



ICLG

The International Comparative Legal Guide to:

Aviation Law 2019

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General Chapters:

1	The Use of Personal Data in the Commercial Aviation Industry – Alan D. Meneghetti & Yasmin Roland, Katten Muchin Rosenman UK LLP	1
2	Investing in Mid-Life Aviation Assets – Philip Perrotta, K&L Gates LLP	6
3	EU Law: Passenger Rights & Protections – Anna Anatolitou, Ince & Co LLP	11
4	Compensation for Non-Pecuniary Losses in Wrongful Death Cases: Addressing the Global Inconsistency – Marc S. Moller & Justin T. Green, Kreindler & Kreindler LLP	16
5	Regulations on Drone Flights in Japan – Hiromi Hayashi & Koji Toshima, Mori Hamada & Matsumoto	21
6	WALA: 10 Years of Growth in the Airport Sector – Alan D. Meneghetti & Michael Siebold, Worldwide Airports Lawyers Association (WALA)	25
7	Liability for Damage in International Civil Aviation from a GNSS Perspective – Pablo Mendes de Leon, Leiden University	28

Country Question and Answer Chapters:

8	Argentina	Freidenberg, Freidenberg & Lifsic: Elizabeth Mireya Freidenberg	33
9	Austria	Kubes Passeyrer Attorneys at Law: Dr. David Kubes & Mag. Tina Vollmann	42
10	Belgium	Monard Law: Birgitta Van Itterbeek & Tine Bogaerts	49
11	Brazil	ASBZ Advogados: Guilherme Amaral & Beatriz Giacomini	58
12	British Virgin Islands	The Maples Group: Michael Gagie & Rebecca Lee	64
13	Canada	Dentons Canada LLP: Robert Quon & Stacy Shields	71
14	Cayman Islands	The Maples Group: Sherice Arman & Shari McField	79
15	Colombia	Gongora Reina & Associates: Jorge Góngora	86
16	Denmark	IUNO: Aage Krogh	93
17	France	Clyde & Co: Maylis Casati-Ollier & Benjamin Potier	99
18	Germany	Urwantschky Dangel Borst PartmbB: Rainer Amann & Claudia Hess	108
19	India	Lakshmikumaran & Sridharan: Neeraj Dubey & Rohit Subramanian	117
20	Ireland	The Maples Group: Donna Ager & Mary Dunne	126
21	Israel	Gross Orad Schlimoff & Co. (GOS): Omer Shalev	137
22	Italy	Studio Pierallini: Laura Pierallini & Francesco Grasseti	146
23	Japan	Mori Hamada & Matsumoto: Hiromi Hayashi	155
24	Malaysia	Azmi & Associates: Norhisham Abd Bahrin & Nazran Arvind Bin Nahdan Rengganathan	164
25	Malta	Dingli & Dingli Law Firm: Dr. Tonio Grech	173
26	Mexico	Cervantes Sainz, S.C.: Luis A. Cervantes Muñoz & Alejandro Zendejas Vázquez	180
27	Nigeria	Banwo & Ighodalo: Kashimana Tumba & Tenilola Olowu	187
28	Pakistan	Kabraji & Talibuddin: Syed Ali Bin Maaz & Mubeena Sohail Ellahi	194
29	Panama	Arias, Fabrega & Fabrega: Roy C. Durling & Sofia J. Cohen	203
30	Romania	Furtună și Asociații: Mihai Furtună & Ioana Anghel	209
31	Russia	AEROHELP Law Office: Oleg Aksamentov & Ilona Tsimbal	218

Continued Overleaf →

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Country Question and Answer Chapters:

32	South Africa	Christodoulou & Mavrikis Inc.: Chris Christodoulou & Antonia Harrison	227
33	Sweden	IUNO: Aage Krogh	235
34	Switzerland	VISCHER AG: Urs Haegi & Dr. Thomas Weibel	241
35	Thailand	Weerawong, Chinnavat & Partners Ltd.: Nattaporn Pengkul	250
36	United Kingdom	Katten Muchin Rosenman UK LLP / K&L Gates LLP: Alan D. Meneghetti & Philip Perrotta	256
37	USA	LeClairRyan PLLC: Diane Westwood Wilson & Rebecca Tingey	270

South Africa

Chris Christodoulou



Antonia Harrison



Christodoulou & Mavrikis Inc.

1 General

1.1 Please list and briefly describe the principal legislation and regulatory bodies which apply to and/or regulate aviation in your jurisdiction.

