



# ICLG

The International Comparative Legal Guide to:

## **Aviation Law 2017**

**5th Edition**

A practical cross-border insight into aviation law

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# 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 Air Services Regulations provide for certain classes and types of air services, categories of aircraft, insurance levels and third-party and cargo liability.

The Convention on the International Recognition of Rights in Aircraft Act No. 59 of 1993 provides for the application in the Republic of the Convention on the International Recognition of Rights in Aircraft, to make special provision for the hypothecation of aircraft and shares in aircraft, and to provide for matters connected therewith.

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 into law, and provides for matters connected therewith.

The Civil Aviation Act No. 13 of 2009 and the Civil Aviation Regulations, 2011: provide for the control and regulation of aviation within the Republic; repeal, consolidate and amend the aviation laws giving effect to certain International Aviation Conventions; provide for the establishment of a South African Civil Aviation Authority with safety and security oversight functions; provide for the establishment of an independent Aviation Safety Investigation Board in compliance with Annexure 13 of the Chicago Convention; give effect to certain provisions of the Convention on Offences and Certain other Acts Committed on Board Aircraft; give effect to the Convention for the Suppression of Unlawful Seizure of Aircraft and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; provide for the National Aviation Security Programme; provide for additional measures directed at more effective control of the safety and security of aircraft, airports and the like; and provide for matters connected thereto.

The Airports Company Act No. 44 of 1993 provides for the establishment of a public company and the transfer of the State's shares in the company to regulate certain activities at company airports and to levy airport charges.

The Air Traffic and Navigation Services Company Act No. 45 of 1993, together with the Air Navigation Regulations, 1976, provide for the transfer of certain assets and functions of the State to a public company, provide for air traffic services and levy air traffic service charges.

#### 1.1.2 Regulatory bodies

These are as follows:

- The South African Civil Aviation Authority ("SACAA"), which was established in terms of the Civil Aviation Act No. 13 of 2009 to control and regulate civil aviation safety and security and to oversee the functioning and development of the civil aviation industry.
- The Air Service Licensing Council, which is responsible for the licensing and control of domestic air services.
- The International Air Services Licensing Council, which is responsible for the licensing and control of international air services.
- The Air Traffic and Navigation Services Company Limited, which is responsible for the provision and operation of air navigation infrastructures, air traffic services or air navigation services.
- The Airports Company of South Africa, which owns and regulates certain activities at company airports and levies airport charges (with the permission of the Regulating Committee established by Section 11 of the Airports Company Act).

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

The operation of domestic and international air services in South Africa is 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 for an international air service licence is made on a prescribed form set out in Annexure A of the International Air Services Act (obtainable at the Department of Transport: [www.transport.gov.za](http://www.transport.gov.za)) and 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) (i) a plan setting out in detail the manner in which the applicant will ensure that a safe and reliable international air service is operated; and
  - (ii) proof that he/it is financially capable of operating such international air service; and
- (c) a certified true copy of:
  - (i) the existing licence held by the applicant, (where applicable); and
  - (ii) in the case of a company: a) its memorandum and articles of association; and b) the authorising resolution concerned.

#### Requirements in respect of aircraft, other than South African aircraft, concerning application for exemption

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:

- (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 the Republic 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, signed at Chicago on 7 December 1944; an air transport service agreement; or a foreign licence. However, it will be subject to the conditions of a foreign operator's permit issued in terms of the Act.

#### 1.2.2 Domestic air service licence

Operating a domestic air service is subject to the provisions of the Air Services Licensing Act No. 115 of 1990.

An application for a licence is made to the council on the prescribed form. Within 21 days after the receipt of an application, the Council shall: (a) forward a copy of such application to the Director of the SACAA; and (b) make known the prescribed particulars in respect of the application concerned by notice in the *Government Gazette*.

Any person may, after the publication of the said notice, obtain a copy of such application from the council, provided that particulars pertaining to the financing of the proposed air service shall not be disclosed without the consent of the applicant.

Any person may address in writing, within 21 days of publication of the notice, and make representations in the prescribed manner, to the Council against or in favour of such application, provided that those representations shall be founded only on (a) the applicant's ability to satisfy the Council that the air service will be operated in a safe and reliable manner, (b) the applicant being a natural person, a resident of the Republic, or, if the applicant is not a natural person, being incorporated in the Republic and at least 75 per cent of the voting rights in respect of such person being held by residents of the Republic, (c) the person referred to being actively and effectively in control of the air service, and (d) the aircraft which will be used in operating the air service being a South African aircraft as defined in Section 1 of the Aviation Act, 1962 (Act No. 74 of 1962).

#### 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) (i) a plan setting out in detail the manner in which the applicant will ensure that a safe and reliable air service is

operated, and must contain full particulars and information on the following aspects in respect of the air service to be provided:

- (1) the description and objectives of the air service to be provided;
  - (2) the full name and surname, qualifications and experience of each of the following officials:
    - (I) the Chief Executive Officer;
    - (II) the Responsible Person: Flight Operation;
    - (III) the Responsible Person: Aircraft; and
    - (IV) the Air Safety Officer;
  - (3) a statement of the responsibility and accountability for the duties of each official mentioned in paragraph (2) above and a written acceptance thereof by such official;
  - (4) a line management diagram indicating to whom each official mentioned in paragraph (2) above reports and the subordinate managerial positions;
  - (5) an outline of the engineering, maintenance and flight operation management practices; and
  - (6) the management practices indicating the manner in which procedures will be updated; and
- (ii) 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) in the case where the applicant will use an aircraft which is not registered in his name in the operation of his air service, a certified true copy of the agreement concerned under which the applicant is entitled to use the aircraft.

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.

In the event of the applicant being a company established for the purpose of operating the air service to be provided, a certified *pro forma* balance sheet reflecting the opening balances as at the projected date of commencement of the air service is to be provided, together with explanatory notes which shall refer to the operating capital and the cash resources available to the applicant at the outset.

In the event of the applicant being an *individual or a partnership*, a certified statement of personal assets and liabilities in respect of that individual or each partner, together with acceptable documented proof of adequate cash resources which will be available at the outset to fund the air service is to be provided, alongside, in the case of an application to operate a scheduled public air transport service, full particulars with regard to the following aspects:

- (i) projections of the income statement, including the: proposed tariffs; forecast revenue; forecast yields, passenger numbers and cargo volumes, if applicable; and flying hours;
- (ii) a cash flow statement including: revenue; trading costs by main category and receipts by operation; fixed assets expenditure; debtor, creditor and stock assumptions; finance raised and repaid; financing costs and taxation; and opening and closing balances;
- (iii) 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;
- (iv) 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 the number and value of issued shares;

- (v) 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 finally
- (vi) 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.

