
THE AVIATION LAW REVIEW

SECOND EDITION

EDITOR
SEAN GATES

LAW BUSINESS RESEARCH

THE AVIATION LAW REVIEW

The Aviation Law Review

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THE AVIATION LAW REVIEW

Second Edition

Editor
SEAN GATES

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EDITOR'S PREFACE

The first edition of *The Aviation Law Review* has been enthusiastically received around the world. Not only is aviation law global in its reach, but it is also in many respects unique, even in the field of transport, as this edition demonstrates. The second edition of *The Aviation Law Review* includes chapters from contributors to the first edition alongside a number of chapters from lawyers in additional jurisdictions, making this an even more vital tool for students, practitioners and in-house counsel.

Clients continue to demand a 'one-stop shop' approach from their lawyers in this field given the issues they face and the special nature of the subject. All the customary disciplines of a commercial practice come into play, but all must then be overlaid with an aviation perspective. This further emphasises the essential nature of specialisation in the industry and maintains the exclusivity of the practice of aviation law.

This year again, regulatory matters have been to the fore with more and more countries seeking to feather-bed consumers with protection from the vicissitudes of life, and at the expense of the industry. The global tendency towards the nanny state piles costs on operators, which can only be recovered from ticket prices, and therefore consumers, but since the link between regulation and cost is indirect, regulators can boast of their concern for consumers without having to deal with the backlash of increasing cost, or finding a budget for their extravagance. Among others the US consumer protection laws represent a further imposition, though perhaps EC carriers will find comfort in the company of their peers!

Unmanned aerial vehicles are coming into the regulatory focus as aspirational operators look to adopt the technology for cost saving and additional services. BP has won the first licence from the FAA for use of UAVs to monitor the Alaskan pipeline. Amazon's intentions in this area have been widely published and the plans of Jeff Bezos should not be dismissed lightly. Many jurisdictions are consulting on the shape of the regulatory framework, on whether UAV operators will fall to be regulated similarly to commercial operators and what airspace they will be permitted to occupy.

Last year I railed against the failure of the EC to institute a truly first-class accident investigation body within Europe. This year practitioners' eyes should be

focused on a recent decision of the UK Court of Appeal in *Rogers v. Hoyle*, which has permitted the use of accident reports in civil liability trials contrary to the prohibition on this practice recommended by the draftsmen of the Chicago Convention 1944 in the accident investigation annex and by the draftsmen of the EU Regulation on accident investigations. The prospects for the EC revisiting the topic are remote, but perhaps the right approach in any event would be for a truly global accident investigation board to be established; the potential for cost saving would be significant, while providing the opportunity to eliminate those unable to attain a sufficiently high standard. Sadly the prospects of movement in the International Civil Aviation Organization (ICAO) within the next two decades seem remote, though in the past the Air Navigation Commission has acted as an investigatory appellate body!

Before closing, one must welcome the Montreal Protocol to the Tokyo Convention following the Diplomatic Conference at the ICAO in Montreal this year. This has been focused on the activities of disruptive passengers and the regulation of in-flight security officers. The Protocol, by extending jurisdiction to the state of next landing in relation to criminal offences committed on board aircraft make it much more probable that those offences will be prosecuted and that disruptive passengers will be brought to book. Sadly, states declined to take the short step of extending immunity to the commander of the aircraft beyond that extant in the original Convention. The actions of the commander and flight and cabin crew remain susceptible to examination by courts, which can review their actions with the full benefit of hindsight and a test of reasonableness the interpretation of which will vary widely from one country to another. Industry recommended that deference be given to the actions of the flight crew in situations where the safety of the aircraft could be jeopardised, but this was not taken up by the delegates. Nevertheless the Protocol is to be commended for what it does achieve more than criticised for that which delegates passed on, and hopefully it will be ratified without too much delay.

I would like to extend my thanks to the contributors to this volume, both those who contributed before and those who have joined the group. Their efforts are highly appreciated and represent a substantial contribution to the global aviation law library.

Sean Gates

Gates Aviation Ltd

London

July 2014

Chapter 24

SOUTH AFRICA

*Chris Christodoulou*¹

I INTRODUCTION

South Africa's aviation services are premised on the work of the South African Civil Aviation Authority, the Air Traffic Navigation Services and the Airports Company South Africa. These three entities have an obligation to ensure aviation safety and that airport security infrastructure development and air navigation services are efficiently carried out.

