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# ALTITUDE



Current Issues in Aviation and Logistics from Benesch's Transportation & Logistics Practice Group

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## Frequency Check: Is Your UAS FCC Compliant?

The past decade has seen a rapid increase in the use of unmanned aircraft systems ("UAS") (sometimes, though unusually inaccurately, called "drones"). The integration of UASs into the national airspace continues to be an area of major attention for the FAA and industry proponents. While the FAA naturally plays a crucial role in this process, UASs by definition, are unmanned. As such, it is equally critical that UAS manufacturers ensure compliance with all applicable requirements of the Federal Communications Commission ("FCC"), as evidenced by the FCC's recent civil penalty imposed against Lumenier Holdco LLC (f/k/a FPV Manual LLC) ("Lumenier").

Lumenier sold a series of UASs that were marketed purportedly as constituting Amateur Radio equipment. Generally speaking, equipment that is for amateur use is typically exempt from FCC certification requirements. The problem, however, was that many of Lumenier's UASs did not operate on approved frequencies and operated on frequency bands reserved for federal aviation navigation and communication (amongst other unapproved bands). Further, even some of UASs that operated in approved frequencies still used unauthorized transmitters which exceeded the authorized power limit (1 watt) for model aircraft.

Lumenier ceased all sales of the deficient UASs upon notice from the FCC. However, this was not enough for the FCC. Instead, the parties entered into a Consent Decree in which Lumenier admitted liability. Even though there were fortunately no adverse incidents that occurred, the FCC also imposed a civil penalty of \$180,000 against Lumenier.

The significance is obvious: UAS manufacturers must ensure that all aspects of their equipment are compliant with FCC regulations. Whether a UAS is FCC compliant is not simply limited to ensuring operation in approved frequency bands. UAS manufacturers must also ensure the transmitter's compliance with the FCC's Equipment Authorization and Marketing Rules, including but not limited to power limits and any potential equipment registration and approval requirements.

Companies must engage qualified counsel to ensure their devices comply with all FCC requirements and should not rely on internal technical expertise alone. Failure to ensure compliance may result in steep fines from the FCC or potentially even more onerous penalties (not to mention negative press), even if no adverse incidents ever occur.



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## IATA-FIATA Pilots New Airline/Forwarder Relationship

Airlines and air forwarders are changing their global relationship for the first time in decades with the launch of a new International Air Transport Association (IATA) and International Federation of Freight Forwarders' Association (FIATA) Air Cargo Program. Canada was selected as the pilot country for the new IATA-FIATA Air Cargo Program. Implementation began in Third Quarter of 2017 with an effective date of January 2018. The timeline for a phased roll out for the remaining jurisdictions, including the United States, remains yet to be determined.

The new Air Cargo Program follows the creation of a joint IATA-FIATA Governance Board and a stated interest in updating the airline and air forwarder relationship to more accurately reflect current legal and economic realities. In so doing, this new structure is intended to align with the expectations of all parties in today's global air cargo market.

The key difference between the IATA-FIATA Air Cargo Program Forwarder Agreement and the legacy IATA Cargo Agency Agreement is that air

forwarders are recognized as principals in their own right in a buyer-seller relationship with the airlines. Under this new Air Cargo Program, air forwarders will bear direct responsibility to their shippers rather than serving as sales agents for the airlines. The new Air Cargo Program does not change the CASS program or any other operational criteria. The use of air waybills by forwarders likewise will not dramatically change apart from the new role as independent principal vis-à-vis the forwarder's shipper.

All current IATA Cargo Agents will automatically qualify for endorsement by IATA-FIATA as part of the new Air Cargo Program. The IATA-FIATA Air Cargo Program Forwarder Agreement is not

open to negotiation by forwarders. If an IATA Cargo Agent fails to accept the new Air Cargo Program Forwarder Agreement then its current IATA Cargo Agency Agreement will be terminated. Any such termination of IATA accreditation will require re-applying to become a IATA CASS Associate if it desires to continue using the program to settle freight charges.

Benesch's Transportation & Logistics Practice Group will continue to monitor the global roll-out of this new IATA-FIATA Air Cargo Program, including its impact to carriers, forwarders, and shippers.



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## Aircraft Lessor Lesson Learned: Is Your Aircraft Properly Insured?



