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The View from Across the Sea

Just What Are Those Darn
Americans Up To, Now?

Jason Dickstein

- Aviation Suppliers Association
 - General Counsel
- Aviation Lawyer from Washington, DC
 - Clients include repair stations, air carriers, aircraft parts manufacturers, aircraft parts distributors and aviation trade associations



Want a Copy of the Presentation?

Available on-line as a free download at:

<http://www.WashingtonAviation.com>

There is more information in this presentation than we have time to cover, so I urge you to download a copy

Agenda

- Documentation
 - Selling to the US
 - Buying from the US
 - The Future
- False and Misleading Statements
- Dangerous Goods
- Re-Export of American Goods
- Bankruptcies

Parts Documentation and Approval

- Selling to the US? What do you need?
 - NO US regulation comparable to EASA 145.A.42
 - FAA Chief Counsel's opinion states that traceability is generally NOT required
 - US documentation and traceability requirements are generally *commercial* in nature
- US law requires:
 - Parts approval at the manufacturing level (there are exceptions, like standard parts)
 - Installer makes an airworthiness determination at time of installation (often supported by documentation)

What do American Buyers Need?

- If you meet the terms of a bilateral agreement, then your part may be presumed airworthy [Part 21 Subpart N]
 - Usually entails documentation, e.g. EASA 1
- Otherwise component is treated as a non-aviation part – installation eligibility determined by installer
 - Engineering analysis often necessary
 - No exemption from import tariffs

What do American Buyers Want?

- New parts from Europe
 - 8130-3 tag or EASA Form 1 (some Asian customers prefer 8130-3, even though that is not always available)
- Used parts
 - Approval for return to service tag (8130-3 tag or EASA Form One) completed by a FAA-approved (or TCCA) maintenance facility
- Standard parts
 - Certificate of Conformance from manufacturer

Buying Parts from the US

- EASA 145.A.42 requires that new, airworthy parts be accompanied by EASA Form One or equivalent
- EASA is currently accepting 8130-3 tags as equivalent pursuant to bilateral agreements
- BUT American exporters are not always able to obtain export 8130-3 tags!

Who Issues 8130-3 Airworthiness Authorizations?

- Only the FAA can issue an airworthiness authorization
 - FAA Employees
 - FAA Designees
 - *Manufacturers do not have an independent privilege of issuing 8130-3 tags!*
- Manufacturers must employ FAA designees
 - Some smaller manufacturers have been denied designees on the grounds that the FAA does not have the resources to oversee any more designees

Getting Documentation

- Many newly-manufactured parts are not issued an 8130-3 tag
- Designated Airworthiness Representatives (DARs) may issue them:
 - DARs can issue export 8130-3 tags for Class II Items (TSOA articles and major critical assemblies)
 - DARs are generally *precluded* from issuing export 8130-3 tags for Class III Items (most components and piece-parts)
 - ASA is working on a petition for exemption
 - In the mean time the only option is a 'domestic' 8130-3 tag

US “Domestic” 8130-3 Tags

- For a class III part, the only difference between a domestic tag and an export tag is the recognition of special conditions
 - No European country has identified a special condition to the US for a class III part
 - Additional bilateral requirements regarding PMA parts are not special conditions
- In recognition of this, in May, the FAA rescinded the requirement to print “for domestic shipment only” on domestic tags

