

Treaty, Regulatory, and Common Law Liability of Cargo Carriers: A Primer

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Introduction

There are various ways air cargo carriers can be potentially subject to civil claims for damages to property and persons during operations. International treaties, federal-agency regulations, and state common law standards may all impose liability. This article will help air cargo carriers navigate the different bodies of laws and regulations and understand more completely when they might be liable, what they might be liable for, and which agency or body of law might govern.

International Treaties

International treaties have long governed shipment of air cargo across international borders, and air cargo carriers should be aware of their scope. The Warsaw Convention, adopted in 1929, established uniform liability rules for damages arising from international air transport of passengers, cargo, and mail. But in later years, the Warsaw Convention's amendments, other laws and regulations, court decisions, and private agreements among carriers setting up parallel liability rules served to create a complex and sometimes-inconsistent patchwork of standards and holdings. The 1999 Unification of Certain Rules for International Carriage by Air, otherwise known as the Montreal Convention, helped re-establish uniformity and still governs today. It applies to international air carriage of passengers, cargo, and mail whether for reward or performed gratuitously.

The Montreal Convention imposes liability on air cargo carriers for the destruction, loss, or damage to cargo during international flight unless the destruction, loss, or damage is caused by something or someone else (Article 18). The Convention also provides for additional limits on carrier liability, establishes formulas for calculating damages, and prevents carriers from limiting liability through contract. Additionally, and significantly, Article 29 bars all other claims, including state-law claims, when an action for damages falls within the substantive scope of one of three liability-creating provisions. So if Article 18 were to apply, for example, the Montreal Convention would be the exclusive instrument by which a claimant could seek redress for his or her damages.

While the Montreal Convention imposes liability for destruction, loss, or damage to cargo during international flight, it also sets a ceiling for the amount of damages that can be recovered, the situations in which a claimant can bring suit, and the types of claims that a claimant can bring. These are important limitations to know.

Two recent cases illustrate when the Montreal Convention does and does not apply. In a 2016 case, a wholesale distributor of dairy

products contracted with an airline for the shipment of cheese from Paris, France, to New York. United States Customs and Border Protection (CBP) and Food and Drug Administration (FDA) conducted a six-day inspection before releasing the cheese to the distributor. When it finally did, the cheese was rancid, and the distributor sued. Because the flight was international and both France and the US are signatories, the Montreal Convention's Article 18 governed.

The court held, however, that the airline could not be liable for damages. First, the distributor could not prove the shipment was damaged during flight, a prerequisite to holding the airline liable. It was possible the shipment was unmarketable to begin with. And, second, it was possible the CBP and FDA's inspection, an act by public authorities, ultimately caused the damage. In this event, the airline still would not be liable.

In another ongoing case, filed in 2015, an individual contracted with a multinational courier-delivery-service company for the shipment of two packages of iPhones from Chicago, Illinois, to Dubai, United Arab Emirates. The individual sued the air carrier for negligence and breach of contract when one of the packages did not arrive, alleging the air carrier had lost his package. A US federal district court found the air carrier's argument, that the Montreal Convention should apply, unavailing. The Convention did not govern because Article 18 covers only damage to cargo sustained "during the carriage by air." Here, the shipment never left the air carrier's facility.

Federal-Agency Administrative Action

Air cargo carriers are also subject to a number of federal regulations promulgated by national aviation authorities. The regulations cover an air carrier's aviation operations, as well as the transport of cargo itself.

For example, the United States Federal Aviation Administration (FAA) is responsible for the safe flight of civil aircraft in air commerce and the safety of US airspace. It also enforces regulations governing air transportation of hazardous materials. The FAA's enforcement program is outlined in FAA Order 2150.3B, which also articulates the Agency's "compliance philosophy" for safety oversight. Under its compliance philosophy, the FAA will exercise discretion based on a number of factors, including the severity and frequency of infractions, to find the most effective means to ensure regulatory violations are not repeated. Civil penalties and fines, as well as other Agency actions such as certificate suspension or revocation, are available to the FAA by US statutes and regulations to ensure compliance by cargo carriers and other operators.