Access to markets is somewhat restricted by regulation, perceived unfair treatment for state-owned airlines and nationality laws, as well as high fuel costs and airport tariffs, which are generally reported as being among the 10 most expensive in the world. The development of international air services continues to be determined by the bilateral air services framework.

Protective and restrictive measures in favour of national airlines continues despite efforts to liberalise African skies under the Yamoussoukro Decision, although alliances and cooperation agreements are increasing.

The Air Traffic and Navigational Services Company (ATNS) is currently conducting the slot coordination function in South Africa within the confines of a limited legislative framework. To address the limited legislative framework, as well as the outlook for slot coordination in the medium term, the Slot Coordination Working Group under the leadership of the Department of Transport was established.

South Africa ratified the Cape Town Convention in 2007.

The government's domestic air transport policy includes fostering a competitive domestic air transport market to level the playing field and ensure equal treatment of state-owned airlines in a competitive market as opposed to a market that is reserved for a state-owned and controlled monopoly.

¹ Chris Christodoulou is the managing partner at Christodoulou & Mavrikis Inc.

The Air Service Licensing Council is responsible for the licensing and control of domestic air services, while the International Air Services Licensing Council is responsible for the licensing and control of international air services.

The provision and operation of air navigation infrastructures, air traffic services or air navigation services falls under the Air Traffic and Navigation Services Company Limited, while the Airports Company of South Africa owns and regulates activities at company airports and levies airport charges (with the permission of the Regulating Committee established by Section 11 of the Airports Company Act).

The Competition Act No. 89 of 1998 is the legislation by means of which competition is regulated. The Competition Amendment Act No. 1 of 2009 has been signed and assented to but is not yet in force.

II LEGAL FRAMEWORK FOR LIABILITY

Liability in the aviation sector is principally governed by parliamentary and subordinate legislation on aviation matters, multilateral international conventions and the common law.

Applicable legislation is centred on the Carriage by Air Act No. 17 of 1946, which gives effect to the Convention for the Unification of Certain Rules for International Carriage by Air in South African law, and covers the rights and liabilities of carriers, passengers, consignors, consignees and other interested parties.

South Africa is a party to the following important international aviation treaties:

- a* the Convention on International Civil Aviation (the Chicago Convention);
- b* the International Air Services Transit Agreement (the Transit Agreement);
- c* the Convention for the Unification of Certain Rules relating to International Carriage by Air (the Warsaw Convention);
- d* the Protocol to amend the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air (the Hague Protocol);
- e* the Convention on the International Recognition of Rights in Aircraft (Geneva 1948);
- f* the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules relating to Carriage by Air Performed by a Person other than the Contracting Carrier (Guadalajara);
- g* the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention);
- h* the Convention on Offences and Certain other Acts Committed on Board Aircraft (the Tokyo Convention);
- i* the Convention for the Suppression of Unlawful Seizure of Aircraft (the Hague Convention);
- j* the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. (Montreal 1971); and
- k* the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on Matters Specific to Aircraft Equipment (the Cape Town Convention).

i International carriage

South Africa has incorporated the majority of the major multilateral aviation agreements, including the Warsaw Convention, the Chicago Convention, the Transit Agreement and the Montreal Convention.

The Carriage by Air Act No. 17 of 1946 gave effect to the Warsaw Convention, and the amendment thereof by the Carriage by Air Amendment Act No. 15 of 2006 gave effect to the International Convention for the Unification of Certain Rules for International Carriage by Air signed in Montreal on 28 May 1999, which came into operation on 19 June 2007.

The Civil Aviation Act² gave effect to the Chicago Convention and the Transit Agreement by their inclusion in the Schedules to the Act. This Act also incorporated the Tokyo and Hague Conventions.

ii Internal and other non-convention carriage

Liability in respect of domestic carriage is governed by the common law except to the extent that the rules of common law have been excluded or modified by the individual carrier's conditions of carriage.

iii General aviation regulation

The Civil Aviation Act³ provides that where material damage or loss is caused to any person or property on land or water by an aircraft in flight, taking off or landing; to any person in any such aircraft; or any article falling from any such aircraft, damages may be recovered from the registered owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action, as though such damage or loss had been caused by his or her wilful act, neglect or default except where the damage or loss was caused by or contributed to by the negligence or wilful act of the person by whom it was suffered.