David M. Krueger

Commercial transactions, particularly those involving aircraft lease agreements and insurance coverage, often involve numerous parties and complex relationships between them. The Eleventh

Circuit's decision in *Aviation One of Florida, Inc. v. Airborne Insurance Consultants (PTY), LTD, et al.*, No. 16-16187 (11th Cir. Jan. 11, 2018) serves as a prime example both of the importance of reviewing contractual terms, and exercising due diligence to ensure that such terms are adhered to by the opposite party.

While the underlying facts are convoluted, they are not unlike many commercial transactions. Aviation One of Florida, Inc. ("Aviation One"), based in Florida, leased an aircraft to S.A. Guinee, a Georgia company, for operation of an aircraft in West Africa. Aviation One required S.A. Guinee to obtain insurance on the aircraft, and specifically to obtain a breach of warranty endorsement.

S.A. Guinee contacted Airborne Insurance Consultant Ltd. ("Airborne"), an insurance broker based in South Africa, to obtain the necessary coverage. Airborne obtained coverage for the aircraft, but failed to obtain the required breach of warranty endorsement in a subsequent renewal of the policy. While the renewal policy was in effect, the aircraft crashed and was a total loss.

Aviation One filed an insurance claim through Airborne, but the insurance carrier rejected the claim on the grounds that the S.A. Guinee's renewal policy did not include a breach of warranty endorsement. Airborne subsequently recommended Aviation One retain the law firm of Clyde & Co., based in England, to

pursue a claim against the insurance carrier in South Africa. However, it was not disclosed to Aviation One that Clyde & Co. had a long-standing relationship with Airborne. Aviation One retained Clyde & Co. to represent it in a lawsuit in South Africa against the insurance carrier, but ultimately abandoned the suit without any recovery.

Aviation One then filed a lawsuit in federal district court in Florida against S.A. Guinee and Airborne alleging that they had negligently failed to obtain the required breach of warranty endorsement. Aviation One also filed suit against Clyde & Co., alleging that it had failed to disclose a conflict of interest through its relationship with Airborne.

Aviation One settled with S.A. Guinee. The district court then dismissed Aviation One's claims against Airborne on the grounds that the court lacked personal jurisdiction over Airborne. The district court also dismissed Aviation One's claims against Clyde & Co. on the grounds that the representation agreement provided that any disputes must be heard by a court of England.

### **Eleventh Circuit Affirms Dismissal**

The Eleventh Circuit affirmed the district court's dismissal of the claims. As to Airborne, the court noted that Airborne, which was located in South Africa, obtained the insurance coverage on behalf of S.A. Guinee, which was located in Georgia. While Aviation One was listed as an additional insured under the policy, the court affirmed that "Airborne did not solicit business in Florida, did not insure property or a risk in Florida, and had no direct contact with Aviation One in Florida before the crash."

As to Clyde & Co., the court affirmed that the forum-selection clause in its agreement with Aviation One required any disputes to be heard in England. Even though Aviation One alleged that Clyde & Co. fraudulently failed to disclose its relationship with Airborne, the court concluded that those allegations, even if true, did not invalidate the forum selection clause.

### **Practical Considerations**

In many ways, the result of *Aviation One* is not surprising. Generally speaking, a defendant must have some connection to the jurisdiction in

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## Montreal Convention Statute of Limitations Does Not Apply to Contributions Claims, S.D.N.Y. Holds



David M. Krueger

In *AGCS Marine Ins. Co. v. Geodis Calberson Hungaria Logisztikai KFT*, No. 16-CV-9710 (S.D. N.Y. 2017), the Southern District of New York recently held that a contracting carrier's claims for contribution and indemnification against actual carriers were not subject to the two year statute of limitations established by Article 35 of the Montreal Convention.

In the underlying facts, Geodis Calberson Hungaria Logisztikai KFT ("Geodis") contracted with AGCS Marine Ins. Co. ("AGCS") to ship computer equipment from Hungary to Pennsylvania. Geodis enlisted El Al Israel Airlines Ltd. ("El Al") to fly the equipment from Europe to the United States. Alliance Ground International, LLC ("Alliance") acted as El Al's ground handling agent upon the equipment's arrival in the United States in New York, and PAI Trucking Corp. ("PAI") ultimately transported the equipment by motor carrier from New York to the destination in Pennsylvania.