A 2017 case arising from FAA enforcement actions addressed whether two actions brought by the FAA against the same air carrier for hazardous-materials violations should be consolidated into one case. The air carrier argued that the cases raised the same legal issue, that there were common facts between them, and that they could save unnecessary effort and expense if consolidated. The FAA argued against consolidation because the alleged violations occurred on different dates, involved different materials, alleged different secondary violations, and judicial notice of facts in one case could prejudice the other. The Administrative Law Judge found that consolidation was warranted, but allowed additional discovery to mitigate prejudice from the matters of concern to the FAA.

State Common Law Liability

Where air cargo carriers are not subject to civil claims under international treaties or federal-agency regulations, they still may be subject to civil claims asserted by private plaintiffs, typically in state court. In the US, the most common state-law claims are negligence, wrongful death, wrongful survival, and breach of contract. In a negligence claim, a claimant must prove four elements to succeed: 1) the air cargo carrier owed a legal duty to the claimant; 2) the air cargo carrier breached its duty; 3) the breach of duty was the legal and proximate cause of damages to the claimant's person or property; and 4) the claimant suffered harm or damages.

Wrongful-death or survival claims are similar to negligence claims, but because the would-be claimant is deceased, close surviving family members or the decedent's estate are the ones who bring suit. The damages in these claims also are typically higher than in negligence claims. In breach-of-contract claims, a court, jury, or arbiter will determine whether there was an enforceable agreement between the parties, whether a breach of any provision occurred, and whether the breach caused the claimed economic damages. In the US, both judges and juries determine whether these elements have been met.

In 2015, relatives of crewmembers killed in an airplane crash in Afghanistan sued a private cargo operator in state court alleging negligence and wrongful-death claims. The plane was carrying military cargo that, during takeoff from Bagram Air Force Base, allegedly broke loose, penetrated a pressure bulkhead, and caused the plane to crash. Plaintiffs alleged that the captain became aware of a broken cargo strap before take-off and even discussed re-securing the load.

One dispute centered on whether the case should be heard in federal or state court. The air carrier argued it was a "federal actor" because it was transporting military cargo at the direction of the US government, and, therefore, a federal court should hear the case. However, the federal court reviewing the request determined the carrier did not establish all of the elements required to remove the case from state court.

First, the court found the air carrier did not establish a causal nexus

between its actions and the US government's direction. Although the air carrier was performing its duties under a US government contract, it had significant discretion over shipping the cargo and was not acting under the government's direct authority.

Second, the court found the carrier did not have a plausible federal defense to the plaintiffs' claims. The carrier raised three unsuccessful federal defenses, including that the claims arose from the military's combat activities, which are specifically excepted from the Federal Tort Claims Act. The court found even though the air carrier was supporting broad combat objectives of the US government, the specific flight was not "aiding the military in swinging 'the sword of the battle.'"

The case has not yet been resolved. But it does show that air cargo carriers may be subject to state common law claims for damage to property and persons even when conducting operations tied to federal interests.

Conclusion

Potential liability from various sources, as well as in many venues, is a consequence of providing the essential service of moving goods by air. The highlighted cases show that cargo carriers face many of the same issues as other litigants: determining the applicable law, defending in several forums, developing facts, and raising relevant defenses such as causation and damages. However, cargo carriage is a highly regulated industry with a specialized body of law. It is critical to retain experienced aviation counsel when claims arise, especially in the international context, to ensure that appropriate defenses are developed.

About Dean E. Griffith, Of Counsel, Jones Day

Dean Griffith focuses his practice on aviation regulatory matters including air carrier, on-demand, fractional ownership, agricultural, helicopter air-ambulance operations, and unmanned aircraft. Dean held both law- and policy-related positions during his more than nine-year career at the Federal Aviation Administration (FAA).

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John Goetz has nearly 30 years of experience defending companies in business and tort litigation. A recognized authority in aviation and transportation litigation and defended multinational companies in trial and appellate courts across the US, Canada, and Europe. A licensed pilot, John leads Jones Day's airlines and aviation-industry practice. John also counsels clients in NTSB investigations and in FAA proceedings.

About Jennifer J. Yeung, Associate, Jones Day

Jennifer Yeung is an associate in Jones Day's New Lawyers Group and recently graduated magna cum laude from the Duquesne University School of Law.



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