#### **Requirements for the operation of an air service in a safe and reliable manner**

An applicant who applies for a licence to operate a class 1 air service (scheduled public air transport service) must, in addition:

- (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 in (b)(i)(2) 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 which the Council deems to be a fair representation of that component of the applicant's projected cash flow; and
- (b) at all times make his/its financial accounting system available to the Council, or to a person designated by the Council for inspection, provided that the details concerning such financial accounting system shall not be made public without the consent of the applicant.

#### **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.

One of the SACAA's key oversight activities entails ensuring compliance by carrying out various aviation security audits. Whilst the regulations allow for punitive actions to be taken, the SACAA undertakes scheduled and *ad hoc* oversight activities to ensure that instances of non-compliance are addressed and appropriate corrective actions are taken. The SACAA thus puts emphasis on assisting stakeholders to correct non-compliance that may have been picked up during audits. This role is undertaken by the SACAA's Air Safety Operations Division.

The SACAA has also established a Safety Committee and approved the revised terms of reference for the Safety Sub-Committee in March 2011.

The Civil Aviation Act further provided for the establishment of an independent Aviation Safety Investigation Board (the "ASIB") in compliance with Annexure 13 of the Chicago Convention. The ASIB investigates the causes of, and factors contributing to, aircraft accidents, in conjunction with certain other bodies authorised to conduct investigations, issues a report on its findings without apportioning blame or liability, and makes safety recommendations based on its findings. (*See detailed notes under 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", which is 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.

Air charters are operated under a licence in respect of the class and type of air service to be operated: Class II being a non-scheduled public air transport service; and Type N1 being transport of passengers or Type N2 being transport of cargo or mail.

#### **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.**

**Shareholding** – no shareholding restrictions or limitations are imposed on international air carriers operating in South Africa except for the licence requirements (*see further notes under question 4.4 below*).

**Slot availability** – the Airport Slot Coordination Regulations of 2012 came into operation on 22 February 2013, which make 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. In addition, a Slots Coordinating Committee has been established under the Regulations to promote the optimisation of the utilisation of slots in the national interest and the interests of all stakeholders, and to advise the Coordinator. The Regulations further provide guidelines for the allocation of slots and to deal with problems encountered by new entrants in accessing coordinated airports.

**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** – the Air Traffic and Navigation Services Company Limited levies air traffic service charges that are regulated by the Regulating Committee established by Section 11 of the Airports Company Act. Differentiation in charges applies 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. The differentiation in charges will be phased out by 2015.

**Taxes relating to foreign carriers** – an aircraft owner or charterer who is not a resident of South Africa is exempt from taxation in South Africa, if a similar exemption or equivalent relief is granted by the country of which that owner or charterer is resident, to any South African resident in respect of any tax imposed in that country on income which may be derived by that South African resident

from carrying on in that country any business as an aircraft owner or charterer. Furthermore, provisions dealing with these aspects are generally contained in agreements for the avoidance of double taxation.

Income derived by a *resident* who is an aircraft owner or charterer is taxable in South Africa. Foreign taxes that have been paid by a *non-resident* company may be claimed as a credit against the South African income tax liability. Apart from taxable income derived from other sources, an aircraft owner or charterer who is not a resident of South Africa is deemed to have derived taxable income from passengers embarked in South Africa equal to 10 per cent of the amount payable to him or an agent on his behalf, no matter whether the amount is payable in or outside of South Africa. That aircraft owner or charterer will be assessed accordingly. However, this will not apply if the aircraft owner or charterer renders accounts that satisfactorily disclose the actual taxable income derived from the business.

### 1.7 Are airports state or privately owned?

Airports in South Africa are both State and privately owned.

ACSA owns and operates nine major domestic and international airports: OR Tambo International (Johannesburg); Cape Town International; King Shaka International (Durban); Bram Fischer International (Bloemfontein); Port Elizabeth International; Upington International; East London Airport; George Airport; and Kimberley Airport.

Lanseria International Airport (“HLA”) is South Africa’s largest privately owned airport, owned by a consortium which includes Harith Fund Managers, a Black Economic Empowerment consortium which includes the women’s empowerment company Nozala, and the Government Employee Pension Fund (“GEPP”), through the Public Investment Corporation (“PIC”).

Other airports include Kruger Mpumalanga International Airport and Richards Bay.

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

No. Airports do not impose requirements save for “conditions of use” agreements. In terms of the International Air Services Act, 1993, however, foreign aircraft must be operated in terms of:

- the International Air Services Transit Agreement, signed in Chicago on 7 December 1944;
- 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?

- (1) In terms of the Civil Aviation Act No. 13 of 2009, read together with Part 12 of the Civil Aviation Regulations, 2011, the South African Civil Aviation Authority regulates all aspects of aircraft accidents and investigations. Furthermore, an independent Aviation Safety Investigation Board has been established by the SACAA in compliance with Annexure 13 of the Chicago Convention, whose objectives are to:

- (a) conduct independent investigations, including, when necessary, public inquiries into selected aircraft accidents

- and aircraft incidents in order to make findings as to their causes and contributing factors;
- (b) identify safety deficiencies as evidenced by aircraft accidents and aircraft incidents;
- (c) make recommendations designed to eliminate or reduce any such safety deficiencies;
- (d) report publicly on its investigations and on the findings in relation thereto;
- (e) promote compliance with the provisions and procedures of Annexure 13 to the Convention;
- (f) investigate aircraft accidents and aircraft incidents in compliance with the provisions and procedures of Annexure 13 to the Convention; and
- (g) discharge all other functions and obligations in compliance with the provisions and procedures of Annexure 13 to the Convention.

- (2) The Director of Investigations 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, reports to the Aviation Safety Investigation Board with regard to investigations and conducts such further investigation as the Aviation Safety Investigation Board requires.
- (3) The Aviation Safety Investigation Board does not apportion blame or liability in any report following the investigation of any aircraft accident or aircraft incident, and the sole objective of the investigation is accident prevention.
- (4) In delivering its findings as to the causes and contributing factors of an aircraft accident and an aircraft incident, it is not the function of the Aviation Safety Investigation Board to assign fault or determine civil or criminal liability, and the Board must not refrain from fully reporting on the causes and contributing factors merely because fault or liability might be inferred from the Aviation Safety Investigation Board’s findings.
- (5) No finding of the Aviation Safety Investigation Board should be construed as assigning fault or determining civil or criminal liability.
- (6) The findings of or the evidence before the Aviation Safety Investigation Board are not binding on the parties to any legal, disciplinary or any other proceedings and may not be used in any civil, criminal or disciplinary proceedings against persons giving such evidence.
- (7) Where the causes and contributing factors of any aircraft accident or aircraft incident are known to the Aviation Safety Investigation Board, it may refuse to investigate such aircraft accident or aircraft incident.
- (8) 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 shall 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?