1.1.1 Principal legislation

- **The Carriage by Air Act No. 17 of 1946** (as amended) gives effect to the Convention for the Unification of Certain Rules for International Carriage by Air, signed in Montreal on 28 May 1999, and for the unification of certain rules relating to international carriage by air.
- **The Air Services Licensing Act No. 115 of 1990 and the International Air Services Act No. 60 of 1993** provide for the establishment of Air Service Licensing Councils for the licensing and control of domestic and international air services.
- **The Convention on the International Recognition of Rights in Aircraft Act No. 59 of 1993** provides for the application of the Convention on the International Recognition of Rights in Aircraft.
- **The Convention on International Interests in Mobile Equipment Act No. 4 of 2007** enacts the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment. (The Cape Town Convention.)
- **The Civil Aviation Act No. 13 of 2009 and the Regulations, 2011** provide for the control and regulation of aviation within the Republic.
- **The Air Traffic and Navigation Services Company Act No. 45 of 1993, and Regulations, 1976**, provide for air traffic navigation services.

1.1.2 Regulatory bodies

- The South African Civil Aviation Authority (the SACAA).
- The Air Service Licensing Council, for domestic air service and the International Air Services Licensing Council, for international air services.
- The Air Traffic and Navigation Services Company Limited (ATNS).

1.2 What are the steps which air carriers need to take in order to obtain an operating licence?

Domestic and international air services are governed by the Air Services Licensing Act No. 115 of 1995 and the International Air Services Act No. 60 of 1993, respectively.

1.2.1 International air service licence

An application to the Council in the prescribed format is required. An applicant 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.

1.2.2 Domestic air service licence

The granting of a licence is founded on the applicant's ability to satisfy the Council that the air service will be operated in a safe and reliable manner; at least 75% of the **voting rights** are held by residents of the Republic; the person referred to will be actively and effectively in control of the air service; and the aircraft is a South African registered aircraft.

1.3 What are the principal pieces of legislation in your jurisdiction which govern air safety, and who administers air safety?

The SACAA has overall safety and security oversight functions, exercised in terms of the Civil Aviation Act, 2009 and the Civil Aviation Security Regulations, 2011.

The Act provides for the establishment of an independent Aviation Safety Investigation Board in compliance with Annexure 13 of the Chicago Convention. (See more at question 1.9 below.)

1.4 Is air safety regulated separately for commercial, cargo and private carriers?

No, all modes of air transport (except for defence) are regulated in the same manner.

1.5 Are air charters regulated separately for commercial, cargo and private carriers?

Yes, passenger charters are classified as a non-scheduled public air transport service, (defined as a public air transport service rather than a *scheduled public* air transport service), and in connection with which a specific flight or a specific series of flights is undertaken.

Domestic air charters are regulated under the Domestic Air Services Regulations, 1991, issued under Section 29 of the Air Services Licensing Act, 1990.

1.6 As regards international air carriers operating in your jurisdiction, are there any particular limitations to be aware of, in particular when compared with 'domestic' or local operators? By way of example only, restrictions and taxes which apply to international but not domestic carriers.

The limitations to be considered are as follows:

- **Shareholding** – no shareholding restrictions or limitations are imposed on international air carriers operating in South Africa.
- **Slot availability** – the Airport Slot Coordination Regulations of 2012 makes provision for the appointment of a Coordinator (the ATNS) allocating, monitoring and enforcing the use of slots at airports and ensuring that the capacities of coordinated airports are not exceeded.
- **Airport charges** – the Airports Company South Africa Limited (ACSA) levies airport charges that comprise landing, parking and passenger service charges, which are regulated by the Regulating Committee. There is a differentiation in airport charges for flights landing at an ACSA airport where the airport of departure of that aircraft was outside of South Africa, but those charges apply equally to both foreign and locally owned carriers.
- **Air traffic service charges** – ATNS levy air traffic service charges which are regulated by the Regulating Committee established by Section 11 of the Airports Company Act. Differentiation in charges apply in respect of flights undertaken by an aircraft (regardless of whether the carrier is foreign or locally owned) where either the airport of departure or the airport of arrival of the aircraft is within any State other than South Africa, and the other airport is within South Africa or elsewhere.

1.7 Are airports state or privately owned?

Airports are both State and privately owned. ACSA owns and operates nine major domestic and international airports. Lanseria International Airport (HLA) is privately owned, as are a number of other smaller airports.

1.8 Do the airports impose requirements on carriers flying to and from the airports in your jurisdiction?

Airports do not impose requirements save for “conditions of use” agreements.

Foreign aircraft must be operated in terms of:

- the International Air Services Transit Agreement (the Chicago Convention);
- a bilateral air transport service agreement;
- a foreign licence; or
- a foreign operator’s permit.

