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I am delighted to continue to be associated with *The Aviation Law Review*, of which this is the seventh edition. Aviation has from the outset been one of The Law Reviews’ most successful publications; its readership has been vastly enhanced by making it accessible online to over 12,000 in-house counsel, as well as subscribers to Bloomberg Law and LexisNexis. This year I welcome a new contributor from Cyprus, as well as extending my thanks and gratitude to our seasoned contributors for their continued support. Readers will appreciate that contributors voluntarily donate considerable time and effort needed to make these contributions as useful as possible to readers. They are carefully selected for their knowledge and insights into their subject and we are fortunate to enjoy their support.

At the time of writing, the shocking B737 Max disaster story continues to unfold. The method of self-approval adopted by Boeing with the support of the FAA has been the subject of much criticism, the more so since approval by the FAA has routinely been followed by other regulators hitherto without serious challenge and because the FAA was the last substantial regulator to ground the type following the two fatal accidents. In an unprecedented break with previous practice, EASA has announced that it is conducting its own ‘independent’ review of the design of the Max and that ‘completion of it was a prerequisite for return to service of the aircraft’. EASA itself had adopted the practice of reciprocal recognition. There can be no doubt they knew of its drawbacks. There are eerie parallels between this and the Helios 737 accident where Boeing incorporated a warning system that it had superseded in other models, notwithstanding warnings following other depressurisation incidents from European accident investigation boards and NASA itself! The complacency of both the manufacturer and the FAA following the two fatal accidents has left many aghast.

Inevitably following the news, plaintiffs are seeking a route to the US for their compensation claims and seeking to avoid the *forum non conveniens* rule that in principle directs such lawsuits back to the countries with jurisdiction over the carrier – usually with the requirement of full Boeing cooperation with the plaintiffs’ alternative choice of jurisdiction and provision of all discovery that would otherwise be mandated in US litigation. The manufacturer will also be seeking an early agreement with the operators’ insurers, and any other interested parties, to a settlement agreement to try to limit its own exposure to non-US jurisdictions. The shortcomings discovered in the regulator’s own processes may, however, hamper Boeing’s efforts to escape US judicial oversight, as may the involvement of the Federal Bureau of Investigation in the criminal investigation of the certification of the type, following the establishment of a grand jury investigation of the certification process. In the meantime, as a result of the grounding of the 737 Max, claims are mounting from operators that will dwarf the insurance coverage available (reportedly capped at US$250 million). In the meantime, Boeing’s loss of orders will redound to the benefit of Airbus and other
single-aisle aircraft manufacturers, as has been seen from orders announced at the Paris Air Show; notwithstanding the loyalty displayed by the International Airlines Group with regard to its order for 200 737 MAX aircraft.

It is hoped EASA will also reconsider its reliance on other regulators’ type certificates, as well as any reliance it places on European manufacturers for type approval. The cost of adequate regulation in all jurisdictions must be met centrally, as was heavily recommended as long ago as 2000 in the Rand Institute’s report ‘Safety in the Skies’ on the aviation accident investigation process.

Inevitably, the European aviation legal scene continues to be dominated by Brexit where reassuring words, at least by regulators in the UK, have yet to be converted into terms of final agreements. This has led major carriers to focus on developing European air operator certificates and some are also now ensuring they satisfy the European tests for majority ownership, which may cause interesting issues in the future for some of the low-cost carriers that heretofore have been able to operate from the UK – although the UK has signalled by means of a draft statutory instrument that it will not apply the EU majority ownership and control rules once the UK leaves the Union.

Another current project of note within Europe concerns the infamous EU Regulation 261/2004, which from its beginnings as an attempt to ensure fair treatment of passengers (or, as frequently rumoured, the reprisal of a snubbed EU Commissioner determined to show she was not to be ignored) has become, by virtue of the legislative inclinations of the Court of Justice of the European Union (CJEU), a monster devouring the assets and threatening the safety of European airlines. The Regulation has been grotesquely judiciously distorted since its adoption. The ECJ has devastated the balance of the regulation by destroying the defence of ‘exceptional circumstances’ as a defence to claims, as well as by applying a time limit for making claims of up to 10 years, and finally by eliding delay and cancellation in determining availability of compensation. This was achieved without any attempt to determine the financial impact on carriers who have seen regional routes in particular become inoperable due to cost resulting in losses of prized European connectivity. All this in return for the sake of a few hundred euros ‘compensation’ to individuals for minor inconvenience and perhaps a misguided boost to the popularity of the nanny super state!

The regulation is being reviewed by the EU on the assumption that the UK is leaving, and that Spain will withdraw its blockade on this and other projects as a result. The Steer group has been commissioned to review and report back and has instigated a number of enquiries to various organisations as a result. The omens are not good. The review is being conducted of the effect of the regulation, but has consciously ignored regional carriers in its case studies and has been heavily weighted to claimants’ associations whose raison d’être is the collection of fancy percentages on claims made.

As was made clear at a recent conference of the European Regions Airlines Association, the uninformed extrajudicial legislative impulses of the CJEU in this area threatens regional connectivity and the operation of routes that are only marginally profitable. The European Regions Airline Association continues, with other industry groups, to lobby for change. Local governments whose industry and regional connectivity is threatened by this project need to join forces with consumer associations interested in consumers’ freedom of movement and industry interested in logistics to make their interest in continued connectivity heard.

The second European Aviation Environmental Report (EAER) was published this year and provides an updated assessment of the environmental performance of the aviation sector published in the first report of 2016. It reports that continued growth of the sector has
produced economic benefits and connectivity within Europe and is stimulating investment in novel technology but recognises that the contribution of aviation activities to climate change, noise and air quality impacts is increasing, thereby affecting the health and quality of life of European citizens. Countermeasures are being developed, but their combined effect has reportedly not kept pace with the recent strong growth in the demand for air travel, thereby leading to an overall increase in the environmental impact. If Member States would stop pandering to uninformed sectional national and labour interests to permit the true operation of the Single European Sky ATM Research (SESAR) programme the direction of travel would be altered overnight, but as usual incompetent short termism prevails in politics to the detriment of industry and the environment. It is hoped one day we will see an unfettered SESAR introduced, although the recent EU decision to prevent UK carriers from using carbon offsets does not suggest an overwhelming dedication to pollution reduction.

The tension between ‘just culture’ and the criminal law and their inherent incompatibility has been highlighted again by the convictions in Switzerland of three air traffic controllers in relation to separate incidents of conduct found by the Swiss court to have been negligent. One of the instances involved a separate conviction of the pilot of one of the affected aircraft. The incidents involved serious mistakes by air traffic control, which were corrected either by the controller or the affected pilots, so the Swiss law requirement of a ‘real collision risk’ seems unduly aggressively to have been applied in these cases. Criticisms of the Swiss courts aside regarding the convictions, the fact of prosecutions highlights again the ‘myth’ of ‘just culture’ as being a philosophy in actual practice, as opposed to a touching expression of faith dispelled by the reality that prosecutors and courts will recognise that some priority should be given to safety over criminalisation. Unnecessary prosecutions make confidential reporting an ever more risky approach for those at the sharp end of aviation.

Following the high-profile collapse of Monarch Airlines preceded by a number of other highly expensive forays by the state into the provision of private air transport, an airline insolvency review was established by the Chancellor to research better ways to deal with the collapse of airlines. The review has now reported. The obvious solution adopted elsewhere of using the assets of the insolvent airline to repatriate its customers is one of the alternatives recommended and it is hoped, notwithstanding the current stasis in legislation in the UK for other reasons, will be one given urgent attention. The creation of a special administration regime changing the purpose of an airline’s administration to the repatriation of its passengers as a first priority over payment of creditors and ensuring payments of salaries and costs during rescue efforts would enormously mitigate the cost otherwise imposed on taxpayers via the UK government’s current approach of arranging and paying for alternative air transport from other operators where inevitably the rates charged are at the highest end of the spectrum.

Illicit drone activity has been a significant feature of the past year and has resulted in the closure for significant periods of time of a number of major airports. Those incidents, including threats by environmental groups deliberately to use drones to close Heathrow Airport, highlight the fact that technology has got ahead of regulation and counter technology. Last year ICAO issued guidance material on safety management, seeking a ‘total system safety’ in which all users of the aviation environment operate within a fully integrated safety system. How that might affect rogue users is not clear given the ease with which operators can interfere with any inbuilt protections in the drone itself. Inevitably claims from passengers arise as a result of delays and equally inevitably, by virtue of the operation of EU261, airlines will continue to bear significant costs regardless of fault simply for caring for passengers. This may compel them at last to take seriously the prospects for claims against third parties such
as airport operators, air navigation service providers and conceivably the drone manufacturers themselves.

Once again, I would like to extend my thanks to the many contributors to this volume and welcome those who have joined the group. Their studied, careful and insightful contributions are much appreciated by all those who now refer to *The Aviation Law Review* as one of their frontline resources.

**Sean Gates**  
Gates Aviation Ltd  
London  
July 2019
Chapter 1

ARGENTINA

Ana Luisa Gondar

I INTRODUCTION

The National Civil Aviation Administration (ANAC), created by Executive Decree No. 239/2007, is the governmental entity in charge of civil aviation matters, which monitors compliance with the Argentine Aeronautical Code, the Air Policy as stated by Law No. 19030, international treaties and agreements, and all applicable regulations related to civil air transportation.

Executive Decree No. 1840/2011 provided that the Argentine Air Force under the Ministry of Defence should be in charge of air traffic control, which will be overseen by ANAC.

Slots are granted by ANAC taking into account international agreements in relation to air traffic rights and the previous approval by the Argentine Air Force and airport authorities as set forth by Executive Decree No. 1770/2007 and Resolution ANAC No. 764/2010.

Code-sharing operations should be authorised by ANAC, which verifies compliance with Section 110 of the Aeronautical Code, which provides that agreements that imply business or service pooling, connecting, consolidating or merging arrangements shall be subject to prior approval by the aviation authority. Article 2 of Executive Decree No. 1401/98 establishes that for code-sharing or joint operation proposals to be approved, air operators should be holders of approvals or licences that allow them to operate the air service that is the subject matter of the code-sharing agreement.

As to domestic air fares applicable to scheduled air services, the Secretariat of Transport indicates periodically the maximum amounts of economy class fares that air carriers can apply.

Air policy is established by Law No. 19,030, as amended by Law No. 19,534. Foreign air carriers may operate international air services pursuant to the terms provided by the treaties and bilateral air services agreements entered into by Argentina.

Chapter 7, Article 138 of the Aeronautical Code provides that routes that represent a general interest for the country may receive subsidies. There are also benefits for domestic air carriers in relation to fuel prices. Aerolineas Argentinas, a state-owned company, receives funds from the national budget and the current administration is highly protective of its operation.

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1 Ana Luisa Gondar is a legal counsel at Gondar & Asociados.
II LEGAL FRAMEWORK FOR LIABILITY

i International carriage

Argentina has ratified, among others, the following international multilateral conventions:


b Law No. 14,111 ratified the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed on 12 October 1929 (the Warsaw Convention).

c Law No. 17,386 ratified the Protocol modifying the Warsaw Convention signed at The Hague on 28 September 1955.

d Law No. 23,556 ratified the Montreal Protocols, signed in Montreal on 25 September 1975.

e Law No. 17,404 ratified the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed in Rome on 7 October 1952.


g Law No. 23,111 ratified the Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft, signed in Rome on 29 May 1933.


i Law No. 25,806 ratified the sub-regional agreement with Bolivia, Brazil, Chile, Paraguay, Peru and Uruguay signed in Fortaleza on 17 December 1996.

j Law No. 26,451 ratified the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention 1999). The instrument of accession by Argentina contains the following interpretative declaration: ‘For the Argentine Republic, the term “bodily injury” in Article 17 of this treaty includes mental injury related to bodily injury, or any other mental injury which affects the passenger’s health in such a serious and harmful way that his or her ability to perform everyday tasks is significantly impaired.’

k Decree-Law No. 12,359/57, which was ratified by Law No. 14,467, ratified the Convention on the International Recognition of Rights in Aircraft signed in Geneva on 19 June 1948.


m Law No. 19,793 ratified the Convention for the Suppression of Unlawful Seizure of Aircraft signed in The Hague on 16 December 1970.


ii Internal and other non-convention carriage

The Aeronautical Code has been approved by Law No. 17,285. It has been amended by Law No. 22,390 and Executive Order No. 326/82. Resolution No. 1532/98 issued by the Ministry of Economy, Works, and Public Services established regulations applicable to the general conditions for the contract of carriage.
Article 92 of the Aeronautical Code provides that air transportation service is any act aimed at transporting people or things in an aircraft, from one airport to another and that aerial work comprises all commercial air commercial operations excluding transportation.

Article 131 of the Aeronautical Code provides that to perform aerial work in any of the specialities, the operators should obtain prior authorisation from ANAC, which will verify their technical and financial capacity.

### iii General aviation regulation

Article 36 of the Aeronautical Code sets forth that any equipment or mechanisms that may fly in the airspace and that would be suitable to transport people or things will be considered as aircraft.

This definition includes helicopters and microlights. As such they have to comply with regulations that provide that aircraft should have registration and airworthiness certificates pursuant to Article 10 of the Aeronautical Code.

The provisions included in the Aeronautical Code and international treaties ratified by Argentina are applicable to any aircraft. Pursuant to Article 139 of the Aeronautical Code, the carrier shall be liable for the damage caused by the death or bodily injury suffered by any passenger when the accident that caused the damage has occurred on board the aircraft or during take-off or landing operations.

The carrier should also have mandatory insurance in relation to the employees and in relation to the damage they may cause to transported passengers, cargo and third parties on the surface.

### iv Passenger rights

Resolution No. 1532/98 issued by the Ministry of Economy and Public Works and Services sets forth the General Conditions of the Contract for Carriage by Air, which regulate the rights and obligations of the parties including passenger protection rules in cases of delays, cancellation and denied boarding.

On 12 April 2013, Resolution No. 203/2013 issued by ANAC was published in the Official Gazette, whereby Article 12 of the Resolution No. 1532/98 was amended stating that air carriers will be excluded from the provision of the following services free of charge at the airport where adverse climate conditions cause delays or cancellations, delay in the delivery of luggage, a stop could not be made as scheduled or at the destination or in the case of loss of a connecting flight with a confirmed reservation:

- a. phone communication to the point of destination and local calls;
- b. food and beverages according to the waiting time until boarding of the next flight;
- c. hotel accommodation, either at the airport or in the city, after a four-hour delay; and
- d. shuttle services to and from the airport.

Notwithstanding the above, the air carrier should take all the possible measures it can to provide passengers with adequate and truthful information about the delays caused by said circumstances until it can either provide or resume its transportation services or passengers can be rerouted through the services of another air carrier or an alternative means of transportation.

Consumer Protection Law No. 24,240 as amended by Law No. 26,361 provides that regulations of the Aeronautical Code and international treaties will be applicable as priority pieces of legislation.
In relation to discrimination, Argentina is a party to applicable international treaties, which include the following:

a. the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities, signed in Guatemala, and ratified by Law No. 25,280;

b. the UN Convention on the Rights of Persons with Disabilities, ratified by Law No. 26,378;

c. the International Convention on the Elimination of All Forms of Racial Discrimination, ratified by Law No. 17,722;

d. the Convention on the Elimination of all Forms of Discrimination against Women, ratified by Law No. 23,179; and

e. the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by Law No. 23,338.

Law No. 22,431 created a comprehensive protection system for persons with disabilities, which provided the requirement to avoid the creation of physical barriers in buildings, and for transportation to allow access to persons with reduced mobility. Decree No. 914/97 related to Law No. 22,431 provided that in relation to air transportation the following benefits should be provided to passengers with reduced mobility and communication:

a. a safe and comfortable entrance and exit of the aircraft by means of mechanical or alternative systems that exclude physical effort should be allowed;

b. a special wheelchair to be used in the aisles of the aircraft to allow a non-walking person to reach his or her seat;

c. seats located in the aisles with foldable armrests for persons with reduced mobility; and

d. general and emergency information, provided orally to all passengers and in a written form, in printed maps and in Braille so that blind persons can locate emergency exits.

In addition, the above-mentioned Resolution No. 1532/98 issued by the Ministry of Economy and Public Works and Services sets forth the General Conditions of the Contract for Carriage by Air, which states that in domestic flights disabled passengers will be authorised to travel with their guide dogs in the aircraft cabin free of charge (Article 9).

Law No. 23,592 prohibits and penalises discriminatory actions or omissions that may restrict the full exercise of constitutional rights based on race, religion, nationality, ideology, political or union opinion, sex, economic position, social condition or physical characteristics.

The Argentine Criminal Code provides that any person who performs any action that endangers the safety of an aircraft shall be punished with two to eight years’ imprisonment. If the act results in an air disaster, punishment shall be six to 15 years’ imprisonment.

If the act causes injury to a person, the punishment shall be six to 15 years’ imprisonment and, if it causes a person’s death, it will be 10 to 25 years’ imprisonment (Article 190).

Those who, without creating a common dangerous situation, prevent, obstruct or hinder the normal operation of the air transport shall be punished with three months to two years’ imprisonment (Article 194).

Pilots, mechanics and other employees who abandon their position during their corresponding services before arriving at their destination shall be punished with one month to one year’s imprisonment, if the act does not imply a more severely punished crime (Article 195).
Those who, because of imprudence or negligence, unskilfulness in their art or profession or non-compliance with the regulations or ordinances, cause a derailment, shipwreck or any other accident provided for in this chapter, shall be punished with six months to three years’ imprisonment. If a person is injured or dies as a result of the crime, one to five years’ imprisonment shall be imposed (Article 196).

Article 198 provides that the following shall be punished with three to 15 years’ imprisonment:

2º. those practising any act of pillage or violence against an aircraft in flight or while it is performing the operations immediately before the flight, or against persons or things therein, without being authorised by any belligerent power or exceeding the limits of a legitimately granted authorisation;
3º. those who, by means of violence, intimidation or deception, misappropriate a vessel or an aircraft to take possession thereof or to dispose of the things or persons therein;
4º. those who, in collusion with pirates, deliver a vessel or an aircraft, their cargo or what belongs to their passengers or crew to them;
5º. those who, with threats or violence, oppose the commander or the crew's defence of the vessel or aircraft being attacked by pirates;
6º. those who, on their behalf or on behalf of others, equip a vessel or an aircraft intended for piracy;
7º. those who, from the Argentine territory, knowingly traffic with pirates or provide them with aid.

Article 199 sets forth that if the acts of violence or hostility mentioned in the preceding article are followed by the death of a person having been attacked in the aircraft, the punishment shall be 10 to 25 years’ imprisonment.

III LICENSING OF OPERATIONS

i Licensed activities

Individuals or corporations domiciled in Argentina may be granted authorisation to provide domestic air services. Foreign air carriers shall not be authorised to provide passenger, cargo or mail transportation within the Argentine territory. Article 97 of the Aeronautical Code provides that the executive power, for general interest reasons, may authorise foreign companies to perform domestic air services, subject to reciprocity. Since 2016, the new government administration changed previous policies granting authorisation to new air carriers to enter the market. After several years, a public hearing was held on 27 December 2016, where several air carriers stated their interest to provide their services.

Article 105 of the Aeronautical Code provides that no concession or authorisation shall be granted without prior verification of the operator's technical and economic-financial capacity, as well as its ability to use the airport, auxiliary services, and flight material in a proper manner. The procedure to obtain a licence to operate air services is ruled by Law No. 19,030 as amended by Law No. 19,534 and by Executive Order No. 1492/1992 as amended by Executive Order No. 2186/1992.

ii Ownership rules

Sections 98 and 99 of the Aeronautical Code set forth that domestic air transportation may only be provided by Argentine individuals or legal entities domiciled in Argentina. Corporate officers that exercise the control and management of the company should have their domicile in Argentina. The president of the board of directors, the managers and at least two-thirds of the directors and administrators must be Argentinian.
The majority of the voting shares of corporations that provide domestic air services should be nominative and held by Argentine shareholders domiciled in the country. Pursuant to Section 2 of Executive Decree No. 52/94 said provision is also applicable to Argentine legal entities that provide international air services following Article 128 of the Aeronautical Code.

iii Foreign carriers
To operate scheduled services to and from Argentina, bilateral and multilateral air services agreements would be analysed by ANAC in terms of air traffic rights, capacity, frequencies, cargo capacity, etc.

Foreign-registered operators will have to register a branch office in Argentina before the tax authorities and the Superintendency of Corporations. They will have to submit, among other documentation, a diplomatic designation, the air operator's certificate, registration and airworthiness certificates of the aircraft and an insurance certificate.

Argentina has signed several bilateral agreements and memoranda of consultation on air transport services with different countries.

IV SAFETY
Safety regulations are issued by ANAC, which verifies compliance with, among other regulations, requirements set forth by the Civil Aviation Aeronautical Regulations, the Argentine Airworthiness Regulations, the International Civil Aviation Organization (ICAO) recommended standards, and the Aeronautical Information Service.

The Aeronautical Code provides that air activities in certain areas of the Argentine territory may be prohibited or restricted for reasons of national security, public interest or flight safety (Article 8). Carriage of things posing a risk for flight safety shall be ruled by the aviation authorities. In no case shall carriage of hazardous materials in aircraft carrying passengers be authorised, except for radioactive material, which may be transported pursuant to the regulations issued by the competent authority and subject to inspection (Article 9).

Executive Decree No. 2416/85 sets forth that domestic carriage of dangerous goods will be ruled by the provisions of Annex 18 of the Chicago Convention 1944, as well as its technical documentation.

No aircraft shall fly without having the licence, airworthiness certificates and logbooks required by the regulations. Aircraft that are built, repaired or undergo modifications shall not perform any flights without having been previously inspected and the repair works having been approved by the aviation authority or by technicians expressly authorised thereby. The same procedure shall be followed when the aircraft airworthiness certificate has expired (Article 10). Aircraft should be equipped with radio devices for communication and they must have a licence issued by the competent authority. The aviation authority shall determine the aircraft that may be exempted from having said equipment (Article 11). ANAC will carry out verifications related to persons, aircraft, crew and carried goods, before departure, during the flight or at landing or at its apron, and take the proper measures for flight safety (Article 12). A mechanic authorised by the Argentine aviation authorities must verify the safety conditions of the aircraft before take-off.

Accident investigations are ruled by Annex 13 of the Chicago Convention, Title IX (Articles 185 to 190) of the Aeronautical Code and Decree No. 934/1970.

The Board of Investigations of Civil Aviation Accidents pursuant to Decree No. 1193/2010 develops its activities as an autonomous entity within the Ministry of
Transportation. It is in charge of the technical investigation of civil aviation accidents and incidents to determine their causes and recommend efficient actions aimed at avoiding the occurrence of accidents and incidents in the future.

On 12 April 2017, the Board of Investigations of Civil Aviation Accidents issued Resolution No. 55/2017 (published in the Official Gazette) whereby it established that physical persons and legal entities, national or foreign, private or public, and the agencies to whom the Board’s recommendations were addressed should inform to the Board their actions aiming to comply with said recommendations within a term of 60 business days as from notice of the Board’s approval of the final report. On 22 January 2017, Resolution No. 251-E/2017 was published in the Official Gazette, issued by the Civil Aviation Board of Accident Investigation (JIAAC), which established the confidentiality of accident and incident investigation records pursuant to the new parameters set forth by Amendment 15 regarding Paragraph 5.12 of Annex 13 issued by ICAO in July 2016.

On 26 March 2018, the Federal Civil and Commercial Court of Appeals, Chamber I, confirmed the first instance court’s decision that had rejected the complaint filed by a passenger’s widow, whose husband died as a consequence of the crash of LAPA flight 3142 dated 31 August 1999. The claimant sought damages from the National Administration (Argentine Air Force – Ministry of Defence) arguing that it should be held liable on the grounds that the Argentine Air Force authorities should have exercised their control over persons and goods destined to provide air transportation as a public service. The plaintiff argued that the pilot and the co-pilot should not have been granted the authority to perform their jobs. The first instance court based its decision to reject the complaint on the criminal court’s decision related to the accident where reference has been made to the investigation carried out by the Civil Aviation Board of Accidents Investigation (JIAAC), which has ascertained that the crew failed to carry out appropriate measures to ensure safety. The criminal court had held that it had not been ascertained that the alleged lack of compliance of public officers’ duties had any relation to the accident and that their appointment as pilot and co-pilot, respectively, had been the exclusive decision of the involved air carrier. The court of appeals held that the public officers had complied with their duties and they could not be considered liable either in relation to the air carrier’s decision to appoint them as pilot and co-pilot or in relation to their safety mistakes.2

V INSURANCE

Title X of the Aeronautical Code (Sections 191 to 196) provides that the aircraft operator should have the following insurance:

- labour insurance;
- liability insurance in relation to passengers, baggage and shipped goods;
- insurance in relation to liability for surface damage; and
- as set forth by Section 193, it is mandatory for the authorisation of the operation of foreign aircraft to have an insurance policy that covers damage that could be caused by the aircraft to carried persons and goods as well as third parties on the surface as stated in the Aeronautical Code and the international conventions.

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In Docket No. 11575/2002, dated 8 February 2013, the Federal Civil and Commercial Court of Appeals, Chamber II, ruled in favour of the Argentine Association of Insurance Companies together with 12 insurance companies that had filed legal actions against the executive power challenging as unconstitutional Emergency Executive Decree No. 1654/02, and its extension No. 1012/06, whereby it was stated that in view of the country facing an economic crisis and the higher local insurance costs, the Argentine air carriers were exempted from taking out local insurance. On 27 October 2015, the Supreme Court confirmed the Court of Appeal’s decision, which held that the Emergency Executive Decrees were unconstitutional and that the ordinary procedure for the enactment of a law should have been followed.

VI COMPETITION

Law No. 25,156 penalises cases of market distortion owing to an abuse of a dominant position that affect the general interest, imposing fines on companies whose conduct could be considered against the regulations of the Law. The legislation is intended to avoid concentration and manipulation of prices that result in price distortions that affect the economic public interest.

The Argentine Federation of Associations of Travel Agencies (FAEVYT) initiated separate individual legal actions before the Federal Civil and Commercial Court of Appeals against several air carriers (Aerolineas Argentinas, LATAM, Copa, Aeroméxico, Gol) requesting the Court to establish the minimum percentage that the air carriers should pay to travel agencies as a reasonable commission or remuneration for their services in order to cover involved costs and an economic benefit in relation to the service rendered by the travel agencies. FAEVYT argued that in their decision to eliminate payable commissions to the travel agencies the air carriers had abused their dominant position. Furthermore, FAEVYT has extended the scope of the initial complaint arguing that the terms and conditions of the IATA travel agency agreement should be comprehensively reviewed, in particular, the terms related to agents’ remuneration. The proceedings are still pending litigation.3

VII WRONGFUL DEATH

Depending on the personal characteristics of the deceased including age, life expectancy and income, the life value would be assessed in order to consider the amount of compensation to be awarded within the limitations established by the Aeronautical Code.

VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

In some provinces and the federal jurisdiction, a mediation stage is mandatory before litigation at court in relation to civil and commercial liability claims. If the parties cannot reach settlement during mediation, the claimant is entitled to start legal action before the courts.

Article 228 of the Aeronautical Code provides that claims for liability compensation arising from damage caused to transported passengers, baggage or cargo in domestic air

carriage should be legally filed within one year. The term is calculated from the arrival at
destination or the day when the aircraft should have arrived or the detention of transport or
the moment when the person is declared absent with presumption of death.

On 27 August 2018, the Federal Civil and Commercial Court of Appeals, Chamber II,
admitted the plaintiff’s appeal and revoked the first instance court’s decision that had
considered that the procedure should follow the terms pursuant to the Civil and Commercial
Procedural Code instead of the shorter terms pursuant to Consumers’ Law No. 24,240.
The Prosecutor stated that pursuant to Section 53 of Law No. 24,240 all claims based on
said Law should be followed pursuant to the shortest applicable procedure unless the court
could ground its decision to consider applicable another procedure based on the complexity
of the matter. This decision implied that the air carrier had only five days instead of 15 days
to file its answer to the complaint together with the supporting means of evidence (Docket
No. 4310/2018 – Sequeira Wolf, German v. UAL). The same court of appeals followed the
same criterion in Milillo, Christian v. UAL on 5 September 2018.

On 29 October 2018, the National Commercial Court of Appeals, Chamber A, upon the
plaintiff’s appeal, revoked the first instance court’s decision that held that the federal civil and
commercial courts should assess the claim filed regarding compliance of the alleged unilateral
cancellation of the carriage agreement by the defendant air carrier. The plaintiff argued that
there had been a fraudulent advertisement by the involved travel agencies and the defendant
air carrier which had unilaterally cancelled the offered flight Santiago de Chile-Sydney during
a CyberMonday promotion campaign. The air carrier argued that there had been a technical
mistake that resulted in the announcement of the flight at an extremely low fare. The plaintiff
rejected the reimbursement of the paid amount and requested compliance of the carriage
agreement pursuant to the published terms and conditions. The court of appeals found that
there had been a situation related to the advertisement in relation to the offer regarding the
commercialisation of certain fares and that there was no specific connection with aviation
regulations. Consequently, it held that the commercial court should assess the case since
commercial regulations were involved and the federal civil and commercial courts should not
be considered as the competent Courts. (Docket No. 16221/2018 – Abraham Riso, Fernanda
et al v. UAL).

On 22 November 2018, the National Commercial Court of Appeals, Chamber E, upon
an air carrier’s appeal in relation to the lower court’s decision that had rejected the challenge
filed regarding the lack of jurisdiction, held that in relation to a damages claim based on
the sale of air transportation tickets by a travel agency the commercial courts should be
considered the appropriate jurisdiction taking into consideration that it should be considered
a commercial matter ruled by commercial regulations regardless of the air transportation
service and consequently the federal courts should not be involved. The claimants had filed
legal actions based on the Consumers’ Defence Law No. 24.240 seeking compensation for
the alleged damages sustained due to the air carrier’s mistake arising from the issuance of the
claimants’ minor of age son’s ticket after the change of the plaintiff’s original ticket who could
not board due to her medical health condition. (Docket No. 669/2018 – Rozboril, Marcelo
Carlos et al v. LAN Peru S.A. Sucursal Argentina).

Carriers’ liability towards passengers and third parties
Title VII of the Aeronautical Code (Sections 139 to 174) rules air operators’ liability in
relation to damage caused to carried passengers, luggage, cargo and third parties on the surface.
The air carrier shall be liable for the damages resulting from the death or corporal injury sustained by a passenger because of an accident on board or during take-off or landing operations. Also, the air carrier shall be liable for delayed arrival at destination and in cases of destruction, loss or damage to registered luggage and cargo.

Liability shall be limited, but the air carrier shall not be entitled to limit its liability where damage derived from its wilful misconduct, or that of the persons under its responsibility in the performance of their duties. The air carrier will not be held liable if it proves that it had taken all the necessary measures to avoid the damage, that it was impossible to take them or if it proves that the person who suffered the damage contributed to it.

Any person suffering third-party damage on the ground shall be entitled to relief just by proving that the damage was caused by an aircraft in flight or of a person or item that fell from it or from its unusual noise. However, there shall be no possibility of relief if the damage was not a direct consequence of the event giving rise to it.

Argentina has ratified the Warsaw Convention, the Hague and Montreal Protocols as well as the Montreal Convention as detailed in Section II.i.

In cases of aviation accidents, criminal proceedings have also been pursued that involved company officers as well as private and public officers such as airport managers and airport security managers, airport weather observers, airport administrators and air traffic directors, among others.

In Damiani, Jorge Claudio v. Delta Airlines, the Federal Civil and Commercial Court of Appeals, Chamber III, held on 4 May 2017 that the defendant air carrier should compensate the claimant who sought compensation for moral and material damages as a result of missing a fishing tour and the loss of his professional fees as a journalist, arguing that he failed to submit his article because of the delay and cancellation of his flights. The air carrier denied liability and argued that the Las Vegas–Atlanta flight was delayed at departure owing to a mechanical fault (loss of hydraulic fluid) that required non-scheduled maintenance, which meant that the claimant missed his connecting flight from Atlanta to Manaus. The next flight was cancelled owing to a technical fault in the satellite communications software. The air carrier appealed the decision held by the first instance court because the court held that the air carrier should be considered liable and because it had admitted the plaintiff’s requested damages regarding loss of profits and mental distress. The Federal Civil and Commercial Court of Appeals confirmed the first instance court’s decision and held that the delay for technical reasons should be considered as contractual liability pursuant to Section 522 of the Civil Code, and that the air carrier should be held liable for the delay that deprived the claimant of the possibility to decide how and where he wanted to spend his time. In order to avoid liability, the air carrier should have proved that it had taken all necessary measures to avoid damage or that it was impossible to take them because it was a completely unexpected event, such as a fortuitous event or a case of force majeure. The Appellate Court took into consideration the new Civil and Commercial Code (in force since 1 August 2015), which provides that damages compensation should cover breach of the victim’s personal rights, psychophysical health, mental distress and any other damage that interferes with the claimant’s life.

In In re Spivak, Ricardo Victor v. American Airlines, the Federal Civil and Commercial Court of Appeals, Chamber III, on 27 April 2017, awarded compensation to a claimant who argued that as a result of the cancellation of his connecting flight to Los Angeles he had lost earnings as he could not attend business meetings in Japan and China. His flight had to return to Buenos Aires Airport after two hours owing to a technical fault. The aircraft was
ready to fly the next morning but the crew had exceeded its time of service. The Court held that the defendant air carrier failed to provide evidence that either it had taken all necessary measures to avoid damage or that it was impossible to take them. The Court further held that the following circumstances had not been clearly stated: why the technical fault had not been found during maintenance checks; why it was not possible to solve it within a reasonable period of time; why it had not been possible to obtain an alternative aircraft within 24 hours after the originally scheduled time; or why there was no arrangement in place to have a substitute crew for cases where the appointed crew exceeds its time of service. The Court ruled that the air carrier had to pay damages including loss of earnings.

### iii Product liability

With regard to product liability, the Aeronautical Code refers to the air operator. The manufacturer's liability may be applicable in relation to civil legislation governing liability arising from defective products.

The aircraft operator is the person using the aircraft legitimately on his or her own behalf, even not for profit. The owner shall be considered the aircraft operator except when said capacity has been transferred by means of an agreement duly registered before the National Aircraft Registry (Articles 65 and 66 of the Aeronautical Code).

The registration of the agreement releases the owner from the operator's liabilities, which shall be the exclusive responsibility of the air operator. If the agreement has not been registered, the owner and the operator shall be jointly and severally liable for any violation of applicable regulations or damage produced because of the aircraft (Article 67 of the Aeronautical Code).

### iv Compensation

According to Article 144, the air carrier's liability in relation to passengers should be limited to the amount equal in pesos to 1,000 argentinos oro.

In relation to damage sustained by third parties on the surface, according to Article 160 of the Aeronautical Code the operator shall be liable for every accident up to the limit of the amount equal, in pesos, to the number of argentinos oro resulting from the following scale, according to the quotation they have at the moment when the event generating the liability takes place:

- **a** 2,000 argentinos oro for aircraft heavier than 1,000 kilograms;
- **b** 2,000 argentinos oro plus 1.5 argentinos oro for each kilogram over 1,000 for aircraft heavier than 1,000 and lighter than 6,000 kilograms;
- **c** 10,400 argentinos oro plus 1 argentinos oro for each kilogram over 6,000 for aircraft heavier than 6,000 and lighter than 20,000 kilograms;
- **d** 25,000 argentinos oro plus 0.5 argentinos oro for each kilogram over 20,000 for aircraft heavier than 20,000 and lighter than 50,000 kilograms; and
- **e** 43,600 argentinos oro plus 0.37 argentinos oro for each kilogram over 50,000 for aircraft heavier than 50,000 kilograms.

Compensation in cases of death or injury shall not exceed 2,000 argentinos oro per deceased or injured person.
In cases of personal injuries or property damages, half of the amount to be distributed shall be preferentially allocated to compensate the personal injuries. The remainder of the total amount to be distributed shall be shared proportionally between the compensation for property damages and the part of the other compensation that is not covered.

For the purposes of this chapter, ‘weight’ means the maximum weight authorised by the aircraft airworthiness certificate.

Pursuant to Article 162, the operator shall not be entitled to limit its liability, when damage derives from its wilful misconduct or that of the persons under its responsibility when performing their duties.

Moral damages are generally awarded in most liability cases even in cases of delayed arrival at destination. There are no provisions in relation to condolence money.

IX DRONES

As from 28 May 2019, as per ANAC Resolution No. 368/2019, during a 45-day period, the draft of the new regulation that will be applicable to drones has been opened to receive opinions from any interested party willing to participate and cooperate in the final version of the regulation.

Once said period has been concluded, the authorities will gather the documentation and opinions received and afterwards the final regulation will be issued.

X VOLUNTARY REPORTING

The Civil Aviation Board of Accident Investigation (JIAAC) has an online anonymous form and a 24-hour contact centre where aviation accidents and incidents can be reported. On 4 October 2013, the JIAAC issued Resolution No. 64/13 that, pursuant to Annex 13 of the Chicago Convention, established that reports obtained from the JIAAC during the course of the investigation should be kept confidential at the Investigations Department of the JIAAC including all the depositions obtained, the communications between the persons who have participated in the operation of the aircraft, medical or personal information of persons involved in the accident or incident, conversation recordings of pilots position and their transcripts, conversation recordings of air transit control agencies and their transcripts, image recordings of pilots position and the opinions stated in the analysis of the information including voice registration recordings.

XI THE YEAR IN REVIEW

ANAC issued Resolution No. 706-E/2017, which established that air carriers should inform ANAC of the applicable procedure to refund passengers the difference in airport fees collected in tickets issued during 2016 for flights departing from 1 January 2017, when airport fees were reduced.

Consumers’ defence associations filed legal actions against most air carriers in relation to the refund that should be made to passengers in relation to the difference in the airport taxes collected by airlines which had been reduced pursuant to Resolution No. 101/2016 issued by the National Airport System Regulatory Agency (ORSNA). ANAC issued Resolution 706-E/2017 whereby the air carriers should report to ANAC the applicable
procedure to refund passengers said difference in airport fees collected for tickets issued during 2016 for flights departing as from 1 January 2017, when airport fees were reduced. Litigation with the consumers’ defence associations is still ongoing and pending decisions.⁴

XII  OUTLOOK

On 2 June 2017, Law No. 27,357 was published in the Official Gazette, through which Argentina ratified the Convention on Mobile Equipment and its Protocol on Matters Specific to Aircraft Equipment, signed in Cape Town, South Africa on 16 November 2001.

In the past two years, new operators have entered the market as a result of new policies put in place by the current government administration.

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I INTRODUCTION

Aviation in Australia is overseen through a combination of industry and regulatory bodies that deal with specific sectors of aviation, and the laws surrounding liability of carriers in Australia are administered under both international conventions and domestic legislation.

The federal government department responsible for aviation is the Department of Infrastructure, Transport, Cities and Regional Development. The role of this department in relation to aviation is to advise the federal government on policy and regulatory frameworks for airports and the aviation industry, manage administration of the government’s interests in privatised airports, and provide policy advice to the Minister for the department on the efficient management of Australian airspace and on aircraft noise and emissions.²

Airservices Australia is a government-owned organisation established under the Air Services Act 1995 (Cth). Its functions include to ‘provide services and facilities to give effect to the Chicago Convention, for purposes relating to the safety, regularity or efficiency of air navigation, whether in or outside Australia, including giving effect to other international agreements’.³ More specifically, Airservices Australia’s main responsibility is airspace management, but it also has responsibility for aeronautical information, aviation communications, radio navigation aids and aviation rescue fire services.

Established under the Civil Aviation Act 1988 (Cth), the Civil Aviation Safety Authority (CASA) is the primary regulator of safety regulations in civil air operations both within Australia, and Australian aircraft operating outside Australian territory. In administering a number of statutes, CASA is responsible for regulating and maintaining standards for training, education, licensing and certification of both aircraft and operators. Its mission is to ‘to promote a positive and collaborative safety culture through a fair, effective and efficient aviation safety regulatory system, supporting our aviation community’.

The Australian Transport and Safety Bureau (ATSB) is Australia’s national transport safety investigator with responsibility for investigations of accidents in the aviation industry. Its functions are to assess and independently investigate transport safety matters, and identify factors affecting transport safety,⁴ and it is the body to which aviation accidents are reported. The ATSB works with other government and non-government bodies to improve safety in
Australia

the industry. However, it is not a function of the ATSB to apportion blame or provide means
to determine liability in respect of a transport safety matter\(^5\) and there are restrictions on the
use of evidence gathered by it in the course of accident investigations.

As Australia is a country with a federal political system, there is also state legislation
relating to the aviation industry.

II LEGAL FRAMEWORK FOR LIABILITY

i International carriage

Through the Civil Aviation (Carriers’ Liability) Act 1959 (Cth), Australia has implemented
and given force to the following international conventions:

a the 1999 Montreal Convention (given force by Section 9B);
b the Warsaw Convention as Amended at the Hague 1955 (given force by Section 11);
c the Warsaw Convention 1929 (without the Hague amendments) (given force by
Section 21);
d the Guadalajara Convention (given force by Section 25A); and

e the Montreal No. 4 Convention (given force by Section 25K).

The 1999 Montreal Convention came into effect in Australia on 24 January 2009. It
was implemented through the Civil Aviation Legislation Amendment (1999 Montreal
Convention and Other Measures) Act 2008. This had the effect of amending a number
of pieces of legislation, including the Civil Aviation (Carriers’ Liability) Act 1959, the Air
Accidents (Commonwealth Government Liability) Act 1963 and the Civil Aviation Act

Provisions covering Australian domestic carriage, and travel not otherwise covered by
any of the above conventions, are found in Part IV of the Civil Aviation (Carriers’ Liability)
Act 1959 (Cth) (see subsection ii).

ii Internal and other non-convention carriage

Part IV of the Civil Aviation (Carriers’ Liability) Act 1959 (Cth) deals with ‘other carriage’. This includes domestic travel in Australia, as well as travel from Australia to a country not
covered by any of the five conventions implemented by the Act.

Section 27 provides that this Part:

applies to the carriage of a passenger where the passenger is or is to be carried in an aircraft being
operated by the holder of an airline licence or a charter licence in the course of commercial transport
operations, or in an aircraft being operated in the course of trade and commerce between Australia
and another country, under a contract of carriage of the passenger:

a Between a place in a State and a place in another State;
b Between a place in a Territory and a place in Australia outside that Territory;
c Between a place in a Territory and another place in that Territory; or

d Between a place in Australia and a place outside Australia;

not being carriage to which the 1999 Montreal Convention, the Warsaw Convention, the Hague
Protocol, the Montreal Protocol No. 4 or the Guadalajara Convention applies.

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\(^5\) ibid. Section 12AA(3).
Part IV imposes liability on a carrier, with certain exceptions, for injury or death caused to a passenger, or for the loss or damage to a passenger’s baggage.6 Where no convention, Part IV, or any applicable state legislation applies, then an action will be governed by common law principles.

Other relevant pieces of legislation regarding carriage include the Customs Act 1901 (Cth), which regulates the import and export of goods via customs, and the carriage of dangerous goods is regulated by the Crimes (Aviation) Act 1991 (Cth) and its associated regulations.

iii General aviation regulations

In terms of the operation of civil aviation aircraft, the Civil Aviation Act 1988 (Cth) is the governing legislation, with its main object being to establish a regulatory framework for maintaining, enhancing and promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents.7 The Civil Aviation Safety Authority was established through this Act under Section 8, and its role is to oversee this and other pieces of legislation to ensure a safe and high-quality aviation sector.

‘Aircraft’ has been defined by the Civil Aviation Act 1988 (Cth) to include ‘any machine or craft that can derive support in the atmosphere from the reactions of the air, other than the reactions of the air against the earth’s surface’,8 and this includes helicopters, gyroplanes and many others as defined in Section 2(1) of the Civil Aviation Regulations 1988 (Cth).

iv Passenger rights

Australia has no specific consumer legislation with regard to aviation. Rather, the Competition and Consumer Act 2010, which commenced operation on 1 January 2011, replacing the Trade Practices Act 1974 (Cth), provides more generalised consumer protection and guarantees that apply across many industries. The Australian Competition and Consumer Commission (ACCC) was created in 1995, and its role is to enforce the Competition and Consumer Act and any other relevant legislation to ensure competition and its promotion is maintained, while protecting the interests and safety of consumers.

In relation to compensation to passengers for delay or cancellation, Australia has no specific legislation or right to compensation. As such, each passenger will have to rely on the terms and conditions listed in their terms of carriage. Passengers may be able to seek a right to compensation under the Montreal Convention 1999 (see subsection i for implementation into Australian law) for delay on applicable flights, unless the carrier can show that it took all reasonable steps or it was impossible to avoid the delay.9

While there is no direct provision dealing with the rights of disabled or handicapped passengers, CASA has made a number of Civil Aviation Orders (CAO) regarding processes and procedures surrounding these passengers. Under CAO 20.16.3, the carriage of handicapped persons must satisfy three requirements:

- the operator shall establish procedures that identify as far as possible passengers who are handicapped;

6 Civil Aviation (Carriers’ Liability) Act 1959 (Cth) Sections 28 to 29.
7 Civil Aviation Act 1988 (Cth) Section 3A.
8 ibid. Section 3.
b the operator shall ensure that handicapped persons are not seated in an aircraft where they could in any way obstruct or hinder access to any emergency exit by other persons on the aircraft; and

c the operator shall ensure that there are procedures in place to enable particular attention to be given to any disabled passenger in an emergency, as well as ensure that individual briefings on emergency procedures are given in accordance with the requirements of CAO Section 20.11 (the briefing must include which emergency exit to use, and the person giving the briefing should enquire as to the most appropriate way of assisting the passenger so as to prevent pain or injury).

These requirements are made according to Section 235(7) of the Civil Aviation Regulations,\(^\text{10}\) which lists the penalty for contravening a direction given under the Section at 50 penalty units (currently listed at A$210).

v Other legislation

*Competition and consumer protection*

As mentioned in subsection iv, general competition and consumer legislation in Australia is contained within the Competition and Consumer Act 2010 (Cth). The Act incorporates the Australian Consumer Law in its Schedule 2, which includes provisions in relation to misleading and deceptive conduct, unconscionable conduct and unfair contract terms, and imposes obligations in relation to contracts for the supply of services to consumers.

Airlines are also prohibited by the Act from engaging in anticompetitive behaviour such as making a contract, arrangement or understanding that lessens competition,\(^\text{11}\) or misuse of market power.\(^\text{12}\)

*Environmental policy*

Under the Civil Aviation Act Section 9A(2), CASA must exercise its powers and perform its functions in a manner that ensures that, as far as practicable, the environment is protected from the effects of, and associated with, the operation and use of aircraft. Further to this, Airservices Australia is a Commonwealth entity that aims to implement environmentally responsible air traffic management and other services to the industry.

III LICENSING OF OPERATIONS

i Licensed activities

*Aircraft*

To be able to operate, an aircraft must be registered. This is done through an application to CASA, which keeps the public Australian Civil Aviation Register, and has the power to register, suspend or cancel a registration under the Civil Aviation Safety Regulations.\(^\text{13}\)

\(^{10}\) Civil Aviation Regulations 1988 (Cth).

\(^{11}\) Section 45.

\(^{12}\) Section 46.

\(^{13}\) Civil Aviation Safety Regulations 1998 (Cth) Part 47.
An eligible person with regard to being a registered operator is a resident of Australia over 18 years of age and an Australian citizen (or holding a permanent visa), a corporation, a body incorporated under law in force in Australia, the Commonwealth, state or territory, or a foreign corporation lawfully carrying on business in Australia.\textsuperscript{14}

Where the owner of an aircraft becomes a registration holder, but they are not an eligible person to be its registered operator, then they must appoint an eligible person as the registered operator.\textsuperscript{15} The penalty for flying an unregistered aircraft is a penalty of up to two years’ imprisonment.\textsuperscript{16}

An owner, operator, hirer or pilot of an Australian aircraft also requires an airworthiness certificate to operate, unless the regulations authorise a flight without one.\textsuperscript{17} Again, a person can apply for this through CASA, for the certain type of aircraft to be operated. Airworthiness is an ongoing obligation that must be maintained.

**Carriers**

To conduct commercial activities as set out in Section 206 of the Civil Aviation Regulations, including the carriage of passengers or cargo, an air operator’s certificate (AOC) is required from CASA under Section 27 of the Civil Aviation Act. An AOC is issued for a specific term determined by CASA, and an AOC holder must reapply prior to the expiry date for a renewal of the AOC.

In deciding whether a person is fit to hold an AOC, CASA may take into account such things as an applicant’s financial position, and must issue an AOC if it is satisfied that the applicant has or is capable of complying with safety rules and other matters in relation to the applicant’s organisation as set out in Section 28. The application must be in a form approved by CASA (Section 27AA)\textsuperscript{18} and CASA may impose certain conditions on the grant of the AOC that must be continually satisfied.

Under the Civil Aviation Act, CASA may grant a foreign aircraft AOC authorising the operation of a foreign-registered aircraft on flights that are not regulated domestic flights.\textsuperscript{19} CASA may give written notice to an applicant for a foreign aircraft AOC, requiring the applicant to give CASA relevant documentation including a copy of any air operator’s certificates, limitations or conditions imposed by the authority on operations conducted by the applicant. In the notice, CASA must state whether the applicant needs to comply with lodgement requirements, or do something else.\textsuperscript{20}

**ii Ownership rules**

To be a registered operator, a person needs to be an ‘eligible person’, which is defined as:

\begin{itemize}
  \item[a] \text{a resident of Australia who is:}
  \begin{itemize}
    \item 18 years of age or older; and
    \item an Australian citizen or the holder of a permanent visa;
  \end{itemize}
  \item[b] \text{a corporation incorporated under the Corporations Act 2001;}
\end{itemize}

\begin{footnotes}
\item[14] ibid. Regulation 47.010.
\item[15] ibid. Regulation 47.100.
\item[16] See footnote 7, Section 20AA(1).
\item[17] See footnote 13, Part 21.
\item[18] See footnote 7.
\item[19] See footnote 7, Sections 27AE(4)(a).
\item[20] ibid. Section 27AE.
\end{footnotes}
c a body incorporated under a law (other than the Corporations Act 2001) in force in Australia;
d the Commonwealth, state or territory; and
e a foreign corporation carrying on business in Australia.21

Should an owner become a registered holder but not be an eligible person, they must appoint an eligible person as the registered operator of the aircraft they wish to register.22

With regard to obtaining an AOC, it may only be issued to a natural person or a body having legal personality.23

When forming a view of an applicant for an AOC, Section 28(2) of the Civil Aviation Act states that ‘the financial position of the applicant is one of the matters that CASA may take into account.’

iii Foreign carriers

For foreign-registered operators to gain authorisation to operate in Australia, there are a few different avenues they can take.

The starting point is Section 26(1) of the Civil Aviation Act, which states that an aircraft shall not, except with permission of CASA, arrive in or depart from an Australian territory from a place outside an Australian territory. If the aircraft is already registered in a foreign territory, an application can be made for a foreign aircraft AOC through Section 27AE, which would allow the aircraft to operate on flights into and out of Australia; however, the flights must not be regulated domestic flights. If a person wishes to operate a foreign-registered aircraft on regulated domestic flights (and there has been no agreement with CASA under Section 28A(1)(a)), an application can be made to CASA under Section 27A for permission. CASA may only grant permission of this type if it is satisfied under Subsection (2) that: (1) the person not having a commercial presence in Australia has complied with conditions relating to obtaining personal liability insurance,24 and operation, maintenance and airworthiness conditions have been met; and (2) that in any case, to grant permission would not adversely affect the safety of air navigation.

Mention should be made of the close relationship between Australia and New Zealand. A New Zealand AOC will be recognised in Australia (known as a New Zealand AOC with ANZA (Australia New Zealand Aviation) privileges) and comes into force in Australia under Section 28C, where the holder gives a copy to CASA, as well as a written notice of conditions imposed on the AOC by the Director of CAA New Zealand, the holder’s Australian and New Zealand contact details, and any other information prescribed by the regulations.

IV SAFETY

As a contracting state to the Convention on International Civil Aviation (the Chicago Convention), Australia has, in its Aviation State Safety Programme, set out a state safety policy, which ensures an effective safety system through various pieces of legislation.

21 See footnote 13, Regulation 47.010.
22 See footnote 13, Regulation 47.100.
23 See footnote 7, Section 27(2B).
24 See footnote 6, Section 41E.
The ATSB is an independent body established to investigate transport safety matters, assess reports on safety matters, informing the public about transport safety matters, and many other responsibilities as set out under the Transport Safety Investigations Act 2003 (Cth).

Under Sections 18 and 19 of this Act, immediately reportable matters, including death or serious injury to a passenger, serious damage to an aircraft or the aircraft going missing, must be immediately reported to a nominated official (ATSB or its CEO), and this must be followed up by a written report within 72 hours.

As regards ongoing safety matters, CASA’s Maintenance Standards subcommittee oversees the relevant regulations. These include airworthiness standards and ongoing airworthiness requirements, a part of which is the need for ongoing maintenance to the standards set out in the Civil Aviation Safety Regulations.25

V INSURANCE

Part IVA of the Civil Aviation (Carriers’ Liability) Act 1959 sets out the mandatory insurance requirements for carriers. It states that ‘a person must not engage in, or propose to engage in, a passenger-carrying operation, unless an acceptable contract of insurance in relation to the operation is in force.’26

In respect of each passenger, Section 41C sets out that under a contract of insurance, the insurer’s liability to indemnify the carrier against personal injury liability is required to be for an amount of no less than A$725,000 for domestic carriage, and 260,000 special drawing rights (SDR) for any Montreal Convention or other carriage.

The penalty for a person who intentionally contravenes Part IVA is up to two years’ imprisonment.27

CASA is the regulating body with regard to aviation insurance in Australia, and has the enforcement of the insurance and financial requirements of Part IVA of the Civil Aviation (Carriers’ Liability) Act specifically listed in the Civil Aviation Act as one of its functions.

Australia, however, does not require mandatory insurance for third-party damage.

The Damage by Aircraft Act 1999 allows recovery for damage to people or property on the ground as a result of any damage caused from an aircraft or parts of an aircraft.

Under the Montreal Convention Article 50, carriers are required to maintain adequate insurance covering liability under the Convention, so while there is no mandate for carriers to hold third-party insurance in Australia, it may be part of what a carrier considers to be ‘adequate’ insurance.

A contract of insurance may, under the Civil Aviation (Carriers’ Liability) Regulations 1991,28 through the adoption of a standard exclusion clause, exclude liability for radioactive contamination, nuclear risks, noise and pollution; or war, hijacking and other perils as set out in Subsection (2).

25 Maintenance Standards are contained both within the Civil Aviation Safety Regulations and the Civil Aviation Regulations Part 4A.

26 See footnote 6, Section 41E.

27 ibid. Section 41E(2).

VI  COMPETITION

Competition in the aviation industry, and other industries in Australia, is governed by the Competition and Consumer Act 2010, which incorporates the Australian Consumer Law, found in Schedule 2. The body responsible for regulation is the ACCC. Specific to the aviation industry, the ACCC works with Airservices Australia, and assesses proposals in relation to various pricing agreements for airports and aviation generally.

Mergers and acquisitions in the market are regulated in accordance with Section 50 of the Competition and Consumer Act 2010. A corporation must not directly or indirectly acquire shares in the capital of a body corporate or acquire assets of a person if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market. In determining whether an acquisition would have the effect of lessening competition, the ACCC must take into account:

- the actual and potential level of the market;
- the height of barriers to enter the market;
- the level of concentration in the market;
- the degree of countervailing power in the market;
- the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- the extent to which substitutes are available or likely to be available in the market;
- the dynamic characteristics of the market including growth, innovation and product differentiation;
- the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor; and
- the nature and extent of vertical integration in the market.  

The Commission may then grant approval or clearance if it is satisfied of these factors.

‘Cartel provisions’ have a broad definition under the Act, and include price-fixing and controlling, as well as preventing or limiting the production capacity or supply of goods. Breaches of cartel law are dealt with specifically under Sections 45AF and 45AG (criminal sanctions) and 45AJ and 45AK (civil sanctions) of the Competition and Consumer Act 2010, which make it illegal for a corporation to make or give effect to a contract or understanding containing a cartel provision.

VII  WRONGFUL DEATH

Part IV of the Civil Aviation (Carriers’ Liability) Act 1959 states that where Part IV applies to the carriage of a passenger (see Section II.ii), the carrier is liable for damage sustained by reason of the death of the passenger or any bodily injury resulting from an accident that took place on board the aircraft or in the course of any of the operations of embarking or disembarking. The limit of liability of a domestic carrier in respect of each passenger (for injury or death) is A$725,000, and for carriage to which Part IV applies other than a domestic carrier, the
limit of liability is 260,000 SDR.\textsuperscript{32} Damages are recoverable for the benefit of a passenger’s personal representative in their capacity as personal representative, and can include damages for loss of earnings or loss of profits up to the date of death, the reasonable expenses of the funeral of the passenger, and medical and hospital expenses reasonably incurred in relation to injuries sustained prior to the death of the passenger.\textsuperscript{33} However, the court is not limited to financial loss resulting from the death of the passenger,\textsuperscript{34} and is therefore able to make an award for general damages for pain and suffering and loss of enjoyment of life up to the time of death. When assessing damages, the courts can vary widely in their assessments, further complicated as in some states, claims may involve juries in determining damages.

VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

The are no industry-specific mechanisms used to settle claims in Australia.

Under the Civil Aviation (Carriers’ Liability) Act 1959, and Article 35 of the Montreal Convention 1999, an action must be brought within two years of the date of arrival of the aircraft at the destination, or, if the aircraft did not arrive at the destination, from the date at which it should have arrived, or the date at which the carriage stopped, whichever is later.\textsuperscript{35}

Each state has a set of Civil Procedure Rules for each of their courts. While they are not uniform across Australia, most jurisdictions aim to deal with claims in a just, efficient and timely manner.\textsuperscript{36} To illustrate when a party may be joined to an action, under the Victorian provisions relating to the Civil Procedure Rules, a party may be joined as a defendant where the court makes an order. The court may add a person if that person is one who ought to have been joined as a party to ensure all questions in the proceeding are effectually and completely determined, or where a question may arise out of, or in connection with, any claim in the proceedings between any party and the person joined that is just and convenient to determine as between all parties.\textsuperscript{37}

ii Carriers liability towards passengers and third parties

Section 9C of the Civil Aviation (Carriers Liability) Act 1959 gives effect to Article 21 of the Montreal Convention, which limits the damages available to be claimed in compensation for the death or injury of a passenger.

However, Section 9C(1) also states that regulations may specify a number of SDR exceeding the relevant number of SDR, as specified in the Montreal Convention, and this has the effect of assuming the stated SDR are used instead of the relevant number of SDR in the Convention. In general, the Civil Aviation (Carriers Liability) Act 1959 makes a carrier liable for any injury or death of a passenger, or loss and damage to cargo.\textsuperscript{38}

\textsuperscript{32} ibid. Section 31.
\textsuperscript{33} ibid. Section 35(6)–(7).
\textsuperscript{34} ibid. Section 35(8).
\textsuperscript{35} ibid. Section 34.
\textsuperscript{36} See Civil Procedure Act 2010 (Vic) Section 7.
\textsuperscript{37} Supreme Court (General Civil Procedure) Rules 2015 (Vic) Rule 9.06; County Court Civil Procedure Rules 2008 (Vic) Rule 9.06.
\textsuperscript{38} See footnote 6.
There is a strict liability on owners, operators, hirers and pilots who are required not to operate an aircraft in such a way as to endanger, or in a manner that could endanger, the life, person or property of another person. In Australia, as with many common law jurisdictions, strict liability means that there are no fault elements to be proved in making out the offence, but a defence of mistake is available.

As regards third-party liability, owners and operators are jointly and severally liable to a person or property for damage resulting from their aircraft. This includes if ‘a person or property on, in or under land or water suffers personal injury, loss of life, material loss, damage or destruction’ caused by impact with an aircraft in flight or that was immediately in flight before the impact, impact with part of an aircraft that was damaged or destroyed in flight, impact with a person animal or thing that dropped or fell from an aircraft in flight, or something that occurred as a result of any of these occurrences. A person may not claim, however, if the injury suffered is mental injury caused by any of these occurrences, unless the person or property suffers other personal injury, material loss, damage or destruction.

iii Product liability

As mentioned in Section II.iv, the ACCC is the body responsible for ensuring fair business practices across all industries in Australia. The provisions in the Australian Competition and Consumer Act provide protection for consumers in relating to the quality of products they purchase, including guarantees as to acceptable quality and fitness for purpose of goods, due care and skill, and reasonable time for supply of services.

iv Compensation

Compensation for damage or personal injury in Australia is dealt with under a number of provisions. As a party to the Montreal Convention, the provisions dealing with compensation under Chapter III apply to relevant carriage in Australia. Damages are a monetary remedy that have the object of compensating the plaintiff for loss suffered by a defendant’s wrong, and place the plaintiff in a position they would have been in but for the injury. As noted in subsection i, an action must be brought within two years of the date of arrival of the aircraft at the destination or if it did not arrive at the destination, the date at which it should have arrived, or the date at which the carriage stopped, whichever is later.

Under common law, in personal injury matters, economic loss damages may be brought for special damages, for lost earning capacity or things arising from this, and non-economic damages for pain and suffering, loss of enjoyment of life and loss of expectation of life.

For an action in liability for death, Section 35(7) of the Civil Aviation (Carriers’ Liability) Act 1959 states that the damages recoverable include loss of earnings or profits up to

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39 See footnote 7, Section 29.
41 Damage by Aircraft Act 1999 (Cth) Section 10.
42 ibid. Section 10(1A).
43 See footnote 29, Schedule 2 Section 54.
44 ibid. Section 55.
45 ibid. Section 60.
46 ibid. Section 62.
to the date of death and the reasonable expenses of the funeral of the passenger and medical and hospital expenses reasonably incurred in relation to the injury that resulted in the death of the passenger.

IX DRONES

Australia has seen a rapid escalation of use of drones and has taken a number of steps to control their use and mitigate the risks to public safety posed by their increased use.

Part 101 of the Civil Aviation Safety Regulations 1998 sets out the requirements for the operation of unmanned aircraft and subpart 101.F relates to remotely piloted aircraft (RPA). Standard operating conditions require RPA to remain within visual line of sight, below 400 feet above ground level and away from restricted areas such as airports. CASA approvals are required for certain non-standard operations.


Despite these measures and the introduction of mandatory RPA operators certificates (ReOC) and remote pilot licences (RePL) for use in certain circumstances – generally where used for commercial purposes or where RPA are large (as defined in the regulations), there remain significant concerns about the increased unauthorised use and the dangers posed as a result. CASA continues to engage in educating the community about the safe operation of drones, in particular recreational drones.

Significant work is being done by both private industry and commercial interests on geofencing solutions in an attempt to mitigate risks.

X VOLUNTARY REPORTING

The REPCON scheme was set up as a mechanism for voluntary and confidential reporting to the ATSB of issues that affect, or might affect, transport safety, and applies to manned aircraft, large RPA, small RPA and micro RPA.

The scheme’s primary purpose is to enable the ATSB to use the reports made to identify unsafe procedures, practices or conditions and to give information to the aviation industry, transport safety authority or an emergency services organisation in relation to an identified unsafe procedure, practice or condition to facilitate action, awareness and improvements in transport safety.
A person may make a report to the ATSB about any reportable safety concern. The report should be made in writing, and must include the name of the person making the report, a description of the reportable safety concern and relevant contact details.

The ATSB must not disclose restricted information relating to a report unless all personal information is removed. Restricted information may be disclosed that includes personal information where: it is not possible to remove the personal information without defeating the purpose for which the ATSB proposes to make the disclosure; the ATSB believes it necessary or desirable to disclose the information for one of the purposes of the scheme and it has obtained the consent of the person to whom the personal information relates prior to disclosure; or where the ATSB believes the disclosure is necessary for reporting, investigation or prosecuting a potential offence against Section 137.1 of the Criminal Code (false and misleading information), to reduce or prevent a serious or imminent threat to transport safety or a person’s life and health, is in accordance with Part 6 (terrorism or unlawful interference with aviation) or necessary for reporting, investigating or prosecuting criminal conduct not mentioned in Part 6.

There are further restrictions on the use of information in a report. A person must not use information to take disciplinary action against an employee of the person or make an administrative decision under an Act or an instrument made under an Act. The ATSB has an obligation to inform the Department of Infrastructure and Regional Development where it reasonably believes that information relates to either an act or unlawful interference with aviation that is an offence under the Aviation Transport Security Act 2004 or a terrorist act involving or relating to transport or a transport vehicle. Further, a report, and evidence about the contents of a report, is not admissible in court (save for proceedings under Section 137.1 Criminal Code as noted above).

The Civil Aviation Act also provides a scheme where the holder of an authorisation, may have a reportable contravention disregarded if they can prove to CASA that they reported the contravention to the Executive Director of Transport Safety Investigation within 10 days of the contravention and before they were given a show cause notice. This may only be done once in a five-year period. The scheme is known as the Aviation Self Reporting Scheme, and the process for self-reporting, functions of the Executive Director and use of information is dealt with in Division 13.K.1 of the Civil Aviation Safety Regulations 1998 (Cth).

52 ibid. Regulation 10(1). A ‘reportable safety concern’ is defined in Regulation 10(2) as any issue that affects, or might affect, transport safety other than matters showing a serious and imminent threat to transport safety or a person’s life or health, industrial relations issues and criminal conduct.
53 ibid. Regulations 11 and 12.
54 Defined in Section 3, Transport Safety Investigation Act 2003 (Cth).
55 See footnote 51, Regulation 16(1)(a).
56 ibid. Regulation 16(2).
57 ibid. Regulation 16(3).
58 ibid. Regulation 18.
59 ibid. Regulation 21(1).
60 ibid. Regulation 19(1)–(2).
61 See footnote 7, Section 30DO.
62 ibid. Section 30DQ.
Protection is provided to whistle-blowers through both Commonwealth and state legislation. In particular, the Commonwealth Parliament passed the Public Interest Disclosure Act 2013, and each state and territory has similar legislation. 63

XI YEAR IN REVIEW

There have been significant decisions in the High Court of Australia that have confirmed the supremacy of the Montreal Convention 1999 and its related domestic liability regime64 and the application of remedies available under the Civil Aviation (Carriers’ Liability) Act 1959 to the exclusion of other common law rights and the role of state and territory laws in relation to work health and safety in relation to aviation activities.65

CASA continues to engage in educating the community about the safe operation of drones, in particular recreational drones.

The Air Navigation (Aircraft Noise) Regulations 2018 came into effect on 1 April 2018. These regulations are in substantially the same form as the former Regulations, but apply a stricter noise restriction to those aircraft manufactured after 1 January 2018, in order to give effect to Australia's obligations under the ICAO. An Aircraft Noise Ombudsman conducts independent reviews of Airservices Australia's and Defence's management of aircraft noise-related activities.66

XII OUTLOOK

Competition remains intense in the aviation sector in Australia but recent increases in aviation fuel prices have seen some rises in fares.

Inbound tourism, particularly from China, has seen significant growth in international traffic. This has in turn placed additional pressures on the available pool of trained commercial pilots and a skills shortage in the industry remains a real and growing concern. As noted above, regulation of RPA also continues to be of concern as the increased risks posed by unauthorised operation and proximity to commercial aircraft operations and airports have been difficult to adequately control by regulation.