A registered owner or operator of an aircraft must have insurance as prescribed for any damage or loss that is caused by an aircraft to any person or property on land or water, and in relation to an aircraft, a 'registered owner' means the person in whose name the aircraft is registered, and includes any person who is or has been acting as an agent in South Africa for a foreign owner, or any person by whom the aircraft is hired at the time.

iv Passenger rights

The Consumer Protection Act 68 of 2009 (CPA) applies to the promotion and supply of goods and services within South Africa concluded in the ordinary course of business between suppliers and consumers and provides significant protections to passengers in the event of a denial of boarding under certain circumstances. The CPA provides for the reasonableness test for overselling and overbooking.

2 Civil Aviation Act No. 13 of 2009.

3 Act No. 13 of 2009.

With regard to damage suffered as a result of a supplier's inability to supply goods or services because of overbooking or overselling, the CPA provides for a refund of the amount paid plus interest (usually, this would be the deposit plus interest), as well as any consequential damages that directly resulted from the breach of contract.

The Domestic Air Services Council normally requires a 'guarantee' for consumer protection with regard to cash receipts for flights not yet undertaken in terms of Regulation 6A of the Domestic Air Services Regulations. The International Air Services Council normally imposes a condition on international air services licences for a 'consumer guarantee' to be provided.

v Other legislation

The Competition Act⁴ prohibits horizontal and vertical restraints and abuse of dominance, and imposes administrative penalties, divestment orders and the possibility of imprisonment for recurring non-compliance.

Anti-corruption laws

The Financial Intelligence Centre Act No. 38 of 2001 set up a regulatory anti-money laundering regime intended to break the cycle used by organised criminal groups to benefit from illegitimate profits, and complements and works with the Prevention of Organised Crime Act, No. 121 of 1998, which contains substantive money laundering offences.

Product liability law

Alongside the common law, the Consumer Protection Act introduced far-reaching changes to the law of product liability and introduced the concept of strict liability for the first time into South African law.

Environmental law

The National Environmental Management Protected Areas Act No. 57 of 2003 includes provisions that affect the aviation sector, restricting the use of aircraft, over flight, take-off and landing in special nature reserves, national parks or world heritage sites, which includes the airspace above the reserve, park or site to a level of 2,500 feet above the highest point of the reserve, park or site, except where this is necessary for a public purpose or in the public interest, or to be used for training and testing of aircraft.

The Regulations pertaining to the Act prohibit a person (except with the prior written permission from a management authority) from engaging in the sport of parachuting or abseiling using a hang-glider or any other kind of glider; launching or flying a hot-air balloon; or flying model planes or gliders in a national park or world heritage site except in an area set aside by the management authority for that purpose.

4 Act No. 89 of 1998.

III LICENSING OF OPERATIONS

i Licensed activities

The provision of an air transport service by an aircraft for reward may only be undertaken if licensed in accordance with the terms and subject to the conditions in Air Services Licensing Act No. 115 of 1995 and the International Air Services Act No. 60 of 1993. An air transport service is a service by aircraft for the carriage of passengers or goods for reward and includes such service on charter terms.

Exemptions may be granted for the provision of an air service on a non-profit basis for purposes incidental to social welfare or charity, or for purposes of salvage on humanitarian grounds, or where the service will assist in saving life.

Authorisation for an international air service licence

An application for an international air service licence is made in accordance with the provisions of the International Air Services Act No. 60 of 1993 and must be accompanied by:

- a* documents to the satisfaction of the Council that the applicant will be actively and effectively in control of the international air service;
- b* a plan setting out in detail the manner in which the applicant will ensure that a safe and reliable international air service is operated;
- c* proof that the applicant is financially capable of operating such international air service; and
- d* a certified true copy of:
 - the existing licence held by the applicant (where applicable); and
 - in the case of a company: (1) its memorandum of incorporation; and (2) the authorising resolution concerned.

Domestic air service licence

Operating a domestic air service is subject to the provisions of the Air Services Licensing Act.⁵

An application for a domestic licence must be accompanied by:

- a* documents to establish, to the satisfaction of the Council the manner in which the applicant will be actively and effectively in control of the air service;
- b* a plan setting out in detail the manner in which the applicant will ensure that a safe and reliable air service is operated, containing full particulars and information on the following aspects in respect of the air service to be provided:
 - the description and objectives of the air service to be provided;
 - the full name and surname, qualifications and experience of each of its principle officials;
 - a statement of the responsibility and accountability for the duties of each official, and a written acceptance thereof by such official;

⁵ Act No. 115 of 1995.