FAA Form 8130-3

| | | | | | | | |
|--|-----------------|---|---|--|--|--------------------------|--|
| 1. Approving National Aviation Authority/Country: FAA/United States | | 2. AUTHORIZED RELEASE CERTIFICATE FAA Form 8130-3, AIRWORTHINESS APPROVAL TAG | | | | 3. Form Tracking Number: | |
| 4. Organization Name and Address: | | | | | 5. Work Order/Contract/Invoice Number: | | |
| 6. Item: | 7. Description: | 8. Part Number: | 9. Eligibility: * | 10. Quantity: | 11. Serial/Batch Number: | 12. Status/Work: | |
| | | | | | | | |
| 13. Remarks: | | | | | | | |
| 14. Certifies the items identified above were manufactured in conformity to: <input type="checkbox"/> Approved design data and are in a condition for safe operation. <input type="checkbox"/> Non-approved design data specified in Block 13. | | | | 19. <input type="checkbox"/> 14 CFR 43.9 Return to Service <input type="checkbox"/> Other regulation specified in Block 13 Certifies that unless otherwise specified in Block 13, the work identified in Block 12 and described in Block 13 was accomplished in accordance with Title 14, Code of Federal Regulations, part 43 and in respect to that work, the items are approved for return to service. | | | |
| 15. Authorized Signature: | | 16. Approval/Authorization No.: | 20. Authorized Signature: | | 21. Approval/Certificate No.: | | |
| 17. Name (Typed or Printed): | | 18. Date (m/d/y): | 22. Name (Typed or Printed): | | 23. Date (m/d/y): | | |
| User/Installer Responsibilities | | | | | | | |
| <p>It is important to understand that the existence of this document alone does not automatically constitute authority to install the part/component/assembly.</p> <p>Where the user/installer performs work in accordance with the national regulations of an airworthiness authority different than the airworthiness authority of the country specified in Block 1, it is essential that the user/installer ensures that his/her airworthiness authority accepts parts/components/assemblies from the airworthiness authority of the country specified in Block 1.</p> <p>Statements in Blocks 14 and 19 do not constitute installation certification. In all cases, aircraft maintenance records must contain an installation certification issued in accordance with the national regulations by the user/installer before the aircraft may be flown.</p> | | | | | | | |
| FAA Form 8130-3 (6-01) | | | *Installer must cross-check eligibility with applicable technical data. | | NSN: 0052-00-012-9005 | | |

Block 12: Status /Work

- Unlike the EASA rules, in the US block 12 only can hold one word, which should be one of the 'authorized' phrases
 - Violating this may not be a regulatory infringement, but it makes it difficult to get through some receiving inspections
- *Where a European* repair stations would use multiple words in block 12, FAA insists that additional comments be included in block 13 (remarks)

Block 12: Status /Work

| | | | | | | | |
|--|-----------------|---|-------------------|---------------|--|--------------------------|--|
| 1. Approving National Aviation Authority/Country: FAA/United States | | 2. AUTHORIZED RELEASE CERTIFICATE FAA Form 8130-3, AIRWORTHINESS APPROVAL TAG | | | | 3. Form Tracking Number: | |
| 4. Organization Name and Address: | | | | | 5. Work Order/Contract/Invoice Number: | | |
| 6. Item: | 7. Description: | 8. Part Number: | 9. Eligibility: * | 10. Quantity: | 11. Sub/Part Number: | 12. Status/Work: | |
| 13. Remarks: | | 12. Status/Work: | | | | | |

- Rebuilt
- New
- Prototype
- Export (*added by 8130.21D*)
- Altered
- Inspected
- Modified
- Overhauled
- Repaired

Who Can Approve for Return to Service?

- A much broader list than in Europe:
 - A & P mechanics & repairmen
 - Some feel that they should not use the 8130-3
 - Repair stations
 - Air carriers
 - Air operators
 - Manufacturers operating within their limited maintenance privileges

Upcoming Regulatory Changes

- Manufacturing rules
 - February 1999: ARAC proposes changes
 - FAA has now promised publication of those changes in 2006 as a Notice of proposed Rulemaking
- Harmonization efforts affect distribution
 - Manufacturers will be delegated the privilege of issuing 8130-3 tags for their new parts
 - All new parts from the US will be documented

False and Misleading Statements

- New FAA rule expands FAA oversight concerning distribution
 - Fraud
 - Misleading statements
- Effective October 17, 2005
- Applies to documents and advertisements

Applicability

- Any person who makes a record
- That is conveyed to another person
- When there is an associated potential for compensation
- If the record relates to a type-certificated product or a product, part, appliance or material that may be used on a type-certificated product