Two cases were particularly noteworthy in 2016:

*Nationwide Airlines (Pty) Ltd (In Liquidation) v South African Airways (Pty) Ltd (Case No. 12026/2012) (Delivered 8 August 2016)*

The matter involves a delictual claim arising out of the anti-competitive practices of South Africa’s national carrier South African Airways (“SAA”), notably only the second claim of its kind in South African Competition Law, and the first time a claim for

damages has been litigated pursuant to a finding by the Competition Tribunal (“the Tribunal”).

The Plaintiff was Nationwide Airlines (Pty) Ltd (in liquidation) and a direct competitor to SAA up until March 2005 – its claim against SAA was for an amount of R170 million for loss of profit as a result of a breach of the Competition Act.

The Tribunal held that SAA’s conduct was a prohibited practice in terms of Section 8(d)(i) of the Act, i.e. that the agreements with numerous travel agents resulted in SAA being guilty of abuse of dominance in the marketplace and that the incentive agreements were in contravention of the Act as they induced the travel agents to exclusively deal with SAA. The Tribunal’s finding was upheld in the Competition Appeal Court and it held that the incentive agreements were ‘prohibited practices’. The Court was thus asked to determine the quantum of the damages to be awarded to Nationwide.

It was held that SAA’s abusive conduct was the major cause of the decrease in volume of Nationwide’s passengers and therefore the damages would be in the amount of its lost profit over the relevant period, and Nationwide was awarded the sum of R139.5 million less a 25 per cent contingency deduction (for the time that SAA was on strike in July of 2005). Accordingly, damages in the sum of R104 million were awarded.

***South African Transport And Allied Workers Union, Dinindaza and 29 Others v G4S Aviation Secure Solutions (Case No. JS49/12) (Delivered January 2016)***

In this matter, the applicants who were employed in G4S Aviation Secure Solutions at OR Tambo International Airport were dismissed based on the respondent’s operational requirement. The Court was asked to decide whether the retrenchment procedure was procedurally and substantively fair.

The Court concluded that the reasons for the dismissals were both fair and valid as they were based on the respondent’s need to remain profitable and competitive in the marketplace and therefore deemed to be fair and logical. The applicants’ case was thus dismissed.

## 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 Regulations does *not* confer or imply true ownership over an aircraft. However, 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.

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 CAA 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

The Convention on the International Recognition of Rights in Aircraft Act No. 59 of 1993 (the “Rights in Aircraft Act”) resulted in the opening of a mortgage register with the South African Civil

Aviation Authority and made 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.

In terms of Section 4 of the Rights in Aircraft Act, an aircraft or share therein may be mortgaged as security for a loan or other debt, and the instrument creating the mortgage is called a deed of mortgage. On the production of such instrument and payment of the prescribed fee, the Director of Civil Aviation records the mortgage in the register kept for that purpose in the prescribed manner.

Mortgages are recorded by the Director in the order in which the deeds creating them are provided to him/her, and endorsed with the date and time of that record.

#### 2.2.2 Registration procedure

Upon written application on the prescribed form and on payment of the prescribed fee by the registered owner (“registered owner” means a person to whom an aircraft or a share in an aircraft belongs and whose name is registered as such in the prescribed register) of a South African aircraft (or a share therein) who wishes to mortgage the aircraft by a deed of mortgage to be executed outside the Republic, the Director shall issue a certificate of mortgage.

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 South African Civil Aviation Authority is designated in accordance with Article 18 (5) of the Convention as the entry point through which the information required for registration may be transmitted to the International Registry.

#### 2.2.3.1 Fees payable (in South African rands)

- (a) The recording of a mortgage in the register of aircraft mortgages: R1,100.00.
- (b) A notification of the discharge of a mortgage: R1,100.00.
- (c) A transfer of mortgage by deed of cession: R1,100.00.
- (d) A declaration of transmission of rights in a mortgage: R1,100.00.
- (e) A certificate of mortgage: R820.00.
- (f) Access to the register of aircraft mortgages: R140.00.
- (g) The furnishing of information from the register of aircraft mortgages (R1.00 per page up to a maximum of R200.00).

### 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 Aircraft Act, 1993, where applicable.

- (1) 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 record-keeping purposes.

- (2) The oversight responsibilities in respect of a dry lease-in of a foreign-registered aircraft may be fully or partially transferred in terms of an Article 83*bis* Agreement from the appropriate authority of the State of Registry to the appropriate authority of the State of the Operator.
- (3) When the conditions, contemplated in sub-regulation (3) (d), are not met, the aircraft to be dry leased-in 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.
- (4) The conditions of approval referred to in sub-regulation (3) must be made part of the lease agreement, and in particular must specify the responsibilities of the parties involved in respect of:
- airworthiness of the aircraft and performance of maintenance;
  - signing the maintenance release;
  - flight and cabin crew member certification;
  - crew member training, competency and currency;
  - scheduling of crew members;
  - dispatch or flight-following; and
  - insurance arrangements.

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

The Republic of South Africa is a signatory to the following Conventions:

### 2.4.1 The Geneva Convention

The Convention on the International Recognition of Rights in Aircraft, signed in Geneva on 19 June 1948, was enacted into South African law by means of the Convention on the International Recognition of Rights in Aircraft Act No. 59 of 1993. (Assented to 29 April, 1993; date of commencement: 1 January 1998.)

### 2.4.2 The Cape Town Convention

The Convention on International Interests in Mobile Equipment Act No. 4 of 2007 brought into force 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. (Ratification of the Convention – date of deposit 18 January 2007; effective date 1 May 2007. Ratification of the Protocol (Convention Arts 39 (1) (a); 39(1) (b); 40; 54 (2)) – date of deposit 18 January 2007; effective date 1 May 2007.)

### 2.4.3 The Montreal Convention

The Carriage by Air Amendment Act No. 15 of 2006 (assented to 14 December 2006; date of Commencement: 19 June 2007) gives effect to the International Convention for the Unification of Certain Rules for International Carriage by Air, signed in Montreal on 28 May 1999.