- a line management diagram indicating to whom each official reports and the subordinate managerial positions;
 - an outline of the engineering, maintenance and flight operation management practices;
 - the management practices indicating the manner in which procedures will be updated; and
 - proof that the applicant is financially capable of operating an air service;
- c* in the case of a company, a certified true copy of its memorandum of incorporation and certificate to commence business, and the authorising resolution concerned; and
- d* where the applicant will use an aircraft that is not registered in its name in the operator of the air service, a certified true copy of the agreement under which the applicant is entitled to use the aircraft.

To maintain a licence an applicant who applies for a licence to operate a class I air service (scheduled public air transport service) must additionally:

- a* submit, to the satisfaction of the Council, a consumer guarantee for the total sum of cash receipts as envisaged in the plan referred to above for services in respect of the transport of passengers or cargo, where such services have already been sold but not yet rendered by the applicant and that the Council deems to be a fair representation of that component of the applicant's projected cash flow; and
- b* at all times make its financial accounting system available to the Council for inspection, provided that the details concerning such financial accounting system shall not be made public without the consent of the applicant.

ii Ownership rules

Foreign ownership of domestic airlines is controlled in terms of aviation legislation rather than the Competition Act. If the applicant is not a natural person resident in the Republic, at least 75 per cent of the voting rights of a domestic carrier must be held by residents of the Republic,⁶ and the aircraft that will be used in operating the air service is a South African registered aircraft.⁷ The voting rights in respect of a South African licensed international carrier need to be substantially held by residents of South Africa, and the aircraft that will be used in operating the air service is a South African registered aircraft.⁸

No shareholding restrictions or limitations are imposed on international air carriers operating in South Africa except for the licence requirements discussed above.

For the purposes of satisfying the Council that the applicant is financially capable of operating the air service concerned, an applicant must submit to the Council a set of audited accounts of the most recently completed financial year including a certified *pro forma* balance sheet reflecting the opening balances as at the projected date of

6 Section 16(4)(c)(ii) of the Air Services Licensing Act, 1990.

7 Section 16(4)(e) of the Air Services Licensing Act, 1990.

8 Section 17(5)(a) and 17(5)(c) of the International Air Services Act, 1993.

commencement of the air service together with explanatory notes that shall refer to the operating capital and the cash resources available to the applicant at the outset.

If the applicant is an individual or a partnership, the applicant must provide a certified statement of personal assets and liabilities together with acceptable documented proof of adequate cash resources that will be available at the outset to fund the air service.

In the case of an application to operate a scheduled public air transport service, full particulars with regard to the following aspects must be provided:

- a* projections of the income statement, including the proposed tariffs; forecast revenue; forecast yields, passenger numbers and cargo volumes, if applicable; and flying hours;
- b* a cash-flow statement including revenue; trading costs by main category and receipts by operation; fixed assets expenditure; and debtor, creditor and stock assumptions; finance raised and repaid; financing costs and taxation; and opening and closing balances;
- c* a balance sheet in respect of the air service to be provided and the assumptions on which the projections are based, for a period of 12 months following the date of application, including in relation to sources of finance: equity; short, medium and long-term loan facilities; securities for finance; and encumbered assets;
- d* in relation to the company's shares, details as to shareholders and proposed shareholders; the nationality of shareholders and proposed shareholders; types of shares; and number and value of issued shares;
- e* in relation to its assets, (including aircraft, engines and spares), the capital costs; financing arrangements, including deposit, amount of finance and repayments; and leasing arrangements; and
- f* a sensitivity analysis of the assumptions used with regard to possible adjustments and the consequences that such adjustments may have on the projections referred to in that subparagraph.

iii Foreign carriers

Foreign-registered operators who wish to use an aircraft other than a South African aircraft in providing an international air service must satisfy the Council that:

- a* an appropriate certificate of airworthiness has been issued in respect of the aircraft concerned in the country in which that aircraft is registered;
- b* the aircraft complies with the registration and identification requirements of the country in which it is registered; and
- c* a type certificate has been issued by the Commissioner for Civil Aviation or an appropriate authority in the country in which the aircraft was manufactured.