False Statements and Fraud

- When conveying information related to an advertisement or sales transaction, no person may make or cause to be made:
 - (1) Any fraudulent or intentionally false statement in any *record* about the *airworthiness* of a type-certificated *product*, or the acceptability of any product, part, appliance, or material for installation on a type-certificated *product*.
 - (2) Any fraudulent or intentionally false reproduction or alteration of any *record* about the *airworthiness* of any type-certificated *product*, or the acceptability of any product, part, appliance, or material for installation on a type-certificated *product*.

False Statements and Fraud

- False Statement
 - (1) a false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity.
- Fraud
 - (1) a false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) it was made with the intent to deceive, and (5) action was taken in reliance upon the representation.

Misleading Statements

- When conveying information related to an advertisement or sales transaction, no person may make, or cause to be made:
 - a material representation that a type-certificated *product* is *airworthy*, or that a product, part, appliance, or material is acceptable for installation on a type-certificated *product* in any *record* if that representation is likely to mislead a consumer acting reasonably under the circumstances
 - through the omission of material information, a representation that a type-certificated *product* is *airworthy*, or that a product, part, appliance, or material is acceptable for installation on a type-certificated *product* in any *record* if that representation is likely to mislead a consumer acting reasonably under the circumstances

Get Out of Jail Free Card

- The provisions of the rule don't apply if a person can show that the *product* is *airworthy* or that the product, part, appliance or material is acceptable for installation on a type-certificated *product*
- Shifts the burden to the SELLER to prove airworthiness

Disclaimer

The seller makes no independent representation that the part is airworthy, or that it is acceptable for installation. These determinations are to be made by the installer, based on an inspection of the part and of the documentation forwarded by the seller.

Dangerous Goods in the Crosshairs

- It is not unusual to see proposed dangerous goods fines in the six figure range, particularly those issued by the FAA
- FAA inspectors have now been officially ordered to inspect for DG compliance under the FAA Inspectors' Handbook (Order 8300.10)
- FAA has been bringing significant DG cases against European companies

Nine Classes of Dangerous Goods

Do You Recognize These
Dangerous Goods From Your
Inventory?

If You Do, Then You Should
Probably be Concerned about
Dangerous Goods Compliance

Explosives

- Including explosive squibs and actuators
- E.g., in the fire suppression systems



Gasses

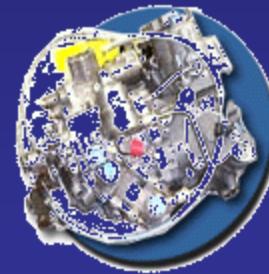
- 2.1 Flammable gas
- 2.2 Nonflammable gas
- 2.3 Toxic gas

