



LEGAL EASE

Aviation Law Made Simple

BY JASON DICKSTEIN
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Aviation Industry is No Stranger to an Interdependent Global Society

Recent economic events have reinforced the homily that we live in a global economy. Cascading bank and securities failures resonating across the globe have shown how interdependent the economies of the world have become.

The aviation industry is no stranger to globalization. Aviation is one of the prime instrumentalities of globalization. Since 2001, the air cargo industry has hauled 326.1 million tons of goods valued at \$437 billion. Last year alone, in a depressed economy, the air cargo industry still was responsible for the carriage of 36 million tons of goods valued at \$49 billion. During the past five years (2005-2009), this has totaled 195.7 million tons of goods valued at \$273 billion.

During times of global recession, economists often fear protectionist reactions. Protectionism shields local economies, but inhibits the global interactions helping to facilitate international trade. Of course, those same interactions also facilitate international interdependence, which leads to international cascading failures when one large economy is in trouble.

Thus, it is with some joy international economists receive the news from a recent World Trade Organization/Organization of Economic Cooperation and Development/United Nations Conference on Trade and Development report on protectionist measures.

The joint WTO/OECD/UNCTAD report concluded that fears of rampant protectionism were misplaced.

But perhaps the reports are not fully accounting for trade inhibitions; perhaps protectionism is simply taking another form. Trade limits can be overt. For example, Brazil has published a list of 102 target United States goods, upon which it intends to levy punitive tariffs as punishment for U.S. non-compliance with a WTO ruling concerning U.S. cotton subsidies. The list is made up mostly

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According to the report, new import restricting measures by the G20 nations cover around .7 percent of G20 imports. These numbers are down from 1.3 percent of G20 imports from the period of October 2008 to October 2009, which is the last time a similar report was issued. The report also indicates nearly half of these import restrictions were related to fuel.

of consumer goods and automobile engines, so AEA members should be largely unaffected, although headphone tariffs increase from 20 percent to 40 percent. However, trade limits can be more subtle.

Countries can take “safety-related” actions that effectively inhibit trade, but are not recognized as protectionist measures because of the claim of a safety basis. Technical barriers

The predicted compromise would permit the U.S. to enter into bilateral agreements with other governments, such as the current maintenance implementation procedures, and to rely on audits conducted under those bilateral agreements in lieu of live audits by U.S. inspectors.

like this are largely prohibited under the Agreement on Trade in Civil Aircraft, but they are permitted when they relate (or are alleged to relate) to safety.

U.S. Initiative Impacting Maintenance Globalization

As I was writing this column, Congress was considering an FAA Reauthorization Bill that would impose new burdens on repair stations outside the United States that want to hold U.S. FAA repair station certificates to work on U.S.-registered aircraft.

The proposed legislation would require two audits a year to be conducted by FAA inspectors. Failure to obtain such inspections would mean the non-U.S. repair station would lose its FAA credentials and would be unable to maintain or alter U.S.-registered aircraft (or the parts removed from such aircraft). It is not the fact of the inspections that entails the greatest burden; it is the lack of resources for supporting these inspections that causes a problem.

Already strapped for cash to sup-

port its program, the FAA would have to add inspectors to its international field offices to be able to support the twice yearly audits for the roughly 500 “foreign” repair stations holding FAA repair station certificates. With no additional funding being provided to support this burden, the FAA would either have to tax the repair stations to pay for the additional costs (an option permitted under the current FAA regulations) or it would have to cut back on the total number of extraterritorial repair station certificates it issues to a limit that can be fully supported by the existing staff.

Government is the art of the possible, and the U.S. already seems to have identified the compromise solution it likely will implement. The predicted compromise would permit the U.S. to enter into bilateral agreements with other governments, such as the current maintenance implementation procedures, and to rely on audits conducted under those bilateral agreements in lieu of live audits by U.S. inspectors.

But this solution does not help

everyone. The U.S./European Union bilateral agreement still remains unimplemented, and while the U.S. currently has bilateral agreements with 13 of the 27 EU nations (Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Italy, the Netherlands, Poland, Romania, Spain, Sweden, and the UK), there are only three countries with MIPs in Europe: France, Ireland and Germany. Repair stations in other EU nations likely would need to be subject to the U.S. FAA audits unless the U.S.-EU agreement is implemented. And repair stations in nations that do not have MIPs with the U.S. would have no recourse but to submit to the audits or lose their FAA certificates.

Repair stations in countries like Canada could be affected unless the language of the bill is changed to preserve the current relationship between the U.S. and Canada (or unless it is redrafted to meet the new statutory requirements). In fact, the current language of the bill

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addressing “non-certificated maintenance organizations” would preclude Canadian repair stations from performing work because they are not Part 145 organizations (they are 571 organizations).

This FAA inspection burden likely would be implemented shortly after the new TSA rule, which would require initial auditing of repair stations’ security programs. This rule would permit periodic inspections, but it does not set a schedule or minimum frequency for such audits. Together, the programs likely would require about three audits each year of non-U.S. repair stations by U.S. inspectors.

What would be the likely impact? Some non-U.S. repair stations probably would decide a FAA certificate is not worth the burden and would surrender their credentials. Others probably would incur significant expenses to submit to the additional audits. The European Parliament and EASA already have plans to impose reciprocal auditing burdens on U.S. repair stations holding European certificates, to the extent necessary to mirror the U.S. burdens imposed on European repair stations.

The timing of these U.S. efforts is ironic, in that the International Civil Aviation Organization is considering proposals calling for recognition of foreign repair station certificates at face value. ICAO is the international body charged with promoting global aviation safety and cooperation.