A licence is not required if an aircraft is visiting South Africa from time to time and registered in another state and is used to operate an international air service provided that such air service is operated under and in accordance with the provisions and subject to the conditions of the International Air Services Transit Agreement; an air transport

service agreement; or a foreign licence; it will, however, be subject to the conditions of a foreign operator's permit issued in terms of the Act.⁹

IV SAFETY

The South African Civil Aviation Authority (SACAA) has overall safety and security oversight functions, exercised in terms of the Civil Aviation Act¹⁰ and the Civil Aviation Security Regulations of 2011, which further provide for the establishment of an independent Aviation Safety Investigation Board in compliance with Annex 13 of the Chicago Convention.

An operator of a class I domestic air service is required to submit to the satisfaction of the council, a guarantee for the total sum of cash receipts as envisaged in the plan referred to in Regulation 6(4)(b)(ii) for services in respect of the transport of passengers or cargo, where such services have already been sold but not yet rendered by the applicant and that the council deems to be a fair representation of that component of the applicant's projected cash flow; and at all times make its financial accounting system available to the council, or a person designated by the council, for inspection. The details concerning such a financial accounting system shall not be made public without the consent of the applicant.

An operator who wishes to use an aircraft other than a South African aircraft in providing an international air service must satisfy the council that an appropriate certificate of airworthiness has been issued in respect of the aircraft concerned in the country in which that aircraft is registered and a type certificate has been issued by the Commissioner for Civil Aviation or an appropriate authority in the country in which the aircraft was manufactured; and that the aircraft will be operated and maintained by staff who are in possession of licences or validations that in the opinion of the Commissioner for Civil Aviation comply with the standards prescribed in terms of the Civil Aviation Act.¹¹

i Accident reporting

South African aviation regulations require operators and pilots to notify the Director of Civil Aviation, an air traffic service unit or the nearest police station, of such accident as soon as possible but at least within 24 hours after an aviation accident or an incident being an occurrence other than an accident that affects or could affect the safety of operations.

The Commissioner for Civil Aviation has delegated the process for reporting and recording of accidents to the Accidents and Incidents Investigations Division of the South African Civil Aviation Authority.

Every type-certificated aircraft on the South African Civil Aircraft Register is required in terms of Part 43 of the Civil Aviation Regulations to be maintained according to an approved aircraft maintenance schedule as prescribed in the Regulations. The

9 Section 13(2) of Act No. 60 of 1993.

10 Act No. 13 of 2009.

11 Act No. 13 of 2009.

owner of an aircraft is obliged to draw up, or have drawn up, a maintenance schedule for his or her aircraft in accordance with the provisions of the Technical Standards.

V INSURANCE

In respect of domestic air services, a licensee must at all times be insured for the following minimum amount, irrespective of the class of licence held:

- a* in respect of passenger liability, 1 million rand per seat, irrespective of the category of aircraft, excluding a microlight aeroplane, for the total number of seats authorised by the certificate of airworthiness applicable to the aircraft concerned, except where the licence held by the licensee does not authorise the transport of any passenger for reward; and
- b* in respect of cargo liability, 50 rand per kilogram of cargo calculated according to the total possible mass of cargo that can be carried by the aircraft concerned, except where the licence held by the licensee does not authorise the transport of any cargo for reward.

In respect of international air services, a licensee who operates an international air service under an air carrier's licence shall at all times be insured for the following minimum amount, irrespective of the class of licence held:

- a* In respect of passenger liability: 1 million rand per seat, irrespective of the category of aircraft, for the total number of seats authorised by the certificate of airworthiness applicable to the aircraft concerned.
- b* Mandatory third-party insurance provisions apply as follows:
 - Domestic air services:
 - (i) in relation to an aircraft with a maximum certificated mass exceeding 20,000 kilograms, 50 million rand per aircraft;
 - (ii) in relation to an aircraft with a maximum certificated mass exceeding 5,700 kilograms but not exceeding 20,000 kilograms, 20 million rand per aircraft;
 - (iii) in relation to an aircraft with a maximum certificated mass exceeding 2,700 kilograms but not exceeding 5,700 kilograms, 10 million rand per aircraft;
 - (iv) in relation to an aircraft with a maximum certificated mass of 2,700 kilograms or less, excluding a microlight aeroplane, 2.5 million rand per aircraft; and
 - (v) in relation to a microlight aeroplane, 500,000 rand per microlight aeroplane.

The sum total of the minimum amounts of coverage required for passengers and cargo and for third-party liability may be insured for a combined single limit of insurance per any one occurrence.