Finally, with a recently re-elected coalition government, amendment of Section 9 of the Civil Aviation Act 1988 (Cth) is expected to be soon enacted to require CASA to take into consideration the economic and cost impact on individuals, businesses and the community and the differing risks associated with different industry sectors when developing and promulgating aviation safety standards.67

63 Protected Disclosure Act 2012 (Vic), Public Interest Disclosures Act 2010 (NSW), Public Interest Disclosures Act 2010 (Qld), Whistleblowers Protection Act 1993 (SA), Public Interest Disclosures Act 2002 (SA), Public Interest Disclosure Act 2003 (WA) Public Interest Disclosure Act 2008 (NT) and Public Interest Disclosure Act 2012 (ACT).
64 Parkes Shire Council v. South West Helicopters Pty Ltd [2019] HCA 14
65 Work Health Authority v. Outback Ballooning Pty Ltd [2019] HCA 2.
66 Established under Air Services Amendment Act 2018 (No. 2) (Cth).
67 Civil Aviation Amendment Bill 2019 (Cth).
AUSTRIA

Dieter Altenburger, Azra Dizdarevic and Georg Schwarzmann

I INTRODUCTION

Austria is a central European landlocked country with a population of around 8.8 million inhabitants and it has been a member of the European Community, the predecessor of the European Union, since 1995. Following the enlargement of the European Union in 2004 and 2007, Austria is now situated in the centre of the Union and constitutes the link to the neighbouring countries in the east. Germany is the most important trading partner by far; there are close economic, legal and social connections, not least because of the common language. However, it must be considered that there are substantial differences in the judicial practice, especially regarding the jurisdiction in aviation law, despite the partial applicability of European law.

The domestic passenger and goods transport forms only a minor part in the aviation sector; nevertheless it is of particular significance owing to its close connection to the neighbouring countries and other countries of the European Union. Furthermore, Vienna International Airport serves as an important hub to the Middle East. Austria has six commercial airports with steadily increasing traffic figures, which are located in Vienna, Salzburg, Innsbruck, Graz, Linz and Klagenfurt. The largest and most important airport by far is the Vienna International Airport, with 27 million passengers and 295,427 tonnes of cargo volume (air cargo and trucking) in 2018. It is situated 16km south-east of the city of Vienna and can be reached in 16 minutes by the City Airport Train, which was put into service in 2003. Also, the Slovakian capital Bratislava is only 49km away and can be reached easily by public transport. Finally, according to various statistics, Vienna International Airport has one of the best punctuality records of airports in Europe, and is part of the leading group worldwide.2

The largest airline in Austria is Austrian Airlines, which has a fleet of 83 aircraft. It is a member of Star Alliance and a subsidiary of the German Lufthansa Group. The Austrian Aviation Act3 (LFG) is the central statutory provision at national level. This legal regime is supplemented by numerous other statutes and ordinances. In addition, Austria is a signatory to all principal international agreements in the aviation sector, such as the Chicago Convention (ratified on 26 September 1948), Tokyo Convention (ratified on 8 May 1974) and the Montreal Convention (ratified on 28 June 2004). Austria is not party to the Rome Convention, the Geneva Convention or the Cape Town Convention. All European legal

1 Dieter Altenburger is a partner and Azra Dizdarevic and Georg Schwarzmann are associates at Jarolim Partner Rechtsanwälte GmbH.
2 OAG Punctuality League 2016.
3 Luftpahrtgesetz of 2 December 1957 – LFG.
provisions are applicable because Austria is a member of the European Union, and the primacy of application of EU law is guaranteed. However, directives, in contrast to regulations, must be implemented by national law and, therefore, are not self-executing.

II LEGAL FRAMEWORK FOR LIABILITY

In terms of liability in the aviation sector, international agreements and European provisions assume considerable importance in practice because of the primacy of application of these provisions and their extensive harmonisation of the applicable law. Nonetheless, decisive differences in the jurisdiction of the contracting states are common. The reasons for this are, on the one hand, the different interpretation of the law and on the other, the specific procedural provisions. In addition, national statutes such as the LFG or the Aviation Security Act also provide (additional) liability and penal provisions. Furthermore, the general damages provisions of the Austrian Civil Code are subsidiarily applicable. Other important laws regulating aviation matters are the Airport Charges Act, the Act on Airport Ground Handling, the Federal Act on International Air Services and the Air Transport Levy Act. In addition, there are several national regulations, such as the Civil Aviation Personnel Licensing Regulation, the Rules of the Air and the Air Operator Certificate Regulation.

The supreme civil aviation authority in Austria is the Ministry for Transport, Innovation and Technology (BMVIT). The competent authority for operational, technical and licensing matters is the Austro Control GmbH, a state-owned entity.

i International carriage

As mentioned above, Austria is party to numerous bilateral and multilateral agreements regarding the aviation sector. In terms of liability, the Montreal Convention is of significant importance. It only applies to international transport, which is why the national liability provisions remain applicable, albeit their legal scope is severely restricted. The national Austrian provisions simulate or refer to those of the Montreal Convention (see subsection ii). In compliance with the limits of liability, the obligation to register complaints in a timely manner and other restrictions, the Montreal Convention provides liability in respect of damage to passengers and baggage. It replaced the Warsaw Convention, which is only applicable if one of the disputing parties has not ratified the Montreal Convention. In addition, Regulation (EC) No. 2027/97 is applicable, which integrates the Montreal Convention into European law and provides partially supplementary provisions. Austria is also party to the Chicago and Tokyo Conventions. In case of delays, denied boarding and cancellation, Regulation (EC) No. 261/2004 lays down claims for liquidated damages.

4 Luftfahrtssicherheitsgesetz of 2011 – LSG.
5 Allgemeines bürgerliches Gesetzbuch – ABGB.
6 Flughafenentgeltdgesetz – FEG.
7 Flughafen-Bodenabfertigungsgesetz – FBG.
8 Bundesgesetz über den zwischenstaatlichen Luftverkehr – BGzLV.
9 Flugabgabegesetz – FlugAbgG.
10 Zivilluftfahrt-Personalverordnung – ZLPV.
11 Luftverkehrsregeln – LVR.
12 Luftverkehrsbetreiberzeugnis-Verordnung – AOCV.
ii  Internal and other non-convention carriage
The provisions on liability and its extent in Chapter 10 LFG largely resemble those of the Montreal Convention. For example, the liability of the owner for damaged baggage and cargo or in case of death or injury of the passenger or third parties caused by an accident is regulated in Article 148 ff LFG. When there are several owners of an aircraft, all of them have joint liability, but the limits of Article 151 LFG, which are staggered in accordance to the maximum take-off mass, still apply. Also in accordance with the Montreal Convention, the liability of the carrier is limited to 1,131 special drawing rights in case of damaged baggage. Furthermore, the general damages provisions of the Civil Code are subsidiarily applicable. Several provisions of the ABGB were explicitly integrated into the LFG. For example, Article 161 LFG regarding the liability in case of contributory negligence refers to Article 1304 ABGB. However, in accordance with the reservation contained in Article 146/1 LFG, the LFG is only applicable where neither European nor international law can be applied.

iii  General aviation regulation
Gratuitous carriage of passengers or goods that are not performed by a licensed carrier is not subject to the liability provisions of the Montreal Convention or European Law. However, the provisions of the LFG on liability, as shown in subsection ii are applied in these cases because they establish liability of the owner regardless of whether the carriage was gratuitous or performed by a licensed carrier.

iv  Passenger rights
Passenger rights in Austria are mainly regulated by European law. In particular, the Montreal Convention and Regulation (EC) No. 261/2004 on Passenger Rights are of decisive importance. This regulation under certain circumstances entitles the passenger to claim compensation in case of cancellation or delays. In these procedures, special attention must be paid to the local jurisdiction. In numerous cases, the plaintiff refers to the consumer jurisdiction of Article 17 ff. of Regulation (EU) No. 1215/2012, but according to Article 17/3 of Regulation (EU) No. 1215/2012 it does not apply to transport contracts other than package travel contracts. Concerning claims for compensation the place of jurisdiction is usually not determined by the consumer's residence, because the carrier is usually only obliged to transport services. In accordance with the Package Travel Directive, Austrian courts explicitly found that a flight may not be qualified as package travel, even when it takes place during night hours and includes catering. Because of the stated reasons, the place of jurisdiction is usually the place of performance of the obligation in question, provided the carrier does not have an establishment that is registered in the Austrian commercial register. Therefore, the legal venue for all these disputes is the court of the district where the airport of arrival or department is situated. Those provisions on international jurisdiction result in the consequence that almost all claims that are based on the Regulation on Passenger Rights are concentrated in only a few courts. The competent court of first instance for the Vienna International Airport is the District Court of Schwechat, if the value of dispute does not exceed €15,000. This centralisation offers the advantage that the deciding judges are highly experienced in passenger rights. The Austrian courts developed clear judicial practices for most of the legal questions.

13 District Court Salzburg 13 April 2017, 31 C 39/17a.
For instance, the courts pay particular attention to the measures that could reasonably be required. This tendency results from one of the few rulings of the Supreme Court (court of last instance) about the Passenger Rights Regulation.\(^\text{14}\) Article 5/3 of Regulation (EC) No. 261/2004 explicitly provides that the obligation to prove that all reasonable measures had been taken refers solely to the extraordinary circumstances that caused the cancellation. Thus, the operating air carrier must only take the reasonable measures that are appropriate to avoid those extraordinary circumstances. This approach was, for instance, followed by the German Federal Court of Justice.\(^\text{15}\) Nevertheless, in Austria this question of law is answered to the contrary and to the disadvantage of the air carrier. The carrier must prove that all reasonable measures had been taken to minimise the delay as much as possible. Hence, the proof of all reasonable measures taken is also required when there is no possibility of influencing the extraordinary circumstances, for example, in case of closures of the airspace. In these cases, carriers must offer reasonable re-routing, substitute transportation or prove why this was not reasonable or possible in the particular case.

Article 7/2 of Regulation (EC) No. 261/2004 provides the reduction of compensation by 50 per cent, when the delay does not exceed a distance-related time limit. The District Court of Schwechat – in whose jurisdiction the Vienna International Airport is situated, as mentioned above – ruled that this reduction does not apply \textit{eo ipso}, but must be claimed explicitly by the carrier.\(^\text{16}\) This means that the initially claimed full sum may adversely affect process costs. For this reason, carriers and their legal representatives should examine the potential reduction under Article 7/2 of the Passenger Rights Regulation in any case. The submission to the court should then include a reference to the 50 per cent reduction and its applicability. This ensures that the court will apply this principle even if the claim is granted.

Provided the proof of extraordinary circumstances succeeds and probable cause shows that the delay or cancellation could not have been avoided, even if all reasonable measures had been taken, the claim for compensation principally will be denied. In particular, the proof of regulatory airspace restrictions and capacity limitations usually lead to a relief of liability. Furthermore, there are several procedural particularities that should be noted. Unlike in other European countries, oral proceedings are held in each case. Both the plaintiff and the defendant must attend the hearing and submit all decision-supporting information by the end of the oral procedures before the court of first instance to avoid adverse procedural consequences. Supplements at a later stage are only allowed in specific cases and only to a limited extent. In practice, a credible and conclusive witness testimony is hugely significant. Written statements of witnesses, however, are not allowed. Usually, the amount in dispute based on Regulation (EC) No. 261/2004 is comparatively small, which means that an appeal against the ruling of the first instance is strictly limited and the focus should be on the proceedings at first instance.

Article 5 of the Passenger Rights Regulation not only provides that there is no compensation in case of extraordinary circumstances, but also if information has been given in a timely manner and there has been an offer to reroute. The relevant time frames are regulated in Article 5/1(c) of Regulation (EC) No. 261/2004. In Austria, and also Germany, the operating carrier is solely accountable for informing the passengers on time. The information of a travel agency or the contracting carrier only justifies a relief of liability.

\(^{14}\) Supreme Court 17 December 2012, 4 Ob 164/12.

\(^{15}\) BGH 24 September 2013, XZR 129/12.

\(^{16}\) District Court Schwechat 1 March 2017, 4 C 744/16v.
when the information was transmitted to the passengers within the statutory time frames. In
general, the affected passengers should be informed by the operating carrier directly to avoid
defaults.

Another significant ruling of the Supreme Court dealt with the sequential use of
flight coupons by a passenger. The legal dispute at hand was based on the circumstance
that carriers sometimes offer a flight connection that consists of several flight stages for a
cheaper price than the individual flights. The General Terms and Conditions of Carriage of
the defending carrier contained a clause that provided an obligation of the consumer to pay
an extra charge if he or she only uses one of the flight stages and the flight itself would have
been more expensive than the booked flight travel. The Supreme Court considered that such
clauses are only valid where the consumer originally intended to use only one of the several
flights of a combined offer and, therefore, consciously tried to circumvent the tariff system.
Clauses that also burden consumers who initially wanted to use the actual combined offer,
but decided otherwise later – for example, because of delay of a feeder flight or a change in
the itinerary – are grossly discriminatory and, therefore, void.

In this context clauses of General Terms and Conditions of Carriage are void in
accordance with Article 879/3 ABGB when they grossly discriminate against one party. The
Supreme Court has clarified the standards by which the clauses are measured in numerous
rulings. This jurisdiction was developed by an actual decision of the Commercial Court
of Vienna, which dealt with the legitimacy of certain clauses in the General Terms and
Conditions of Carriage. In summary, the Court has ruled that clauses in Conditions of
Carriage that allow the refund of taxes and fees in the event of cancellation only upon
the payment of a fee are inadmissible. Another particularity of the Austrian legal system
is the frequent claim for damages as a result of loss of holiday enjoyment. Loss of holiday
enjoyment constitutes non-material damage, which means that no direct pecuniary damage
occurs in the sphere of the aggrieved party. According to Austrian tort law, compensation
for non-material damage may only be granted in explicitly statutory exceptions. With regard
to the loss of holiday enjoyment, Article 31e/3 of the Consumer Protection Act (KSchG) explicitly entitles compensation. According to the legal provisions and court decisions, this entitlement may only be applicable to package tours that were organised by a travel agency. Therefore, air carriers are not liable for loss of holiday enjoyment according to Article 31/3 KSchG.

v Other legislation

In general, there are no Competition Law or Environmental Law provisions that are
specifically applicable to corporations in the aviation sector. Both the Austrian Competition
Act and the provisions on economic crime comply with the European prerequisites. The
Act on Airport Ground Handling, which regulates the market, is also relevant. Potential
ground-handling services must fulfil a variety of requirements and complete an extensive
detailed statutory selection procedure. The number of ground-handling services per airport is
restricted to two in each of the essential areas, such as baggage handling, ramp handling, mail

17 Supreme Court 17 December 2012, 4 Ob 164/12i.
18 Supreme Court 13 April 1983, 1 Ob 581/83; 20 July 2016, 6 Ob 120/15p; 23 February 2017, 2 Ob 29/16b.
19 Konsumentenschutzgesetz.
20 Supreme Court 10 October 2002, 6 Ob 11/02i.
and freight-handling services. Regarding the noise emissions of the airport, the Protection Against Environmental Noise Act\textsuperscript{21} applies. The statutory provisions are regularly specified by binding national regulations such as the Regulation on Civil Airports\textsuperscript{22} and the Civil Aircraft and Aeronautical Equipment Regulation.\textsuperscript{23}

### III LICENSING OF OPERATIONS

#### i Licensed activities

The LFG stipulates that all carriers require a licence. The Act defines an air carrier as any undertaking transporting passengers or goods by aircraft for commercial purposes and explicitly refers to Regulation (EC) No. 2407/92 on licensing of air carriers and Regulation (EC) No. 1008/2008 on common rules for the operation of air services in the European Community. For example, a licence is also required for commercial circular flights. Provided that an equivalent licence of another Member State of the European Union is available, a separate licence application must not be submitted. In general, there are two kinds of licensing procedures. In case of passenger, mail or freight transport by a sailplane, free balloon or an ultralight aeroplane, an application for a licence according to Article 104 ff. LFG must be submitted to the Austrian Ministry for Transport, Innovation and Technology.\textsuperscript{24} In all other cases of commercial services in the aviation sector, an application for a licence according to Regulation (EC) No. 1008/2008 must be submitted to the Ministry for Transport, Innovation and Technology.\textsuperscript{25} Austro Control GmbH is responsible for issuing the air operator certificate (AOC), and thereby implementing the Ordinance on Air Operator Certificate 2008. Austro Control GmbH is a public, commercial enterprise that performs sovereign tasks and is subject to instruction from the Minister for Transport, Innovation and Technology.

#### ii Ownership rules

The legal framework on ownership is largely orientated to Regulation (EC) No. 1008/2008. In addition, Article 16 LFG states that an aircraft register is kept by the Austro Control GmbH. Further implementations are provided by the Civil Aircraft and Aeronautical Equipment Regulation. However, the register only records the operator; the ownership is irrelevant in this context.

#### iii Foreign carriers

The AOC of a Member State of the European Union also entitles the operation of aircraft on Austrian territory. Numerous bilateral agreements have been concluded with third countries, resulting in the recognition of their AOCs. The Act on International Air Services\textsuperscript{26} provides the requirements under which operation and overfly rights are granted to air carriers from third countries.

\textsuperscript{21} Bundes-Umgebungslärmschutzgesetz.
\textsuperscript{22} Zivilflugplatz-Verordnung 1972 – ZFV.
\textsuperscript{23} Zivilluftfahrzeug- und Luftfahrterät-Verordnung 2010 – ZLLV.
\textsuperscript{24} Article 102/1 LFG.
\textsuperscript{25} Article 102/2 LFG.
\textsuperscript{26} Bundesgesetz über den zwischenstaatlichen Luftverkehr 2008 – BGzLV.
IV  SAFETY

In Austria, safety requirements are usually standardised by legal instruments of the European Union. However, in addition to numerous references to European provisions, the LFG also contains regulations on the implementation and organisation of security measures. The aim is to prevent offences against the safety of civil aircraft. Special safety measures are directly stated in the LFG.

In addition, Article 136 LFG sets out the obligation to report accidents and incidents to Austro Control GmbH. In this way, accidents and incidents are to be recorded and investigated in order to increase safety in air traffic. The following persons are obliged to report such incidents:

a  operators of civil aircraft;

b  civil aerodrome operators;

c  organs of the public security service;

d  responsible pilots;

e  persons who develop manufacture, maintain or modify civil aircraft or their equipment construction or components;

f  persons who sign a re-examination certificate or a release certificate for a civil aircraft or its equipment, construction or components;

g  persons entrusted with the performance of the duties of the air traffic service;

h  persons performing a function related to the installation, modification, maintenance, repair, overhaul, flight inspection or control of air traffic; and

i  persons performing aerodrome operations on an aerodrome, including refuelling, service, preparation of mass and gravity, and loading, de-icing and towing of the aircraft.

Austro Control GmbH is obliged to forward the notifications received without delay to the Federal Security Investigation Offices. Incidents that did not result in an accident are subject to the reporting obligation. The Civil Aviation Notification Regulation\(^\text{27}\) determines the notifiable events and specifies the reporting procedures. Other reporting requirements, such as the Civil Aircraft and Aeronautical Equipment Regulation or the Air Operator Certificate Regulation,\(^\text{28}\) may also be subject to reporting requirements. These shall remain unaffected by the obligation to report as stated in the LFG.

V  INSURANCE

In the area of insurance law, European standards are of central importance. In principle, the insurance level is based on Regulation (EC) No. 785/2004. The LFG provides specific provisions and insurance amounts for airlines, which are not subject to the regulation. These vary depending on the aircraft operated. Austro Control GmbH is the competent authority in insurance matters. Terminations or interruptions of the insurance must be immediately notified to the authority by the insurer or the insured party. An insurance certificate must be issued by the insurer and must be carried in the aircraft.

\(^{27}\) Zivilluftfahrten-Meldeverordnung – ZMV.

\(^{28}\) Luftverkehrsunternehmen- und Flugbetriebs-Verordnung 2008 – AOCV.
VI  COMPETITION

Competition between air carriers is regulated by competition law. Austrian national competition law is mainly set out in the Act Against Unfair Competition\(^{29}\) and the Competition Act. In addition to the national legal framework, European competition law is applicable – Regulations (EC) Nos. 1/2003 and 139/2004 are relevant in this context. Regulation (EC) No. 411/2004 relates specifically to the aviation sector and extends the applicability of European competition law to air transport between the European Union and third countries.

The applicable competition rules are applied by the regular national and European competition authorities. In Austria, the independent Federal Competition Agency (BWB)\(^{30}\) is the competent authority. Besides the enforcement of the competition provisions, this authority is also responsible for merger control. In addition to the BWB, there is the federal antitrust prosecutor who is directly controlled by the Federal Minister of Justice.

The Competition Act applies to all types of merger transactions. The respective relevant markets are the flight routes. In order to determine whether or not a transaction has an effect on competition, the relevant markets are compared.

In the context of competition and commercial law, the protection of intellectual property is also very important. In Austria, trademarks can be registered under the Trademark Act\(^{31}\) in the Trademark Register. However, there is also protection for unregistered marks and labels if the existence and use is proven. Patents can be registered in the Patent Register. The Patent Act\(^{32}\) and the Model Protection Act\(^{33}\) are applicable.

VII  WRONGFUL DEATH

The provisions of the Montreal Convention standardise the provisions for the loss of physical integrity or the death of passengers. Damages claims are fulfilled if the conduct is attributable to the air carrier, the air carrier was unlawful and culpable, and was causally responsible for the death. Liability is independent from other claims under national regulations. Damages compensating for shock and grief in connection with the death of close relatives are generally only awarded if the impairment is causing a disease. Such damages are attributed by the Supreme Court only in the case of gross negligence on the part of the injuring party.\(^{34}\) However, damage to property occurring in the sphere of the surviving dependants must be compensated (e.g., funeral expenses and possible maintenance obligations).

\(^{29}\) Gesetz gegen den Unlauteren Wettbewerb – UWG.
\(^{30}\) Bundeswettbewerbsbehörde.
\(^{31}\) Markenschutzgesetz – MSchG.
\(^{32}\) Patentgesetz – PatG.
\(^{33}\) Musterschutzgesetz – MuSchG.
\(^{34}\) Welser, Bürgerliches Recht, page 340.
VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

In the air transport sector, most policyholders and insurers prefer an extrajudicial resolution of disputes. According to the applicable legislation in Austria, there are no restrictions, and the involved have the freedom to choose a preferred dispute resolution.

Especially in cases of long-term contractual agreements, there will be a possibility to conclude an arbitration clause. Merely contract components or agreements that are results of an imbalance of power or that violate statutory provisions or public morality rights for other reasons are not permitted.

Even though dispute settlement proceedings do not have the same importance in central Europe as in the Anglo-Saxon legal system, there have been some major improvements in this area in recent years.

In the entrepreneurial area especially, many actors recognise the benefits of an extrajudicial or even consensual dispute resolution. This increasing acceptance can also be seen in the private domain. In 2003, a legal framework for mediation procedures concerning civil claims was implemented through the Civil Law Mediation Act.35 These amenities are hardly regulated in the public sector.

The jurisdiction of the Austrian courts is determined by the value of the dispute. District courts are competent in the first instance for disputes with a value of up to €15,000. If the value exceeds this threshold, the regional courts, which otherwise act as an instance of appeal, decide in the first instance. However, judges are encouraged to support the parties in reaching an amicable solution.

The Agency for Passenger Rights36 has been established for the extrajudicial enforcement of passenger rights. It is a conciliation and enforcement agency for rail, bus, air and ship traffic. Under Article 139a LFG, air carriers are obliged to participate in a conciliation procedure and provide all the necessary information documents for reviewing the situation. The deadlines laid down in the procedural guidelines of the APF must be adhered to. If a carrier fails to meet its obligations towards the arbitration body, administrative penalties are to be expected. However, the air carrier is not obliged, under any circumstances, to accept a solution proposed by the conciliation body. If conciliation cannot be reached in the APF conciliation procedure, the passenger is entitled to appeal.

ii Carriers’ liability towards passengers and third parties

The liability of the air carrier is primarily regulated by the provisions of the Montreal Convention, which provide maximum liability limits. The air carrier is primarily held accountable. This does not mean, however, that the air carrier has to bear the damage definitively. The Montreal Convention does not affect a potential claim for recourse by the airline against third parties and is, in principle, governed by Austrian law. A recourse claim may be considered, for example, if the damage is caused by several persons who are liable in solidarity with the injured party. If the injured party only takes action against the airline, the airline has to pay the full amount, but may recover the corresponding shares of damages from the other injuring parties.

35 Zivilrechts-Mediations-Gesetz – ZivMediatG.
36 Agentur für Passagier- und Fahrgastrechte – APF.
Special legal conditions exist for the recourse of the air carrier as an employer to its employees as direct victims. The Employee Liability Act\(^{37}\) provides compensation for damages inflicted by an employer to the employee or a third party in the performance of the work. Compared to the provisions of the ABGB, the liability of the employer for the added damages is substantially restricted. In the case of excusable mistakes (the slightest degree of negligence), the liability of the employer is completely omitted. In other cases of negligence, the right of recourse may be reduced by the court according to the Employee Liability Act. However, if the employee is injured while performing his or her work, the employer is liable for the impairment of the employee’s physical integrity only in case of intent (employer’s liability privilege\(^{38}\)).

When European or international law provisions are not applicable, the national liability rules apply. Liability against third parties is regulated in Article 148 ff LFG, whereby the maximum liability amounts of Article 151 LFG have to be observed. These provisions are broadly similar to those of the Montreal Convention. The injured party loses the claims declared under Article 148 if he or she fails to report (1) the accident within three months of obtaining knowledge of the damage and (2) the operator of the aircraft. The loss of rights does not occur if the complaint has been omitted owing to a circumstance for which the injured party is not responsible or if the operator of the aircraft became aware of the accident within the time limit in another way.

In addition, the general provisions of the ABGB are to be taken into consideration.

iii  
Product liability

The European Product Liability Directive\(^{39}\) was implemented in Austria by the Product Liability Act.\(^{40}\) It establishes that if a person is killed or injured as a result of the defect of a product, the manufacturer or importer is obliged to reimburse the damages. The manufacturer or importer is only liable for damages caused by defective products. A product must be qualified as faulty if it does not offer the security that a person is entitled to expect under all circumstances. The Product Liability Act establishes a fault-independent liability. In the case of material damage, liability is excluded, provided the damage occurs in the property of an entrepreneur and is caused by a product that has been used predominantly in the company. In addition, the liability provisions of the ABGB apply.

iv  
Compensation

Damages claims can be made under national law. Immaterial damages can only be replaced if this is explicitly stipulated by law. For example, the compensation for pain is stated in Article 1325 ABGB. According to the prevailing jurisprudence, both physical and mental pain may be compensated, with higher demands being placed on compensation for mental damage. In practice, the pain is calculated on a daily basis, differentiating between mild, moderate and severe pain. For a day of light pain, approximately €100 will be awarded, though legal practice varies with different courts. For a day with severe pain, up to approximately €350 will be awarded depending on the jurisdiction. According to recent jurisprudence, more
Austria

claims for damages are also increasingly attributed to psychological damage, such as damage caused by shock or grief. Liability for such damages exists only in cases of gross negligence or intent, according to the case law of the Supreme Court. In contrast, the healing costs and the loss of earnings are already compensable for slight negligence.

The Austrian law on compensation for damages is complex and includes numerous special provisions. For example, for contractual claims, a reversed burden proof is in place. According to Article 1298 ABGB, the injured party must prove that he or she did not act culpably. In the Consumer Protection Act, special provisions for the liability claims of consumers against companies are standardised.

IX DRONES

As in many other countries, there has been a rapid increase in the use of unmanned aerial vehicles in Austria, and there have been repeated incidents involving drones in the vicinity of Vienna International Airport. Even though collisions and other accidents have been avoided so far, the airport operator is considering installing a drone defence system. In this context, it should be noted that the operation of drones in the no-fly zones around airports is absolutely inadmissible and can lead to criminal consequences.

Apart from the aforementioned no-fly zones, drone flights up to a maximum flight altitude of 150 metres are generally permitted without special permission. The applicable provisions can be found in the fourth section of the LFG and the Aviation Regulation.41 The regulations regarding unmanned aerial vehicles entered into force with the amendment of the LFG in 2014 and correspond to the intention of the legislature to create a specific legal framework for the increasing number of deployed drones and the associated risks. The LFG differentiates between certain classes of unmanned aerial vehicles whose approval criteria differ. The classification depends, on the one hand, on the area of operation and, on the other hand, on the operating mass of the aircraft.

X VOLUNTARY REPORTING

There is no institution for voluntary reporting in Austria. However, air carriers and other persons and companies active in the aviation sector are legally obliged to report. Article 136 LFG provides a reporting obligation to Austro Control GmbH for accidents as well as for incidents that have not resulted in an accident. There are no special provisions for the protection of whistle-blowers. See Section IV.

XI THE YEAR IN REVIEW

On 1 January 2019 the Location Development Act42 entered into force in Austria. The StEntG is relevant for proceedings that fall under environmental impact assessments (EIAs) and thus, under the Austrian Environmental Impact Assessment Act.43 Between 2009 and 2017 the average EIA proceeding had a duration of 14.9 months (from filing the application for its permit). However, it has been criticised that this duration has increased drastically in

41 Luftverkehrsregeln 2014 – LVR.
42 Standort-Entwicklungsgesetz – StEntG.
43 Umweltverträglichkeitsprüfungsgesetz – UVP-G.
more complex proceedings, according to recent statistics. For example, it was found that one of these proceedings had a duration of 64 months. This was considered as an unacceptable situation, especially for location-relevant projects, and was thus counteracted with the StEntG. The StEntG establishes a special selection procedure with which individual location-relevant projects for the development or further development of Austria as a business location are identified. These ‘site-relevant projects’, for which the special ‘public interest’ of the Republic of Austria has been confirmed, are to be announced by means of an Ordinance. According to the StEntG, a location-relevant project is considered to be of particular public interest if it has extraordinarily positive consequences for Austria as a business location. Once a site-relevant project has been declared as of special public interest, special measures to accelerate the EIA proceeding are applicable.

With its decision of 6 March 2019 the Supreme Constitutional Court confirmed the approval for the construction of the third runway at Vienna International Airport. In February 2017, the Federal Administrative Court prohibited the construction of the third runway for climate protection reasons. However, this decision was reversed by the Constitutional Court in June 2017 and the proceedings before the Federal Administrative Court continued. In its ruling of 23 March 2018, the Federal Administrative Court confirmed the approval granted by the Lower Austrian provincial government for the construction of the third runway. In May and November 2018, however, several Viennese citizens’ initiatives and a number of residents living near the airport lodged appeals with the Supreme Administrative Court. In its ruling of 6 March 2019, the Administrative Court dismissed these appeals as unfounded, thus confirming the authorisation for the construction of the third runway.

Vienna International Airport has announced that as of summer 2019 Austrian Airlines, Air Canada and China Southern Airlines are launching new long-haul services. Moreover, Royal Air Maroc will also be represented in Vienna. In addition, as a consequence of Air Berlin’s insolvency in 2017, the low-cost segment is also increasing at Vienna International Airport. Airlines such as Laudamotion, Wizz Air, LEVEL, easyJet as well as other low-cost airlines are scheduling flights. Moreover, some aircraft have been registered in Austria and stationed permanently in Schwechat. However, it is worth noting that the increase of the low-cost segment is having a negative impact on the established Austrian Airlines. Owing to the increased competition, Austrian Airlines had higher losses in the first quarter of 2019 than in the last quarter of 2018.

There have also been some remarkable decisions regarding the Passenger Rights Regulation within the past year. In a landmark ruling, the ECJ decided which distance should be used to calculate the compensation amount when a flight consists of several flight legs. According to this binding interpretation, solely the distance between the departure airport and the final destination is relevant. Any additional distances due to the location of the stopover airport or the concrete flight route remain unnoted. With regard to technical defects, the ECJ has stated in another decision that such incidents represent exceptional circumstances within the meaning of the Regulation (EC) No. 261/2004 if they are caused by external influences such as a screw on the runway that damaged the wheel of the aircraft. Furthermore, the Austrian Supreme Court has stated that in the event of cancellation, the operating air carrier is obliged to rebook to another airline in order to comply with the requirements of Article 8/1 of Regulation (EC) No. 261/2004. The earliest possible rerouting is therefore not limited to flights of the initially operating carrier but has to consider all
transport options to the final destination.\textsuperscript{44} In another case, the District Court of Schwechat has stated that despite a stopover of nearly 15 hours, two separate flights could be considered as one single flight according to the Regulation, if this stopover does not have its own purpose. For this reason, even in the case of a 15-hour stopover, only the arrival time at the final destination – and not at the airport of the stopover – is relevant for assessing the existence of a compensation claim.\textsuperscript{45}

\textbf{XII  OUTLOOK}

Although, as stated, some clarifications have been made within the scope of Regulation (EC) No. 261/2004, there is still a lack of clarity regarding several questions of interpretation that have been controversially responded to by Austrian and European courts. For example, the qualification of strike-related cancellations or flight delays as exceptional circumstances is highly controversial. In particular, a current judgment of the ECJ suggests that strikes of employees of the air carrier can never be exceptional circumstances. This conclusion should be questioned critically and how the national courts will interpret the ECJ’s remarks remains to be seen.

In addition, unmanned aerial vehicles are becoming increasingly important. Fully automated aircrafts, or air taxis, are intended to create a new transport option in urban areas. In this context, a specification of the legal provisions will be necessary to deal with the new requirements caused by this technical development.

\textsuperscript{44} Supreme Court 29 August 2018, 1 Ob 133/18t.

\textsuperscript{45} District Court Schwechat 15 November 2018, 18 C 111/18m.
I  INTRODUCTION

In 1718, the Commonwealth of the Bahamas became a British crown colony, and gained its independence in 1973 while remaining a member of the Commonwealth with the British monarch as its head of state.

Civil aviation falls within the scope of the Ministry of Aviation and is governed by the Civil Aviation Act 2016 (the Act), the Civil Aviation (Safety) (Amendment) Regulations 2016 and the Civil Aviation (General) Regulations 2017 (the Regulations). It is intended that the new Act and Regulations will create an enhanced and robust civil aviation sector in the Bahamas.

In particular, the Act created for the first time in the Bahamas an independent Civil Aviation Authority (the Authority), which is headed by the Director of Civil Aviation. The Act also created a new Civil Aviation Security with a National Civil Aviation Security Programme, as well an Air Accident Investigation Department to be headed by the Chief Investigator of Air Accidents. The Act also makes provision for the development and enhanced use of the navigable airspace within the Bahamas, with supporting facilities and services.

II  LEGAL FRAMEWORK FOR LIABILITY

The key pieces of legislation governing liability in the aviation sector are the Act, the Regulations and the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 2017 (the Air Accident Regulations). The Bahamas is a party to the Convention on International Civil Aviation (the Chicago Convention) and the Convention for the Unification of Certain Rules Relating to International Carriage by Air (the Warsaw Convention) as modified by the Montreal Convention in 1999 (the Warsaw Convention with its supplemental amendments had become cumbersome and inconsistent, which was a departure from its original intent). Therefore, as a Member State, the Bahamas conforms to the standards and recommendations of the International Civil Aviation Organization (ICAO). Although the ICAO is a regulatory agency, it forms a part of the United Nations to establish and maintain consistency between contracting states.

1 Llewellyn V Boyer-Cartwright is a partner at Callenders & Co.
2 7 December 1944.
3 12 October 1929 and became law in 1933.
4 12 October 1929.
i  **International carriage**

The Bahamas is a party to the following multilateral agreements relating to international carriage, and as such adheres to all recommended standards, procedures and practices adopted by the ICAO under Article 37 of the Convention and contained in the annexes thereto:

a  International Civil Aviation Organization established by Chicago Convention; 7 December 1944 and Amended in 1947, 1954, 1961 and 1968;

b  Protocol on the Authentic Trilingual Text of the Convention on International Civil Aviation; Chicago 1944;

c  Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air; Warsaw 12 October 1949;

d  Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air; Guatemala City, 28 September 1955;

e  Convention, Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by Persons Other than the Contracting Carrier; Guadalajara, 18 September 1961;

f  Convention on Damage Caused by a Foreign Aircraft to Third Parties on the Surface; Rome 7 October 1952; and

g  International Air Services Transit Agreement; Chicago 7 December 1944.

ii  **General aviation regulation**

The Act and the Regulations govern all aspects of general aviation in the Bahamas. Schedule 28 of the Regulations provide for general aviation, corporate operators, turbojet and large airplanes.5

iii  **Passenger rights**

The Bahamas, as an ICAO member state, observes the provisions of the Warsaw Convention as modified by Montreal regarding liabilities and passenger rights.

III  **LICENSING OF OPERATIONS**

i  **Licensed activities**

All commercial air transport operations (scheduled or non-scheduled) must obtain approval for an air operator certificate (AOC) from the Authority. Any proposed operator wishing to obtain an AOC must submit an application (1) in the form and manner prescribed by the Authority; and (2) containing any information the Authority requires the applicant to submit.6

Each AOC applicant must submit an application within at least 90 days prior to the date of intended operation. An AOC is usually valid for a period of 12 calendar months.

The renewal for an AOC should be made within at least 30 days of the expiration of the operator’s current AOC. The criteria for renewal is as follows: (1) in the form and manner prescribed by the Authority; and (2) containing any information the Authority requires the applicant to submit.7

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5 Schedule 28 of the Regulations.
Prior to renewal, the Authority shall conduct a risk assessment of the AOC holder’s continued compliance with the certification standards for an AOC applicable to the type and complexity of the operations and ensure that there are no outstanding safety concerns at the time of renewal.8

All commercial licensing requirements are set out in Schedule 12 of the Regulations. The certification process for air taxi operators is the same as that for all other AOC applicants.

ii Ownership rules

The Authority may issue an AOC if, after an investigation, it finds that the applicant:

\[ a \] is a citizen of the Bahamas;
\[ b \] has its principal place of business and registered office, if any, located in the Bahamas;
\[ c \] meets the applicable regulations and standards for the holder of an AOC;
\[ d \] is properly and adequately equipped for safe operations in commercial air transport and maintenance of the aircraft;
\[ e \] has paid the cost recovery fee required; and
\[ f \] holds the economic authority issued by the Bahamas under the Civil Aviation Act.9

In the event the applicant is a body incorporated under the laws of the Bahamas, it must be substantially owned and effectively controlled by nationals of the Bahamas.10

In the Bahamas, the ownership of any business is customarily reserved for Bahamians. However, certain business activities such as aviation may be partially foreign-owned with the prior approval of the National Economic Council (NEC).11 The NEC will carefully consider any such application from the non-Bahamian and may grant approval subject to conditions, for example, the employment of Bahamians, how many aircraft may be operated, or the granting of work permits for any required non-Bahamian personnel.

Each AOC applicant, whether Bahamian or non-Bahamian, who is engaged in commercial air transport in the Bahamas, by law requires economic authority from the Authority. The air operator economic authorisation permits air operators to advertise flight services and conduct business in the Bahamas for the purpose of transporting passengers and property by air, for remuneration, hire or other valuable consideration. During the processing of this application, the Authority will also determine whether the individual or company who makes the application is economically capable of supporting the proposed operations.

iii Foreign carriers

There is no prohibition on foreign carriers operating to and from the Bahamas. The Regulations, however, set out the requirements for the licensing of foreign carriers in the Bahamas, which must conform with ICAO standards.12 These requirements are:

\[ a \] a foreign air operator shall not operate in the Bahamas unless it holds operations specifications issued to it by the Authority;

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8 Schedule 12.045 of the Regulations.
9 Schedule 12.025 of the Regulations.
10 Section 64(3)(a) of the Act.
12 Schedule 20.165 of the Regulations.
where an air operator wishes to apply to operate in the Bahamas it shall make such application to the Authority in the form and manner prescribed by the Authority;

c an application for operations specifications, shall be accompanied by:

• a copy of a valid AOC and supporting authorisations issued by the state of the operator;
• a copy of any equivalent operations specifications issued by the state of the operator for any demonstrating approvals to be used while conducting operations in the Bahamas;
• a copy of the licence or authorisation granted to the air operator by the state of the operator to conduct commercial air transport to and from the Bahamas;
• a copy of the approval page for a minimum equipment list approved by the state of the operator for each aircraft type intended to be operated in the Bahamas;
• a representative copy of a certificate of registration issued in the state of registry for the aircraft types proposed to be operated in the Bahamas;
• a copy of a document identifying the maintenance that is required to be carried out for aircraft while they are operated in the Bahamas;
• a copy of the maintenance contract between the air operator and the approved maintenance organisation certificate approved by the state of registry to conduct the maintenance while in the Bahamas;
• a copy of any lease agreements, if the aircraft is not owned by foreign air carrier;
• a proposed aircraft operator security programme, for the approval of the Authority; and
• any other document the Authority considers necessary to ensure that the intended operations will be conducted safely; and

d an applicant under this Schedule shall apply for the initial issue of foreign air operator operations specifications at least 15 days before the date of commencement of intended operation, although it would be more prudent to allow more time for the application process.

Additionally, the Authority will issue operations specifications to a foreign air carrier to conduct commercial air operations in the Bahamas, only if the Authority is satisfied that the air operator:

a has a valid AOC issued by the state of the operator;

b has an aircraft operator security programme approved by the state of the operator and the Bahamas for the operations intended;

c meets the applicable standards and recommended practices for commercial air transport by the ICAO for:

• aeroplanes, Annex 6, Part 1; or
• helicopters, Annex 6, Part 3;

d meets the standards contained in applicable Annexes to the Chicago Convention for the operation to be conducted; and

e has sufficient financial resources to conduct safe operations.\textsuperscript{13}
IV SAFETY

All AOC holders are required to operate within the parameters of the Act and the Regulations, as well as the ICAO-recommended standards and practices, particularly with respect to the following.

i Accident reporting

Schedule 19 of the Regulations makes provision for the reporting of any accident or incident. Operators and individuals (Bahamas-registered or from a contracting state) that are involved in or have knowledge of any accident or serious incident within the Bahamas’ airspace, with a Bahamas-registered aircraft, or holding a Bahamas AOC, are obligated to report that accident or incident. All operators shall immediately and expeditiously notify the Authority upon the occurrence of an aircraft accident or any incident as prescribed by the Regulations. The content of any notification shall be in the manner prescribed in the Regulations. The Regulations also provide for mandatory and voluntary occurrence reporting, the particulars of which are set out in Schedule 19.

The Act established an Air Accident Investigation Department (AAID), which is headed by a Chief Investigator of Air Accidents. The AAID shall have the power to investigate or arrange, by contract or otherwise, for the investigation of accidents or serious incidents, occurring in or over the territory of the Bahamas, or outside the territory of any contracting state to civil aircraft registered by the Civil Authority for the purpose of determining the facts, conditions and circumstances relating to each accident or incident and the probable cause thereof.

The investigation of all accidents and incidents are governed by Schedule 19 of the Regulations and the Civil Aviation (Investigation of Air Accidents and Incidents) Regulation 2017.

ii Maintenance

All AOC holders must have an approved maintenance programme as a part of their operations specifications, which must be approved by the Authority in accordance with the criteria specified in Schedule of the Regulations. AOC maintenance requirements include, but are not limited to, the following:

- maintenance responsibility;
- approval and acceptance of AOC maintenance systems and programmes;
- maintenance control manual;
- mandatory material;
- maintenance management;
- maintenance quality assurance programme;
- aircraft technical log entries; and
- maintenance records.

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14 19.025.
15 Subpart C; Schedule 19.055-19.100, the Regulations.
16 ibid., Subpart I.
No operator will be granted an AOC unless its maintenance is performed by an approved maintenance organisation.\(^{17}\)

iii Airworthiness\(^{18}\)

An application for a certificate of airworthiness (COA) may be made to the Authority by any registered owner (or agent of the owner) of a Bahamas-registered aircraft. The application must be in the form and manner as prescribed by the Authority. COAs will be issued for aircraft in a specific category and model designated by the state of design in the type certificate. The Authority may issue special airworthiness certificates in the form of a restricted certificate, experimental certificate or special flight permit. It may also issue an export certificate of airworthiness in cases where a Bahamas-registered aircraft is being exported to the registry of another contracting state.

V INSURANCE

Aviation insurance is quite complex and it can be extremely difficult to navigate its nuances. Adequate coverage is vital to any air operator and the type and level of coverage is dependent upon the type of operation. Current legislation (the Act, the Regulations and the Insurance Act) does not set out the types and limits of insurance that an air operator must have, although the Authority requires all AOC holders to have aircraft insurance – both liability and hull coverage. The Flight Standards Inspectorate is exploring the possibility of establishing a minimum coverage that all AOC holders are required to have.

However, as a contracting state, Bahamas AOC holders are obligated under the Montreal Convention to maintain adequate insurance covering all liability under the Convention.\(^{19}\)

VI WRONGFUL DEATH

The Act does not specifically provide for wrongful death. However, an action can be brought in tort under the Fatal Accidents Act 2001 (the Fatal Accidents Act). However, Part IX of the Act provides for liability for damage caused by aircraft.

In assessing compensation for wrongful death, under the provisions of the Fatal Accidents Act, the Supreme Court of the Bahamas will award damages as follows:

\[
\begin{align*}
a & \quad \text{in proportion to the injury resulting in the death of any person;} \\
\text{b} & \quad \text{with the deduction of any costs not recovered from the defendant; and} \\
\text{c} & \quad \text{dividing the damages (in such shares as the court orders) among those parties entitled.}\end{align*}
\]

Further, the court will not take into account any insurance money, benefit, pension or gratuity that has already been paid, or that will or may be paid, as a result of the wrongful death.\(^{21}\)

The Montreal Convention does provide the claimant with a choice of forum with respect to international carriage.\(^{22}\)

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\(^{17}\) ibid., Schedule 6.

\(^{18}\) ibid., Schedule 5.

\(^{19}\) Article 50, Montreal Convention.


\(^{21}\) ibid., 5(3).

\(^{22}\) Article 33 Montreal Convention.
VII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure
An action may be commenced in the Supreme Court of the Bahamas by way of a writ of summons.

The Court will typically stipulate the award of damages and provide the time in which any such award must be paid. Any order or judgment for the payment of damages may be enforced by the Court in the event the party so ordered or adjudged does not pay in the manner so ordered or adjudged.

No action may be brought, under the Fatal Accidents Act, upon the expiration of three years after the date of death or the personal representative’s knowledge of the death, whichever is the later.

Under the Montreal Convention, an action for death or personal injury must be brought within two years of the occurrence of the accident or injury. Therefore, a Bahamian citizen injured during an international flight will be subject to the two-year limitation period.

Upon the purchase of a ticket for travel from the airline, a contract is created as between the carrier and the passenger and, therefore, no third parties may be joined in such action; that is, the passenger is not privy to any contract between the carrier and a third party (e.g., pilots, owner or manufacturer of the aircraft).

ii Carriers’ liability towards passengers and third parties
A Bahamian operator’s liability to passengers is fault-based. The liability is a civil liability. An operator may increase its limits of liability above those provided for in the Montreal Convention or stipulate that there are no limits of liability whatsoever.

There is no provision under Bahamian law for strict liability in cases of personal injury. The Montreal Convention provides that air carriers are strictly liable for proven damages up to 113,000 special drawing rights (SDR), although a carrier shall not be strictly liable for damages exceeding 113,000 SDR if the carrier can prove that (1) the accident that caused the flight injury or death was not owing to its own negligence; or (2) the accident was attributable to the negligence of a third party.

A carrier cannot seek the ‘third-party’ defence when the passenger seeks damages of less than 100,000 SDR.

The Contributory Negligence Act 2001 states that Article 21 of the Warsaw Convention contained in the Carriage by Air (Colonies, Protectorates and Trust Territories Order 1953 (which empowers a court to exonerate wholly or partly a carrier who proves that the damage was caused by or contributed to by the negligence of the injured person), shall have effect subject to certain provision of the said Act.

23 Order 45 Rules of the Supreme Court 1978.
24 Section 9, Limitation Act, 1995.
25 Article 35, Montreal Convention.
26 Article 25 Montreal Convention.
27 As at the date of writing one SDR had a value of US$1.38.
28 Article 21 Montreal Convention.
29 Section 5.
30 Section 3 of the Contributory Negligence Act.
iii  Product liability

Strict product liability is not recognised as a cause of action under Bahamian law; however, product liability claims can be brought under negligence as provided for under the Consumer Protection Act.31

iv  Compensation

Social security in the Bahamas provides various benefits, including death benefits, and is governed by the National Insurance Act 1972 (NIA).

The court should not take into account any right to death benefits under the NIA resulting from the death of any person when assessing damages in respect of the death in any action under the Fatal Accidents Act, or the Carriage by Air Act 1961 and the Carriage by Air (Supplementary Provisions) Act 1962 of the United Kingdom as extended to the Bahamas.32

VIII VOLUNTARY REPORTING

There is a voluntary reporting system in the Bahamas. However, currently there is no provision for voluntary reporting to third-party bodies.

Schedule 19 of the Regulations33 specifically sets out those persons or organisations that are obligated to file a mandatory report with respect to any accident or serious incident. However, the Authority encourages voluntary reporting by any other person or organisation not obligated to report by law.34 The voluntary reporting system is designed to maintain anonymity by the deletion of certain data that would reveal the identity of the person or organisation reporting. Voluntary reports shall remain confidential and be protected by the Authority. Further, the voluntary disclosure of any information, by way of voluntary reporting, shall be inadmissible in any future proceedings relating to the person or organisation reporting.

The Authority also encourages self-disclosure regarding non-compliance with the Regulations, regardless of whether it is associated with mandatory or voluntary reporting. The Regulations set out certain conditions35 that must be met by the reporter, in order to avoid any legal action with respect to the non-compliance. The Authority shall maintain the confidentiality36 of the reporter and shall not disclose the contents of the report, unless otherwise obligated by law, or with the consent of the reporter. Additionally, The Authority shall not, unless gross negligence is found, bring any legal action against any organisation or person regarding unpremeditated or inadvertent breaches of the law.

There are currently no provisions in the Act or Regulations regarding the protection of whistle-blowers.

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31  Section 43.
32  Section 64(3) National Insurance Act.
33  19.060.
34  19.075.
35  19.080(b).
36  19.085.
IX DRONES

The use of drones in the Bahamas has risen rapidly in recent years. The Regulations apply to both commercial and recreational (hobby) drones. Schedule 11 (subpart L) governs commercial use and Schedule 27 concerns recreational use.

In the Bahamas drones may not be operated:

- near airports (within five miles);
- at excessive heights (above 200 feet);
- near congested or populated areas (within 500 feet);
- near an organised open-air assembly (within 500 feet);
- near a vessel, vehicle or structure (within 100 feet);
- within close proximity to any person (within 175 feet);
- ‘in a dangerous or reckless manner so as to endanger other persons or their property’; or
- above private property without prior consent from (1) any persons occupying that property, or (2) the property owner and within visual line of sight.

To import a drone a certificate of registration must first be secured from the Authority. The Customs Department will detain drones at the border if a certificate of registration has not been obtained.

All drones in the Bahamas must be registered; failure to do so may result in the drone being detained by the Authority.

Drones will always be a risk to aircraft and airport operations. It is the responsibility of the drone operator to comply with the Regulations, although advances in technology are ongoing that will allow for the airborne detection of drones. In some areas of the Bahamas such as New Providence, where the busiest international airport is located, it is difficult to comply with some of aspects of the Regulations as the island is only 21 miles long and seven miles wide.

X THE YEAR IN REVIEW

Continued restructuring of the civil aviation sector took place in 2018, and it is anticipated that amendments to the Act and the Regulations will be forthcoming as the Authority prepares for its upcoming ICAO Audit scheduled for the last quarter of 2019.

The Act contains a specific provision allowing the Minister of Transport and Aviation, at the recommendation of the Authority, to enter into an agreement with a foreign aeronautical authority in accordance with the Article 83 bis agreement under the Chicago Convention.

The Bahamas also enacted regulations with respect to the use and operation of unmanned aerial vehicles, commonly known as ‘drones’, to be operated both commercially and recreationally.

At the 9th International Civil Aviation Organisation Air Services Negotiation Event (ICAN2016) the Bahamas signed six new bilateral agreements with Qatar, Singapore, New Zealand, Curacao, Brazil and Kuwait; and two others separately with Turkey and the United Arab Emirates. These agreements evidence the government’s commitment to maintaining and expanding the growth of air traffic services to and from the Bahamas.

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37 Section 74, the Act.
38 At the time of writing, the Bahamas has not yet entered into any agreements.
On 22 March 2017, the government signed a Declaration of Intent on Flight Information Region with the United States, which included a radar data sharing partnership.39

XI  OUTLOOK

The civil aviation sector continues to flourish. The government has signed a memorandum of understanding with a United States based company that will assist with the aircraft registry enhancement project and anticipates signing an agreement by August 2019. Draft legislation for the ratification of the Cape Town Convention40 is currently being reviewed by the Office of the Attorney General.

Improvements to the infrastructure of airports throughout the islands of the Bahamas continue, including a US$20 million runway rehabilitation project at Lynden Pindling International Airport to commence in June 2019. At the time of writing the government has issued several requests for proposals regarding unmanned aerial systems, consultancy services for sovereign airspace architects, governance and monetisation.

Chapter 5

BELGIUM

Dimitri de Bournonville and Kim Verhaeghe

I  INTRODUCTION

Belgium is located in the heart of Europe and hosts most of the major institutions of the European Union. It is a federal country with competence lying in the federal state but also at the level of regions (Flanders, Wallonia and Brussels) and communities (Flemish, French and German-speaking communities). Although most of the aviation law and liability regulations are addressed by laws and regulations adopted at a federal level, the regions are also vested with important competence, notably in regional airports management and environmental issues such as aircraft noise-related regulations.

The milestone of Belgian air legislation is the 27 June 1937 Act amending the 16 November 1919 Act regarding the air navigation regulation, and its Royal Decree of 15 March 1954 regulating the air navigation. The 1937 Act (as amended from time to time) provides, inter alia, that any infringement of European Union air regulations will be considered as a criminal offence and those breaching the regulations will be prosecuted.

Next to its inclusion in the European legislation as a founding Member State, Belgium has ratified several international conventions in the field of aviation.

The country did ratify the 1948 Geneva Convention on the International Recognition of Rights in Aircraft, but has not yet ratified the 2001 Cape Town Convention on International Interests in Mobile Equipment. While it is worth mentioning that the European Union approved the Cape Town Convention and its Protocol in April 2009 with respect to matters specific to aircraft equipment (Decision 2009/370/EC), this has not entailed that the Convention is directly applicable in the Member States (subject to a few exceptions and save, of course, for the Member States that did ratify the Convention). Aircraft are considered as movable goods under Belgian law and as such may not benefit from the mortgage-related rules. Although there is no specific registry with the Belgian Civil Aviation Authority, liens on aircraft can be created through classical pledges and be registered as such. A new set of rules relating to securities on movable assets, adopted by the Belgian parliament in 2013 and which came into force on 1 January 2018, allows both the constitution of pledges on aircraft without dispossession and their registration in a national and electronic pledge register. The country is also a party to the 1933 Rome Convention for the Unification of Certain Rules Relating to the Preventive Seizure of Aircraft.

As regards criminal air law, Belgium has ratified the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, the 1970 Hague Convention

1  Dimitri de Bournonville is a partner and Kim Verhaeghe is an associate at Kennedys Brussels LLP. The authors would like to thank Cyril-Igor Grigorieff for his contribution to the former editions of the present chapter.

As far as liability regimes are concerned, Belgium has ratified the 1929 Warsaw Convention and the related Hague Protocol of 1955. The country has also ratified the 1961 Guadalajara Convention and the Montreal Protocol No. 4 of 1975. The 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air entered into force in Belgium on 28 May 2004 further to the Ratification Act of 13 May 2003.2

The surface damage liability regime in Belgium is essentially laid down in the 1952 Rome Convention.

In light of the number and importance of European Union laws and regulations that are directly applicable in Belgium in the field of aviation, this chapter shall only deal with national aspects. A specific chapter is devoted to European Union law and should be read in conjunction with this chapter for a comprehensive overview on the laws and regulations applicable to the aviation sector in Belgium.

II LEGAL FRAMEWORK FOR LIABILITY

i International carriage

Belgium is a party to the following agreements relating to international carriage:

a the 1929 Warsaw Convention for the unification of certain rules relating to international carriage by air, and the related Hague Protocol of 1955. The country has also ratified the 1961 Guadalajara Convention and the Montreal Protocol No. 4 of 1975; and

b the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air.

In addition, Regulation (EC) No. 2027/97 of the Council of 9 October 1997 on air carrier liability in respect of the carriage of passengers and their baggage by air, as amended by Regulation (EC) No. 889/2002, also applies in Belgium.

ii Internal and other non-convention carriage

Given the size of the country there are no scheduled domestic flights in Belgium.

Regulation (EC) No. 2027/97 of the Council of 9 October 1997 on air carrier liability in respect of the carriage of passengers and their baggage by air, as amended by Regulation (EC) No. 889/2002 implements ‘the relevant provisions of the Montreal Convention in respect of the carriage of passengers and their baggage by air and lays down certain supplementary provisions. It also extends the application of these provisions to carriage by air within a single Member State’. It also provides that: ‘The liability of a Community air carrier in respect of passengers and their baggage shall be governed by all provisions of the Montreal Convention relevant to such liability.’

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Although this Regulation entails that the carrier operates with a valid operating licence, Article 3.3 of Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community provides that:

Without prejudice to any other applicable provisions of Community, national or international law, the following categories of air services shall not be subject to the requirement to hold a valid operating licence:

a) air services performed by non-power-driven aircraft or ultralight power-driven aircraft; and
b) local flights.

In the view of some authoritative authors, the consequences of incidents involving this type of aircraft or flights would not fall within the Montreal Convention liability regime, but would rather be governed, depending on the circumstances, by the Warsaw Convention regime (whose scope has been extended to intra-Belgium flights by the Belgian Ratification Act), the domestic law on contract of transport or tort law.

iii Passenger rights

Passenger rights in relation to compensation for delay, cancellation of flights and carriage of disabled passengers are essentially detailed in the European Union chapter dedicated to these questions.

In terms of passenger rights in cases of delay, cancellation and overbooking, the application of Regulation (EC) No. 261/2004 is monitored by the European Commission and national enforcement bodies, which in Belgium is the Directorate-General of the Belgian Civil Aviation Authority.

As in some Member States of the European Union, there was a debate around the binding or non-binding nature of the decisions that may be taken by the Directorate-General in the context of the application of the Regulation. In an approach similar to that already taken in other Member States, the Belgian Council of State confirmed, in a ruling dated 3 June 2014, that the Directorate-General has no real power to force airlines to pay compensation to passengers under Regulation (EC) No. 261/2004.

Some controversy existed surrounding time limits on lodging a judicial action in Belgium, however, the Belgian Court of Cassation recently confirmed the applicability of the one-year time limit set out in the 1891 Act amending the Commercial Code regarding transport contracts in this matter.3

The Belgian Supreme Court, seized for the first time with respect to the Regulation, confirmed the Sturgeon ruling of the European Court of Justice on 12 October 2017.

As regards passengers with reduced mobility, the Directorate-General of the Belgian Civil Aviation Authority is also in charge of monitoring the application of Regulation (EC) No. 1107/2006 at Brussels Airport. In addition, alongside the provisions of Regulation (EC) No. 1107/2006, disabled passengers are also protected under the principles of equality and non-discrimination pursuant to the Belgian Constitution and the Belgian Act of 10 May 2007 designed to fight against certain forms of discrimination.

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3 Hof van Cassatie, C.18.0327.N/1, 8 February 2019.
Passengers travelling on the basis of package tour deals may find additional protection under the Belgian Act of 21 November 2017 regulating tour operators and agency contracts, which is the Belgian implementation act of Directive (EU) 2015/2302 on package travel and linked travel arrangements. Finally, general consumer rights can also be found in the Economic Code, which lays down specific provisions regarding market practices and consumer protection.

### Other legislation
See the European Union chapter of this publication and Section VI, below.

### III LICENSING OF OPERATIONS

#### i Licensed activities
Specifications regarding the allocation of the operation licence can be found in Belgium in the Ministerial Decree of 3 August 1994. This Ministerial Decree notably provides (1) that the Belgian Civil Aviation Authority is in charge of delivering, suspending and withdrawing operating licences; (2) that to obtain such a licence, the applicant will need to be either the owner or the lessee of at least one aircraft registered in its name in the Belgian aircraft registry; and (3) that the operator will need to demonstrate that it is sufficiently insured up to the required limits (set forth at EU level).

For more detail, see the European Union chapter.

#### ii Ownership rules
In Belgium, the Ministerial Decree of 3 August 1994 provides that to determine whether an air carrier complies with the requirements of European Union majority ownership and effective control, the carrier in question will have to provide the Belgian Civil Aviation Authority with all information concerning the legal status or technical capability of the carrier (and any modification thereof), including the registered offices, the articles of association, the designation of directors and the delegations of power, any project of merger or purchase, the operated fleet and the technical services that maintain it, and the licence and qualifications of the pilots.

For more detail, see the European Union chapter.

#### iii Foreign carriers
Pursuant to Regulation (EC) No. 1008/2008 on common rules for the operation of air services in the European Union, Community air carriers have free access, with a few exceptions, to the intra-Community routes. Although not required by law, the Belgian Civil Aviation Authority requests them to notify their scheduled flight routes.

Scheduled air services operated by Community carriers to and from outside the European Union are subject to the requirements laid down in the air services agreements signed by Belgium or the European Union and the relevant third countries.

In the latter respect, the 18 August 2010 Royal Decree on the designation of Community air carriers and on the allocation of air traffic rights in light of scheduled air services operation between Belgium and non-EU countries sets forth the applicable procedure to be granted the necessary traffic rights and operate such flights. This Royal Decree sets forth the criteria used by the Belgian Administration for the purpose of designating carriers on routes where capacity
is limited under the applicable air service agreements: guarantees in terms of long-term continuity of operations, consistency with the airline’s business plan, optimisation of the use of the traffic rights, operation of the carrier’s own aircraft, interests of all categories of users, opening of new markets and routes, maintaining of a satisfactory level of competition, effects on employment, date of the first request to obtain the traffic rights, etc. The Royal Decree also describes the process to challenge designation of carriers on certain routes.

The operation of scheduled air services operated by non-Community air carriers is also subject to the requirements laid down in the air services agreements signed by Belgium or the European Union and the relevant third countries. However, these carriers enjoy, upon certain conditions, the first two freedoms of the air if their country of registration is a party to the 1944 Chicago Convention and the 1944 International Air Services Transit Agreement.

Non-scheduled flights may be operated without authorisations within the European Union by Community air carriers. Again, although not required by law, the Belgian Civil Aviation Authority requests Community air carriers to notify them of any of these services. Save for where this question would be specifically dealt with within an international agreement to which Belgium or the European Union would be a party, an authorisation is required for extra-EU non-scheduled flights operated by Community carriers to, from and via Belgium. The same applies to non-Community air carriers wishing to operate non-scheduled flights to, from and via Belgium. These, however, enjoy the first two freedoms of the air, with a few conditions, pursuant to Article 5 of the 1944 Chicago Convention if their country of registration is a party to the Convention.

In addition to the above, an operating ban may apply to non-Community carriers (see the European Union chapter for more information).

Non-commercial operations and notably operations involving state flights, flights for the carriage of dangerous goods, flights with noise restrictions, air tasks, special flights and public service obligation are subject to other specific requirements and procedures.

Additional information and relevant application forms may be obtained on the Belgian civil aviation website.4

IV SAFETY

The majority of safety issues are regulated on the EU level under the auspices of the European Aviation Safety Agency (EASA) and its Basic Regulation (EU) 2018/1139.

On a national level, the Belgian legal order contains several safety instruments, some standalone and some implementing European legislation on a national level. A complete list is to be found on the website of the Belgian Civil Aviation Authority.5

Most notably, there is the Royal Decree of 9 January 2005 regulating the technical requirements for aircraft of general aviation. Furthermore, the Royal Decree of 25 October 2013 is an executive implementation of Regulation (EU) 1178/2011 and Regulation (EU) 216/2008 (former EASA Basic Regulation) and lays down technical requirements and administrative procedures for civil aviation aircrew. Lastly, the Royal Decree of 10 April 2016 and the Ministerial Decree of 30 November 2016 were adopted recently in relation to the technical exploitation of drones.

4 www.mobilit.belgium.be/fr/transport_aerien/.
V  INSURANCE

The type and levels of insurance that air carriers and aircraft operators are required to have in place are detailed in Regulation (EC) No. 785/2004 on insurance requirements for air carriers and aircraft operators, as regularly amended. This Regulation applies, with few exceptions, to all air carriers and to all aircraft operators flying within, into, out of or over the territory of a Member State of the European Union.

The various legislative provisions regarding insurance in general have been enshrined in the Belgian Insurance Act dated 4 April 2014, which also refers to aviation matters.

For the rest, reference can be made to the Belgian Royal Decree of 12 November 2008 setting minimal insurance requirements concerning liability towards passengers for the non-commercial operation of aircraft of which the maximum take-off weight is equal to or lower than 2,700 kilograms.

VI  COMPETITION

Belgian competition law was redrafted and reorganised by the Belgian parliament in the Act of 3 April 2013, which entered into force on 6 September 2013.

This Act does not affect the substantive provisions of Belgian competition law, which reflect the provisions of Articles 101 and 102 of the Treaty on the Functioning of the European Union, except for the (new) possibility of seeking the personal liability of, and imposing administrative fines on, individuals involved in major violations of the rules (such as price-fixing practices) if they act on behalf of undertakings or associations of undertakings.

Under the Act, a single Belgian Competition Authority will investigate and decide upon infringements of competition law that affect a Belgian market or a substantial portion thereof. Decision-making powers will be entrusted to a new College of Competition Law Experts (the College). The College is an administrative body and, as such, will be able to appear as a party in appeal procedures before the Court of Appeal. The College will be headed by the President of the Belgian Competition Authority.

Investigation powers of the Competition Authority are entrusted to the College of Competition Auditors, led by the Auditor-General.

In terms of infringement proceedings, a two-step process is provided for under the Act. First, the College sends the undertaking a letter setting out its concerns: the undertaking will then have a right to access the information and documents based on which the concerns are based, for the purpose of the preparation of its reply. The undertaking will have a minimum of one month to reply after the issuance of the letter outlining the above concerns. Within one month of said reply, the College will prepare a draft decision. As from that moment (which is the second step of the process), the undertaking will have access to the entire file prepared against it and have two months to select the documents relevant to its defence, to add new documents to the file and to file written comments. One to two months after this, a hearing will take place and the College will finally take a decision within one month of the hearing. The Act introduces a settlement procedure, which may be used in the first round of the above procedure.

Appeals against the College’s decision before the Court of Appeal (of Brussels) remain possible.

Finally, in a much criticised move, the Act now also provides that the Belgian Competition Authority will be involved in price-control matters, by being entitled, in certain
cases and under certain conditions, to adopt interim measures where there is an urgent need to avoid a situation likely to cause serious, imminent and irreparable damage to undertakings or consumers or likely to harm the general economic interest.

VII  WRONGFUL DEATH

Compensation for wrongful death, as for any other loss, is traditionally computed in Belgium according the Indicative Chart published and regularly amended by the Royal Unions of First Instance Judges. The computation system takes into account several criteria to assess the quantum of the loss. Some criteria take into account the revenue of the deceased person, while others are more standardised. For example, the moral damages for the loss of a husband is approximately €15,000.

VIII  ESTABLISHING LIABILITY AND SETTLEMENT

i  Procedure

Claims may be settled in Belgium in or out of court. However, claims may be time-barred after a certain period as described below and if brought to court, should respect the forum provided by international conventions or domestic law if applicable.

The claimant is allowed to bring to court any party it considers may be liable for the damage claimed. However, the admissibility and the scope of their liability remain subject to the interpretation of the laws by the court. As an example, the possibility to directly sue an airline’s insurer may not be accepted in Belgium.

ii  Carriers’ liability towards passengers and third parties

If the applicable liability regime is established by an international convention, the scope of damage that can be recovered and the applicable time limit are generally explicitly addressed. In Belgium, the two-year limitation period under the Montreal and Warsaw Conventions is generally considered as not likely to be suspended or interrupted. In addition, Regulation (EC) No. 2027/97 on air carrier liability in the event of accidents provides that Community air carriers will, without delay, and in any event not later than 15 days after the identity of the natural person entitled to compensation has been established, make him or her an advance payment, as may be required, to meet his or her immediate economic needs on a basis proportional to the hardship suffered. The Regulation also provides that such an advance payment cannot be less than 16,000 special drawing rights per passenger in the event of death.