## 2.5 How are the Conventions applied in your jurisdiction?

### 2.5.1 The Geneva Convention

The Convention on the International Recognition of Rights in Aircraft Act No. 59 of 1993 (the "Rights in Aircraft Act") resulted in the opening of a mortgage register with the South African Civil Aviation Authority, and made it possible for a creditor to register a mortgage over an aircraft or in respect of aircraft over any spare part including engines.

In accordance with Section 4 of the Rights in Aircraft Act:

- An aircraft or share therein may be mortgaged as security for a loan or other debt, and the instrument creating the mortgage is called a deed of mortgage.
- On the production of such instrument and payment of the prescribed fee, the Director of Civil Aviation records the mortgage in the register in the prescribed manner and containing the prescribed particulars.
- Mortgages are recorded by the Director in the order in which the deeds creating them are produced and endorsed on each deed that has been so recorded, stating the date and time of that record.
- Upon written application on the prescribed form and on payment of the prescribed fee by the registered owner ("registered owner" means a person to whom an aircraft or a share in an aircraft belongs and whose name is registered as such in the prescribed register) of a South African aircraft who wishes to mortgage the aircraft or share by a deed of mortgage to be executed outside the Republic, the Director shall issue to him a certificate of mortgage.
- A certificate of mortgage shall not authorise any mortgage to be made in the Republic or by any person not named in the certificate.
- A certificate of mortgage shall contain 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.

### 2.5.2 The Cape Town Convention

In terms of the Convention on International Interests in Mobile Equipment Act No. 4 of 2007, the South African Civil Aviation Authority is designated in accordance with Article 18 (5) of the Convention as the 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.

## 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. In addition, the holder of a lien over a debtor's property is regarded as a secured creditor on insolvency of the debtor.

There are two types of lien, *viz.*:

- (i) **Debtor/creditor liens** – in respect of debts relating to the aircraft over which a creditor has a lien *vis-à-vis* the creditor and the debtor, though not between a creditor and third parties.
- (ii) **Salvage and improvement liens** – which arise in respect of salvage services and/or improvements by the creditor to aircraft belonging to the debtor.

3.1.2 Other than the form of self-help contained in the Cape Town Convention (*see notes under 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.

3.1.3 Steps to be taken to obtain an Order:

There are two types of proceedings in the High Court, namely motion and action proceedings; motion proceedings being the shorter and speedier of the two.

Proceedings are initiated by a Notice of Motion together with a supporting affidavit from the Applicant, or by way of a Summons for action proceedings. In both instances, the proceedings are served by the Sheriff of the Court and the Respondent is afforded an opportunity to defend and file opposing papers. In notice proceedings, the usual time taken to reach finality is six to 12 months, and for action proceedings, the close of pleadings can be reached within 12 months; however, it may take as long as two years before the matter is finally heard or even for a trial date to be allocated in certain jurisdictions. Judgments are usually handed down within 30 days of the matter being heard.

3.1.4 A court has discretion to order the release of the aircraft against the provision of security for the creditors' claim together with costs and interest.

Note: 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 found 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 aircraft if it needs to reacquire possession of the aircraft or enforce any of its rights under the lease/finance agreement?

3.2.1 Aside from the option provided by Article 10 of the Cape Town Convention, which is in effect a self-help option, financiers and lessors of aircraft have to resort to the courts in the event of default or breach of an agreement usually by means of an application, which is a relatively speedy procedure.

3.2.2 South Africa has made the necessary Declaration under the Cape Town Convention to include the availability of non-judicial 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, i.e. a lessor may take possession of an aircraft without the Court's permission.

### 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 country regarding the courts in which civil and criminal cases are brought?

3.3.1 No specialised aviation courts are available in South Africa; however, the most appropriate courts for hearing aviation-related claims and disputes are the superior courts, which consist of the High Court of South Africa, Provincial and Local divisions, which have jurisdiction for claims exceeding R200,000.00 in value. Superior courts have both review and appellate jurisdiction in criminal and civil matters.

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

3.3.3 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 effected by the Sheriff of the Court, and must be effected between the hours of 07:00 and 19:00, excluding Sundays unless so directed by the Court.

The Rules of Court (No. 4) provide for service in the following ways:

- **Personal service:** by serving a copy of the legal process personally on the Defendant/Respondent. Such service is required in matters affecting status or in sequestration proceedings.
- **Residence or business:** by serving a copy of the legal process at the residence or business place of the Defendant/Respondent, or with a person who is apparently in charge of the premises at the time of service and is not younger than 16 years of age.
- **Place of employment:** by serving a copy of the legal process at the place of employment of the Defendant/Respondent, or with a person who is apparently in charge of the premises at the time of service and is in a position of authority over the Defendant/Respondent.
- **Domicilium citandi:** by serving a copy of the legal process where the Defendant/Respondent has a chosen a *domicilium citandi* or by leaving a copy at such *domicilium*.
- **Corporation or company:** by serving a copy of the legal process on the responsible employee of the company or corporation at the principal place of business and/or the registered office falling within the jurisdiction of the Court. If the employee refuses to accept service, then a copy may be attached to the principal door or business place.

It is within the Court's discretion to determine whether service is void/defective, and accordingly the Court may refuse to accept service and order that the legal process be re-served.

Service in the inferior courts is governed by Magistrate's Court Rules 8 and 9, and is aligned with service in the superior courts, as described above.

Sometimes service cannot be effected in the prescribed manner due to the fact that the Defendant/Respondent cannot be traced although physically present in South Africa or the Defendant/Respondent is no longer physically present in South Africa regardless of whether or not the foreign address is known. In such instances the Plaintiff/Applicant must seek the leave of the Court to serve in a different manner to that prescribed. The Court will grant leave to serve in one of two manners, as follows:

- **Substituted service in South Africa:** where a Defendant/Respondent's physical whereabouts are unknown. The litigant must convince the Court that there are reasonable grounds to believe that the Defendant/Respondent is still present in South Africa. The Court will direct as to the manner of service and the Court generally prescribes a period of 14 days in which the Defendant may enter an appearance to defend.
- **Service by edictal citation outside South Africa:** where a Defendant/Respondent is not present within South Africa, regardless of whether or not the foreign address is known. The litigant must obtain the Court's discretion as to the

manner of service and permission in order to commence proceedings by substituted service. The mode of service is by way of edictal citation and the litigant must, by way of *ex parte* application, apply to the Court for leave to sue in this manner. Should the Court grant permission to serve in this manner, the litigant will issue what is known as a citation (equivalent to a summons). Attached to the citation is an *intendit* (equivalent to a declaration or particulars of claim), and service will then be effected in the manner as prescribed by the Court.