1.9 What legislative and/or regulatory regime applies to air accidents? For example, are there any particular rules, regulations, systems and procedures in place which need to be adhered to?

The SACAA regulates all aspects of aircraft accidents and investigations and the independent Aviation Safety Investigation Board conducts independent investigations through the Director of Investigations who has exclusive authority to direct the conduct of investigations on behalf of the Aviation Safety Investigation Board under this Act in relation to aircraft accidents and aircraft incidents.

Subject to the provisions of the South African Maritime and Aeronautical Search and Rescue Act, 2002 (Act No. 44 of 2002) and the Convention, the South African Police Service have rights of prior access to any scene of an aircraft accident or aircraft incident.

1.10 Have there been any recent cases of note or other notable developments in your jurisdiction involving air operators and/or airports?

Recent changes involving air operators and airports include:

- **Export Development Canada and Another v Westdown Investments Proprietary and Others.** All SA 783 (GJ) (21 March 2018), relating to an interim interdict to have an aircraft grounded and returned to a safe location to be stored. The case has important implications on the concept of “expeditious handling of matters”, provided for in the Cape Town Convention under Article 13 (1).
- **Comair Limited v South African Airways (Pty) Ltd.** All SA 78 (GJ) (15 February 2017); which involved a damages action to determine whether the South African Airways incentive schemes, which were found to have had an anti-competitive exclusionary effect on rival airlines in the domestic airline market by the Competition Tribunal under the Competition Act, caused Comair Limited a loss of profits as it alleges and, if so, the quantum of that loss.
- **Comair Limited v Neluheni NO** (in her capacity as Chairperson of the Air Services Licensing Council) (6 September 2017). Comair sought an order to review and set aside the Council’s decision to suspend the air services licence, which arose out of a complaint that Comair’s shareholding did not meet the 75% voting rights requirements of Section 16 (4) (c) of the Air Services Licensing Act.

2 Aircraft Trading, Finance and Leasing

2.1 Does registration of ownership in the aircraft register constitute proof of ownership?

Registration of an aircraft and the issuing of a certificate of registration under the Civil Aviation Regulations does not confer or imply true ownership over an aircraft. In terms of Section 8 of the Civil Aviation Act of 2009, the registered owner of an aircraft is deemed to be the owner for purposes of liability for damages caused by the aircraft in certain circumstances. Registration of ownership is obtained by filing the necessary form (CAR47A-2) with the SACAA.

The legal effect of registration is to designate aircraft registered on the South African Civil Aircraft Register as being deemed to have South African nationality.

Proof of ownership is satisfied by either a Deed or Bill of Sale, or an Aircraft Purchase Order or a similar agreement, supported by a deregistration certificate issued by the SACAA if the aircraft was previously registered.

The legal effect of registration is to designate aircraft registered on the South African Civil Aircraft Register as being deemed to have South African nationality.

Proof of ownership is satisfied by either a Deed of Sale or Aircraft Purchase Order or a similar agreement, supported by a deregistration certificate issued by the SACAA if the aircraft was previously registered.

2.2 Is there a register of aircraft mortgages and charges? Broadly speaking, what are the rules around the operation of this register?

2.2.1 The mortgage register under the Geneva Convention

Section 4 of the Convention on the International Recognition of Rights in Aircraft Act No. 59 of 1993 provides for the opening of a mortgage register with the SACAA which makes it possible for a creditor to register a mortgage over an aircraft or a share therein or in respect of aircraft over any spare part including engines.

2.2.2 Registration procedure

Registration is on application to the SACAA with the filing of the prescribed form (MAR 2.1), and payment of the prescribed fee. The prescribed form identifies the mortgagor and mortgagee, the cause of indebtedness, and the amount secured. The application is usually accompanied by the instrument giving rise to the debt or finance transaction together with a company resolution authorising the registration.

If the mortgage is to be registered under a Power of Attorney from a non-resident, the Power will have to be notarised and apostilled and filed with the SACAA.

The certificate of mortgage does not authorise any mortgage to be made in the Republic or by any person not named in the certificate and contains the prescribed particulars and also a statement of any registered mortgages or certificates of mortgage affecting the aircraft or share in respect of which the certificate is given.

2.2.3 Registration under the Cape Town Convention

In terms of the Convention on International Interests in Mobile Equipment Act No. 4 of 2007, the SACAA is designated in accordance with Article 18 (5) of the Convention as the entry point through which the information required or registration may be transmitted to the International Registry.