With regard to the liability regime under Belgian law, and without consideration to specific liability regimes, the scope of the indemnification of damage should be distinguished depending on the legal ground of the action. If the action is based on tort, the whole prejudice should in principle be indemnified; whereas in the event of breach of contractual duty, and unless as otherwise agreed, only the foreseeable damage will be compensated. Belgian legislation does not accept penalty damages but provides that, up to a certain amount, legal counsel fees spent in court may be compensated.

The time limitation to lodge a claim equally varies according to the way the action is grounded. For a breach of contractual duty, the Belgian Civil Code generally provides that claims are time-barred after 10 years. It is generally admitted that this limit starts running from the day the damage occurred. By contrast, actions based on tort are time-barred within
the five years following the next day where the victim has had knowledge of the damage, or its aggravation, and of the identity of the liable person. It is, however, required that action should in any case be initiated within 20 years following the next day where the fact that led to the damage occurred.

iii Product liability

The regime governing manufacturer's liability is particularly complex in Belgium. The relations between the manufacturer and the buyer will generally be governed by the contractual liability regime; whereas actions introduced by a passenger against the manufacturer will essentially be grounded on tort. Next to this rather classical distinction, the 25 February 1991 Act concerning liability for defective products establishes an additional liability regime. Pursuant to this Act, the manufacturer is liable for the damage resulting from a defect of the product. The burden of the proof of such a defect, of the damage and of the link between these two is, however, to be borne by the claimant. This Act provides that when several parties are liable for the same damage, they remain severally liable in relation to the victim. Besides, the manufacturer's liability cannot be limited towards the victim in situations where the damage occurred jointly as a defect of the product and as a result of a third-party action or omission. Actions initiated on the basis of this Act are time-barred 10 years following the day the product was put into circulation.

iv Compensation

For the main features of the compensation system, see Section VII.ii. However, personal injury will generally be indemnified pursuant to non-binding indicative tables regularly published and updated by professionals and used by the Belgian courts.

In addition, state-funded social security may intervene in the indemnification of a victim of an air accident. The institution, such as any additional third party indemnifying the victim, may be subrogated in some of the rights of the claimants and try to recover the monies paid from the liable party.

IX VOLUNTARY REPORTING

In pursuit of the concept of ‘just culture’, a Royal Decree on the reporting of incidents in the aviation sector with a view to improving safety was adopted on 22 April 2005. Within a maximum of 72 hours following the occurrence of the ‘event’, the latter must be communicated to the Belgian Civil Aviation Authority. The purpose of such reporting is only to improve safety and not to determine the liability that may attach to anyone. The database is anonymous and neither the public prosecutor nor the employer of the person who reported the event may use such information to initiate an action against said person.

X THE YEAR IN REVIEW

Concerning legislation, an amendment has been introduced in May 2019 to the Act of 21 March 1991 concerning the reform of some economic public companies, in order to change the name of the Belgian air navigation and traffic service provider formerly known as ‘Belgocontrol’ to ‘Skeyes’.

Furthermore an amendment was made on 9 September 2018 to the Royal Decree of 2 December 2011, which is the national implementing act for the aviation sector of Directive
2008/114/EG of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection and of the Belgian Act of 1 July 2011 concerning the security and safety of critical infrastructures. These infrastructures are installations or systems that are critical for the preservation of vital social functions, public health, safety and security, the economic prosperity or social well-being. The Belgian Act contains the specific internal and external protection measures national critical infrastructures must adhere to. The Royal Decree mentioned focuses specifically on the aviation sector. It specifies the applicable criteria for the qualification of a certain infrastructure as ‘critical’, the government body responsible for the oversight (the Belgian CAA) and the procedure for the designation of a certain infrastructure as critical.

The 2013 Act on the creation and enforcement of security interests in movable assets finally also entered into force on 1 January 2018 with the consequence that pledges over aircraft can now be created without the previous need of transfer of the possession of the aircraft to a third-party holder. This is effected through registration in a national electronic registry. However, the electronic registry still needs to be adapted to meet the industry needs as it remains difficult to verify if there is any recorded pledge over an aircraft or engine with just the manufacturer serial number or engine serial number.

Lastly, social unrest at the above-mentioned Belgian air navigation and traffic service provider Skeyes caused prolonged strikes of its air traffic controllers during the first quarter of 2019. This resulted in the complete shutdown of the Belgian airspace during a couple of days, which in turn led to massive delays and cancellation of flights from and to Brussels Airport and Liège Airport. In reaction to these delays and cancellations, some air carriers decided to instigate summary proceedings before the Belgian courts against Skeyes. The judgments imposed penalty payments on Skeyes for all future flights that would be cancelled because of the strikes. An amount of €10,000 was awarded per European cancelled flight and €20,000 per long distance cancelled flight.

XI OUTLOOK

With regard to litigation, in February 2019, the appeal procedure against 18 suspects started with respect to the diamonds robbery that took place at Brussels Airport in February 2013. The proceedings may be of interest for the aviation sector insofar as debates might take place over the question of responsibilities of the airport in terms of security and access to its facilities.

Social unrest remains at the Belgian air traffic controller Skeyes and negotiations between the company and labour organisations have overall been unsuccessful. Politicians have been suggesting to end the current monopoly of Skeyes as air traffic service provider or to evolve the public company more to a private structure.

A new Act was adopted on 28 March 2014 to introduce a class action procedure in Belgian law. The new procedure is aimed at organising the redress of mass damage suffered by a group of consumers, as defined by the Act, in relation to a limited list of regulations, which includes Regulation (EC) No. 261/2004. The Act, which entered into force on 1 September 2014, would therefore enable the introduction of class actions against airlines for flight delays and cancellations, and the case law of the (Brussels) courts that would be seized on that basis will have to be closely watched as it could expose airlines considerably more than in the past.
On the legislative front, a consultation process took place at the level of the Belgian Civil Aviation Administration in 2013 and 2014 for the purpose of collecting the views of various stakeholders (mainly airports and airlines) over the new version of a draft royal decree on non-scheduled flights. The adoption of the text is not facilitated by the views that these stakeholders may have on the drafting of the decree, in light of their sometimes conflicting interests. It will be interesting to follow any new developments in that respect.

Finally, the impact and reduction of aircraft noise emissions around Brussels Airport is still on the political agenda.
I INTRODUCTION

Bermuda is an overseas territory of the United Kingdom. As such, the Register of Aircraft is governed by a UK statute, the Air Navigation (Overseas Territories) Order 2013 (ANOTO). Air Safety Support International, a wholly owned subsidiary company of the Civil Aviation Authority of the United Kingdom, acts as the oversight regulatory body for the Overseas Territories of the United Kingdom in relation to aviation matters.

II LOCAL REGISTRATION

i The regulator

Most matters relating to aviation are dealt with by the Bermuda Civil Aviation Authority in Bermuda (BCAA), which is a government quango with a statutorily appointed board of directors responsible for the performance of the BCAA in accordance with applicable law. The functions of the BCAA include all issues relating to the licensing, certification and regulation of aircraft, flight crew and aerodromes, together with air navigation services, aviation security, management of the Bermuda Air Terminal, participation in the operation of the Bermuda International Airport and all matters concerning the economic regulation of air transport and the development of air services. The BCAA is ranked as a Category 1 Aviation Regulatory Authority by the US Federal Aviation Administration.

The BCAA is subject to the Overseas Territories Aviation Requirements (OTARs) which are similar to those of the EASA, the FAA and Transport Canada and are based on ICAO standards.

ii Registration of aircraft

Aircraft can be registered in Bermuda in either the private or the commercial transport category. Aircraft can only be registered in the commercial category where the aircraft is to be operated in a jurisdiction with which Bermuda has an agreement under Article 83 bis of the Convention on International Civil Aviation (Chicago, 1944) (the Chicago Convention) to which the United Kingdom (representing Bermuda) is party. Under Article 83 bis agreements, certain functions and duties normally carried out by a state of registry are transferred to an

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1 Julie McLean is a director and Angela Atherden is counsel at Conyers.

2 As at 22 May 2019, the BCAA records indicate a total of 899 aircraft on the Register with 100 aircraft registered in the private category and 799 aircraft in the commercial transport category.
operator’s state. The BCAA retains airworthiness oversight; an attractive position for lessors and owners as they receive the asset on return with a complete maintenance history, in English, to a very high standard.

Requirements for registration of aircraft are fully set out in the ANOTO. This includes who is considered to be a qualified person for registration. Such qualified persons are:

a the Crown in right of Her Majesty’s government in the United Kingdom or in right of the government of Bermuda;

b United Kingdom nationals;

c Commonwealth citizens;

d nationals of any European Economic Area State;

e bodies incorporated in any part of the Commonwealth and which have their registered office or principal place of business in any part of the Commonwealth; or

f undertakings formed in accordance with the law of a European Economic Area State and which have their registered office, central administration on principal place of business within the European Economic Area.

The BCAA uses the Aircraft Information and Records System (AIRS), which is essentially an electronic filing and record-keeping system to be used by authorised persons during the initial registration of the aircraft and to renew certificates and licences while the aircraft remains registered in Bermuda. Registration applications are made on AIRS by authorised and certified users, which includes certain personnel of Bermuda law firms.

Aircraft registered on the Bermuda Register will be subject to various technical directives concerning their maintenance and operation. Such requirements are fully detailed in separate notices available on the BCAA’s website at www.bcaa.bm. The only requirements external to the BCAA are those relating to the Class 6 Aircraft Radio Licence, which, under statute, is administered by the Bermuda Regulatory Authority.

The Register of Aircraft forms the official public record relating to the registration of an aircraft and the particulars recorded in it are the only details that are publicly available. All other records related to the owner, aircraft, etc., are treated as confidential.

The Register of Aircraft will include the following particulars:

a the registration certificate number;

b the aircraft’s nationality mark and the registration mark assigned to it;

c the name of the constructor of the aircraft and its designation;

d the aircraft serial number;

e the name and address of the registrant; and

f relevant dates such as that of registration, change of ownership, cancellation of registration, etc.

iii Fees

Unlike other jurisdictions, the BCAA has only one principal registration fee and that is for the certificate of airworthiness, calculated by reference to the maximum take-off mass of the aircraft. This fee is payable prior to the initial registration and annually thereafter.

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3 Article 16(1) of the ANOTO.
4 The mark consists of five letters commencing with the nationality mark VP-B or VQ-B and followed by the two letters assigned to the specific aircraft.
iv Security and aircraft mortgages

Parties to an aircraft financing may agree what governing law they want for an aircraft mortgage and the norm is to use the same governing law as the loan documentation. As a matter of Bermuda law, there is no need to register a mortgage to provide perfection. However, aircraft mortgages and aircraft engine mortgages can be registered under the Mortgaging of Aircraft and Aircraft Engines Act 1999 and related regulations. The relevant registers are maintained by the BCAA. Registration ensures priority over any non-registered mortgages or subsequently registered mortgages.

Fees for registration are set on a sliding scale up to a maximum of US$800. Mortgages are filed on AIRS and a PDF copy of the executed and dated mortgage must be filed with the statutory registration form.

It is also possible for the priority of a mortgage to be fixed by filing a priority notice with the BCAA pursuant to which the priority of a yet to be executed mortgage can be a fixed for a 14-day renewable period. On such an entry being made, and the mortgage being registered within 14 days thereafter (excluding public holidays), the mortgage will be deemed to have priority from the date of registration of the Priority Notice.5

All information on the Mortgage Register is deemed to be in the public domain. As such all parties are deemed to have express notice of the information contained within the Register.

Where a charge under a security document has been granted by a Bermuda incorporated company, it is also possible to register the charge with the Bermuda Registrar of Companies. A charge granted by a non-Bermuda company over assets situate in Bermuda may also be registered with the Bermuda Registrar of Companies. Registration will ensure priority over any subsequently registered charge or unregistered charge over the same assets.

v Liens

While not definitive, it is believed that only the following aircraft liens exist under Bermuda law:

\[ a \] seller’s lien – under the Bermuda Sale of Goods Act 19786 an unpaid seller may have a lien over the aircraft to the extent the buyer fails to pay the purchase price;

\[ b \] possessory lien – a common law lien that requires that the lienholder has continuous possession of an aircraft on which it has bestowed labour authorised by the owner that has improved the aircraft in some way; and

\[ c \] contractual lien (including pledge) – a lien created by contract, for example, the owner of an aircraft may pledge it to a creditor as security for a debt, or a lien may arise as a result of a person expending labour on an aircraft that improves its value in some way in accordance with a contractual agreement (such as frequently occurs in respect of aircraft repairs).

The law in Bermuda with respect to salvage liens is unclear, since Bermuda has no statutory provision similar to the UK Civil Aviation Act 1982, Section 87. It is uncertain whether

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5 Mortgaging of Aircraft (Procedures) Regulations, Section 10(2).
6 ’Goods’ are defined to include all personal chattels (Sale of Goods Act 1978 Section 1(1)).
an aircraft salvage lien can be asserted in Bermuda and whether the maritime salvage liens established by the Bermuda Wreck and Salvage Act 1959 and the Bermuda Merchant Shipping Act 2002 would be extended to apply to aircraft.

It is not possible to register liens in Bermuda. Generally, an aircraft lienholder will not have to apply to the Bermuda courts to enforce its lien since it will have a statutory right, or one arising by way of contract, to undertake such actions. An exception is a possessory lien where the lienholder has no general right to sell an aircraft without the consent of the court.

vi Rights of detention

As well as aircraft liens, there are various statutory rights of detention exercisable over aircraft. Under Bermuda law, persons are granted a right to detain and, in some cases, to sell (or cause to be forfeited) aircraft in certain circumstances such as:

a non-payment of airport charges;
b contravention of certain licensing and air navigation provisions of the ANOTO;
c forfeiture under Bermuda customs law. Forfeiture of an aircraft may occur if an aircraft has been adapted and used for the purpose of smuggling or concealing goods;
d crimes:
   • terrorism: under the Aviation Security and Piracy (Overseas Territories) Order 2000 certain sections of the United Kingdom Aviation Security Act of 1982 were extended to Bermuda. Under the Anti-Terrorism (Financial and Other Measures) Act 2004, the Bermuda courts may make forfeiture orders with respect to any property of a person convicted of financing terrorism that is intended to be, or is suspected might be used, for the purposes of terrorism. This would include aircraft; and
   • drug trafficking: if an aircraft is used for drug trafficking purposes or purchased from the proceeds of crime, a court can order the aircraft to be forfeited;

e war or national emergency: when a state of war or national emergency exists, the Governor of Bermuda has broad powers to make regulations pursuant to the Emergency Powers Act 1963 which includes, inter alia, the power to make regulations that authorise the taking of possession or control of any property.

vii Judgment enforcement rights

The courts of Bermuda would recognise as a valid judgment, a final and conclusive judgment, in personam, obtained in foreign courts against a Bermuda company under which a sum of money is payable (other than a sum of money payable in respect of multiple damages, taxes or other charges of a like nature or in respect of a fine or other penalty) and would give a judgment based thereon provided that:

a such courts had proper jurisdiction over the parties subject to such judgment;
b such courts did not contravene the rules of natural justice of Bermuda;
c such judgment was not obtained by fraud;
d the enforcement of the judgment would not be contrary to the public policy of Bermuda;

8 Article 8 of Part IX of the ANOTO.
9 See Schedule 1, Article 2.
e no new admissible evidence relevant to the action is submitted prior to the rendering of the judgment by the courts of Bermuda; and

f there is due compliance with the correct procedures under the laws of Bermuda.

A final and conclusive judgment in the superior courts of certain foreign jurisdiction against a Bermuda company based upon the finance documents under which a sum of money is payable (not being in respect of multiple damages, or a fine, penalty, tax or other charge of similar nature) would, on registration in accordance with the provisions of the Judgments (Reciprocal Enforcement) Act 1958 be enforceable in the Supreme Court of Bermuda against the Bermuda company without the necessity of any retrial of the issues that are the subject of such judgment or any re-examination of the underlying claims; however, where the foreign judgment is expressed in a currency other than Bermuda dollars the registration will involve the conversion of the judgment debt into Bermuda dollars on the basis of the exchange rate prevailing at the date of such judgment as is equivalent to the judgment sum payable. The present policy of the Bermuda Monetary Authority is to give consent for the Bermuda dollar award made by the Supreme Court of Bermuda to be paid in the original judgment currency.

III INTERNATIONAL FINANCE TRANSACTIONS

Bermuda is an important jurisdiction for the complex cross-border finance structures often established for aircraft. Political and economic stability, recognised systems for international financial transparency and information exchange, a respected and consistent judicial system (where the Privy Council is the final court of appeal), a favourable legislative framework and tax regime, no exchange control or currency restrictions, and a strong commercial aircraft registration capability make Bermuda a popular jurisdiction for ownership, financing and securitisation structures.

Historically, one of the reasons for the success of Bermuda as a jurisdiction for commercial aircraft financing is owing to the Article 83 bis agreements under the Chicago Convention, especially the Article 83 bis agreement with Russia. Russian operators needing new aircraft often need financing from Western-based lenders and export credit agencies. Such lenders do not wish the security to be Russian-law governed. In addition to the other benefits Bermuda offers as enumerated above, the lenders appreciate the fact that Bermuda courts follow English common law principles (which includes recognition of the equitable right of redemption under a mortgage unlike civil law jurisdictions) and are likely to recognise and enforce English or New York law governed security documents. The foreign operators are happy to use Bermuda, which they view as a neutral jurisdiction through which to finance the aircraft.

Bermuda vehicles are also regularly used in both ‘off-balance sheet’ financing structures, where the owner of the aircraft is an ‘orphan’ and ‘on-balance sheet’ structures where the owner will own the aircraft directly in its own name.

Off-balance sheet structures are often used for asset-backed securitisations (ABS). Although many ABS transactions involve a special purpose vehicle (SPV) that is directly owned by a parent, often a transaction will require an ‘orphan’ SPV, meaning that it is not part of the originator’s corporate group. By selling the asset to the orphan SPV, the asset is
removed from the originator’s balance sheet. When an orphan structure is required, the SPV is incorporated with all the shares issued to a trustee (also offshore) pursuant to a charitable or purpose trust. A Bermuda purpose trust is of particular benefit in an ABS transaction structured in this manner, as the purpose trust is established to fulfil purposes rather than in favour of beneficiaries, while a charitable trust has charities as the beneficiaries (where, depending on circumstances, a conflict of interest may arise).

Bermuda has in place legislative bankruptcy and corporate structures that are particularly suited to establishing the bankruptcy remoteness of the SPV often used for commercial financing structures. As long ago as 1990 Bermuda enacted the Trusts (Special Provisions) Act enabling the creation of trusts for a broad range of non-charitable purposes and since that time Bermuda has developed a practice establishing purpose trusts.

One of the areas where a number of such trusts have been used is aircraft financing. In the typical financing structure, a Bermuda exempted company is incorporated to act as owner and lessor or as lessee and sub-lesser of the aircraft. The location of the company in a tax-neutral and flexible jurisdiction may offer certain protections against the bankruptcy of other involved parties (such as the operator) and facilitates innovative and cost-effective methods of asset finance, often utilising cross-back tax benefits.

The issue that then arises is how the shares of the SPV should be held. It is often the case that it is not possible or desirable for any of the parties to the transaction to own the company or include the company as a balance sheet asset. In the past, one solution was to use a charitable trust as the shareholder. The purpose trust, however, provides certain distinct advantages.

With a charitable trust, the duties of the trustees are to invest the trust funds so that the return for charities is maximised and to make appropriate distributions. These duties can conflict with the requirements of the parties to the transaction. With a purpose trust, the duties are to fulfil the stated purposes that accord with the intentions of the parties. These purposes are normally to:

a. promote the incorporation of the Bermuda exempted company;
b. subscribe for the shares of the company;
c. hold those shares;
d. support the company in pursuing the activity of the particular transaction in question; and
e. enter into any agreements that may be appropriate in connection with the transaction.

The trustee may also charge the shares of the Bermuda exempted company by way of security.

The main advantages of the purpose trust are twofold. First, the duties of the trustees of a purpose trust are clear, being to fulfil the stated purposes. The duties of trustees of a charitable trust are to maximise the benefits for the charity or charitable purposes. Depending on circumstances, a conflict of interest may arise whereby it is in the interests of the party establishing the structure to minimise the profit of the trust’s assets. Ideally, it is usually desired that the company only declare enough dividend to fund its ongoing expenses. The use of a purpose trust, where the stated purposes are to promote the use of Bermuda exempted companies to meet the needs of the arrangements by subscribing for the shares of one or more such companies, holding those shares and supporting the efficient operation of the company or companies, avoids such a conflict.

Secondly, Bermuda, like most jurisdictions that follow English common law principles, would grant a common law jurisdiction to the Attorney-General (or a similar public official)
to enforce charitable trusts that are not being properly administered for the benefit of charity. While we are not aware of any instance where the Attorney-General in Bermuda has sought to enforce a charitable trust that has been used in a commercial structure, the risk cannot be entirely discounted in any jurisdiction where such enforcement powers exist. In the case of purpose trusts, the legislation expressly provides for the selection of a person to enforce the obligations under a purpose trust. This person may be a representative of an interested party to the structure or transaction or any independent professional. The Attorney-General may only become involved to appoint an enforcer where the trustees are aware that the person designated by the trust instrument to enforce the trusts is not able to do so. A well-drafted trust instrument will normally provide for a mechanism to appoint successors to the original enforcer to ensure this problem never arises. In any event, the interest of anyone seeking to enforce the trust will be to ensure that the purposes are complied with, not that charitable benefits are maximised.

At the end of the financing period when the loan has been repaid, the orphan SPV will sell the aircraft for a nominal fee to the operator. The SPV is then liquidated and the purpose trust is terminated.

IV EMERGING TRENDS

Owing to increased regulations by the European Union following the introduction of the Market Abuse Regulation (MAR), companies looking to list debt have been looking for alternate markets outside the EU.

The Bermuda Stock Exchange (BSX) has become a popular alternative for companies looking to list debt associated with aircraft finance and intercompany loan note transactions as it avoids the onerous and costly conditions imposed by MAR but still offers the high level of market protection that investors are accustomed to.

Some of the advantages of listing on the BSX are as follows:

a it is the world’s largest offshore fully electronic securities exchange;
b it is internationally respected and recognised by UK, US, Irish, Canadian and Australian tax authorities and regulatory bodies;
c it is an affiliate member of the International Organisation and Securities Commissions;
d it is flexible, responsive and sensitive to confidentiality requirements;
e it is well placed between Europe and the US, which provides real-time same-day access to both markets; and
f it is designated as a ‘recognised exchange’ by HM Revenue and Customs (UK) and Revenue – Irish Tax and Customs.

There were two BSX listings in 2018, which totalled US$1.7665 billion of ABS notes, and there are more in the pipeline for 2019.
THE YEAR IN REVIEW

Securitisations and capital markets
The use of Bermuda SPVs for aircraft portfolio securitisations has remained popular.

In September 2018, Avolon Holdings Limited (Avolon), the international aircraft leasing company, did a senior notes offering using its wholly owned subsidiary Avolon Holdings Funding Limited. The offering, which priced on 6 September 2018, comprised US$1 billion aggregate principal amount of 5.125 per cent senior notes due in 2023, at par. Avolon used the net proceeds from this offering for general corporate purposes, which may include the future repayment of outstanding indebtedness.

START Ltd and START Holding Ltd were the issuers of an ABS comprising three tranches of notes secured on a portfolio of 24 in-production aircraft on lease to 16 global airlines in 15 countries, with an appraised value of approximately US$700 million. START Ltd is notable as the first aircraft portfolio purchase vehicle structure to include a dedicated asset manager for equity investors.

Aircastle Funding (Ireland) DAC, a wholly owned subsidiary of Aircastle Limited (NYSE:AYR) listed its US$1.28 billion unsecured senior A and senior B notes to the Official List of the Bermuda Stock Exchange.

Merx Aviation, following on from its inaugural aviation ABS in 2018, completed a further US$429 million transaction comprising three tranches of notes secured on a portfolio of 19 aircraft. The issuer was MAPS 2019-1 Limited, a Bermudian company. The proceeds from the notes will be used to refinance the original RISE Ltd (RISE) asset-backed secured term loan aircraft ABS transaction, which closed in February 2014 and was renamed MAPS 2019-1 Limited pursuant to this transaction. Of the 19 aircraft in this portfolio, 18 were also securitised in the AABS portfolio.

START II Ltd and START Holding II Ltd were the issuers of an ABS comprising three tranches of notes secured on a portfolio of 20 in-production aircraft on lease to 13 global airlines in 11 countries, with an appraised value of approximately US$597 million. The notes comprise US$382 million series A fixed rate secured notes Series 2019-1, US$69 million Series B fixed rate secured notes Series 2019-1, US$23 million Series C fixed rate secured notes Series 2019-1, along with US$99,556,000 Class E participating certificates. This ABS transaction marks another aircraft portfolio purchase vehicle structure which includes a dedicated asset manager for equity investors. In this transaction GECAS sold a portfolio of aircraft to Start II Ltd, which is financing its acquisition through issuance of 144A debt and equity. GECAS will continue to service the portfolio and an affiliate of Oz will serve as an asset manager.

SMALL UNMANNED AIRCRAFT (DRONES)
The operation of small unmanned aircraft, otherwise known as drones must be carried out in accordance with Article 73 of the ANOTO, ‘Regulation of small unmanned aircraft provisions’.

Such regulations prescribe that the person in charge must maintain direct unaided visual contact with the aircraft sufficient to monitor its flight path in relation to other aircraft, vehicles, vessels, persons and structures so as to avoid a collision.

If the drone has a mass of more than 7kg, excluding its fuel, it must not be flown in certain airspace unless the permission of the appropriate air traffic control has been obtained. If the purpose of the flight is aerial work, permission must also be obtained. The drone must
not be flown over or within 150 metres of any congested areas, over or within 150 metres of an organised assembly of more than 1,000 people or within 50 metres of any vehicle, vessel, structure or person, unless special permission has been obtained.

The regulations also prohibit the drone being operated at a height of more than 400 feet or any article or animal form being dropped from the drone.

Pursuant to its powers under the ANOTO to prohibit or restrict flying, the BCAA also designated certain restricted fly zones in respect of certain areas and landmarks one of which is the Bermuda Airport. The prohibited area is a 2 nautical mile radius circle around the airport. Anyone who fails to comply with these directions commits an offence under Article 68(4) of the Order, and is punishable on summary conviction of a fine not exceeding US$4,000.

The above regulations also apply to any small unmanned aircraft that is equipped with and whose purpose is to undertake surveillance or data acquisition.

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12 Air Navigation (Overseas Territories) Order under Article 68(4).
I INTRODUCTION

After general elections taking place in 2018 and a new president taking office in January 2019, Brazil renewed its hope to recover from a long period of economic recession, mainly through the approval of relevant changes in structural legislation related to taxation and the public pension system.

Although the first months of the new government did not show much in the way of real change, the civil aviation sector in Brazil took advantage of a rebalanced distribution of routes and flights and a more optimistic environment. There was an increase of 14 per cent in the number of international direct routes from Brazil, for example.

Brazil is still working on relevant concession plans for airports and a new round including 12 airports in March 2019 generated a revenue of roughly 2.5 billion reais.

A better understanding of the rules created by ANAC’s Resolution 400, which covers the general conditions of carriage for both domestic and international carriers, and a better enforcement of the Brazilian Supreme Court (STF) precedent, which indicates that in cases involving international air transportation, international conventions ratified by Brazil – such as the Montreal Convention – should be applied in case of conflict with Consumer Defence Code rules, have had a positive impact for airlines operating in the country, but the development of a safer business environment, in particular considering the excessive litigation, is still a work in progress.

II LEGAL FRAMEWORK FOR LIABILITY

Even though Brazil has ratified and implemented the Warsaw and Montreal Conventions, liability in Brazil, especially for passenger-related minor incidents such as flight delays and baggage loss, is quite complex.

The main source of conflict is the difference between the structures of the Brazilian Consumer Protection Code (Law No. 8,078/90), in which the main idea is to protect the right of a consumer to be as broadly indemnified as possible, and the idea on which the Warsaw/Montreal system was based, to somehow have uniform and predictable outcomes on similar incidents.
Even though the Supreme Court recognised the supremacy of the Montreal Convention, some decisions have ignored the limitations of the international treaties. This is one of the main reasons for the significant number of passenger claims before the Brazilian courts.

Two cases decided by the Supreme Court in 2017 established a binding position recognising the supremacy of the international treaties in case of conflict with the Consumer Protection Code or other pieces of local legislation. The decisions on both claims clarified that the two-year statute of limitations is being applied by the majority of the Brazilian courts, as well as the limitation on 1,131 special drawing rights (SDR) to compensate for property damage as a result of baggage loss. After that, several motions for clarification were filed, and judgment is pending. Until the final decision is issued there is still room for controversy regarding the Montreal Convention’s application.

However, the most relevant problem airlines face in Brazil is still unresolved: the inclusion of moral damages in virtually any award granted by the courts.

Unfortunately, as moral damages were expressly excluded from the limitation established by the Supreme Court based on the Warsaw and Montreal Conventions, Brazilian courts are likely to maintain their current practice and include moral damages above the limitations, at least until new cases are brought to the Supreme Court to review this point specifically.

i  **International carriage**

Brazil has ratified, among others, the following international treaties and conventions that are relevant for liability framework evaluation:

- a  Warsaw Convention of 1929, implemented in Brazil through Decree No. 20,704/1931;
- b  Chicago Convention of 1944, implemented in Brazil through Decree No. 21,713/1946;
- c  Montreal Convention of 1999, implemented in Brazil through Decree No. 5,910/2006;
- d  Cape Town Convention of 2001, implemented in Brazil through Decree No. 8,008/2013.

As mentioned above, the main challenge regarding the application of the international treaties is whether the limitations (brought mainly by Warsaw and Montreal Conventions) somehow violate the full indemnification principle established by the Consumer Protection Code. As the Supreme Court has already clarified the SDR with regard to property damage in a favourable way to the airlines, the next step is to bring to discussion on moral damages to the attention of Supreme Court.

ii  **Internal and other non-convention carriage**

For the domestic market, in which the international treaties would not be directly applicable, Brazil passed the Brazilian Aeronautical Code (CBA) (Federal Law No. 7,565/1986) over 30 years ago. Even though the vast majority of its 324 articles relates to operational matters, from the use of air space, air traffic control and licensing of operations, liability is also relevant, since the CBA follows the structure of the international treaties establishing standards for the payment of indemnifications on the most usual types of incidents and accidents.

The CBA faces the same challenges the international treaties have historically faced in Brazil. Courts usually follow the Consumer Protection Code by applying the concept of full indemnification and including moral damages in most decisions.
The CBA is the main Brazilian internal law and is being reviewed by Congress. As the current political landscape is not very clear, no developments are expected this year, but some of the discussions on liability are relevant.

While experts working with the aviation industry have suggested the maintenance of a system based on the structure of the international treaties, aiming for not only uniform but also predictable decisions for both passengers and airlines, there is also pressure from consumer protection agencies that could influence the final model.

The options presented by such agencies are either to adopt the Consumer Protection Code system and work on a case-by-case evaluation with full indemnification or, as an alternative, work with much more relevant amounts for the standard limitations of liability.

### iii General aviation regulation

The main source for liability regulation in Brazil is brought by its Civil Code and, in general terms, is applicable to several industries, not just aviation.

Articles 186 and 187 establish that any person that causes damage to a third party by carrying out an illicit act has the obligation to compensate the third party for the loss. Every action undertaken voluntarily by an agent, actively or through omission, negligence or imprudence that causes any kind of damage to another person can be considered an illicit act.

For transportation, Article 734 of the Civil Code establishes that the carrier is liable for damage caused to the people, assets and baggage carried, except in cases of force majeure. The idea behind Article 734 is still the link between the damage and the behaviour of the carrier.

The CBA follows the same path, with the carrier being liable for damages caused during transportation (Article 246), but it includes limitations to indemnification that would only not be applicable in case of gross negligence or wilful misconduct.

The challenges in applying these rules include the Consumer Protection Code’s principles against the liability limitation, and the fact that the structure established in these pieces of legislation is outdated; the amounts are established in monetary units that no longer exist and the entire regulation of the transportation contract is not appropriate for the electronic or digital model applied by most carriers. Despite this, the rules are still applied to the industry and the economy.

Apart from that, the other relevant challenge that arises in applying such regulation is the courts’ position on force majeure allegations. Even though the original concept of carrier liability used force majeure as an exception, most courts in Brazil include events that could be qualified as force majeure under the risks of the activity, and, therefore, hold the carrier liable for the consequences.

### iv Passenger rights

Resolution 400, which became effective in March 2017, consolidates most of the regulations related to passenger rights. Several aspects were reviewed through Resolution 400, the most relevant of which in this context is the right of clear information regarding passenger rights.

The Brazilian aviation market is not as mature as that of Europe or North America, therefore one of the main aims of Resolution 400 is the obligation of clear communication in Portuguese and presenting prices in the local currency in order to help passengers who know little about air transportation to make their choices.
As one of the main aims of Resolution 400 was to deregulate matters such as baggage allowance, there was concern surrounding how airlines would sell different services and how easy would it be for the passenger to understand what is included in the ticket being purchased.

Even though the idea behind Resolution 400 was to allow carriers to compete and sell different products, some aspects of passenger rights were kept to a minimum, with a mandatory protection package to be included with every ticket.

The mandatory protection includes assistance in cases of delays, cancellations or denied boarding, including communication, food and in some cases lodging facilities; the right to cancel within 24 hours, with full reimbursement if the ticket is purchased at least seven days prior to the flight; the right to be able to correct the spelling of the passenger’s name until check-in time; cash payment in case of involuntary denied boarding; and a complete review on the time frame for reimbursement and indemnification in case of problems with baggage delivery, with periods as short as seven days for payment.

v  Other legislation

Labour law

Along with consumer claims, of which there is a high number in Brazil, labour is probably the second main source of liability and legal expenses for most carriers.

Law No. 13,467/2017, which modified the Labour Law (Decree 5,452/1943), was approved in July 2017. The aim of this law was to introduce more flexibility when negotiating contracts, including adding outsourcing options. It seems to have impacted both the possibility of outsourcing, something that the market is using in a broader manner now, and also the number of labour claims, which seems to have dropped for most carriers.

The main source of problems for carriers in Brazil is still the use of outsourcing companies, as carriers might be held liable and are usually included in claims against the employee’s original employer.

For that reason, a careful and well-designed structure on outsourcing contracts is important to avoid unnecessary risk, mainly foreseeing events such as bankruptcy or judicial restructuring.

Competition law

Based on the system created by Federal Law 12,529/2011, which provides the framework for the Brazilian Competition Protection System, carriers and their employees are liable for infractions against the economic order, mainly those acts affecting free competition.

Cartel cases in the aviation industry in Brazil are rare, but there are already decisions issued based on this system, and in a cargo case in 2013 the fines reached approximately 300 million reais.

Anti-corruption law

Based on concepts brought by Federal Law 12,846/2013, Brazil has a system that evaluates the administrative impact of an act of corruption and applies penalties that could result in the dissolution of the legal entity, as well as criminal liability of the agents involved in the act.
Environmental law

In terms of liability, environmental risk is one of the main factors that companies should consider when operating in the country. Both the entity itself and the individuals involved in an act of environmental damage are liable in three different areas: repairing the damage, paying administrative fines and facing criminal prosecution.

The system, which was created through different pieces of law including the Federal Constitution, is based on the idea of reparation and punishment with no exclusion of such liability, even in force majeure cases. The only evaluation made is based on the link between the activity and the damage, and if this link can be identified the liability cannot be excluded.

The aviation industry was recently involved in several discussions related to environmental regulation in Brazil. The two main examples are: (1) the class actions filed by the Public Prosecutor in Guarulhos against carriers in order to have them repair the damages and indemnify the city for the emission of greenhouse gases; and (2) the Brazilian Institute for the Environment and Natural Resources sending carriers an official letter requesting them to enrol and provide information through a system that controls hazardous material.

Data protection law

Brazil has recently approved its own Data Protection Law, which was based on the European GDPR but with some relevant differences; it will be effective from August 2020.

III LICENSING OF OPERATIONS

i Licensed activities

ANAC is the governmental body that issues licences and authorisations for the operation of aviation-related services. Maintenance companies and personnel and pilots are certified by ANAC, and carriers for domestic or international flights, and regular or non-regular services including air taxi, must go through a licensing process before they can operate.

For regular international flights, after the designation by the country where the company is established, carriers need to go through a two-step process that starts with authorisation to function in the country (involving an evaluation of the corporate documents of the company) and authorisation to operate in Brazil (focused on the operation itself). This process is explained in detail in subsection iii.

ii Ownership rules

After years of discussions on the modernisation of the ownership limitation in Brazil, and after provisional measures that did not turn into law moved the cap from 20 per cent to 49 per cent, Brazil once more approved a provisional measure lifting the limitation and allowing 100 per cent foreign ownership in Brazilian airlines.

The discussion on whether to turn this into law is ongoing, but the expectation is that this change will not only allow more investment in the current airlines, but perhaps even increase competition with the arrival of new groups to compete on the local market.
Brazil

iii Foreign carriers

In order to operate in Brazil, there are three main requirements brought by the CBA: (1) designation by the country where the company is established; (2) issuance by ANAC of an authorisation to function in Brazil; and (3) issuance by ANAC of an authorisation to operate in Brazil.

After those three requirements are fulfilled, the carrier will have to present documents before the local Board of Trade and obtain a Taxpayer ID number from the tax authorities. Other local requirements depending on the state and city where the carrier will operate may be applicable.

Apart from the designation by the country where the company is established, the two main steps to be taken in Brazil are based on the following documents and measures.

The authorisation to function in Brazil is issued by ANAC after it evaluates if the corporate documents presented by the company meet the requirements of the CBA and if the company has a local legal representative.

The documents evaluated are evidence of the designation itself, the articles of incorporation or similar document, the complete list of shareholders, a copy of the document through which the company decided to operate in Brazil and the latest published financial statement.

The legal representative is a person that can represent the company locally, having the power to receive summons, and can be either a foreigner with a Brazilian Taxpayer ID or a Brazilian. A copy of the personal documents and the signature on a document issued by ANAC accepting the position of legal representative will also be necessary.

For the authorisation to operate, the documents are related to the operational security programme and the operational specifications, and at this point documents to prove the non-existence of debts in Brazil with the government and with ANAC will also be requested.

IV SAFETY

The approval of an operational security programme is part of the steps required to have authorisation by ANAC to operate in Brazil.

Apart from that rule, the CBA has a chapter dedicated to investigation and preventive measures related to accidents. This chapter was changed by Law No. 12,970/2014, and one of the changes was to outline that the investigation on incidents or accidents has as its goal the identification of facts that somehow contributed to the accident and to work on preventive measures to avoid new incidents or accidents. One of the rules to increment the information related to accidents, created by the same Law, is that any person who has any information related to an accident is obliged to inform the closest public authority.

Investigations are currently being conducted by the Aeronautical Accidents Investigation and Prevention Centre (CENIPA), according to a Regulation issued by the Aeronautic Command.

Brazil also has regulations related to the safety against acts of illicit interference (RBAC 108), which were recently updated by Resolution ANAC 410/2017.

V INSURANCE

Generally, for operating in Brazil, any person or company exploiting an aircraft has the legal duty to hire insurance covering, at least, damages to passengers, crew, the value of the aircraft itself and damages on the ground.
The amount involved in the insurance policy must be calculated considering the liability limitations established in the CBA and the international treaties to which Brazil is a party. The issuance or renewal of the airworthiness certificate depends on the proof of the valid insurance policy.

Aircraft on foreign registers need, based on the CBA requirements, the same level of coverage as established for aircraft on the national register.

VI COMPETITION

The Brazilian System of Competition Defence (SBDC), created by Law No. 12,529/2011, is based on several principles included in the Brazilian Constitution, such as the free initiative (or free enterprise), free competition, social function of the properties, consumer protection and repression of economic power abuse.

At the centre of the SBDC and issuing decisions related to acts that could somehow affect competition is the Administrative Council for Economic Defence (CADE), both in anticompetitive behaviour evaluation and in mergers and acquisitions approval.

In evaluating anticompetitive behaviour, such as cartel cases, the penalties CADE applies may reach significant amounts such as 20 per cent of the group’s income in the year prior to the filing of the administrative procedure. Penalties to a company’s officers are also relevant and could include not only fines but also imprisonment as a cartel is not only established as an anticompetitive behaviour but also as a crime against the economic order.

For alliances, cooperation agreements, joint ventures, and mergers and acquisitions the evaluation is made both by CADE and ANAC. CADE adopts the previous approval model, so the control is made before the closing. To decide whether an agreement must be submitted to CADE, one of the main factors would be evaluating the gross revenue of both groups in Brazil on the previous year. Notification would be mandatory if one of the groups registers a gross revenue higher than 750 million reais and the other registers a gross revenue higher than 75 million reais.

VII WRONGFUL DEATH

As in most cases before Brazilian courts, moral damages are a relevant part of wrongful death cases in the country. Based on the idea that the family of the deceased suffers immaterial damages, courts in Brazil usually award amounts that have no criteria defined by law for calculation and are decided on a case-by-case basis.

In addition to that, funeral and other expenses related to the incident plus loss of dependency calculated based on the income, age, life expectation and number of dependants are usually awarded.

VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

Discussions held directly between a passenger and an airline (through customer care services), discussions mediated by the Consumer Protection Agency (Procon) and claims filed in the small claims courts inside the airports have no judge, and a settlement is the only possible outcome that could end the matter definitively.
Apart from those cases, most passenger claims in Brazil are filed before small claims courts, in which the lawsuit follows a simpler procedure. That is also the procedure for cases filed in the airport that are not settled, as they are sent to the court that is closer to the passenger’s residence.

In a small claims court case, the awards are decided by each judge on a case-by-case basis, and the timeline for a judgment after filing is usually between six and 12 months. Settlements can be reached at any time between the parties.

If a claim is filed before a civil court, the timeline for a judgment increases significantly, and could easily reach two or three years, and settlements can still be reached at any time.

For final decisions, the timelines increase a lot considering the variety of appeals one can file, mainly in civil court cases.

The limitation period for bringing claims was for a long time a major issue as the five-year statute of limitations established by the Consumer Protection Code was applied by the courts much more frequently than the two-year period established by the international treaties (the Warsaw/Montreal Conventions regime).

That position is changing as in 2017 the Supreme Court finally recognised the supremacy of the Warsaw/Montreal Convention over the Consumer Protection Code, especially on statutes of limitation. There has already been a discernible change in judges’ behaviour and the most recent decisions have applied the two-year period and the limitation for compensation in baggage loss claims.

In consumer claims in Brazil, which are most of the claims related to aviation, all parties that somehow form the supply chain might be held jointly liable for the damages. Usually the defendants are the airlines, and sometimes travel agencies, but other companies that somehow participated in the facts of the case (such as manufacturers in case of accidents or incidents related to the aircraft itself) might be added as defendants.

ii Carriers’ liability towards passengers and third parties

When dealing with claims from passengers, as they are consumer claims, the liability is strict and there is no evaluation on fault or intent. Service providers such as airlines or travel agents are liable based on an evaluation of the damage, an act or omission from the company, and a link between both.

For third parties, considering they are not consumers, liability would not be strict, and following the system created by the Civil Code an evaluation on a voluntary action or omission, negligence or imprudence that caused damages to someone would create the obligation to repair such damages.

The limitations brought by the Warsaw and Montreal Conventions and the limitations created by the CBA are usually disregarded by the courts based on the idea that the Consumer Protection Code protects the right of full indemnification on consumer claims. This scenario changed with the recent decision from the Supreme Court recognising the supremacy of the international treaties regime protects the limitation on property (material) damages but still allows courts to award moral damages that could bring the actual awards to an amount higher than the original limitation established by such treaties.
Product liability

As a general rule, if the operator of the aircraft is registered in the Brazilian Aeronautical Registry, the owner of such aircraft should not be held liable for any damage arising from the use of the aircraft. The identification of the operator should be enough to have the liability concentrated in this specific company.

The exception would be consumer cases in which every company that could somehow be considered part of the supply chain could be considered jointly liable, including the manufacturer of the aircraft mainly in accident cases.

In terms of liability from manufacturers and owners to the operators, the general civil rule based on the identification of the act or omission, the damage and the link between to evaluate liabilities should be applicable.

Compensation

Even though most countries evaluate compensation based on accidents, owing to the outstanding number of claims based on consumer claims related to operational problems such as flight delays and baggage loss, the latter are definitely the most relevant kinds of situation to be considered when analysing the compensation system in Brazil.

For most claims, the main challenge is dealing with moral damages, usually included in awards granted in day-to-day situations such as short flight delays. This kind of damage is also relevant to baggage claims, where it is not unusual to see a higher award for moral damages than for material damages.

In terms of accidents, as explained in Section VII, the awards might include funeral costs and other property damages, moral damages and the loss of dependency based on the criteria clarified in Section VII.

Drones

The use of drones is regulated by Brazilian Civil Aviation Regulation No. 94/2017 (RBAC-E No. 94/2017) of ANAC, by the operating standards of drones established by the Airspace Control Department (DECEA), as well as by the rules of the Brazilian Telecommunications Agency (ANATEL).

In addition, there is a Bill Law (Project No. 9,425/17) that is currently being discussed in Congress, which establishes specific rules for the use of drones, as well as the use of fully autonomous armed drones.

VOLUNTARY REPORTING

The CBA establishes the obligation for anyone who has any information on an accident to communicate with the authority in the closest proximity. The rules regulating the procedures followed by CENIPA are not solely based on the idea of voluntary reporting. They also expressly guarantee that the investigation will be performed with the only goals being the identification of facts that somehow contributed to the accident and working on preventive measures to avoid new incidents or accidents, and not for civil or criminal liability purposes.
XI THE YEAR IN REVIEW

As mentioned, because of the general elections that took place in 2018, it was not a particularly active year in terms of changes to regulations and the law, but the better application of recent regulation and new jurisprudence brought a better business environment to airlines, at least before the courts.

Global passenger traffic results for 2018 showing that demand in Brazil increased compared to 2017 are also relevant data to evaluate how 2018 brought signs of recovery to the industry’s numbers.

XII OUTLOOK

The new government has given the Brazilian public high expectations mainly due to its market-oriented speech during election campaign, proposing changes to structural rules related to taxation, bureaucracy for business and public pension plans. The year started with optimistic views on the development of the economy in general, as well as in civil aviation.

The first months were not as active as suggested, but there is still hope the changes will be approved and the economy shows stronger signs of recovery.

For the aviation market, an adjusted route structure shows still higher occupation rates than in previous years, and the judicial recovery of one of the four big carriers in the country (Avianca Brazil) has also increased prices and load factors for the remaining three carriers.

The discussion on the review of the CBA, the formalisation of the authorisation for 100 per cent ownership of Brazilian airlines as law and new regulations approved by the Aviation Agency (ANAC) are also expected and could have a significant impact on the market’s structure.
I  INTRODUCTION

As the British Virgin Islands is an overseas territory of the United Kingdom, registration of aircraft in the British Virgin Islands is governed by a UK statute, the Air Navigation (Overseas Territories) Order 2013. Air Safety Support International, a wholly owned subsidiary company of the UK Civil Aviation Authority, acts as the oversight regulatory body for the United Kingdom's overseas territories in relation to aviation matters.

Air Safety Support International has powers under the UK Air Navigation (Overseas Territories) Order 2013. In addition, the BVI Airports Authority (the Authority), a statutory organisation of the government of the British Virgin Islands, was incorporated in 2005 to oversee the effective and efficient operation of all airports in the British Virgin Islands. The objectives of the Authority include, inter alia:

a  to acquire, own, operate, control, manage, develop, administer and maintain the international airport and any extension thereof, and any designated airport in the territory as a commercial undertaking in a manner that recognises its role in the first instance as an international airport and for the benefit of the economy of the territory;

b  to provide and maintain, on a commercial basis, facilities and services for air transport and such other facilities and services as are necessary or desirable for, or in connection with, the international airport or any designated airport;

c  to collect such dues and charges as the company may be authorised by an enactment to collect; and

d  to use, develop and manage, on a commercial basis, all lands vested in, transferred or leased to the company.

The relevant European Aviation Safety Agency (EASA) approvals and Overseas Territories Aviation Requirements (OTARs) under the UK Air Navigation (Overseas Territories) Order 2013 apply to air carrier operations.

II  LEGAL FRAMEWORK FOR LIABILITY


1  Audrey M Robertson is a counsel at Conyers.
i **International carriage**

The BVI is not a signatory (or a party by extension from the UK) to the Rome Convention, the Geneva Convention, the Chicago Convention or the Cape Town Convention.

In relation to the Chicago Convention, however, certain provisions of that Convention with which the United Kingdom is obliged to ensure that its overseas territories (including the BVI) comply are reflected in the Air Navigation (Overseas Territories) Order 2013.

The BVI is, by Order-in-Council from the United Kingdom, a party to the New York Convention.

ii **Internal and other non-convention carriage**

There is no national or regional legislation governing liability in respect of non-convention carriage.

iii **General aviation regulation**

The relevant EASA approvals and OTARs under the UK Air Navigation (Overseas Territories) Order 2013 govern the liability in operation of civil aviation aircraft, including helicopters and microlights.

iv **Passenger rights**

There is no consumer rights legislation governing compensation for delay, cancellation of flights and carriage of disabled passengers.

v **Other legislation**

The relevant EASA approvals and OTARs under the UK Navigation (Overseas Territories) Order 2013 apply to environmental obligations.

### III LICENSING OF OPERATIONS

i **Licensed activities**

Members of the flight crew are required to be licensed under the UK Navigation (Overseas Territories) Order 2013.

ii **Ownership rules**

Aircraft can be registered in the British Virgin Islands. There are currently only five aircraft registered in the British Virgin Islands all in the names of locally registered corporations. Requirements for registration of aircraft are fully set out in the Air Navigation (Overseas Territories) Order 2013. This includes who is considered to be a qualified person for registration. Such qualified persons are:

a the Crown in right of Her Majesty’s Government in the United Kingdom or in right of the government of the British Virgin Islands;

b United Kingdom nationals;

c Commonwealth citizens;

d nationals of any European Economic Area state;

e bodies incorporated in any part of the Commonwealth and which have their registered office or principal place of business in any part of the Commonwealth; or
undertakings formed in accordance with the law of a European Economic Area state and which have their registered office, central administration or principal place of business within the European Economic Area

iii  Foreign carriers
As a territory regulated by EASA, EASA requires a Third Country Operator approval before a foreign aircraft may operate in the territory.

IV  SAFETY
The relevant EASA approvals and Overseas Territories Aviation Requirements (OTARs) under the UK Air Navigation (Overseas Territories) Order 2013 apply to air carrier operations.

V  INSURANCE
There is no mandatory level of insurance.

VI  COMPETITION
There are no competition provisions in the BVI.

VII  WRONGFUL DEATH
The relevant EASA approvals and OTARs under the UK Navigation (Overseas Territories) Order 2013 apply to wrongful death. There have been no cases in the BVI.

VIII  ESTABLISHING LIABILITY AND SETTLEMENT
i  Procedure
The relevant EASA approvals and OTARs under the UK Navigation (Overseas Territories) Order 2013 apply to wrongful death. There have been no cases in the BVI.

The limitation period is six years.

ii  Carriers’ liability towards passengers and third parties
With respect to an owner, Section 76(4) of the UK Civil Aviation Act 1982 is extended to the BVI to the effect that loss or damage caused by an aircraft in flight or by a person in, or an article, animal or person falling from, such an aircraft is transferred to the person to whom the owner has demised, let or hired out the aircraft if the demise, let or hire is for a period of more than 14 days and no crewmember is employed by the owner.

The owner of the aircraft would be subject to strict liability by virtue of Section 40(2) of the UK Civil Aviation Act 1949, extended to the BVI.

iii  Product liability
There is no regime governing manufacturers’ and owners’ liability to passengers and operators.
iv  Compensation
The relevant EASA approvals and OTARs under the UK Navigation (Overseas Territories) Order 2013 apply. This is not an area that has been tested in the BVI.

IX  DRONES
The relevant EASA approvals and OTARs under the UK Navigation (Overseas Territories) Order 2013 apply.

X  VOLUNTARY REPORTING
There are no voluntary reporting initiatives.

XI  THE YEAR IN REVIEW
The British Virgin Islands has many attractive features, including political stability, tax neutrality and the absence of exchange control and currency restrictions, which make it an ideal jurisdiction for aircraft and other international financing transactions. From a legal perspective, it has a well-developed, English-based legal system, a bespoke commercial court and flexible, highly commercially friendly legislation. On top of this, it adheres to international standards of compliance. These are all factors that have led to the BVI becoming a popular jurisdiction in which to establish special purpose vehicles for owning and leasing aircraft.

XII  OUTLOOK
There are currently no forthcoming developments in aviation policy, legislation, regulation or the sector in the BVI.
I INTRODUCTION

i Legislation
Under the Canadian Constitution Act 1867 aviation is a federal government area of responsibility. Transport Canada is a department of the government of Canada under the federal Minister of Transport, Infrastructure and Communities. It is responsible for the issuance of transportation (including aviation) operating permits and certifications and for transportation safety oversight. The principal legislation administered by Transport Canada with respect to aeronautics is the Aeronautics Act, and the Canadian Aviation Regulations (CARs) promulgated thereunder. The Carriage by Air Act implements, inter alia, the provisions of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) as part of domestic law in Canada. The Canadian Air Transport Security Act establishes and defines the authority and the powers of the Canadian Air Transport Security Authority, the agency responsible for aviation security in Canada. Canada ratified the Convention on International Interests in Mobile Equipment and the Aircraft Protocol (collectively, the Cape Town Convention) on 1 April 2013. The Cape Town Convention is now part of the domestic law of Canada pursuant to the provisions of the International Interests in Mobile Equipment (aircraft equipment) Act. The Transportation Appeal Tribunal of Canada Act establishes the Transportation Appeal Tribunal of Canada, which provides for reviews and appeals of administrative actions taken by Transport Canada and the Canadian Transportation Agency (CTA) as expressly provided under federal transportation legislation, including aviation legislation.

ii Licensing
The licensing of air operators for the provision of domestic air services and scheduled and unscheduled international air services is governed by the provisions of the Canada

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1 Laura Safran QC is a senior partner and Prasad Taksal is an associate at DLA Piper (Canada) LLP.
2 30 & 31 Victoria, c. 3 (UK).
4 SOR/96-433.
6 S.C. 2002, c. 9, s. 2.
7 S.C. 2005, c. 3.
8 S.C. 2001, c. 29.
Transportation Act\(^9\) and the Air Transportation Regulations\(^{10}\) (ATRs) made thereunder. To operate an air service that is publicly available, a licence must be issued by the CTA, an independent agency established under the Canada Transportation Act. Licences for international scheduled services generally are issued pursuant to bilateral air service agreements made between Canada and foreign states and are route-specific, in accordance with the commercial rights identified in these agreements.

iii  Air charter
The ATRs specify a stringent set of rules that nominally apply to air charter services. However, the impact of these rules is largely alleviated by the provisions of Canada’s International Cargo Charter Policy and International Passenger Charter Policy (the Policies), which were announced in May 1998 and April 2000 respectively. The CTA is in the process of amending the ATRs to conform to the Policies but, in the interim, the CTA has been authorised to grant general exemptions from the application of those provisions of the ATRs that conflict with the Policies.

iv  Airport slot allotments
Airport slots are allocated by individual airport authorities in Canada and there is no uniform slot allotment policy or system applicable to all Canadian airports. Some Canadian airports have airport adviser status with IATA and participate in semi-annual IATA Slot Conferences, at which carriers, airports, coordinators and industry experts discuss schedule adjustments. Upon negotiating, trading or transferring slot times at the IATA Slot Conferences, carriers can then apply to the applicable airport authorities for a slot. Slot allocation at the Canadian airports using the Slot Clearance Request/Reply system is regulated by the IATA Scheduling Guidelines.\(^{11}\)

v  Air navigation services
Civil air navigation services are carried out by NAV Canada, a private sector corporation established under the Civil Air Navigation Services Commercialization Act.\(^{12}\) Service charges are levied against air carriers and aircraft operators to recover costs incurred by NAV Canada in providing air navigation services.

vi  Accident investigations
The Transportation Safety Board (TSB) is an independent agency established under the Canadian Transportation Accident Investigation and Safety Board Act.\(^{13}\) The TSB is responsible for conducting independent investigations of aviation incidents and accidents and publicly reporting its findings, identifying safety deficiencies and making recommendations for eliminating such deficiencies.

\(^{9}\) S.C. 1996, c. 10.
\(^{10}\) SOR/88-58.
\(^{11}\) See www.iata.org for details.
\(^{12}\) S.C. 1996, c. 20.
\(^{13}\) S.C. 1989, c. 3.
II LEGAL FRAMEWORK FOR LIABILITY

i International carriage
Canada is a party to and has ratified the Montreal Convention, which is made part of the domestic law of Canada by the Carriage by Air Act.\textsuperscript{14} Section 2 of the Carriage by Air Act provides that the provisions of the Montreal Convention relating to the rights and liabilities of carriers, passengers, consignors, consignees and other persons have the force of law in Canada. Subsection (5) of Section 2 provides that any liability imposed by the Montreal Convention on a carrier for the death of a passenger shall be in substitution for any liability of the carrier for such a death under any law in force in Canada. Subsections (6) and (7) provide for the conversion of francs and special drawing rights into Canadian dollars at rates established by the International Monetary Fund.

ii Internal and other non-convention carriage
There are no special rules with respect to death or injury to passengers and loss or damage to baggage or cargo for domestic carriage. Those claims are largely resolved in accordance with principles of the common law of contract and negligence, as interpreted by the courts of each province. The courts of Quebec apply civil law principles and concepts but the end result for an aviation claim in Quebec is not likely to substantially differ from that of a similar case in a common law province. In recent years the CTA has intervened in a number of domestic air accident cases to require air carriers to apply international liability rules. To date, such intervention has been limited to cases in which the claim is for damage to, loss of or delay in the transportation of baggage.

Under the Criminal Code,\textsuperscript{15} the dangerous or negligent operation of an aircraft or knowingly sending an aircraft that is not airworthy on a flight are criminal offences and any such incidents that result in injury or death may result in a criminal investigation and possible criminal charges, if the circumstances so warrant.

iii General aviation regulation
In Canada, civil aviation operations (including the operations of advanced and basic ultralight aircraft, gliders and unmanned aerial vehicles) are governed by the provisions of the Aeronautics Act\textsuperscript{16} and the CARs and the standards issued thereunder. The CARs regulate the identification and registration of aircraft, licensing and training of personnel, airworthiness of aircraft, general operating and flight rules, commercial air services and air navigation services.

iv Passenger rights
The CTA makes decisions concerning air, rail and marine matters and its jurisdiction extends to economic regulation and consumer protection. With respect to aviation, the CTA issues licences and permits, has authority to disallow tariffs and imposes rules relating to the accessibility of air services. Passenger rights are governed primarily by the provisions of the Canada Transportation Act\textsuperscript{17} and the ATRs, which require every air carrier to file a copy of its tariff with the CTA. Air carriers are required to include all of the terms and conditions

\textsuperscript{14} See footnote 5, above.
\textsuperscript{15} R.S.C. 1985, c. C-46.
\textsuperscript{16} See footnote 3, above.
\textsuperscript{17} See footnote 8, above.
of carriage in their tariff, including those relating to the carriage of persons with disabilities, compensation payable for denial of boarding, passenger rerouting, failure to operate on schedule, refunds, ticketing procedures, limits of and exclusions from liability, and so forth. The CTA has the jurisdiction to address complaints and disputes relating to transportation services, rates, fees and charges, terms and conditions of carriage, accessibility and other issues arising out of or in relation to the tariffs.

Air carriers providing charter services are required to provide financial guarantees in respect of advance payments received from tour operators. Carriers are also required to price charter contracts on the basis of tariffs in effect on the date the contract is entered into. Those tariffs must be maintained by the carrier but need not be filed with the CTA.

Additionally, the provisions of consumer protection legislation in certain provinces may be applicable also to air carriers, provided that such provisions do not conflict with federal law or encroach on federal jurisdiction.

In May 2018, the Transportation Modernization Act18 amended the Canada Transportation Act to require the CTA to make regulations that would establish airline obligations toward passengers. On 24 May 2019, the Canadian federal government announced the finalisation of new Air Passenger Protection Regulations (APPR), some of which take effect on 15 July 2019 and the remainder on 15 December 2019. The APPR prescribe minimum standards in respect of passenger rights for travellers on flights to, and from and within Canada, including connecting flights and certain charter flights, and set out certain airline obligations to travellers, including minimum standards, in the following areas: communication when there are flight disruptions; delayed or cancelled flights; denied boarding; tarmac delays lasting more than three hours; the seating of accompanied children under 14 years of age; lost or damaged baggage; and the transportation of musical instruments.

III LICENSING OF OPERATIONS

i Licensed activities

A licence is required under the Canada Transportation Act19 to operate publicly available air services, which includes domestic air services (small, medium, large and all-cargo aircraft) and scheduled and unscheduled international services.

The CTA has issued a determination to clarify that a reseller (which does not operate aircraft but purchases seating capacity of an air carrier and subsequently resells those seats) is not required to hold a licence, provided it does not hold itself out to the public as an air carrier operating an air service. The air carrier operating the flight remains responsible to the passengers pursuant to its tariff.

ii Ownership rules

A licence to operate a domestic air service may only be granted to a Canadian, unless the applicant has been exempted from that requirement by the Minister. A ‘Canadian’ is defined in the Canada Transportation Act as a Canadian citizen or permanent resident, a government in Canada or an agent of such a government or a corporation or other entity incorporated or formed under the laws of Canada or a province or territory of Canada that is controlled

18 S.C. 2018, c. 10.
19 ibid.
by Canadians and of which a minimum of 51 per cent of voting interests are owned and controlled by Canadians. Further, the licence will only be granted to an applicant that is controlled de facto by Canadians.

Pursuant to amendments proposed to the Canada Transportation Act that came into force in May 2018,²⁰ the foreign ownership limit was raised from 25 per cent to 49 per cent in order that a corporation or other incorporated entity qualifies as Canadian, provided at least 51 per cent of its voting interests are held by non-Canadians. However, under such amendments no single non-Canadian may hold more than 25 per cent of the voting interests.

### iii Foreign carriers

A person may not operate an aircraft (other than a hang-glider or a parachute) in Canada unless it is registered in Canada or in a foreign state that is either a contracting state or has an agreement with Canada that allows aircraft registered in that foreign state to be operated in Canada.

To be eligible for a licence to operate a scheduled international service, a foreign air carrier must obtain the appropriate Canadian aviation document from Transport Canada, have the prescribed liability insurance coverage in place, meet the prescribed eligibility conditions and satisfy the CTA that the foreign air carrier has not contravened the provisions of the Canada Transportation Act relating to sale of air services in Canada without an appropriate licence. To satisfy the eligibility conditions, the foreign air operator must be designated by a foreign government to operate an air service in terms of a bilateral air service agreement between that country and Canada and hold a scheduled international licence issued by that foreign government. Extra-bilateral authority in the form of additional city pairs and fifth or seventh freedom rights can be obtained on occasion on application to the CTA.

To obtain a foreign air operator certificate, a foreign carrier may be required to pass a base maintenance and safety-related inspection carried out by Transport Canada.

### IV SAFETY

Transport Canada is responsible for regulating aviation safety and airworthiness requirements for all civilian aircraft in Canada. The CARs and the associated standards form a comprehensive code for the regulation of aviation safety. Airworthiness requirements are described in Part V of the CARs. The requirements include obtaining an airworthiness certificate for each aircraft operated in Canada and submission of an annual airworthiness report (except in cases of an ultralight aircraft). In addition to the airworthiness requirements prescribed in Part V of the CARs, any use of an aircraft for a commercial air service is subject to the certification scheme created by the Aeronautics Act²¹ and associated regulations. For aerial work (consisting of helicopter external loads, towing or dispersal of products and involving the carriage of persons other than crew members) an operator certificate is required subject to limited exceptions.

The Transportation Safety Board Regulations²² require reporting of aviation accidents and incidents. Where a reportable incident occurs, an obligation to preserve evidence

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²⁰ See footnote 17, above.
²¹ See footnote 3, above.
²² SOR/92-446.
is triggered. The Transportation of Dangerous Goods Act 1992\textsuperscript{23} imposes reporting requirements in certain cases of release of, or improper transport of, dangerous or hazardous goods. In addition, safety management systems referred to in Part V of the CARs include the requirements that approved maintenance organisations report to Transport Canada as to certain service difficulties encountered in the course of maintaining an aircraft.

The maintenance of aircraft is regulated by Part V of the CARs and by the standards thereunder. A Transport Canada-approved Airworthiness Manual addresses the licensing and training standards that aircraft maintenance engineers must meet. Part V of the Manual defines the conditions under which different categories of work must be performed, as well as documentation requirements. In the case of commercial aircraft, all work must be done in accordance with a Transport Canada-approved maintenance policy manual.

V INSURANCE

For the CTA to issue a licence to provide domestic or international services, air carriers are required to carry liability insurance. Section 7 of the ATRs\textsuperscript{24} provides for a minimum liability insurance for commercial operators in the amount of C$300,000 per seat for passenger liability. In respect of public liability, the mandatory coverage is a minimum of C$1 million for aircraft with maximum certified take-off weight of less than 7,500 pounds and a minimum of C$2 million for aircraft with maximum certified take-off weight of more than 7,500 pounds. In cases of aircraft with maximum certified take-off weight in excess of 18,000 pounds, the minimum amount of insurance is C$2 million, plus an amount equal to C$150 multiplied by the number of pounds by which the weight of the aircraft exceeds 18,000 pounds.

Air operators, flight training unit operators, operators of balloons carrying fare-paying passengers and operators of aircraft in excess of 5,000 pounds maximum certified take-off weight are required to have passenger liability insurance in place in the amount of C$300,000 per seat. Insurance coverage need not extend to any passenger who is an employee of the operator and covered by worker’s compensation legislation or to passengers carried on board for making a parachute descent, provided that the operator has provided notice to such persons of the absence of such insurance. All private operators are required to carry public liability insurance, which is related to aircraft weight and the nature of the operations undertaken.

Liability insurance can only have limited exclusions or waiver provisions consisting of standard exclusion clauses relating to chemical drift, excluding contractual liability and voiding of insurance on account of misrepresentation by the air carrier.

As part of its initiative to update and modernise air transport regulations, the CTA is currently reviewing the minimum liability insurance requirements under the ATRs to ensure the current requirements continue to be appropriate over time.\textsuperscript{25}

\textsuperscript{23} S.C. 1992, c. 34.

\textsuperscript{24} See footnote 9, above.

\textsuperscript{25} See www.otc-cta.gc.ca/eng/discussion-paper-regulatory-modernization-air-transportation#TC-TM-3-2-B for details.
VI  COMPETITION

The aviation industry in Canada is subject to the provisions of the federal Competition Act, as well as certain sector-specific competition rules. In response to the merger of Air Canada and Canadian Airlines in 1999, the government passed the Regulations Respecting Anti-Competitive Acts of Persons Operating a Domestic Service to define specific anticompetitive acts that would be subject to the abuse of dominance provisions. There are also provisions in the Canada Transportation Act that deal with mergers in the aviation sector. Access to the aviation sector is further regulated by certain financial and nationality requirements. Access to the market for international air services is governed by bilateral air service agreements between Canada and various foreign states.

