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ALTITUDE

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

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New Air Cargo Screening Regulations Go Into Effect For International Shipments To U.S.

David M. Krueger

Effective June 12, 2018, U.S. Customs & Border Patrol (CBP) has implemented new interim final rules regarding Air Cargo Advance Screening (ACAS) for inbound aircraft into the United States that have commercial cargo on board. See 83 FR 27380. CBP believes that the existing regulatory time frame for transmitting air cargo data, and accompanying requirements, may be insufficient to identify high-risk cargo until it is already en route to the United States. The intent of the new rules is to allow CBP to conduct risk assessments prior to the aircraft's departure for the United States.

In December 2010, CBP, in conjunction with TSA and the air cargo industry, began operating a voluntary ACAS pilot program to collect certain advance air cargo data earlier in the supply chain. Pilot participants provided CBP with a subset of specific pilot data as early as practicable prior to the loading of cargo onto the aircraft. To address the identified security concerns, CBP is implementing a mandatory ACAS program, intended to obtain the most accurate data possible while minimizing the impact on the flow of commerce.

The new ACAS requirements apply to any inbound aircraft required to make entry under 19 CFR 122.41 that will have commercial cargo aboard. These are the same aircraft that are subject to the current 19 CFR 122.48a requirements. Under the amendments, an inbound air carrier and/or other eligible ACAS filer must transmit specified air cargo data to CBP earlier in the supply chain so that CBP can perform the necessary risk assessments prior to the aircraft's departure for the United States. Generally speaking, the key amendments are:

- **Timing of data submission:** as early as practicable, but no later than prior to loading of aircraft.
- **Data submitted:** Mirrors ACAS pilot program requirements, but includes conditional requirement of Master air waybill number and optional data point for Second Notify party.
- **Eligible filers:** Now allows indirect air carriers to constitute eligible filers (in additional to air carriers and previously eligible filers).

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- **Bond requirement:** All ACAS filers are required to have an appropriate bond.

The interim final rules went into effect June 12, 2018, though comments may still be submitted on the rules until August 13, 2018.

Failure to comply with the new requirements may result in penalty of $5,000 for each violation. CBP may also assess penalties for violation of the new ACAS regulations where CBP deems that such penalties are appropriate. CBP states that it "will show restraint" in enforcement of the new rules for the first year (until June 12, 2019). Air carriers, indirect air carriers, and other persons involved in the shipment of international cargo should consult with counsel and review all policies and procedures to ensure compliance with the new ACAS reporting requirements.

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David is a partner with the firm's Litigation and Transportation & Logistics Practice Groups, representing businesses in commercial and consumer disputes, aviation, and class action litigation, and maintains currency on both his private pilot and remote pilot certificates.

FCC Seeks $3 Million Fine Against Drone Company

David M. Krueger

In June, the Federal Communications Commission ("FCC") proposed imposing a $2.86 million fine against HobbyKing, a seller of "first-person view" navigation devices for unmanned aircraft systems ("UASs"). We previously reported a $180,000 civil penalty that the FCC imposed on Lumenier Holdco LLC ("Lumenier") for marketing UASs that operated outside of approved radio frequencies and exceeded FCC approved power levels.

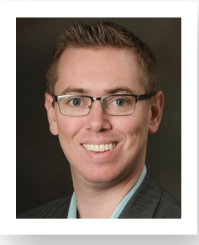
As was the case with Lumenier, the FCC found that the devices sold by HobbyKing violated Section 203 of the Communications Act by operating on unapproved frequencies and by using excessive power levels. The FCC also rejected a disclaimer on HobbyKing's website that attempted to shift responsibility to consumers for determining whether the devices were in compliance with "local laws" prior to purchasing. The FCC's rejection of this defense is the result of the fact that the Equipment Authorization and Marketing Rules prohibit advertising non-compliant devices for sales, independent of whether sales actually occur.

The severity of the proposed fine against HobbyKing is the result of numerous additional factors, including the fact that HobbyKing is still selling non-compliant devices in the U.S. even after notification from the FCC. The FCC also recently issued an enforcement advisory regarding the sale of drones and, as evidenced by its actions against Lumenier and HobbyKing, is stepping up its enforcement activity.