- International air services:
 - (i) in relation to an aircraft with a maximum certificated mass exceeding 20,000 kilograms, 50 million rand;

- (ii) in relation to an aircraft with a maximum certificated mass exceeding 5,700 kilograms but not exceeding 20,000 kilograms, 20 million rand;
- (iii) in relation to an aircraft with a maximum certificated mass exceeding 2,700 kilograms but not exceeding 5,700 kilograms, 10 million rand; and
- (iv) in relation to an aircraft with a maximum certificated mass of 2,700 kilograms or less, 2.5 million rand.

The minimum amounts of coverage required for passenger and third-party liability may be insured for a combined single limit of insurance per any one occurrence.

There is no provision for exemption from the minimum insurance requirements; however, the licensing council shall advise the Minister of Transport every three years on the desirability of revising the minimum amounts.

VI COMPETITION

The Competition Act¹² provides for various prohibitions on anti-competitive conduct, restrictive practices (such as price fixing, predatory pricing and collusive tendering) and 'abuses' by 'dominant' firms (firms with a market share of 35 per cent or more).

The Act also entails a notification and prior approval procedure for certain mergers and acquisitions and carries significant penalties for contraventions.

i The regulatory regime for anti-competitive behaviour

The Competition Act¹³ is the legislation by means of which competition is regulated. There are three institutions of regulation provided for in the Competition Act:¹⁴

- a* the Competition Commission investigates and evaluates mergers and prohibited practices;
- b* the Competition Tribunal is the court of first instance in adjudicating competition law matters; and
- c* the Competition Appeal Court (CAC) is the designated appellate authority for competition law matters.

The Supreme Court of Appeal is authorised to hear appeals from the CAC, and the Constitutional Court is empowered to hear constitutional issues arising from competition law cases.

ii How cooperation agreements between operators are viewed

Code-sharing would probably be dealt with under the provisions of the Competition Act¹⁵ dealing with restrictive practices (horizontal and vertical) rather than a merger. The

12 Act No. 89 of 1998.

13 Act No. 89 of 1998.

14 Act No. 89 of 1998.

15 Act No. 89 of 1998.

test of cooperative agreements is whether they have the effect of substantially preventing or lessening competition in a market, mitigated by technological or other pro-competitive gain. Interlining agreements would probably be regarded as positive.

The 'relevant market' is determined primarily with a specific focus on the aviation sector, but there is room for a narrower focus on the specific type of aviation sector in which the transaction occurs, if distinguishable (e.g., cargo transport). Until now, there has not been any case in terms of which a narrower view of a specific type of sector within the aviation industry was applicable.

iii Imposition of criminal liability of individuals and companies for breaches of cartel law

The Competition Amendment Act¹⁶ introduced criminal sanctions against directors and managers who participate in cartel conduct, or tacitly consent to such conduct. In addition to administrative financial penalties, penalties including fines and imprisonment can be invoked against individuals for recidivism or for hindering the enforcement process or breaching confidentiality requirements.

VII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

Aviation disputes are predominantly dealt with by the superior courts, which consist of all the high courts of South Africa. The superior courts are the courts of first instance and have both review and appellate jurisdiction in criminal and civil matters. The rules of jurisdiction relating to the value of a claim and geographical area are important considerations in approaching the correct superior or lower court.

The apex courts are the Constitutional Court and the Supreme Court of Appeal, which cannot be approached as a court of first instance.

Disputes can be referred to arbitration by agreement between the parties and governed by the Arbitration Act No. 42 of 1965. Arbitral awards are final and unless otherwise agreed, are not subject to appeal and can be made an order of court and enforced in the same manner as any judgment of court. The Recognition and Enforcement of Foreign Arbitral Awards Act No. 40 of 1977 governs specifically the enforcement of foreign arbitral awards in South Africa.

Timelines for settlement

Settlement can occur at any stage prior to the institution of legal proceedings, or if an action is before the court the parties to the action may settle before judgment is handed down. In both instances, the parties may on application request the court to make the settlement agreement an order of court.

16 Act No. 1 of 2009.

Limitation periods for bringing claims

The Prescription Act No. 38 of 1969 provides for four different prescription periods and a debt prescribes after the relevant period provided for by law for that debt lapses. Judgment debts, debts secured by mortgage bonds and tax-related debts are governed by a 30-year prescriptive period. Debts normally prescribe after a three-year period and prescription begins to run as soon as the debt is due. (A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises, although a creditor shall be deemed to have such knowledge if he or she could have acquired it by exercising reasonable care.)