It must be noted that edictal citations are used only to *initiate* legal proceedings. Should the litigant wish to serve any other document outside of South Africa, the litigant must make application to the Court, setting forth concisely the nature and extent of the claim, the grounds upon which it is based and upon which the Court has jurisdiction to entertain the claim, and also the manner of service which the Court must authorise. When the Defendant/Respondent is not present in the Republic, the Court generally prescribes a period of at least 21 days within which the Defendant may enter an appearance to defend.

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

- 3.5.1 Interim orders – South African common law allows lessors to apply to the courts for an interim (and urgent) interdict preventing an aircraft from being removed pending the final determination of a court. Such interim orders can extend to a preservation order, custody and control of the aircraft, and even to an income stream.
- 3.5.2 Article 13 of the Cape Town Convention makes provision for similar interim orders.
- 3.5.3 Final orders are made in the normal course of events once a matter has been decided upon by the arbitral tribunal or the Court, and are executable by means of a writ served by the Sheriff of the Court.

#### Steps to be taken to obtain an order

There are two types of proceedings in the High Court, namely motion and action proceedings; motion proceedings being the shorter and speedier of the two.

Proceedings are initiated by a Notice of Motion together with a supporting affidavit from the Applicant, or by way of a Summons for action proceedings. In both instances, the Sheriff of the Court serves the proceedings and the Respondent is afforded an opportunity to defend and file opposing papers. In notice proceedings, the usual time taken to reach finality is six to 12 months, and for action proceedings, the close of pleadings can be reached within 12 months; however it may take as long as two years before the matter is finally heard or even for a trial date to be allocated in certain jurisdictions. Judgments are usually handed down within 30 days of the matter being heard.

### 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?

- 3.6.1 A Right of Appeal from the higher courts is to the Supreme Court of Appeal and, in the case of constitutional matters, an appeal may be brought in the Constitutional Court against a ruling of the Supreme Court of Appeal.

In addition, a person aggrieved by an authority's decision (such as the Civil Aviation Authority) may, under the Promotion of Administrative Justice Act, 2000 ("PAJA"), seek a judicial review of the decision in a court or tribunal.

Furthermore, in terms of PAJA, a person who has been aggrieved by an authority's decision has a right to be given reasons for the decision.

- 3.6.2 South Africa is a signatory to the New York Convention on the enforcement of arbitral awards, given effect through the Recognition and Enforcement of Foreign Arbitral Awards Act, No. 40 of 1977.
- 3.6.3 The arbitration of disputes is governed by the Arbitration Act No. 42 of 1965, which provides for the settlement of disputes by arbitration in terms of a written agreement, and for the enforcement of arbitral awards. Unless otherwise agreed, an arbitral award is final and not subject to appeal. However, the award can be made an order of court which may then be enforced in the same manner as any judgment of court. The Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 governs specifically the enforcement of foreign arbitral awards in South Africa.

## 4 Commercial and Regulatory

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

All joint ventures, in whatever form, that take place in the Republic, or outside the Republic with an effect in the Republic, 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:

- (a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or
- (b) it involves any of the following restrictive horizontal practices:
  - (i) directly or indirectly fixing a purchase or selling price or any other trading condition;
  - (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
  - (iii) collusive tendering.

The question would therefore be whether such joint ventures prevent or reduce competition or alternatively constitute a merger in a manner contemplated in the Competition Act.

#### Global airline alliances

The Competition Commission granted South African Airways ("SAA") an exemption to retain its membership of the global airline grouping, the Star Alliance.

The Commission investigated whether SAA's membership of the airline grouping was anticompetitive and concluded that SAA's membership of the Star Alliance constitutes a "prohibited" practice. However, after analysing the matter, an exemption was granted "to ensure the maintenance or promotion of South African exports". The Competition Commission granted SAA a conditional exemption for 55 months, ending 31 December 2015. SAA must, *inter alia*, submit annual reports to the Commission in respect of the revenue that it generates through participating in the Star Alliance products.

#### Fully integrated, revenue-sharing "metal-neutral" alliances

No application has been made in this regard. These matters would be considered under the provisions of the Competition Act, dealing with restrictive practices – horizontal and vertical (Sections 4 and 5).

### Code-share agreements

The Competition Commission approved a temporary exemption of a code-share agreement between SAA and Qantas until December 2012. SAA has applied for an exemption of a code-share agreement with Qantas to co-ordinate activities, allocate the market and to acquire blocks of seats on each other's aircraft on the basis of the maintenance and promotion of exports (Section 10(3)(b)(i)) and a change in productive capacity necessary to stop the decline in an industry (Section 10(b)(iii)) for the period 1 January 2013 until 31 December 2015. This application is pending at the time of writing.

In 2007, the Competition Commission found that agreements between SAA and Lufthansa "created a platform for SAA and Lufthansa to collude and that the airlines had used the opportunity to fix the selling price of air tickets on their flights between Cape Town/Johannesburg and Frankfurt". This related to code-share flights, the co-ordination of flights, revenue sharing and sales incentives. Both SAA and Lufthansa were required to pay administrative penalties and undertook not to fix the selling price of air tickets or any other products or services with one another or any other competitor, and to implement a compliance programme designed to ensure that its employees and directors are informed of, and comply with, their obligations under competition law and the provisions of the Act.

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

The Competition Act of 1998 is the legislation by means of which competition is regulated. The Competition Amendment Act 1 of 2009 (the "Amendment Act") has been signed and assented to but is not yet in force and effect.

There are three institutions of regulation provided for in the Competition Act:

- (i) the Competition Commission (the "Commission"), which is responsible for investigating and evaluating mergers and prohibited practices;
- (ii) the Tribunal, which is essentially the court of first instance in adjudicating competition law matters; and
- (iii) the Competition Appeal Court ("CAC"), which is the designated appellate authority for competition law matters.

In addition, the Supreme Court of Appeal ("SCA") is authorised to hear appeals from the CAC, and the Constitutional Court is empowered to hear constitutional issues arising from competition law cases.

No airline merger has been notified to date. Any such application would be dealt with in terms of Chapter 3 of the Competition Act, 1998 – Merger Control, applicable to all industries.