The general regulator of competition matters in Canada is the Competition Bureau, headed by the Commissioner of Competition. Proposed mergers and acquisitions that meet prescribed thresholds must be notified to the Commissioner under the Competition Act, and simultaneously notified to the Minister of Transport, Infrastructure and Communities and the CTA under the Canada Transportation Act. The Minister is required to make a determination as to whether the proposed transaction raises issues with respect to the public interest as it relates to national transportation. A proposed transaction may not be completed unless it is approved by the Governor-in-Council on the recommendation of the Minister, and the CTA determines that the transaction would result in an undertaking that preserves the ‘Canadian’ nature of the operator as required by the Canada Transportation Act.

Under the Competition Act, a person who conspires with a competitor to fix prices, allocate customers, sales or territories, or control or prevent supply is guilty of a criminal offence punishable by imprisonment or a fine, or both.

Pursuant to amendments to the Canada Transportation Act that came into force in May 2018, an antitrust immunity regime for transactions involving transportation undertakings, including air transportation, is now in place.

VII  WRONGFUL DEATH

Under common law, there is no general right to bring an action for wrongful death for the death of a family member. Many provinces have therefore enacted statutes that allow certain survivors to bring a wrongful death claim in certain circumstances, and damages are awarded in accordance with the prescribed limits. Wrongful death claims arising out of international carriage by air are subject to Article 17 of the Montreal Convention and the limits of liability under Article 21 of the Montreal Convention. Under Article 21, a carrier cannot limit its liability in the event of the death of or injury to a passenger for damages of up to 100,000 special drawing rights (SDR) per passenger, and the carrier’s liability will not exceed 100,000 SDR if the carrier can establish that the damage was not the result of the negligence or other wrongful act of the carrier, or that such damage was solely the result of the negligence or wrongful act of the passenger. Courts in Canada have consistently held that any action for damages arising in the course of international carriage may only be brought

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27 SOR/2000-324.
28 See footnote 8, above.
29 ibid.
30 See footnote 22, above.
subject to the terms and conditions and the limitations of liability provided by the Montreal Convention, and that no damages are recoverable for purely psychological injuries, pain and suffering or loss of enjoyment. Generally, courts in Canada will award damages on the basis of life expectancy, loss of income, the level of the claimant’s dependency on the deceased and expenses incurred on behalf of the deceased.

VIII  ESTABLISHING LIABILITY AND SETTLEMENT

i  Procedure
Claims relating to passenger air travel, terms and conditions of carriage, charter flights and transportation of persons with disabilities are adjudicated by the CTA. In addition, the CTA also investigates alleged or suspected violations of terms and conditions of licences or illegal or unlicensed operations by carriers providing publicly available services. In the event of consumer complaints, claimants are encouraged by the CTA to attempt to resolve the dispute directly with the air carrier before approaching the CTA. A complaint must be filed as soon as possible after the incident. In the event the Montreal Convention applies to the complaint, it must be filed within two years of the date of the incident.

Upon receipt, the CTA investigates the complaint and if the complaint is warranted, attempts to facilitate a settlement between the claimant and the air carrier. In the event the claimant is not satisfied, the claimant may resort to the formal process for resolution of the complaint, conducted by a panel of members of the CTA and involving submission of evidence and written arguments. In certain matters where the issues involved are of general public interest, the CTA panel may hold a public hearing. Once the CTA panel has considered the evidence, it issues a written decision. CTA decisions are binding unless overturned.

The CTA does not entertain complaints relating to issues such as customer service, aircraft cabin standards, aircraft noise, problems at airports, unfair competitive practices and bilingual services. The CTA also does not hear complaints against tour operators and travel agents. Depending upon the nature of the complaint, a complainant may approach a provincial court, a superior court, Transport Canada, the Competition Commission or other tribunals that have jurisdiction over such matters.

ii  Carriers’ liability towards passengers and third parties
An operator’s liability to a passenger for incidents arising in the course of international carriage is established and limited in accordance with the provisions of the Montreal Convention. Operators are strictly liable for proven damages up to the prescribed amount under Articles 21 and 22 of the Montreal Convention, unless a special declaration of interest is made at the time of delivering baggage or cargo to the operator.

There are no specific rules governing the liability of aircraft operators for surface damage; however, the Airport Traffic Regulations,31 which were made under the Government Property Traffic Act,32 prescribe rules for the operation of motor vehicles, pedestrians and mobile equipment at airports. Contravention of those rules may result in a fine or imprisonment or both. In addition, the Airport Traffic Regulations address requirements specific to the control of aircraft on aprons.

31  C.R.C., c. 886.
There is no special legislation in place governing an operator's liability to third parties so that such liability is governed by the common law of torts. With respect to accidents and incidents, however, it is important to note that under Section 7(2) of the Canadian Transportation Accident Investigation and Safety Board Act, the TSB cannot make any findings on civil or criminal liability and under Section 7(3) no finding of the TSB can be construed to assign blame or liability. The findings of the TSB also do not bind any party to a legal proceeding.

iii  Product liability
Manufacturers and owners are subject to the provisions of the Aeronautics Act and the CARs and may not operate an aircraft except in compliance with the same. A person who makes false representations in seeking to obtain a Canadian aviation document, falsifies records, operates or deals with a detained aircraft or acts in contravention of a Canadian aviation document is guilty of a criminal offence punishable by a fine, imprisonment or both.

There is no special legislation in place governing a manufacturer's or owner's liability to third parties and such liability is governed by the common law of torts.

iv  Compensation
In cases of consumer complaints adjudicated by the CTA, it may, depending on the circumstances, order the air carrier to compensate the consumer for out-of-pocket expenses incurred by the consumer. It cannot, however, award damages for pain and suffering or impose punitive damages or penalties on air carriers.

In Canada, damages are quantified in accordance with the principles of common law of contracts and torts, and there are no special rules applicable to claims related to the aviation industry. Typically, the actual loss or damage suffered by the claimant will play a significant role in determining the amount of damages that may be awarded. The plaintiff is required to prove that the defendant caused the loss or damage and that such loss or damage was reasonably foreseeable. Punitive damages are less common and may be awarded only in situations in which the plaintiff's conduct is excessively malicious or oppressive.

Canada has a universal publicly funded healthcare system administered by the governments of all of the provinces and territories. The government has a right to recover healthcare costs with respect to a person who is injured as result of the acts or omissions of a third party.

IX  VOLUNTARY REPORTING
Pursuant to Section 2(1) of the Transportation Safety Board Regulations, the owner, operator, pilot-in-command, crew member and any person providing air traffic services who has direct knowledge of an aviation occurrence involving a fatality or serious injury, structural failure or damage to an aircraft, missing or inaccessible aircraft, engine failure or other operational issues in case of large aircraft, is under a statutory obligation to report to the Transportation Safety Board. Under Section 30(2) of the Canadian Transportation Accident Investigation and Safety Board Act, a statement given to the Transportation Safety Board in relation to a transportation occurrence is privileged.

33 See footnote 12, above.
X  THE YEAR IN REVIEW

i  Standing at the CTA

In *Lukacs v. Canada (Transportation Agency)*,34 the Federal Court of Appeal overturned a decision of the CTA dismissing a complaint of discriminatory practices commenced by an individual passenger advocate (not a passenger), Dr Gabor Lukacs, on the preliminary basis that he lacked standing to bring the complaint. Dr Lukacs filed a complaint with the CTA alleging that certain practices of Delta Airlines Inc (Delta) relating to the transportation of ‘large (obese)’ persons are discriminatory, contrary to Section 111(2) of the ATRs.35 The CTA found that although Dr Lukacs was not required to be a member of the group discriminated against in order to have standing, he was required to demonstrate ‘sufficient interest’ in the practices complained of, which the CTA determined he had failed to do. The Federal Court of Appeal overturned the CTA decision on the ground that the CTA erred in applying the law in regard to standing on a complaint of discriminatory practices under the Canada Transportation Act36 and the ATRs. Delta appealed the Federal Court of Appeal decision to the Supreme Court of Canada. In *Delta Air Lines Inc v. Lukacs*,37 the Supreme Court of Canada, by a majority decision, held that the CTA has broad discretion to hear and determine complaints, but it did not exercise this discretion in a reasonable manner. The Supreme Court found that the CTA had applied an unreasonable test to determine whether public interest standing was available, and the CTA’s total denial of public interest standing was unreasonable in view of its legislative scheme. The Supreme Court stated that the CTA’s application of tests for determining public and private interest standing precludes any public interest group or representative group from ever having standing before it. Therefore, the Supreme Court remitted the matter back to the CTA to reconsider whether it would hear the complaint.

ii  Tarmac delay

In July 2017, two Air Transat flights from Brussels and Rome were diverted to Ottawa MacDonald-Cartier International Airport, together with 18 other commercial aircraft, owing to inclement weather. The diverted flights experienced lengthy tarmac delays of, respectively, almost six hours and almost five hours. During the period of delay, the passengers were not given an opportunity to disembark, and were only provided with limited food and water. The CTA conducted an investigation following several passenger complaints and media coverage and a public hearing then ensued.38 The CTA determined that Air Transat had failed to apply provisions of its tariffs relating to the distribution of drinks and snacks, and that its tariff relating to disembarking passengers in the event of a tarmac delay was unreasonable. The CTA further determined that Air Transat was not exempt from liability pursuant to the non-application of its tariff provisions on the basis that the diversion resulted from a force majeure event, or that its third-party service providers failed to perform their obligations. The CTA ordered Air Transat to compensate passengers for expenses incurred by them as a result of Air Transat’s failure to properly apply its tariffs, to revise certain provisions of its tariffs and

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34 2016 FCA 220.
35 See footnote 9, above.
36 See footnote 8, above.
37 2018 SCC 2.
to provide proper training to its crew in relation to the provision of services during on-board delays. The CTA further imposed an administrative monetary penalty against Air Transat of C$295,000 based upon the examination of the details and severity of the incident.

XI OUTLOOK

The Transportation Modernization Act, amending the Canada Transportation Act and other legislation relating to transportation, received royal assent and was passed into law on 23 May 2018. Among other matters, the new Act liberalises rules concerning foreign ownership of a Canadian airline, which means that although a Canadian airline must continue to be controlled by Canadians, up to 49 per cent of the voting interests of the airline may be owned and controlled by non-Canadians, provided that no more than 25 per cent of such voting interests are owned directly or indirectly by any single non-Canadian. Additionally, the CTA has established new air passenger rules (the APPR), as referred to in Section II above, which take effect in two phases on 15 July 2019 and 15 December 2019. Finally, the Act creates a process for review of air carrier joint ventures so as to take into consideration issues concerning public interest and competition.

On 19 January 2018, the Supreme Court of Canada (SCC) released its decision in Delta Air Lines Inc. v. Lukacs regarding whether the CTA acted reasonably in dismissing a complaint against Delta on the basis that the complainant met neither of the tests for standing as an unaffected party. The complaint concerned an email from Delta in response to a passenger’s complaint about seating. In that email, Delta stated that it encouraged large passengers or passengers who require more space to book additional seats, to move to another location on the aircraft, or to take a later flight. Dr Lukacs, who is a self-described ‘air passenger rights advocate’, filed a complaint with the CTA, arguing that those practices were contrary to Section 111(2) of the ATRs, which prohibits unjust discrimination in an airline’s terms and conditions of carriage. The CTA, when considering the complaint, questioned whether Dr Lukacs had an interest in Delta’s practices governing the carriage of obese persons and concluded that he did not. The SCC found that the CTA did not reasonably exercise its discretion to hear the complaint and remitted the matter to the CTA for reconsideration in its entirety. It is expected that a new CTA decision will provide sufficient guidance on whether and how the CTA will exercise its discretion to hear and decide future complaints by an unaffected person.

In response to the Lion Air Flight 610 crash on 29 October 2018 and the Ethiopian Airlines crash on 10 March 2019, the Minister of Transport made the decision on 13 March 2019 to ground the Boeing 737 Max 8 in Canada. The Boeing Company is working to resolve the technical problems that contributed to the crashes; however, it is not yet clear when they will be resolved. Until that occurs and the Minister of Transport is satisfied with the resolution, the Minister will not be in a position to authorise resumption of operations of that aircraft type.

The CTA has also proposed accessible transportation regulations under the Canada Transportation Act, referred to as the Accessible Transportation for Persons with Disabilities Regulations (ATPDR). The ATPDR would apply to travel by air, rail, ferry and bus, and would replace the two regulations and six voluntary codes of practice currently in place. The ATPDR will establish obligations of service providers, including air carriers, in the following areas: communications, training, services, fleets and equipment, terminals and security
screening, and border clearance. The CTA has received comments from the public and has indicated its intention to finalise and publish the finalised regulations by the summer of 2019.

In early May 2019 it was announced that one of Canada’s largest international air carriers, WestJet, was being purchased by and would be taken private by a Canadian equity investor, Onex. The transaction remains subject to shareholder and regulatory approvals and is not expected to close until late 2019 or early 2020. Also in May, Air Canada commenced exclusive negotiations to purchase the corporate entity that owns Air Transat, a Canadian leisure airline operating scheduled and charter flights globally. In early June, 2019, a second higher bid to purchase Air Transat was made by another party but the exclusivity of the negotiating arrangement with Air Canada continues until approximately June month end. If any transaction proceeds as a result of any such offer and negotiations, it too will be subject to shareholder and regulatory approvals.

In June 2019, regulations applicable to pilots flying drones weighing between 250 grams and 25 kilograms at take-off came into force. The regulations proscribe reckless and negligent operation of drones, and establish requirements in the following areas: age of the pilot; pilot certification; drone registration and marking; reporting; maintaining records; and manufacturer declarations. The regulations also set restrictions on where drones may be flown and circumstances under which drone operations must cease. The regulations replace the interim order issued by the Minister of Transport in 2017 in response to an increase of reported incidents involving recreational drones across Canada.

In May 2016, Transport Canada proposed regulations to amend the provisions of CARs that govern commercial seaplane operations. The draft regulations propose a requirement that all passengers of commercial seaplanes be instructed to wear a personal flotation device, and that pilots be required to undergo training to facilitate underwater egress following an accident, both of which are expected to come into force in 2020 and 2022 respectively.
Chapter 10

CAYMAN ISLANDS

Wanda Ebanks, Shari McField and Barnabas Finnigan

I LOCAL REGISTRATION

i The regulator

The Civil Aviation Authority of the Cayman Islands (CAACI) is responsible for the regulation of the aviation industry within the Cayman Islands. A body corporate originally established under the Civil Aviation Authority of the Cayman Islands Law 1987 (the current law is the Civil Aviation Authority Law (2015 Revision)), this self-funding statutory authority is a revenue-generating operation for the Cayman Islands government.²

The CAACI’s functions include those conferred on the Governor of the Cayman Islands by the Air Navigation (Overseas Territory) Order 2013 (ANOTO) and other similar regulations.³ The CAACI’s authority covers all aspects of regulation and supervision of the aviation sector within the jurisdiction, including aircraft registration through the Cayman Islands Aircraft Registry operated by the CAACI (the Registry), safety of air navigation and aircraft (including airworthiness), regulation of air traffic, certification of operators of aircraft, licensing of air crews, licensing of air transportation services and certification and licensing of airports.⁴ The CAACI is also responsible for ensuring that civil aviation in the Islands conforms to the standards of the International Civil Aviation Organization, established by the Convention on International Civil Aviation, signed in Chicago on 7 December 1944 (ICAO).

The CAACI is headed by a director general and a statutorily appointed board of directors. The board is responsible for the effective implementation and performance of the CAACI in accordance with applicable law.⁵

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1 Wanda Ebanks is a partner, Shari McField is of counsel and Barnabas Finnigan is an associate at Maples Group.
2 CAACI revenues are generated from regulatory activities and the registration of aircraft (private and corporate) on the Cayman Islands Aircraft Registry. The CAACI’s latest annual report indicates that 2016–2017 was another successful year for the CAACI.
3 Civil Aviation Authority Law (2015 Revision), Section 5(1)(a).
4 ibid., Section 5(1)(a).
5 Civil Aviation Authority Law (2015 Revision), Section 7(1).
The register maintained by the Registry (the Aircraft Register) is primarily a ‘private-use category’ register and aircraft registered thereon must not be used for commercial operations (i.e., for ‘hire or reward’) unless a separate air operator’s certificate (AOC) is granted.\(^6\) Despite its relatively small size,\(^7\) the Registry has evolved as a highly regarded private aircraft registry.

### ii Registration of aircraft

Requirements relating to the registration of aircraft are fully set out in the ANOTO.

#### Eligibility for registration

To register an aircraft with the Registry, the owner, or, if the aircraft is chartered, the charterer by demise, must be a ‘qualified person’ as defined in the ANOTO.

A qualified person includes:

- \(a\) the Crown in right of Her Majesty’s government in the United Kingdom or in right of the government of the territory;
- \(b\) United Kingdom nationals;
- \(c\) Commonwealth citizens;
- \(d\) nationals of any European Economic Area state;
- \(e\) bodies incorporated in any part of the Commonwealth and that have their registered office or principal place of business in any part of the Commonwealth; or
- \(f\) undertakings formed in accordance with the law of a European Economic Area state and that have their registered office, central administration or principal place of business within the European Economic Area.\(^8\)

An unqualified person holding a legal or beneficial interest in an aircraft or a share therein may still register an aircraft if he or she resides or has a place of business in the Cayman Islands and the CAACI is satisfied that the aircraft may properly be registered. Similarly, if the aircraft is chartered by demise (whether by dry or wet lease) to a qualified person the CAACI may permit registration, irrespective of whether an unqualified person is entitled as owner to a legal or beneficial interest in an aircraft or a share in the aircraft. Both of the foregoing exceptions are subject to the discretion of the CAACI and the full facts and circumstances must be presented to the CAACI before any such registration will be considered.

The ANOTO also provides that an aircraft shall not be registered or continue to be registered in the Cayman Islands if it appears to the Registry that:

- \(a\) the aircraft is registered outside the Cayman Islands and that registration does not cease by operation of law upon the aircraft being registered in the Cayman Islands;
- \(b\) an unqualified person holds any legal or beneficial interest in the aircraft;
- \(c\) the aircraft could more suitably be registered in some other state (including the United Kingdom and its territories and dependencies) that is a party to the ICAO; or
- \(d\) it would be inexpedient in the public interest for the aircraft to be or to continue to be registered in the Cayman Islands.

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\(^6\) Only six approved AOC holders are reported in the 2017 CAACI Annual Report.

\(^7\) As at 29 March 2019, the CAACI records indicated a total of 246 aircraft were registered on the Cayman Islands Aircraft Registry (Active Aircraft Register on CAACI website at www.caacayman.com).

\(^8\) Air Navigation (Overseas Territories) Order 2013, Article 16(1).
Requirements for registration of aircraft for private use
Applications for registration are made to the CAACI and applicants can typically take advantage of the CAACI’s online portal, VP-C Online, to submit much of the documentation supporting the application.

The application process is as follows:

a. submission of an aircraft registration application to the Registry and payment of deposit;
b. satisfactory completion of financial and legal due diligence with respect to the applicant;
c. issuance by the Registry of (1) notice of acceptance of the applicant, and (2) a reserved Cayman Islands registration mark;
d. completion of airworthiness survey of aircraft by a CAACI surveyor;
e. completion and submission of supporting documentation (including various technical forms); and
f. effecting deregistration from existing state of registry (if applicable).

A Cayman Islands certificate of registration, certificate of airworthiness and all associated certification documents will be issued by the Registry on registration.

Requirements for registration of aircraft for commercial operations
An application for a Cayman Islands AOC permitting the holder to undertake commercial operations requires provision of certain information, including the following:

a. the official name, address and telephone number of the applicant;
b. the types, serial numbers and registration marks of each aircraft for which a certificate is required;
c. the purpose for which the aircraft will be operated;
d. the specific location of the principal operating base and any other places at which the aircraft will be operated or based;
e. the names and addresses of organisations responsible for all maintenance of each type of aircraft;
f. the names, qualifications and experience of the accountable manager and nominated post holders and details of the duties for which each individual is responsible (with résumés); and

g. the names, qualifications and experience of persons nominated to be responsible for conducting on behalf of the operator, the training and assessments specified in the relevant legislation.9

In addition, the CAACI requires that the holder of a Cayman AOC operate a Cayman Islands office. An applicant for an AOC is encouraged to seek Cayman Islands legal advice on setting up a physical presence in the Cayman Islands to meet this requirement.

Fees payable on registration of aircraft
The fees payable on registration of aircraft are set out in the Air Navigation (Fees) Regulations, 2010. A summary of these may be found on the CAACI’s website at: www.caacayman.com.

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9 More detailed information is available from the CAACI directly.
Effect of registration
The registration of title to the aircraft constitutes prima facie evidence of ownership of the aircraft. However, such evidence is not conclusive. The ANOTO provides that, to the extent its provisions apply to Cayman Islands aircraft, such provisions have extraterritorial effect.\(^\text{10}\)

No registration of leases
Leases are not required to be registered with the Registry in relation to Cayman registered aircraft and the law of the Cayman Islands does not otherwise provide for their registration by filing or recording in the Cayman Islands.

Deregistration of aircraft registered with the Registry
When it becomes necessary to deregister an aircraft from the Registry (following a sale or otherwise):
\begin{itemize}
  \item[a] the registered owner\(^\text{11}\) or the person responsible for the aircraft, must provide the CAACI with instructions to deregister the aircraft;
  \item[b] the registered owner's financial account with the CAACI must be fully settled;
  \item[c] if a certificate of airworthiness for export is required by the importing state, a CAACI surveyor must inspect the aircraft prior to issuance. To initiate this process a certificate of airworthiness request form must be submitted to the CAACI;
  \item[d] the original certificate of registration must be submitted to the CAACI, with Section III on the reverse side signed by the registered owner of the aircraft or the person responsible for the aircraft (accompanied by the related certified power of attorney in the latter case);
  \item[e] if an aircraft has a mortgage registered against it on the aircraft mortgage register maintained by the Registry (the Mortgage Register), the mortgagee must confirm in writing to the Registry how the mortgage is to be addressed following deregistration. If the mortgage is to be discharged, this must be effected prior to or simultaneously with deregistration. If not, the CAACI will require a certified or notarised confirmation letter from the mortgagee that:
    \begin{itemize}
      \item the mortgage will not be discharged;
      \item the mortgage remains in force; and
      \item a notation will remain on the Mortgage Register; and
    \end{itemize}
  \item[f] if necessary, the CAACI will confirm to the new state of registry that the aircraft is being or has been deregistered from the Register.
\end{itemize}

In a default enforcement scenario, the above deregistration procedure applies save that the following will also be required:
\begin{itemize}
  \item[a] a notarised or original deregistration power of attorney (in favour of the person seeking to instruct the CAACI);
  \item[b] proof of default under the agreement giving rise to the right to deregister the aircraft and the details thereof;
  \item[c] proof of right to deregister the aircraft in an event of default (i.e., reference to the relevant section of the agreement);
\end{itemize}

\(^{10}\) Air Navigation (Overseas Territories) Order 2013, Article 188(1).

\(^{11}\) References to ‘registered owner’ mean either the owner or the charterer by demise (as relevant).
confirmation that the adversely affected party is seeking to enforce its rights under the agreement; and

if the enforcement is contentious and the original certificate of registration cannot be obtained from the owner, an affidavit by the adversely affected party confirming that to be the case and requesting deregistration of the aircraft indicating the new state of registry.

iii Security and aircraft mortgages

Aircraft mortgages may be governed by the law chosen by the parties. If the parties agree that it will be governed by foreign law, the Cayman Islands courts will uphold contractual terms to that effect unless the selection of the governing law was (1) made in bad faith, (2) illegal or contrary to the public policy of the Cayman Islands, or (3) would not be regarded as a valid and binding selection or be upheld by the courts of the foreign jurisdiction selected.

A mortgage in relation to an aircraft registered in the Cayman Islands may be registered in the Mortgage Register to secure the benefit of priority.

The Cape Town Convention (referenced below) came into force in the Cayman Islands on 1 November 2015 pursuant to the International Interests in Mobile Equipment (Cape Town Convention) Law, 2015 (the Cape Town Law). At present under Cayman Islands law, there exists a dual system for perfection and priority of security over Cayman registered aircraft for entities that qualify as follows:

a where there is a registerable ‘international interest’ under the Cape Town Convention (as defined in the Cape Town Law), any such international interest in respect of an aircraft may be recorded on the international registration facilities established under the Cape Town Convention (the IR). Registration on the IR is permitted for aircraft that qualify under the Cape Town Convention. Cape Town registrations and filings on the IR are made in the usual way. Where an international interest has been registered against an aircraft that is registered with the CAACI in accordance with the Cape Town Convention, priority of a mortgage over that aircraft will be determined solely by the filings on the IR. No additional registrations are required with the CAACI in relation to a mortgage over such aircraft; or

b if the Cape Town Convention does not apply, then the priority of a registered mortgage against Cayman Islands registered aircraft will be determined in accordance with registration on the Mortgage Register pursuant to the Mortgaging of Aircraft Regulations, 2015 (the Regulations). The Regulations, among other things, offer a system for obtaining priority for a security interest, perfecting the security interest and protection from deregistration of an aircraft without the registered mortgagee’s consent. Registration on the Mortgage Register constitutes express notice to all persons of all facts appearing thereon.

Requirements to register a mortgage with the CAACI

To register a mortgage on the Mortgage Register:

a a completed or executed application form must be submitted on behalf of the mortgagee;
the application must be accompanied by a copy of the mortgage (a PDF copy is sufficient and advisable since Cayman Islands stamp duty becomes payable if the original mortgage is brought to or executed in the Cayman Islands);\textsuperscript{12} and

\vspace{12pt}

c payment of the applicable mortgage registration fee must be made.

It is also possible to file a priority notice with the Registry by filing the applicable documentation and payment of the relevant fee. Provided the relevant mortgage is filed within 14 days of the date of such a priority notice it shall be deemed to have priority from the time when the priority notice was registered.

Under the current legislation, an international interest (as defined in the Cape Town Law) registered on the IR has priority over any other interest subsequently registered on the IR and over an interest that is not registered on the IR, subject to certain exceptions.\textsuperscript{13}

\textbf{Discharge of mortgage registered with the CAACI}

The following is the procedure to effect deregistration of a mortgage with the CAACI:

\begin{itemize}
  \item[a] submission of a mortgage discharge form signed by the mortgagor and mortgagee (together with copies of signing authorities);
  \item[b] provision of a copy of a fully executed deed of release of mortgage. Alternatively, a letter addressed to the CAACI signed by an authorised signatory of the mortgagee instructing the CAACI to deregister the mortgage will suffice; and
  \item[c] payment of the applicable mortgage discharge fee.
\end{itemize}

\textbf{Creditor rights}

The courts of the Cayman Islands will enforce a foreign money judgment made against the owner or charterer by demise of a Cayman Islands registered aircraft without a retrial of the merits provided the judgment: (1) is made by a foreign court of competent jurisdiction; (2) imposes on the judgment debtor a liability to pay a liquidated sum for which the judgment has been given; (3) is final; (4) is not in respect of taxes, a fine or a penalty; (5) is not impeachable on the grounds of fraud; and (6) does not offend natural justice or the public policy of the Cayman Islands.\textsuperscript{14}

The judgment creditor holding an enforceable foreign judgment has a wide range of options to enforce the judgment against the debtor. These include: (1) writs of fi. fa. (i.e., seizure and sale of goods); (2) charging orders in respect of land and securities; (3) garnishee orders (i.e., attachment of debts including bank deposits); (4) appointment of a receiver (who might collect receivables or even run a business); or (5) an attachment of earnings order.

Recent English authorities (which are persuasive, although not binding on the Cayman Islands courts) suggest that foreign judgments that are integral to bankruptcy proceedings may be enforceable without satisfying the usual requirements set out at the first paragraph above and without the need to embark on fresh proceedings in the Cayman Islands. However, these authorities have yet to be fully considered by the Cayman Islands courts.

\textsuperscript{12} \textit{Ad valorem} duty at the rate of 1.5 per cent of the sum secured is payable if the original mortgage is executed in or brought to the Cayman Islands following execution.

\textsuperscript{13} See Sections 3 and 4 of the International Interests in Mobile Equipment (Cape Town Convention) Law, 2015.

\textsuperscript{14} In any application to exercise enforcement options under Cayman Islands law, the judgment creditor will need to establish the factors outlined above, to the satisfaction of the Cayman Islands court.
Assignment of security rights

Security interests may be assigned under Cayman Islands law. If an assignment is to be governed by Cayman Islands law, it should be in writing and notice of the assignment must be given to the debtor to perfect the assignment. If the document creating the security interest is brought to, or executed in, the Cayman Islands, it must be stamped with applicable Cayman Islands stamp duty.

A Cayman Islands company must make an entry in its register of mortgages and charges in respect of all mortgages and charges created by it under any transaction documents to comply with local law; failure by the company to comply with this requirement does not operate to invalidate any mortgage or charge though it may be in the interests of the secured parties that the company should comply with the statutory requirements. The register of mortgages and charges is not a public document and is maintained by the company’s registered office in the Cayman Islands on the company’s minute book.

Enforcement of security over aircraft registered in Cayman

Enforcement will be determined by the provisions of the relevant agreement. Taking physical possession of the aircraft is permitted under Cayman Islands law. Self-help remedies are permitted without the need to obtain a court order; however, it is open to the relevant enforcing party to seek a court order.

Permission of the CAACI is not required prior to pursuing remedies on enforcement. However, possession via either a transfer of title or change of details of the entity registered with the CAACI will require the cooperation of the CAACI (and thus compliance with CAACI’s transfer formalities for Cayman-registered aircraft).

Liens and rights of detention

Liens are not registrable in the Cayman Islands.

It is believed that the following aircraft liens exist under Cayman Islands law:

a. seller’s lien – pursuant to the Sale of Goods Law (1997 Revision), an unpaid seller may have a lien over an aircraft to the extent that the buyer fails to pay the purchase price;

b. salvage lien – based on the principle that a person providing voluntary assistance should recover their costs prior to the other parties with an interest in vessels;

c. possessory lien – a common law legal lien relating to specific aircraft. Applicable where a person bestowed labour upon authorisation from its owner, enhancing the aircraft’s value. That person will have a lien on the aircraft to the extent that it remains unpaid for its labour; and

d. contractual lien (including pledge) – parties may create a lien by contract that is ‘certain’, regardless of whether a possessory lien exists at common law. The owner of an aircraft may pledge it to the creditor as security for a debt, or a lien may arise as a result of a person expending labour on an aircraft, which improves its value in some way in accordance with a contractual agreement, or a contractual salvage lien may also arise.

15 Enforcement by a Cayman court requires originals of the relevant documents (with Cayman stamp duty paid thereon), and applicable court fees to be paid.
16 It is not possible to be definitive since no legislation and, to the best of our knowledge, no Cayman Islands case law has analysed aircraft liens in detail.
17 The absence of relevant cases makes it uncertain whether an aircraft salvage lien can be asserted in the Cayman Islands.
The Cayman Islands are not a signatory to international conventions that relate to aircraft liens. However, the Cayman court will recognise a foreign aircraft lien provided it is valid under its appropriate governing law, subject to qualifications relating to enforceability being met.

In addition to aircraft liens, under the Cayman Islands legislation persons can be granted a right to detention. In the event that more than one detention right exists over an aircraft at the same time, their priority will likely be determined according to the time each contravention occurred. In addition to the statutory rights to detain aircraft, detention may also arise as result of a breach of contract or in a case where an attachment of an aircraft is sought (e.g., for the non-payment of a debt or on the liquidation or insolvency of the owning company). Statutory detention rights are generally not based on possession and do not seek to prevent other parties with an interest in the aircraft from having access to it.

Under Cayman Islands law, persons are granted a right to sell (or detain) an aircraft for:

- **a** Airport charges: aircraft can be detained and sold for non-payment of airport charges; default of payment creates a statutory lien.
- **b** Customs: where anything becomes liable to forfeiture under the Customs Law (2017 Revision), any aircraft used for the carriage, handling, deposit or concealment of that thing shall also be liable to forfeiture. Forfeiture of an aircraft may also occur where it has been adapted to be used for or is used for the purposes of smuggling or concealing goods.
- **c** Crimes: where a person is convicted of an offence, any vessel in his or her possession or under his or her control that was used in connection with such an offence or intended to be used for that purpose may be forfeited to the Crown by order of the court.
- **d** War or national emergency: regulations made under the Emergency Powers Law (2006 Revision) can give powers to the governor of the Cayman Islands to authorise the taking possession or acquisition of any property.
- **e** Terrorism: the court can make a forfeiture order in accordance with Section 28 of the Terrorism Law (2018 Revision).

The priority of domestic aircraft liens and detention rights will be in the following order:

- **a** statutory detention rights;
- **b** contractual lien;
- **c** salvage lien;
- **d** possessory lien;
- **e** registered mortgages; and
- **f** unregistered mortgages.

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19 Airports Authority Law (2005 Revision) Section 34.
20 Customs Law (2017 Revision) Section 61.
21 Misuse of Drugs Law (2017 Revision) Section 25(2). Note also that the court has broad powers under the Proceeds of Crime Law (2019 Revision) to order the confiscation of property derived from the proceeds of criminal conduct. (Applications for compensation in these situations are dealt with thereunder.)
The priority of foreign aircraft liens before a Cayman court will be determined by Cayman Islands law, as the law of the forum deciding the matter (the *lex fori*), since the question of priority is a procedural rather than a substantive matter under Cayman Islands law.

**iv  Strict liability under Cayman Islands law**

The owner of an aircraft registered with the CAACI is subject to Section 40(2) of the Civil Aviation Act 1949 (as extended to the Cayman Islands by the Civil Aviation Act 1949 (Overseas Territories) Order 1969), which states that:

> Where material loss or damage is caused to any person or property on land or water by, or by a person in, or an article or person falling from, an aircraft while in flight, taking off or landing, then unless the loss or damage was caused or contributed to by the negligence of the person by whom it was suffered, damages in respect of the loss or damage shall be recoverable without proof of negligence or intention or other cause of action, as if the loss or damage had been caused by the wilful act, neglect, or default of the owner of the aircraft:

Provided that where material loss or damage is caused as aforesaid in circumstances in which:

- damages are recoverable in respect of the said loss or damage by virtue only of the foregoing provisions of this subsection; and
- a legal liability is created in some person other than the owner to pay damages in respect of the said loss or damage;

the owner shall be entitled to be indemnified by that other person against any claim in respect of the said loss or damage.

The normal exemption on which a passive owner relies is contained in Section 76(4) of the Civil Aviation Act 1982 as extended to the Cayman Islands by the Civil Aviation Act 1982 (Overseas Territories) (No. 2) Order 2001, which states that:

> Where an aircraft has been bona fide demised, let or hired out for any period exceeding fourteen days to any other person by the owner thereof, and no pilot, commander, navigator or operative member of the crew of the aircraft is in the employment of the owner, Section 40(2) of the Civil Aviation Act 1949 (as extended by the Civil Aviation Act 1949 (Overseas Territories) Order 1969 to any of the Territories specified in Schedule 2 to this Order) shall have effect as if for references to the owner of the aircraft there were substituted references to the person to whom the aircraft has been so demised, let or hired out.

**v  Emerging trends**

**Transition Register**

The CAACI is able to accommodate registration of aircraft on the Aircraft Register for short periods; for example, during the fit-out stage following a ‘green delivery’ or following termination of a lease, repossession by a mortgagee or otherwise. The applicant must qualify to register an aircraft on the Aircraft Register as discussed above. In lieu of a certificate of airworthiness, the CAACI will issue special flight authorisations as may be required to transport the aircraft. One attractive feature of this offering is that the aircraft may be subject to the financiers’ registered security interest. Once the period specified for the registration is concluded, the aircraft can be deregistered and re-registered on an alternative register as may
be required; for example, for commercial operations. The deregistration process is simple and low cost and can be completed on a same-day basis. It is important to note that the Aircraft Register is not a register for parked aircraft or aircraft at the end of their useful life.

**Article 83 bis arrangements**

Notwithstanding that the Registry is primarily for private use aircraft. Aircraft operating commercially may only register on the Aircraft Register if they are operating under an Article 83 bis agreement or an air operator’s certificate (AOC).

The CAACI have been open to putting in place arrangements under Article 83 bis of ICAO, which permits the Registry to transfer all or part of its functions relating to oversight and operation to the state of operation of the aircraft. The Cayman Islands currently has an Article 83 bis arrangement with Saudi Arabia. This allows aircraft that are operated by certain operators in Saudi Arabia to be operated commercially although registered on the Aircraft Register.

## II CROSS-BORDER FINANCING TRANSACTIONS

Although commercial aircraft are not commonly registered in, or operated out of the Cayman Islands, the jurisdiction plays an important role in the structuring of some of the more complex cross-border transactions used in the acquisition, financing and leasing of aircraft.

The Cayman Islands’ long-established reputation for being politically stable, tax neutral and having a well-established legal system based on English common law principles has led to the jurisdiction’s preferred status as a place to establish special purpose vehicles (SPVs) for owning or leasing aircraft.

The SPV will typically hold title to the aircraft. SPVs are flexible corporate structures that can be utilised either as a single-aircraft owning company or to hold multiple aircraft in a single entity. The acquisition of the aircraft by the SPV will most commonly be financed by way of a loan from a third-party lender, who will in turn take security over the aircraft in the form of an aircraft mortgage. Other typical features include the granting of security over lease payments in the structure and a charge or mortgage over the issued share capital of the SPV itself.

Although these traditional debt financing arrangements remain the norm, other alternative forms of financing are becoming increasingly common and in recent years there has been a marked increase in the number of aircraft financing transactions accessing the capital markets (e.g., through bond issuances; asset backed securitisations, use of the Enhanced Equipment Trust Certificates (EETC) regime; or through direct equity injection from private equity firms).

There are two basic structures that are commonly used for the financing and leasing of aircraft through a Cayman Islands SPV: (1) an off-balance sheet, bankruptcy remote or ‘orphan trust’ structure; or (2) an on-balance sheet direct ownership structure.

A common advantage of both structures is the choice of the Cayman Islands as the jurisdiction of incorporation of the SPV. In both scenarios, the assets are held by a company incorporated in a first-class jurisdiction with a high degree of political and economic stability and a familiar and trusted legal system. Financiers find this particularly attractive as they are comfortable that if an enforcement event arises, the financing documents will be capable of enforcement in a jurisdiction where the legal system is based on English common law.
Another key advantage for both structures is taxation. The Cayman Islands does not currently have any form of direct taxation and therefore payments made into or out of the Islands will not be subject to taxation, under Cayman Islands law. To give additional comfort on this point, the Cayman Islands government will on request provide an undertaking confirming that the SPV is exempt from direct taxation in the Cayman Islands for a period of 20 years from the date of the issuance of the undertaking.

i  Off-balance sheet structures

In a typical Cayman Islands orphan trust structure: (1) the issued share capital of the SPV will be held by an offshore trust company as share trustee on charitable or purpose trusts; and (2) the directors of the SPV will be provided by a third-party corporate administrator (which is often the same entity as the share trustee) pursuant to the terms of an administration agreement entered into between the SPV, the administrator and the airline or leasing company.

The SPV will enter into the financing and leasing documents necessary to enable it to acquire the aircraft, and lease it to an end user (which is typically an airline).

To avoid either a breach of duty or the payment of significant transaction fees to the SPV to balance the commercial risk of the assumption of open-ended loan repayment obligations, the SPV limits its obligations both in amount and recourse to the value of the security granted by the SPV. As the SPV will grant security over all its material assets (namely, the aircraft and its rights under the lease) the lender is not being deprived of recourse against any significant asset.

Following termination of the transaction, the trust will terminate and the trust property (namely, the issued share capital and any transaction fees earned by the SPV net its expenses, (i.e., the net asset value of the SPV)) will be distributed by the trustees to one or more charities as the trust document provides.

A key attraction of this structure is that ownership of the aircraft does not vest with the airline but with the SPV, which holds title in an off-balance sheet capacity. This ensures that the SPV will not be consolidated on the balance sheet of the lender, airline or the trustee.

From the lender’s perspective, the fact that the bankruptcy of the airline will not have an impact on the assets provides lenders a greater degree of control and certainty over the underlying assets that constitute the basis of their security. Additionally, as the SPV is entirely independent from both the lender and the airline, in a default scenario the lender is likely to experience a greater degree of cooperation from and (through the covenants in the financing documents) control over the SPV.

ii  On-balance sheet structures

In a typical on-balance sheet structure, either the airline or operator, or the financier, will establish the SPV directly and will hold the shares in the SPV themselves (rather than these being held on the terms of a charitable or purpose trust). The directors are also commonly employees or nominees of the shareholder (although it is not uncommon for one or more of the directors to be provided by a third-party corporate administrator to act as an ‘independent director’).

The choice of structure will depend on a number of factors including the jurisdiction where the airline is incorporated, the jurisdiction in which the aircraft will be operated, the desired tax treatment of the overall structure and the needs of the financiers.

The on-balance sheet structure lacks bankruptcy-remote characteristics and there will be implications up and down the chain upon a default or winding up of one or other of the
parties. There is also not the same protection from consolidation as that offered in an orphan structure as the assets of the SPV are likely to be treated as being consolidated onto the balance sheet of the parent shareholder.

III EMERGING TRENDS

There continues to be a strong interest in alternative sources of funding for aviation financing transactions, and the trend for using transaction structures that allow airlines and lessors to access the capital markets looks set to continue through 2019 and 2020.

Asset-backed securitisation platforms structured using Cayman-incorporated Irish tax resident issuers to issue notes, the proceeds of which are used to acquire an underlying portfolio of aircraft, remain popular. Even where the issuer vehicles are not incorporated in the Cayman Islands, many of the issuer vehicles are taking advantage of the flexible and user-friendly listing regime of the Cayman Islands stock exchange to list the notes and other securities.

The CAACI offers a novel option to lessors and financiers requiring a reputable register to facilitate the temporary registration of aircraft that are transitioning between leases or that have been repossessed. The CAACI will facilitate the temporary registration of an aircraft on the Aircraft Register until the aircraft can be transitioned to the next phase of its useful life, be that the sale, lease, remarketing of the aircraft or otherwise.

IV THE YEAR IN REVIEW

i Financing transactions

The securitisation of aircraft portfolios through Cayman Islands SPVs continues to show strong demand in the market, and it is expected that these will continue to be used to provide access to funding for portfolio acquisitions or financing, or both.

ii Cayman Maritime & Aviation City

The Cayman Islands has distinguished itself from other special economic zones and favourable tax jurisdictions with the addition of the Cayman Maritime & Aviation City to the special economic zone, provided by Cayman Enterprise City, which is designed to make it easier for aviation services providers, including commercial air transport operators, aerospace developers and manufacturers to set up a physical presence in the Cayman Islands.

iii Registration of Aircraft Operating Commercially and Transition Register

The ability to take advantage of the opportunities to set up a business in the Cayman Maritime & Aviation City to, among other things, obtain an AOC and the innovative offering for the temporary register of aircraft during a transition process are very attractive features of the Aircraft Register, which continue to draw financiers and owners alike to registering aircraft in the Cayman Islands.
Chapter 11

CHINA

Gao Feng

I INTRODUCTION

In mainland China, the Civil Aviation Law (CAL) is the main law regarding civil aviation. The CAL was issued by the Standing Committee of the National People’s Congress and came into effect on 1 March 1996, and has general binding force. All 215 articles of the CAL are categorised in 16 chapters.

Other laws, such as the General Principles of the Civil Law, the Contract Law, the Corporate Law, the Tort Liability Law and the Criminal Law, as well as administrative regulations by the State Council and ministerial regulations by ministries and commissions of the State Council, are also important rules to which the civil aviation activities shall be subject.

The aforementioned normative laws and regulations together constitute China’s civil aviation legal system.

i Civil aviation regulatory regime

As per the authorisation of the CAL and the State Council, the Civil Aviation Administration of China (CAAC) under the Ministry of Transport is the competent authority in civil aviation, responsible for:

a the development, implementation and supervision of strategy and planning of civil aviation industry development;

b the drafting of relevant laws, regulations, policies and standards;

c supervisions on air transport and general aviation market, civil aviation safety and ground safety, civil airport construction and safe operation;

d civil air traffic management; and

e civil aviation emergency response.

Under the CAAC, there are seven regional administrations (RAs) in China, namely in the north, east, north-east, north-west, south-west, central and southern, and Xinjiang RAs, responsible for regional issues as authorised by the CAAC.

ii Market access

China’s domestic investment can go towards areas such as public air transportation, general aviation (GA), civil airports and air traffic management systems. As with some sectors, aviation
enterprises shall be wholly state-owned or state-controlled (including relatively controlled). For example, Air China, China Southern Airlines and China Eastern Airlines shall remain wholly state-owned or state-controlled.

Foreign investments shall comply with Chinese laws and regulations as well as rules and policies established by related ministries and commissions of the central government, such as the Catalogue of Industries for Guiding Foreign Investment, published by the Ministry of Commerce (MOFCOM) in 2017 (the Catalogue, which may be amended from time to time) and Special Administrative Measures for Foreign Investment Access (the Negative List, which may be amended from time to time), published by the National Development and Reform Commission (NDRC) and MOFCOM. As per the Negative List, the special administrative measures for foreign investment in the aviation industry are as follows:

- Public air transport companies must be controlled by Chinese entities, and a single foreign investor and its affiliates shall not hold more than 25 per cent of the equity. The legal representative must be a citizen of Chinese nationality.
- The legal representative of a general aviation company must be a citizen of Chinese nationality. The general aviation companies for agriculture, forestry and fishery are limited to joint venture operations, and in relation to others, with Chinese parties as the controlling shareholders.
- The construction and operation of civil airports must be controlled by Chinese parties.
- Investment in air traffic control is prohibited.

The areas other than the Negative List are administered under the consistency principle for domestic and foreign investment.

iii Slots
The Methods for Management of Civil Aviation Slots, which came into effect on 1 April 2018, is the latest CAAC regulation over slots management in China. According to the Methods, the CAAC and RAs are responsible for specific coordination, allocation and supervision over the use of slots. The Methods also specify exchange and swap of slots, code sharing, joint operation, transfer, voluntary return and revocation of slots.

iv Treaty-based commitments regarding transit and traffic rights
Regarding transit and traffic rights, China joined the Convention on International Civil Aviation (the Chicago Convention) and the International Air Services Transit Agreement in 1994.

v Interests in aircraft equipment
China has joined the Cape Town Convention. Also, as per Chinese law, rights in aircraft (including civil aircraft structure, engines, propellers, radio devices and any other equipment therein) include rights of ownership, possession and mortgage as well as lien, which applies to claims for compensation for the rescue and salvage of the aircraft and claims for costs for the preservation and maintenance of aircraft. The CAAC shall be in charge of the work of the registration of rights in civil aircraft.

The relevant finance parties may also register their rights with the Ministry of Commerce, or the People's Bank of China (if applicable).
VI Government policy and state aid

As per the Interim Measures for the Collection, Use and Management of the Civil Aviation Development Fund by the Ministry of Finance of China, which became effective from 1 April 2012, such aviation development fund shall be collected from passengers taking flights in China as well as air transport enterprises registered and established within the territory of China and engaged in passenger and cargo transport business with China’s air route resources and GA enterprises engaged in business flights. Such fund would be used in the construction of civil aviation infrastructure, regional aviation and GA development, civil aviation’s energy conservation and emission reduction, research and development of key science and technology regarding civil aviation, etc.

In recent years, with the expansion of the application of the public-private partnership mechanism in public services and infrastructure construction, promoted by the NDRC, the market access for the construction and operation of the civil aviation airport has been further liberalised, and more social capital has been encouraged to engage with this area, which was previously mainly invested in by the government or state-owned enterprises.

VII Labour and employment issues

There are no specific stipulations in the CAL regarding labour and employment issues, which shall be subject to China’s Labour Law, the Labour Contract Law and its Implementation Regulations. For temporary, auxiliary or substituting positions, employees could be sent to airports or airlines by labour dispatch.

II LEGAL FRAMEWORK FOR LIABILITY

The responsibilities of the public aviation transport carrier and the actual carrier are stipulated in Chapter IX, Sections 3 and 4 of the CAL. As per the CAL, a carrier should assume liability for casualties among the passengers owing to accidents on the aircraft or during their boarding or alighting. The carrier is not liable for casualties arising entirely from health reasons on the part of passengers. A carrier should assume liability for the destruction of cargo resulting from accidents during the flight. But the carrier is not liable for the destruction, loss of or damage to cargo if the loss or damage can be proved as entirely having resulted from certain factors.

Liabilities for damages to third parties on the ground are stipulated in Chapter XII of the CAL. As per the CAL, the victims of personal injury or death, or loss of property on the ground (including water surface) caused by in-flight civil aircraft or falling people or things from in-flight aircraft have the right to acquire indemnity for the damages, unless the injury or damage is not a direct result of such accident, or it is only a result of the passage of the aircraft in conformity with the state rules of air traffic.

In addition, in 1959, China joined the Convention for the Unification of Certain Rules for International Carriage by Air signed at Warsaw on 12 October 1929 (the Warsaw Convention), and in 2005 China joined the Convention for the Unification of Certain Rules for International Carriage by Air signed at Montreal on 28 May 1999 (the Montreal Convention).
i  International carriage

China is a party to the following multilateral agreements relating to international carriage: the Convention on International Civil Aviation, the Warsaw Convention and its Hague Protocol, and the Montreal Convention.

In the CAL it stipulates that, as to international carriage, where contradiction appears between the CAL and the international treaties to which China is a signatory or party, provisions of international treaties shall prevail, except those on which China has made reservations.

ii  Internal and other non-convention carriage

Non-convention carriage responsibilities shall be subject to those provisions regarding international transportation in the CAL and bilateral agreements by and between China and the foreign country.

iii  General aviation regulation

Civil liability

For GA, the CAL only provides the civil liability for the damages of the third party on the ground caused by aircraft (including GA aircraft), and administrative and criminal responsibilities for violation of laws and endangering flight safety.

As per Article 71 of the Tort Liability Law, where a civil aircraft causes any harm to another person, the operator of the civil aircraft shall assume the tort liability, whether or not he or she is the passenger or the third party on the ground.

Administrative liability

The General Operating and Flight Rules (CCAR-91-R3) by the CAAC provide regulations on general operation and flight of civil aircraft (including rotorcraft and microlight aircraft), covering airworthiness, flight rules, maintenance, equipment, instrumentation and certification, forestry-spraying operations, etc. And as per the Rules, in the case of violation of the Rules, the CAAC has the right to order the immediate cessation of the violating activities and impose penalties such as a warning, fine, temporary suspension or revocation of licences, or a combination of these penalties.

iv  Passenger rights

Regarding compensation for flight delays, in accordance with Article 126 of the CAL, the carrier should assume liability for the losses to passengers, baggage or cargo caused by delays in the air transport. But the carrier will not be liable if there is evidence that necessary measures to avoid the losses were taken by the carrier or its employees or agents, or that it is impossible to take such measures (such as those caused by bad weather or air traffic control).

The Regulations on the Management of Flight Regularity, which came into effect on 1 January 2017, apply to all Chinese carriers and foreign carriers departing from mainland China airports or with stopovers at the airports of mainland China. The Regulations set out airlines’ obligations on maintaining flight regularity and providing necessary services and support to passengers in case of flight delays or cancellations. Carriers shall clarify their service contents in case of flight delays or cancellations in their General Conditions of Carriage.

In terms of the carriage of disabled persons, according to the Measures of Air Transportation of Disabled Passengers by the CAAC Transportation Department, the carrier
must not refuse to carry a disabled passenger who meets the requirements for boarding, on the basis that his or her appearance or involuntary behaviour owing to his or her disability is likely to cause offence, annoyance or inconvenience to the crew or other passengers, unless otherwise stipulated in the law or for safety reasons.

Carriers, airports and airport ground service agents are required to provide necessary assistance and equipment at the terminal buildings and in the cabin. In particular, service dogs are allowed to accompany disabled passengers during the flight.

v Other legislation
As per the General Principle of the Civil Law and the Environmental Protection Law, those who cause environmental pollution shall undertake to eliminate such pollution and provide compensation to those who have suffered harm as a result of it. And according to the Law on Prevention and Control of Pollution from Environmental Noise, with the exception of take-off, landing or other situations as provided for by law, no civil aircraft may fly over urban areas of cities. The civil aviation departments shall take effective measures to mitigate environmental noise pollution. Those suffering from the hazards of environmental noise pollution shall have the right to demand the polluter to eliminate the hazards; if a loss has been caused, it shall be compensated.

As per the Consumer Rights Protection Law, where business operators (i.e., air carriers) knowingly provide defective goods or services for consumers, causing the death of, or serious health damage to, the consumers or other victims, the victims shall be also entitled to demand punitive damages of up to twice the losses suffered.

According to the Cybersecurity Law, network operators (e.g., an airline company that has its own booking website) shall not divulge, tamper with or damage the personal information they have collected, and shall not provide the personal information to others without the consent of the persons whose data is collected. However, a circumstance where the information has been processed and cannot be recovered, and thus it is impossible to match such information with specific persons, would be an exception.

III LICENSING OF OPERATIONS

i Licensed activities
To set up a public air transportation enterprise, the applicant must firstly obtain the authorisation of preparations for establishment and within two years thereafter, apply for the AOC from the CAAC before it gets its company business licence from the Administration for Industry and Commerce and starts the formal operation.

To set up a GA enterprise, the applicant must apply to an RA for an AOC for general aviation and apply to the local Administration for Industry and Commerce for its company business licence. As to GA operations requirements, the GA enterprise must be a legal person, the legal representative must be a Chinese citizen and the staff chiefly in charge shall have appropriate aviation expertise. The registered capital must comply with relevant laws and regulations and the equity fund for the GA enterprise to purchase aircraft (including facilities and equipment) must meet certain requirements (e.g., 50 million yuan for enterprises undertaking business aviation). It must have two or more airworthy aircraft registered in China and have qualified personnel, airport, facilities and equipment.
Services operated by an established public air transportation/GA enterprise requiring a licence include operation qualification of carriers, scheduled and unscheduled domestic and international air transportation, dangerous goods transportation, airport construction and operation.

In addition, based on the overall economic situation of China’s civil aviation industry, the CAAC might promulgate regulatory measures over market access for a certain period of time, controlling the number of newly established aviation enterprises by raising more specific requirements.

### ii Ownership rules

The Civil Aircraft Nationality Registration Ordinance of China and the Regulations on the Civil Aircraft Nationality Registration provides that civil aircraft owned by Chinese state institutions, Chinese corporations and individuals must be registered in China. Civil aircraft must not have dual nationality, and civil aircraft nationality registration must not be used as evidence of ownership.

For ownership registration, the following documents are required:

- the individual identification or business certificate;
- the nationality registration certificate; and
- documentary proof that the ownership has been obtained.

### iii Foreign carriers

As per the Provisions on Licensing the Operation of Flight Routes by Foreign Air Transport Enterprises, if a foreign airline applies to operate a prescribed flight route between a foreign location and a location in China, it must comply with the bilateral civil air transport agreement, and must be first designated by the government of its home country through diplomatic channels, except as otherwise provided. After that, the foreign airline must apply to the CAAC for the AOC.

After the AOC is obtained and before the actual operation, the airline must:

- obtain the Operating Norms for Foreign Air Transportation Carrier, as approved by the CAAC;
- file for record with the CAAC its security plan; and
- apply for slots and the price.

As to the unscheduled flights between locations in the foreign country and China, the foreign airline must obtain the AOC and get examination and approval as per the Rules on the Examination and Approval of the Operation Certification of Foreign Public Air Transportation Carriers (CCAR-119TR-R1).

In addition, foreign airlines may not engage in scheduled or unscheduled flights between two locations in China, unless for very special reasons such as rescue and relief and as approved by the CAAC.

### IV SAFETY

#### i Incident reporting

According to the Regulations on the Reporting, Investigation and Disposition of Work Safety Accidents by the State Council, the Regulations on the Investigation into Civil Aircraft Flight Accidents and Incidents and the Regulations on the Investigation Schedule on Civil
Aircrafts Incidents by the CAAC, where such incident takes place, it must be immediately reported to the relevant government departments (including the Work Safety Administration Departments and the RAs) and the police, the worker’s union and the People’s Procuratorate. Contingency plans must be triggered and efficient measures must be taken to prevent the accident from escalation and reduce casualties and property losses.

Afterwards, investigations must be made in a timely manner and accurately, in order to find out the truth, the reason and the loss, to summarise lessons from the accident and to propose corrective measures. Investigation into extraordinary serious accidents shall be undertaken by the State Council or its authorised department.

ii Airworthiness and maintenance

As outlined in the Regulations for the Administration of the Airworthiness of Civil Aircraft, all units or individuals that are engaged in the designing, manufacturing, use and maintenance of civil aircraft (including aircraft engines and propellers, and the same hereinafter) within China, all units or individuals that export civil aircraft to China, and all units or individuals that perform outside China maintenance services to aircraft registered in China, must abide by these Regulations. For example, with regard to the export and import of aircraft, a certificate of airworthiness for export or import must be obtained from the CAAC beforehand. As to the use of aircraft, the certificate of airworthiness issued by the CAAC must be obtained before its use, in which the type of civil aircraft, validity period, safety requirements and other conditions and restrictions are stated.

V INSURANCE

As to the insurance, the CAL only stipulates that liability insurance for the third party on the ground is universally required. In addition, other regulations require other insurance for different types of operators, for example:

a hull insurance, hull risk insurance and legal liability insurance are required for those carriers or operators undertaking international air transportation, according to the Regulation on Scheduled International Air Transportation; and

b hull insurance and legal liability insurance are required for those foreign operators undertaking unscheduled air transportation of passengers, baggage, cargo and mail, according to the Detailed Rules for the Business Licensing for Non-scheduled Flights of Foreign Air Transport Enterprises.

There is no circumstance under which the insurance obligation could be exempted except if similar government indemnity is provided and considered acceptable by the CAAC.

Generally, a certificate of insurance would be used as the proof of insurance, whether the original or a photocopy consistent with the original. But copies of the insurance policies may also be required at the sole discretion of the competent authorities.

VI COMPETITION

The Antimonopoly Law (AML) is the special law regulating monopolistic activities. The State Administration for Market Supervision (SAMS) is responsible for the enforcement of the AML.
Where the concentration of business operators satisfies a certain threshold, they must file an application to the SAMS for approval.

The competing business operators are prohibited from reaching monopoly agreements that may eliminate or restrict competition. But a monopoly agreement can be exempted if it falls into certain categories, such as improvement of technology, quality and efficiency. The SAMS proactively, and on its own initiative, investigate business operations they suspect may be monopolistic. Those who undertake monopoly agreements may face severe punishment if they cannot be exempted according to law.

In terms of monopolistic behaviours, only administrative responsibilities and civil liability can be imposed, but no criminal liability. However, those who refuse or hinder the investigation by the antimonopoly law enforcement agencies may be held criminally responsible.

VII WRONGFUL DEATH

Where the victim suffers bodily injury or death, the liable party shall pay for the funeral expenses, the living expenses of the persons in need of the victim's maintenance and upbringing, the death compensation expenses, the traffic expenses and accommodation expenses paid by the victim's relatives for funeral matters, compensation for psychological damages and their loss of income resulting from missed working time, and other reasonable expenses. The death compensation shall be based on the average annual disposable income of the urban residents or net income of the rural residents in the previous year at the locality of the court seized of the case.

VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

In China, aviation-related disputes are solved by litigation or arbitration (where a binding arbitration agreement exists) according to the Civil Procedure Law and the Arbitration Law. In the case of litigation, such disputes are to be filed with normal courts (e.g., there is no special court for civil aviation as there is for maritime-related disputes). Generally speaking, a first-instance trial takes place and any party that disagrees with the first-instance judgment can file an appeal with the superior court. The second-instance judgment is the final judgment. Normally, the first-instance trial shall take place within six months, which can be extended by another six months in special cases, and the second-instance trial should last no longer than three months.

In the case of arbitration, an arbitration award is final and binding. The timelines of arbitrations are subject to rules of the arbitration organisation.

The limitation of action, as per the CAL, is two years, counting from the day of arrival of the aircraft, or its scheduled arrival, or the termination of the shipment. The compensation claim time limit for injury and damages of the third person on the ground is two years, counting from the day the injury or damage occurs, and it should not exceed three years under any circumstances. With regard to other types of action that are outside the ambit of the CAL, the time limitation shall be three years generally, according to the General Provisions of the Civil Law, which came into effect as of 1 October 2017.
Carriers’ liability towards passengers and third parties

Regarding damage to the third person on the ground, the operator shall be responsible. The registered owner shall be deemed to be the operator, unless proved otherwise. Employees or agents shall not be responsible, unless they are proved to have caused the damages intentionally. In addition, the third person could file the lawsuit against the insurer or guarantor if the operator is bankrupted.

Carriers’ liability towards passengers is strict liability. A carrier should assume liability for casualties among the passengers owing to accidents on the aircraft or during their boarding or alighting, unless the casualties arise entirely from health reasons on the part of passengers or their intention. A carrier should assume liability for the destruction, loss or damage of the carry-on articles of passengers owing to accidents on the aircraft or during their boarding or alighting, unless they have resulted entirely from the natural properties, quality or defects itself.

As to the limitation of liabilities, for domestic transportation, the liability limitation for passengers is 400,000 yuan per passenger, 3,000 yuan for carry-on baggage and 100 yuan per kilogram for cargo; and for international transport, the liability limitation for passengers is 16,600 special drawing rights (SDR) per passenger, 17 SDR per kilogram for cargo and 332 SDR for carry-on baggage.

The liability for the injury or damages to the third person on the ground is also strict. The victims of personal injury or death or loss of property on the ground (including water surface) caused by in-flight civil aircraft or falling people or things from in-flight aircraft have the right to acquire indemnity for the damages, unless it is not a direct result of the accident responsible for the injury or damage, or it is only a result of the passage of the aircraft in the air in conformity with the state rules of air traffic. There is no such liability limitation.

Normally, the carrier bears civil liability. However, if extraordinary loss or casualty has been caused because of intention or significant negligence of the carrier or its employee, they may be held criminally liable.

Product liability

Product liabilities are mainly stipulated in the General Principles of Civil Law, the Product Quality Law and the Tort Liability Law. Under these laws, the manufacturer is obliged to compensate for injury or damage arising from defective products. Therefore, in air transport, if the loss of or damage to the passengers or the aircraft owner or operator resulted from the defect of the aircraft or its parts, the manufacturer of the aircraft or its parts shall be responsible for compensation. In addition, if the manufacturer knows of the defect and still sells the aircraft or part to the owner, the owner or the passenger could request punitive compensation, the standard of which is yet to be stipulated by law.

Compensation

For loss of or damage to property, the liable party shall compensate the loss.

For personal injury, the liable party shall compensate medical expenses, loss of income, nursing care, necessary transportation and accommodation, and nutrition fees, etc.

Where the victim becomes disabled because of an injury, the liable party shall pay the compensation for disability, expenses of aid for disability, the living expenses of the person in need of his or her maintenance and upbringing, the necessary healing expenses that actually occurred for healing and nursing, continuing treatment, nursing expenses, and the follow-up treatment expenses.
Compensation for spiritual damages shall also be paid, but the amount will be subject to court decision.

Thus, factors that influence the level and amount of the compensation include the severity of injury, the victim’s income and the living standards where the victim lives.

Furthermore, for those injured or deceased victims who have paid social insurance in China (social medical insurance included), they can get compensation from China’s social insurance fund, which shall be entitled to recovery from any liable third party.

IX DRONES

The CAAC has promulgated a series of regulations and normative documents to implement better overall management of drone operations, including the Regulations on Real-name Registration of Civil Unmanned Aerial Vehicles, Management Procedures for Trial Operation of Specific Types of UAVs (Interim), etc, in which the real-name registration system for drones has been established and training for drone operators and certification management has been carried out.

To provide a legislative framework for the supervision of drones, the Civil Aviation Law was amended on 29 December 2018 with the addition of Article 214, authorising the State Council and the Central Military Commission to develop dedicated regulations for drones.

X THE YEAR IN REVIEW

In the past year, some events of far-reaching significance have taken place, in particular the following:

a The CAAC is encouraging the development of GA and a series of regulations regarding the development of GA were revised or issued in 2018 to simplify the airworthiness approval procedures, streamline the application procedures for the approval of commercial transport operation of small aircraft and reduce certain requirements.

b On 12 October 2018, the CAAC reissued a special paper on low-altitude airspace, the Overall Plan for the Development of Low-Altitude Flight Service Support System, to resolve current issues in low-altitude airspace management. These include the construction of low-altitude flight service support systems, the upgrading of service support capacity, and effective development and utilisation of low-altitude airspace.

c The revised Regulations on the Allocation and Use of International Aviation Rights Resources were implemented on 1 October 2018. The revised Regulations clarify that international routes are clarified as Class 1 or Class 2. Different conditions are imposed on different air routes. On Class 1 international routes, the Regulations do not limit the number of designated carriers, flight schedules, operating frequencies or capacity arrangements. Competition will be gradually introduced into Class 2 international long-haul passenger routes. For Class 2 international long-haul passenger routes already operated by existing air transport enterprises, a new carrier can be added only if required standards are met. This will gradually break the monopoly of one carrier for one long-haul international route and encourage more carriers to fly these routes.

d The Programme of Flight Slot Resource Allocation for Operation Transfer to Beijing Daxing International Airport and Beijing ‘One City Two Airports’ Operation and the Programme of Resource Coordination during the Phase of Operation Transfer of the ‘Two Airports in One City’ of Beijing, issued on 3 January 2019, have planned the
operation of the ‘Two Airports in One City’ scheme for Beijing. Chinese and foreign airlines that are willing to be transferred to Daxing International Airport according to the requirements will be given priority to adjust the slots structure and obtain new slots accordingly, so as to encourage airlines to transfer to Daxing International Airport as soon as possible.

XI OUTLOOK

In the near future, special attention should be paid to the following:

a. In order to become more open to the rest of the world, actively promote foreign investment, protect the legitimate rights and interests of foreign investors, and regulate the administration of foreign investment, the 13th National People’s Congress passed the Foreign Investment Law on 15 March 2019. The Law will take effect on 1 January 2020 and will replace the three currently effective laws on foreign investment, namely the Law on Chinese-Foreign Equity Joint Ventures, the Law on Wholly Foreign-Owned Enterprises and the Law on Chinese-Foreign Contractual Joint Ventures. The State Council plans to amend relevant supporting regulations and policies to ensure the implementation of the Law.

b. The Ministry of Transport is drafting the Transport Law as the fundamental and comprehensive law regulating transport activities.
Chapter 12

CYPRUS

Christos Clerides and Andrea Nicolaou

I INTRODUCTION

Air transport is the main mode of transport to and from Cyprus carrying almost the entire passenger traffic. Airport passenger numbers consistently grow, despite the adverse market conditions, while in 2018 a record number of almost 11 million passengers were handled by the island’s two airports, Larnaca and Paphos. The growth in the aviation sector is a global phenomenon and Cyprus is considered a viable alternative for the creation of ownership, leasing and finance structures.

Following Cyprus’ accession to the European Union, the status of the operation of flights within the EU has been liberalised resulting in an increase in competition. The government has advanced the modernisation process of the two airports by selecting the private consortium Hermes Airports to undertake the construction and modernisation of new facilities.

To achieve an optimised use of airport capacity and to avoid congestion on the premises of the airports, slot allocation, as provided by EU Regulation No. 95/93, is in force. Moreover, as regards allocation of scarce traffic rights, Ministerial Decree 208 was published, aiming to determine the procedure and criteria for granting access licences to Community carriers established in the Republic.

The legal framework for air transport in Cyprus is governed by EU legislation and international conventions and agreements on air transport and the Civil Aviation Law No. 213(I)/2002 (the Civil Aviation Law).