- Oxygen bottles, fire bottles, fire extinguishers, *any* compressed gases



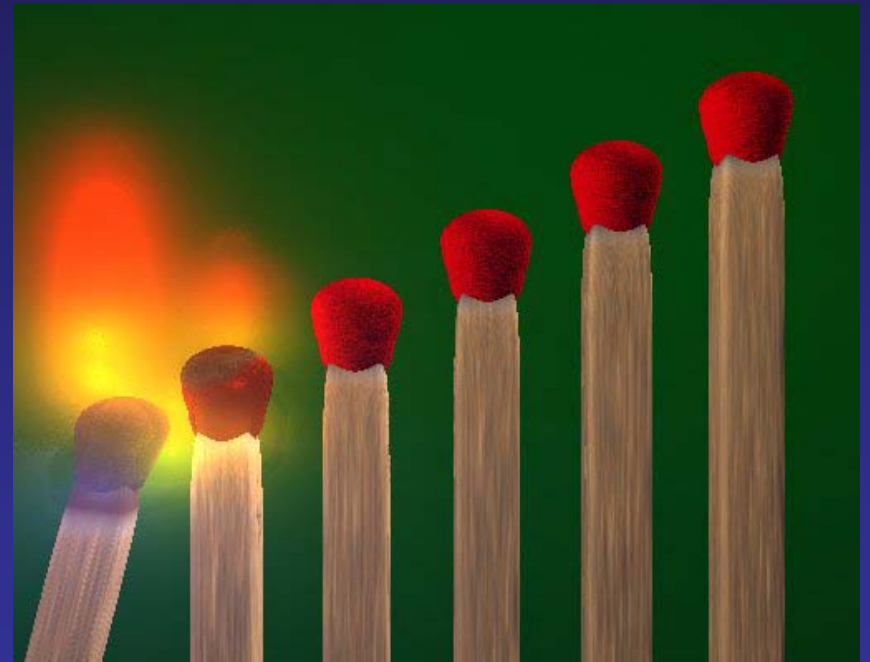
Flammable Liquids

- Class 3 includes those liquids with a flash point of 141°F or less, including jet fuel



Flammable Solids

- Matches are a good example of flammable solid
- We handle little, if any, class four material in our industry



Oxidizers

- Oxygen generators
- Spent oxygen generators are hazmat, too (in class nine)



Toxics

- Certain coatings (e.g. rust-inhibiting coatings containing strontium chromate)
- Often, the toxic coating are also class three flammable liquids
- Certain greases are also listed as class six toxics

Radioactives

- Depleted uranium counterweights may be found in some control surfaces, particularly older ones
- Radium, used in older instrument dials



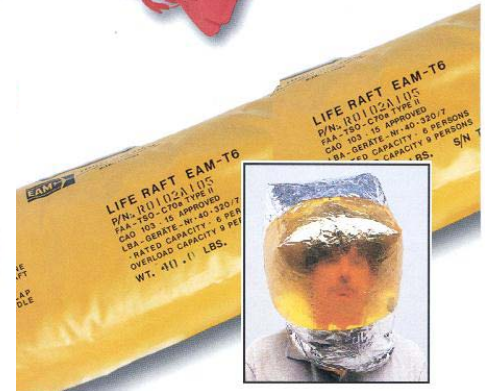
Corrosives

- Batteries may be hazardous materials
- Many articles with batteries in them, like flight data recorders, must therefore be treated as hazmats



Miscellaneous Dangerous Goods

- Aircraft first aid kits
- Self-inflating emergency equipment like life preservers and slides
- Flares
- Fuel system components w/fuel residue



Training is Required

- In general, once every three years for US
- In general, once every two years for ICAO-compliant nations
- US air carrier personnel require annual training
- A new US rule will increase some recurrent training requirements to annual (expected to be law in 2006)

New DG Training Proposal

- FAA proposal would increase dangerous goods training frequency to once per year for
 - US Part 145 Repair Stations
 - 121/135 air carriers
 - Companies performing functions for 121/ 135s
 - (1) Acceptance; (2) Rejection; (3) Handling; (4) Storage incidental to transport; (5) Packaging of company material; (6) Loading; (7) Unloading; or (8) Carriage
 - Could include, for example, holding air carrier consignment
- Proposal was also submitted to ICAO for international adoption

Re-Export of Goods

- The United States has been enforcing its export laws against those who ‘re-export’ components bought from a US source
- TIP: if you know that you intend to sell a particular component to a “US-forbidden” customer, then do not buy from the US
- TIP: integrate non-serialized parts into your general inventory, so that there is no direct link from the sale to the purchase

US Forbidden Persons

- Identify whether your customer is a forbidden person
- Consult the Department of the Treasury's Office of Foreign Assets Control (OFAC) list:
 - **Specially Designated Nationals List:** (provides alphabetical master list of Specially Designated Nationals and Blocked Persons)
 - <http://www.ustreas.gov/offices/enforcement/ofac/sdn/index.html>