Globalization is important, and the FAA does not always have control of

the globalization equation — not even the U.S. aviation safety component of the equation.

Implementation of Safety Management Systems

The FAA has been promoting the idea of safety management systems. SMS is an ICAO mandate and something the civil aviation authorities of the world have been directed to incorporate into their regulations. In the United States, the momentum of the SMS movement is making it appear as though we must adopt some sort of SMS regulation to avoid being subject to disparate SMS standards from each of the foreign markets our businesses affect — which could impede the ability of U.S. repair stations to provide maintenance to customers from outside the United States.

As ICAO envisions it, SMS would be imposed on repair stations, air carriers and manufacturers. At a paradigm level, SMS resembles a quality management system with a few additional features. The additional features include collection of data to support safety risk analysis, risk-based analysis of the safety data, proactive identification of potential hazards, and a plan for mitigating or remedying identified hazards.

The FAA’s suggested implementation of SMS was published in FAA Order 8000.367. It is meant to serve as the template for SMS in the United States. But the U.S. template diverges in subtle, yet critical ways from the ICAO recommendation.

For example, ICAO’s SMS manual envisions a paradigm of continuous improvement of the SMS. In explanatory text, the ICAO SMS manual states

the regulated organization should develop a formal process to identify the causes of substandard performance of the SMS, determine the implications of substandard performance of the SMS in operations, and eliminate or mitigate such causes. It is envisioned as continuous improvements aimed at those elements of the program the safety policy identifies as being substandard.

Contrast this with the FAA’s SMS order, which talks about a continual improvement to the level of safety. Under the ICAO plan, continual improvement to the level of safety is a government obligation under the government’s state safety program, not a private industry obligation under the SMS. Under the ICAO-recommended paradigm, the FAA should be responsible for periodically raising the bar. But such bar-raising activities are accomplished through normal rulemaking activities that guarantee a level of due process in accordance with traditional legal norms.

By shifting the burden to raise the level of safety to make it an obligation of the regulated industry, the FAA creates the potential for a regulatory system that violates due process standards by imposing changing safety standards without the formalities of rulemaking, and equal protection standards because companies are required to improve, so they must meet ever-higher standards unique to each company and inconsistent across the industry.

It is subtle changes like this that turn a regulation that could be easily integrated into the U.S. system into a potential regulatory blank check.

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Worldwide Impact: Implementing SMS in the U.S.

This might have some readers clamoring to abandon the SMS paradigm. Some people claim it is not reasonable

for the U.S. to abandon SMS as a regulatory fixture. Because of the globalization of the aviation marketplace, ICAO enjoys a strong influence as an arbiter of international aviation regulatory standardization.

Already, a number of nations have implemented SMS regulations on the

ICAO model. And these non-U.S. implementations are one of the elements driving implementation in the United States.

Implementation, or at least recognition, in the U.S. of SMS has become important for international trade reasons. If the U.S. does not implement SMS in its regulations and its major trading partners do implement it, then the trading partners would be justified in insisting that U.S. certificate holders comply with the non-U.S. SMS provisions as a condition of market access. This is partly because SMS provisions are deemed to be safety requirements.

For an avionics manufacturer intending to sell to many markets, this means the manufacturer must meet all of the potentially conflicting standards from the various markets in which the manufacturer intends to do business. On the other hand, if the U.S. has its own SMS program, the U.S. easily can assert its program achieves the same goals and should be subject to recognition in the foreign nations. Repair stations with multiple certificates (such as FAA, EASA, CAAC, TCCA, etc.) will recognize the value in having similar standards the various regulatory authorities can validate easily.

So, U.S. implementation of SMS for repair stations and manufacturers makes more sense as a trade issue than as a true safety issue (for repair stations and manufacturers already employing rigorous quality and continuous operational safety systems, the safety case for SMS is highly speculative because most of the useful elements of SMS already exist in the regulatory system).

This does not mean, however, the FAA implementation concept envisioned in Order 8000.367 is the only way to implement. Gap analyses have

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shown most of what SMS requires already is contained in Part 21 (the manufacturing rules) and in Part 145 (the repair station rules). So, the most painless implementation would be to add the elements not yet contained in the regulations and declare victory. This likely would entail adding clauses to Parts 21 and 145, and either Part 119 or Parts 121/135.

The FAA has expressed a preference for a single, uniform SMS regulation that would exist in a separate place in the regulations and be applied to each of the certificate holders described in its last paragraph. There are cosmetic justifications supporting this approach. It would be easy to point to a separate SMS part and claim the U.S. is in compliance with ICAO provisions, while the FAA would need to work a bit harder to demonstrate SMS is encompassed in each of the regulatory structures to which it applies.

It also would be easier to make uniform changes to SMS when changes are warranted. But it would impose a uniformity of implementation that might not serve the best interests of safety. Manufacturers, air operators and repair stations are not built the same and do not operate the same. Trying to impose a uniform SMS mechanism on them all might be like trying to fit a square peg into a round hole.

If we recognize safety resources are not infinite, then we must recognize the resources spent on implementing an SMS system that does not work well, might be resources taken away from a safety system that could have worked better. For example, resources spent on risk analysis of low-risk issues could have been spent on mitigating well-known, higher-risk issues that do not need risk analysis to be identified.

Thus, the assumption an SMS must

be “automatically superior” to a system that does not feature risk-based analysis might be a faulty one. No one has yet developed sound data to support or refute such a hypothesis

regarding the usefulness of SMS in small organizations.

This is an issue on a fast track, so it will continue to deserve headlines in the months to come. □

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