2.2.3.1 Fees payable (in South African Rand)

(a) The recording of a mortgage in the register of aircraft mortgages	R 1,731
(b) A notification of the discharge of a mortgage	R 1,100
(c) A transfer of mortgage by deed of cession	R 1,100
(d) A declaration of transmission of rights in a mortgage	R 1,100
(e) A certificate of mortgage	R 820
(f) Access to the register of aircraft mortgages	R 140
(g) The furnishing of information from the register of aircraft mortgages	(R 1 per page up to a maximum of R 200)

2.3 Are there any particular regulatory requirements which a lessor or a financier needs to be aware of as regards aircraft operation?

In terms of Part 48 of the Civil Aviation Regulations of 2011, all aircraft lease agreements involving South African air service operators, South African-registered aircraft and foreign-registered aircraft operated by South African air service operators, or any South African operator who enters into a financial or capital lease agreement as lessee in respect of an aircraft, must provide the Director of the SACAA with a certified copy thereof, and adhere to the provisions of the Convention on the International Recognition of Rights in the Aircraft Act, 1993, where applicable.

Where a dry lease involving a foreign operator is approved by the Director, a copy of the duly completed form must be forwarded to

the International Air Services Council or the Domestic Air Services Council, as applicable, for recordkeeping purposes. The oversight responsibilities in respect of a dry lease of a foreign-registered aircraft may be fully or partially transferred in terms of an Article 83bis Agreement from the appropriate authority of the State of Registry to the appropriate authority of the State of the Operator.

When the conditions, contemplated in sub-regulation (3) (d) of Part 48.03.1 are not met, the aircraft to be dry leased must be registered in the Republic as prescribed in Part 47 of the regulations, and:

- the aircraft shall be subject to the airworthiness certification, maintenance, and inspection procedures prescribed by the regulations in respect of South African-registered aircraft;
- the responsibility or custody of the aircraft and control of all operations shall be vested in the lessee operator;
- the responsibility for the airworthiness and maintenance of the aircraft shall be vested in the lessee operator; and
- the registration of the aircraft shall be valid only for the duration of the lease agreement, and for as long as the aircraft is operated in accordance with the regulations, the terms or conditions specified in the lessee operator's operating certificate, the related operations specifications, and the lessee operator's operations and maintenance control manuals.

The conditions of approval referred to in sub-regulation (3) must be made a part of the lease agreement.

(As regards the right to retake possession of the aircraft either on breach or at the end of the contract, the comments in questions 3.1 and 3.2 below apply.)

2.4 As a matter of local law, is there any concept of title annexation, whereby ownership or security interests in a single engine are at risk of automatic transfer or other prejudice when installed 'on-wing' on an aircraft owned by another party? If so, what are the conditions to such title annexation and can owners and financiers of engines take pre-emptive steps to mitigate the risks?

The common law does not allow the automatic transfer of any rights in an asset, including a component thereof, and a court order is required in all cases. See more at question 3.1 below.

It is also not possible for an owner or operator's rights in a single engine to be separately registered and can only be registered together with an interest in the airframe to which it is affixed. A solution may be the registration of a notarial bond over a moveable asset.

2.5 What (if any) are the tax implications in your jurisdiction for aircraft trading as regards a) value-added tax (VAT) and/or goods and services tax (GST), and b) documentary taxes such as stamp duty; and (to the extent applicable) do exemptions exist as regards non-domestic purchasers and sellers of aircraft and/or particular aircraft types or operations?

The tax implications in South Africa are as follows:

- **Sale of Aircraft** – VAT is levied at the effective rate of 15.4%.
- **Exported aircraft** – a sale of an aircraft that is exported should not attract any VAT, and the transaction is zero rated for the purposes of VAT. If the zero rating is not accepted by the Revenue Authority, due in part to inadequate documentation, etc., there is a possibility that the non-resident purchaser may apply to be exempt from registering for VAT.
- **Imported aircraft** – other than on a temporary basis attracts VAT at 15%.
- **Leases** – aircraft imported for the purposes of a lease will attract VAT on the value of the aircraft based according to

the 'blue book' value. If the lessor is a non-resident and the lessee a South African resident, this may result in the lessor having to register for VAT purposes.

- There are no documentary taxes or costs, nor is stamp duty applicable to aircraft trades.

2.6 Is your jurisdiction a signatory to the main international Conventions (Montreal, Geneva and Cape Town)?

South Africa is a signatory to:

- The Geneva Convention by means of the Convention on the International Recognition of Rights in Aircraft Act No. 59 of 1993 (date of commencement: 1 January 1998).
- The Cape Town Convention by means of the Convention on International Interests in Mobile Equipment Act No. 4 of 2007 (effective date: 1 May 2007).
- The Montreal Convention by means of the Carriage by Air Amendment Act No. 15 of 2006 (Commencement: 19 June 2007).