US Forbidden Persons

- Identify whether your customer is a forbidden person
- Consult the Department of Commerce's Bureau of Industry and Security (BIS) lists:
 - **Denied Persons List** (provides listing of names and addresses of individuals with whom trade may not be conducted)
 - <http://www.bxa.doc.gov/dpl/Default.shtm>

US Forbidden Persons or Entities

- Identify whether your customer might raise an automatic “red flag”
- Consult the Department of Commerce’s Bureau of Industry and Security (BIS) lists:
 - **Unverified List** (foreign persons who raise automatic “red flags” because of past verification issues)
 - http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified_parties.html

US Forbidden Persons or Entities

- Identify whether your customer is a forbidden entity
- Consult the Department of Commerce's Bureau of Industry and Security (BIS) lists:
 - **Entity List** (listing of foreign end users who have been determined to present an unacceptable risk of diversion to developing weapons of mass destruction or the missiles used to deliver those weapons)
 - <http://www.access.gpo.gov/bis/ear/pdf/744spir.pdf>

US Forbidden Persons or Entities

- Identify whether your customer is debarred from trade
- Consult the Department of State's Directorate of Defense Trade Control (DDTC) list:
 - **Statutorily and Administratively Debarred Parties List:** (provides listing of individuals and corporations with whom trade is barred)
 - <http://pmdtc.org/debar059intro.htm>

US Forbidden Persons or Entities

- Identify whether your customer is embargoed by the Department of the Treasury's Office of Foreign Assets Control (OFAC) embargoed lists
 - Diamonds
 - Drugs
 - Nonproliferation
 - Terrorists

OFAC Restrictions

- Diamond Trading – No diamonds from non-Kimberley Process sources (avoids conflict diamonds)
- Narcotics Trafficking – No trading with Drug Kingpins listed here:
 - <http://www.ustreas.gov/offices/enforcement/ofac/sanctions/t11drugs.pdf>

OFAC Restrictions

- Weapons of Mass Destruction Trade Control (prohibited parties):
 - <http://www.ustreas.gov/offices/enforcement/ofac/sanctions/t11wmd.pdf>
 - E.g. Moscow Aviation Institute
- Terrorists – Lists of prohibited parties:
 - <http://www.ustreas.gov/offices/enforcement/ofac/sanctions/t11ter.pdf>

US Forbidden Countries

- Identify whether your customer is in a forbidden country
- Consult the Department of the Treasury's Office of Foreign Assets Control (OFAC) list:
 - **Embargoed Destinations List:** (prohibited countries subject to the sanctions program)
 - <http://www.ustreas.gov/offices/enforcement/ofac/sanctions/>

Nations Restricted by OFAC

- Balkans
- Burma (Myanmar)
- Cuba
- Iran
- Iraq
- Liberia
- Libya
- North Korea
- Sudan
- Syria
- Zimbabwe

US Forbidden Persons or Countries

- Identify whether your customer is in an embargoed country
- Consult the Department of State's Office of Defense Trade Control (ODTC) list:
 - **Defense Trade Controls – Embargo List:**
(provides listing of countries with whom trade is barred)
 - <http://pmdtc.org/country.htm>

IDENTIFY OTHER “RED FLAGS”

- ‘Red flags’ have been designated by the BIS to illustrate the types of circumstances that should cause reasonable suspicion that a transaction will violate export administration regulations (EAR)
- Examples of ‘Red flag’ situations:
 - The customer or its address is similar to one of the parties found on the Commerce Department's [BIS's] list of denied persons.
 - The customer or purchasing agent is reluctant to offer information about the end-use of the item.

Red Flags

- The product's capabilities do not fit the buyer's line of business, such as an order for sophisticated computers for a small bakery.
- The item ordered is incompatible with the technical level of the country to which it is being shipped, such as semiconductor manufacturing equipment being shipped to a country that has no electronics industry.
- The customer is willing to pay cash for a very expensive item when the terms of sale would normally call for financing.

Red Flags

- The customer has little or no business background.
- The customer is unfamiliar with the product's performance characteristics but still wants the product.
- Routine installation, training, or maintenance services are declined by the customer.
- Delivery dates are vague, or deliveries are planned for out of the way destinations.