Code-shares would 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, which relates to the direct or indirect acquisition or establishment of control over the whole or part of the business of another firm (Section 12). The test of co-operative agreements is whether they have the effect of substantially preventing or lessening competition in a market, mitigated by technological or other pro-competitive gain (Sections 4 and 5). 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 more narrow 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 case in terms of which a more narrow 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 has the power to disallow small and intermediate mergers, and makes recommendations on large mergers to the Tribunal.

Not all mergers that occur in business are required to be notified to the competition authorities.

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

An intermediate merger occurs when the consolidated turnover or assets (whichever is higher) of the target firm and the acquiring group of companies amounted to R560 million or more in the last financial year, and the consolidated assets or turnover of the target firm amounted to R80 million or more in its last financial year.

A large merger occurs when the consolidated turnover or assets (whichever is higher) of the target firm and the acquiring group of companies was R6.6 billion or more in the last financial year, and the consolidated assets or turnover of the target firm is R180 million or more in its last financial year.

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

Notwithstanding this, on 15 April 2009, the Commission issued a guideline on small merger notification. In spite of the fact that the Competition Act allows for implementation of a small merger without approval, the Commission's guideline provides that the Commission will need to be informed of all small mergers that meet the following criteria:

- at the time of entering into the transaction, any of the firms, or firms within the group, are subject to an investigation by the Commission in terms of Chapter 2 (prohibited practices and abuse of dominance) of the Competition Act; or
- at the time of entering into the transaction, any of the firms, or firms within their group, are respondents to pending proceedings referred by the Commission to the Tribunal in terms of Chapter 2 of the Competition Act.

In terms of the guideline, the Commission has advised parties to small mergers that meet the above criteria to voluntarily inform the Commission in writing, by way of a letter, of their intention to enter into the relevant transaction. The letter must contain sufficient detail concerning the parties, the proposed transaction and the markets in which the parties compete. Upon consideration of the letter, the Commission will revert to the parties, informing them whether or not the Commission will require the parties to formally notify that merger in the prescribed manner.

When required to consider a merger, the Commission or, where relevant, the Tribunal will first determine whether or not the merger is likely to substantially prevent or lessen competition, and if so, whether there are technological, efficiency or other pro-competitive gains that offset the anti-competitive effect of the merger. The Commission or Tribunal will also consider whether the merger can be justified on substantial public interest grounds.

Factors relevant to this enquiry include: the ease with which, and the ability of, new firms to enter into the market; the level and trends of concentration in that particular market; whether there has been a history of collusion in the market; and if the merger will result in the removal of an effective competitor.

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

Foreign ownership of 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 (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).

A merger relates to the direct or indirect acquisition or establishment of control over the whole or part of the business of another firm (Section 12 of the Competition Act). 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.

##### What does the Competition Commission consider in analysing a merger?

Section 12A of the Act sets out the analytical framework for the competitive assessment of mergers in the following manner:

- (i) Is the merger likely to substantially prevent or lessen competition in the relevant markets?
- (ii) If it appears that the merger is likely to substantially prevent or lessen competition in the relevant markets, then the Commission needs to determine whether these anti-competitive effects can be outweighed by technological, efficiency or other pro-competitive gains, and whether a merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in sub-Section (3).

In terms of Section 12A(2)(a)-(h) of the Act, the Commission needs to evaluate the following factors to assess the strength of competition in the relevant market/s and determine whether the merger will result in any change in the competitive landscape that could substantially prevent or lessen competition in the relevant market/s:

- (i) the actual and potential level of import competition in the market;
- (ii) the ease of entry into the market, including tariff and regulatory barriers (a merger is unlikely to create or enhance market power or to facilitate its exercise if entry into the market is timely, that is within a period of two years in most markets, likely to be profitable for new entrants and sufficient to return market prices to their pre-merger levels);
- (iii) the levels and trends of concentration (this is usually undertaken in the assessment of market shares and the calculation of the Herfindahl-Hirschman Index or HHI, which is basically the sum of the squared market shares of merging parties and their competitors in the relevant market/s) and history of collusion in the market;
- (iv) the degree of countervailing power in the market (that is, the bargaining strength that the buyer has *vis-à-vis* the seller in commercial negotiations due to its size, commercial significance to the seller and its ability to switch to alternative suppliers);
- (v) the dynamic characteristics of the market, including growth, innovation and product differentiation;
- (vi) the nature and extent of vertical integration in the market;

(vii) whether the business or part of a business of a party to the merger or proposed merger has failed or is likely to fail (the relevant tests in assessing the “failing firm” doctrine were outlined by the Tribunal in the *Iscor Ltd / Saldanha Steel (Pty) Ltd* decision (case number: 67/LM/Dec01)). It should be noted that the onus is on the merging parties to invoke the doctrine of the failing firm; and

(viii) whether the merger will result in the removal of an effective competitor.

Merger reviews are conducted in terms of Chapter 3 of the Competition Act. Firms entering into intermediate or large mergers are required in terms of Section 13A of the Act to notify the Commission of that merger in a prescribed manner and form, and may not implement that merger until it has been approved with or without conditions by either the Commission (intermediate mergers), the Tribunal (large mergers) or the Competition Appeal Court.

The Mergers & Acquisitions Division will investigate and analyse the likely effects of the notified merger and conclude whether or not the merger is likely to substantially prevent or lessen competition in any of the markets in which the parties compete. In addition, the division will consider the likely impact that the transaction is likely to have on the following public interest grounds:

- (a) a particular industrial sector or region;
- (b) employment;
- (c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
- (d) the ability of national industries to compete in international markets.

In assessing mergers, the focus is on whether the post-merger market structure will be conducive to competition. The Competition Act defines a merger as the direct or indirect acquisition or establishment of direct or indirect control over the whole or part of the business of another firm. This may be achieved in any manner, including through the purchase or lease of the shares in, or an interest of, the target firm.

Whether a merger has occurred or not, often turns on the question of whether there has been a change in “control” amongst the parties. The Competition Act sets out numerous instances of control, which include, *inter alia*:

- where there has been a change in beneficial ownership of more than half of the issued share capital of the firm;
- where the acquiring firm is entitled to vote, a majority of the votes that may be cast at a general meeting of the target firm, or that firm has the ability to control the voting of a majority of those votes, either directly or through a controlled entity;
- where there is an ability to appoint or to veto the appointment of a majority of the directors of the target firm; and
- where the acquiring firm has the ability to materially influence the policy of the target firm in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in the paragraphs above.