The competent authority on aviation matters is the Department of Civil Aviation (DCA), which is responsible, inter alia, for the supervision and operation of the country’s airports, the development of air links between Cyprus and other countries, the provision and regulation of air traffic services, the development, design and supervision of the aviation security system, and the issuing and update of licences to Cypriot or foreign air carriers. Safety and security regulation and the implementation of Community legislation on air transport, including EU restrictive measures, are also among the DCA’s main activities. The DCA also remains in continuous coordination with other governmental departments, bodies as well as international organisations to which Cyprus is a member.

1 Christos Clerides is the managing partner and Andrea Nicolaou is an advocate at Phoebus, Christos Clerides & Associates LLC.
3 As amended. Also, the IATA Worldwide Slot Guidelines and the best practices of the European Airport Coordinators’ Association (EUACA) are applied.
II LEGAL FRAMEWORK FOR LIABILITY

The key legislation in Cyprus is the Civil Aviation Law, which is fully harmonised and aligned with the acquis communautaire on air transport. The implementation of the acquis is a dynamic process and the DCA is continuously monitoring and following the new developments.

In accordance with the established principle of the Supreme Court’s case law, community law is superior to the national law. Furthermore, international treaties to which the Republic has acceded, have increased force over any other domestic law, but not over Community law. Cyprus has implemented most international law instruments, which are applied as part of the Cypriot legal order.

i International carriage

The key treaties on international air carriage that Cyprus has embodied are: set out below:

a The Convention for the Unification of certain rules relating to international carriage by air, commonly known as the Warsaw Convention 1929, was ratified by the 1953 Decree on Air Carriage.


e The Convention for the Unification of certain rules for international carriage by air, known as the Montreal Convention 1999 has become a part of the Cyprus legal order through Law No. 2(III)/2002.


g Law No. 31/1972 embodies the Convention on Offences and Certain other acts committed on board aircraft (Tokyo Convention 1963).


j Law No. 33(III)/2001 adopts the 1988 Protocol relating to suppression of unlawful acts against the safety of civil aviation.

k Law No. 10(III)/2018 ratifies the Convention on the suppression of unlawful acts relating to international civil aviation.

ii Internal and other non-convention carriage

Article 285 of the Civil Aviation Law stipulates that the scope of application in the Republic of the provisions of the Conventions of Chicago 1944, Tokyo 1963, Hague 1970 and

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4 As incorporated into Article 1A of the Cyprus Constitution.
5 Article 169.3 of the Constitution.
Montreal 1973 are extended so that they apply not only to international flights but also to domestic flights. Further, Article 231(2) of the said Law underlines that the provisions of the Montreal Convention 1999 also cover the internal air carriage.

iii General aviation regulation

The Civil Aviation Law regulates all relevant matters, including aircraft registration, airworthiness, maintenance and other safety rules, training of the aircraft crew, responsibilities and liability of the captain, airports’ operation and fees, ground handling, landing and takeoff rules, air carriers, environmental protection, civil liability of air carriers and protection of the civil aviation. Each section is also governed and supplemented by the corresponding Regulatory Administrative Acts (RAA) as well as the relevant EU and international instruments.

The term ‘aircraft’ under the ambit of the Civil Aviation Law, implies any device capable of flying at least 30 metres above the ground and includes balloons, airships, gliders, kites, landplanes, seaplanes, seaplanes, amphibian aeroplanes, propeller driven aeroplanes, jet powered aeroplanes, helicopters and gyroplanes. The provisions relating to liability apply to all aircraft under the Civil Aviation Law’s meaning.

iv Passenger rights

The Flight Compensation Regulation No. 261/2004 relating to denied boarding, flight cancellations, or long delays of flights is applied in Cyprus through RAA No. 283/2005. Moreover, Regulation No. 2111/2005 on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier is embodied by RAA No. 541/2007. Regarding the rights of disabled persons and persons with reduced mobility when travelling by air, Regulation No. 1107/2006 is applied through RAA No. 287/2008.

The DPA is responsible for implementing the above Regulations in a case where the passenger departs from Larnaca or Paphos Airport or from a third-country airport to those airports and the air carrier is a Community carrier.

Passengers have the right to lodge a complaint to the DPA in the case of an alleged violation. If a violation is found, the passenger is entitled to the compensation provided. Also, the offender is subject to administrative sanctions. Such a sanction may result in the imposition of a fine or the suspension or revocation of a licence.

v Other legislation

Regarding employment law, the Organisation of Working Time of Flying Personnel of the Civil Aviation Law No. 12(I)/2004 is relevant. The said Law lays down the minimum health and safety requirements and covers issues such as annual leave, working rates, maximum working time, medical examinations, and the role and powers of inspectors.

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6 Article 2.
7 Articles 243, 245 and 246 of the Civil Aviation Law.
8 The fine shall not exceed the amount of €8,543 or 10 per cent of the annual turnover in the field of activity of the affected company – Article 246.
9 Article 245 of the Civil Aviation Law.
Moreover, Chapter 24 of the Civil Aviation Law makes provision as to the protection of the environment. In particular, Article 190 confers an obligation upon airport operators, aircraft owners and captains to avoid and reduce environmental pollution caused by the emission of inevitable noises, vibrations or gases. In this area, the Evaluation and Management of Environmental Noise Law No. 224(I)/2004 requires, inter alia, the determination of exposure to noise emitted by means of air traffic through noise mapping.

Competition law issues are analysed under Section VI.

III LICENSING OF OPERATIONS

i Licensed activities

According to Regulation (EC) No. 1008/2008, the air operator is required to obtain an operating licence and an air operator certificate (AOC). The licensing of air carriers falls under the responsibility of the Air Transport Licensing Authority (ATLA). An air carrier is licensed after securing an AOC from the DPA, which in fact certifies that the air carrier has the professional capacity and organisation to ensure the safe operation of aircraft for the aviation activities mentioned in it. The conditions and procedure for issuing, suspending and withdrawing an AOC are defined in the JCAA Regulations, which are in force in the Republic.

Once the AOC has been issued, the applicant must also acquire an operating licence, which allows the air carrier to provide air transport services as specified in it. Article 113 of the Civil Aviation Law provides that the operating licence is issued, suspended and revoked in accordance with the provisions of Regulation (EEC) No. 2407/92.

The air carrier's operating licence may be suspended or revoked if the operator is committing serious or repeated breaches of its obligations under the Civil Aviation Law or EU law.

ii Ownership rules

Registration, transfer and deletion of the aircraft and of its rights, as well as every modification of the submitted data, are recorded in the Cyprus Aircraft Register, which is kept by the DCA.

The conditions under which an aircraft can be registered in the Cyprus Registry are specified under Section 11 of the 2002 Law, as follows:

a the aircraft must not be registered in a foreign registry;
b the aircraft has a valid certificate of airworthiness;
c the aircraft's environmental compliance is attested by noise certification; and
d the aircraft's owner with a stake greater than 50 per cent or holder of the rights to acquire them is a natural person of Cypriot nationality, or an EU national, even if not residing or staying in the Republic; or a body corporate that has been incorporated under Cyprus law or a Member State law; has its registered office and main place of business in Cyprus or Member State territory; and of which more than 50 per cent of the assets and capital are held by Cypriot or EU nationals.

10 ibid., Articles 2 and 123.
12 Article 247(4) of the Civil Aviation Law.
The registration procedure is contained in Aeronautical Circular (AIC) No. C004/2010. Persons wishing to register an aircraft in Cyprus should submit an application at least three weeks in advance, accompanied by the documents listed in the Circular. Applicable registration and certification fees are specified in the Civil Aviation Fees Regulations No. 458/2004.

iii Foreign carriers

The Cypriot national procedure and criteria for the allocation of limited air traffic rights is included in Ministerial Decree No. 406/2008. Any Community carrier with an AOC and a valid operating licence issued by a Member State under Regulation (EEC) No. 2407/92, which is established in Cyprus, may apply to the DCA for an access licence for available commercial rights and any new commercial rights granted under the relevant bilateral aviation safety agreements.

The ATLA is responsible for granting commercial rights to foreign airlines to perform flights to and from Cyprus. In the case of third countries that have accepted the right of other Community air carriers to operate routes from Cyprus, a recommendation is made by an evaluation committee to the Minister of Communications and Works for granting permission to access such commercial rights.

IV SAFETY

Under Articles 23 and 28 of the Civil Aviation Law, only persons who have successfully completed initial and periodic recurrent training may be employed as cabin crew members of an aircraft carrying passengers. Such training shall be provided by the aircraft operator after approval by the DCA and necessarily includes flight safety and first aid tasks. For flight crew and aircraft maintenance engineers licensing, the owner must contact the Licensing Section of the DCA's Safety Regulation Unit. All procedures regarding pilots’ licensing and approved training organisations’ approval are in accordance with Regulation (EC) No. 1178/2011. The applicable registration and certification fees are specified in Civil Aviation Fees Regulations No. 458/2004. Organisations involved in the training of such personnel (ATOs) shall be approved in accordance with the above Regulation. ATOs are issued with an approval certificate displayed at their offices, detailing the approved courses, which may include flight training for both the pilot and commercial pilot qualifications. Chapters 5 and 6 of the Civil Aviation Law include detailed provisions for the aircraft crew licences and training requirements.

As regards aircraft maintenance engineers’ licensing, the applicable procedures and required qualifications are in accordance with Commission Regulation (EC) No. 1321/2014. AIC C009/15 contains the policy details followed by the DCA.

Furthermore, an aircraft may operate only if it is equipped with a valid certificate of airworthiness issued, extended, renewed, validated or recognised under the civil aviation law of the country in which that aircraft is registered and complies with the conditions under which the certificate of airworthiness was issued. The certificate of airworthiness is governed

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13 OJ EU 10 March 2009 C56/37.
14 Article 5 of the 2008 Decree.
by Article 16 of the Civil Aviation Law and the EASA Regulations. The aircraft owner must contact the Airworthiness Section of the DCA. An airworthiness inspector will be assigned, who will be in charge of the certification process.\(^{16}\)

Everyone involved with aviation in any capacity, including owners and operators, has a duty to report incidents and occurrences that could affect flight safety. The DCA operates a system for collecting occurrence reports in accordance with Civil Aviation (Incident Reporting) Regulations No. 334/2005. To that end, the Aircraft Accident and Incident Investigation Board (AAIIB) has been appointed as the appropriate official authority for the evaluation and analysis of the incidents that are mentioned in the Regulation and recommending the implementation of any preventive actions it considers necessary to be taken promptly to enhance aviation safety. It operates under Annex 13 to the Chicago Convention, EU Regulation No. 996/2010 and the Cyprus Aircraft Accident and Incident Investigation Law No. 73(I)/2015. The AAIIB, as the official investigation body, is obliged by the Regulation to publish a safety review annually in order to inform the public of the general aviation safety level at national level.

V INSURANCE

Under Article 121 of the Civil Aviation Law, an air carrier shall be fully insured against risks for which it is liable in the event of accidents. This insurance obligation must be interpreted as meaning that every air carrier is required to be sufficiently insured so that all natural persons entitled to compensation receive the full amount they are entitled to.\(^{17}\)

Each air carrier is required, upon request by the competent authority, to produce at any time an insurance document showing that the required insurance cover is complete and valid.\(^{18}\) Those responsible for the construction, reconstruction or extension of airports, as well as the ground handling service provider, have an obligation to insure.\(^{19}\)

Insurance requirements for air carriers and aircraft operations are contained in AIC No. 13/2005. In particular, Regulation (EC) No. 784/2004 applies, which defines the minimum insurance requirements to cover passengers, baggage, cargo and third parties. For liability in respect of passengers, the minimum insurance cover shall be 250,000 special drawing rights (SDR)\(^{20}\) per passenger. In respect of liability of third parties, the Circular also states the minimum insurance cover per accident for each aircraft.

\(^{16}\) AIC 004/10, Section 2.

\(^{17}\) Article 241(1) of the Civil Aviation Law.

\(^{18}\) ibid., Article 241(2).

\(^{19}\) ibid., Article 241.

\(^{20}\) The currency value of the SDR is determined by totalling the values in US dollars, based on market exchange rates, of a basket of major currencies. The SDR currency value is calculated daily and the valuation basket is reviewed and adjusted every five years (https://www.imf.org/external/np/fin/data/rms_sdrv.aspx).
VI  COMPETITION

As regards the application of competition law and state aid laws, the competent authority in Cyprus is the Commission for the Protection of Competition (CPC). The relevant provisions are included in the Protection of Competition Law No. 13(I)/2008. Articles 101, 102, 107 and 108 of the Treaty on the Functioning of the European Union (TFEU) are also applicable.

Given the liberalisation of air transport, fresh opportunities continuously arise for air carriers to take a stand in the competitive Cypriot air transport market. Notably, the European Commission in its Decision 2015/1073 found that Cyprus illegally granted state aid to Cyprus Airways (€66,090,000 in total) in breach of Article 108(3) TFEU, distorting the free competition in the market of air transport in Cyprus and the EU. Given that Cyprus Airways was unable to return the illegal state aid, it eventually went bankrupt.

Moreover, the European Commission underlines that ‘the availability of competitive airport services, including runways, passenger terminals and groundhandling, is critical for the continued success of EU aviation.’ Hermas Airports Ltd (Hermes) has the exclusive management rights of Larnaca and Pafos Airports, under a concession agreement with the Republic. Remarkably, following complaints by a private company against Hermes, the CPC decided that Hermes breached Article 6(1)(a) of Law No. 13(I)/2008 due to abuse of its dominant position regarding parking facilities at Larnaca Airport. The Commission considered the nature and gravity of the infringement and decided to impose an administrative fine of €1,193,864.

VII  WRONGFUL DEATH

An air operator has the obligation to make, without delay, and in any event within 15 days of the identification of the person who is entitled to claim compensation, the necessary advance payment to meet the immediate economic needs, depending on the suffering of the injured person. In the case of aircraft resulting in death of passengers, the deposit shall not be less than the equivalent amount of 15,000 SDR per passenger. Nevertheless, the advance payment does not necessarily constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier, who is subsequently found liable. The advance payment shall not be reimbursed except in circumstances where it is subsequently established that the person who received the payment caused or negligently contributed to the damage or was not entitled to compensation.

In August 2005, an aircraft operated by Helios Airways Ltd, which was scheduled to fly from Larnaca to Athens, crashed near Athens. In Omiros Christodoulou a.o. v. A.G. of the Republic of Cyprus, the children of two of the passengers killed brought an action against the Republic claiming damages for bereavement. In July 2007, the claimants received from the airline’s insurance company a total amount of €1,778,585 due to their parents’ death. Given that, the District Court preliminarily rejected their action, since it found that the claimants,

22 The full judgment is available on the CPS’s website in Greek (dated 16 May 2018).
23 Article 240.
25 Article 58, Cap. 148.
by receiving the said amount as compensation in full and final settlement of all and any claims in respect of their parents’ death, were estopped from claiming damages for the same rights for which they had already been compensated.

VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

The passenger can bring an action before the competent Cyprus courts based on the breach of contractual obligations under Contract Law, Cap. 149 or for the breach of duty (torts) under Civil Wrongs Law, Cap. 148. A recent case is that of *Cyprus Airways Ltd v. Stelios Kourouklides.26* In this case, the Supreme Court of Cyprus concluded that Cyprus Airways had breached its contract with the claimant, regarding his return from London to Larnaca, since the captain of the aircraft unjustifiably and wrongfully denied them boarding on the aircraft. The Court awarded the amount of €350 as general damages, because of the inconvenience, discomfort, frustration and distress suffered as a result of the breach of contract. The Supreme Court also considered that Regulation No. 261/2004 was applicable and awarded the amount of €600 as compensation.

Another possible way to resolve disputes regarding air carrier liability is the procedure provided for under Regulation (EC) No. 861/2007 establishing a European Small Claims Procedure, provided that certain conditions are met. This procedure was applied in *Constantinos Papaleontiou v. LOT POLISH AIRLINES*27 and was conducted based on both parties’ written proposals and the Court’s decision was handed down within 30 days. In this case, the claimant concluded a contract with the defendant for the transfer of his family and himself from Cyprus to France. When they arrived in France, it was found that their luggage had not arrived. The Court examined the provisions of the Montreal Convention, which affected the parties’ contractual relationship, and found the air carrier liable for the damage occasioned by the delay in the carriage by air of the claimant’s baggage under Article 19. The District Court awarded the amount of €924.74 as compensation for the costs incurred due to the delay in the baggage arrival, including the costs for buying a phone charger. However, the Court refused to award compensation regarding the costs of renting a navigational device because his own device was in the luggage, on the ground that the claimant had contractually assumed that such an electronic device would not be carried in his luggage, therefore not complying with that term of the contract contributed to his loss.28

In Cyprus, the limitation periods for actionable claims are regulated by the Limitation of Actionable Rights Law No. 66(I)/2012. For instance, the default limitation period for tort claims is six years from the completion of the cause of action, but exceptions do apply. If the claim is related to personal injury or death, the court has discretion to extend the relevant limitation period, under certain conditions.

Article 35 of the Montreal Convention provides that any court action to claim damages must be brought within two years of the date (or expected day) of arrival of the aircraft. As decided by the ECJ,29 the national law of the Member States on the limitation of actionable rights applies, instead of Article 35 of the Montreal Convention, only when the nature of

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28 Article 20 of the Montreal Convention.
the claimant’s claim for compensation does not fall within the scope of the Regulation (EC) No. 2027/97 and the Montreal Convention or when there is no provision on the limitation period. Hence, given the hierarchy of the rules of law in Cyprus, where the EU Regulation or the Montreal Convention, or both, do apply, the Article 35 provision on limitation of actions outweighs the relevant provisions under national legislation.

A relevant case on the matter is that of Leontiou Papamina v. 1. Swissport Cyprus Ltd and 2. Cyprus Airways Public Co Ltd. In this case, the claimant asked for damages for personal injuries suffered due to the defendant’s alleged negligence, while he was embarking on an aircraft owned by Cyprus Airways. Following an objection raised by the defendants, the Court considered that the claim falls within the scope of Regulation (EC) No. 2027/97 and the Montreal Convention and thus it should have been filed within the two-year limitation period set out in Article 35. The claimant failed to comply with the above provisions, and thus the proceedings in respect of Cyprus Airways were dismissed.

According to Article 239 of the Civil Aviation Law, it does not follow that the air carrier is the only one liable for compensation. Article 17 of the Montreal Convention also states that it is the carrier who has tortious liability for the damages sustained under the conditions specified in it. Nevertheless, as Article 30 of the Montreal Convention stipulates, if an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that they acted within the scope of their employment, shall be entitled to avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under the Convention. Although the provisions of the Montreal Convention may limit the nature of the claim that may be made against a servant or agent of the air carrier, the question of their liability is a matter decided under the provisions of national law and as reported by the UK Supreme Court in Western Digital Corporation a.o. v. British Airways plc, such persons do not enjoy the protection of the provisions under the Montreal Convention beyond that under Article 30.

### ii Carriers’ liability towards passengers and third parties

According to the general rule, as under Article 232(1) of the Civil Aviation Law, each air carrier shall be liable for compensation for a passenger’s death or personal injury caused by an air accident, provided that the accident causing death or injury occurs onboard the aircraft or in the course of any of the operations of embarking or disembarking, for damage sustained by delay; and for destruction, loss of, damage to or delay caused during the carriage of checked baggage.

It is further specified that in the event of damage sustained by delay as well as liability for baggage, the air carrier is required to notify the passenger as to the receipt and examination

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30 Action No. 424/2012, 23 June 2017.
32 Governed by the provisions of Articles 17, 20 and 21 of the Montreal Convention (Article 236 of the Civil Aviation Law).
33 Articles 19, 20, 22(1), (5) and (6) and Article 31 of the Montreal Convention apply (Article 237 of the Civil Aviation Law).
34 Governed by the provisions of Articles 19, 20, 22(2), (5) and (6) and Article 31 of the Montreal Convention (Article 238 of the Civil Aviation Law).
of the complaint within 14 days. Within a further 30 days, the air carrier shall notify the passenger of its final decision and, upon acceptance of liability, proceed to the corresponding payment.\(^\text{35}\)

As stipulated by Article 233, the carriers’ liability is strict, hence not based on fault. It is further mentioned\(^\text{36}\) that the carriers shall be wholly or partly exonerated from their liability to the claimant, in the event it is proved that the damage was caused or contributed to by a wrongful or negligent act on behalf of the latter.\(^\text{37}\)

Article 104 provides for the right to claim compensation when a person suffers loss or damage, caused by forced landing, re-takeoff or removal from an aircraft. The Act’s provisions relation to aircraft liability are applied \textit{mutatis mutandis}.

The 2002 Law states that the Criminal Code also applies in the field of civil aviation.\(^\text{38}\) The relevant provision for criminal liability is Article 250, which states that the person who commits one of the offences listed within it shall be punished by imprisonment for a period not exceeding two years or a fine not exceeding €2,600, or both. When a pilot is punished for one of the offences stated, the owner and operator of the aircraft shall be punished with the same penalties, provided they tolerated the pilot’s criminal conduct.

iii Compensation

Under Article 21 of the Montreal Convention, the carrier is strictly liable without proof of fault for passenger injury or death up to provable damages of 100,000 SDR. If damages exceed 100,000 SDR, the carrier can excuse its liability by proving such damage was not due to the negligence of the carrier or its agents, or that it was due to a third party’s negligence.

Importantly, a contractual clause that relieves the air carrier or its agents of liability or fixes a lower limit of compensation than that which is laid down in the Montreal Convention is null and void.\(^\text{39}\)

The court will assess whether damages can be recovered for loss of earning capacity, pain and suffering, loss of expectation of happiness, etc. As regards the Cyprus courts’ approach, the modern tendency is to increase the amount of compensation awarded, ensuring a fairer and more liberal assessment of human pain. The courts have the power to award general damages, whose purpose is to safeguard justice and compensate the inconvenience and discomfort experienced by the innocent party without, however, placing an excessive burden on the wrongdoer.\(^\text{40}\) The compensation should be fair, reasonable and socially acceptable. Based on the established case law, in the event of a breach of contract, the courts can award damages for mental distress due to discomfort, inconvenience or any other damage caused to the claimant. For instance, in \textit{Marcos Pantelides a.o. v. Aerotrence Aviation \& Tours Ltd a.o.,}\(^\text{41}\) the District Court awarded the amount of €1,000 to each claimant for the psychological distress

\(^{35}\) Article 237(2) and 238(2) of the Civil Aviation Law.

\(^{36}\) Article 234 of the Civil Aviation Law.

\(^{37}\) Article 20 of the Montreal Convention.

\(^{38}\) Article 27(4).

\(^{39}\) Article 235.

\(^{40}\) Ioannou a.o. v. Kapsis Travel and Trade Ltd (2003) 1 AAD 52.

\(^{41}\) Action No. 914/04.
and physical inconvenience caused to them during a flight operated by the defendants. This kind of compensation should not be too remote a consequence of the defendant’s breach and has been characterised by common law as ‘modest compensation’. 42

Moreover, punitive damages may also be claimed, but they can only be awarded where the defendant’s conduct is so reprehensible that it is appropriate to be punished by a civil court. Such conduct is accompanied by strong elements of arrogance and tends to humiliate the victim. 43

IX DRONES

The use and operation of unmanned aircraft (drones) in the airspace of the Republic of Cyprus is governed by the Civil Aviation Law, Ministerial Decree No. 402/201544 and Civil Aviation Decision No. 403/2015, 45 which aims to ensure the safety of flights within Cypriot airspace. Drone owners are expected to register, with no charge, their aircraft with the DCA through the website www.drones.gov.cy.

The use of drones for recreational purposes is allowed without authorisation from the DCA, while the commercial use of drones requires, under certain circumstances, the securing of an operating licence and that the operator hold a pilot licence, 46 both issued by the DCA. For this purpose, the legislation distinguishes between open and special category drones.

For safety purposes, all flight operations of such aircraft shall be carried out in accordance with the conditions defined under Section 6(3)(i) to (xvi) of Decree No. 402/2015. Among others, a safety distance of at least eight 8 kilometres from an airport or landing strip shall be maintained, while flights above, within, or in proximity to military installations, public utility installations, archaeological sites and public or private facilities, are not permitted.

The pilot licence requires that the owner or operator provides for insurance cover against death, personal injury and damages, caused to third parties, for the minimum amount of €1 million. 47 Currently, the DCA does not recognise drone pilot licences of other countries and the process of issuing a commercial drone licence is currently taking up to one year.

Owners and operators of drones who fail to comply with the provisions of the applicable legislation are committing an administrative offence and will be subject to penalties in accordance with Articles 245 to 247 of the Civil Aviation Law. 48

X VOLUNTARY REPORTING

Besides the mandatory reporting system, Regulation No. 334/2005 sets up a voluntary reporting system for collecting and analysing information on observed deficiencies in air transport, for which reporting is not required on the basis of the mandatory reporting system.

44 Conditions for the Operation of Unmanned Aerial Vehicles in the Republic.
45 Exemption of Unmanned Aerial Vehicles from Obligatory Registration.
46 Section 7(2) and (4).
47 Section 9.
48 Section 8.
Cyprus

which, however, are considered to be dangerous or potentially dangerous. The procedures governing the voluntary reporting system are the same as those governing the mandatory reporting system. As underlined in the AIC C03/2003, it is legitimate for an organisation or individual to report voluntarily any defects on equipment fitted to aircraft types not subject to mandatory reporting.

The Regulation also states that an employee who reports an incident should not suffer any harm or consequence from his or her employer regarding his or her employment status. Moreover, under Article 22(1) of Law No. 73(I)/2015, any person involved in the investigation of accidents is obliged to treat any information as confidential, otherwise they will be guilty of an offence and punished with imprisonment of no more than two years, a financial penalty not exceeding €20,000, or both.

XI THE YEAR IN REVIEW

In 2019, two airlines, Cobalt Air and Germania, which were bringing thousands of tourists to the island, ceased their operations in Cyprus. The closure of Cobalt Air, a Cypriot firm, has meant the end of direct flights to four countries and revived the debate of Cyprus’ air connectivity with the rest of the world, in the wake of the demise of state-owned Cyprus Airways.

In April 2019, a meeting was held between the Ministry of Transport, the Deputy Minister for Tourism, tour and airport operators, and airlines, in order to discuss the public’s concerns about high airfares. It was decided that efforts must be made to improve air connectivity in an attempt to reduce ticket prices. To achieve this, each of the participants should undertake efforts within their sector, but also increase cooperation among themselves, to build on existing or future bilateral agreements and convince countries to fly to Cyprus. The Minister of Transport, Vassiliki Anastasiadou, underlined that incentive schemes were already in place, but they could be advanced, if necessary.

XII OUTLOOK

Undoubtedly, Cyprus’ aviation law reflects and incorporates entirely the EU and international civil aviation legal regime. Cyprus, through the DCA, closely follows new developments so as to comply with the new regulations and directions effectively and expediently.

Currently, 70 airlines fly from Cyprus to 40 countries and 120 destinations, and new routes are expected to be added. The liberalisation of air transport, in combination with the development of the new airports, is expected to create the potential for Cyprus to become a regional transit hub between Europe and the Middle East.

In an intervention at the EU Transport and Telecoms Council that took place in Luxembourg in June 2019, the Cyprus Minister of Transport raised the issue of air pollution and warned her counterparts that efforts to reduce greenhouse gas emissions from the aviation industry should not make prices prohibitive, since air transport is indeed the only means for

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49 Article 9.
50 Article 8(4).
Cyprus residents to connect with Europe and the rest of the world. She also underlined that any effort to reduce emissions should be based on ensuring the international competitiveness of the EU aviation sector and considering the particularities of all Members States.  

Meanwhile, a bill providing for the establishment of a state-owned air navigation company is currently under consideration and will eventually be referred to the Cyprus Parliament’s plenum for voting on a new law in 2019. Such a company, which exists in most EU countries, is expected to provide more flexibility in managing air traffic today, while increasing the state’s revenues and reducing flight delays.

I INTRODUCTION

Even though Denmark is a relatively small country with approximately 5.5 million inhabitants, Danes have access to a high number of international and domestic air routes, and the Danish capital, Copenhagen, is the largest centre for air traffic in the Nordic region. The Danish civil air sector was liberalised in the mid-2000s, resulting in a better access to the market and a more efficient competition between air carriers. This has led to the entrance on the market of cheaper air carriers and growing pressure on established air carriers.

The Danish civil air sector is to a high degree governed by market mechanisms. As such, the establishment of new routes, determination of ticket prices, frequencies, etc., are all based on market-related considerations. However, at the same time the civil air sector is subject to detailed legislation, namely in relation to safety and security standards.

Civil aviation within Danish airspace is governed by the Aviation Act as well as a number of EU regulations as detailed below. The Danish Ministry for Transport has the overall responsibility for maintaining the Aviation Act while the Danish Transport Authority has the administrative powers under the Act in relation to supervision, authorisations, registrations, etc.

Foreign air carriers must be given access to Danish airports under the same conditions as Danish air carriers when a multilateral or bilateral agreement between Denmark and the foreign state in question so warrants. As Denmark is an EU Member State, Danish airports must give equal access to Danish and other EU air carriers.

The allocation of slots in Denmark is governed by Council Regulation 95/93 on common rules for the allocation of slots at Community airports, which obligates Community airports to allocate slots based on neutral, transparent and non-discriminatory terms.

The Danish civil aviation sector employs approximately 45,000 people.

II LEGAL FRAMEWORK FOR LIABILITY

All air carriage within Danish airspace is governed by the liability provisions in the Danish Aviation Act (see the Aviation Act, Section 1). The Aviation Act incorporates the liability regime introduced by the Warsaw Convention of 1929 and passed on by the Montreal

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1 Jens Rostock-Jensen is a partner and Jakob Dahl Mikkelsen is a senior attorney at Kromann Reumert. The information in this chapter was accurate as at July 2018.
Convention of 1999. The Aviation Act is supplemented by a number of Ministerial Orders and Provisions for Civil Aviation (BLs) issued by the Danish Transport Authority, which contains detailed and technical requirements for air carriers.

The Aviation Act, Chapter 9, governs the carrier’s liability for damage to passengers and transported goods, while Chapter 10 governs liability for personal injury or damage to goods caused outside the aircraft (see Section VII).

Denmark is a party to both the Warsaw and Montreal Conventions. As an EU Member State, Denmark is further governed by Council Regulation 261/2004 as amended by Council Regulation 889/2002 on air carrier liability, Council Regulation 261/2004 on passenger rights, Council Regulation 2407/92 on licensing of air carriers and other relevant EU legislation.

i **International carriage**

Denmark has ratified the Warsaw Convention as amended by the Hague Protocol of 1995 and the Montreal Conventions. Both are implemented (partially) in the Danish Aviation Act. As such, the liability provisions in the Aviation Act are modelled upon the provisions in the Montreal Convention (see Section VII).

ii **Internal and other non-convention carriage**

Non-convention carriage is governed by the Aviation Act insofar as the air transport took place within Danish airspace.

iii **General aviation regulation**

See Section VII.

iv **Passenger rights**

Air carriers’ liability for delays is described in Section VII. Further, EU Council Regulation 261/2004 applies in Denmark.

v **Other legislation**

Air carriers are subject to a number of general rules and regulations governing Danish undertakings.

Under the Danish Competition Act, companies including air carriers may be fined for violations of the Act, including agreements restricting the competition on the market (cartels) and abuses of a dominant market position. The Competition Act is detailed in Section VI.

Air carriers are further subject to the general provisions and principles regarding torts and product liability. Under the Danish general principles of tort, air carriers will generally be liable for damage resulting from the carrier’s negligence, although the carrier’s liability is modified by the Aviation Act (see Section VII).

Under the Product Liability Act, manufacturers are subject to a strict liability for any personal injury or damage to consumer goods caused by products produced by the manufacturer. In relation to damage to business goods, manufacturers will be liable if the damage resulted from negligence on the part of the manufacturer.

Air carriers are subject to the Danish environmental legislation including the Environmental Protection Act, under which undertakings may be fined for violations of the Act.
III LICENSING OF OPERATIONS

i Licensed activities

Under the Aviation Act, Section 75, any regular air transport for commercial purposes requires authorisation from the Minister of Transport, with a few specific exceptions, for example, in cases of transport of family or close friends or if the transport was not publicly announced. Further, air shows require authorisation even when not performed for commercial reasons. Authorisation will be given for a specific time and under certain conditions as found necessary. Authorisation is obtained by applying to the Ministry of Transport. Domestic air transport may only be authorised for aircraft registered in Denmark (see Section III.ii). Any person who violates or attempts or conspires to violate Section 75 may be punished by a fine or by imprisonment for up to four months (see Section 149).

ii Ownership rules

Regulation 1008/2008 applies in Denmark and is enforced by the Transport Authority. Danish aircraft must be registered with the Transport Authority and must be in possession of a certificate of registration to be approved for air transport.

Aircraft can only be registered in Denmark if:

a the owner is a Danish citizen or company and is domiciled in Denmark or in a state in which the owner because of his or her nationality is not allowed to be registered as an owner of an aircraft;
b the owner is an EU or EEA citizen or company; or
c the owner is domiciled in Denmark and the aircraft is based in Denmark.

Further, aircraft must be in possession of a certificate proving its airworthiness to be registered. These certificates are issued by the Danish Transport Authority.

When the aircraft is registered with the Transport Authority it will be considered to be of Danish nationality.

Under Sections 122 and 130 of the Aviation Act, the owner of the aircraft must be able to document that the aircraft is insured for an amount equal to the owner’s potential liability under the Act.

iii Foreign carriers

Foreign aircraft flying within Danish airspace must be in possession of a certificate of nationality and registration or similar, as applicable, as well as a certificate proving airworthiness to gain authorisation to operate.

As to the documents executed in the foreign state there must be an agreement based upon the privilege of aviation between Denmark and the foreign state (see Sections 2 and 20).

Under the Aviation Act, Section 75, any regular air transport for commercial purposes within Danish airspace requires authorisation from the Minister of Transport.

IV SAFETY

Carriers must at all times be airworthy. A certificate of airworthiness is issued by the Transport Authority upon inspection of the aircraft in question.
Foreign carriers must obtain either a Danish certificate of airworthiness or an equivalent and recognised certificate from another state.

The Danish Transport Authority carries out regular inspections to ensure the airworthiness of aircraft in operation. The inspections are further regulated through detailed ministerial orders (namely BL 1-12, 1-4, 1-7, 1-8, 1-16, 1-17 and 1-20), including in relation to intervals, requirements, etc.

A certificate of airworthiness is invalid if the aircraft in question has not been subject to the required inspections, if the aircraft has been changed in any way deemed significant in relation to its airworthiness, if the aircraft has been damaged or if the requirements for insurance coverage are not met.

The owner or carrier is responsible for ensuring the adequate staffing of the aircraft. Pilots and crew members must obtain a certificate from the Transport Authority. A certificate will be issued only if the pilot or crew member meets the requirements specified in relation to his or her profession in relation to education, training, experience, age, tests completed, etc. The specific requirements are set out in BL 6-03.

All aircraft registered in Denmark must appoint an aircraft superior whose duty it is to ensure that the aircraft is airworthy and adequately staffed, and that the flight is conducted in accordance with applicable rules. The aircraft superior must further supervise the crew and passengers.

If there is reason to believe that an aircraft is not airworthy or adequately staffed, the Transport Authority may deny take-off and detain the aircraft until the inadequacies have been corrected (see Section 145).

In the event of an accident, the aircraft superior must report the accident to the Danish Accident Investigation Board. If the aircraft superior is not able to report the accident, the obligation lies with the owner or carrier. The requirements for notifications of accidents are regulated in detail in BL 5-40.

V INSURANCE

Under the Aviation Act, Section 122, the air carrier must be able to document that insurance has been taken out with a sum sufficient to cover any liability towards passengers or baggage or goods. Under Section 130, the owner of an aircraft used within Danish airspace must maintain insurance coverage sufficient to cover the owner or carrier's liability in relation to damage caused to persons or goods outside the aircraft.

These provisions are mandatory and without exceptions.

The specific requirements to the insurance coverage are provided in Regulation 785/2004, under which air carriers are obligated to establish and maintain insurance as follows:

- for liability towards passengers: a minimum insurance cover of 250,000 special drawing rights (SDR) per passenger;
- for liability in respect of baggage: a minimum insurance cover of 1,000 SDR per passenger in commercial operations; and
- for liability in respect of cargo: a minimum insurance cover of 17 SDR per kilogram in commercial operations.
In respect of liability for third parties, the minimum insurance cover required will depend upon the maximum take-off weight of the aircraft in question, ranging from 750,000 SDR for aircraft weighing less than 500 kilograms to 700 million SDR for aircraft weighing more than 500,000 kilograms.

Air carriers must deposit an insurance certificate with the Danish Transport Authority. If the mandatory insurance provisions are not complied with, the aircraft’s certificate of airworthiness will be invalid (see Section 26 of the Aviation Act). Accordingly, foreign certificates of airworthiness will not be recognised as valid if the mandatory requirements for insurance coverage are not complied with.

VI COMPETITION

The Danish Competition Act (Consolidated Competition Act No. 23 of 17 January 2013) comprises two provisions of major relevance: Section 6, prohibiting restrictive agreements; and Section 11, prohibiting abuse of dominance.

i Section 6

Section 6 prohibits agreements, concerted practices and decisions having as their direct or indirect object or effect the prevention, restriction or distortion of competition. The term ‘agreement’ is broad and includes informal understandings, ‘gentlemen’s agreements’ and standard terms and conditions of sale. A concerted practice may exist if two undertakings, without entering into an agreement, undertake coordinated behaviour that restricts or distorts competition in the market.

Prohibited agreements are null and void and cannot be enforced.

The prohibition is subject to a de minimis rule (set out in Section 7) and does, as a rule, not apply if:

- the parties concerned (including the groups to which they belong) have an aggregate annual turnover on a worldwide basis of less than 1 billion kroner and a combined market share of less than 10 per cent; or
- the parties (regardless of their market shares) have an aggregate annual turnover of less than 150 million kroner.

Further to that, a possibility for individual exemptions exists in Section 8. It applies automatically without any notification where the exemption conditions are met. Therefore, both self-assessment and voluntary notification are available. The exemption will be triggered where an agreement:

- strengthens efficiency in the production or distribution of goods and services;
- promotes technical or economical development; and
- the arrangement between the parties ensures that consumers receive a share of the advantages, without placing restrictions on the parties that are not indispensable to the attainment of these objectives.

The Competition Council may issue orders directing undertakings to bring prohibited agreements or behaviour to an end or, at the Council’s discretion, negotiate binding commitments to resolve the issue.
Section 11

Section 11 prohibits the abuse of a dominant position. To determine whether an undertaking holds a dominant position in any given market, it is necessary to define the ‘relevant market’ in terms of products or services and the relevant geographical area. Secondly, if an undertaking has a market share of more than 40 per cent, there is a rebuttable presumption that it holds a dominant position. A market share of more than 50 per cent is in itself conclusive evidence of a dominant position. Other relevant aspects may be barriers to entry, sunk costs, vertical integration, economies of scale, etc. Collective dominance may exist where separate undertakings adopt the same conduct in the market (non-coordinated effects). Such behaviour can constitute abuse of this collective dominance, even if none of the undertakings can be said to hold dominant positions individually. The abuse of a dominant position may be evidenced by a variety of activities, including the imposition of unreasonable purchase or sales prices on other parties, the use of discriminatory terms and conditions towards trading partners, and a refusal to supply.

Sanctions

Since an amendment to the Danish Competition Act entering into effect on 1 March 2013, sanctions for infringing the Act have been tightened significantly. Fines for infringement of the Act can be imposed where behaviour is negligent or intentional. Fines are calculated on the basis of the gravity and duration of the infringement and the turnover of the undertaking in question. Fines of more than 20 million kroner may be imposed for the most severe infringements.

Fines may be imposed on persons as well. Personal fines may amount to 200,000 kroner and upwards for the most severe infringements.

With the amendment, persons involved in cartel infringements may be imprisoned for up to six years. Imprisonment as a sanction is yet to be seen in practice.

The Danish Competition Act comprises a leniency programme for cartel infringements. Cooperation with the authorities in a cartel investigation may lead to a reduction in any fine of up to 100 per cent (for the first applicant), up to 50 per cent (for the second applicant), up to 30 per cent (for the third applicant) or up to 20 per cent (for later applicants). The amount of the reduction is left to the discretion of the authorities.

Wrongful Death

Compensation for wrongful death is, as a main rule, limited to compensation for loss of dependency and funeral costs (see Section VIII). However, if the death was caused as a result of intent or gross negligence, the surviving relatives may claim additional compensation. Such compensation will rarely exceed 100,000 kroner.

Establishing Liability and Settlement

Procedure

Passengers may bring their complaint against air carriers under Regulation 261/2004 in relation to compensation for delays or cancellations before the Danish Transport Authority.

Claims for damages are settled through the Danish courts. Under the Aviation Act, Section 118, claims for damages relating to damage to passengers, baggage or goods must
be submitted to the Danish courts within two years from the aircraft’s arrival at its final
destination, the intended time of arrival or from the time when the carriage was interrupted
(e.g., the time of the accident).

Generally, Danish court cases will be resolved within one year from the submission of
the complaint, although complex disputes may take substantially longer.

Under the Aviation Act, the air carrier is subject to a strict liability for damage to
passengers, while the owner is under a strict liability for damage to persons or goods outside
the aircraft (detailed in Section VII.ii). However, claims may be brought against pilots,
manufacturers, etc., under the general rules on tort under Danish law.

The aggregated claim against the carrier and crew members can never exceed the limits
of liability provided by the Aviation Act (see Section VII.ii).

Claims are generally brought against the carrier or owner (depending on the type of
damage) because of the strict liability under the Aviation Act. Pilots and crew members are
rarely joined in the proceedings and will as a general rule not be found liable if the injured
has also claimed compensation from the owner or carrier.

### Carriers’ liability towards passengers and third parties

Chapter 9, Section 106 provides that the carrier is liable for injury or death caused to
passengers while on board the aircraft, including embarking and disembarking. The carrier’s
liability includes liability for loss of provider (i.e., compensation to a surviving spouse or
children).

However, Section 111, Subsections 1 and 2, provides that the carrier is not liable for
damages exceeding 113,000 SDR for each passenger if the carrier can establish that the
damage was not owing to any negligence on the part of the carrier or if the damage was
owing exclusively to negligence from a third party. The carrier’s liability cannot be limited to
less than 113,000 SDR.

In the event of an accident causing personal injury or death to a passenger, the carrier is
obligated to make an advance payment of no less than 16,000 SDR to the person entitled to
compensation. The advance payment must be made immediately and no later than 15 days
after the person entitled to compensation has been identified.

Section 107 provides that the air carrier is liable for damage to luggage caused while on
board the aircraft or while in the carrier’s care, unless the damage was due to deficiencies in
the goods. The carrier is liable for damage to passengers’ hand luggage if it is the result of its
negligence. However, the carrier’s liability for damage to luggage cannot exceed 1,131 SDR
per passenger (see Section 111, Subsection 4).

Under Section 108, the carrier is liable for damage to transported goods caused while in
the care of the carrier unless the damage was the result of deficiencies in the goods themselves,
insufficient packaging, acts of war or acts from public authorities. The carrier’s liability is
limited to 19 SDR per kilogram of goods.

Under Section 109, the carrier is liable for damage caused by delays in the transport
of passengers or goods, unless the carrier can establish that the carrier had taken all measures
that could reasonably be expected of the carrier to avoid the damage or that the damage
was unavoidable. Under Section 111, Subsections 3 and 4, the carrier’s liability for delays is
limited to 4,694 SDR in relation to passengers and 1,131 SDR in relation to the transport
of goods.

In the event of damage to persons or goods outside the aircraft, the owner is subject to
strict liability. However, the owner will not be liable to pay compensation if the injured party
himself or herself caused the damage by wilful misconduct or gross negligence. In the event of damage to persons or goods located within the area of an authorised airfield the owner will not be liable under the Aviation Act. In this case the general Danish principles of torts will apply, according to which the carrier is liable if the damage was owing to negligence on its part.

If the owner has transferred the use of the aircraft to an independent operator, who has assumed the full responsibility for the operation and maintenance of the aircraft, the operator will assume the liability under the Aviation Act instead of the owner.

### iii  Product liability

Under Danish law, product liability is governed by two different sets of rules. Personal injuries and damage to consumer goods is governed by the Product Safety Act (which is based upon the Product Safety Directive 85/374) while damage to business goods is governed by the principles on tort established through case law.

Under the Product Safety Act, which will generally apply in relation to damage to passengers and passenger goods, manufacturers are subject to a strict liability for defects. A product is considered defective if it does not provide the safety that can reasonably be expected.

However, the manufacturer will not be liable if it can establish that:
- it did not put the product into circulation;
- it can be assumed that the defect that caused the damage did not exist at the time when the product was put into circulation;
- that the product was neither manufactured or distributed by it in the course of its business;
- that the defect is owing to compliance of the product with mandatory regulations issued by the public authorities; or
- that the state of scientific and technical knowledge at the time when the product was put into circulation was not such as to enable the existence of the defect to be discovered.

The manufacturer’s liability under the Product Safety Act towards the injured or anyone subrogating into the injured’s claim may not be limited or excluded by any agreements or provisions.

Any claims against the manufacturer will be time-barred three years after the injury occurred and in any event no later than 10 years after the product in question was marketed.

Under the principles on tort established through case law, manufacturers will be liable for damage to business goods if the damage was caused by the manufacturer’s negligence. If the product in question is found to be defective, Danish courts will generally assume that this was because of negligence on the part of the manufacturer.

Claims against the manufacturer for damage to business goods will be time-barred three years after the damage occurred.

### iv  Compensation

Under the Liability for Damages Act, an injured person may claim compensation for loss of earnings, pain and suffering, permanent injury and loss of ability to work.

Loss of earnings is calculated as the actual loss of earnings from the time of the accident until the injured returns to work.
Pain and suffering is compensated with 195 kroner for each day the injured is off work, up to a maximum of 75,000 kroner.

If the injured has suffered permanent injury, this will be converted to a percentage rate representing the degree of injury the injured has suffered. If no agreement can be reached as to the degree of injury, the National Board of Industrial Injuries can be asked to determine the degree of injury. The injured will be entitled to compensation equal to 8,600 kroner per percentage point of injury.

Loss of ability to work is likewise converted to a percentage rate, and the injured is entitled to compensation equal to the injured’s yearly salary before the accident multiplied by 10 times the percentage rate, to a maximum of 9.029 million kroner.

Further, an injured party may claim compensation for loss of provider equal to 30 per cent of the compensation the deceased would have been entitled to in the event of a total loss of ability to work, calculated as described above.

In cases of damage to goods, the level of award will be based upon the actual loss suffered.

Punitive damages are not recognised under Danish law.

If a passenger is killed or injured because of an accident, the carrier must make a prepayment to the person entitled to compensation within 15 days after the person entitled has been identified (see the Aviation Act, Section 111a). The compensation is meant to cover expenses relating to the accident (e.g., funeral costs or medical bills, must be at least 16,000 SDR).

The person entitled to damages will be either the passenger or if the passenger was killed, the person who actually paid for the funeral, etc.

If the person entitled is the spouse of the deceased, the compensation cannot be less than 158,500 kroner (see Liability for Damages Act, Section 14a).

As mentioned, only actually suffered losses will be compensable. Punitive damages are not recognised under Danish law.

Hospital and doctors’ costs for Danish citizens are generally covered by social security, whereas costs for special treatments such as physiotherapy, chiropractors, etc., will generally not be covered. Costs for medicine are covered while the patient is in hospital and partly covered when out of hospital.

The state cannot recover any costs from third parties in relation to support paid under the social security. However, the state may recover any sickness benefit paid to the injured from the responsible third party.

IX VOLUNTARY REPORTING

Under Danish law, any person involved in or affected by an aircraft accident must report the accident to the Accident Investigation Board Denmark, who will then carry out an independent investigation of the accident. There are, to our knowledge, no additional voluntary reporting initiatives.

X THE YEAR IN REVIEW

On 23 January 2018, the Danish Supreme Court made its decision in an appeal case between a number of passengers and an airline company. The case concerned the interpretation of Article 12(1) of Regulation 261/2004; in particular, whether the airline company could deduct compensation paid to the passengers under the Travel Package Directive from compensation due under Regulation 261/2004. Both claims for compensation related to the same delayed flight.

The Supreme Court noted that compensation under both the Regulation and the Directive compensated the passengers’ loss of time. As such, the Supreme Court found that the passengers would be overcompensated if they received the full compensation under both the Directive and the Regulation. On this basis, the airline was entitled to deduct the compensation already paid under the Travel Package Directive from the compensation due under Regulation 261/2004, with reference to Article 12(1).

XI OUTLOOK

The Supreme Court judgment mentioned in Section X is a landmark case, which is expected to be of significant prejudicial importance for a great number of Danish court cases where passengers are entitled to compensation both under the Travel Package Directive and Regulation 261/2004. The judgment shows that the general principle under Danish law that a claimant is only entitled for compensation equal to but not exceeding his or her loss also applies in relation to compensation to airline passengers.
INTRODUCTION

Civil aviation is an industry that is fundamentally important to the Dominican Republic, as it has an enormous impact on the country’s commercial activities. In particular, civil aviation constitutes one of the principal tools for the development of tourism. In 2018 alone, 14,488,668 passengers travelled to and from the Dominican Republic, which is an increase of 5.2 per cent compared to 2017, mainly through two of the seven international airports: Punta Cana International Airport (located in the resort area of Punta Cana, on the east side of the island) and Las Americas International Airport (located approximately 22 kilometres east of Santo Domingo, the capital city of the Dominican Republic). Of these passengers, 90 per cent (13,046,715) were mobilised through regular flights, and 10 per cent (1,441,953) through charter flights.

The geographical location of the Dominican Republic makes it a potential hub for international passenger traffic, as it provides easy access to and from major cities in the Americas and Europe. In 2018, approximately 66 international airlines had authorisation to operate regular flights to and from the Dominican Republic.

Civil aviation is governed by the provisions of Law No. 491-06 (the Civil Aviation Law) and its Regulations, without prejudice and by several international treaties and conventions duly ratified by the Dominican Republic. The scope of the Civil Aviation Law includes the inspection, oversight and control of all domestic or foreign civil aircraft, their owners, operators, crew, passengers and cargo transported in such aircraft, as well as any person that is involved in aviation activities within Dominican territory, that departs from, lands on, overflies or in any other way is under the jurisdiction of national sovereignty.

Pursuant to the provisions of Articles 5 and 6 of the Civil Aviation Law, the Dominican State has complete and exclusive sovereignty over its territory. Consequently, it exercises jurisdiction over its territory, its jurisdictional waters and airspace.

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1 Rhina Marielle Martínez Brea is a partner and Maria Pia Garcia Henriquez is an associate at Squire Patton Boggs Peña Prieto Gamundi.
2 www.jac.gob.do/.
3 ibidem.
5 Article 2 of the Civil Aviation Law.
Article 7 of the Civil Aviation Law sets forth an ample list of acts, events and behaviours that are subject to Dominican jurisdiction; these include all acts performed, events, offences, misdemeanours, crimes or any of the following violations of Dominican laws and regulations:

a. violations committed on board Dominican aircraft within the Dominican territory, or while they overfly the high seas or over territory not submitted to the sovereignty of another state;

b. violations committed on board Dominican aircraft while they overfly the territory of a foreign state, excepting those cases of interest to the security or public order of the underlying state;

c. violations committed on board foreign aircraft that overfly Dominican territory or are stationed in Dominican territory, when such acts, events, offences, misdemeanours or crimes are of interest to or affect the security or public order of the Dominican Republic, or when they occur or have effects within Dominican territory; and

d. violations committed during a flight of a foreign aircraft, when such a foreign aircraft lands first in the Dominican Republic after the crime is committed.

International public air transportation services are by law reserved for Dominican air operators. However, such services may be granted to foreign air operators when the Dominican Republic has signed and ratified agreements or treaties with the country of origin of the requesting foreign air operator. The Dominican Republic currently has formal bilateral relationships with over 40 sovereign states through the execution and ratification of air service agreements.

There are three regulatory bodies that oversee civil aviation activities in the Dominican Republic: the Civil Aviation Board (JAC); the Dominican Institute of Civil Aviation (IDAC); and the Dominican Aviation Security Body (CESAC).

The main civil aviation regulatory body of the Dominican Republic is the JAC, which is the advisory body to the executive branch of government regarding commercial aviation. It is also the main regulatory body with respect to the economic aspects of commercial aviation.

The IDAC is a technical and specialised public body in charge of the supervision and control of civil aviation in Dominican Republic, except when the JAC has jurisdiction over specific matters.

The Dominican Aviation Security Body is a dependency of the Ministry of the Armed Forces and is in charge of the security of the passengers, crew, ground staff and the general public, the aircraft, airports and aerodromes, and of the infrastructures and facilities that provide civil aviation services.

An air carrier may obtain the corresponding authorisation to operate as an air operator in the Dominican Republic as a national air operator or as a foreign air operator.

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6 Article 7 of the Civil Aviation Law.
8 The JAC was created on 2006 by Law No. 491-06.
9 Created by the Civil Aviation Law.
10 CESAC was created by Law No.188-11 on Aviation Security and Civil Aviation, Official Gazette No. 10628, dated 22 July 2011. CESAC was created in response to security recommendations under the Chicago Convention on International Civil Aviation.
11 An air operator is any national entity directly or indirectly dedicated to national or international commercial air transportation.
12 A foreign air operator is any non-national operator directly or indirectly in charge of carrying on commercial air transportation to or from the Dominican Republic.

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National air operators must comply with the following two requirements: 

- the obtainment of a certificate of economic authorisation issued by the JAC; and
- the obtainment of an air operator certificate issued by the IDAC.

Foreign air operators must fulfil the following two requirements:

- the obtainment of an operation permit issued by the JAC; and
- the obtainment of the acknowledgement certificate issued by the IDAC in accordance with the operation specifications from the origin country.

In addition, in both cases, each air operator’s security manual has to be validated and approved by the CESAC.

II LEGAL FRAMEWORK FOR LIABILITY

i International carriage

The Dominican Republic is party to the following multilateral agreements relating to international carriage:

<table>
<thead>
<tr>
<th>Agreement</th>
<th>Date signed by the Dominican Republic</th>
<th>Date ratified by the Dominican Republic</th>
<th>Effective date of the agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beijing Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation</td>
<td>10 September 2010</td>
<td>27 November 2012</td>
<td>1 July 2018</td>
</tr>
<tr>
<td>Chicago Convention on International Civil Aviation</td>
<td>7 December 1944</td>
<td>25 January 1946</td>
<td>4 April 1947</td>
</tr>
<tr>
<td>Multilateral Open Skies Agreement for Member States of the Latin American Civil Aviation Commission – up to the sixth freedom flights and seventh freedom for cargo</td>
<td>5 November 2010</td>
<td>2 February 2011</td>
<td>–</td>
</tr>
<tr>
<td>Air Transport Agreement – Caribbean States Associations – pending definitive signature</td>
<td>12 February 2004</td>
<td>–</td>
<td>–</td>
</tr>
</tbody>
</table>

The Civil Aviation law, Law No. 188-11 on Airport Security and Civil Aviation (Law No. 188-11) and the regulations issued by the JAC, IDAC and CESAC, to an important extent have implemented the international treaties listed above.

The application of the Civil Aviation Law and its regulations may not contradict the application of the provisions of international treaties and multilateral agreements duly ratified.

13 Both certificates may be requested concurrently.
14 The operation permit is the permission granted to foreign air operators by the JAC.
by the Dominican Republic. Likewise, pursuant to the provisions of Paragraph I of Article 2 of Law No. 188-11, in the event of a contradiction between Law No. 188-11 and the provisions of an international treaty, the provisions of the international treaty shall prevail.

The Dominican Republic is also a party to air service agreements and memoranda of understanding regarding the degree of openness of traffic rights with the following countries: Antigua and Barbuda, Argentina, Aruba, Austria, Bahamas, Belgium, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Curacao, Czech Republic, China, Dubai, Denmark, Ecuador, El Salvador, Finland, France, Germany, Guatemala, Guyana, Hungary, Haiti, Iceland, India, Ireland, Israel, Italy, Jamaica, Jordan, Kuwait, Kenya, Luxembourg, Mexico, Morocco, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Portugal, Poland, Qatar, Russia, Rwanda, Saint Martin, Serbia, Seychelles, Spain, Switzerland, Sweden, Singapore, South Africa, Sri Lanka, Trinidad and Tobago, Turkey, United Arab Emirates, United Kingdom, United States, Uruguay and Venezuela.

ii Internal and other non-convention carriage

Pursuant to the provisions of Article 191 of the Civil Aviation Law, the operator of any aircraft that flies over the territory of the Dominican Republic shall be liable for all damage caused to third parties or to the property of third parties located on the ground. The affected party has the right to receive compensation when the damage was caused by an aircraft in flight or by any part or any object that falls from such an aircraft.

iii Passenger rights

National and foreign air carriers shall indemnify the damage caused by the death or by any injury suffered by a passenger as a consequence of the transportation. Such damage includes physical as well as mental injuries. Air carriers shall also compensate passengers for the damages arising out of the loss, destruction or delay of the cargo or baggage. The obligation to compensate for the damage described above includes damage caused by force majeure.

iv Other legislation

For cases not contemplated by the Civil Aviation Law or by the regulations, rules and norms governing the IDAC and the JAC, the general principles of aviation law shall be applicable; and, in the absence of such principles, then the general principals of the common law of the Dominican Republic shall be applicable.

III LICENSING OF OPERATIONS

i Licensed activities

Pursuant to the provisions of the Civil Aviation Law, all activities relating to civil, national or foreign aircraft, their owners, operators, crew, passengers and cargo, and any person involved in the operation of such aircraft, are subject to licensing by the Director General of Civil Aviation (IDAC).
Dominican Republic

in aviation activities within the Dominican territory that departs from, lands on, overflies or in any other way is under the jurisdiction of national sovereignty, will be regulated by this law and will be subject to the jurisdiction of the JAC, the IDAC and the CESAC.

The following types of authorisation are granted by the above-mentioned institutions:

- economic authorisation certificate for national air carriers;
- operation permit for foreign air carriers;
- air operator certificate for national air carrier;
- consignee licences;
- aircraft registration for national aircraft;
- mortgage registration for national aircraft;
- charter flight authorisations;
- code-share agreement authorisations;
- security manual approval; and
- operations specification approval.

Most of these authorisations must be renewed after a specific period. For example, the operation permit must be renewed every three years. In addition, most of these authorisations require that the air carriers keep current their security manual, corporate documents, tax obligations in the Dominican Republic and payments to the corresponding authorities.21

ii Ownership rules

In principle, international public air transportation services are reserved for Dominican air operators. Such services may be granted to foreign air operators when the Dominican Republic has signed and ratified agreements or treaties with the country of origin of the requesting foreign air operator.22

Pursuant to the provisions of the Civil Aviation Law,23 to be considered a national air carrier, companies incorporated and in existence pursuant to the laws of the Dominican Republic must also comply with the following requirements:

- at least 35 per cent of the company's capital or substantial property shall be owned by Dominican physical persons or entities, and 35 per cent of the members of the board of directors shall be Dominican;
- at least 51 per cent of the company's managers (who are not members of the board) must be Dominicans;
- the principal place of business shall be located in the Dominican Republic; and
- 100 per cent of the company's capital may be owned by foreign investors, as long as such investment belongs to an internationally recognised foreign air carrier or to a branch controlled by such an air carrier, authorised by the executive branch of government.

21 The requirements for these authorisations may vary depending on the type of air carrier and activity.
22 Article 220 of the Civil Aviation Law.
23 Article 237 of the Civil Aviation Law, as amended by Law No. 67-13.
To obtain the corresponding certificate of economic authorisation, the JAC requires that national air carriers file the following documents (among others):

a. Certified copies of the company’s corporate documents.

b. Certification of no criminal record, issued by the General District Attorney’s Office, for each shareholder of the company.

c. Evidence of approval of the company’s security manual by CESAC.

d. Original insurance policy on civil liability, issued in accordance with the requirements of the JAC.

e. The company’s financial statements, audited by a certified public accountant. The financial statements must include: (1) a general balance, (2) an income statement, (3) details of the working capital, and (4) details of financing sources. The statements must also include explanatory notes in accordance with international accounting standards. The financial statements must be presented in the most detailed manner possible. In this respect, the JAC has the right to request additional information.

f. A business plan and feasibility study including, among other requirements: (1) an operational study showing the capacity to operate the business (aircraft, capacity, human resources, etc.); (2) a financial study showing the financial capacity to operate the business; and (3) estimated results for the upcoming months.

g. Proof of availability of funds for sustainment of the operations.

Additionally, air carriers must request the scheduling of an orientation meeting at the JAC, for the purpose of explaining the operations that will be performed and receive relevant information regarding procedures and requirements that must be met to obtain the authorisation from the JAC. This meeting must be scheduled prior to requesting the authorisation.

iii. Foreign carriers

Foreign air carriers interested in operating in the Dominican Republic shall be duly approved to carry out international air transportation services by the corresponding civil aviation authorities of the country of origin. In addition, it is necessary that a bilateral agreement between the country of origin and the Dominican Republic has been executed and ratified. In the event that a bilateral agreement has not been executed, the foreign air carrier must present proof of reciprocity issued by the government of the country of origin in favour of Dominican air transportation companies.

Once the existence of a bilateral agreement or proof of reciprocity with the Dominican Republic is confirmed, all foreign air carriers are required to obtain the following authorisations to operate in the Dominican Republic: (1) establishment of a branch, (2)
certificate of compliance with the aviation security standards (AVSEC) requirements issued by the CESAC, (3) operation permit issued by the JAC, and (4) acknowledgement certificate issued by the IDAC.

**Establishment of a branch**

To establish a branch in the Dominican Republic, a foreign air carrier must obtain a mercantile registry certificate, a taxpayer identification number and a presidential decree authorising the establishment of domicile. This process takes approximately two months. Once this process is completed, the foreign air carrier must proceed with filing for the obtainment of the corresponding operation permit from the JAC.

**Certificate of compliance with the AVSEC requirements, issued by the CESAC**

To obtain the certificate of compliance, foreign air carriers must file their security manual for their operations in the Dominican Republic in Spanish. This process may be undertaken jointly with the application for the operations specifications approval, and usually takes 30 days (subject to delays due to backlog).

**Operation permit issued by the JAC**

Before the JAC grants the operation permit it will evaluate whether the foreign air carrier is qualified and competent to carry out international commercial air transportation services, and complies with the provisions of the Civil Aviation Law. To fulfil these requirements, the foreign air carrier must file the following documents:

- a. authorisation for the exploitation of the requested routes from the country where the foreign air carrier is established;
- b. incorporation documents of the foreign air carrier (certificate of formation, operating agreement, articles of association, etc.) notarised and legalised at the nearest Dominican consulate (or legalised according to the Apostille Convention, if applicable);
- c. power of attorney for the local representative indicating that its domicile for any notification will be its local representative’s domicile, duly notarised and apostilled;
- d. copy of its mercantile registry certificate;
- e. copy of the air operator’s certificate;
- f. original of the insurance certificate;
- g. certificate from the CESAC, indicating that the foreign air carrier’s security complies with the AVSEC requirements;
- h. copy of the taxpayer identification card;
- i. marketing study of the requested routes indicating: (1) passenger projections, (2) cargo (demand), (3) competence analysis (the different airlines that cover these routes), (4) destination (offer), (5) market shares and (6) the schedule of the requested routes;\(^{30}\)
- j. payment of a fee of US$5,000.

The foreign air carrier must acknowledge in the request letter that it is subject to the provisions of the Civil Aviation Law. The JAC may request additional documents or information it considers necessary. Once the filing is completed, the JAC legal department will review

\(^{30}\) This requirement may be waived if the requested routes have been operated, continuously, in the last two years, for two or more months as charter flights.
the request and submit it for the approval of the board at their next meeting. The board usually holds two meetings per month. The JAC approval takes approximately 45 days from the filing of all the documents. The operation permit will be valid for three years. Once this process is complete the foreign air carrier must proceed with the application for the operations specifications from the IDAC.

**Acknowledgement of foreign operator certificate issued by the IDAC**

To obtain the acknowledgement of the foreign operator certificate the following documents and information will be required:

- **a** the company’s name, address, main base of operations abroad and in the Dominican Republic, fax number, email addresses and website information;
- **b** map with the routes authorised by the JAC, indicating the destination and alternative airports in the Dominican Republic (in digital format);
- **c** name, telephone number, fax, email and address of the maintenance director, chief pilot and quality control director, or equivalent officers;
- **d** name, telephone number, fax, email and address of legal representative;
- **e** name, telephone number, fax, email and address of the executive technical staff in the Dominican Republic;
- **f** copy of the air operator’s certificate;
- **g** copy of the operation permit issued by the JAC;
- **h** copy of the maintenance and ticket-counter service agreement with the provider in the Dominican Republic, if applicable, and civil liability insurance;
- **i** name, telephone number, fax, email and address of the operations inspector and maintenance inspector, from where the foreign air carrier is established;
- **j** runway analysis of the destination and alternative airports in the Dominican Republic (in digital format);
- **k** compliance letter in accordance with RAD 129;
- **l** copy of the operations specifications issued by the relevant civil aviation authorities of the country where the foreign air carrier is established (in both paper and digital format);
- **m** maintenance control manual, approved by the authorities of registration of the aircrafts (in digital format);
- **n** copy of the maintenance manual and maintenance programme for each type of aircraft (in digital format);
- **o** copy of operations manual indicating the sections that have been approved by the country of origin (in digital format);
- **p** registration certificates of all the authorised aircraft;
- **q** configuration of the aircraft: number of passengers, cargo capacity, maximum take-off weight, and proof of compliance with the traffic collision avoidance system (in digital format); and
- **r** minimum equipment lists.

The IDAC approval takes approximately 40 days from the filing of all the documents.
IV SAFETY

The safety aspects of civil aviation in the Dominican Republic are regulated by two different institutions: the IDAC and the CESAC.

The IDAC is, among other things, responsible for the oversight of security in air navigation and for ensuring operational safety, including the operation of aircraft, crew and air transportation services in the Dominican Republic. In particular, safety issues are regulated by the Dominican Aviation Regulations, which are issued by the IDAC in accordance with international treaties and agreements.

The CESAC, as indicated above is in charge of the security of the passengers, crew, ground staff and the general public, the aircraft, airports and aerodromes, and of the infrastructure and facilities that provide civil aviation services. The CESAC will only grant a certificate of compliance if the security manual of the air carriers complies with the AVSEC requirements. To obtain the certificate of compliance, foreign air carriers must file the security manual for their operations in the Dominican Republic. The security manual must contain at least the following:

- organisation of and regulations regarding air security;
- passenger and cabin baggage security;
- baggage security;
- crew security;
- passenger and cargo collation;
- aircraft security;
- catering, shops and airlines supply security;
- security of the aircraft cleaning operations;
- cargo, mail and packages security;
- correspondence;
- staff hiring;
- staff training;
- contingency planning;
- incident reporting procedures;
- supervision and vigilance; and
- local airport procedures.

In addition, Aeropuertos Dominicanos Siglo XXI (Aerodom) – a private entity benefiting from an exclusive concession to operate, maintain and develop six airports in the Dominican Republic, including Las Americas International Airport – has implemented several supervision measures to increase trust in commercial aviation and to improve security regarding passenger movement and the handling of baggage and cargo. Among other measures, Aerodom has created a security committee, a security audit programme, a baggage security programme and a security equipment maintenance programme.31

V INSURANCE

Before it grants an operation permit to a foreign air carrier or an economic authorisation certificate to a national air carrier, the JAC will verify the existence of an insurance certificate

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in accordance with the following provisions:\(^{32}\) policy liability coverage, which could be established by a combined single limit, for any occurrence, in the event of damage, death and bodily injury to passengers; destruction or loss or damage to baggage and cargo; and delays in the air transportation of passengers, baggage or cargo. These provisions indicate the following limits of liability:

\(a\) death and injury to passengers; damage to baggage (Articles 17 and 21, Montreal Convention of 1999);

\(b\) damage to passengers, baggage or cargo as a result of air carrier delays (Articles 19 and 22, Part I, Montreal Convention of 1999);

\(c\) damage caused by destruction, loss or harm to the cargo (Article 18, Part I and Article 22, Part III, Montreal Convention 1999);

\(d\) damage caused by destruction, loss or harm to checked baggage, when it occurs on board the aircraft or in the custody of the air carrier (Articles 17 and 22, Montreal Convention of 1999);

\(e\) death of and injury to passengers; and

\(f\) damage and injury caused by the air carrier to third parties or their property when the aircraft is grounded (Article 191 of the Civil Aviation Law).