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 from $20,000 to $150,000 *per day*, even if no adverse incidents ever occur.

Northern District of California Dismisses Claim Against Lufthansa



David M. Krueger

In *Wendelberger v. Deutsch Lufthansa AG*, No. 18-cv-01055, 2018 U.S. Dist. LEXIS 88532 (N.D. Cal. May 25, 2018), the Northern District of California recently dismissed a claim against Deutsch Lufthansa AG ("Lufthansa") on the grounds that the court did not have subject matter jurisdiction over the claims in the United States. In the underlying facts, the plaintiffs had purchased round-trip tickets from Lufthansa for carriage from Vienna, Austria, to Boston, Massachusetts, with layovers in Frankfurt, Germany. On the flight, a cup containing scalding water slid off the seat and injured the plaintiff. The plaintiff and her husband filed claims for mental distress, embarrassment, and loss of spousal support. However, the plaintiffs filed suit in California, rather than Austria. Lufthansa moved to dismiss the claims on the grounds that the Northern District of California did not have jurisdiction over the claims.

Article 33 of the Montreal Convention, which governs international air carriage, provides that an injured party may present a claim for damages in a territory of the State Party to the Convention before a court (1) of the domicile of the carrier or of its principal place of business; (2) where the air carrier has a place of business through which the contract has been made; or (3) before the court at the place of destination. The plaintiff argued that the "place of destination" was in the United States, thereby giving rise to jurisdiction in the United States.

Under Warsaw Convention, the predecessor to the Montreal Convention, when a round-trip ticket was purchased, the "place of destination" was uniformly held to be the ultimate place of destination at the end of the round-trip, and did not include any intermediary locations. When the Montreal Convention was adopted, Article 33 of the Montreal Convention was substantively identical to its predecessor provision. Despite this, the plaintiffs argued that the "place of destination" related to a particular aircraft, or a particular leg of a flight, and argued that the court should not simply adopt the holdings under the predecessor Warsaw Convention.

The court squarely rejected this argument, concluding that in light of the near-identical language between the Montreal and Warsaw Convention, there was no need to depart from prior precedent. Accordingly, because the plaintiffs' "place of destination" was Austria, and without any other grounds to justify jurisdiction in the United States, the court dismissed the claim.

By itself, the outcome of *Wendelberger* is not surprising and is consistent with decades of prior precedent regarding jurisdiction under the Montreal and Warsaw Conventions. However, the key takeaway is that the plaintiffs attempted to rely on a recent decision from the Sixth Circuit, *Doe v. Etihad*, 870 F.3d 406 (6th Cir. 2017), in

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attempting to persuade the court to ignore prior precedent from the Warsaw Convention to reach a different conclusion. As we have previously reported in prior issues, the Sixth Circuit's decision in *Etihad* represents a radical departure from prior decisions applying the Warsaw Convention to claims under the Montreal Convention.

Just like the plaintiffs attempted to do in *Wendelberger*, we have previously warned that *Etihad* will encourage plaintiffs to file new lawsuits on previously well-settled issues, whether as part of a legitimate attempt to change the course of precedent under the Montreal Convention, or simply to try and create leverage for settlements. Indeed, *Wendelberger* involved a completely different issue than what was presented in *Etihad*, and while the plaintiffs' attorney seemed to acknowledge the likely difficulties they faced in their claims, they claimed that *Etihad* gave them a sufficient "good faith" basis to continue prosecution of their claims "unless the parties settled."

The court in *Wendelberger* considered, but did not impose, sanctions on the plaintiffs' attorney, finding that the arguments were not necessarily frivolous "given the Sixth Circuit's entertainment of related arguments (albeit in a substantially different context)." Thus, whatever the context of potential claims under the Montreal Convention, air carriers must continue to be prepared to defend against new claims that attempt to rely on *Etihad*, and be prepared to discuss the factual and legal issues of *Etihad* and why no other courts should follow it.

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