028, Aircraft Wet Lease Arrangements. The FAA requires such an amendment whether the other party to the wet lease is a U.S. or foreign air carrier. In support of the amendment, each party to the wet lease arrangement must submit to the FAA a copy of the wet lease arrangement or a written memorandum of the pertinent terms of the wet lease. The following objectives must be achieved in the review of the documents pertaining to the wet lease:

- Identify the aircraft that are subject to the wet lease. OpSpec A003, Aircraft Authorization, of the lessor's OpSpecs must list the aircraft if the lessor is a foreign carrier and in addition OpSpec D085 if the aircraft is U.S. registered. OpSpec D085, Aircraft Listing, must list the aircraft if the lessor is a U.S. carrier.
- Determine which carrier will exercise operational control over the wet lease operations. If the lessor is a U.S. air carrier, it must retain operational control of each wet leased aircraft.
- Confirm that each party to the wet lease arrangement holds the necessary operating and economic authority to conduct the wet lease. Each carrier must hold the appropriate economic authority from the Office of the Secretary of Transportation (OST) to conduct wet lease operations to the United States.

D. Because of differences in the way FAA and OST

define and apply the term “wet lease”, the analysis of a wet lease transaction can be complicated. Both FAA and OST agree that a wet lease is any leasing arrangement whereby a person agrees to provide an aircraft and at least one pilot flight crewmember to another person, and that code-share arrangements are not wet leases. However, OST also includes transactions commonly referred to as *charters* within the scope of what constitutes a wet lease.

315. CHARTERS.

A. A charter is an agreement whereby a person agrees to provide all or part of the lift capacity of an aircraft it operates to another person for a defined period of time or number of flights. In short, a charter is the provision of a flight service.

(1) Under this definition, the essential elements of a charter are:

- A person holding the necessary economic and operating authorities for the aircraft.
- The provision of all or part of the aircraft’s lift capacity to another person.
- The person contracting for the lift capacity is not the operator of the aircraft.
- A defined duration for the provision of the lift capacity.

(2) Just as important are the elements that are not essential to a charter: a specific aircraft is not identified, and there is no transfer of exclusive possession and use of that aircraft to the other person. The lack of these elements typically distinguishes an aircraft charter arrangement from an aircraft lease agreement.

B. A foreign air carrier conducting charter operations to or from the United States must hold the appropriate economic authority from OST and part 129 Opspecs from the FAA. The FAA requires prior notification in accordance with the reporting requirements of OpSpec paragraph A039, of any charter operation by a foreign air carrier to or from any point in the United States not identified in OpSpec paragraphs C070 and/or H120 (Airports Authorized for Scheduled Airplane or Rotorcraft Operations) of the foreign air carrier’s OpSpecs as a regular airport. The FAA does not otherwise document charter operations by a foreign air carrier in its operations specifications.

317. ARTICLE 83 BIS. Under international law, the State of registry of an aircraft is responsible for overseeing the airworthiness of the aircraft, the licensing of its flight crew-

members, and compliance by the operator of the aircraft with the applicable rules of the air. When an aircraft registered in one country is operated by an operator certificated in another country, the ability of the State of registry to carry out its oversight responsibilities may be diminished. In such cases, the State of registry and the State of the operator may enter into an agreement pursuant to Article 83 *bis* to the Chicago Convention transferring some or all of the oversight responsibilities of the State of registry to the State of the operator. (The term “bis” is a latin term used through out the convention to designate the articles created between existing sequentially numbered articles. For further information on the Chicago Convention, refer to Order 8400.10, volume 1, chapter 3, International Aviation.)

A. Among the visible effects of a transfer of oversight responsibilities pursuant to an Article 83 *bis* agreement are the following:

- If the State of registry transfers its airworthiness oversight responsibilities under the Article 83 *bis* agreement, the State of the operator will issue a certificate of airworthiness to the aircraft and oversee the continuing airworthiness of the aircraft in accordance with its laws and regulations.
- If the State of registry transfers its personnel licensing oversight responsibilities under the Article 83 *bis* agreement, the flight crewmembers will hold airman certificates issued by the State of the operator pursuant to its laws and regulations.
- An aircraft that is subject to an Article 83 *bis* agreement will continue to be registered in the State of registry and to bear that State’s registration marks. The registration certificates will be issued by the State of registry.

B. A State of registry and State of the operator are not required to enter into an Article 83 *bis* agreement as to a particular aircraft. However, once they execute such an agreement, it becomes effective as to third party States only when it has been registered with and made public by ICAO, or when one of the parties to the agreement communicates the existence and scope of the agreement to those third party States.

C. The State of the operator cannot transfer the responsibilities for the certification and oversight of an air carrier to another State pursuant to an Article 83 *bis* agreement.

318. RESERVED.

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