2.7 How are the Conventions applied in your jurisdiction?

2.7.1 The Geneva Convention

A mortgage register with the SACAA is open for a creditor to register a mortgage over an aircraft or in respect of aircraft over any spare part, including engines.

2.7.2 The Cape Town Convention

The SACAA is the designated entry point through which the information required for registration may be transmitted to the International Registry.

For the purposes of Article 53 of the Convention, the High Court of South Africa is the court that has jurisdiction, as contemplated in Chapter XII of the Convention.

As aforesaid, practical implementation of the Convention has yet to be achieved due to the inconsistencies in the local laws and regulations.

2.8 Does your jurisdiction make use of any taxation benefits which enhance aircraft trading and leasing (either in-bound or out-bound leasing), for example access to an extensive network of Double Tax Treaties or similar, or favourable tax treatment on the disposal of aircraft?

South Africa is a signatory to a number of double taxation agreements for the avoidance of double taxation.

3 Litigation and Dispute Resolution

3.1 What rights of detention are available in relation to aircraft and unpaid debts?

In terms of the common law, a creditor may seize an aircraft for debts owing to the creditor by the debtor by means of formal proceedings in the High Court, which has a discretion to order the release of the aircraft against the provision of security for the creditors' claim together with costs and interest.

In addition, the holder of a debtor/creditor or salvage and improvement lien over a debtor's property is regarded as a secured creditor on insolvency of the debtor.

Other than the form of self-help provisions contained in the Cape Town Convention (see, however, the comments at question 3.2 below), the creditor will in the normal course have to approach the Court for an order to seize and detain the aircraft. Urgent and *ex parte* (without notice) orders are available to the creditor in regard to the formal proceedings referred to above.

Where a debtor is a *peregrinus* (foreigner) to a local court, assets belonging to the debtor within the jurisdiction of the local court may be attached in order to find or confirm jurisdiction and to secure the creditor's claim.

3.2 Is there a regime of self-help available to a lessor or a financier of an aircraft if it needs to reacquire possession of the aircraft or enforce any of its rights under the lease/finance agreement?

No general remedies of "self-help" are available to financiers or lessors, who have to resort to the courts in the event of default or breach of an agreement by means of formal action or motion proceedings.

South Africa has made the necessary Declaration under the Cape Town Convention to include the availability of nonjudicial remedies for a lessor seeking to re-acquire possession of the aircraft either at the end of the contract or upon the breach thereof under the Convention; however, practical implementation has yet to be enforced due to the inconsistency between certain provisions of the Convention and local laws. The Airline Working Group is currently hard at work in assisting local authorities to overcome the issues.

3.3 Which courts are appropriate for aviation disputes? Does this depend on the value of the dispute? For example, is there a distinction in your jurisdiction regarding the courts in which civil and criminal cases are brought?

Specialised aviation courts are not available in South Africa. The most appropriate courts for hearing aviation disputes are the superior courts for amounts over R 200,000, and which consist of the High Court of South Africa, Provincial and Local Divisions which have review and appellate jurisdiction in criminal and civil matters.

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

The rules of jurisdiction relating to the value of a claim and geographical area are important considerations in approaching the correct superior or inferior court.

3.4 What service requirements apply for the service of court proceedings, and do these differ for domestic airlines/parties and non-domestic airlines/parties?

Service of court proceedings is obligatory and is affected by the Sheriff of the Court.

The Court Rules require personal service in matters affecting status or in sequestration proceedings or on a residence or place of business of the Defendant, or on a person who is apparently in charge of the premises at the time of service and is not younger than 16 years of age.

Service at a place of employment or at a chosen address (*domicilium citandi*), or at the registered office is also permissible as is substituted service or by edictal citation where the details are unknown to initiate legal proceedings.

3.5 What types of remedy are available from the courts or arbitral tribunals in your jurisdiction, both on i) an interim basis, and ii) a final basis?

Interim orders interdicting and preventing an aircraft from being removed pending the final determination of a court are available and can be extended to include preservation and control of the aircraft.

Article 13 of the Cape Town Convention makes provision for similar interim orders.

Final orders are made in the normal course of events once a matter has been decided upon by the arbitral tribunal or the Court.

3.6 Are there any rights of appeal to the courts from the decision of a court or arbitral tribunal and, if so, in what circumstances do these rights arise?

Rights of appeal from the higher courts are to the Supreme Court of Appeal and in applicable cases to the Constitutional Court.