The minimum amount of the certificate of liability insurance for national or foreign air carriers that operate international flights will be established by the Convention for the Unification of Certain Rules for International Carriage by Air, dated 28 May 1999, as follows:

<table>
<thead>
<tr>
<th>Coverage</th>
<th>Special drawing rights (SDR)</th>
<th>Amount in US dollars (1 SDR = US$1.39)*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Death of and injury to passengers; damage to baggage (Articles 17 and 21 Montreal Convention of 1999)</td>
<td>113,100 SDR per passenger</td>
<td>US$158,649.33</td>
</tr>
<tr>
<td>Damage to passengers, baggage or cargo as a result of air carrier delay (Articles 19 and 22, Part I, Montreal Convention of 1999)</td>
<td>4,694 SDR per passenger</td>
<td>US$6,584.43</td>
</tr>
<tr>
<td>Baggage transport – destruction, loss, harm or delay of checked baggage (Article 22, Montreal Convention of 1999)</td>
<td>1,131 SDR per passenger</td>
<td>US$1,586.49</td>
</tr>
<tr>
<td>Cargo transport – destruction, loss, harm or delay (Article 22, Montreal Convention of 1999)</td>
<td>19 SDR per kilogram</td>
<td>US$26.65 per kilogram</td>
</tr>
</tbody>
</table>

* Rate as of October 2016.

**VI** COMPETITION

Dominican law does not include specific competition regulation for the aviation industry. However, all industries are subject to the provisions of Law No. 42-08 on the Defence of Competition (Law No. 42-08), which has the primary objective of promoting and defending the effective competitiveness of all industries to increase the economic efficiency of all markets of goods and services, and to create benefit and value in favour of consumers within the Dominican territory.\(^{33}\) In addition, the Dominican Constitution reserves the right to create monopolies in favour of the Dominican government.\(^{34}\)

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32 Requisites Manual, JAC 001.
33 Article 1 of Law No. 42-08.
34 Article 50, Paragraph 1 of the Dominican Constitution.
Law No. 42-08 applies to all areas of economic activity and to all economic agents, including acts or agreements that may have originated outside the Dominican Republic but restrict competition within the Dominican territory. All acts, agreements and arrangements among competing economic agents, express or implied, verbal or written, with the objective or effect of imposing unjustified barriers in the market are considered as ‘concerted practices’ and ‘anticompetition agreements’ and are prohibited by Law No. 42-08. In that regard, the following activities are considered to be concerted practices and anticompetition agreements:

a to agree to impose prices, discounts, extraordinary charges or other selling conditions, as well as to exchange information that would produce the same objective or effect;

b to coordinate or agree on offers or on the withdrawal from bidding processes, tenders or contests;

c to distribute or assign segments or sections of goods or services markets assigning specific time or space, providers or clients;

d to limit the production, distribution or commercialisation of goods or the rendering or frequency of services, without regard to their nature; and

e to eliminate competitors from the market or limit their access.

Law No. 42-08 does not set forth any provisions on mergers or corporate reorganisations.

Under the Civil Aviation Law, code-share agreements, which are common in the aviation industry, require the approval of the JAC, who, as part of the approval process, will evaluate the competition aspects of such agreements and their implications for consumers in the Dominican Republic. Foreign air carriers applying to the JAC for an operation permit to operate in the Dominican Republic are also subject to this evaluation process.

VII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

In the Dominican Republic the mechanisms to settle claims are judicial procedures, arbitration, mediation and conciliation.

For the cases where the Montreal Convention is applicable, any action must be brought within a period of two years, reckoned from the date of arrival at the destination, or from the date that the aircraft ought to have arrived, or from the date on which the carriage stopped.

The determination of the parties that may be joined in actions for compensation will depend on the type of claim and the situation that caused such a claim. For instance, if the claim is for loss of baggage, the carrier will be the only one involved.

The allocation of liability will be determined by the participation of each defendant in the chain of liability.

35 Article 3 of Law No. 42-08.
36 Article 5 of Law No. 42-08.
37 Articles 214 and 257 of the Civil Aviation Law.
38 Article 35 of the Montreal Convention.
ii Carriers’ liability towards passengers and third parties

The liability of the air carrier towards passengers and third parties will depend on the type of case at hand. For cases involving international carriage, the provisions of the Montreal Convention would be applicable. These provisions are widely recognised by Dominican courts.

iii Product liability

In addition to the provisions of the Montreal Convention, the Civil Aviation Law regarding passenger rights described in Section II.iii, and Articles 198 to 203 of the Civil Aviation Law regarding damages caused by the collision of aircraft or during boarding or disembarking, there are no other relevant provisions in Dominican legislation specifically regulating manufacturers’ and owners’ liability to passengers and operators.

Notwithstanding the above, the Dominican Consumer Law39 – which aims to protect the economic interests of consumers through equitable treatment and through the prevention of discriminatory or abusive behaviour on behalf of providers of goods and services – contains general principles that shall be followed by all services providers in the country.

iv Compensation

In addition to the compensation set forth by the Montreal Convention, the Dominican Republic recognises:

a material damages, which include corporal damages; and
b moral damages, which are those concerning mental capabilities.40

The Dominican Republic does not have state-founded social security or medical support for those incapacitated in aviation accidents.

VIII THE YEAR IN REVIEW

The year 2018 was an important one for the Dominican Republic, especially for the tourism and hospitality sector. For instance, passenger flow continued to increase, owing in part to the registration of eight new routes: Bristol–Punta Cana; St Petersburg–La Romana; Valencia, Venezuela–Las Americas; Valencia, Venezuela–Punta Cana; Madrid-Barajas–El Catey, Samaná; Kansas City–Punta Cana; Düsseldorf–El Catey, Samaná; Sheremetyevo, Moscow–Las Americas. The most prominent of these routes is Bristol-Punta Cana, which mobilised more than 2,000 passengers on average during the months of April through October 2018.41

In 2018, the number of visitors to the Dominican Republic grew by 5.2 per cent in 2018, which is more than the United States (1.6 per cent), Caribbean (4.1 per cent) and Central

40 Article 196 of the Civil Aviation Law.
41 Statistic Report of Air Transport 2018 issued by the Board of Civil Aviation (JAC).
America (3.7 per cent). In addition, after an audit performed in 2017 by the International Civil Aviation Organization (ICAO), civil aviation security in the Dominican Republic was classified as exceptional.

In 2017, during a visit to the Dominican Republic by the president of the ICAO Council, Olumuyiwa Benard Aliu, it was stated that the country has achieved tremendous progress in terms of compliance with the ICAO’s Standards and Recommended Practices (SARPs), with audits showing that it is now a world leader in this area. Compliance with the ICAO’s SARPs enables the Member States to access the international civil aviation network and the socio-economic development benefits of air services. Additionally, the Dominican Republic has committed to support its neighbours by acting as a Champion State of ICAO’s ‘No Country Left Behind’ initiative. More recently, in 2018, the Regional Director of the ICAO referred to the country as a ‘reference for historic achievements’ in air transport.

In 2017, Pan Am World Airways Dominicana, SA (Pawa Dominicana), the first Dominican air carrier to operate international flights to and from the territory of the United States after the country was upgraded to Category I by the Federal Aviation Administration in 2007, topped the list of fastest-growing airlines compared to the previous year, reflecting an increase of 173,532 passengers, which was mainly a result of new routes to United States and the Caribbean. However, despite this, on 26 January 2018, the JAC suspended Pawa Dominicana’s economic authorisation certificate for 90 days because of its failure to comply with tax obligations and airport services fees, leaving 17,000 passengers stuck in several airports and 500 unemployed. Pawa Dominicana has a debt of approximately US$69 million with public and private institutions.

In February 2018, Pawa Dominicana declared itself bankrupt, and filed a restructuring request with the Mercantile Restructuring Court, which was approved in April 2018. At the time of writing, Pawa Dominicana is continuing with the restructuring process, and trying to obtain the best outcome in the circumstances.

IX OUTLOOK

Despite the bankruptcy of Pawa Dominicana occurring in the first half of 2018, the civil aviation authorities continue to be optimistic with regard to the development of the aviation industry because of the progress that has been made in recent years.

Punta Cana International Airport, which is among the busiest airports in the Caribbean, ranked second both in growth (61.2 per cent) and number of passengers (7.3 million) in 2017. On 1 December 2016, the US Customs and Border Protection (CBP) and the Dominican government signed an agreement for the establishment of preclearance operations from Punta Cana International Airport. The owners and operators of CBP and

42 https://www.diariolibre.com/noticias/aviacion-civil-dice-republica-dominicana-crecio-en-entrada-de-pasajeros-por-encima-de-norteamerica-EE9024655.
Punta Cana International Airport are currently awaiting final approval of the agreement by the Constitutional Court, where all government-to-government agreements must be referred for final approval, in order to initiate the preclearance operation as soon as possible.

In addition, the air carrier Dominican Wings rebranded itself as Flycana, the first low-cost carrier in the Caribbean. This new airline expects to initiate operations in 2023, and plans to operate a fleet of 28 aircraft to over 50 destinations, carrying 6.5 million passengers a year.

Finally, in 2018, the Dominican Republic executed 14 agreements by means of which aero commercial relations were established or updated with several countries (including with the Bahamas, Jamaica, Poland, Portugal, Rwanda, Seychelles, Germany, Holland, and others). Additionally, the Dominican Republic signed an air service agreement with China that opens the door for direct flights between both countries, with a potential market of 2 million tourists per year. This new opportunity has already attracted the interest of several airlines, such as Air China, China Southern Airlines and China Eastern Airlines.
I INTRODUCTION

Egypt is an important player in the Middle Eastern and African aviation markets largely because of its geographic location, which places it at the crossroads of two continents, making it an important transit destination. This is in addition to its old aviation tradition, which dates back to 1932 when the first Egyptian airline was established.

Aviation-related matters in Egypt are regulated by several general and specific laws, whose application is overseen by a number of authorities, chief among which is the Ministry of Civil Aviation and the Egyptian Civil Aviation Authority (ECAA). These authorities play a role in issuing licences and permits for carriers and aviation-related services and ensuring adequate management of airports and air navigation services, either directly or through the government-owned Egyptian Holding Company for Airports and Air Navigation and its subsidiaries.2

The Egyptian Civil Aviation Law3 is the main legal instrument governing the regulation of aviation in Egypt. It incorporates the terms of the major international conventions to which Egypt is a party and provides, whether directly by reference, for a carrier liability regime for international carriage analogous to those stipulated in international treaties. Conversely, the Commercial Code4 regulates matters of domestic carriage and creates a liability regime that complements the general terms of the Egyptian Civil Code (ECC), the law of general application.

II LEGAL FRAMEWORK FOR LIABILITY

The general liability regime is governed by the ECC, which states in Article 163 that ‘Every fault which causes injury to another imposes an obligation to make reparation upon the person by whom it is committed.’ Reparation for contractual breaches is limited to direct and foreseeable damages, including lost profit, although for torts, such liability covers direct and unforeseeable damages. In the event of fraud (i.e., wilful negligence) and gross negligence in implementing a contract, the rules of tortious liability apply.

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1 Tarek Badawy is a partner at Shahid Law Firm. The author wishes to thank Nadine Khalil, associate at Shahid Law Firm, for her research assistance.
2 For example, the Egyptian Airports Company (EAC) and National Air Navigation Services Company (NANSC).
3 Law No. 28 of 1981.
4 Law No. 17 of 1999.
The parties may by contract extend their liability to cover consequential and unforeseeable damages as well as cases of force majeure, and may also limit it by agreement, although such a limitation does not apply in the event of fraud (i.e., wilful breach) or gross negligence.\(^5\)

In addition to the general civil liability regime, Egyptian law contains provisions that are applicable specifically to the aviation industry. Such provisions apply as *lex specialis* and override the ECC in the event of conflict. Rules of liability vary depending on whether the contractual relationship between the airline and the customer is governed by an international treaty or domestic law. In the event of international carriage, the rules of liability found in international treaties apply.

### i International carriage

Article 123 of the Civil Aviation Law states that the rules of the Warsaw Convention in addition to ‘other amending and complementing conventions shall apply’ to international air transportation. Egypt is a party to all the major international aviation instruments on carrier liability including the 1929 Warsaw Convention;\(^6\) the 1955 Hague Protocol;\(^7\) the 1961 Guadalajara Convention;\(^8\) the 1975 Additional Protocols 1, 2\(^{10}\) and 4\(^{10}\) to the Montreal Convention; and the 1999 Montreal Convention, which Egypt ratified on 25 April 2005. Article 151 of the Egyptian Constitution provides for the incorporation of international conventions into domestic law following the satisfaction of the ratification and publication requirements. The international aviation treaties to which Egypt is a party met the constitutional requirements of their incorporation into domestic law and are therefore binding on Egyptian courts.

### ii Internal and other non-convention carriage

Internal and other non-conventional carriage are subject to the general liability regime of the ECC, the Civil Aviation Law and the Commercial Code, which contains a chapter on air transport. Article 285 of the Commercial Code defers to the terms of international conventions to which Egypt is a party in matters relating to international air transport, and states that the Code applies to domestic air transport provided that the parties agree that the points of departure and arrival are located in Egypt.\(^11\)

Egyptian law provides for a form of strict liability where the carrier is deemed responsible for injuries to passengers as long as they were caused while passengers were in the custody of the carrier or its agents at the airport of departure, in the aircraft, at the airport of arrival, or any airport or place the aircraft lands in.\(^12\) The same applies to damage caused to luggage and cargo when the accident causing the damage takes place during air transport. Air transport is deemed to begin at the time the luggage and cargo are in the possession of the carrier or its agents in the airport of departure, arrival, during flight, or in any airport or place the aircraft

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5. Article 217 of the ECC.
6. Ratified in December 1955
11. Articles 285(2) and 285(3) of the Commercial Code.
lands in. The carrier will also be responsible for damages resulting from delay in delivery of luggage, cargo or passengers, where luggage and cargo will be deemed damaged if not delivered within 30 days of the scheduled delivery date.

The carrier will in all cases be held liable for delay or damage unless it establishes that the delay or damage was caused by an event of force majeure, a defect in the transported product, the error of the consignor or consignee, or the passenger.

To benefit from a liability cap for damage or delay, the carrier must include in the air waybill or ticket that it will be subject to the liability cap provided by the Commercial Code, otherwise liability will be unlimited. The cap is limited to 150,000 Egyptian pounds for damages incurred by a passenger, unless the passenger and the carrier agree to a higher cap. Compensation for damage incurred by luggage and cargo is capped at 50 Egyptian pounds per kilogram, unless the passenger discloses in advance that luggage or cargo is of a special nature and pays additional fees to the carrier, in which case the carrier will pay full compensation.

Any attempt by the carrier to waive or limit its liability by lowering the liability caps provided in the Commercial Code or to waive or limit its liability for fraud (i.e., wilful negligence) or gross negligence will be null and void.

iii Other legislation
Airlines should also be cognisant of Egyptian environment legislation. The Egyptian Environment Law (EEL) aims at protecting the environment and ensuring compliance with international environmental standards. Egypt is a party to several international environmental instruments including the Kyoto Protocol and the Vienna Convention for the Protection of the Ozone Layer. These instruments are binding on Egyptian courts and apply alongside the EEL, which provides for criminal sanctions in cases of breach. Claimants may also rely on the civil liability regime highlighted above for breaches of environmental and other laws that cause them harm.

Penalties under the EEL vary from fines to imprisonment, or both. For instance, Article 90 of the EEL states that those that intentionally dump (including through aircraft) hazardous substances in Egypt’s exclusive economic zone shall be subject to a fine ranging between 300,000 Egyptian pounds and 1 million Egyptian pounds; and whoever throws rubbish and solid waste in places other than those designated by law can be subject to a fine ranging between 1,000 Egyptian pounds and 20,000 Egyptian pounds.

13 Article 288 of the Commercial Code.
14 Articles 289(1) and 289(2) of the Commercial Code.
15 Article 290 of the Commercial Code.
16 Article 286 of the Commercial Code.
17 Article 292(1) of the Commercial Code.
18 Article 292(2) of the Commercial Code.
19 Article 294 Commercial Code and Article 217 of the ECC.
20 Law No. 4 of 1994.
21 Ratified in December 2005.
23 Articles 1(27) and 90 of the EEL.
24 Article 87 of the EEL.
Standards of compliance with environmental legislation are also set by the ECAA, which determines permitted levels of noise and emissions by aircraft using Egyptian airports and landing areas, in addition to permitted flight altitudes, speed, engine capacities and other conditions. Failure to comply can lead to the suspension or withdrawal of permits or licences issued.

III LICENSING OF OPERATIONS

i Licensed activities

All aviation-related operations must be licensed or approved by the Minister of Civil Aviation, the ECAA, or both. For example, the ECAA is responsible for licensing aviation personnel operating on aircraft in Egypt (including pilots, crew, engineers and air traffic control officers), all of whom must satisfy licensing requirements, including passing mandatory tests. Licence terms and retention requirements vary depending on the licensed activity. For example, pilot licences are valid for six to 12 months, and pilots must undergo medical and other examinations to retain the licence. A maintenance engineer’s licence is valid for 12 months, and the engineers must demonstrate that they practised the licensed activity to retain the licence.

The ECAA may also accredit foreign-licensed personnel subject to certain conditions, including that they be licensed in a state that is party to the Chicago Convention, that this state has a bilateral agreement with Egypt that authorises the reciprocal recognition of licences, that the licensee passes a test and that the licensee works for an Egyptian company (Egyptian citizens are exempt from this last requirement).

ii Ownership rules

In 2015, the Civil Aviation Regulations were amended to permit non-Egyptians to own up to 40 per cent in companies engaging in (1) scheduled international flights for the transportation of passengers and cargo, (2) scheduled and charter domestic fights, and (3) air taxi operations; and up to 100 per cent in airlines engaging in international charter flights transporting passengers and cargo.

To set up an Egyptian airline, a number of conditions must be met, including obtaining the Minister of Civil Aviation’s approval; satisfying minimum capital requirements; obtaining all permits and licences (and ensuring they remain up to date), including a valid air operator certificate (AOC) and an airworthiness certificate for each aircraft operating in Egypt; and possessing (owned or leased) at least two aircraft for airlines engaging in scheduled flights for passengers, and one aircraft for charter airlines and scheduled flights for cargo.

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Following establishment, the Egyptian carrier must obtain an operating licence by demonstrating that it meets certain conditions, including having a bank account at a bank licensed by the Central Bank of Egypt, depositing the capital of the company in this account, providing a business plan, acquiring premises equipped with the necessary installations and facilities to ensure it can operate, and employing the required technical and administrative personnel.\(^{35}\)

Companies offering agency services, however, must be fully owned by Egyptians.\(^{36}\) This restriction is in line with agency legislation, which precludes foreigners from owning shares in commercial agency companies operating in Egypt.

**iii Foreign carriers**

Foreign carriers must be licensed by the Egyptian Minister of Civil Aviation. The licence will be valid indefinitely if it is issued based on an international treaty to which Egypt and the operator’s state are parties (including a bilateral air transport treaty),\(^{37}\) otherwise the licence will be valid for up to one year.\(^{38}\) Foreign carriers must also obtain an ECAA permit that authorises them to fly over Egyptian territory.\(^{39}\)

To obtain an operating licence, the foreign carrier must meet several requirements including being a national of a state party to an air transport agreement to which Egypt is also a party, being authorised by the aviation authorities in its state of registration to engage in air transport, and complying with Egyptian labour laws with respect to the hiring of Egyptian and foreign employees.\(^{40}\)

Furthermore, the aircraft to be operated in Egypt must satisfy certain conditions including:

- being registered in its state of nationality;
- having a valid AOC issued by its state of nationality;
- bearing the marks indicating its nationality and registration;
- having licensed pilots and crew (who must be in the number and of the level provided in the aircraft manual); and
- benefiting from insurance coverage.

**IV SAFETY**

Egyptian law emphasises the importance of compliance with maintenance programmes applicable to aircraft, which vary depending on an aircraft’s type and model. The ECAA conducts regular inspections of aircraft and maintenance operations (including weighing exercises, flight tests, accessing aircraft and test equipment) to ensure they have complied with their programmes. Failure to comply can lead to the revocation of the AOC.

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\(^{35}\) Article 8 of the Civil Aviation Regulations.

\(^{36}\) Article 68 of the Civil Aviation Law.

\(^{37}\) This licence is only issued to carriers operating scheduled flights. Charter airlines and private aircraft operators must consult with the ECAA regarding authorisations to operate in Egypt.

\(^{38}\) Article 9 of the Civil Aviation Law.

\(^{39}\) Article 9 of the Civil Aviation Law.

\(^{40}\) Article 10 of the Civil Aviation Regulations. Operating licences may be permanent or temporary. The requirements to obtain each type of licence, vary albeit slightly.
The Civil Aviation Law also provides the ECAA with the powers to follow any procedure to prevent the commission of a crime that may affect the safety of aviation in Egypt,\(^{41}\) and requires all crew members to report any accident that takes place aboard an aircraft. Reported incidents are subsequently investigated by the Ministry of Civil Aviation.\(^{42}\)

The Ministry of Civil Aviation’s General Administration for Investigation and Prevention of Aircraft Accidents investigates aircraft accidents on Egyptian territory.\(^{43}\) When the aircraft is not registered in Egypt, representatives from the aircraft’s state of registration and operator’s state of origin, among others, are invited to participate in the investigation. They are entitled to visit the site of the accident, inspect the wreckage, take testimony, access evidence and provide input to local investigators.\(^{44}\)

V INSURANCE

All aircraft operators in Egypt must obtain third-party liability insurance against dangers to passengers, luggage and cargo, and damage to persons on the ground.\(^{45}\) All crew members and workers employed by the carrier that are exposed to the dangers of operating an aircraft must also be insured.\(^{46}\) The insurer must be authorised to provide insurance services by the laws of the state where the aircraft is registered.\(^{47}\) In Egypt, only Egyptian joint-stock companies with minimum issued capital of 60 million Egyptian pounds may provide insurance services.\(^{48}\) Reinsurance providers are not bound by such a requirement.

An operator may be exempt from having to seek insurance from a licensed insurance provider in the aircraft’s state of registration if it deposits a bond in the treasury of the state of registration or a licensed bank in that state, or if the state of registration provides an undertaking that the operator will not benefit from any judicial immunity in the event of a dispute over the bond. The amount of the bond is determined by the ECAA.\(^{49}\)

Compliance with the mandatory insurance rules is evidenced by placing the insurance certificate aboard the aircraft or depositing a certified copy of the certificate with the ECAA.\(^{50}\)

VI COMPETITION

The Egyptian Competition Act\(^{51}\) was promulgated in 2005 to fight anticompetitive behaviour. The Competition Act contains provisions against abuse of dominance, bid rigging, vertical and horizontal restraints, price fixing, market allocation, and anticompetitive agreements in general,\(^{52}\) and provides for civil and criminal penalties for breaches, although the default

\(^{41}\) Article 153 of the Civil Aviation Law.
\(^{42}\) Article 99 bis of the Civil Aviation Law.
\(^{43}\) Article 132 of the Civil Aviation Regulations.
\(^{44}\) Article 104 of the Civil Aviation Law.
\(^{45}\) Article 138(1) of the Civil Aviation Law.
\(^{46}\) Article 138(2) of the Civil Aviation Law.
\(^{47}\) Article 139 of the Civil Aviation Law.
\(^{48}\) Article 27 of the Insurance Law No. 10 of 1981.
\(^{49}\) Article 140 of the Civil Aviation Law.
\(^{50}\) Articles 138–141 of the Civil Aviation Law.
\(^{51}\) Law No. 3 of 2005.
\(^{52}\) Articles 6 and 8 of the Competition Act.
penalties are of a civil nature unless the head of the Competition Authority requests that
criminal prosecution take place, in which case the case file will be transferred to the Office of
the Attorney General for processing.\textsuperscript{53}

A company will be deemed dominant in a market if it holds a market share that
exceeds 25 per cent and has an effective impact on prices or volume of supply in the
market notwithstanding competitors’ attempts to limit this impact.\textsuperscript{54} While this provision
can arguably apply to certain airlines operating flights on certain routes, the Competition
Authority does not appear to have investigated airlines. National carriers do not benefit from
an exemption from competition legislation, although the Competition Act explicitly exempts
public utilities directly managed by the state from liability.\textsuperscript{55}

The penalty for cartels is a fine of between 2 per cent and 12 per cent of the total
revenue of the product subject to the offence during the period the offence was committed. If
it is impossible to calculate the total revenue, the penalty shall be a fine of between 500,000
Egyptian pounds and 5 million Egyptian pounds.\textsuperscript{56}

Cooperation agreements between operators will be scrutinised by the Competition
Authority if they have negative effects on competition in Egypt.\textsuperscript{57} Egyptian competition
legislation\textsuperscript{58} deems agreements between competitors to be anticompetitive if they tend to
cause any of the following:
\begin{itemize}
  \item[a] raising, decreasing or stabilising product or service prices;
  \item[b] allocating markets on the basis of geographical zones, distribution centres, types of
          customers or products or services, market share, seasons, or periods of time;
  \item[c] coordinating with respect to participating or refraining from entering in tenders, bids
          and other supply offers; or
  \item[d] restricting the manufacturing, production, distribution or marketing process of
          commodities, including the restriction of the type or size of a product or service, or
          limiting its availability.
\end{itemize}

The Competition Authority may provide an exemption to the foregoing if the benefits of an
agreement between competitors (to customers) outweigh its anticompetitive effects.\textsuperscript{59} This
exemption can be relied on by the aviation industry.

\section*{VII \hspace{1em} ESTABLISHING LIABILITY AND SETTLEMENT}

\textbf{i \hspace{1em} Procedure}

Liability is confirmed by means of a court judgment or the award of an arbitral tribunal. The
parties can settle their disputes at any time, even after a judgment or an award is issued. That
being said, claims will be guided by the limitation periods provided by law.

\textsuperscript{53} Article 21 of the Competition Act.
\textsuperscript{54} Article 7 of the Competition Regulations.
\textsuperscript{55} Article 9 of the Competition Act.
\textsuperscript{56} Article 22 First of the Competition Act. Those holding managerial functions or have effective control of a
company subject to the fine may also incur the same penalty if the offence resulted from their negligence
and knowledge of the acts leading to the commission of the offence (Article 25 of the Competition Act).
\textsuperscript{57} Article 5 of the Competition Act.
\textsuperscript{58} Articles 6 of the Competition Act and 11 of the Competition Regulations.
\textsuperscript{59} Article 6 of the Competition Act.
Limitation periods vary depending on the type of claim brought by the plaintiff. While the general limitation period provided by law is 15 years, this period is reduced to seven years in commercial claims (which typically apply to supply contracts between airlines and their catering companies, or disputes between agents and airlines in relation to their business, loan agreements with banks or airline leasing companies), and three years for tort claims.

Other lex specialis provide shorter limitation periods. Accordingly, claims relating to domestic transport are subject to the terms of the Commercial Code and Civil Aviation Law, which state that liability claims relating to loss or damage to luggage and cargo are subject to a one-year limitation period from the date of delivery, whereas claims for injury to, or death of, passengers are subject to a two-year limitation period, which starts running from the date of the injury or death, as applicable. The same limitation period applies to claims brought by or on behalf of third parties injured on the ground, although unlike those in a contractual relationship with the airline, their claims are not subject to a liability cap in the case of domestic flights. With respect to international flights, however, caps will be governed by the relevant international conventions, if applicable.

Carriage disputes are generally subject to the jurisdiction of the court where the respondent is domiciled. Parties may also agree to refer their disputes to arbitration as Egypt is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and has enacted its own commercial arbitration law, provided that a written arbitration agreement exists between the parties.

Disputes regarding compensation for damage to third parties on the ground are subject to the jurisdiction of the court in the area of the accident, although the parties may agree to subject the dispute to the jurisdiction of a court in any other state.

The liability regime (as well as liability caps and defences) for international air transport, however, varies depending on the applicable convention or protocol. For example, under the Warsaw Convention carriers can avoid liability for death or injury of individuals if they establish that they had taken all necessary measures to avoid the incident causing the injury or death; whereas in the 1999 Montreal Convention carriers may not limit or exclude their liability for injuries of death in claims not exceeding 100,000 special drawing rights (SDR) for each passenger, although they may be able to limit or exclude their liability for damages exceeding 100,000 SDR if they, their servants or agents did not act negligently or were not responsible for any wrongful act or omission, or if the damage was solely caused by a third party.

60 Article 374 of the ECC.
61 Article 68 of the Commercial Code.
62 Article 172 of the ECC.
63 Article 296(1) of the Commercial Code.
64 Article 296(2) of the Commercial Code.
65 Article 137 of the Civil Aviation Law.
66 Article 132 of the Civil Aviation Law.
67 Article 49 of the Code of Civil and Commercial Procedures. The Warsaw and 1999 Montreal Conventions provide for similar non-exclusive fora (e.g., Article 28 of the Warsaw Convention; and Article 33 of the 1999 Montreal Convention).
68 Law No. 27 of 1994.
69 Article 136 of the Civil Aviation Law.
70 Article 20 of the Warsaw Convention.
71 Articles 17 and 21 of the 1999 Montreal Convention.
Egyptian law recognises the vicarious liability of employers for the act of their employees (without prejudice to an employer’s right to seek damages from the employee should it establish that the employee was responsible for the injury).\textsuperscript{72} The law also provides for joint and several liability when multiple persons are responsible for an injury.\textsuperscript{73} It follows that pilots may, in principle, be subject to a claim for delay, damage to cargo, or injury to or death of passengers, although a claimant must overcome the evidentiary burden of proving that the pilot acted negligently (considering pilots are not a party to the contract with the consignor or passenger). Even then, a pilot found to be acting negligently may limit his or her liability to the caps provided by Egyptian law.\textsuperscript{74}

The liability of pilots for international carriage and travel is governed by the applicable international convention. For example, the 1999 Montreal Convention provides employees and agents of a carrier with the right ‘to avail themselves of the conditions and limits of liability . . . unless it is proved that they acted in a manner that prevents the limits of liability from being invoked in accordance with this Convention’.\textsuperscript{75} Egyptian law deems fraud (wilful breach) and gross negligence to amount to acts that prevent the limitation of liability.\textsuperscript{76}

\section{ii Product liability}

Manufacturers of aircraft are also liable to owners and passengers and their heirs for injury or deaths caused by manufacturing defects. The manufacturer’s liability towards aircraft owners is contractual in nature, may be limited or waived by agreement\textsuperscript{77} and prescribes within one year of the sale unless the manufacturer wilfully hides the defect.\textsuperscript{78} Passengers or their heirs may pursue manufacturers in torts, where the action will prescribe after three years.\textsuperscript{79}

\section{iii Compensation}

Unless capped by agreement or law,\textsuperscript{80} as is the case in the relationship between passengers and consignors and carriers, compensation is generally calculated based on the foreseeable and direct damages resulting from a breach of contract, including lost profit.\textsuperscript{81} In case of torts, all direct damages are compensable irrespective of whether or not they were foreseeable at the time the act causing the injury took place. Where appropriate, judges can also impose moral damages, whose assessment is subject to the judge’s sole discretion.\textsuperscript{82}

Unless guided by specific legal provisions (e.g., terms of international aviation conventions that provide for different defences against liability), judges will typically assess whether the respondent acted reasonably and will factor possible contributory negligence on the part of a claimant prior to ruling on the case. Heirs of the deceased can also claim damages.

\begin{footnotesize}
\begin{enumerate}
\item Articles 174 and 175 of the ECC.
\item Article 169 of the ECC.
\item Article 293 of the Commercial Code.
\item Article 43 of the Montreal Convention.
\item Articles 217 of the ECC and 294 of the Commercial Code.
\item Article 453 of the ECC.
\item Article 452 of the ECC.
\item Article 172 of the ECC.
\item Article 223 of the ECC.
\item Article 221 of the ECC.
\item Article 222 of the ECC.
\end{enumerate}
\end{footnotesize}
VIII DRONES

In 2017, the Law No. 216 of 2017 (the Drones Law) was enacted to regulate the use, trade and circulation of drones. The Drones Law defines a drone as any object that can fly unmanned by using any type of technology, irrespective of its shape or size, and is remotely operated or controlled.83

Article 2 of the Drones Law prohibits any person (including government authorities), from importing, manufacturing, compiling, circulating, possessing, trading or using drones prior to obtaining a permit from the Ministry of Defence, according to the terms, conditions and procedures specified in the executive regulations of the Drones Law (the Drones Regulations).

Drones may be used for economic, commercial,84 sports,85 scientific, and research activities86 subject to obtaining the approval of various security agencies. A registry has been created at the Ministry of Defence in which all drones as well as the names of those licensed to manufacture, import, own, operate and trade in drones are documented.87

IX VOLUNTARY REPORTING

With the exception of the reporting obligations discussed in Section IV, there are no voluntary reporting mechanisms provided under Egyptian aviation legislation. Once the investigation of a crime is handled by the prosecution it has discretion to withhold information from the public to ensure that the investigation progresses smoothly.

X THE YEAR IN REVIEW

On 8 January 2019, Egypt’s Court of Cassation adjudicated a case on the interpretation of Articles 22 and 23 of the 1999 Montreal Convention in relation to a lawsuit filed by a passenger claiming damages for the loss of his belongings. The Court ruled that in assessing the amount of compensation for lost possessions, judges may rely on information published on official websites administered by international organisations such as the United Nations and specialised agencies (e.g., the IMF), on the basis that they reflect public information (whether or not the parties to a dispute invoke such information as evidence). As such, the court consulted the IMF’s website to determine the amount of compensation owed to the plaintiff following the conversion of SDR units into euros (then into Egyptian pounds) according to the rate applicable at the time the case was filed before confirming that the plaintiff was entitled to damages based on that conversion rate. While this case relates to the valuation of SDRs, the principle introduced by the court was about the use of online information found on websites administered by international organisations in general and will likely have an impact on the way Egyptian courts examine claims under international treaties going forward.

83 Article 1 of the Drones Law.
84 Article 3 of the Drones Regulations.
85 Article 4 of the Drones Regulations.
86 Article 5 of the Drones Regulations.
87 Article 2 of the Drones Regulations.
XI  OUTLOOK

In January 2019, Egypt inaugurated the Sphinx International Airport (SPX) in Western Cairo. The new airport is located 12km from the great pyramids of Giza, and its location will hopefully serve to promote 'one-day tourism'.

SPX is also expected to alleviate the pressure on Cairo International Airport, Egypt’s main airport, and serve international carriage operations to the growing districts of 6th of October and Sheikh Zayed in Western Cairo, as well as the governorates of Fayoum and Beni Suef.

Furthermore, the Ministry of Civil Aviation is preparing to inaugurate the International Administrative Capital Airport in the coming weeks. The new airport will service the new administrative capital and neighbouring areas such as the city of Suez and Ein Sokhna and is modelled on international standards.
Chapter 16

EUROPEAN UNION

Dimitri de Bournonville and Charlotte Thijssen

The European Union comprises 28 Member States and its origins lie in the 1957 Treaty of Rome. In March 2017, the United Kingdom officially announced its decision to leave the European Union, which triggered the start of two years of negotiations with the EU. On the foreseen deadline of 29 March 2019, still no exit scenario had been voted by the British Parliament and an extension was granted, under which the United Kingdom has now until ultimately 31 October 2019 to organise itself and confirm the conditions under which it will effectively exit the EU.

For a long time, air transport was not addressed by the different European institutions. European air transport law emerged only in the early 1990s from the work of the European Commission, the European Parliament and the European Council.

European legislation comprises mainly Regulations, which are directly applicable, and Directives, which need to be transposed into national law. European aviation law today covers many aspects of the industry.

I PASSENGER RIGHTS


The Regulation entered into force in 2005 and aims at ensuring a high level of protection of air passengers, providing them with specific rights in the event of denied boarding against their will, flight cancellation or delay.

i Scope

The Regulation applies to passengers departing from an airport located in the territory of a Member State (whether they travel with a European Union carrier or not), and to passengers

1 Dimitri de Bournonville is a partner and Charlotte Thijssen is a senior associate at Kennedys Brussels LLP. The authors would like to acknowledge the contribution of Jeremy Robinson and Cyril-Igor Grigorieff, who co-wrote the chapter in previous editions upon which this chapter is based.

2 Which coincides with the date on which a new European Commission will be appointed into office; see Paragraph V(vi) on the foreseen impact of Brexit.
departing from an airport in a third country to an airport situated in the territory of a Member State if they travel with a European Union carrier and under the condition that they do not receive benefits or compensation or are given assistance in the third country.

In its early decision *Emirates* of 10 July 2008 (C-173-07), the Court of Justice of the European Union (CJEU) held (in the case of a non-European air carrier) that the Regulation does not apply to the case of an outward and return journey in which passengers who have originally departed from an airport located in the territory of a Member State travel back to that airport on a flight from an airport located in a non-Member State. According to the Court, the fact that the outward and return flights are the subject of a single booking has no effect on the interpretation of that provision.

The Regulation also applies to any scheduled and non-scheduled flights, including package tours, except when the package tour is cancelled for reasons other than the cancellation of the flight.

In the *Wegener* decision of 31 May 2018 (C-537/17), the CJEU ruled that the Regulation applies to a passenger transport effected under a single booking and comprising, between its departure from an EU airport and its arrival in a non-EU airport, a scheduled stopover outside the EU with a change of aircraft.

In the *Wirth* decision of 4 July 2018 (C-532/17), the CJEU clarified the question of who is the operating carrier in the case of a wet lease operation for the purpose of the definition of ‘operating carrier’ of Article 2(b) of the Regulation. The ‘operating air carrier’ is defined in the Regulation as the carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger. The CJEU clarified this concept in the context of a wet lease operation by stating that the definition does not cover a carrier (the wet lessor) that wet leases an aircraft to another carrier when the wet lessor does not bear operational responsibility for the flights, even if the booking confirmation mentions the name of the wet lessor that operates the flight in question.

### ii Denied boarding

When an operating carrier reasonably expects to deny boarding, it will first call for volunteers to surrender their reservation in exchange for benefits commonly agreed and with at least a right to reimbursement or rerouting.

If no or insufficient passengers surrender, the operating carrier may then deny boarding to passengers against their will. In this situation, the Regulation provides that the air carrier will have to immediately compensate the concerned passengers according to the chart set out in Article 7 of the Regulation, which foresees fixed and immediate compensation between €250 and €600 depending on the destination. The air carriers will also be required to offer reimbursement or rerouting to the denied boarding passengers and to provide them with assistance, which may include free food, hotel accommodation, and calls and emails.

Under the Regulation, denied boarding passengers are those who are obviously denied the right to board the aircraft against their will, but to fall within the definition of the Regulation they should also have a confirmed reservation on the flight and have presented themselves for check-in at the agreed time or, if no time was agreed, at least 45 minutes before the published departure time.

In the *Germán Rodríguez Cachafeiro* case of 4 October 2012 (C-321/11), the CJEU held that the concept of ‘denied boarding’ includes situations where, in the context of a single contract of carriage involving a number of reservations on immediately connecting flights and a single check-in, an air carrier denies boarding to some passengers arguing that
the first flight included in their reservation has been subject to a delay attributable to that carrier and that the latter mistakenly expected those passengers not to arrive in time to board the second flight.

On the same day, in the *Lassooy* decision (C-22/11), the CJEU considered that this regime related not only to cases where boarding is denied because of overbooking but also to ‘those where boarding is denied on other grounds, such as operational reasons’. The Court noted that the occurrence of ‘extraordinary circumstances’ resulting in an air carrier rescheduling flights after those circumstances arose ‘cannot give grounds for denying boarding on those later flights or for exempting that carrier from its obligation to compensate, [. . .] a passenger to whom it denies boarding on such a flight’.

The regime described above does not apply when there are reasonable grounds to deny boarding, for instance for health, safety, security or inadequate travel documentation reasons.

### iii Cancellation

Cancellation is defined by the Regulation as the ‘non-operation of a flight that was previously planned and on which at least one place was reserved’. In such a case, the Regulation provides that the affected passenger should be offered the choice between reimbursement and rerouting under comparable transport conditions, and also be given food, refreshments and calls, all free of charge. In the event of rerouting, when a stay of at least one night becomes necessary, the passenger should also be offered hotel accommodation and transport from and to the airport.

One particularity of this legislation consists in the automatic and standardised financial compensation offered to the passengers whose flight is cancelled. Article 7 sets this compensation at between €250 and €600 depending on the travel distance. These amounts may, however, be decreased by 50 per cent, in a rerouting situation, when the arrival time does not exceed the scheduled arrival time originally booked by two to four hours depending on the distance.

This automatic standardised compensation may nevertheless be avoided if the passenger is informed of the cancellation within a certain time limit or if the cancellation results from extraordinary circumstances.

The CJEU, in its *Rodriguez* decision of 13 October 2011 (C-83-10) ruled that the term ‘cancellation’ also covers cases in which a flight departs but then returns to the airport of departure and does not proceed further.

In the *Wunderlich* order of 5 October 2016 (C-32/16), the CJEU also ruled that a flight in respect of which the places of departure and arrival accorded with the planned schedule but during which an unscheduled stopover took place could not be regarded as cancelled.

In the *Krijgsman* decision of 11 May 2017 (C-302/16), the CJEU ruled that the operating air carrier is required to pay the compensation where a flight was cancelled and that information was not communicated to the passenger at least two weeks before the scheduled time of departure, including in the case where the air carrier, at least two weeks before that time, communicated that information to the travel agent via whom the contract for carriage had been entered into with the passenger concerned and the passenger had not been informed of that cancellation by that agent within that period.

In the *Harms* decision of 12 September 2018 (C-601/17), the CJEU ruled that in case of a cancellation, the price to be taken into account for reimbursement to the passenger includes any commission charged by an intermediary except if this is done without the knowledge of the air carrier.
iv Extraordinary circumstances

The automatic standardised compensation in the event of cancellation of a flight does not need to be paid by an operating carrier if it can prove that the cancellation is the result of extraordinary circumstances ‘which could not have been avoided even if all reasonable measures had been taken’.

The recitals of the Regulation indicate that such extraordinary circumstances may occur in situations of political instability, weather conditions, security risks, unexpected flight safety shortcomings, strikes or air traffic control decisions.

The CJEU, in its Wallentin decision of 22 December 2008 (C-549/07) held that the 1999 Montreal Convention’s rules on limitation and exclusion of liability were not decisive for the interpretation of the liability provisions of the Regulation. In its decision, the Court considered that a:

> technical problem in an aircraft which leads to the cancellation of a flight is not covered by the concept of ‘extraordinary circumstances’ [ . . . ], unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control.

The Court then ruled that the fact that an air carrier has complied with the minimum rules on maintenance of an aircraft cannot in itself suffice to establish that the carrier had taken ‘all reasonable measures’.

Later, in the Eglitis case of 12 May 2011 (C-294/10), the Court ruled that since an air carrier is obliged to implement all reasonable measures to avoid extraordinary circumstances, it must reasonably:

> at the stage of organising the flight, take account of the risk of delay connected to the possible occurrence of such circumstances. It must, consequently, provide for a certain reserve time to allow it, if possible, to operate the flight in its entirety once the extraordinary circumstances have come to an end.

In the McDonagh decision of 31 January 2013 (C-12/11), the Court ruled that circumstances such as the closure of part of European airspace as a result of the eruption of the Icelandic volcano constituted extraordinary circumstances. The Court recalled on this occasion that the concept of ‘extraordinary circumstances’ does not release air carriers from their obligation to provide care as described above.

In the Siewert order of 14 November 2014 (C-394/14), the Court recently ruled that mobile stairs colliding with an aircraft does not automatically constitute extraordinary circumstances.

In the van der Lans decision of 17 September 2015 (C-257/14), the Court again reduced the scope of the concept of extraordinary circumstances in considering that a delay resulting from a technical problem, which occurred unexpectedly, and that was not attributable to poor maintenance or detected during routine maintenance checks did not fall within the concept of ‘extraordinary circumstances’.

In the Peskova decision of 4 May 2017 (C-315/15), the Court ruled that a bird strike should be considered as ‘extraordinary circumstances’. In the same decision, the Court also ruled that when a delay results from both an extraordinary circumstance and another
circumstance that does not qualify as ‘extraordinary’, the delay caused by the first event must be deducted from the total length of the delay in arrival of the flight concerned in order to assess whether compensation for the delay in arrival of that flight must be paid.

In the Krüsemann decision of 17 April 2018 (C-195/17), a wildcat strike was ruled as not constitutive of an extraordinary circumstance.

In the Pauels decision of 4 April 2019 (C-501/17), the CJEU ruled that damage to an aircraft tyre caused by a foreign object (such as a screw) lying on an airport runway qualifies as ‘extraordinary circumstances’ relieving the carrier from its duty to compensate passengers. However, strikingly, air carriers must still prove that they deployed all resources in terms of staff or equipment and the financial means at their disposal to avoid the changing of a tyre damaged by a foreign object, such as loose debris lying on the airport runway.

Delay

The Regulation does not provide a definition of the concept of ‘delay’ as it does for ‘cancellation’. It generally provides that when an operating carrier reasonably expects a flight to be delayed beyond its scheduled time of departure by a certain time, which varies depending on the travel destination, passengers shall be offered meals and refreshments, the ability to place two calls, and accommodation and transfer from and to the airport under certain conditions. If the delay is at least five hours, the concerned passengers should also be offered the choice of a reimbursement and of a return flight to the first point of departure.

Soon after the entry into force of the Regulation, these provisions were challenged before the CJEU as they seemed to overlap and be contrary to the provisions of the 1999 Montreal Convention and the Regulation (EC) No. 2027/97 on air carrier liability in respect of the carriage of passengers and their luggage by air, as amended by Regulation No. 889/2002. In fact, this Convention was duly approved by the EU and provides for what seemed to be an exclusive cause of action and liability related rules. In its IATA case of 10 January 2006 (C-344/04), the Court held that two different kinds of damage exist in cases of delay:

First, excessive delay will cause damage that is almost identical for every passenger, redress for which may take the form of standardised and immediate assistance or care for everybody concerned . . .

Second, passengers are liable to suffer individual damage, inherent in the reason for travelling, redress for which requires a case-by-case assessment of the extent of the damage caused and can consequently only be the subject of compensation granted subsequently on an individual basis (Point 43).

On these grounds, the Court affirmed the validity of the Regulation with regard to EU law and the Montreal Convention.

The Court later ruled, controversially, in its Sturgeon decision of 19 November 2009 (joint cases C-402/07 and C-432/07), that passengers whose arrival at their final destination was delayed by three or more hours should be treated as passengers whose flight has been cancelled and therefore entitled to the same financial compensation:

passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled and they may thus rely on the right to compensation laid down in Article 7 of the regulation where they suffer, on account of a flight delay, a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier.
However, the Court underlined that:

*Such a delay does not, however, entitle passengers to compensation if the air carrier can prove that the long delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances beyond the actual control of the air carrier.*

The Grand Chamber of the Court reaffirmed this position on 23 October 2012 in the Nelson case (joint cases C-581-10 and C-629/10). The Court held that there was no conflict between the Montreal Convention and the Regulation insofar as (in the Court’s opinion) they covered two different situations.

On 26 February 2013, the Court ruled in the *Folkerts* case (C-11/11), regarding connecting flights, that the same compensation for delay is payable to passengers who have been delayed at departure for a period below the limits specified in the regulation, but have arrived at the final destination at least three hours later than the scheduled arrival time.

In the *Henning* case of 4 September 2014 (C-452/13), the Court held that the concept of ‘arrival time’, in the context of computation of delay, referred to the time at which at least one of the doors of the aircraft is opened.

In the *Bosen* case of 7 September 2017 (C-559/16), the Court ruled that the concept of ‘distance’ relates, in the case of air routes with connecting flights, only to the distance calculated between the first point of departure and the final destination on the basis of the ‘great circle’ method, regardless of the distance actually flown.

vi **Downgrading**

The Regulation provides that in case of downgrading, the operating carrier shall reimburse the passenger from 30 per cent to 75 per cent of the price of the ticket according to the flight distance.

In the *Mennens* decision of 22 June 2016 (C-255/15), the Court ruled that where a passenger is downgraded on a flight, the price to be taken into account in determining the reimbursement for the passenger affected is the price of the flight on which he or she was downgraded, unless that price is not indicated on the ticket entitling him or her to transport on that flight, in which case, it must be based on the part of the price of the ticket corresponding to the quotient resulting from the distance of that flight and the total distance that the passenger is entitled to travel. The Court added that the price of the ticket to be taken into consideration for the purpose of determining the reimbursement is solely the price of the flight itself, with the exclusion of taxes and charges indicated on that ticket, as long as neither the requirement to pay those taxes and charges nor their amount depends on the class for which that ticket has been purchased.

vii **Further compensation**

The Regulation provides that its application should not, except in cases of denied boarding ‘volunteers’, prejudice passengers’ rights to further compensation, adding that the compensation granted under the Regulation may be deducted from such compensation. In the *Rodriguez* case of 13 October 2011 (C-83/10), the CJEU ruled that the meaning of ‘further compensation’ must be interpreted to the effect that ‘it allows the national court
to award compensation, under the conditions provided for by the Montreal Convention 1999 or national law, for damage, including non-material damage, arising from breach of a contract of carriage by air.’

viii  Time limitation

The Regulation does not stipulate any time limitation for action. In the Moré case of 22 November 2012 (C-139/11), the Court held that the time limits for bringing actions for compensation, under the provisions regarding cancellation and compensation are determined in accordance with the rules of each Member State on the limitation of actions.

ix  Means of redress

Next to the ‘extraordinary circumstances’ means of defence mentioned above, the Regulation specifically mentions that it does not restrict the right of an operating air carrier, which complied with its obligations to indemnify passengers in cases of delay or cancellation, to seek compensation from any person, including third parties, in accordance with applicable law.

x  National enforcement body

The Regulation provides that each Member State must designate a competent authority responsible for its enforcement. In a decision of 17 March 2016 (C-145/15), the Court confirmed that where an individual complaint has been made by a passenger to the body designated by each Member State following the refusal by an air carrier to pay to the passenger the compensation, that body is not required to take enforcement action against the carrier with a view to compelling it to pay the compensation.

xi  Evolution and revision of the Regulation

In its Proposal to amend Regulation 261/2004 (COM (2013) 130 final of 13 March 2013), the European Commission aims to promote a high level of air passenger protection in cases of disruption. The Proposal was voted on by the European Parliament on first reading on 5 February 2014.

In a certain number of key areas, the European Parliament has proposed a different approach from the one initially taken by the Commission.

The five-hour threshold for delay compensation proposed by the Commission was rejected and the European Parliament instead proposed a three-hour threshold. Furthermore, the European Parliament has suggested the height of compensation to be €300 for all journeys of 2,500 kilometres or less, instead of €250.

Although the European Parliament agreed with the Commission to define extraordinary circumstances outside the control of the air carrier in an unambiguous manner, it has taken a similar approach to the CJEU in the Wallentin-Hermann verdict by considering that technical defects could not fall within the concept of ‘extraordinary circumstances’. The Parliament has proposed an exhaustive list of extraordinary circumstances, contrary to the initial proposal of the Commission under which the concept was an open one, so as to possibly include exceptional events and their consequences, such as the ash cloud in 2010 or the Japanese tsunami in 2011.

The current Regulation does not provide for a limit to liability, even in extraordinary circumstances or major air traffic disruptions. The Commission hence proposed the introduction of a three-night limit in circumstances of strikes, storms or snows. This has
proven to be sufficient in most circumstances and allows air carriers to foresee the impact on their passenger rights budgets. The Parliament agreed to a limit but proposed to set the limit at five nights. A cap on the duty to provide for accommodation in cases of extraordinary circumstances also for persons with reduced mobility, pregnant women, unaccompanied children and other persons in need of special medical care was rejected by the Parliament in its entirety.

The Parliament rejected the proposal of the Commission on no-shows on the first leg of a multi-sector journey, and has proposed that it should not be possible for passengers to be denied boarding on a section of the journey of a two-way (return) ticket on the grounds that they have not travelled on every leg of the journey covered by the ticket.

Other proposals by the European Parliament include the imposition of bankruptcy insurance upon air carriers to ensure that passengers are, in cases of bankruptcy, assured of the reimbursement of costs and repatriation.

With regard to the issue of denied boarding, the Parliament proposed to extend the definition of denied boarding to include 'a flight for which the scheduled time of departure has been brought forward with the consequence that the passenger misses that flight shall be considered a flight for which the passenger has been denied boarding'.

The discussions on the proposal are currently suspended.

On 10 June 2016, the Commission published new Interpretative Guidelines on the Regulation. These Guidelines essentially summarise the recent case law of the CJEU.

On 9 March 2017, the European Commission published an Information Notice on relevant EU consumer protection, marketing and data protection law applicable to claim agencies’ activities in relation to Regulation 261/2004 on air passenger rights. This Information Notice provides, inter alia, that the passenger should always seek to contact the operating carrier before considering other means to seek redress for his or her rights, and that claim agencies must be able to produce a clear power of attorney and should not resort to persistent unsolicited telemarketing.

xii Passengers with reduced mobility

The Regulation provides that passengers with reduced mobility (PRM) and the persons accompanying them should be given priority by the carrier. Additional requirements towards PRM are laid down in Regulation (EC) No. 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air. This legislation establishes that air carriers cannot refuse carriage to PRM, unless for specific safety requirements or if the size of the aircraft makes the embarkation physically impossible. Instead, the PRM and accompanying persons should be offered reimbursement or rerouting under certain conditions. Assistance without additional charge should also be offered by the managing body of the airport to PRM.

xiii Regulation 2027/97 and the 1999 Montreal Convention

Beside the Regulation 261/2004, passengers’ rights are also protected by the Regulation 2027/97, amended in 2002, on air carrier liability in respect of the carriage of passengers
and their baggage by air, and by the 1999 Montreal Convention, which was approved by the Community with the consequence that it is an integral part of the European Union legal order allowing the CJEU to give a preliminary ruling concerning its interpretation.

In the *Walz* decision of 6 May 2010 (C-63/09), the CJEU ruled that the term ‘damage’, under Article 22(2) of the Montreal Convention that sets the limit of an air carrier’s liability for the damage resulting, inter alia, from the loss of baggage, must be interpreted as including both material and non-material damage.

In the *Sanchez* decision of 22 November 2012 (C-410/11), the Court ruled that the same Article 22(2) of the Montreal Convention read in conjunction with its Article 3(3) must be interpreted as meaning that the right to compensation and the limits to a carrier’s liability in the event of loss of baggage apply also to a passenger who claims that compensation by virtue of the loss of baggage checked in in another passenger’s name, provided that the lost baggage did in fact contain the first passenger's items.

In the *Prüller-Frey* decision of 9 September 2015 (C-240/14), the CJEU ruled that Regulation 2027/97 and the Montreal Convention preclude claims on the basis of Article 17 of the Convention for damages brought by a person who was a passenger in an aircraft that had the same place of take-off and landing in a Member State and was being carried free of charge for the purpose of viewing from the air a property in connection with a property transaction planned with the pilot of that aircraft.

In the *Wucher* decision of 26 February 2015 (C-6/14), the Court ruled that Article 17 of the Montreal Convention must be interpreted as meaning that a person who comes within the definition of ‘passenger’ within the meaning of Article 3(g) of Regulation 785/2004 on insurance requirements for air carriers, also comes within the definition of ‘passenger’ within the meaning of Article 17 of that convention, once that person has been carried pursuant to a ‘contract of carriage’ within the meaning of Article 3 of the Montreal Convention.

In the *Air Baltic Corporation* decision of 17 February 2016 (C-429/14), the Court ruled the Montreal Convention must be interpreted as meaning that an air carrier that has concluded a contract of international carriage with an employer of persons carried as passengers, such as the employer at issue in the main proceedings, is liable to that employer for damage occasioned by a delay in flights on which its employees were passengers pursuant to that contract, on account of which the employer incurred additional expenditure.

In the *Finnair* decision of 12 April 2018 (C-258/16), the Court held that, under certain conditions, a complaint recorded in the information system of the carrier fulfils the requirement of being in written form.

II LICENSING OF OPERATIONS

Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community deals with the conditions under which commercial air carriers established in one of the Member States of the European may start and carry out their activities.

Undertakings established in the European Union are not permitted to provide air services unless they have received an appropriate operating licence from the competent

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authority of a Member State. Undertakings meeting the requirements of the Regulation are entitled to receive an operating licence. Therefore, applications from such undertakings that meet the criteria cannot be rejected.

Simplified rules apply to carriers operating smaller aircraft and no licence is required when the concerned air services are performed by non-power-driven aircraft or ultralight power-driven aircraft and for local flights.

The holder of an operating licence must comply with these requirements at all times:
- its principal place of business must be located in the licensing Member State;
- it has an air operator’s certificate (AOC) granted by the same licensing Member State;
- it has one or more aircraft at its disposal operated through ownership or dry lease (meaning that the air carrier must initially and at all times operate at least one aircraft under its own AOC);
- its main occupation is to operate air services or the repair and maintenance of aircraft;
- its company structure allows the competent licensing authority to control if it complies with the Regulation, notably in terms of majority ownership and effective control requirements;
- it must be majority-owned and effectively controlled by EU Member States or nationals of EU Member States, except as provided under agreements between the European Union and third countries;
- it meets certain financial and insurance requirements. These requirements notably include the ability to demonstrate that it can meet actual and potential (financial) obligations for at least the 12 months (or for a period of 24 months from the start of operations), the obligation to communicate audited accounts to the licensing authority on a yearly basis and to comply with minimum insurance requirements in respect of passengers, baggage, cargo, mail and third parties; and
- the physical persons who will compose the management of the air carrier must be of good repute.

The operating licence may be revised in certain circumstances. For instance, the licence needs to be resubmitted for approval when operations have not started six months after the licence has been granted, if operations have stopped for more than six months, if the licensing authority determines that changes affecting the legal situation of the European carrier require it (such as a merger or takeover) or in the event of significant change in the financial situation of the air carrier.

In addition, the air carrier is obliged to notify its licensing authority in certain cases: when it plans to make substantial changes to its activities, when it is involved in a merger or acquisition project or when there is a change in ownership of shares representing more than 10 per cent of the equity capital of the air carrier. Depending on the significance of the proposed change, the licensing authority may require a revised and updated business plan, decide that the licence has to be resubmitted for approval or suspend or revoke the licence, or grant a temporary licence.

Finally, the operating licence can be suspended and the air carrier prevented from continuing its operations when, in the opinion of the licensing authority, the airline cannot meet its obligations for a 12-month period, when the carrier’s audited accounts have not been communicated in due time, when the carrier has knowingly or recklessly provided false information, when the AOC has been suspended or withdrawn or when the conditions of good repute are no longer met.
Ownership and effective control requirements apply to European Union air carriers and are reflected in the Regulation. It is indeed a well-established principle of EU aviation law that an operator can obtain, and maintain, an operating licence in the EU only if it has EU nationality. Article 4(f) of the Regulation provides that Member States or nationals of Member States must own more than 50 per cent of the undertaking and effectively control it, whether directly or indirectly through one or more intermediate undertakings, except as provided for in an agreement with a third country to which the EU is a party. Effective control is defined as:

a relationship constituted by rights, contract or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, and further possibility of directly or indirectly exercising a decisive influence on undertaking, in particular by (a) the right to use all parts of the assets of an undertaking; (b) rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking.

A transaction by which a non-EU carrier acquires either ownership or control or both in a Community carrier would contravene this principle and result in the loss of EU nationality and the operating licence.

The ownership requirement has been interpreted to mean that at least 50 per cent plus one share of the capital of the air carrier must be owned by Member States or nationals of Member States. However, the scale of the third-country investment, as well as the distribution of the shares within each group of shareholders, needs to be taken into account in assessing compliance with the effective control requirement. Complications may arise where it is difficult to identify the beneficial owner (and therefore the nationality of ownership) of shares, for example, through structures involving nominee shareholders on behalf of undisclosed persons. Equally, shares that do not have voting rights or otherwise different rights might be weighted differently. In practice, this difficulty can be avoided through more simple structures that clearly confer majority ownership in the EU.

As regards effective control, at issue is the question of who in practice is making a company’s decisions. The Swissair/Sabena case\(^4\) established that effective control cannot be exercised jointly between EU and non-EU persons. The non-EU person or persons must not have decisive influence over the carrier. The Commission has stated that the starting point of the national licensing authority would be to assume that control would follow ownership. However, control may not be in direct proportion to ownership, for example if some shares have more votes attached to them than others, or if conditions in loan or lease agreements confer unusual powers on the lender or lessor. The licensing authority should examine the key legal documents including the statutes of the company and any shareholders’ agreement and any powers of veto given to a third-country investor on matters that would normally within be within the powers of a company’s board to decide.

In the Swissair case, the Commission concluded that EU nationals or Member States, individually or together with other EU nationals or Member States, must have the

\(^4\) It was assessed under a previous version of the nationality rule in Commission Decision of 19 July 1995 on a procedure relating to the application of Council Regulation (EEC) No. 2407/92 (Swissair/Sabena). At the same time it was assessed by the European Commission under the old merger control rules in Case No. IV/M. 616 – Swissair/Sabena under Regulation (EEC) No. 4064/89 on 20 July 1995.
ultimate decision-making power in the management of the air carrier (in matters such as the appointment to the decisive corporate bodies of the carrier, the carrier’s business plan, its annual budget or any major investment or cooperation projects). Further, this ability must not be substantially dependent on the support of natural or legal persons from third countries.

On 8 June 2017, the Commission adopted interpretative guidelines on the rules on Ownership and Control of EU carriers (Commission Notice C (2017) 3711 final), which supplement the information provided in the Swissair/Sabena case and in its previous Information Note of 2011, among others regarding financial links between the carrier and third-country shareholders.

The Regulation also expands and clarifies the conditions for aircraft leasing, by providing for definitions of dry-lease and wet-lease agreements, by stating that EU air carriers can freely lease aircraft as long as they continue at all times to operate at least one aircraft under their own AOC (except for safety reasons) and by imposing a prior approval of the licensing authority when at least one of the parties to a dry-lease agreement is an EU air carrier and when an EU carrier wet-leases in (as a lessee) an aircraft. More stringent conditions apply for wetleases in an aircraft registered outside the European Union, such as the obligation for the concerned carrier to demonstrate that the leasing is necessary to satisfy exceptional or seasonal capacity needs or to overcome operational difficulties.

Subject to EU competition rules (discussed in Section IV) and any applicable safety requirements, the Regulation allows EU air carriers to combine air services and to enter into code-sharing arrangements with any other EU or third-country air carriers on intra-EU air routes as well as on air routes between Member States and third countries. Code-sharing arrangements between EU carriers and third-country air carriers on air routes between Member States and third countries may be restricted by the Member State concerned in certain circumstances.

The Regulation provides clear criteria and a specific procedure for when air routes may be covered by public service obligations: routes to an airport serving a peripheral region; routes to an airport serving a development region; or ‘thin’ routes to any airport. The procedure involves the initiating Member State, the other (destination) Member States concerned (if any), the European Commission, the airports concerned and the air carriers operating the route in question. The Regulation also provides for Member States to restrict access to the route in question to a single air carrier and, if needed, to compensate its losses. A number of requirements need to be fulfilled to proceed to exclusive concessions and the concession must be tendered according to the procedures set out in the Regulation. Regulation 1008/2008 was also amended by Regulation 2018/1139 (see below in further detail) to reflect that EASA has become the competent authority for oversight and issuance of air operator certificates. The amendments also aim to increase cooperation between the oversight authorities of the different authorities that can be responsible for AOC and operating licences, especially for carriers with operating bases in different Member States.

Regulation 1008/2008 was furthermore amended by Regulation 2019/2 that relaxes the time limits for wet leasing as imposed by the Regulation when an international agreement with a third country is concluded, such as the Air Transport Agreement between the EU and the United States.

The other rules provided for under the Regulation are dealt with in other chapters in this publication.
III SAFETY AND SECURITY

Safety and security are mainly dealt with at European Union level through various regulations, which the present section will not list or review in an exhaustive manner.

Regulation 216/2008 aims, inter alia, to establish common rules on aviation safety to guarantee a high level of safety and to ensure and enhance the efficiency of the certification process. It applies essentially to the design, production, maintenance and operation of aeronautical products, parts and appliances, as well as personnel and organisations involved. The European Aviation Safety Agency (EASA) was established and is based in Cologne, Germany.

The EASA prepares, among others, legislation for the Commission in the field of safety and sees its scope of competence increase regularly. Member States are required to comply with this legislation, but may still on some occasion have some room for manoeuvre regarding the way it is implemented and the timing for implementation. As an example, in Belgium, the rules set out in Regulation 923/2012 on Standardised European Rules of the Air have been implemented and supplemented by a national Royal Decree.

Next to the preparation of EU legislation, the EASA also publishes acceptable means of compliance (AMC) and certification specifications. Contrary to the EU legislation, each Member State may depart from the AMC if they find it necessary to fulfil their task of implementing EU law, provided they issue alternative means of compliance in line with the regulations. Where a Member State intends to develop its own means of compliance, it must notify it to the EASA if the field covered relates to air crew, air operations, aerodromes or air traffic controllers' licences. In the fields that do not fall within the scope of the EASA, Member States remain free to adopt their own set of rules. Therefore, even if the harmonisation is not totally achieved yet, many national safety rules have now been replaced by EU ones.

Even more competences were transferred to EASA by Regulation 2018/1139, which entered into force on 11 September 2018. The principal aim of the Regulation is to contribute to maintaining a high and uniform level of aviation safety while ensuring environmental protection. Its scope is very large and it updates many directives and regulations regarding aviation safety. It enlarges EASA’s mandate (to the safety-related aspects of security and to protection of the environment) and updates legislation regarding airworthiness, crew, airports, air navigation services and air operations. Furthermore, it comprises rules for civil drones and sets out a division of tasks between the EU and national authorities of the Member States.

Alongside the certification process, the European Union has introduced, through Regulation (EC) No. 2111/2005, a list of carriers banned from operating to, from and within the European Union. This Regulation also establishes the right for passengers to be informed on the identity of the operating carrier.

Investigation and prevention of accidents and incidents in civil aviation is regulated by Regulation (EU) No. 996/2010. This Regulation aims to prevent future accidents and incidents by requiring, for each accident or serious incident, an independent safety investigation and an Investigation Report. This Investigation Report will, however, not seek to apportion blame or liability. This Regulation also aims to improve the assistance to the victims of air accidents and their relatives. In this perspective, the Regulation provides that airlines offer travellers the opportunity to give the name and contact details of a person to be contacted in the event of an accident before the name of the person on board is made publicly available. In the same context, EU carriers and third-country carriers operating flights from the EU are required to make available a list of all persons on board within the two hours following the notification of the accident. The Member States must establish a civil aviation
accident emergency plan at national level. The Regulation requires them to ensure that all airlines established in their territory have a plan for the assistance to the victims of civil aviation accidents and their relatives. In addition, Directive 2003/42 amended by Regulation No. 596/2009 on occurrence reporting in civil aviation was adopted with the objective of collecting, reporting, storing, protecting and disseminating all sorts of relevant information on safety.

On 26 February 2014, the European Parliament voted on the European Commission Proposal for a ‘Regulation on the reporting, analysis and follow-up of occurrences’. This Regulation is aimed at facilitating and enhancing exchange of information on aviation safety incidents between stakeholders in the aviation industry as well as between Member States, with the objective of enabling a thorough analysis and ensuring that adequate action is taken to prevent the occurrence of similar accidents. The proposed text was adopted and enacted in Regulation (EU) No. 376/2014 on the reporting, analysis and follow-up of occurrences in civil aviation, which amended Regulation (EU) No. 996/2010 and repealed Directive 2003/42.