In terms of the Apportionment of Damages Act No. 34 of 1956, any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants, and several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact. A party may be joined to an action on notice at any time before the close of pleadings in the action by the plaintiff or by any joint wrongdoer who is sued in the action or to any other joint wrongdoer not sued in the action.

Allocation of liability among defendants

The liability of defendants is calculated to determine their respective liability; however, the Apportionment of Damages Act¹⁷ also provides for the situation where the person who suffers damage by a defendant is also party liable because of his or her conduct.

In the case of contributory negligence and for proceedings against joint and several wrongdoers, where any person suffers damage that is caused partly by his or her own actions and partly by the actions of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant, but the damages recoverable in respect thereof shall be reduced by the court to such an extent that the court may deem just and equitable having regard to the degree to which the claimant was at fault in relation to the damage. Damage shall for that purpose be regarded as having been caused by a person's actions notwithstanding the fact that another person has an opportunity of avoiding the consequences thereof and negligently failed to do so.

ii Carriers' liability towards passengers and third parties

South African law of delict is firmly based on fault; however, there are exceptions and remedies for which fault is not a requirement.

South Africa has accepted that harm caused by certain types of dangerous activities carrying a significant risk of injury or damage to a community should be redressed without the need for the plaintiff to prove fault on the part of the defendant and that such liability derives from statute rather than from the common law.

17 Act No. 34 of 1956.

Strict liability was imposed in terms of Section 11 of the Aviation Act No. 74 of 1962 (now repealed) by the Civil Aviation Act.¹⁸ Section 8 of the Civil Aviation Act confirms and mirrors the legislative provisions of strict liability contained in the old Section 11 of the Aviation Act No. 74 of 1962. The registered owner of an aircraft is liable for certain types of damages without the need to prove fault on the part of the owner, either in the form of negligence or intention.

Section 8(2) of the Civil Aviation Act¹⁹ states that where material damage or loss is caused by (1) an aircraft in flight, taking off or landing; (2) any person in any such aircraft; or (3) any article falling from any such aircraft, to any person or property on land or water, damages may be recovered from the registered owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action as though such damage or loss had been caused by his or her wilful act, neglect or default. Subsection (2) does not apply where the damage or loss was caused by or contributed to by the negligence or wilful act of the person by whom it was suffered.

The law regulating the liability for damages is purely civil; however, a claim for damages can arise from a civil or criminal action.

Liability is limited to the amount of proven damages for the harmful consequences that can be attributed to the defendant and thus the carrier is not liable for indirect or consequential damages.

iii Product liability

Before the advent of the Consumer Protection Act (CPA), the common law determined the principles of product liability in South Africa in terms of which a manufacturer, retailer or distributor of the product could only be found liable for harm caused to a consumer or their property by reason of a defective product if there was a contractual relationship between them that provided for such a claim, or if the consumer could prove negligence on the part of the supplier or manufacturer. The CPA introduced far-reaching changes to the law of product liability and introduced the concept of strict liability for the first time into South African law. The liability is joint and several, which means that a consumer can elect to take action against any one of the parties in the supply chain – even if they do not have a contract with that party and even where they are unable to establish negligence.

iv Compensation

The principle of mitigation (reduction) of damages is recognised in South African law, and a plaintiff may not recover damages for the loss that is the factual result of the defendant's conduct but could nevertheless have been prevented if the plaintiff had taken reasonable steps to avoid or reduce the damage.

However, at the same time a plaintiff does not have a 'duty' towards the defendant in this regard: the general legal principle is that the plaintiff cannot be the author of its own loss. The defendant must prove that the plaintiff could and should have reduced its

18 Act No. 13 of 2009.

19 Act No. 13 of 2009.

loss. The rule extends in favour of the plaintiff in that a plaintiff can, if necessary, claim any expenses incurred in taking reasonable steps to minimise its damage.

No special rules apply to claims handling other than the contractual undertakings commonly found in insurance policies, etc. The award for damages takes the form of a monetary lump sum. The court cannot order periodic or instalment payments and a plaintiff may claim for compensation even if the full extent of its damage has not yet emerged.

Claims for damages and damages are usually associated with contractual and delictual liability and give rise to recovery of patrimonial loss, non-patrimonial loss and damages afforded by legislation.