Red Flags

- A freight forwarding firm is listed as the product's final destination.
- The shipping route is abnormal for the product and destination.
- Packaging is inconsistent with the stated method of shipment or destination.
- When questioned, the buyer is evasive and especially unclear about whether the purchased product is for domestic use, for export, or for reexport.

What if there is a Red Flag?

- The exporter/re-exporter MUST inquire about the end-use or end-user or ultimate country of destination
- If you encounter a piece of information in the course of your dealings with the customer that raises a red flag:
 - Refrain from the transaction, OR,
 - Contact a regional BIS enforcement office. Office addresses & phone #s provided at:
<http://www.bxa.doc.gov/Enforcement/report.htm>

What if there is a Red Flag?

- Voluntary anonymous reports of export issues may be made to:
 - <https://www.bis.doc.gov/forms/eeleadsntips.html>
- If you can adequately confirm that the red flag does not represent an actual legal issue or violation, then you may proceed with the transaction
 - Use documents and keep them on file
 - Do not become “willfully blind” to issues

Bankruptcies

- United – Preference letters have been out for a few months
- US Airways – Merging with America West
- Northwest – filed Thursday, September 15
- Delta – filed Thursday, September 15
- More may be coming

Executory Contracts

- Contracts that still have obligations yet to be performed
- Post-petition, these contracts are ‘in limbo’ while the trustee decides what to do with them
 - Post-petition, anyone who still has one of these contracts is bound by the contract

The Fate of the Executory Contract

- The trustee may reject or assume an executory contract
 - Must be ratified by the judge to be effective
- This should be done within 60 days
 - It is not unusual in chapter 11 cases for the 60 day period to be extended, and for the reject / assume decisions to be made as part of the reorganization plan

Rejection

- If an executory contract is rejected:
 - Rejection relates back to the date of the filing
 - Rejection is considered a pre-petition breach
 - Post-filing services or goods are subject to the post-filing administrative priority
 - Pre-filing services or goods are treated as unsecured pre-filing debt (unless security exists)

Assumption

- An executory contract may not be assumed if it is in default
 - Defaults must be cured or trustee must provide adequate assurance of timely cure
 - This means you get paid!

Preferences

- If you have been paid by a bankrupt within 90 days before the bankruptcy filing, then this may be a preference

Preferences

- Transfers of
 - Assets (cash, liens, etc.)
 - Made by the debtor
 - To or on the behalf of the creditor
 - During the stated time period (90 days or 1 year)
 - To pay a pre-existing debt

Preference Exceptions

- Did it have a preferential effect?
 - NO – it was payment made in the ordinary course of business [*a critical exception*]
 - Ordinary dealing between the parties AND
 - Ordinary dealing in the industry
 - NO – it was an unsecured credit extension subsequent to a payment
 - Did they pay you, and you subsequently allowed them to run up additional debt at least equal to the payment?

Preference Exceptions

- Did it have a preferential effect?
 - NO – it was an enabling loan (to permit purchase of goods)?
 - Did they loan you money so you could buy their goods?
 - NO – it was the filing of a valid statutory lien (e.g. formed by maintenance activity!)
 - Such liens are based on local law
 - Lien is established by law, *contemporaneously* with the activity
 - Filing the lien is merely notice, not a preference

Administrative Priority

- Except in cases of executory contracts, no one is required to do business with a bankrupt company
- **INCENTIVE:** Those who do business with a company in US bankruptcy court can expect an administrative priority for payments
 - This means you get paid first, out of their cash flow
 - But this only works as long as there is cash flow

New Bankruptcy Law Details

- Signed into law April 20, 2005
- Effective October 17, 2005
- Generally favors those who did business with the debtor more than the prior revisions
 - Preferences < \$5,000 USD are waived
 - Only need to meet one of the two elements of the ordinary course of business defense

Thank You

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