European security legislation is voluminous. The aviation security legislation is essentially organised upon the framework of Regulation (EC) No. 300/2008 on common rules in the field of civil aviation security. This Regulation sets common rules and common basic standards on aviation security together with mechanisms for monitoring compliance. The common basic standards mainly refer to methods of screening, categories of articles that may be prohibited, access control and criteria for staff recruitment. The Regulation also provides that every Member State shall draw up, apply and maintain a national civil aviation security programme and a quality control programme. Equal requirements apply to airports and air carriers. This Regulation should be read in connection with its supplementing regulations, notably the regularly amended Regulation (EU) No. 185/2010 laying down detailed measures for the implementation of the common basic standards on aviation security, and its implementing regulations. Note, for example, the requirements on air carriers flying cargo and mail into the EU from non-EU countries to be designated, following a strict procedure, as an ‘Air Cargo or Mail Carrier operating into the Union from a Third Country Airport’. Equally, Regulation 452/2014 requires third-party operators to obtain an authorisation to be allowed to operate within, into or out of the EU.

Directive 2004/82 imposes on Member States the obligation for immigration purposes to develop a system for collecting passenger data, known as ‘Advanced Passenger Information’, through air carriers. This information includes the number and type of travel document used, the nationality, the full names, the date of birth, the border crossing point of entry into the territory of any of the Member States, the code of transport, the departure and arrival time of the transportation, the total number of passengers carried on that transport and the initial point of embarkation.

In 2016, Directive (EU) 2016/681 was also adopted regarding the use of passenger name record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. This directive was required to be transposed into the national law of the Member States by 25 May 2018.
IV COMPETITION

EU competition law applies to the aviation sector as to other sectors. The principal elements are:

a Article 101 of the Treaty on the Functioning of the European Union (TFEU), which prohibits anticompetitive agreements such as cartels;

b Article 102 TFEU, which prohibits the abuse of a dominant position;

c Articles 107 to 109 TFEU, which control state aid; and

d Regulation (EC) No. 139/2004, which creates an EU-wide system of merger control.

The regulatory framework of aviation influences how the competition rules are applied; for example:

a Regulation No. 1008/2008 provides that EU air carriers must be owned (by more than 50 per cent) and effectively controlled by EU Member States or nationals of Member States, directly or indirectly. This restricts the degree of foreign ownership of EU carriers and with it, the possibility of global airline consolidation; and

b the EU–US Open Skies Agreement, amended in 2010, significantly liberalised air traffic between those two regions, which in turn enabled competition authorities on both sides of the Atlantic to take a more lenient view of the BA/AA alliance within OneWorld.

i Article 101 TFEU and airline cartels

Airlines have been fined for cartel activity: the European Commission fined 11 carriers €799,450,000 in Airfreight; and the Commission closed its case on passenger fuel surcharge price-fixing for administrative priority.

ii Article 101 TFEU and airline alliances

The European Commission’s alliance decisional practice includes:

a **SAS and Maersk** (1999): a cooperation agreement principally about code-sharing agreements and cooperation in periods of high demand led to a complaint of market sharing, which was upheld. The Commission fined the parties.

b **OneWorld** (2010): the American Airlines, Iberia and British Airways tie-up was found to be compatible with Article 101 TFEU subject to slot divestment remedies at London Heathrow or London Gatwick as well as various other remedies designed to facilitate new market entry.

c **Star Alliance** (2013): Air Canada, United and Lufthansa gave 10-year slot availability commitments in relation to their revenue-sharing joint venture on the Frankfurt–New York route.

iii Abuses of dominance

**Market definition**

Product markets for passenger air transport are generally defined on the basis of a route described as an origin–destination pair. At its narrowest, each origin–destination pair will be a separate market. More broadly, the market may include substitute airports and other modes of transport; and it may distinguish markets by passenger type, such as time-sensitive or non-time-sensitive passengers.
Abuse of dominance: predatory pricing
There are no guidelines or case law on airline predatory pricing as these questions are essentially dealt with at national level or challenged through the non-compliance of the state aid rules.

Abuse of dominance: other airline abuses
British Midland/Aer Lingus (1992) confirmed that refusal to interline was not normal commercial practice and could be a selective and exclusionary abuse restricting the development of competition.

Virgin/British Airways (2000) established that BA’s bonus schemes for travel agents were illegal exclusionary rebates that had a loyalty-inducing effect. BA was found to be a dominant buyer of travel agent services. The CJEU upheld the decision and stated that a system of discounts or bonuses that did not constitute quantity discounts, bonuses, or fidelity discount or bonuses, could be abusive if it was capable of making market entry very difficult or impossible for competitors and if it made it more difficult or impossible for co-contractors to choose between different sources of supply or commercial partners. The Court also found that the scheme was not economically justified.

Airports abuse cases
In Zaventem Airport (1995), the threshold of monthly fees needed by an airline to obtain the highest level of discount was so high that only a carrier based at Brussels Airport could benefit from the discount, placing the EU carriers at a competitive disadvantage. In Ilmailulaitos/Luftfartsverket (1999), the Finnish airports operator had abused its dominant position in awarding a 60 per cent discount on landing fees at various Finnish airports for domestic flights but not for intra-EU flights, giving domestic flights favourable treatment. Similar cases have been decided in relation to Portuguese, Spanish and Italian airports. In 2011, the Airport Charges Directive came into effect, a form of *ex ante* regulation requiring, inter alia, the setting of airport charges on a non-discriminatory basis.

V MERGER CONTROL
Ryanair/Aer Lingus (2007) was blocked because the Commission found that the merger would have combined the two leading airlines operating from Ireland and would have created a monopoly or a dominant position on 35 routes operated by both parties. The remedies were considered insufficient. The General Court upheld the decision.

Olympic/Aegean (2011) was blocked because the merger would have resulted in a quasi-monopoly on the Greek air transport market. Together, the two carriers controlled more than 90 per cent of the Greek domestic air transport market with no realistic prospect that a new airline of sufficient size would enter the routes to constrain the merged entity’s pricing. The remedies were considered inadequate.

IAG/bmi (2012) was cleared, conditional on the release of 14 daily slots at London Heathrow to facilitate new entry and on IAG’s commitment to carry connecting passengers to feed the long-haul flights of competing airlines at London Heathrow.

Ryanair/Aer Lingus (III) (2013) was blocked. The merger was found likely to harm consumers, and the remedies package, including two upfront buyers, was considered inadequate. The decision is under appeal to the General Court of the EU.
FedEx/TNT (2016) was cleared. Nevertheless, EU ownership and control rules prohibited FedEx from acquiring TNT Express’s subsidiary, TNT Airways SA, which was hence sold to ASL Aviation Group prior to the acquisition of TNT Express by FedEx.

VI STATE AID

In April 2014, the Commission published Guidelines on State Aid for Airports and Airlines, replacing the 2005 Guidelines, which gave rise to around 100 decisions while in force.

The aims of the 2014 Guidelines are to permit investment aid in cases of a genuine transport need, to allow small airports a transition period, to establish a simple framework for the start-up of new routes, to provide flexibility with regard to isolated regions and to ensure the right use of state aid.

Four reforms have been declared critical by the Commission:

a. to allow for the transition period for operating aid, to enable unprofitable airports to gradually adjust to market change;

b. to ensure that public support better targets cases where it is truly needed;

c. to simplify rules for start-up aid, to start using new airports and attract airlines to fly to new destinations; and

d. to establish a clear framework for airport–airline agreements, to ensure that they are aid-free and help to contribute to the profitability of concerned airports.

The new guidelines simplify the conditions for start-up aid. Under these new rules, airlines will be able to receive aid that covers 50 per cent of the airport charges for new destinations during a period of three years. More flexibility as regards airport size and eligible destinations can hence be justified for airports in remote regions.

On 17 May 2017, the Commission approved new state aid rules that exempt certain public support measures for airports from prior Commission scrutiny. Commission Regulation 2017/1084 introduced a new exemption from the duty to notify state aid measures to the Commission for prior approval, covering investment aid for airports below 3 million passengers. The four principal conditions to be met to benefit from the exemption are: (1) aid may not be granted to airports located in the vicinity of another airport; (2) there is a proven need that the funded infrastructure shall be used in the future and is not too large; (3) the aid does not reach beyond necessary to trigger the investment, also when calculating future revenues from the investment; and (4) the investment costs can only be subsidised for a percentage (that depends on the size and whether or not the airport is located in a remote region). Additionally, for small airports (below 200,000 passengers per year), the Regulation allows for operating aid and provides for simplified rules for investment aid.

On 12 April 2019, the CJEU ruled in Deutsche Lufthansa AG v. Commission (T-492/15) that the appeal of Lufthansa requesting the cancellation of a Commission decision finding that Ryanair had not benefited from undue advantage for its use of the Frankfurt-Hahn Airport since it paid a higher price than the extra costs of the airport. The CJEU rejected the appeal on jurisdictional grounds, concluding Lufthansa could not be admissible in challenging the relevant decision as it was not a recipient thereof and did not provide information on how the decision had a substantial effect on its market position. The CJEU ruled that Lufthansa furthermore could not challenge the decision as these national measures had not been granted in the framework of an aid scheme but rather as an individual decision and hence the ruling of the Commission was not a regulatory act. Pursuant to increasing
attention on the importance of fair competition between Union carriers and third-country air carriers, Regulation 868/2004 (on protection against subsidisation and unfair pricing practices in the air transportation sector) had been introduced to protect EU carriers from certain unfair competition practices adopted by third countries or third-country carriers. It granted the European Commission the possibility to launch an investigation and impose measures in case unfair practices that favoured a third country were found. This Regulation has, however, proved ineffective and has not been applied in practice. Therefore, it has been replaced by Regulation 2019/712. The new Regulation broadens the scope of the actors who can file a complaint to the Commission (Member States, air carriers, a group of air carriers or the Commission itself), lowers the requirements for the launching of an investigation, broadens the scope of a potential investigation and aims at making the measures that can be imposed more effective.

VII OTHER DEVELOPMENTS

i Airport charges

On 19 May 2014, the European Commission issued its report on the application of the Airport Charges Directive (the Directive). The Directive establishes common principles for the levying of airport charges and aims to enhance transparency of the calculation of airport charges; ensure the non-discrimination between airlines in the application of airport charges; create consultation between airlines and airports on a regular basis; and establish, in each Member State, an Independent Supervisory Authority (ISA) in charge of dispute settlement on airport charges between airports and carriers, and that will supervise the correct application of the provisions of the Directive by Member States. Member States were required to transpose the provisions of the Airport Charges Directive into national law by March 2011. The report of May 2014 analyses the application of the Airport Charges Directive by Member States.

The Commission found that several of the main objectives of the Airport Charges Directive have been achieved. Air carriers raised concerns about transparency with regards to cost and other commercial information airports were to provide, as well as the efficiency of the consultation process established by the Directive. Furthermore, air carriers have complained about the large variety of differentiation in airport charges and the compliance with the criteria of relevance, objectivity and transparency. In particular, ‘incentive schemes’ and discounts to new entrants and low-cost carriers were identified as controversial. The controversy of ‘incentive schemes’ or discounts was also raised in relation to capacity constraints and access to tailored services and dedicated terminal (parts) but then on the side of airports. On the establishment of an ISA (Articles 6 and 11), controversial issues were its role and apparent lack of independence, and the absence of a statutory deadline for airlines to submit an appeal and the suspensory effects of such appeals. The Commission has initiated infringement procedures against certain Member States on the application of the obligations the Directive establishes. The Commission will furthermore organise meetings with ISAs to discuss the enforcement of the rules. The Commission is currently in the process of revaluating the Airport Charges Directive and stakeholders were invited to render their feedback by the end of May 2019.

The Groundhandling Directive (97/67) had as a purpose the opening up of the groundhandling market at EU airports for competition. For this aim, the Groundhandling Directive wielded three main principles: liberalisation, the freedom to self-handle and the
freedom of third-party handling. Exemptions to these principles are only allowed under specific conditions. The Groundhandling Directive has been evaluated for a revision and possibly the transformation into a regulation in 2002, 2009 and 2011 but this never materialised. A new evaluation was launched in February 2019 and the Commission now intends to adopt a new instrument in the first quarter of 2020.

ii Emissions Trading System

The Emissions Trading System (ETS) of the EU, through Directive 2003/87/EC, regularly amended, puts a cap on carbon dioxide emissions in relation to the aviation sector. Under this system, air carriers could buy and trade allowances to compensate their emissions pursuant to a market-based system. Whereas initially air carriers were to pay for their emissions when their point of departure or destination lay in the territory of the EU, strong opposition, threats of retaliation and trade war from third countries have caused the EU institutions to surrender to a temporary system in which only carriers operating intra-EU flights are subject to the EU ETS regime.

Following the adoption in October 2016 by the ICAO Resolution 39-3 of the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), the European Union adopted in 2017 a regulation to continue the current limitation of its EU ETS to intra-EU flights and to prepare the implementation of CORSIA from 2021. Further legislation is being prepared to implement CORSIA in the EU. First, provisions are being included in three pieces of implementing and delegated legislation: a delegated act, the Commission Implementing Regulation on the monitoring and reporting of greenhouse gas emissions and the Commission Implementing Regulation on the verification of data reports and on the accreditation of verifiers. A second step will consist in making amendments to the EU ETS system by the European Parliament and the Council through the ordinary legislative procedure.

iii Unmanned aircraft systems

In its Communication (2014) 207 and in the Riga Declaration of 6 March 2015, the European Union is taking a step forward in its political will to regulate the use of unmanned aircraft systems, commonly known as drones. Regulation 2018/1139 also provides new rules for the operation of (civil) drones by introducing essential requirements. The rules are intended to be proportionate to the risk of the specific (type of) operation and require that the drone is safely controllable and manoeuvrable. According to the Regulation, drones should be so designed as to fit their function and intended type of operation, respect privacy and the protection of personal data. Drones should furthermore be identifiable, also as to their nature and purpose of their operations.

iv Package Travel Directive

The old Package Travel Directive (Directive 90/314/EEC) has been recast in a new directive (Directive 2015/2302). Member States were required to transpose it into their national legislation by 1 January 2018.

v Brexit

While Brexit has been postponed at the last minute until ultimately 31 October 2019, the impact of a hard Brexit on the aviation sector could be significant at the level of aviation
safety requirements next to its other potential impact on traffic rights and airline licensing. Most aviation safety certificates are provided under the EASA Basic Regulation (former Regulation 216/2008 now replaced by Regulation 2018/1139). As such, the harmonisation of the aviation safety requirements, the verification of these requirements and the mutual recognition by EU Member States of these certificates is ensured. However, because of the withdrawal of the United Kingdom from the EU, post-Brexit the United Kingdom would become a third party state falling outside the scope of the EASA Basic Regulation, rendering the existing and future certificates invalid. Nonetheless, for most certificates EU law provides for solutions to this problem by transferring verification authority to one of the CAAs from one of the remaining Member States or applying for a new certificate directly with EASA, which can become valid from the withdrawal date. For some certificates these existing solutions will not be sufficient since Annex 8 of the Chicago Convention has reserved certain airworthiness responsibilities to the state of design (i.e., the state having jurisdiction over the organisation responsible for the type design). These responsibilities cannot be transferred to another jurisdiction. Hence Regulation 2019/494 temporarily extends the validity of these certificates until a permanent solution can be worked out between the United Kingdom, the EU and EASA.
Chapter 17

FRANCE

Carole Sportes and Albertine Guez

I  INTRODUCTION

In France, civil aviation is regulated by the Civil Aviation Code and the Transport Code. The French administrative authority in charge of regulation of aviation is the Directorate General for Civil Aviation (DGAC). The DGAC is a national administration, under the Ministry of Sustainable and Ecological Transition, which includes all government departments responsible for regulating and supervising aviation safety, air transport and civil aviation in general.

The DGAC is in charge of guaranteeing security and safety of air transportation. The tasks of the DGAC cover every component of civil aviation such as sustainable development, security, safety, air control, economic regulation and education.

As France is a Member State of the European Union, civil aviation is also regulated by the European Regulations and the European Aviation Safety Agency (EASA).

i  Access to the market

An airfield can be built either by the state or by any other entity that previously obtained an administrative authorisation. Any person exploiting a civil airfield supporting commercial flights must obtain a safety certificate under Article L.211-3 of the Civil Aviation Code. Airfield exploitation is subject to three different regimes: public company, concession and autonomous status.

Under Law 2015-992 dated 17 August 2015 relating to energy transition for a sustainable development, and its application decree dated 11 May 2016, the private or public person exploiting certain airfields shall implement a process to reduce the emission of greenhouse gas and polluting substances.

Most of the regulations on the operation of air services are harmonised at the European level, following the principle of free access to the market for airlines that have been granted an air operator certificate and an operating licence.

ii  Regulation of slots

The EU adopted common rules for the allocation of landing and takeoff slots to ensure access to the busiest EU airports in a neutral, transparent and non-discriminatory manner.\(^2\)

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1 Carole Sportes is a partner and Albertine Guez is an associate at Squire Patton Boggs.
An independent coordinator is in charge of allocating the slots. Air carriers have to use at least 80 per cent of the slots they receive to maintain the same number of slots for the following period.

### Treaty-based commitments regarding transit and traffic rights

Regulation (EC) No. 1008/2008 of 24 September 2008 on common rules for the operation of air services in the Community, relevant bilateral conventions and the Civil Aviation Code regulate scheduled and non-scheduled air services to and from France.

As a result of European harmonisation, European air carriers are not required to have a prior authorisation to operate flights within the European Union. Any other scheduled or unscheduled flight to or from France still requires a prior authorisation.

### Interest in aircraft equipment

The Transport Code regulates two types of security interest on aircraft: mortgage and liens. Non-possessory pledges on aircraft are also possible, but are regulated by the common law of securities.

France is a signatory of the Geneva Convention dated 19 June 1948 on the international recognition of the rights on aircraft, applicable only in cases of international disputes. This Convention has not been ratified by a large number of states.

France also signed the Cape Town Convention on International Interests in Mobile Equipment and the specific Protocol to the Convention regarding aircraft equipment on 16 November 2001, but they have not yet been ratified.

### Labour and employment issues

Employment in the aviation sector is regulated by the Labour Code and applicable collective agreements.

Some low-cost companies used to take advantage of the European posted workers Regulation, which allowed them to subject the employment contracts to foreign labour law. In 2005, however, France passed a law creating Article R.330-2-1 of the Civil Aviation Code, providing that when an activity is entirely directed towards France or conducted in France in a habitual, stable and continuing manner, the employer is not regulated by posted workers laws and the employment contracts are governed by French employment law.3

### II LEGAL FRAMEWORK FOR LIABILITY

#### International carriage

In instances of international carriage, the Montreal Convention is applicable as it has been ratified by the European Union through Regulation No. 2001/539 on behalf of all the Member States. The Convention has been into force since 28 June 2004 in the EU and takes precedence over the Warsaw Convention according to its Article 55. Under Article 1 of the Montreal Convention, it applies to all international carriage of persons, baggage or cargo performed by aircraft for reward, as well as to gratuitous carriage by aircraft performed by an air transport undertaking.

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3 Council of State (French Administrative Supreme Court), 11 July 2007, No. 299787, 300114, EasyJet Airlines Company Ltd et al.
Air carrier liability regarding the carriage by air of passengers and their baggage within Member States is regulated by European Regulation No. 2027/97 dated 9 October 1997 as amended by Regulation (EC) No. 889/2002, which aligns EU legislation with the Montreal Convention provisions.

ii Internal and other non-convention carriage

As opposed to international carriage, internal carriage is defined as the transportation from one point to another, both within the same state, without any layover in a foreign state.

The Transport Code provisions concerning transportation contracts (L.6421-1 to L.6422-5) are applicable to both gratuitous and onerous transportation regardless of whether the carrier is a professional.

In the event of transportation of passengers, these Articles refer to the responsibility regime created by EU Regulation No. 889/2002 dated 13 May 2002, which extended the application of the Montreal Convention to internal carriage within a Member State.\(^4\)

In the event of paid transportation by a carrier without an exploitation licence, the Warsaw Convention, as amended by the Hague Convention, is applicable.

iii General aviation regulation

General aviation regulation is found in the Civil Aviation Code and in the Transport Code. The Civil Code is also applicable to the extent the Transport Code refers to it.

In the event of free transportation by a non-professional carrier, Article L.6421-4 provides that the responsibility of the person assuming the role of carrier can be solely engaged if the damage originated in his or her fault.

iv Passenger rights

Passenger rights are provided by the European Regulation No. 261/2004, which sets the obligations of air carriers operating from France and to France if the operating air carrier is an EU carrier, in terms of compensation and assistance of passengers in cases where boarding is denied, the flight is cancelled, or subject to long delay. Since a European Court of Justice (ECJ) decision of 2009,\(^5\) a delay of more than three hours is assimilated to a flight cancellation and entitles the passenger to the assistance and compensation provided for in Regulation No. 261/2004.

When the indemnification is due because of flight delay, the Court of Cassation ruled that the passengers must evidence that they actually boarded the plane by producing their boarding pass and would otherwise fail to meet the burden of proof.\(^6\)

Under Regulation No. 261/2004, air carriers are not liable for indemnification in cases of extraordinary circumstances that could not have been avoided even if all reasonable measures had been taken.

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\(^4\) Supreme Court (Court of Cassation) 1 civ., 2 April 2014, No. 13-16.038.


\(^6\) Supreme Court (Court of Cassation), 14 February 2018, No. 16-23205.
Point 14 of the Preamble gives a non-exhaustive list of situations that can be considered extraordinary circumstances: 'political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier'.

Although the concept of ‘extraordinary circumstances’ suffers from a lack of clarity in the Regulation, a few situations have been examined by the ECJ.7

A time limitation for filing a claim under Regulation 261/2004 is not provided by the EU Regulation, which creates a difference of treatment between the Member States. The Court of Cassation finally ruled on that matter in 2017 and held that the five-year common law limit is the applicable statute of limitation.8

Passenger rights are also regulated by specific European Regulations:

a Regulation (EC) No. 1107/2006 sets out the rules regarding the carriage of disabled persons.

b Regulation (EC) No. 1008/2008 sets out passenger rights regarding airfares, especially pricing and price comparison.

c Regulation (EC) No. 2111/2005 requires any person or company selling flight tickets to disclose to the passengers the identity of the air carrier operating the flight and allows the European Commission to establish a list of airlines (blacklist) banned from operating in the EU.9 The information requirement is more stringent under the Transport Code,10 which requires any person or company selling a flight ticket on an air carrier listed on the EU blacklist to clearly and unambiguously inform passengers and invite them to seek alternatives. This obligation is subject to an administrative fine of €7,500 per ticket issued – doubled in case of renewed breach – and a criminal penalty under Article 121-3 of the French Criminal Code.

Finally, as of 2004, the French Consumer Code provides that air carriers and any person selling air transport tickets shall reimburse individualised taxes and fees, the payment of which stems from the actual boarding of the passenger. As a general rule, the reimbursement is therefore due in any cases, whether the ticket is refundable and even in the case of no-show.11

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7 ECJ, 31 January 2013 No. C-12/11, Denise McDonagh v. Ryanair Ltd (holding that a volcanic eruption is an extraordinary circumstance); ECJ, 4 May 2017, No. C-315/15, Pešková v. Travel Service (ruling that a collision with a bird must be classified as extraordinary circumstance) Supreme Court (Court of Cassation) 1 Civ, 12 September 2018, No. 17-11.361 (finding that an aircraft struck by thunder upon takeoff constitutes an extraordinary circumstance); but see ECJ, 22 December 2008, No. C-549/07, Wallentin-Hermann (finding that a technical problem leading to the cancellation of a flight is not an extraordinary circumstance).

8 Supreme Court (Court of Cassation) 1 Civ, 17 May 2017, No. 16-13352; 1 Civ, 15 June 2017; No. 16-19375.

9 The Blacklist has been updated on 16 April 2019 and includes 120 air carriers banned in the EU: 114 owing to a lack of security oversight by their local aviation authorities and six owing to concerns regarding the security of the air carrier.

10 Article L6421-2-1 of the Transport Code.

v  Other legislation


The Directive has been transposed into French law through Decree No. 2017-1717, which came into force on 1 July 2018 and is applicable to any contract executed after this date.

The 2015 Directive broadens the definition of package travel and now covers the following travel combinations:

a  prearranged packages: ready-made holidays from a tour operator made up of at least two elements – transport and accommodation or other services (e.g., car rental);

b  customised packages: selection of components by the traveller and bought from a single business online or offline; and

c  linked travel arrangements: if the customer, after having booked one travel service on one website, is invited to book another service through a targeted link or similar, the new rules offer some protection, provided that the second booking is made within 24 hours.

Any person engaging in these activities is subject to strict liability towards the purchaser for the full performance of their contractual obligations, regardless of whether the contracts have been entered into online and whether the services are to be performed in person or by another service provider, without prejudice to their right of recourse against such a provider and within the limits set out in international conventions (Article L.211-16 of the Tourism Code).

As an exception, in the case of linked travel arrangements, every professional is strictly liable only for the part of the trip that he or she sold.

The 2015 Directive clarifies the scope of the relevant information requirements, the rules protecting customers against travel organisers' insolvency and the rules relating to compensation demands.

Finally, the newly incorporated Article L.211-17-1 of the Tourism Code provides for a duty of assistance by the professionals towards travellers.

III  LICENSING OF OPERATIONS

i  Licensed activities

Under Article L.6111-1 of the Transport Code, an aircraft cannot be in circulation without prior registration. Through registration in France an aircraft obtains French nationality, in compliance with the Chicago Convention.

In addition, and unlike the Chicago Convention, the Transport Code imposes prerequisites to an aircraft registration in France. According to Article L.6111-3 of the Code, an aircraft can only be registered in France if it:

a  belongs to a French natural person or a national of a Member State;

b  belongs to a legal entity constituted under the laws of a Member State and having its registered office or its principal place of business within the French territory or a Member State; or
c is exploited by an air carrier whose exploitation licence has been delivered by a French administrative authority.

The following licensing requirements apply to air carriage for a fee (as opposed to free air carriage):

a Air operator certificate (AOC): a certificate delivered to an undertaking confirming that the operator has the professional ability and organisation to ensure the safety of the operations specified in the certificate. It is delivered by the DGAC, under Article L.6412-2 of the Transport Code transposing Regulation (EC) No. 1008/2008.

b Operating licence: subject to the conditions set forth in Article 4 of Regulation (EC) No. 1008/2008, such as having its principal place of business in France.

c Authorisation to operate transport services: operators shall notify schedules flights to the DGAC at least one month before their performance under Article R.330-8 of the Civil Aviation Code. Non-scheduled flights are subject to specific provisions.

ii Ownership rules

Article 4 of Regulation (EC) No. 1008/2008 creates an ownership condition to the granting of an operating licence to an undertaking. Member States or nationals of Member States must own more than 50 per cent of the undertaking and effectively control it, whether directly or indirectly through one or more intermediate undertakings.

The Transport Code and Civil Aviation Code provide specific requirements for publicly traded companies that own an operating licence, whose purpose is to comply with the 50 per cent rule (Article L.6411-2 et seq. Transport Code; Article L.360-2 Civil Aviation Code).

iii Foreign carriers

Under Regulation (EC) No. 1008/2008, European air carriers are not required to obtain an authorisation to carry out intra-Community flights. However, intra-Community air service must be notified to the DGAC, a month in advance for a scheduled flight, 10 days in advance for a non-scheduled flight, and two working days in advance for any other cases. The approval is tacit.

European air carriers have to request in the time frame described above an authorisation to conduct extra-Community air service. Non-European air carriers are required to obtain an authorisation from the DGAC for any flights.

IV SAFETY

As a signatory to the Chicago Convention on International Civil Aviation (dated 7 December 1944) and as a Member State of the International Civil Aviation Organization (ICAO), France complies with the international safety standards defined by the ICAO but also with the European harmonised safety rules.

As of 15 November 2015, occurrence and accident reporting are governed by Regulation (EU) No. 376/2014 and Regulation (EU) No. 1018/2015, the latter providing the list of occurrences subject to mandatory reporting.

In addition, Directive (EU) 2016/681 of 27 April 2016 on the use of passenger name record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime and investigations and prosecutions in these areas, compels all air carriers to provide the national authorities with passengers’ data for all flights to or from an EU
Member State. The Directive was transposed into French law through Law No. 2017-1510 dated 30 October 2017 and the transposition was completed through Decree No. 2018-714 of 3 August 2018.

i Occurrence reporting

As of 15 November 2015, Regulation (EU) No. 376/2014 gives pilots and other civil aviation professionals a duty to report any occurrence to the reporting person they are working for.

An occurrence is a ‘safety-related event which endangers or which, if not corrected or addressed, could endanger an aircraft, its occupants or any other person and includes in particular an accident or serious incident’. Annexes I–V of Regulation (EU) No. 1018/2015 provide a list of reportable occurrences.

Regulation (EU) No. 376/2014, in its Article 6, provides that each organisation to which occurrences are reported must designate one or more persons to handle independently the collection, evaluation, processing, analysis and storage of details of occurrences reported.

All occurrences reports collected in the EU are stored in the European Central Repository.

ii Accident reporting

Accident reporting is governed by Regulation (EU) No. 996/2010 of 2 October 2010 on the investigation and prevention of accidents and incidents in civil aviation, and by Regulation No. 36/2014; Article L.6221-1 et seq. of the Transport Code and Article R722-2 et seq. of the Civil Aviation Code.

Accidents or serious incidents that occur in France have to be notified to the French investigation board, which will then notify the Commission, the EASA, the ICAO, and the Member States and third countries concerned.

iii Maintenance and continuing airworthiness

Maintenance and continuing airworthiness of aircraft are governed by Regulation (EU) No. 1321/2014 on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks relating to:

a the ‘measures to be taken to ensure that airworthiness is maintained, including maintenance’ and to the ‘conditions to be met by the persons or organisations involved in such continuing airworthiness management’;\(^\text{12}\)
b the ‘requirements to be met by an organisation to qualify for the issue or continuation of an approval for the maintenance of aircraft and components’;\(^\text{13}\)
c the ‘aircraft maintenance licence’ and ‘the requirements for application, issue and continuation of its validity’; and
d the ‘requirements to be met by organisations seeking approval to conduct training and examination’.

\(^\text{13}\) Part 145 of the above-mentioned Regulation.
iv Training

Regulation (EU) No. 1178/2011 of 3 November 2011 provides the technical requirements and administrative procedures for civil aviation aircrew. This Regulation was implemented by the Decree of 5 April 2012 and recently modified by two arrêtés, respectively dated 2 April 2015 and 14 April 2016.

The licensing and training of air traffic controllers is governed by Regulation (EU) No. 2015/340 of 20 February 2015.

V INSURANCE

Regulation (EC) No. 785/2004 amended by Regulation (EC) 285/2010 determines the types and levels of insurance that air carriers and aircraft operators must have. They apply to ‘all air carriers and all aircraft operators flying within, into, out of, or over the territory of a Member State’. According to Article 2 of this Regulation, all air carriers and aircraft operators must be insured in respect of passengers, baggage, cargo and third parties, in order to cover the risks associated with aviation-specific liability (including acts of war, terrorism, hijacking, acts of sabotage, unlawful seizure of aircraft and civil commotion):

a For liability regarding passengers, the minimum insurance cover must be 250,000 special drawing rights (SDR) per passenger. EU Member States may set a lower level of insurance cover for non-commercial operations by aircraft with a maximum takeoff mass (MTOM) of 2,700 kilograms or less; provided that such cover is at least 100,000 SDR per passenger.

b For liability regarding baggage, the minimum insurance cover must be 1,131 SDR per passenger in commercial operations.

c For liability regarding cargo, the minimum insurance cover must be 19 SDR per kilogram in commercial operations.

The above levels of insurance do not apply to flights over the territory of the EU Member States carried out by non-EU air carriers and by aircraft operators using aircraft registered outside the EU that do not involve a landing on or takeoff from such territory.

For liability regarding third parties, the minimum insurance cover per accident and per aircraft must be as follows:

<table>
<thead>
<tr>
<th>Category</th>
<th>MTOM (kilograms)</th>
<th>Minimum insurance (million SDR)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>≤ 500</td>
<td>0.75</td>
</tr>
<tr>
<td>2</td>
<td>≤ 1,000</td>
<td>1.5</td>
</tr>
<tr>
<td>3</td>
<td>≤ 2,700</td>
<td>3</td>
</tr>
<tr>
<td>4</td>
<td>≤ 6,000</td>
<td>7</td>
</tr>
<tr>
<td>5</td>
<td>≤ 12,000</td>
<td>18</td>
</tr>
<tr>
<td>6</td>
<td>≤ 25,000</td>
<td>80</td>
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<td>7</td>
<td>≤ 50,000</td>
<td>150</td>
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<tr>
<td>8</td>
<td>≤ 200,000</td>
<td>300</td>
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<td>9</td>
<td>≤ 500,000</td>
<td>500</td>
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<tr>
<td>10</td>
<td>&gt; 500,000</td>
<td>700</td>
</tr>
</tbody>
</table>
Air carriers and, when required, aircraft operators, must comply with the insurance requirements set out in this Regulation by providing the DGAC, the competent authority in France, with an insurance certificate or any other evidence of valid insurance.

Regarding overflights by non-EU air carriers or aircraft registered outside the EU, which do not involve a landing on or takeoff from any EU Member States, as well as in respect of stops in EU countries by such aircraft for non-traffic purposes, the EU Member State concerned may request evidence of compliance with the insurance requirements laid down in the Regulation.

Infringement of this Regulation by EU air carriers can be sanctioned by the revoking of their operating licence whereas, for non-EU air carriers and aircraft operators using aircraft registered outside the EU, the sanction can include the refusal of the right to land on the territory of an EU Member State.

Where EU Member States are not satisfied that the conditions of this Regulation are met, they must prohibit an aircraft from taking off until the air carrier or aircraft operator concerned has produced evidence of adequate insurance cover.

However, even though the Montreal Convention applies, it does not mean that the Warsaw Convention does not apply.

VI  COMPETITION

i  The relevant competition provisions

There are no specific provisions in French law regarding competition in the aviation sector; therefore, the provisions of the Commercial Code apply:

a  Article L.420-1 prohibits all agreements and concerted practices that have the aim or effect of preventing, restricting or distorting competition; and

b  Article L.420-2 prohibits the abuse of a dominant position by an undertaking or group of undertakings.

The French Competition Authority is in charge of implementing competition law and enforcing, where applicable, the European competition provisions.

Article 101 and Article 102 of the Treaty on the Functioning of the European Union (TFEU) apply where the practice at stake can affect trade between Member States.

Regarding state aid, European law provisions apply to the aviation sector. Public aid granted to airports and airlines may, therefore, be caught by Article 107(1) TFEU, in which case the aid will have to be notified to the European Commission for approval.

ii  Procedure before the Competition Authority and fines

The Competition Authority may conduct investigations – either following a complaint or ex officio – to find a breach of competition provisions and impose fines for such breaches. All decisions of the Competition Authority can be appealed before the French courts of appeal.

The amount of the fines imposed by the Competition Authority for anticompetitive practices can reach 10 per cent of the turnover of the undertaking concerned. In practice, the maximum fine is rarely imposed. The method used for the calculation of fines is available in a Notice published by the Competition Authority in 2011.
iii  **Cooperation agreements between operators**

French law does not prohibit cooperation agreements nor do the European competition provisions. Cooperation agreements are sometimes considered as being pro-competitive, generally for research and development agreements.

Cooperation agreements between competitors are generally assessed under antitrust rules, and in particular the prohibition of anticompetitive agreements. The analysis is usually conducted in the light of the European Commission's Guidelines on horizontal cooperation, which set out the Commission’s position for these types of agreements.

The Competition Authority may examine the exchanges of information that take place as part of cooperation agreements as they can be problematic. According to the case law in this matter, any exchange of information exceeding the scope of the cooperation may be considered as an anticompetitive agreement or a concerted practice.

iv  **Criminal liability for breaches of cartel law**

The Commercial Code, in its Article L.420-6, also provides for criminal proceedings initiated against individuals who ‘fraudulently play an individual and decisive role in the conception, organisation or implementation’ of anticompetitive practices. However, this provision is very rarely applied.

**VII  WRONGFUL DEATH**

The types of damages awarded and the levels of compensation payable for wrongful death shall be addressed in Section VIII.

When the Warsaw and Montreal Convention are applicable, claimants are not allowed to request damages against the air carrier in the criminal proceedings. These claims are made before civil courts.

Claims for compensation against aircraft manufacturers or other parties than the air carrier can be made in the context of criminal proceedings. However, as these claims are often also made against the air carrier, most claims for compensation are made before civil courts, allowing all potential liable parties to be called in the same proceedings.

**VIII  ESTABLISHING LIABILITY AND SETTLEMENT**

i  **Procedure**

Under French law, there are no specific fora, mechanisms or timescales used to settle claims relating to air travel. The Montreal and Warsaw Conventions apply exclusively in cases of death or bodily injury. Together with Regulation (EC) No. 889/2002 dated 13 May 2002, they all provide a two-year time limitation for bringing a claim against the air carrier. This time limitation applies to both international and national air carriages.

A compensation claim can be brought against the air carriers and other liable parties, as manufacturers along with their insurers.

ii  **Carriers’ liability towards passengers and third parties**

*Carriers’ liability towards passengers*

The carriers’ liability to passengers is established according to the provisions of the Montreal Convention (applicable to internal carriage with respect to Article 1 of Regulation (EC) No.
France

889/2002 of 13 May 2002). The air carrier has a security duty towards its passengers from the embarking or the disembarking.\textsuperscript{14} In cases of death or bodily injury of passengers, the carrier is strictly liable and cannot exclude its liability for damages up to 113,100 SDR per passenger. For damages exceeding this amount, the carrier may exclude or limit its liability if it proves that:
\begin{itemize}
  \item[a] the damage did not result from its negligence or other wrongful act or omission; or
  \item[b] the damage solely resulted from the negligence or other wrongful act or omission of a third party.
\end{itemize}

In cases of damage caused by delay or damage or loss to cargo or luggage, the carrier’s strict liability is limited to:
\begin{itemize}
  \item[a] 4,694 SDR for damage caused by delay;
  \item[b] 1,131 SDR per passenger in cases of destruction, loss, damage or delay of the baggage unless a special declaration of interest was made; and
  \item[c] 19 SDR per kilogram for the carriage of cargo unless a special declaration of interest was made.
\end{itemize}

\textbf{Carrier’s liability towards third parties}

Article L.6131-2 of the Transport Code provides strict liability of the operator for all damages caused to the surface and only the victim’s fault can exonerate the operator. According to Article L.6131-1, when two moving aircraft collide, the liability is governed by the provisions of the Civil Code.

\textbf{iii Product liability}

Product liability is governed by Article 1245 et seq. of the Civil Code. A product liability action can only be brought against the manufacturer of the product (or if the manufacturer cannot be identified, or the importer if the manufacturer is outside the EU against the seller, lessor or supplier).

\textbf{iv Compensation}

As compensation is not used as a penalty under civil law, no punitive damages can be obtained before French courts.

Apart from the mandatory payment of the financial advances imposed to European air carriers, there is no obligation in international convention for an air carrier to take the initiative of the victim or its beneficiary’s compensation. Therefore, it is up to the victims or their beneficiaries to take necessary action to identify the liable persons or entities and their insurers in order to negotiate the compensation.

In French law, all damages suffered have to be fully compensated. Any types of lawful damages are recoverable as long as causation with the accident is proved. Moral and material damages can be compensated.

\textsuperscript{14} Article 17 of the Montreal Convention, Article 17 of the Warsaw Convention and decision of the French Court of Cassation dated 15 July 1999.
IX  DRONES

i  Legal framework
The use of teleoperated aircraft regardless of their size or use is regulated under the Civil Aviation Code.

  Law No. 2016-1428 of 24 October 2016 reinforcing the security of the use of civil drones regulates the use of drones and sets out three regulatory schemes depending on the use of the drone: for leisure, for experimental purposes, and for ‘particular activities’ (which includes the use of drones for professional purposes).

  EU Regulation 2018/1139 of 4 July 2018 on common rules on the field of civil aviation and establishing a European Union Aviation Safety Agency is also applicable in France.

ii  Registration obligation
Teleoperated aircraft under 25 kilograms are not subject to the registration obligation of Article L.6111-1 of the Transport Code. Teleoperated aircraft are, however, subject to electronic registration on the dedicated website AlphaTango for drones over 800 grams starting from 26 December 2018.

iii  The use of drones for ‘particular activities’
The legal framework provides for four operational scenarios in which authorisation conditions have been detailed; any use outside those four scenarios requires a specific authorisation.

  A person using a drone for ‘particular activities’ must declare its activity to the DGAC, hold a manual of particular activities (MAP), the pilot must hold a certificate of aptitude for the theoretical part and a certificate of practical training, and in certain cases homologation of the drone by the DGAC may be required.

iv  The use of drones for leisure purposes
Drones over 800 grams and used for leisure purposes should be registered, equipped with a system of capacity limitation, operated by a remote pilot that has received training in controlling aircraft without pilots safely and in compliance with air navigation regulations, and equipped with a sound signalling system triggered by the loss of control of the aircraft.  

v  Security of third parties and other aircraft
The use of drones is regulated to protect third parties on the ground and other aircraft by two decrees dated 17 December 2015 regulating flight in populated areas, sensitive sites and above a group of persons. In addition, drones are not permitted above 150 metres, or 50 metres for drones out of sight of the pilot, and above 2 kilograms, any flight out-of-sight of the pilot and near an airport or controlled space is subject to authorisation.

  Finally, drones must be used in respect of the right to privacy.

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X VOLUNTARY REPORTING

In pursuit of the concept of ‘just culture’, there have been various initiatives to encourage voluntary reporting of incidents in the aviation community to third-party bodies with a view to improving safety. Concern has arisen in some areas that such voluntary reporting may be used against reporters in subsequent accidents as evidence of negligence or criminal recklessness. Identify voluntary reporting initiatives in your jurisdiction and the extent to which such reports are kept confidential from claimants in injury and wrongful death actions, regulators and prosecutors. Identify what whistleblower protection is available and discuss its effectiveness.


To encourage voluntary reporting, and in pursuit of the concept of ‘just culture’, Article 16 of Regulation (EU) No. 376/2014 protects reporters or persons mentioned in occurrences reports, both mandatory or voluntary.

Reported information is to be disidentified, meaning all personal data such as names or addresses of natural persons shall be removed. It may not be used to sanction unpremeditated or inadvertent infringements of law, or to support disciplinary actions against the reporter or the person mentioned in the report, except in cases of wilful misconduct, or where there has been a manifest, severe and serious disregard of an obvious risk and profound failure of professional responsibility to take such care as in evidently required in the circumstances, causing foreseeable damage to a person or property, or which seriously compromises the level of aviation safety.

XI THE YEAR IN REVIEW

The trend of selling French airports to private investors continues. The sale of Paris Airport Company (ADP) (of which the state owns 50.6 per cent) has been adopted by the House, and the Constitutional Court approved of the organisation of a special referendum (RIP) on the subject.

XII OUTLOOK

On 15 October 2018, EASA issued a public notice of its proposal for the first regulatory framework of electric vertical takeoff and landing (eVTOL) aircraft in Europe. In France, Airbus and RATP are jointly developing the eVTOL or ‘flying taxi’ as a sustainable way to reduce traffic congestion.
INTRODUCTION

The Indian civil aviation industry is a promising sector owing to increased demand from the upper-middle class, higher disposable incomes, favourable demographics and rapid economic growth. India is currently the seventh-largest aviation market in the world and third-largest in terms of domestic passenger traffic. It has the prospect of becoming the third-largest aviation market (domestic and international) by 2022 and reaching its zenith by 2040. The industry is following a progressive trajectory, paving the way for a new wave of growth and expansion with a substantial focus on low-cost carriers, modern airports, foreign direct investment (FDI) in domestic airlines, information technology developments and regional connectivity. The Indian aviation market is on a high growth path. Total passenger traffic to, from and within India, during April to November 2018 grew by around 15 per cent year on year compared with around 6 per cent globally. With the National Civil Aviation Policy 2016 (NCAP 2016), which came into effect on 15 June 2016, it is necessary to analyse the current framework of the aviation sector.

The Ministry of Civil Aviation (MOCA) is responsible for the administration of the aviation industry in India. It plays a significant role in the formulation of national policies and programmes for development and regulation of civilian aviation, and for devising and implementing schemes for methodical and efficient growth of civilian air transport. The MOCA also ensures the implementation of the Aircraft Act 1934.

The following are the principal regulatory authorities of the civil aviation industry functioning under the authority of the MOCA in India: Directorate General of Civil Aviation (DGCA); Airports Authority of India (AAI); and the Airport Economic Regulatory Authority (AERA).

The DGCA is the principal establishment tasked with the responsibility of regulating civil aviation in India, including air transport services, enforcement of civil air regulations, air safety and airworthiness standards. It also coordinates all regulatory functions with the International Civil Aviation Organization (ICAO).

The AAI is a nodal organisation entrusted with the responsibility of creating, upgrading, maintaining and managing civil aviation infrastructure, both on the ground and in the country’s air space. Its responsibilities include passenger services, air navigation services, security services and managing aerodrome facilities.

AERA was established in 2008 to regulate the tariff for aeronautical services rendered at major airports in India. AERA also monitors the performance standards of the

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1 Ravi Singhania is the managing partner and Rudra Srivastava is a partner at Singhania & Partners LLP.
established airports as set out by the central government or any other body authorised by it. Its primary responsibility is to set aeronautical charges on a five-year cycle, taking into account the economic viability of an airport, in line with ICAO principles of transparency, cost-relatedness, non-discrimination and user consultation.

Some of the prominent features of the civil aviation sector in India include a large number of consumers (passengers and cargo), a relatively small number of airlines with significant market share, high-cost barriers to market entry, differentiated services and competitive firms affecting each other’s business decisions. These market characteristics indicate that India’s civil aviation sector has an inherent oligopolistic market structure.

II LEGAL FRAMEWORK FOR LIABILITY

i International carriage

The Carriage by Air Act 1972 embodies the provisions of the Warsaw Convention 1929 (and as amended by the Hague Protocol 1955). While a large number of countries incorporated suitable amendments to the Warsaw Convention with the passage of time, India continued to abide by the archaic Convention to establish the liability of the carrier. It was finally realised that the obsolete protocols would not address the problems and, consequently, India became the 91st country to ratify the Montreal Convention 1999 (MC99), which is a watershed in the history of the aviation industry. The application of MC99 is elucidated in Article 1(2) of the Montreal Convention.

ii Internal and other non-convention carriage

Section 8 of the Carriage by Air Act 1972 entails application of the said Act to carriage by air that is not international. The Act provides that the central government may, by notification in the Official Gazette, apply the rules contained in the Schedules of the Act and any provision of the Sections provided therein to such carriage by air, not being international and as defined in the First Schedule, as may be specified in the notification subject to such exceptions, adaptations and modifications, as may be specified in this regard.

iii General aviation regulation

The Carriage by Air Act 1972 extends to the entire territory of India, and is applicable to Indian citizens irrespective of the nationality of the aircraft performing the carriage.

In the contemporary world where the use of air transport is a part of modern life, the safety of people is the primary concern for the aviation industry. Consequently, a strict compensation system has been established under the Act. The carrier is not permitted to exclude or limit its liability for damages sustained in case of death or bodily injury of a passenger subject to the conditions that the accident that caused the death or injury took place onboard or in the course of any of the operations of embarking or disembarking, and if the damages do not exceed 100,000 special drawing rights (SDR) for each passenger. For any claim of damages in excess of 100,000 SDR, the airline operator is not liable if it is shown that such damage was not caused by the negligence or other wrongful act or omission of the carrier or its servants or agents, or that such damage was solely the result of negligence or other wrongful act or omission of a third party. However, nothing prevents the carrier and the passenger from entering into an agreement to fix a higher limit of damages. Additionally, any provision to absolve the carrier from liability or fix a lower limit than that which has been
laid down in these rules shall be null and void. Further, if the carrier proves that the damage was caused by the negligence of the injured person, or the actions of said person contributed to the damage, the court may exonerate the carrier wholly or partly from its liability.

III LICENSING OF OPERATIONS

i Licensed activities

Domestic carrier operations

Registration of aircraft

A scheduled service operator in India that provides services using an aircraft with a take-off mass of 40,000kg or more must necessarily purchase or lease a minimum of five aircraft with a start-up equity requirement of 500 million rupees. For each addition of up to five aircraft, additional equity investment of 200 million rupees is required. With respect to an aircraft with a take-off mass of less than 40,000kg, the start-up fleet minimum remains at five aircraft – purchased or leased – with a minimum equity requirement starting at 200 million rupees and growing by 100 million rupees with every five additional aircraft.

For non-scheduled operators, the fleet requirements are nominal; namely, they require possession of only one aircraft and equity requirements exist based on the number of aircraft owned or leased by the operator, which create an additional financial barrier to entry.

An aircraft may be registered in either of the following two categories:

a Category ‘A’, where the aircraft is wholly owned either by citizens of India; a company; a corporation registered and having its principal place of business within India; or the central government or any state government, or any company or corporation owned or controlled by either of the said governments.

b Category ‘B’, where the aircraft is wholly owned either by persons resident in or carrying on business in India who are not citizens of India; or a company or a corporation registered outside India but carrying on business in India.

In a case where the usual station of an aircraft and its area of operation are not situated in India, the DGCA may decline to accept an application for registration of the aircraft in India, or, as the case may be, to permit the aircraft to remain registered in India, if, in its opinion, the aircraft could more suitably be registered in another country.

Deregistration of aircraft

The deregistration of an aircraft registered in India shall be effected in accordance with the provisions of the Cape Town Convention. The substantial right of deregistration prevails over any claims made by any authority in India, such as tax or airport authorities, that may collect damages within the terms of their statutory powers. However, such deregistration does not preclude any entity or authority from realising their dues in respect of any services rendered by it, or for recovery of tax dues. There was controversy surrounding the deregistration of foreign aircraft carriers subsequent to the termination of aircraft lease agreements in India, which caused concern in the global aviation market. This was settled by the Delhi High Court in Corporate Aircraft Funding Company LLC v. Union of India and Awas 39423 Ireland Ltd and Ors v. Directorate General of Civil Aviation and Ors. It was held that the DGCA is necessarily required to render assistance to the aircraft in the process of deregistration.
Although there may be dues that have to be recovered under the Customs Act, it is no impediment to the process of deregistration and there is no authority conferred under the Customs Act to prevent the DGCA from deregistering the aircraft.

ii Ownership requirement

An aircraft carrier has to necessarily obtain permission from the central government to operate any scheduled air transport service from, to, in or across India in accordance with the Aircraft Rules 1937. A scheduled operator’s permit can be granted to any person who is a citizen of India; or a company or a body corporate provided that it is registered and has its principal place of business within India, and a chairman and at least two-thirds of its directors who are citizens of India, with its substantial ownership and effective control vested in Indian nationals. Further, before a schedule operator’s permit is issued, a certain prerequisite is that the applicant shall have a paid-up capital for new applicants for which the applicant shall submit a certificate from the banker or chartered accountant to confirm the paid-up capital of the company.

iii International carrier operations

Pursuant to the DGCA Circular on Operation of Scheduled International Air Transport Services (as amended from time to time) a domestic carrier that wishes to engage in international carrier operations must possess a valid permit of operation and have leased or purchased at least 20 aircraft.

Furthermore, the Open Sky policy of India allows foreign airlines to perform their operations in India provided they act in accordance with the safety regulations in India and are licensed by their home country.

iv Passenger rights

The Civil Aviation Requirements (CAR), Series M, Part IV, which was issued by the Office of the DGCA on 6 August 2010 and came into force on 15 August 2010, which prescribes facilities to be provided to passengers by airlines as a result of denied boarding, cancelled flights or delayed flights.

According to the revised compensation norms, which became effective from 1 August 2016, an airline will be liable to pay compensation to a passenger in the case of delay or cancellation of a flight beyond the specified hours, and also in cases specified therein where passengers are denied boarding.

For example, if a scheduled flight gets cancelled, the airline must inform the passenger of the cancellation at least two weeks before the scheduled time of departure and arrange an alternate flight or refund, as may be acceptable to the passenger. If the passengers are informed of the cancellation less than two weeks and up to 24 hours before the scheduled time of departure, the airline has to offer an alternate flight allowing them to depart within two hours of their original scheduled time of departure. If passengers are not informed based on the aforesaid provisions, the airline becomes liable to pay compensation in addition to the refund of the air ticket. The airline in such cases is liable to pay compensation of 5,000 rupees or booked one-way basic fare plus airline fuel charge, whichever is less for flights that have a block time\(^2\) of up to and including one hour; 7,500 rupees or booked one-way basic

\(^2\) Block time is the total time from the moment an aircraft first moves for the purpose of taking off until the moment it finally comes to rest at the end of the flight.
fare plus airline fuel charge, whichever is less for flights that have a block time of more than one hour and up to and including two hours; or 10,000 rupees or booked one-way basic fare plus airline fuel charge, whichever is less for flights that have a block time of more than two hours. If a flight is delayed by less than 24 hours, the airline has to provide meals and refreshments to passengers. If the delay exceeds 24 hours, hotel accommodation and transfers must be provided.

Treatment of unruly passengers

Unlawful or disruptive behaviour of any passenger on-board aircraft may do the following:

- interfere with the performance of duties by the crew members or hamper their ability to perform their duties;
- jeopardise the safety of the aircraft, persons or property on-board;
- affect the order and discipline on-board; or
- cause discomfort to other passengers and crew members.\(^3\)

This behaviour may invite penal action in accordance with applicable regulations. In such a situation, passengers are expected to abide by law of the land and utilise the means and resources for grievance redressal as specified by the government.

Unruly behaviour onboard aircraft has been declared as an offence and is a punishable act. The CAR were issued under the provisions of Rules 22, 23 and 29 of the Aircraft Rules 1937 and with the approval of the MOCA for information, guidance and compliance of all concerned. All foreign carriers flying in and out of India have to follow the CAR subject to compliance with the Tokyo Convention 1963.

The passenger should be made aware that if his or her behaviour falls into one of the following categories (which are indicative not exhaustive), he or she is likely to be breaking the law and could be arrested on arrival at the destination, or at any other airport where the aircraft commander may choose to land:

- consuming alcoholic beverages or drugs resulting in unruly behaviour;
- smoking in an aircraft;
- failure to obey the instructions of the pilot-in-command; or
- acting in an unruly manner by:
  - use of any threatening or abusive language towards a member of the crew or other passengers;
  - behaving in a physically threatening, abusive and disorderly manner towards a member of the crew or other passengers; or
  - intentionally interfering with the performance of the duties of a crew member.

In addition, the Ministry of Home Affairs may from time to time provide the DGCA and the airlines with a list of individuals identified as national security threats for inclusion in the No-Fly List. Further, airlines are also required to maintain a database of all unruly passengers and submit the same to the DGCA and other airlines. This shall form a No-Fly List, which will be maintained by the DGCA and contain the following information: full name of the passenger; contact details (telephone number, email address, postal address, etc., as indicated at the time of booking the ticket); details of the identification document (Aadhar card, passport,

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\(^3\) As provided under the CAR, Section 3, Air Transport, Series M, Part VI, Issue II, effective from 8 September 2017.
etc.); date of occurrence and details of the incident; sector (i.e., domestic or international); flight number; seat number; category level (as per Paragraph 4.10 of the CAR); date from which the ban is imposed; and the period of time that the ban is imposed for.

v Other legislation

The Competition Act 2002 empowers the Competition Commission of India (CCI) to act as a watchdog and regulate the aviation sector in India. The CCI penalised travel agents who were found guilty of cartelisation and in breach of Section 3 under the Competition Act 2002.

Other such legislations that may impose liability with respect to the aviation sector include the Environment (Protection) Act 1986 and the CAR, which regulate the aviation environment protection in India; the Prevention of Corruption Act 1988; and the Consumer Protection Act 1986.

IV SAFETY

The new Anti-Hijacking Act 2016 has introduced some radical changes to the legislation, but falls short on certain specifics, such as provisions for the protection of ground staff or passengers and crew, and only deals with the consequences of hijacking. The lingering threat of aircraft hijacking by militant organisations compelled the lawmakers to review the existing legislation and preparedness towards such exigencies. The Anti-Hijacking Act 2016, passed by the Lok Sabha on 9 May 2016, gives effect to the Hague Convention of 1971 and the Beijing Protocol of 2010.

The aim of the Act is to broaden the scope of the term ‘hijacking’ by including in its definition the act of threatening to commit hijacking. It is now an offence to unlawfully and intentionally cause any person to receive a threat under circumstances that indicate that the threat is credible. The Act goes a step forward by defining the term ‘in service’. An aircraft is considered to be in service from the beginning of the pre-flight preparation by ground personnel, or by the crew for a specific flight, until 24 hours after landing.

From a punishment perspective, the Act prescribes the death penalty where the offence results in the death of a hostage or security personnel, and life imprisonment in all other cases. For the first time, the Act provides for the confiscation of movable and immovable property of a person convicted under its purview.

The global aviation safety and security standards for the aviation sector are provided by standards and recommended practices laid down by the ICAO. The ICAO puts the onus on the contracting states to devise and formulate a State Safety Programme (SSP). The programme is an integrated set of regulations and activities with the objective of improving safety. The DGCA has responsibility for regulating aviation safety. An SSP and safety management systems (SMS) division has been established to ensure the management of the SSP and implementation of requirements of SMS by stakeholders.

The following are the obligations of authorities engaged in aviation to ensure proper implementation of safety programmes.

i Accident investigation and incident reporting

All events of accident and incident investigation are governed by the Aircraft (Investigation of Accidents and Incidents) Rules 2012. Under these Rules, the central government is under an obligation to institute an investigation into events of accidents with respect to aircraft weighing a maximum of 2,250kg or a turbo jet aircraft; in all other events, it is the DGCA
that is responsible for initiating an inquiry into such events. The Rules provide for the Aircraft Accident Investigation Bureau of India (AAI Bureau) to inquire into the occurrence of accidents or incidents. Further, when any new and material evidence has become available after completion of the investigation, the central government may, by order, direct the reopening of the case or inquiry. It also has the responsibility to apprise the AAI Bureau of any accident or incident within 24 hours of its occurrence. The AAI Bureau maintains an accident and serious incident database and provides the same for inclusion in safety data being maintained by the DGCA, which is required to share their database with the AAI Bureau on a regular basis. Nothing in these Rules limits or otherwise affects the power of the central government with regard to the cancellation, suspension or endorsement of any licence or certificate issued under the Aircraft Rules 1937.

ii  SSP responsibilities and accountabilities

India has recognised the responsibilities and accountabilities pertaining to the establishment and maintenance of SSPs. This comprises the directives to plan, develop, maintain, control and constantly improve the SSP. The DGCA is the central authority entrusted with the responsibility for overseeing the implementation of SSPs and carrying out various activities with the aviation organisations covered under SSP safety oversight.

iii  Airworthiness

Airworthiness is the assessment of an aircraft’s suitability for safe flight. Rule 50 of the Aircraft Rules 1937 stipulates that there shall be a certificate of airworthiness for operation of aircraft in India. Such certification of airworthiness is initially conferred by a national aviation authority and maintained by performing the required maintenance actions. The application of airworthiness defines the condition of an aircraft and forms the basis for evaluation of the suitability for flight of that aircraft, namely, that it has been designed with engineering rigour, constructed, maintained and expected to be operated in accordance with the approved standards and limitations, by competent and approved individuals. Each aircraft either manufactured in India or imported into India for which a certificate of airworthiness is to be issued or validated, shall conform to the design standards and be in a condition for safe operation. To be eligible for the certificate of airworthiness, an aircraft must be type certified – in other words, its type certificate must be validated or accepted by the DGCA.

When an airworthiness directive is issued by the DGCA to correct the unsafe condition, or to require the performance of an inspection, the holder of the type certificate, restricted type certificate, supplemental type certificate, major repair design approval, Indian Technical Standard Order\(^4\) authorisation or any other relevant approval deemed to have been issued shall:

\(\text{a}\) propose the appropriate corrective action or required inspections, or both, and submit details of these proposals to the DGCA for approval; and

\(\text{b}\) following the DGCA’s approval, make available to all known operators or owners of the product, part or appliance and, on request, to any person required to comply with the airworthiness directive, appropriate descriptive data and accomplishment instructions.

\(^4\) The Indian Technical Standard Order is a detailed airworthiness specification issued by DGCA to ensure compliance with the requirements of this regulation as minimum performance standards for specified articles.
Rule 52 of the Aircraft Rules 1937 prescribes the requirement for approval of modification or repair affecting safety of any aircraft in respect of which there is a valid certificate of airworthiness. Annex 6 of the ICAO requires that all modification and repair on an operating aircraft shall comply with airworthiness requirements and procedures shall be established to ensure that substantiating data supporting compliance with the airworthiness requirements are retained.

Electronic nicotine delivery systems (ENDS), also called e-cigarettes, personal vapourisers, etc., are products that produce an aerosolised mixture containing flavoured liquids and nicotine that is inhaled by user. According to International Airport Transportation Association (IATA), several incidents have been reported involving electronic cigarettes overheating by the way of their heating element being accidentally activated, resulting in fire in checked-in baggage. Since such products are a potential health hazard therefore, electronic, simulated smoking materials (cigarettes, pipes, cigars) are prohibited from use by both passengers and crew at all times. They can be accepted onboard in the passengers carry-on baggage, for use by passenger at destination, provided they remain stowed and unused at all times in the passenger's carry-on baggage.

Many instances have come to the notice wherein cockpit crew has indulged in photography in the cockpit. In few instances, both pilots were away from the aircraft controls when the photographs were taken. On few occasions crew have also allowed people to enter cockpit and take photographs even though their entry was not covered under AIC 3 of 1997.

Taking photographs during flight is source of distraction, which may lead to error and resultant reduction in safety. In a recent case one of the pilots was engaged in photography during training flight, which eventually resulted in an accident. In view of such negligent acts, all the air operators are required to ensure that the crew does not indulge in photography during any phase of flight, passengers do not indulge into photography while embarking or disembarking from the aircraft and provision of AIC 3 of 1997 and operation Circular 4 of 2011 on the said subject are unscrupulously followed.

iv Procedure for obtaining permission for import or acquisition of aircraft

Section 5 of the Aircraft Act 1934, inter alia, empowers the central government to make rules for regulating the export and import of an aircraft for securing the safety of operation. The requirements for import of aircraft are laid down by the Directorate General of Foreign Trade (DGFT) and by the Ministry of Commerce. In accordance with the order issued by the MOCA, the DGCA issues permissions for the import or acquisition of aircraft by the Scheduled Operator, Regional Scheduled Operator, Scheduled Commuter Operator, Non-Scheduled Operator and Flying Training Organisations, and recommends that the DGFT issues import licences for aircraft for private use. The DGCA also issues permissions to individuals and companies, etc., for import of microlight aircraft, powered hang gliders and hot air balloons for private use, hobby flying, joy rides, etc. The permission for the import of aircraft, excluding aircraft for private use, is issued in two stages: in-principle approval, and no-objection certificate (NOC) for import. The Directorate of Air Transport (DAT) issues in-principle approval for all categories of aircraft in consultation with other relevant directorates. In case of import of aircraft for private use, an import licence from the DGFT is required. After the in-principle approval has been granted, a letter recommending the issuance of an import licence by the DGFT is issued by the DGCA. All aircraft other than private category aircraft can be imported without the need to obtain an import licence from the DGFT.
The validity of the permission for import or acquisition of each aircraft is one year, which may be extended for another six months on genuine grounds. However, in any case, the permission will not be extended beyond the validity of the initial NOC issued by MOCA for new applicants.

V INSURANCE

The DGCA mandates that the aircraft operator shall maintain current insurance for an amount adequate to cover its liability towards passengers and their baggage, crew, cargo, hull loss and third-party risks in consonance with the provisions of the Carriage by Air Act 1972. In case of death or bodily injury of a passenger, the aircraft is strictly liable to pay 100,000 SDR for each passenger and the carrier cannot exclude or limit its liability in such circumstances. The liability of the carrier in the case of destruction, loss, damage or delay with respect to baggage shall be limited to 1,000 SDR for each passenger. In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 SDR per kilogram. Further, the central government may give effect to the revised limits of liability, under Rule 24 of Chapter III of the Third Schedule to the Carriage by Air Act 1972 for the purposes of determining the liabilities of the carriers and extent of compensation for damages.

VI COMPETITION

The CCI is the premier body of the central government responsible for enforcing the Competition Act 2002 throughout the territory of India and to prevent activities that have an appreciable adverse effect on competition (AAEC) in India. The purpose of the Commission is to establish a competitive culture in order to promote fair, competitive and innovative business practices and eliminate all impediments to the establishment of such environment.

Cartelisation is one such impediment to competitive culture, which is presumed to have an AAEC on competition under Section 3 of the Competition Act. Cartel behaviour in the aviation industry is not unusual in India. A significant level of investments and liquidity to cover start-up and high operational costs are prerequisites that impose barriers to entry in the aviation sector. As a result, cartels are able to exercise control and dominate the sector. Further, regulations pertaining to fleet and financial requirements and slot allocations preclude entry, and may escalate the likelihood of cartel behaviour.

In March 2018, the Competition Appellate Tribunal (COMPAT) penalised three carriers – Jet Airways, InterGlobe Aviation Ltd and Spice Jet – for ‘concerted action in fixing and revising fuel surcharge for transporting cargo’. The COMPAT imposed a penalty of 563.4 million rupees on Jet Airways, 637.4 million rupees on IndiGo and 424.8 million rupees on Spice Jet for cartelisation as ‘connivance’ by airline companies to introduce a fuel surcharge was not founded on concrete grounds and such a practice was without any legal basis, which warranted imposition of penalties.

In the case of Uniglobe Mod Travels Ltd, relating to ticket booking segments, the CCI found the existence of cartelisation of travel agents and penalised them for breach of Section 3 of the Competition Act. The case pertains to a boycott call made by trade associations of the travel agents in India against a few international airlines where one of the members did not submit to the boycott call, which resulted in its expulsion from the association. The CCI held that the travel agents, through their tacit agreement, were involved in the boycott and had therefore violated Section 3 of the Competition Act.
VII WRONGFUL DEATH

The Carriage by Air Act 1972 incorporates the provisions of MC99 pertaining to liability and compensation to be paid in case of wrongful death. According to Article 21 of MC99, in case of death of passengers, the airline is liable to pay up to 100,000 SDR. If there is demand for compensation higher than this limit, the airline can contest it. If it is proved that such damage was not the result of the negligence or other wrongful act or omission of the airline, its staff or agents, or if such damage was solely the result of the negligence or other wrongful act or omission of a third party, then the airline is not liable to pay the higher amount.

The approach of the courts in India in relation to liability in case of death is clearly visible in the case of National Aviation Company of India Ltd v. Abdul Salam and others, where an Air India Express on an international flight from Dubai crashed on landing at the Bajpe International Airport at Mangalore on 22 May 2011 causing the death of 158 people and injury to the remaining 10 people on board, including crew. The cause of the air crash was found to be a pilot error and the Kerala High Court accordingly ruled in favour of the victims. The Court observed that the Third Schedule to the Carriage by Air Act 1972 does not provide any minimum compensation for the death or injury of a passenger. The carrier is liable to pay any actual damages proved by the claimants in the case of death or injury. In the event where the damages claimed is above 100,000 SDR, the carrier can contest the claim in excess of 100,000 SDR by proving that the cause of accident was not on account of any negligence of the carrier or their servants or agents, or that the accident was caused by the negligence or other wrongful act or omission of a third party.