A judicial review of a decision of a Court or a tribunal may be brought under the Promotion of Administrative Justice Act, 2000 (PAJA).

Decisions of the Director of Civil Aviation may be appealed to the Civil Aviation Appeal Committee, and thereafter to the High Court.

4 Commercial and Regulatory

4.1 How does your jurisdiction approach and regulate joint ventures between airline competitors?

Joint ventures fall within the ambit of the Competition Act 89 of 1998 (the Competition Act). Competitors are normally regarded as being in a horizontal relationship. In terms of Section 4(1) of the Act, an agreement between, or concerted practice by firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if the joint ventures prevents or reduces competition or alternatively constitutes a merger in a manner contemplated in the Competition Act.

4.2 How do the competition authorities in your jurisdiction determine the 'relevant market' for the purposes of mergers and acquisitions?

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

4.3 Does your jurisdiction have a notification system whereby parties to an agreement can obtain regulatory clearance/anti-trust immunity from regulatory agencies?

The Commission's Corporate Leniency Policy (CLP) offers a cartel member the possibility to disclose information on a cartel to the Commission in return for immunity from prosecution and fines. Immunity is only available to the first cartel member to approach the Commission.

If other cartel members wish to come clean on their involvement in the same cartel, the Commission will also encourage such cooperation outside the scope of the CLP, which can eventually result in a reduction in the fine to be paid in a settlement agreement. Any member of a cartel can apply for leniency and must comply with the requirements set out in the CLP.

Parties to intermediate and large mergers are required to notify the Commission in the prescribed format, and the parties to such mergers may not implement them until they have been approved by the Commission.

Parties to a small merger may implement the merger without the approval of the Commission (and, as such, are not obliged to notify the Commission of that merger).

An Advisory Opinion may be requested from the Commission by external parties to provide guidance on the position that the Commission is likely to take in respect of certain transactions, agreements or practices (on the payment of a fee of R 2,500). An Advisory Opinion is not binding on the Commission.

4.4 How does your jurisdiction approach mergers, acquisition mergers and full-function joint ventures?

Mergers are generally regulated by the Competition Act; however where an airline is concerned and foreign ownership results, aviation legislation rather than the Competition Act comes into play.

If the applicant is not a natural person resident in the Republic, at least 75% of the voting rights of a domestic carrier must be held by residents of the Republic (Section 16(4)(c)(ii) of the Air Services Licensing Act, 1990), and the aircraft which will be used in operating the air service is a South African-registered aircraft (Section 16(4)(e) of the Air Services Licensing Act, 1990). The voting rights in respect of a South African-licensed international carrier need to be substantially held by residents of the Republic, and the aircraft which will be used in operating the air service is a South African-registered aircraft (Sections 17(5)(a) and 17(5)(c) of the International Air Services Act, 1993).

Joint ventures will probably be dealt with under the provisions of the Competition Act dealing with restrictive practices – horizontal and vertical (Sections 4 and 5) rather than a merger, unless they are constructed in a special purpose vehicle (company), in which case the merger provisions would apply.

4.5 Please provide details of the procedure, including time frames for clearance and any costs of notifications.

4.5.1 Procedure

A notification must be made in a single filing by one of the primary firms, and must include:

- (i) A Merger Notice in Form CC 4 (1), which must declare the names of the primary acquiring and target firms and whether, in the opinion of the filing firm, the merger is small, intermediate or large.
- (ii) For each of the primary acquiring firm and the primary target firm, a Statement of Merger Information in Form CC 4 (2).
- (iii) All the required documents must be provided together with payment of the fees.

4.5.2 Timing

The Competition Act does not prescribe a specific time limit within which a merger must be notified. As the parties to a merger may not implement the merger until it has been approved by the relevant competition authority, the parties have an incentive to notify the merger as soon as possible.

The Commission has an initial 20 business days to investigate intermediate and small mergers and can extend the investigation by 40 business days. With regard to large mergers, the Commission has an initial 40 business days to investigate, and can extend by a maximum of 15 days.

Under non-binding, indicative Service Standards issued by the Commission, the timeframes given are:

- Phase 1 cases (non-complex) – 20 business days.
- Phase 2 cases (complex) – 45 business days.
- Phase 3 cases (very complex) – 60 business days.

4.5.3 Fees

A filing fee of R 100,000 is required for the notification of an intermediate merger, and R 350,000 is required for the notification of a large merger.

4.6 Are there any sector-specific rules which govern the aviation sector in relation to financial support for air operators and airports, including (without limitation) state aid?

No State aid provisions exist in the Competition Act for air operators or airports.