#### 4.5 Details of the procedure, including time frames for clearance and any costs of notifications.

##### 4.5.1 Procedure

A joint merger 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 firm 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 documents required, as stipulated on each form, including:
  - (a) a complete list of shareholders and their respective shareholding, including minority shareholders, for the primary acquiring firm and for any firm that directly or indirectly controls the primary acquiring firm; and
  - (b) strategic documents of the merging parties in relation to the affected markets including, but not limited to, the following: business plans; marketing documents; high-level strategic presentations; and board minutes.
- (iv) A non-confidential version of Form CC 4 (1), and the report on competition if submitted.
- (v) In an attempt to move to a paperless filing system, the Commission also encourages the merging parties to file electronically and include a CD of the merger filing.

The forms may be hand-delivered to the Competition Commission's Registry or may be emailed, faxed or posted.

A case number, together with date of receipt, will be issued to the notifying party. The case number must be used in all subsequent correspondence.

When lodging the forms of notification with the Competition Commission, the notifying party must provide proof of delivery of copies of the forms to every other party to the merger, as well as the relevant registered trade union or employee representatives, with the Competition Commission.

Before the date of filing the forms with the Competition Commission, the merger filing fees must be paid to the Competition Commission.

#### 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.

#### How long does it take to process a merger?

Category of Merger	Period of Investigation	
	Initial Period	Extended Period
Small or Intermediate	20 business days	Once only for 40 business days. The Commission has sole discretion in determination of extending the period of investigation.
Large	40 business days	One or more extensions of a maximum of 15 business days. The Commission requires the merging parties and the Tribunal's consent to extend the investigation.

As illustrated in the table above, the Commission has an initial 20 business days to investigate intermediate and small mergers. The Commission can, however, extend the investigation by 40 business days (refer to Section 13 (5)(a) or Section 14 (1)(a) of the Act). With regard to large mergers, the Commission has an initial 40 business days to investigate; however, the investigation can be extended by a maximum of 15 days per request, with consent from the merging parties and the Tribunal (refer to Sections 14 A (1)(b), 13(5)(a), 14(1)(a) of the Act and Rule 34(2)(a) of the Commission's Rules).

Under non-binding, indicative Service Standards issued by the Commission's Mergers and Acquisitions division in 2010, the Commission classifies mergers into three categories based on their complexity, and (informally) undertakes to adhere to the following timeframes in respect of each category of merger. In practice, the Commission does not always adhere to these timeframes.

#### Phase 1 cases (non-complex) – 20 business days

Phase 1 cases are readily identifiable by the absence of competition issues, and involve a merger where either one or more of the following criteria apply to the facts presented by the parties:

- There is no overlap between the activities of the parties.
- In the event there is an overlap between the activities of the parties, the combined market share is below 15 per cent.
- No complex control structures arise from the merger.
- No public interest issues arise from the merger.

#### Phase 2 cases (complex) – 45 business days

Phase 2 cases are complex mergers which involve transactions between direct or potential competitors (horizontal mergers) or between customers and suppliers (vertical mergers) where the parties have market shares in excess of 15 per cent in their respective markets. Phase 2 transactions generally involve challenges which include either of the following:

- Defining the relevant market/s.
- Multiple product or geographic markets.
- Markets which are subject to deregulation.
- Public interest issues arising from the transaction.

#### Phase 3 cases (very complex) – 60 business days

Phase 3 cases are very complex cases which are likely to create or result in a substantial prevention or lessening of competition. Mergers between leading South Africa market participants in any one of the markets in which the parties compete fall within this category. Phase 3 transactions will necessitate a thorough investigation, including obtaining specific documents and information from the merging parties (not limited to the complete filing documents and information) and third-party industry participants. In practice, the Commission often takes much longer than 60 business days to decide.

#### 4.5.3 Fees

A filing fee of R100,000.00 is required for the notification of an intermediate merger, and R350,000.00 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?

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 "guarantee" of consumer protection.

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 undertakings included that:

- South African Airways ("SAA") would operate autonomously and on a sound commercial basis.

- SAA would not enjoy any privileges in terms of any legislation or any other practice as a result of it being a Government enterprise.
- The Government would in future not guarantee new loans to SAA or any other airline with Government interests, whilst private airlines have to borrow at their own risk.
- Equal treatment of all participants in the air transport market would be ensured.

The recent grant of a R5 billion guarantee and a further R550 million guarantee in favour of SAA (against a background of a legacy of substantial losses and financial assistance to SAA) pose challenges on the enforceability of these undertakings and the maintenance of a competitive domestic air transport market.

#### 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.
- This strategic approach offers the Government much more than it had before, which focused on SAA to the exclusion of other airlines to achieve its strategic objectives. In this context, the Government will be able to focus on both SAA and other airlines to play a role in achieving the economic growth and developmental objectives.

#### 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?

The Protection of Personal Information Act was passed into law on 26 November 2013 and, although the commencement date for the majority of the Sections of the Act is still to be determined, those Sections relating to the establishment of the Information Regulator and the making of regulations under the Act have commenced.

The remaining Sections of the Act will only commence on a date still to be determined by the State President. The Act also provides for a transitional period: all processing of personal information will be required to comply with the provisions of the Act within one year of its commencement (although this may be extended to three years if necessary).

The requirements imposed by the Act will apply to personal information that is held in relation to employees, customers and clients, prospective customers and clients, visitors to premises, and any other personal information that a business holds in the context of its particular activities. Some of the effects of the Act include:

- A business that collects, holds, uses, disseminates or otherwise processes individuals' personal information will have to do so under certain conditions.
- A business cannot collect more personal information than is necessary to fulfil the purpose for which the information was collected.

- Businesses will have to allow customers or prospective customers to specifically opt in to receive direct marketing communications. Until now, businesses have only been required to allow consumers to opt out. There are some exceptions to this general rule in respect of direct marketing to existing customers.
- Steps must be taken to secure the integrity and confidentiality of personal information in the possession of a business, or under its control, by taking appropriate, reasonable technical and organisational measures to prevent loss of, damage to or unauthorised destruction of personal information.
- Cross-border transfers of personal information will have to meet certain requirements.
- A data protection authority, the Information Regulator, is in the process of being established and is tasked with monitoring and enforcing compliance with the law, receiving and handling complaints about alleged violations, serving information notices, enforcement notices and infringement notices, and obtaining a warrant for search and seizure.

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.

