BOOK REVIEW

Cabotage in Air Transport Regulation by Pablo Mendes de Leon [Dordrecht, Martinus Nijoff Publishers, 1992, XXIII + 264 pages; ISBN 0-7923-1795; soft cover]

When one thinks of cabotage, usually the two things that immediately come to mind are the reference to it in Article 7 of the Chicago Convention on International Civil Aviation 1944 and its identification as the eighth freedom in Professor Bin Cheng's celebrated work, "The Law of International Air Transport"[1]. Now, there is a third and it is this book written by Dr Mendes de Leon.

What is cabotage? Etymologically, it is derived from the French "caboter" and in Chapter 1 of the book, the writer traces the historical usage of the word, finding that its use originated in nautical activities. The French used it to mean "coastal navigation" (navigation le long des Cotes); the English referred to it as "coastal trade"; and to the Spaniards it meant navigation near the coast without losing sight of it ("Cabotaje") (page 1).

In Australia, the word became significant when Arthur Phillip landed in Botany Bay in 1788, heralding the beginning of Britain's colonisation of this country. Cabotage in the maritime sense was therefore introduced to Australia, which activity became frantic when gold was discovered. Approximately a century later, it was said that these discoveries (including those in California), the adoption of free trade in Britain, and the arrival of steam navigation, the railways and telegraphs were the most powerful forces ever brought to bear on the extension of trade in any one age[2].

With the turn of the twentieth century and the invention of the aircraft by the Wright brothers, cabotage acquired a new meaning and these days cabotage is defined as the legal arrangement by which the right to engage in air transportation within a state's borders is restricted to domestic carriers[3]. Professor Cheng refers to it as the right to carry traffic from one point in the territory of a state to another point in the same state[4] and Article 7 of the Chicago Convention which is entitled "Cabotage" states that:

> Each contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory. Each contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other State or an airline of any other State, and not to obtain any such exclusive privilege from any other State (page 206).

It is often observed that cabotage, being part of domestic air commerce, has no direct place in the Chicago Convention or works on international air transportation. However, owing to the inherent nature of air transportation, it is appropriate more often than not to include a discussion on cabotage even if the issues are on international transportation. Further, since cabotage rests on the principle of sovereignty, issues of international law become relevant.

The book deals with cabotage within the wider context of international and domestic air transportation regulation. It critically addresses the grey areas, especially in relation to state practice (chapter 3) and autonomy and change of sovereignty (chapter 4). In this context, changes in relationships which have either affected or will affect places like Germany, the former USSR, Hong Kong, China, Taiwan and Macau are dealt with (chapter 4).

The development of intra and interstate relationships is treated in chapter 4. For instance, in the Kingdom of the Netherlands, which consists of three autonomous countries (ie the Netherlands, the Netherlands Antilles and Aruba), there is a distinction between Kingdom and internal affairs, the latter being within the exclusive competence or autonomy of the individual countries (page 68). Since 1967, scheduled air transportation fell within this exclusive competence. However, there is a restriction and air transportation may be considered to be part of Kingdom affairs in two instances ie (a) all three countries must consult with one another insofar as air transportation is concerned[5]; and (b) foreign relations is considered a Kingdom matter[6] (page 69). Thus, a bilateral air service agreement initiated and negotiated by any of the three countries must be formally concluded by the Kingdom government (page 69) and routes between any of these two countries are considered "kingdom cabotage routes" (page 70-71).

A federal structure exists in Australia, resulting in a definite distinction between international, interstate and intrastate relations[7]. Although the various states which comprise the Commonwealth of Australia are not separate and autonomous countries, there is reserved to the constituent states an aviation power. This is because international and interstate activities fall within the power of the federal government[8]; intrastate activities fall within the residual power of the respective states[9].

Consequently, cabotage within Australia exists at two levels ie (a) interstate air transportation, which is carried out by carriers with Australian operators' licences (eg Ansett Australia and Eastwest Airlines which fly routes between the states); and (b) intrastate air transportation which is carried out by carriers with state operators' licences. The latter carriers are known as regional airlines[10].