Government domestic air transport policy includes undertakings to create a competitive domestic air transport market to level the playing field, and 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.

The Domestic and International Air Services Council normally requires a “guarantee” for consumer protection with regard to cash receipts for flights not yet undertaken.

4.7 Are state subsidies available in respect of particular routes? What criteria apply to obtaining these subsidies?

No State subsidies are available at this time. The Airlift Strategy 2006 does, however, create a framework for public service obligations and national interest considerations:

- Consistent with the spirit of sound commercial operations, air carriers should have no obligation to provide services below cost to any institutions whether Government or otherwise, unless such intervention is required based on national interest considerations and subject to appropriate financial compensation.

In terms of the Government’s public service obligations, air transport services on routes that are not economically viable should be invited through a transparent public tender process.

4.8 What are the main regulatory instruments governing the acquisition, retention and use of passenger data, and what rights do passengers have in respect of their data which is held by airlines and airports?

There is currently no dedicated data protection legislation in South Africa, although other legislation does provide some protection, these being the Consumers Protection Act, the National Credit Act, the Promotion of Access to Information Act, the Electronic Communications and Transactions Act and the Regulation of Interception of Communications and Provision of Communications Related Information Act.

The Protection of Personal Information Act of 2013 is the closest thing to a dedicated data protection legislation of the EU

Data Protection Directive, although the Act has not been fully implemented.

The Constitution of South Africa Act No. 108 of 1996 and the common law continue to provide for the right to privacy and impose certain restrictions on the processing and disclosure of personal information.

4.9 In the event of a data loss by a carrier, what obligations are there on the airline which has lost the data and are there any applicable sanctions?

No mandatory breach notification procedure exists. Individuals’ rights are enforced, and damages are claimed through the common law and the Constitution, and enforced by the courts. Normal appeal procedures are available to a carrier against whom damages are granted, as set out in question 3.5 above.

4.10 What are the mechanisms available for the protection of intellectual property (e.g. trademarks) and other assets and data of a proprietary nature?

Trademarks and Patents are protected by the Trade Marks Act and the South African Patents Act 57 of 1978 and are registered with the Companies and Intellectual Property Commission. An action for infringement may be brought in the Court of the Commissioner of Patents (an *ad hoc* court set up under the High Courts of South Africa). Unregistered trademarks may be defended in terms of common law.

South Africa is a signatory to the Paris Convention, and therefore protection is afforded to trademarks that are well known, even if they are not registered in South Africa. South Africa is also a member of the Patent Co-operation Treaty (PCT). Copyright is protected under the Copyright Act 98 of 1978.

4.11 Is there any legislation governing the denial of boarding rights and/or cancelled flights?

The Consumer Protection Act 68 of 2009 (CPA) applies to the promotion and supply of goods and services concluded in the ordinary course of business between suppliers and consumers and provides some protection to passengers in the event of a denial of boarding under certain circumstances.

The Act provides for the reasonableness test for overselling and overbooking. In terms of this test, a supplier may not accept payment for goods or services where it has no reasonable intention to supply the goods or services.

With regard to damages suffered as a result of a supplier’s inability to supply goods or services due to 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.

No specific legislation governs the cancellation of flights; however, some of the aforementioned remedies may be applicable.

4.12 What powers do the relevant authorities have in relation to the late arrival and departure of flights?

There is no applicable legislation or sanction available to authorities at this time. It is worth noting that Article 19 of the Warsaw Convention as incorporated in terms of the Carriage by Air Act is applicable to carriers.

4.13 Are the airport authorities governed by particular legislation? If so, what obligations, broadly speaking, are imposed on the airport authorities?

State airports are governed by the Airports Company Act No. 44 of 1993, which imposes levies and airport charges with the permission of the Regulating Committee and is restricted from having any financial interest, either directly or indirectly, in the provision of any air service and may not unduly discriminate against or among various users or categories of users of any company airport.

The Airports Company is obliged to conduct its business in such a manner as to ensure that it does not: engage in any restrictive practice as defined in Section 1 of the Maintenance and Promotion of Competition Act No. 96 of 1979; may not change the level or modify the structure of any airport charge more than twice within a financial year; must publish any airport charge at least three months prior to the coming into operation of such charge; and ensures that relevant activities are performed subject to any relevant activity service standards which shall conform to internationally accepted and recommended practices.

The Air Traffic and Navigation Services Company (Act No. 45 of 1993) transferred certain assets and functions of the State to a public company responsible for the provision and control or operation of air navigation infrastructures, air traffic services and air navigation services. The ATNS Company is entitled to levy air traffic service charges by virtue of a permission issued by the Regulating Committee.