The common law right to privacy includes the individual's (and a juristic person's) right to determine the ambit and method of disclosure of personal information, such as identity and passport numbers, email and physical addresses, telephone numbers and financial information.

Individuals are also granted access to records held by a public or private body in terms of the Promotion of Access to Information Act No. 2 of 2000, which gives effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights, unless that record is requested for the purpose of criminal or civil proceedings.

The Electronic Communication and Transactions Act No. 25 of 2002 and the National Credit Act No. 34 of 2005 also regulate the processing of personal information in South Africa.

#### 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 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?

The Companies and Intellectual Property Commission ("CIPC") oversees the Register of Trade Marks, which records all the trademarks that have been formally applied for and registered in the Republic of South Africa.

- 4.10.1 A **trademark** can only be protected as such and defended under the Trade Marks Act No. 194 of 1993 if it is registered; however, unregistered trademarks may be defended in terms of common law. South Africa is also 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.

The registration procedure results in a registration certificate which has legal status, allowing the owner of the registered trademark the exclusive right to use that mark.

- 4.10.2 **Patents** are filed with the Patents Office in the CIPC and are regulated by the South African Patents Act 57 of 1978. Patent protection may be obtained for inventions which are new and unobvious, and which are capable of use in the fields of trade, industry or agriculture.

South Africa is a member of the Patent Co-operation Treaty (“PCT”), which allows an individual to file an international application, as well as a national application. The international application will designate countries in which the applicant seeks protection.

Acceptance of the application takes place six to eight months after filing and must be advertised in the Patent Journal. The certificate of registration will be issued thereafter but the publication date is regarded as the grant date of the patent.

- 4.10.3 **Copyright** is protected under The Copyright Act 98 of 1978, which provides for the statutory protection of copyright of literary musical and artistic works; however, there is no provision for the registration of copyright, except for cinematographic films.
- 4.10.4 **Special Courts** – an action for infringement may be brought by way of application or summons and is heard in the Court of the Commissioner of Patents (an *ad hoc* court set up under the High Courts of South Africa).

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#### 4.11 Is there any legislation governing the denial of boarding rights?

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The Consumer Protection Act 68 of 2009 (“CPA”) and the Regulations thereto apply 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 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.

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

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

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

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State Airports, which were transferred to the Airports Company of South Africa under the Airports Company Act No. 44 of 1993, are governed by the said Act and may only impose levies and

airport charges with the permission of the Regulating Committee established by Section 11 of the Airports Company Act.

The Airports Company 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.

It is obliged to conduct its business in such a manner as to ensure that the company: 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 by notice in the Gazette 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 provided for the transfer of 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.

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

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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.

It is submitted that 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.

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

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

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

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

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

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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.

## 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?

#### 5.1.1 Proposed amendments to the Civil Aviation Regulations of 2011

The Minister of Transport gave notice on 23 September 2016 of its intention to amend the Civil Aviation Regulations of 2011 and the Director of Civil Aviation also intends to amend the Technical Standards; however, the amendments are scheduled for discussion at Parliament only in 2017. At this stage, Cabinet approval has not been obtained and the Office of the Chief State Law Advisor has not yet perused the Bill concerned. Furthermore the Bill, after the above-mentioned steps have been finalised, has to be published for public comment.

#### 5.1.2 Remotely piloted aircraft systems (“RPAS”)

Regulations under Part 101 governing the licensing and operation of RPAS came into effect on 1 July 2015, making South Africa one of the first countries to make comprehensive headway in terms of developing regulations for the operation of drones.

The new regulations will affect drones used for private and commercial use. Private use regulation is limited and necessitates that the drone may not have any commercial interest and is solely operated on the property owned by the operator, and requires that distance thresholds are maintained. However, despite universal standards of use, drones do not have to be approved and licensing requirements do not exist.

Should one wish to operate a drone commercially, this must be approved by the South African Civil Aviation Authority and the operator will need to obtain an RPAS pilot’s licence. Such licences are issued in three specific categories: aeroplane; helicopter; and multi-rotor. Logbooks detailing each flight also have to be recorded by pilots.

An issue that will no doubt be debated, and answers thereto found, is what regime will regulate cross-border operation of drones, and whether the bilateral system will need to be addressed to recognition

of foreign operator permits, etc., as well as whether the International Air Services Council has the jurisdiction to deal with the issue or operators will simply have to apply for permission to operate in each specific country from which they wish to launch their operation.

#### 5.1.3 Slot availability

The Airport Slot Coordination Regulations 2012 were published in the *Government Gazette* on 22 February 2013, in terms of which the Air Traffic Navigation Services has been appointed as the Coordinator, whose function is to facilitate the process of voluntary schedule adjustments by aircraft operators so as to avoid exceeding the coordination parameters of schedules-facilitated airports.

In addition, the Slot Coordination Committee was established and made up of representatives of a number of aviation industry and State bodies whose function is to advise on the coordination parameters contemplated in Regulation 18 and make proposals to, or advise, the Coordinator, the Director-General or the Minister on:

- (i) possibilities for increasing the capacities of coordinated airports or for improving their usage by aircraft operators;
- (ii) improvements to aircraft traffic conditions prevailing at coordinated airports, including environmental issues relating to aircraft traffic;
- (iii) local rules and local guidelines for the allocation of slots, which rules or guidelines are specific to a particular airport;
- (iv) methods of monitoring the use of slots;
- (v) serious problems encountered by new entrants in accessing coordinated airports;
- (vi) any other issues relating to capacity, slot allocation and monitoring of the use of slots at coordinated airports; and
- (vii) the designation of coordinated airports and schedules-facilitated airports, the withdrawal of designations, the relaxation of designations and the designation of special event airports in terms of Regulations 2 to 7.

In addition, the Committee is tasked with promoting the optimisation of the utilisation of slots in the interests of all stakeholders and in the national interest.

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Chris practises mainly in the aviation field advising both local and international aviation clients, particularly on contractual issues and other aviation-related work, including negotiation and drafting aircraft acquisition agreements, charter, lease and management agreements as well as aircraft securitisation and recoveries. The firm has represented aviation insurers, brokers and owners in a number of aviation matters.

Chris served as a non-executive Director of a local commercial airliner for more than seven years and chaired various sub-committees.

He is the Contributor of the South African chapters to the following publications: *International Commercial Debt Collection* (Ed. David Franklin – published by Thomson Carswell, 2007); *The Statute of Limitations in International Commercial Claims* (published by Thomson Reuters, 2016); and *The Aviation Law Review* (published by Law Business Research Limited, 2014–2016).



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