There are no state-funded schemes in South Africa other than in respect of motor vehicle accidents. It is therefore encouraged that passengers protect themselves by way of travel and personal insurance. Neither the state nor any body of the state can recover any costs or damages from third parties.

VIII THE YEAR IN REVIEW

A total of two accidents have been reported in 2014, involving respectively a Cessna A188B and a Robinson R44 Raven II helicopter, both occurring in South Africa.

During 2013 a total of 31 accidents and incidents were reported, a decrease from the 52 reported in 2012.

On the regulatory front, the Airport Slot Coordination Regulations, 2012, came into operation on 22 February 2013.

The Regulations made provision for the appointment of a Coordinator (the Air Traffic and Navigational Services Company), with responsibility for allocating, monitoring and enforcing the use of slots at airports and ensuring that the capacities of coordinated airports are not exceeded. In addition, the Regulations established a Slot Coordination Committee, whose function is, *inter alia*, to promote the optimisation of the utilisation of slots in the national interest and the interests of all stakeholders, and to advise the coordinator on, among other things, the possibilities for increasing the capacities of coordinated airports or for improving their usage by aircraft operators; guidelines for the allocation of slots; problems encountered by new entrants in accessing coordinated airports; and any other issues relating to capacity, slot allocation and the monitoring of slots at coordinated airports.

In addition the Director of Civil Aviation issued a new technical standard for civil aviation (Document SA-CATS 93), which contains the standards, rules, requirements, methods, specifications, characteristics and procedures that are applicable in respect of corporate aviation.

In June of 2014, the SACAA issued a statement regarding the use of unmanned aircraft systems (UASs), or 'drones', in South Africa. The SACAA confirmed that it had to date not issued any specific notice or regulation banning the use of UASs. Nor had it given any concession or approval to any organisation, individual, institution or government entity to operate UASs within the civil aviation airspace and, therefore, that any persons flying any type of unmanned aircraft would be doing so illegally.

The SACAA further noted that it was committed to the development of the country's UAS sector, and that it was working closely with the International Civil Aviation Organization (ICAO), to understand, define and ultimately integrate UASs into the civil aviation sector by providing a regulatory framework through Standards and Recommended Practices, with supporting Procedures for Air Navigation Services and guidance material, to underpin the routine operation of UASs in a safe, harmonised and seamless manner comparable to that of manned operations.

In light thereof, the SACAA noted that it was currently compiling an interim guidance document as a provisional solution to enable restricted operational approval on a case-by-case basis, until maturity is attained by both the industry and the SACAA, and it has undertaken to have the document ready before the end of the current financial year, 31 March 2015.

IX OUTLOOK

The review of the regulations and technical standards is an ongoing effort. After the past year's rush to meet ICAO instructions, the Civil Aviation Regulations Committee has commenced with other required updates and proposed amendments to the regulations.

On the commercial front, while government policy continues to be focused on developing a long-term strategy and integration of all of the state's aviation assets, no further developments have been announced. New entrants continue to eye the local market, but there have been no further developments other than an application for an air services operating licence lodged by former senior executives of SAA, who are hoping to offer a wider variety of regional options to the South African market.

FlySafair also announced in April that the Air Services Licensing Council had approved the airline's application for a domestic air service licence after clearing a local shareholding hurdle, and it expects to commence operations in the second half of the year.

Appendix 1

ABOUT THE AUTHORS

CHRIS CHRISTODOULOU

Christodoulou & Mavrikis Inc

Chris is the managing partner of Christodoulou & Mavrikis Inc, a full-service corporate and commercial law firm established in Johannesburg in 1991. The firm specialises in aviation law with solid commercial law capabilities and is ideally placed to deal with both local and international clients.

Chris obtained his BA LLB (Witwatersrand, RSA) and LLM in air and space law (King's College London) and was admitted as a South African attorney in 1991 and as a solicitor of England and Wales (non-practising) in 1997. His areas of practice include corporate and commercial law, international debt collection, civil litigation, franchising and general commercial work.

Chris practises in the aviation field, advising both local and international aviation clients on contractual and other aviation-related issues including negotiation and drafting various commercial aviation agreements. Chris served as a non-executive director of a local commercial airliner for more than seven years and chaired various subcommittees of the board. Chris is the South Africa contributor for the *The International Comparative Legal Guide to Aviation Law 2013* and *2014*, and to the South African section of *International Commercial Debt Collection* (ed. David Franklin) published by Thomson Carswell in 2007.

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