(Refer also to question 1.6 regarding slot allocations and the introduction of the Airport Slot Coordination Regulations of 2012.)

4.14 To what extent does general consumer protection legislation apply to the relationship between the airport operator and the passenger?

The CPA, as stated in question 4.11 above, applies to the promotion and supply of goods and services to consumers within South Africa and thus generally applies to the relationship between the airport operator and the passenger.

If a passenger were to cancel a flight, he/she would be entitled to a refund of the airport taxes included in the air fare under the provisions of the CPA.

4.15 What global distribution suppliers (GDSs) operate in your jurisdiction?

The major global distribution suppliers operating in South Africa are: Amadeus; Galileo (Travelport); Sabre; and Worldspan.

4.16 Are there any ownership requirements pertaining to GDSs operating in your jurisdiction?

There are no ownership requirements placed upon GDSs operating in South Africa.

4.17 Is vertical integration permitted between air operators and airports (and, if so, under what conditions)?

In terms of Section 5 of the Competition Act, an agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighs that effect.

4.18 Are there any nationality requirements for entities applying for an Air Operator's Certificate in your jurisdiction or operators of aircraft generally into and out of your jurisdiction?

Operating a domestic air service is subject to the provisions of the Air Services Licensing Act No. 115 of 1990. Section 16 (4) (c) and (d) which states that, subject to the provisions of subsection 15 (5), the applicant:

- (i) is a natural person, is a resident of the Republic; or
- (ii) if the applicant is not a natural person, is incorporated in the Republic and at least 75% of the voting rights in respect of such person is held by residents of the Republic; and
- (iii) that the person referred to in paragraph (c) will be actively and effectively in control of the air service.

“Resident of the Republic” is defined in the Licensing Act as “a person who has his or her ordinary residence in the Republic and who is a South African citizen by virtue of the provisions of the South African Citizenship Act, 1995” (Act No. 88 of 1995).

Subsection 15 (5) makes provision for the Domestic Air Services Licensing Council to “exempt an applicant on the conditions determined by the Minister (of Transport) from the provisions of subsection 16 (4) (c), if the Minister after considering an application directs the Council to exempt such applicant”.

5 In Future

5.1 In your opinion, which pending legislative or regulatory changes (if any), or potential developments affecting the aviation industry more generally in your jurisdiction, are likely to feature or be worthy of attention in the next two years or so?

The proposed amendments to the Civil Aviation Regulations of 2011 are expected to progress through the passage of the Civil Aviation Amendment Bill and the Air Services Amendment Bill through Parliament in 2019.

Amendments to the Civil Aviation Regulations of 2011 are still to be forwarded to the Minister of Transport for promulgation including changes to Part 111. There will also be a need to make changes to the parts of the Act that deal with the National Aviation Security Programme.

The Amendment Bill to the Convention on International Interests in Mobile Equipment Act No. 4 of 2007 which gives effect to the Cape Town Convention is also expected to overcome the inconsistent civil aviation regulations dealing with the implementation of the Convention concerning the AWG’s model IDERA regulations, to be broadly tailored for South Africa.

The Air Service Licencing Bill is also expected to be submitted sometime in late 2018/2019.

The White Paper on National Civil Aviation Policy 2017 has been published, which covers a wide range of issues and includes a policy statement on ownership and control in respect of domestic air services to mean at least 50% plus one member of the Board should be South African residents and that the Chairperson of the Board or entity should be a South African resident. It also provides that the headquarters and principal place of business (registered) of the air carrier should also be in South Africa.

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Chris is the Contributor of the South African Chapters of: *International Commercial Debt Collection* (Ed. David Franklin (Thomson Carswell, 2007)); *The Statute of Limitations in International Commercial Claims* (Thomson Reuters, 2016); *The Aviation Law Review (Law Business Research Limited, 2014–2016)*; and *The International Comparative Legal Guide to: Aviation Law 2017*.

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Christodoulou & Mavrikis Inc. is a corporate and commercial law firm established in Johannesburg in 1991, with particular expertise in aviation law and with solid commercial law, litigation and dispute resolution capabilities.

The firm provides a full range of aviation law services including liability and contentious issues, drafting and negotiating aviation lease agreements and other commercial aspects of aviation, including aircraft repossessions, acquisitions and registrations.

Recent aviation matters include: securing the release of an aircraft attached by judicial means; providing various Legal Opinion Letters on behalf of a US financed sale and lease and on the local nationality requirements for an aircraft operating licence; advising on certain aspects of a large-scale helicopter acquisition by a sovereign; and advising on the VAT implications of a private jet sale and numerous employee-related disputes.

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