Just over two years later, AGCS sued Geodis as the "contracting carrier," alleging that the equipment had arrived in a damaged condition. Several months later, Geodis filed a third-party complaint against El Al, Alliance, and PAI (collectively the "third-party defendants"), on the grounds that the third-party defendants were liable as the "actual carriers," and sought damages for contribution and indemnification. (Geodis originally included a claim for negligence, but abandoned the claim.)

Article 35 of the Montreal Convention provides that "[t]he right to damages shall be extinguished if an action is not brought within a period of two years." The third-party defendants moved to dismiss the claims against them, arguing that Geodis's claims were filed more than two years later, and therefore barred by Article 35. The district court rejected this argument. The court concluded that the "right to damages" under Article 35 related to a claims by which a passenger or consignor sought to hold a carrier liable for damages. But, the court reasoned that Geodis was not seeking damages for the computer equipment itself. Instead, as the contracting carrier, Geodis was seeking contribution from the actual carriers for any compensation for which it may ultimately be held liable to AGCS, and thus was not a standalone claim for damages.

In making this determination, the court looked to Article 37 of the Montreal Convention, which provides that "[n]othing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person." The court concluded that applying a two year statute of limitations to contribution and indemnification claims by a contracting carrier against an actual carrier would create a conflict between Articles by limiting Geodis's "right of recourse" against the third-party defendants, which is prohibited by Article 37. Instead, the court held that whether Geodis could pursue its claims against the third-party defendant was governed by state law as provided by Article 45 of the Montreal Convention, which applies to claims by carriers against other carriers. As Geodis's claims against the third-party defendants were timely under state law, the court denied the motion to dismiss the contribution and indemnifications claims.

As such, when faced with claims under the Montreal Convention, carriers should not be dissuaded in pursuing claims for contribution and indemnification from other carriers that may ultimately be liable simply because of the two-year limitations period provided by the Montreal Convention. Instead, carriers should look to the applicable state law in determining whether they may pursue such claims against third-parties that may be ultimately liable to a passenger or consignor.

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## Aircraft Lessor Lesson Learned: Is Your Aircraft Properly Insured?

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which it is being sued, and courts often uphold forum-selection clauses between contracting parties that require disputes to be heard in certain courts. There are, however, two significant takeaways from *Aviation One* that may have changed the outcome or prevented the entire situation from arising in the first place.

First, lessors should require lessees to provide copies of current insurance policies covering any leased equipment, and should review those policies to ensure their continuing compliance. When a lessor leases equipment and the lessee must provide insurance coverage, it is a common contractual term that the lessee must provide up to date insurance policies to the lessor (whether for aircraft or any other type of equipment). Just as importantly, lessors should always review, or have qualified counsel review, any updated policies to ensure that there are no inadvertent changes in coverage—exactly what happened in *Aviation One*.

While relegated to a footnote in the Eleventh Circuit's decision, the court noted that the breach of warranty endorsement that spurred the entire litigation *may* have been included in the original insurance policy Airborne had procured, but was subsequently (for reasons unknown) left off the renewal insurance policy that was in effect at the time of the accident. This likely would not have changed the *outcome* of the court's decision, but the entire dispute may have been avoided in the first if due diligence had been exercised to review the renewal insurance policy to ensure it contained the required coverages.

Second, contracting parties should always pay attention to all contractual terms, including seemingly innocuous provisions such as forum selection clauses, to ensure they can effectively prosecute (or defend) their rights in the event of a later dispute. In *Aviation One*, the district court in Florida almost certainly had personal jurisdiction over Clyde & Co., but *Aviation One* ultimately doomed itself by previously agreeing that any disputes with Clyde & Co. would only be heard in England. Similarly, while *Aviation One* did not have direct contact or direct relationship with Airborne until after the aircraft accident, it was aware of Airborne's involvement in obtaining the coverages at issue on behalf of S.A. Guinee.

Multiple transactions involving multiple parties frequently pose complications for where subsequent disputes will be heard, often to the detriment of the lessor or the party at the "top of the chain" when delegating contractual responsibilities to lessees. Lessors should involve qualified counsel to ensure their rights are protected "down the line" in any commercial transactions.

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*As a reminder, this Advisory is being sent to draw your attention to issues and is not to replace legal counseling.*

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