The most interesting chapter is chapter 7 which is comparatively lengthy. Here, the separate discussion on the EEC is found. This chapter follows a discourse on operational and economic aspects (chapter 5), and integration of aviation resources and cabotage at a regional level (chapter 6). There is logic in this format because it discusses the EEC within context.

The creation of a regional air transport market in the EEC is actually in accordance with the original purpose for the establishment of the EEC ie it is a step in the "process leading gradually to a Union with a federal goal"(page 135). The point is made that this ultimate objective of cooperation by member states is not because of integration of aviation resources as a main aim (ibid). Instead, it is part of a process resulting in "a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields" (ibid).

At page 136 the writer states:

> In view of these factors, the EEC presents a unique case and cannot, therefore be compared with the cases which have been discussed in the previous chapter. The field of integration is broader and the degree of integration is substantially higher. That is why the present chapter has been called *centripetal movements*: there is a tendency to build a new centre from which economic - and, perhaps at a later stage, political - activities are not only coordinated, but also administered. I should like to stress that these *centripetal movements* concern, in the first place, *economic policy* and *economic activities*. These movements are driven by cohesive forces in search of an economic centre serving as a binding factor between the participating states that are going to be united in *one* market. The same development does not, however, necessarily apply to the *political* field, neither in Western Europe, nor in Central or Eastern Europe. So far, a *balance* between the two movements has not been found.
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> It is submitted that, at least, as yet, in Western Europe, *air transport* is part of the *centripetal* movements in the economic area rather than of the *centrifugal* movements in the *political* area.
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> Historically speaking, this "option" for air transport is not self-evident, as the coming into being of the Paris Convention of 1919 and the Chicago Convention of 1944 have (sic) demonstrated. That is one of the reasons why the present chapter will reveal a *friction* between the latter convention and the EEC Treaty. The concluding chapter 8, in particular sections 8.2.4, 8.2.6, 8.2.7, 8.3 and 8.4 below, will give further attention to these questions.

The treatment of the EEC is not only relevant but topical. The writer begins with a discussion on the creation of the air transport market and this incorporates an introduction to the EEC's air transport law and policy (page 138 - 140). Next,

he deals with the relationship between air transport and the EEC Treaty (page 140-142), and cabotage as part of that common policy (page 142-145).

These discussions, however, have to be considered in the light of the word of caution counselled by Professor D Goedhuis who states (page 138):

> "The implication of global air transport should never be lost sight of. Tendencies in the world toward dealing with aviation problems on an *exclusively* regional basis should be combated. Regional problems should never be discussed apart from the world problems of aviation, and regionalism should never lead to the formation of blocks of closed sky".

In the concluding chapter (ie chapter 8) the writer summarises his postulations and conclusions, which include the following:

1 cabotage usually refers to the refusal of cabotage rights and reflects the protectionist (nationalist) tendency not to grant them;
2 a less extreme expression should be adopted to reflect current usage eg "domestic air carriage" should replace "cabotage";
3 "air carriage" is not similar to "air service";
4 the tendency is towards regional integration of aviation resources which may even result in the establishment of an aviation union of states "composed of two or more sovereign states...which act as one contracting State" under the Chicago Convention (page 186);
5 a reconsideration of article 7(1) of the Chicago Convention 1944;
6 nondiscrimination as a principle in international relations and the necessity to delete article 7(2);
7 the privatisation of airlines and the growing practice in increasing foreign ownership in airlines vis-a-vis article 7 of the Chicago Convention 1944; and
8 the proposal for a more uniform regime for air services as an economic activity which includes the convergence of the regimes which govern trade in goods and services, the right to carry traffic as a right of access, jurisdiction and control over a market, the legal regime and policy for access into a market, and the barriers which affect the carriage of domestic traffic.

Finally, at the end of chapter 8 is an interesting chronological annexure which sets out a step by step approach towards a new cabotage (or non-existent cabotage) regime. This ultimate new stage envisages the abolition of nationality and regionalism in civil aviation; the registration of aircraft with a central international authority; the introduction of a freedom to facilitate transnational airlines in the operation of international domestic air services; and a multilateral treaty on the regulation of competition. If all of these can be achieved cabotage will become a dinosaur suitable for study as historical fact only.

As to the layout of the book, it is divided into the usual chapters with an unusually detailed table of contents (page I -IV). There is a useful list of acronyms and abbreviations (page XIX-XX). One small item which was unusual but helpful is the reference to "Foreign Affairs" as "An American Quarterly Review" in the footnotes (note 39 page 13). At the end of the book are useful appendices (seven of them) and there are also a selected bibliography and subject index. But what was a tad surprising was there was no table of cases.

If one wished to nit-pick, there were some slips in the technical presentation. For example, in the Acknowledgements, "whish" should read "wish" (line 13 page V) and "precisly" should be "precisely" (line 1 page 51). There are grammatical errors like "Jurisdiction and control is (sic) determined by, and varies (sic) according to, ..." (last line page 29); "The wish to set up air services on a regional basis, and concern that this would be affected by the non-exclusivity clause of the cabotage provision, was (sic) certainly present..." (line 5 page 49); and "The SAR may engage into (sic) economic relations..." (line 7 page 86). There are also examples of clumsy expression which affect the meaning of the sentence eg "The far-reaching consequence of this would be grant of aircraft of contracting states to *automatic* access the territory of the grantor state,..." (page 42). Another example is: "In other words, the arrangement between A en B may not provide *beforehand* that access to the carriage of A's domestic traffic will be denied to contracting state C or one of its airlines" (page 43). In all probability, the errors were the result of a translation from the Dutch into the English language or due to carelessness in typesetting.

Also, consistency (which is a hallmark of good legal writing) should have been adhered to. For example, the single abbreviated reference to "Chicago Convention" would have been sufficient. Instead, the writer used "the Chicago Convention" or "the Convention" interchangeably (line 5-6, page 18).

In relation to references, it would have been better if primary, rather than secondary, sources were used. For instance, in note 195 page 60, reference to the Ihlen declaration in the *Legal Status of Eastern Greenland case*[11] would have been more appropriate as authority when discussing the binding nature of oral representations in international law.

In spite of the above criticisms, the book is still superb and the quality of the substance transcends any negative observations which exist. It is actually the writer's PhD thesis which was presented to Leiden University in 1992. Like all good theses, it asked the right amount of questions and provided a sufficient number of answers and solutions. It is thorough in its research and cannot be faulted in this regard. Therefore, it is no wonder that Dr Mendes de Leon earned the *cum laude* award for his efforts and he should be congratulated on an excellent effort indeed. He is presently the Director of the International Institute of Air and Space Law at Leiden University and is well known in international aviation circles. His other publications include *Air Transport Law and*

Policy in the 1990's[12] and *Air and Space Law: de lege ferenda*[13]. However, this book by him is his most important (academic) achievement.

Footnotes

1 Cheng, B, "The Law of International Air Transport", 1962, page 17.

2 Encyclopaedia Britannica, vol 6, 9th ed (1877), page 205.

3 The Macquarie Dictionary (1981).

4 See note 1.

5 The Kingdom Statute 1954 Article 37.

6 Ibid Art 3b.

7 International relations fall within the external affairs power of the Australian federal government: Australian Constitution section 51 (29); see *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth of Australia v Tasmania* (1983) CLR 1; *Richardson v Forestry Commission* (1988) 164 CLR 261.

8 Australian Constitution section 51(i). Note *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *R v Poole; Ex parte Henry* (No 2) (1938) 61 CLR 634; *Airlines of New South Wales Pty Ltd v New South Wales* (No 1) (1964) 113 CLR 1; *Airlines of New South Wales Pty Ltd v New South Wales* (No 2) (1964) 113 CLR 54.

9 Eg New South Wales Constitution section 5. Note Australian Constitution section 109 which provides that in the event of an inconsistency between Australian and state legislation, the former shall prevail.

10 Eg Hazelton Airlines which operates in NSW. Note that although the domestic avaiation industry in Australia is supposed to be deregulated, there is still a certain amount of regulation at the intrastate level. For instance, Tasmania is very regulated whilst South Australia, Victoria and Northern Territory are not. A certain degree of regulation exists in New South Wales, Queensland and Western Australia.

11 PCIJ 1933 Series A/B, No 53.

12 Published by Martinus Nijoff, Dordrecht, 1991.

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