VIII ESTABLISHING LIABILITY AND SETTLEMENT

The rules contained in the provisions of MC99 relating to the rights and liabilities of carriers, passengers, consignors, consignees and other persons, are, subject to the provisions of the Carriage by Air Act 1972, and have the force of law in India in relation to any carriage by air to which those rules apply, irrespective of the nationality of the aircraft performing the carriage. The carrier is liable in the following circumstances as provided under the Carriage by Air Act 1972:

a. Personal injury: the carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident that caused the damage sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. An action to enforce the liability may be brought by a personal representative of the passenger or by any person but only one action shall be brought in India in respect of the death of any one passenger, and every such action by whomsoever brought shall be for the benefit of all such persons so entitled either domiciled in India or not being domiciled in India express a desire to take the benefit of the action.

b. Damage to luggage or goods:
   - the carrier is liable for damage sustained to any checked-in baggage or any goods, if such damage occurred on board the aircraft or during any period within which the checked-in baggage was in the charge of the carrier; and
   - the passenger shall be entitled to enforce contractual rights of carriage if the carrier admits the loss of the checked baggage, or in case of non-arrival of the baggage within 21 days from the date on which it ought to have arrived;
Compensation: in the carriage of passengers, the liability of the carrier for each passenger is limited. In case of damage caused by delay in carriage of person the liability of carrier for each passenger is limited to 4,150 SDR. Where damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, the carrier and the passenger may agree to a higher limit of liability by entering into a special contract regarding the same.

The carrier shall not be liable for damages to the extent that they exceed for each passenger 100,000 SDR if the carrier proves that such damage was not the result of any wrongful act on the part of the carrier; its servants or agents; or solely of a third party.

In the event of any destruction, loss, damage or delay, the liability of the carrier shall be limited to 1,000 SDR for each passenger unless the passenger has made a special declaration of interest in delivery at the destination and has paid a supplementary sum. In that case, the carrier shall be liable to pay a sum not exceeding the declared sum, except if it is proved that the sum is greater than the passenger's actual interest in delivery at destination. The liability of the carrier arises when any destruction, loss, damage or delay is caused during the carriage of cargo and such liability is limited to a sum of 17 SDR per kg, unless the consignor has made a special declaration of interest in delivery at destination and has paid a supplementary sum. In that case, the carrier shall be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination.

IX  VOLUNTARY REPORTING

The fundamental purpose of the voluntary reporting mechanism is to improve the standards of aviation safety through the collection of reports on actual or potential safety deficiencies, which may not be reported through the established channels. Therefore, a voluntary reporting system has been established to address the lack of reporting under the mandatory reporting system.

The Indian voluntary and confidential reporting system is already defined in the Aeronautical Information Circular 03 of 2015. Under the current framework of voluntary reporting, a number of persons belonging to categories provided in the circular can be instrumental in promoting and maintaining aviation safety by reporting on occurrences or potential threats in the aviation system.

The ambit of voluntary and confidential reports comprises the following areas:

a  flight operations including departure, en route, approach and landing, aircraft cabin operations, air proximity events, weight and balance and performance, heavy landings when structural limits are not exceeded, unstandardised approaches;

b  aerodrome operations including aircraft ground operations, movement on the aerodrome, fuelling operations, aerodrome conditions or services, cargo loading;

c  air traffic management including air traffic control (ATC) operations, ATC equipment and navigation aids, crew and ATC communications comprising read-back or hear-back errors;

d  aircraft maintenance, including aircraft, engines, components maintenance and repair activities;

e  design and manufacturing, comprising of aircraft, engines, components design or production activities;
approved training organisations that carry out training activities involving flight operations and maintenance; and

passenger handling operations related to safety or any other area that has an impact on aviation safety.

X GOODS AND SERVICE TAX 2017

The goods and services tax (GST) is an indirect tax applicable throughout India with effect from 1 July 2017, which replaced multiple cascading taxes levied by the central and state governments. The GST is governed by a GST Council and its chairman is the Finance Minister of India.

a The following are the GST rates for civil aviation services as approved by the GST Council:

- Transport of passengers by air in economy class will be levied 5 per cent GST with input tax credit (ITC) of input services.
- Transport of passengers, with or without accompanied belongings, by air, embarking from or terminating in a Regional Connectivity Scheme airport will be levied 5 per cent GST with ITC of input services.
- Leasing of aircraft under Schedule II(5)(f) of the Central Goods and Service Tax Act 2017 by a scheduled airline for scheduled operations will be levied 5 per cent with ITC of input services.
- Transport of passengers by air in other than economy class will be levied 12 per cent GST with full ITC.

b The following service tax exemptions would be continued in GST as decided by the GST Council:

- Transport of passengers, with or without accompanied belongings, by air, embarking from or terminating in an airport located in the state of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim or Tripura, or at Bagdogra located in West Bengal.

c The MOCA has set up a GST Facilitation Cell to provide guidance in consultation with the relevant sectoral groups set up by the GST Council and facilitate the smooth and effective implementation of GST provisions.

d The MOCA has set up a GST call centre for any queries and concerns related to implementation of the GST provisions concerning the civil aviation sector.

e The GST Facilitation Cell will also circulate guidance notes and other materials relevant to the civil aviation sector via a GST Help Corner on the Ministry's website (www.civilaviation.gov.in/).

XI YEAR IN REVIEW

The NCAP 2016 came into effect on 15 June 2016. The scheme of the Civil Aviation Policy, the first such integrated policy in India, ensures security and affordable air travel while providing access to various parts of India and the world. It strives to achieve the goal of enhanced regional connectivity coupled with ease of doing business and promoting the entire aviation sector chain from cargo, general aviation, aerospace manufacturing to skill development.
Despite global headwinds on crude oil and currency, domestic passenger traffic in the period January to November 2018 grew by 19.2 per cent year on year. Total passenger traffic to, from and within India, from April to November 2018 grew by around 15 per cent year on year. According to IATA, the number of global departures during calendar year 2018 were projected at around 4.3 billion, a growth of 6 per cent over the previous year. In contrast, in December 2018, India completed 52 consecutive months of double-digit growth.

In June 2018, India signed an open sky agreement with Australia allowing airlines on either side to offer unlimited seats to six Indian metro cities and various Australian cities.

According to data released by the Department of Industrial Policy and Promotion (DIPP), FDI inflows in India’s air transport sector (including air freight) reached US$1,817.23 million between April 2000 and December 2018. The government has allowed 100 per cent FDI in scheduled air transport service, regional air transport service and domestic scheduled passenger airlines. However, FDI over 49 per cent requires government approval.

The highly controversial 5–20 rule has been replaced by a 0–20 rule for starting foreign operations, meaning airlines can start international operations provided they deploy a total of 20 aircraft or 20 per cent of total capacity (in terms of average number of seats on all departures put together), whichever is higher for domestic operations.

The NCAP 2016 signalled the government’s intent to radically alter the sector’s growth trajectory. NCAP’s 2016 flagship programme – UDAN Regional Connectivity Scheme (UDAN RCS) – is taking flying to the masses by offering subsidised fares as low as US$35 for a one-hour flight. AAI is going to invest 150 billion rupees (US$2.32 billion) in 2018–2019 for expanding existing terminals and constructing 15 new ones. The AAI plans to develop Guwahati as an inter-regional hub and Agartala, Imphal and Dibrugarh as intra-regional hubs. Indian aircraft manufacture, repair and overhaul (MRO) service providers are exempted completely from customs and countervailing duties.

In February 2019, the government of India sanctioned the development of a new greenfield airport in Hirasar, Gujarat, with an estimated investment of 14.05 billion rupees (US$194.73 million). In January 2019, the government of India released the National Air Cargo Policy Outline 2019, which envisages making Indian air cargo and logistics the most efficient, seamless and cost- and time-effective globally by the end of the next decade. In November 2018, the government of India approved a proposal to manage six AAI airports under public-private partnership. These airports are situated in Ahmedabad, Jaipur, Lucknow, Guwahati, Thiruvananthapuram and Mangaluru.

The year under review saw two of the large full-service airlines (including the national carrier) facing extreme difficulties in continuing operations; Jet Airways – one of the biggest airlines in India halted its operations due to unserviceable debts. However, in contrast the budget airlines operating in India expanded operations and reported positive balance sheets. The Indian budget carriers showed great interest in expanding their operations both in India and abroad. Major players SpiceJet and IndiGo are expanding their fleets and operations domestically as well as internationally. The government decided to privatise its national carrier Air India and helicopter company Pawan Hans, which would have been unthinkable in the past.
XII REGIONAL CONNECTIVITY SCHEME

The UDAN RCS was launched in October 2016 to develop the regional aviation market. It is a vital component of the NCAP 2016. It aims to make flying affordable by providing connectivity to unserved and underserved airports of the country through revival of existing airstrips and airports so that persons in regional towns are able to take affordable flights. The UDAN RCS will be applicable to routes that are between 200km and 800km with no lower limit set for hilly, remote, island and security-sensitive regions. A Regional Connectivity Fund will be created to fund the Scheme via a levy on certain flights. States are expected to contribute 20 per cent to the fund. For balanced regional growth, allocations will be spread equitably across the north, west, south, east and north-east regions with a cap of 25 per cent. The UDAN RCS is expected to have a positive effect on the economy in terms of employment and investment. It will also promote tourism and balanced regional growth.

XIII VISION 2040

The government of India came out with its vision document for the aviation sector in 2040. A few key highlights of the Vision Document 2040 are set out below.

- If the trend (as reported in previous years) continues, India is expected to become one of the top aviation hubs by 2040. Passenger traffic is expected to grow sixfold to around 1.1 billion. India has one of the largest aircraft order books currently with pending deliveries of over 1,000 aircraft. Its commercial airline fleet is likely to grow from 622 in March 2018 to around 2,359 in March 2040.
- India may have around 190–200 operational airports in 2040. Its top 31 cities may have two airports and the cities of Delhi and Mumbai will have three each. The incremental land requirement is expected to be around 150,000 acres and the capital investment (not including cost of acquiring land) is expected to be around US$40–50 billion.
- The government may consider establishing a NABH Nirman Fund (NNF) with a starting corpus of around US$2 billion to support low traffic airports in their initial phases. The concept of land pooling may be used to keep land acquisition costs low and to provide landowners with high value developed plots in the vicinity of the airports.
- Air cargo throughput is projected to quadruple to 17 million tonnes in FY2040. Cargo processing will be completely paperless and dwell times will be reduced to just one to two hours. India’s freighter fleet is likely to expand multifold with the growth in e-commerce. India will gradually become a transshipment hub for the entirety of South Asia.
- With conducive policies and a large fleet of commercial and military aircraft, India will build its indigenous aircraft manufacturing industry in collaboration with global original equipment manufacturers. By 2040, India will assemble almost 70 per cent of its commercial aircraft demand and also export to other countries.
- India will establish its own aircraft leasing industry, which may handle almost 90 per cent of aircraft being ordered in India by 2040. India’s tax structure and repossession processes will be equally or more attractive than those in leading global jurisdictions.
- General aviation will become an integral part of India’s aviation eco-system, driven by remote area connectivity, tourism and disaster management programmes.
- Over the next five to eight years, all Indian aircraft will be flying on the satellite-based GPS-aided GEO augmented navigation (GAGAN) system developed by AAI and ISRO. This
will lead to better airspace utilisation and safer operations despite reduced aircraft separation. GAGAN signals will also be used by other sectors, for example shipping, highways, railways and agriculture.

DGCA may be converted into a fully independent civil aviation authority, with its own sources of funding and freedom to recruit professionals at market-linked salaries. Most transactions with DGCA will be automated with minimal human interface.

**XIV OUTLOOK**

The outlook for 2019 for the aviation industry in India is positive. It is widely perceived that the nation will record growth of more than 7 per cent in 2019. Further, the initiative of the central government to make large-scale investments in the sector for the development of regional airports is expected to be propitious for the industry. However, considering that the cost of choosing air transport over the other modes of transport still proves to be exorbitantly high for a majority of the population, it suffices to say that the sector is yet to be properly explored. Specific attention may be directed to the following events:

\(a\) The NCAP 2016, which came into effect in June 2016, aims to fortify the aviation sector, which has the prospective of growth in the future. It has proposed tax incentives for airlines; the setting up of no-frills airports; maintenance and repair works of aircraft; increasing FDI limit for foreign airlines; and providing viability gap funding for carriers to strengthen the regional air connectivity.

\(b\) The fixing of fare price on the basis of travel time as provided in the NCAP 2016 is a welcome proposal. The central government should take further initiatives towards this end to extend the reach of the airlines to the common masses.

\(c\) The Route Dispersal Guidelines, which mandate all airlines to direct the loss-making flights to remote parts of India, also need revaluation since they create a stringent environment for carrying out business in India.

\(d\) A faster approach towards setting up new airports and airstrips and expanding existing airports, as well as an additional emphasis on infrastructure facilities in large towns, are wholly necessary for exploring the real potential of the sector.

\(e\) Considering the time taken by the government agencies in awarding and clearing infrastructure projects in India, it will be necessary for the government to set up independent and robust machinery for undertaking and monitoring the activities and targets identified in the vision document 2040.

\(f\) Set-up policy and procedures for streamlining the dispute resolution process, land acquisition processes, awarding process, etc.

Indian aviation vision 2040 targets are lofty and aspirational. The road to 2040 will not be easy. India will also need to collaborate with aviation leaders across the globe for knowledge and advice. Overall participation and collaboration of the stakeholders with the policymakers to implement efficient and rational decisions is imperative to boost India’s civil aviation industry. With appropriate policies and persistent focus on quality, cost and passenger interest, the well-formed vision of India becoming the third-largest market by 2022 and the largest by 2040 will be successfully realised.
I INTRODUCTION

The civil aviation industry is one of the most highly regulated industries in Indonesia. The main law governing this sector is Law No. 1 of 2009 on Aviation (Aviation Law). In addition to the Aviation Law, there are a number of implementing regulations, most of which are issued by the Ministry of Transportation.

II LEGAL FRAMEWORK FOR LIABILITY

The Aviation Law stipulates that an air carrier is liable for damages resulting from the death of a passenger and indemnity for the death of a passenger, permanent disability or injury caused by incidents onboard an aircraft or while getting on or off the aircraft. This is further regulated under the Ministry of Transportation Regulation No. 77 of 2011 on Liability of Air Carriers (MOTR No. 77/2011), which states that an air carrier will be liable for damages resulting from, among other things, death, permanent disability or injury (Article 2).

The above-mentioned liability is imposed on an ‘air carrier’, which is clearly defined under Article 1(26) of the Aviation Law and Article 1(2) of MOTR No. 77/2011 as ‘a commercial air transportation company, a non-commercial air transportation a company holding a licence to conduct commercial air transportation operations based on the provisions of this law or any legal entity other than a commercial air transportation company that has entered into an agreement on commercial air transportation’. Thus, theoretically speaking, a non-commercial air carrier is not subject to such liability.

i International carriage

Indonesia has ratified and is therefore bound by the following conventions concerning international carriage of passengers, baggage and cargo by air:

a Convention on International Civil Aviation, Chicago 1944 (Chicago Convention), as ratified by Indonesia becoming a state party to the International Civil Aviation Organization (ICAO);

b Convention for the Unification of Certain Rules relating to International Carriage by Air, Warsaw 1929, as ratified by the Air Carrier Ordinance No. 100 of 1939;

c Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo 1963, as ratified by Law No. 2 of 1976;
Convention for the Suppression of Unlawful Seizure of Aircraft, the Hague 1970, as ratified by Law No. 2 of 1976;
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal 1971, as ratified by Law No. 2 of 1976;
Convention on International Interests in Mobile Equipment, Cape Town 2001, as ratified by Government Regulation No. 8 of 2007; and

The Aviation Law provides that Indonesian laws only apply to incidents occurring in the airspace above the territory of Indonesia. This is based on Article 5 of the Aviation Law, which provides that Indonesia has full and exclusive sovereignty over the Indonesian airspace. This full and exclusive sovereignty is also recognised in Article 1 of the Chicago Convention, which states that every state has complete and exclusive sovereignty over the airspace above its territory. Singapore, Indonesia and Australia are all contracting parties to the Chicago Convention.

**ii Internal and other non-convention carriage**

Article 141 of the Aviation Law recognises that a carrier is liable for damages or losses suffered by a passenger, including death, permanent disability or injury. Such liability is further accorded by the Aviation Law to the air transportation company to indemnify any losses suffered by a passenger, a cargo shipper or a third party.

**iii General aviation regulation**

The Aviation Law is a specific sectoral law that governs civil aviation matters in Indonesia. However, any claim against an air carrier may also be subject to the Indonesian Civil Code, particularly the provision concerning unlawful acts (tort). Nevertheless, the scope of the Aviation Law remains quite extensive and covers the following aspects:

- Chapter I: General Provisions;
- Chapter II: Goals and Principles;
- Chapter III: Scope of the Law;
- Chapter IV: Sovereignty over Air Territory;
- Chapter V: Development;
- Chapter VI: Design and Production of Aircraft;
- Chapter VII: Aircraft Registration and Nationality;
- Chapter VIII: Aircraft Airworthiness and Operation;
- Chapter IX: International Interests in Aircraft;
- Chapter X: Air Transport;
- Chapter XI: Airport Affairs;
- Chapter XII: Air Navigation;
- Chapter XIII: Aviation Safety;
- Chapter XIV: Aviation Security;
- Chapter XV: Search and Rescue in Aircraft Accidents;
- Chapter XVI: Investigation and Further Inquiries into Aircraft Accidents;
- Chapter XVII: Aviation Industry and Technology Development;
iv Passenger rights

The passenger or owner of a cargo being carried on an aircraft has the right to receive compensation for damages resulting from:

- a death of the passenger on air transportation;
- b death of the passenger during boarding or disembarking an aircraft at an airport;
- c any permanent injury owing to an aircraft accident;
- d any injury and hospitalisation owing to an aircraft accident;
- e any missing, destroyed or damaged listed luggage; and
- f any missing or destroyed cargo.

In addition to compensation rights, Article 127 of the Aviation Law also gives a passenger the right to reasonable and fixed airfare, in accordance with the Indonesian Consumer Protection Law. Paragraph 2 of Article 127 of the Aviation Law stipulates that: ‘The upper limit rate as provided in paragraph (1) is determined by the Minister by considering the protection of the consumer and the protection of the scheduled commercial air carrier business entity from unhealthy competition practices aspects.’

The elucidation to this provision provides that ‘consumer protection aspects’ means protecting the consumers from high fares determined by the air carriers, as well as from information of or advertised flight rates that are misleading or even disadvantageous, whereas ‘unhealthy competition practices’ means preventing air carriers from setting lower fares than their competitors in an attempt to eliminate competition from certain services or routes.

III LICENSING OF OPERATIONS

i Licensed activities

Prior to its operation, a carrier must obtain certain basic licences, including a commercial air transportation operation licence, an air operator certificate, a flight route licence and flight approval. These licences are issued by the relevant authority in the Ministry of Transportation, namely the Directorate General of Air Transportation. According to the recently enacted Ministry of Transportation Regulation,2 the application for the aforementioned licences can be made online by accessing the official Ministry of Transportation’s website.3

In addition to the above-mentioned licences, the Aviation Law and its implementing regulations also require a carrier to obtain an approval from the Ministry of Transportation

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2 Ministry of Transportation Regulation No. PM 12 of 2015 on Online Licences of Air Transportation.
3 Application for air transport licences can be made via http://aol.dephub.go.id.
before conducting certain actions. One notable provision is the requirement to obtain the prior approval from the Ministry of Transportation if the carrier intends to charge passengers additional prices on top of their fares for the purchase of an optional product.⁴

ii Ownership rules

Under the Aviation Law, an air transportation company can be in the form of:

a an Indonesian state-owned company;
b an Indonesian local government-owned company;
c an Indonesian legal entity, such as a limited liability company; or
d an Indonesian cooperative company whose entire or majority of the shares are owned by an Indonesian legal entity or Indonesian citizens.

In the event that the shares of an air transportation company are divided among several shareholders, the Aviation Law further stipulates the proportion of the ownership of the company, whereby the national shareholders must continue to have a greater number of shares compared with other shareholders (simple majority).⁵

Moreover, another requirement that must be satisfied to establish an air transportation company is that such company must own a certain number of serviceable aircraft. The number of aircraft required are:⁶

a for an air transportation company operating scheduled commercial air transportation, the newly established company must own at least five aircraft and control at least five aircraft to support the continuation of the business for the service routes;
b for an air transportation company operating non-scheduled commercial air transportation, the newly established company should own at least one aircraft and control at least two aircrafts to support the continuation of the business for the service operating area; and
c for an air transportation company operating cargo air transportation, the newly established company should own at least one aircraft and control at least two aircrafts to support the continuation of business for the service routes.

iii Foreign carriers

Essentially, the Aviation Law allows commercial air transportation operations, both scheduled and non-scheduled flights, to be operated by a foreign entity.⁷ However, a foreign carrier is limited to serving only international flights for both passengers and cargo, and it should be based on a bilateral or multilateral agreement with Indonesia.

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⁴ Ministry of Transportation Regulation No. 51 of 2014 on Mechanism of Calculation Formulation and Determination of Upper Limit on Fares of Economy Class Passengers of Domestic Scheduled Air Carriers, as amended by Ministry of Transportation Regulation No. 59 of 2014 and Ministry of Transportation Regulation No. 91 of 2014.
⁵ Article 106(3) of the Aviation Law.
⁶ Article 118(2) of the Aviation Law and Article 2 of Ministry of Transportation Regulation No. 97 of 2015 on Technical Guidance on the Ownership and Control of Aircraft.
⁷ Articles 83(3) and 86 of the Aviation Law.
Further, there are a number of prohibitions imposed by the Aviation Law on foreign carriers, including:

a. a non-scheduled flight operated by a foreign carrier is prohibited to carry passengers from the territory of Indonesia, except for in-bound traffic; and

b. a cargo flight operated by a foreign carrier is prohibited to carry cargo from the territory of Indonesia, unless it is permitted by the Ministry of Transportation.

IV SAFETY

The Aviation Law requires every aircraft to comply with airworthiness standards, as evidenced by an airworthiness certificate issued by the Ministry of Transportation. The airworthiness certificate will only be issued to an aircraft that passes an airworthiness inspection and test. Further, the carrier is also obliged to maintain the aircraft, the aircraft engines, propellers and other components of the aircraft to ensure continued reliability and airworthiness. The carrier should implement an aircraft maintenance programme that is approved by the Ministry of Transportation.

Every aspect of aviation, including but not limited to the business, operations, ground-handling service, communication, navigation and surveillance (CNS), airport infrastructure, air traffic management and supply chains, relies heavily on computer systems, which means that there is a high chance of a cyberattack. As a result, cybersecurity is a growing concern in this industry. Referring to Annex 17 of ICAO, Indonesia has included articles regarding cybersecurity in the Ministry of Transportation Regulation No. PM 80 of 2017 on National Aviation Security Programme. This regulation requires every airport, airline, AirNav Indonesia and legal entity to establish a cybersecurity unit in order to prevent and mitigate cyberattacks.

On 17 May 2018, the Indonesian Director General of Air Transportation received an honorary award (the Council President Certificate) from the ICAO in Montreal, Canada. The award was a form of acknowledgment from the ICAO for the achievements and developments by Indonesia after resolving a number of safety oversight deficiencies and improving the effective implementation of the ICAO’s Standards and Recommended Practices on aviation safety. The award was also given as a result of an on-site audit in October 2017, in which Indonesia reached 80.34 per cent in effective implementation, compared to 45.33 per cent previously. The audit has also placed Indonesia 58th out of 192 ICAO member states for aviation safety. Indonesia previously ranked in 152nd place and was the 10th accredited country in the Asia-Pacific region out of 39 member states accredited by the ICAO regional office in Bangkok. In addition to receiving acknowledgment from the ICAO, Indonesia also received recognition from the European Union Air Safety Committee. On 15 June 2018, the Committee lifted the EU ban on all Indonesian airlines, which previously prohibited a number of airlines from operating within the EU member states. The ban was revoked after a positive assessment of Indonesia’s flight safety by the ICAO in October 2017 and the EU aviation audit agency in March 2018, following further improvements to aviation safety in the country.

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8 Passengers who have disembarked a previous flight.
V INSURANCE
The Aviation Law requires an air carrier to have liability insurance with respect to passengers and cargo owners. Further, such insurance should be provided by a consortium. The minimum amount of insurance coverage must be equivalent to the amount of compensation that would have to be paid to the passengers and cargo owners.

VI COMPETITION
The Indonesian Competition Law (Law No. 5 of 1999 on the Prohibition of Monopolistic and Unfair Business Practices (ICL)) does not contain any specific provisions regulating the aviation or aviation-related industries. Accordingly, all general competition regulations apply to these industries. Although the ICL features three substantive chapters – prohibited agreements (Chapter III), prohibited conduct (Chapter IV) and abuse of dominance (Chapter V) – best practices are often not complied with. To overcome this, the Indonesian Competition Commission (KPPU) has issued various guidelines on how to interpret the articles of the ICL, and the approach towards and analysis of the ICL should include a consideration of best practices directed against restricted business practices and abuses of dominant position.

Code-sharing between a national and a foreign operator is a part of normal global aviation practice, for domestic or international routes. The United States, European Union and Australia are some jurisdictions that provide antitrust immunity or authorisation programmes for competing operators wishing to elevate their cooperation as part of the open skies agreements among countries and regions. The rationale behind such programmes is

9 The ICL is currently being amended, although there is still no specific date for the effectiveness of the amendment.
10 Chapter III on prohibited agreements stipulates the restriction on oligopoly, price-fixing, price discrimination, below-market pricing, minimum resale price maintenance, market or territorial allocation, (group) boycott, cartel, trust, oligopsony, vertical integration, exclusive dealing, agreement with foreign party. Chapter IV on prohibited conduct stipulates the restriction on monopoly, monopsony, market control, predatory pricing, unfair pricing, bid-rigging, misappropriation of trade or company secrets, group boycott through conspiracy, abuse of dominant position, interlocking directorate, cross-ownership and merger and acquisition.
11 The exemptions of the ICL are stipulated in several articles, namely: (1) Article 5, Paragraph 2: price-fixing in a joint venture or based on existing laws or regulations, (2) Article 50: actions or agreements that: a implement an applicable law and regulation; b are related to IPR and franchise; c implement standardisation; d relate to an agency agreement; e relate to a research cooperation agreement to improve the living standards of society at large; f apply a ratified international agreement; g relate to an export-oriented agreement; b arise from a small-scale business; and i relate to a cooperative activity to serve their members; and (3) Article 51: monopoly by a state-owned company mandated by law and concerning the well-being of society at large.
12 Indonesia entered into the open skies agreement in January 2015 following the Aceh tsunami so that social and humanitarian assistance could be more efficiently directed. The ASEAN Open Skies Policy was implemented in 2015.
that the more operators can integrate their resources, the more likely they are to achieve greater efficiencies and synergies, thus allowing them to provide more routes and better services to consumers. Nevertheless, the ICL and other regulations concerning aviation remain silent on such arrangements.13

The KPPU, as the body charged with enforcing the ICL, has thus far handed down only one decision related to the core aviation industry, namely KPPU Decision No. 25/KPPU-I/2009 on Price-Fixing of Fuel Surcharges for Domestic Flights, which was based on Article 5 of the ICL regarding price-fixing cartels (the Fuel Surcharge case). The KPPU has also investigated seven other cases concerning the aviation-related industries.

Although the Supreme Court ultimately overruled the KPPU’s decision in the Fuel Surcharge case, the KPPU defined the relevant product and geographic market as scheduled air-passenger services from point of origin to point of destination in the catchment area of an airport. There are a few crucial issues to note from the Fuel Surcharge case, including the underlying premises for the KPPU’s determination of the existence of a cartel, namely:

\[ a \] the continued application of a formally cancelled agreement on fuel surcharge determination; and

\[ b \] the use of economic evidence (fuel surcharge movements, concerted action, correlation and homogeneity of variance tests, and comparison of actual to estimated fuel surcharges in the absence of a cartel).

Unlike in many other jurisdictions, a cartel is not considered to be criminal matter under the ICL, and responsibility cannot be assigned to individuals (i.e., the ICL only applies to undertakings). The initiation of a criminal proceeding stemming from the application of the ICL can only take place if an undertaking or individual obstructs an investigation conducted by the KPPU, or a defendant ignores and does not comply with a final and conclusive decision.

### VII WRONGFUL DEATH

Based on the general provisions under the Indonesian Civil Code, there is legal ground for a beneficiary to file a legal claim over an unlawful or negligent death based on the status and financial condition of the beneficiary and other pertinent circumstances.14 Further, MOTR No. 77/2011 has set a specific compensation amount of 1.25 billion rupiah per person for the death of a passenger as a result of an incident on board an aircraft or while getting on or off an aircraft.15 With the ratification of the Montreal Convention in 2016 (see Section X), a person may receive compensation of up to 2.030 billion rupiah for the death of a passenger.

Regardless of the stipulated fixed amount of compensation for the death of a passenger related to air transportation, the Aviation Law also allows the carrier and the passenger or the

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13 Law No. 1 of 2009 on Aviation, Regulation of the Ministry of Transportation No. KM 25 of 2008 on Air Transportation.
14 Article 1370 of the Indonesian Civil Code.
15 Article 3 of the Ministry of Transportation Regulation No. 77 of 2011 on the Liability of Air Carriers.
beneficiary to enter into a specific agreement to determine a higher amount of compensation.\textsuperscript{16} The passenger or the beneficiary may also claim a higher compensation amount if he or she can prove that the accident happened out of negligence or fault of the carrier.\textsuperscript{17}

Based on precedent, Indonesian courts would basically accept claims seeking compensation for wrongful deaths. However, there is no hard-and-fast rule. In the Munir case,\textsuperscript{18} the widow of Munir, an Indonesian civil rights activist who died in a Garuda Indonesia flight from Jakarta to Amsterdam, sued Garuda Indonesia for non-material damages of 9.7 billion rupiah and for material damages of 4 billion rupiah. The material damages were calculated based on the estimated future income of Munir, the costs of education, medical care and therapy of Munir’s children, Munir’s own graduate student tuition and fee, and Munir’s funeral costs. In the end, the court awarded Munir’s widow 3.4 billion rupiah, representing the future economic loss in the form of the income that Munir could be expected to have earned by retirement age.

VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

Essentially, a carrier is subject to strict liability under the Aviation Law. However, the liability of a carrier is limited to the amounts stipulated in MOTR No. 77/2011 (see Section VII.iii).

Further, Article 176 of the Aviation Law governs the legal options available to passengers and cargo owners if they wish to seek additional compensation other than the amounts stipulated in Article 3 of MOTR No. 77/2011. The heirs of a deceased passenger can also bring an action in the civil courts to:

a seek additional compensation: Article 141(3) of the Aviation Law states that the heirs of a deceased passenger may seek additional compensation for the death of a family member in an aircraft accident; and

b bring legal action: under Article 176 of the Aviation Law, the heirs of a deceased passenger who suffer losses may bring legal action against the air carrier in the civil courts using Indonesian law as the governing law. Such action may only be brought by the heirs of the deceased passenger based on the following evidence: (1) documents evidencing inheritance rights; and (2) an official statement from the authorities setting out losses owing to aircraft operations (Article 21, Paragraph 1 of MOTR No. 77/2011).

However, the law imposes a time bar for bringing such action. Article 177 of the Aviation Law provides that the maximum time limit for the initiation of such action is two years from the date on which the baggage is supposed to have arrived at the destination. Consequently, the time limit for filing a claim under Article 177 of the Aviation Law would appear at first sight to apply only to a passenger or cargo owner whose property is lost or damaged. However, this is greatly expanded by the elucidation of Article 177, which states that losses suffered by a passenger or cargo owner are not confined to their baggage, but also include losses in the form of death or injury.

\textsuperscript{16} Article 166 of the Aviation Law.
\textsuperscript{17} Elucidation of Article 180 of the Aviation Law.
\textsuperscript{18} Supreme Court Decision No. 2586 K/PDT/2008 dated 28 January 2010.
ii Product liability

The Aviation Law is silent on the liability of the manufacturer or owner of an aircraft towards passengers, as the Aviation Law only recognises the liability of a carrier towards its passengers. Nevertheless, that does not guarantee that the manufacturer or the owner will be released from aviation claims. Indonesian law enables anyone to file a tort claim in the court for an unlawful act committed by another party.

The elements of tort (or unlawful acts) under Article 1365 of the Indonesian Civil Code are as follows:

a an unlawful act, which according to judicial precedent is not confined solely to a breach of a statutory provision, but also extends to:
• an act that violates the subjective rights of others;
• an act that violates the legal obligations of the perpetrator;
• an act that violates moral norms; or
• an act that violates the appropriateness, diligence and due care that should be demonstrated as part of one's role in society or in respect of the property of others;

b existence of loss;

c existence of fault, by commission or omission; and

d existence of causal relationship between the act and the loss.

The claimant will need to establish to the court that all of the above elements have been fulfilled.

iii Compensation

The amount of compensation that should be paid by an air carrier operating domestic carriage in the event of a loss is governed by MOTR No. 77/2011 and is outlined below:

<table>
<thead>
<tr>
<th>Legal basis</th>
<th>Damage</th>
<th>Compensation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 3 of MOTR No. 77/2011</td>
<td>Death of passenger on air transportation</td>
<td>1.25 billion rupiah per passenger</td>
</tr>
<tr>
<td></td>
<td>Death of passenger boarding or disembarking an aircraft at an airport</td>
<td>500 million rupiah per passenger</td>
</tr>
<tr>
<td></td>
<td>Total permanent injuries</td>
<td>1.25 billion rupiah per passenger</td>
</tr>
<tr>
<td></td>
<td>Injuries and hospitalisation</td>
<td>200 million rupiah per passenger</td>
</tr>
<tr>
<td>Article 5 of MOTR No. 77/2011</td>
<td>Missing, destroyed, or damaged luggage (that is listed)</td>
<td>From 200,000 rupiah h per kilogram per passenger up to 4 million rupiah</td>
</tr>
<tr>
<td>Article 7 of MOTR No. 77/2011</td>
<td>Missing or destroyed cargo</td>
<td>100,000 rupiah per kilogram</td>
</tr>
<tr>
<td></td>
<td>Partly destroyed cargo or cargo contents</td>
<td>50,000 rupiah per kilogram</td>
</tr>
</tbody>
</table>

Liability of an air carrier operating international carriage is provided under the recently ratified Montreal Convention, namely:

a the compensation for passenger casualty is up to 113,100 SDR,\(^{19}\) which is approximately 2.03 billion rupiah. If the passenger wishes to file a claim that exceeds such limit, he or she may do so on a liability based on the fault principle;

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\(^{19}\) Amount after the Inflation Adjustments to Liability Limits Governed by the Montreal Convention, effective 30 December 2009.
b the compensation for delay is a maximum of 4,694 SDR, or approximately 84.2 million rupiah;
c the compensation for loss and damage of baggage is a maximum of 1,131 SDR, or approximately 20.3 million rupiah; and
d the compensation for loss, damage or delay of cargo shipments is 19 SDR, or approximately 341,000 rupiah per kilogram.

IX VOLUNTARY REPORTING

There are two types of reports: a mandatory occurrence report, and a voluntary occurrence report/information.20 The mandatory occurrence report applies to the operator, whether Indonesian or foreign, which must report an accident or a serious incident involving an aircraft immediately, with minimum delay and by the most suitable and quickest means available, to the National Transportation Safety Committee (NTSC) and the Directorate General of Civil Aviation (DGCA). Meanwhile, the voluntary occurrence report/information is open for submission by any person who has knowledge of any hazard that may be a precursor to an accident or serious incident; such voluntary report should go to the NTSC and DGCA, or the nearest transportation authority office, or any government office as soon as is reasonably practicable.

For the implementation of the aforesaid provision, the DGCA has established the State Safety Programme (SSP) to identify obstacles in the aviation system that need to be handled.21 The voluntary report can be submitted online through the SSP’s official website (www.ssp.hubud.go.id) by completing a form with details of the incident. The reporter’s identity will be treated as confidential and may only be used if the DGCA considers it necessary to contact the reporter for further information in the interest of conducting a safety analysis. The DGCA may also conduct an investigation whether the reporter may have contributed to an incident. In the event that the reporter has in any way contributed to the incident, the voluntary reporting may become a discretionary consideration in easing any administrative sanctions by the DGCA.

X THE YEAR IN REVIEW

Since the enactment of the Aviation Law, there have been a number of major cases concerning the aviation sector in Indonesia, most of which have been in relation to the liability of the carrier. These cases contribute to further development of Indonesian aviation law. First, in May 2012, there was an aircraft accident involving a foreign aircraft that was operated by the aircraft manufacturer. The accident, which killed all passengers, happened during a demonstration flight. From a regulatory viewpoint, it could be interpreted that the operator of the aircraft (the aircraft manufacturer itself) was not an air carrier or an air transportation company, thus rendering the Aviation Law inapplicable.

Another interesting case involved an action brought by a passenger against an Indonesian carrier for the loss of baggage during a domestic flight in November 2011.

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20 Ministry of Transportation Regulation No. 14 of 2015 on Civil Aviation Safety Regulation Part 830 on the Notification and Reporting of Aircraft Accidents or Serious Incidents and Accident or Serious Incident Investigation Procedures.

21 Ministry of Transportation Decree No. 8 of 2010 on the State Aviation Safety Programme.
Despite the fact that the amount of compensation for loss of baggage is set out in the Aviation Law and in MOTR No. 77/2011, the Supreme Court ruled in October 2014 that it would be unjust if the actual amount of loss suffered by the plaintiff was higher than the amount of compensation stipulated by the legislation. Consequently, the Court held that the plaintiff should receive more compensation than the statutory amount.

An additional development after the adoption of the Aviation Law was the ratification of the Montreal Convention. The Montreal Convention was implemented into Indonesian national law through the 2016 Presidential Regulation. The 2016 Presidential Regulation came into force on 23 November 2016. This is regarded as the most significant recent change to aviation law as it ensures that Indonesia applies international standards for liability of air carriers and provides legal certainty for passengers, goods, baggage and cargo of international flights, as well as protection for airlines in the form of limits to their liability for compensation.

Furthermore, in October 2018, there was an accident involving a scheduled domestic flight operated by an Indonesian airline from Jakarta to Pangkal Pinang. At the time of writing, this case is still being investigated by the NTSC.

Most recently, in 2019, the Ministry of Transportation issued two new regulations: Ministry of Transportation Regulation No. 20 of 2019 on Procedure and Formulation of Calculation of Airfare Ceilings for Passengers of Economy Class Services for Domestic Commercial Airlines and Decree of the Minister of Transportation No. 72 of 2019 on Airline Ceilings for Passengers of Economy Class Services for Domestic Commercial Airlines. These two regulations provide the authority for the DGCA to regularly evaluate airfare tariffs.

XI OUTLOOK

Given that the number of disputes related to the liability of carriers has been growing in recent years, the Ministry of Transportation is currently considering the possibility of permitting dispute resolution through alternative dispute resolution mechanisms, such as mediation and arbitration.
I  INTRODUCTION

The Isle of Man aviation sector is firmly established in the industry. The Isle of Man Civil Aviation Administration (CAA) is the division of the government’s Department of Economic Development (DED) that is responsible for regulating aviation on the Isle of Man. The CAA’s role is to administer the Isle of Man Aircraft Registry (the Registry) and regulate the Isle of Man airport. The CAA is responsible for ensuring aviation legislation on the Isle of Man meets International Civil Aviation Organization (ICAO) Standards and Recommended Practices and other relevant European aviation standards.

The Registry was created in May 2007 and it is specifically aimed at private and corporate business jets and helicopters. Isle of Man registered aircraft cannot be used for Commercial Air Transport. It is the largest dedicated corporate aircraft register in Europe, with a policy to accept only aircraft with a maximum take-off mass (MTOM) of over 5,700kg and twin turbine helicopters. Aircraft with a MTOM of between 2,730kg and 5,700kg may be considered for registration only if supported by evidence of significant economic benefit to the Isle of Man. There is no MTOM restriction for aircraft registered for Isle of Man residents. The Registry has proven to be an unqualified success, having registered over 1,000 aircraft since its inception.

The Air Navigation (Isle of Man) Order 2007 (which came into force on 1 May 2007) was the governing legislation for the aircraft industry on the Isle of Man and because of the success of the Registry and the continuing development of the industry on the island it has been updated and replaced by the Air Navigation (Isle of Man) Order 2015 (as amended by the Air Navigation (Isle of Man) (Amendment) Order 2016) (ANO). This chapter will cover the main aspects and developments introduced by the new ANO.

About the Isle of Man

The Isle of Man is one of the most politically and economically stable jurisdictions in the world. It is not part of the United Kingdom but conveniently lies within the British Isles. The island is politically and constitutionally separate from the United Kingdom. It has its own political system and its own parliament (Tynwald), which is independent and is the oldest continuous parliament in the world, with over 1,000 years of unbroken parliamentary rule. Tynwald is responsible for setting the island’s laws, including matters of taxation. The island has one of the highest credit ratings of any offshore financial centre and has never entered
recession. It has benefited from year-on-year economic growth, is on the Organisation for Economic Co-operation and Development’s (OECD) ‘whitelist’ and is one of the few countries in the world to be awarded the top ‘compliant’ rating for transparency by the OECD Global Forum.

II LEGAL FRAMEWORK FOR LIABILITY

The Isle of Man aviation industry is governed by the following pieces of legislation: the ANO; the Civil Aviation (Subordinate Legislation) (Application) Orders 2006 and 2008; and the Airports and Civil Aviation Act 1987.

In addition to the above pieces of legislation, the CAA has adopted the content of UK CAA Civil Aviation Publications (CAPs) to address issues or topics not covered by the Isle of Man regulations and instructions for continued airworthiness. Examples of the UK CAA CAPs adopted by the CAA include the following:

<table>
<thead>
<tr>
<th>CAP</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>032</td>
<td>UK Aeronautical Information Publication</td>
</tr>
<tr>
<td>168</td>
<td>Listing of Aerodromes</td>
</tr>
<tr>
<td>382</td>
<td>Mandatory Occurrence Reporting Scheme</td>
</tr>
<tr>
<td>584</td>
<td>Air Traffic Controllers Training</td>
</tr>
<tr>
<td>642</td>
<td>Airside Safety Requirements</td>
</tr>
<tr>
<td>694</td>
<td>The UK Flight Planning Guide</td>
</tr>
<tr>
<td>740</td>
<td>UK Airspace Management Policy</td>
</tr>
<tr>
<td>757</td>
<td>Occupational Health and Safety on board Aircraft Guidance on Good Practice</td>
</tr>
</tbody>
</table>

The ANO came into force on 1 May 2015 and revoked the Air Navigation (Isle of Man) Order 2007 and the Air Navigation (Isle of Man) (Amendment) Order 2008. The ANO is effectively the guiding legislation for the Isle of Man aircraft industry, covering the many practicalities of registering and operating an aircraft on the Isle of Man as further detailed in this chapter.

The Civil Aviation (Subordinate Legislation) (Application) Orders 2006 and 2008 applied a number of pieces of UK legislation to the Isle of Man, including:

- Mortgaging of Aircraft Order 1972;
- Mortgaging of Aircraft (Amendment) Order 1972;
- Civil Aviation Authority Regulations 1991;
- Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996;
- EC/Swiss Air Transport Agreement (Consequential Amendments) Regulations 2004;
- Civil Aviation (Insurance) Regulations 2005;
- Civil Aviation (Safety of Third Country Aircraft) Regulations 2006;
- Rules of the Air Regulations 2007; and

The Airports and Civil Aviation Act 1987 also, inter alia, applied a number of pieces of UK legislation to the Isle of Man, namely:

- the Carriage by Air Act 1961;
- the Carriage by Air (Supplementary Provisions) Act 1962;
- the Tokyo Convention Act 1967;
the Civil Aviation Act 1982; 
the Aviation Security Act 1982; 
the Airports Act 1986; and 
any provision of an Act of Parliament that relates to civil aviation, air navigation or airports.

The Air Navigation (Isle of Man) (Amendment) Order 2016 came into force on the 1 May 2016. It implements recent changes to the International Civil Aviation Organisation (ICAO) Standards and Recommended Practices (SARPs).

The Isle of Man is not a signatory to any of the Warsaw, Chicago or Montreal Conventions, but the United Kingdom is, and through its Department for Transport it has accountable oversight responsibility for the United Kingdom, Crown dependencies and Overseas Territories, which includes the Isle of Man.

III  LICENSING OF OPERATIONS

i  Licensed activities

Certificate of airworthiness

All Isle of Man registered aircraft must be issued with a certificate of airworthiness (COA) before they are able to fly. The COA must specify the category ‘Private’, meaning that the aircraft is not an aerial work aircraft or a commercial air transport aircraft, and must be issued subject to the condition that the aircraft may not be flown except for the purposes (which may not include commercial air transport or aerial work) specified in the certificate (ANO Article 16(3)). Each Isle of Man registered aircraft is required to submit to an annual survey to confirm conformity with the Isle of Man aviation legislation requirements to renew its COA. A Registry airworthiness surveyor attends the aircraft wherever in the world it is based, and conducts a sample review of the aircraft records for the past 12 months, since its previous COA, together with a physical check of the aircraft itself. When the surveyor is satisfied that the aircraft remains compliant to its Type Certificate Data Sheet, a recommendation is made by the surveyor to renew the COA. The Registry will then consider the recommendation and subsequently issue the new COA.

The normal practice for an aircraft to apply for a COA is that its nominated airworthiness technical representative, who will be the Registry’s single point of contact with the operator of the aircraft regarding all matters of airworthiness, completes his or her own inspection of the aircraft and records and satisfies him or herself that he or she is in a position to demonstrate that each of the applicable items to be inspected has reached a full level of compliance and that he or she has all of the requisite documents. A survey will be carried out by one of the Registry’s surveyors, and these surveys do not have to be carried out on the Isle of Man as the Registry has 20 accredited surveyors resident in central Europe, the United Kingdom, the United States and the Isle of Man and they can be flown to various locations as necessary. A maintenance programme must be submitted for approval that identifies the location of the aircraft manufacturer’s recommended aircraft actions, and that has been customised to reflect the aircraft’s operational and emergency equipment and scope of operations and it must include ‘instructions for continued airworthiness’ in relation to any modifications embodied on the aircraft.
Modification and repair data approved in accordance with European Aviation Safety Agency (EASA) regulations are acceptable to the Registry and this includes countries with bilateral agreements with EASA for such activities (e.g., Brazil, Canada, Switzerland and the United States).

As the Registry can only register aircraft for private or corporate use and not aircraft that are operating for commercial air transport with airlines or air charter operations, the Isle of Man does not issue air operator certificates, unlike the majority of countries with an aviation industry.

Notwithstanding the fact that any aircraft registered in the Isle of Man Registry cannot be used for commercial air transport, commercial airliners that are between leases or parked at the end of a lease and not operating commercially may be registered in the Isle of Man as private aircraft. The Isle of Man Registry is attractive to such commercial airliners because there is no minimum time that an aircraft has to remain on the register; any EASA Part 145 maintenance organisation with the appropriate approvals can conduct work on Isle of Man registered aircraft without requiring further approval from the Registry, thus providing flexibility when choosing an end-of-lease maintenance organisation; and type-rated ICAO flight crew licences can be validated for flight crew of Isle of Man registered aircraft, so local pilots with appropriate licences can operate the aircraft at the end of the lease.

ii Ownership rules

In accordance with Part 1, Article 5 of the ANO, only the following persons are qualified to hold a legal or beneficial interest by way of ownership in either an aircraft registered in the Isle of Man or a share in such an aircraft:

a the Crown in right of the Isle of Man, the United Kingdom or any part of the United Kingdom;

b Commonwealth citizens;

c nationals of any EEA Member State or Switzerland;

d British protected persons;

e bodies incorporated in some part of the Commonwealth or having their registered office, central administration or principal place of business in a part of the Commonwealth; or

f Undertakings formed in accordance with the law of the Isle of Man, an EEA Member State or Switzerland and having their registered office, central administration or principal place of business within the Isle of Man, an EEA Member State or Switzerland.

Notwithstanding the above qualification requirements, under the terms of the ANO there are instances wherein the rules may be relaxed somewhat, namely:

a if an unqualified person resides or has a place of business in the Isle of Man and holds a legal or beneficial interest by way of ownership in an aircraft or a share in an aircraft, the CAA/DED may register the aircraft if it is satisfied that the aircraft may otherwise be properly registered; and

b if an aircraft is chartered by demise to a person qualified under the list above, the CAA/DED may, whether or not an unqualified person is entitled as owner to a legal or beneficial interest in the aircraft, register the aircraft in the Isle of Man in the name of the charterer by demise if it is satisfied that the aircraft may otherwise be properly so registered and the aircraft may remain registered during the continuation of the charter.
Under the terms of Article 4 of the ANO, an aircraft may not be registered or continue to be registered in the Isle of Man if it appears to the CAA/DED that:

a  the aircraft is registered outside the Isle of Man and that the registration would not cease by operation of law were the aircraft to be registered, or continue to be registered, in the Isle of Man;

b  an unqualified person holds a legal or beneficial interest by way of ownership in the aircraft or in a share in the aircraft;

c  the aircraft could more suitably be registered in some other part of the Commonwealth or in an EEA state or Switzerland; or

d  it would not be in the public interest for the aircraft to be or continue to be registered in the Isle of Man.

IV  SAFETY

As set out in Section II, the Isle of Man has implemented a number of pieces of UK legislation and regulations and these include those relating to and covering safety issues.

EASA has no involvement with Isle of Man registered aircraft or directive responsibilities and all Isle of Man aircraft are required to follow any national aviation authority directives while operating in its national airspace, but as the Registry meets the recommendations set by ICAO, there are no regulatory aspects in relation to safety from any other state.

In relation to the licensing of aircrew and engineers, the Registry is not a signatory state, but it is able to validate other ICAO states’ licences to be effective in relation to Isle of Man registered aircraft, so long as the licence meets the ICAO Annex 1 standard.

Following the implementation of the ANO the Registry has notified owners of registered aircraft that it may from time to time issue Air Worthiness Directives to address an urgent safety concern or vary the requirements of a State of Design Airworthiness Directive and in such circumstances the Isle of Man directive will take precedence.

V  INSURANCE

By virtue of the application of the Civil Aviation (Insurance) Regulations 2005 to the island by way of the Civil Aviation (Subordinate Legislation) (Application) Orders 2006 and 2008, the Isle of Man is subject to EC regulations relating to insurance requirements. Section 12 of the Regulations on penalties is amended to reflect Isle of Man criminal law and procedures for convictions, otherwise the island is subject to the same rules as the United Kingdom on what must be insured and to what level. Regulation (EC) No. 785/2004 (as amended by Regulation (EU) No. 285/2010) sets out the insurance requirements for all air carriers flying within, out of or over the territory of a Member State (this is covered in more detail in the UK chapter). The CAA is the competent authority on the island for enforcement and this mirrors the position in the United Kingdom.

No insurance premium tax is payable in the Isle of Man, as opposed to the 12 per cent payable in the United Kingdom.
VI  COMPETITION

The primary legislation in relation to competition on the island is the Fair Trading Act 1996 (the FTA 1996). This legislation applies across all sectors of industry on the island, including the aviation sector, and gives the Isle of Man Office of Fair Trading (OFT) certain powers to enforce anticompetition regulations.

Anticompetitive practices are defined by Section 8(1) of the FTA 1996 as follows:

*a person engages in an anticompetitive practice if, in the course of business, he pursues a course of conduct which, of itself or when taken together with a course of conduct pursued by another person or other persons, has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods in the Island or the supply or securing of services in the Island.*

Under Section 8(8) of the FTA 1996, public authorities are also specifically brought under this provision, preventing anticompetitive practices by any such body.

If it appears to the Council of Ministers, the highest-level decision-making body of the Isle of Man government, that any person has in the past or is currently pursuing a practice that could be considered anticompetitive, they may refer such an individual to the OFT for investigation and for a report to be prepared as to whether the practice in question was actually anticompetitive under the legislation.

As an initial remedy the OFT may seek an undertaking from the individual, if such an undertaking 'would remedy or prevent effects adverse to the public interest which the practice may now or in future have'. The OFT is required to review the operation of any such undertakings and make decisions as to whether the individual can be released from the undertaking or whether the undertaking should be revised.

If no such undertaking is sought or given, then the OFT must submit its report to the Council of Ministers, who may then decide whether they think it should be referred to a 'Commission', which may be any appropriate statutory board or government department. The Commission must then make its own investigations and conclude whether the individual has in fact engaged in anticompetitive practices and whether such a practice did, or might be expected to, operate against the public interest. This report is submitted to the Council of Ministers with suggestions as to any actions that may need to be taken to ensure that the effects of the anticompetitive practice are remedied.

The Council of Ministers then has certain powers available to it in relation to the individual found to be engaging in anticompetitive practice. An order may be made prohibiting the individual from engaging in the practices identified in the report or any course of action of a similar form or effect. There are also further powers specified in Schedule 2 of the FTA 1996 in relation to the requirements that may be placed on the individual within an order, including a requirement to terminate any agreements involving practices identified in the report as anticompetitive (unless they relate to employment of workers or their physical working conditions).
VII WRONGFUL DEATH

The Isle of Man’s laws concerning wrongful death claims largely mirror those in the UK. There are two key pieces of legislation: the Fatal Accidents Act 1981 (FAA) allows an action to be brought on behalf of the dependants of the deceased; and the Law Reform (Miscellaneous Provisions) Act 1938 allows an action to be brought on behalf of the deceased’s estate.

In addition to damages for loss of dependency the FAA allows a claim for damages for bereavement, and for recovery of funeral expenses. The sum to be awarded for bereavement is £10,000. Damages in a claim by the estate under the Law Reform (Miscellaneous Provisions) Act 1938 are less certain as very few claims have been through the Isle of Man courts. It is expected that an estate would be able to recover damages for pain, suffering, loss and expense suffered by the deceased before death in a similar manner to the UK.

VIII ESTABLISHING LIABILITY AND SETTLEMENT

There are no specific legal or procedural rules in operation on the Isle of Man in respect of claims brought in relation to aviation matters. Any and all legal proceedings that are related to the aviation sector (e.g., claims for a declaration of ownership of an aircraft, or personal injury claims against an airline) will proceed in the Isle of Man courts in accordance with the usual rules of procedure adopted by those courts.

Isle of Man law prescribes different limitation periods depending upon the nature of the claim. Pursuant to the Limitation Act 1984, claims for breach of contract and claims in tort must be brought within six years of the date on which the cause of action accrued. In respect of personal injury claims, the time limit is three years from the date on which the cause of action accrued (or the date on which the claimant became aware of the cause of action, if later). It must be noted, however, that the court retains discretion to relax the limitation period in respect of personal injury claims if there are equitable grounds justifying such a course of action.

Although the Isle of Man High Court Rules do not contain pre-action protocols (such as are found in the English Civil Procedure Rules), the Isle of Man courts nonetheless expect parties to litigation to correspond with each other and make some effort to resolve the dispute prior to launching court proceedings. To this end, it is advisable for litigants at least to attempt alternative dispute resolution procedures such as mediation and arbitration prior to involving the court in the dispute.

In respect of arbitration, in 1979 the Isle of Man ratified the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention), meaning that awards made pursuant to the Convention will be recognised and enforced on the Isle of Man. The Isle of Man also has its own arbitration legislation in the form of the Arbitration Act 1976.

i Notable case law

The Isle of Man courts have not yet had cause to give judgment in any proceedings relating to passenger rights or claims brought by passengers against carriers. Most judgments (which are publicly available on the Isle of Man courts’ website, www.judgments.im) concern applications for declaratory injunctions relating to the ownership of aircraft or freezing orders in respect of specific aircraft.
**Ausco Oil Limited and others (CHP 2014/58)**

*Ausco Oil Limited and others (CHP 2014/58)* concerned a dispute about the registration of an aircraft on the Isle of Man aircraft register. Concurrent proceedings had been commenced in Nigeria. The Isle of Man High Court initially granted an injunction restraining the respondents in the case from facilitating the deregistration of the aircraft on the Isle of Man, but the injunction was subsequently discharged on the grounds of material non-disclosure.

**Salaam v. Takieddine and another (CP 2009/43)**

*Salaam v. Takieddine and another (CP 2009/43)* was a dispute relating to the purchase of a special purpose vehicle (SPV) company, the sole asset of which was a Boeing Executive aircraft. The respondent in that case had paid a deposit of US$4 million to purchase the SPV, but then, having allegedly discovered that the sale of the SPV to him was a ‘sham’, obtained a freezing injunction restraining the applicant from dealing with the deposit. The applicant was subsequently successful in discharging the freezing injunction on the basis that the respondent had not given full and frank disclosure at the original court hearing.

**Flexton v. Breeze (SUM 2012/08)**

In *Flexton v. Breeze (SUM 2012/08)* the defendant had agreed to sell a Cessna 303 aircraft to the claimant. The claimant paid the purchase price and used the aircraft for a period, but subsequently the defendant breached the contract by failing to transfer legal title to the claimant. The case contains an interesting discussion in respect of the issue of the use of goods by one party after it has discovered that it does not have legal title to those goods.

**IX VOLUNTARY REPORTING**

Under Isle of Man law, it is mandatory to report to the Registry occurrences that endanger or that, if not corrected, would endanger an aircraft, its occupants or any other person. Where necessary, occurrences are investigated on the Isle of Man’s behalf by the UK Air Accident Investigation Branch. All investigations are kept anonymised and confidential in compliance with ICAO recommendations. The Isle of Man Registry has yet to take steps to explicitly address voluntary reporting.

**X THE YEAR IN REVIEW**

The Aviation (Cape Town Convention) (No. 2) Order 2016 was approved by Tynwald on 21 July 2016. This was a crucial step towards bringing the Cape Town Convention into operation on the Isle of Man. The Order has brought the Convention into effect on the island following the UK’s notification that its ratification is to be extended to the Isle of Man, which occurred on 1 January 2018. The first year of the Convention being extended to the Isle of Man has proven a success and adds to the support, certainty and commerciality that the Registry provides to aircraft owners, operators, financiers, purchasers and sellers.
XI OUTLOOK

The Registry continues to prove to be an unqualified success story and as a result the Isle of Man is seen as an industry leader for the registration of business jets and twin turbine engine helicopters. With the implementation of the ANO the Isle of Man can ensure that it is current and reflective of the changing face and development of the aviation industry, and this should help to ensure that its growth and reputation for high quality are maintained and continue in the future.
INTRODUCTION

Israel’s geopolitical situation makes air transportation a vital factor in maintaining its connections with the rest of the world.

The Israeli aviation sector has undergone major changes in recent years. The first of these was the enactment of the Aviation Services Law (Compensation and Assistance for Flight Cancellation or Change of Conditions) 2012 (ASL), establishing passenger rights, similar to those under Regulation (EC) No. 261/2004, to compensation and other benefits in the case of flight delays or cancellations and denial of boarding (as a result of overbooking, etc.).

Another major change was the liberalisation of Israel’s policy on bilateral and multilateral air services agreements and the resulting signature of the EU–Israel Open Skies Agreement in 2012. This change in policy has resulted in a significant increase in the operations of foreign airlines (including low-cost airlines) and the frequency of flights to and from Israel, as well as a decrease in air fares. Thus, for example, international passenger traffic passing through Israel’s main international airport, Ben Gurion Airport (BGA), increased by more than 80 per cent between 2012 (12.4 million) and 2018 (22.4 million). This number is expected to grow in the near future, taking into account the opening in January 2019 of Ramon Airport, a new international airport located in the south of Israel close to the town of Eilat and expected to allow an annual capacity of up to 2.4 million passengers by the year 2030. All Israeli domestic flights previously using the airport in Eilat will now land at the new Ramon Airport.

The Israeli Ministry of Transportation (MOT) has primary responsibility for regulation of the aviation sector. In 2005, the MOT established Israel’s Civil Aviation Authority (CAAI) to oversee, regulate and supervise all aviation-related matters, including the issue of aviation licences and permits. The body responsible for airports is the Israel Airports Authority. The Aviation Security Operation Centre (ASOC) in the Security Department of the MOT oversees aviation security. Aviation security is a priority in Israel in the light of constant

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1 Eyal Doron is a partner and Hugh Kowarsky is of counsel at S Horowitz & Co.
2 Signed and initialled by Israel and the EU Member States on 30 July 2012 and approved by the Israeli government on 21 April 2013.
4 http://www.ramon-airport.com/.
5 The old airport in Eilat was closed on March 18, 2019; https://www.ynet.co.il/articles/0,7340,L-5480536,00.html.
terrorist threats. Operating permits will not be granted unless ASOC has received and approved written confirmation of compliance with ASOC’s security requirements from the relevant foreign airports and airlines.

Allocation of slots at BGA is carried out in accordance with the Aeronautical Information Publication (AIP), which gives priority to scheduled flights and to maintenance of existing allocations.6

II LEGAL FRAMEWORK FOR LIABILITY

i International carriage

Israel is party to several international aviation-related conventions governing the liability of air carriers in international carriage, including the Warsaw Convention 1929, the Guadalajara Convention 1961, the Montreal Convention 1999 and their respective protocols. These conventions have been given effect in Israeli domestic law by the Air Transport Law 1980 (ATL). Section 3B of the ATL provides that where both the Montreal Convention and another of the conventions adopted by the ATL apply, the Montreal Convention will govern.

Section 10 of the ATL provides that the liability for damage, including liability for the death of a passenger, of a carrier under the ATL (i.e., the liability of a carrier under a convention made applicable in Israel by the ATL), substitutes the liability of the carrier under any other Israeli law. The Israeli Supreme Court has implemented this rule (‘the exclusivity of grounds of action rule’ or ‘the pre-emption of claims rule’), holding that where a claim is governed by the ATL, a passenger will not be able to rely on other provisions of domestic law.7

Israel is also party to the Chicago Convention on International Civil Aviation 1944, adopted into domestic law by the Air Navigation Law 2011 (ANL), and to the Tokyo Convention 1944 on offences and certain other acts committed on board aircraft given domestic effect by the Air Navigation Regulations (Offences and Jurisdiction) 1971.

ii Internal and other non-convention carriage

The ATL provides that the Montreal Convention shall apply, mutatis mutandis, to internal flights within Israel.8 The Aviation Services Regulations (Compensation and Assistance for Flight Cancellation or Change of Conditions) (Internal Flights) 2013 (enacted under the ASL), provide (in modifying the rule under the ASL applying to international flights) that a flight delay of three hours or more in an internal flight shall be treated as cancellation of the flight and vest passengers with the right to compensation accordingly.9

Under Section 338(a)(2) of the Penal Law 1977, the reckless or negligent operation of an aircraft, in a way that could endanger human life or result in injury, is a criminal offence punishable by a prison sentence of up to three years.

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6 The AIP is published by the CAAI and is prepared in accordance with the Standards and Recommended Practices (SARPs) of Annex 15 to the Convention on International Civil Aviation and the Aeronautical Information Services Manual (ICAO Doc 8126).
7 Civil Appeal 36/84 (Supreme Court) Trichner v. Air-France, French Air Lines (6 January 1987); see also Civil File 1818/03 (District Court) El-Al Israel Airlines Ltd v. David (7 July 2004).
8 Section 5(a) of the ATL.
9 Because domestic flights are relatively cheap, the sums awarded in cases of flight delay or cancellation are low (again modifying the provisions under the ASL for international flights).
iii  General aviation regulation

Civil aviation operations (including the operation of helicopters and gliders) are governed by the ANL and the regulations enacted thereunder. The ANL regulates the identification and registration of aircraft, licensing and training of personnel, airworthiness of aircraft, general operating and flight rules, commercial air services and air navigation services.

iv  Passenger rights

Passenger rights are regulated pursuant to the ATL by the Montreal Convention (or other applicable convention) and the ASL. The ASL is a pro-consumer act of legislation that regulates passengers’ rights and carriers’ duties, including those relating to payment of compensation (without the need to prove damages) in the case of flight delays, cancellations, denial of boarding and downgrading. The ASL also provides that in cases of flight delays of two hours or more and flight cancellations, the carrier is obliged to provide passengers with ground assistance, including communications services, food and beverages and, in some cases, hotel accommodation.

Although very similar to Regulation (EC) No. 261/2004, the ASL includes a number of innovations, such as the determination that a delay of eight hours or more is considered a flight cancellation, the authority granted to the court to impose exemplary damages on the carrier in case of non-compliance with the ASL and the obligation of a flight operator to station representatives for provision of assistance to passengers in the exercise of their rights under the ASL at every airport from which the operator commences flights to and from Israel (including flights to Israel with stopovers and serving passengers holding a return ticket to and from Israel).

In the spirit of the pro-consumer nature of the ASL, the Israeli courts have given a narrow interpretation to the provision in the ASL exempting the carrier from the obligation to compensate passengers in cases of cancellation of flights where the cancellation was caused by ‘special circumstances’ beyond the carrier’s control and which could not have been prevented even if the carrier had done everything in its power to do so, so that, in general, technical malfunctions in an aircraft will not constitute such circumstances, unless the malfunction is proved to be rare and not to have been preventable by performance of proper maintenance. A judicial decision, reflecting the same approach, in which the court holds that in order for an airline to avoid payment of compensation for cancellation of a flight and, in particular, in order for it to prove that it has done everything within its power to prevent such cancellation, it may be necessary for the airline to prove that it was not able to lease an alternative aircraft or to purchase tickets for its passengers on the flight of another airline, has been issued recently.

Passengers’ rights relating to the purchase and cancellation of flight tickets are regulated by the Israeli Consumer Protection Law 1981 (CPL), which, in certain circumstances,

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10 As in European Regulation 261/2004, the sum of compensation is dependent on the flight distance.
11 The relevant provision has been inserted in the Licensing of Air Services Law 1963 by Section 23 of the ASL.
including transactions made ‘at a distance’ (by telephone, email, etc.), and subject to certain conditions, entitles consumers to cancel transactions without cause and to reimbursement of the price paid, minus a small cancellation fee.\(^\text{13}\)

The carriage of disabled passengers is governed by the Israeli Regulations for Equal Rights for People with Disabilities (Regulation of Access to Public Transport Services), 2003 (RER). The RER lays down certain technical qualifications for the use of aircraft, including a provision that an aircraft shall not be operated for the carriage of passengers if it is not adequately adapted for the disabled.\(^\text{14}\) Section 14 provides that disabled persons have the right to a suitable escort at the terminal and at the crossing from the terminal to the aircraft; the right to have the appropriate person at the airport of destination notified regarding their expected arrival; and the right to have their wheelchair loaded in a manner enabling it to be placed at their disposal immediately upon disembarking from the aircraft, provided the carrier has received at least 48 hours prior notice of the disabled person’s expected arrival.

\textbf{v} \hspace{1cm} \textbf{Other legislation}

Loud noise generated on low-altitude flight routes near populated areas may constitute a nuisance to residents of those areas. With a view to reducing the extent of this nuisance, the Israeli Ministry of Environmental Protection, in conjunction with the Israel Airports Authority, has issued rules governing the construction and planning of airports. Other measures directed to the same purpose include the imposition of night and weekend curfews and the requirement that compliance by an aircraft with the Flight Regulations (Aircraft Noise) 1977 is a condition for issue of a flight permit.

Israel has strict anti-bribery rules. It is a member of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and gave domestic effect to the Convention on 11 June 2008 by adding Section 291A to the Penal Law 1977, providing that a person giving a bribe to a foreign public official for an activity related to his or her position, in order to obtain, secure or promote business activity or other advantage in respect of business activity, shall be deemed to have committed bribery under Section 291 of the Penal Law.

For competition legislation, see Section VI.

\(^{13}\) A report issued on August 2013 by an inter-ministerial committee, appointed by the State of Israel to Examine the Requirement of Israeli Airlines for Regulatory Relief following the approval of the ‘Euro-Mediterranean Aviation Agreement between the Government of Israel and the European Union and its Member States’ suggests that the application of the CPL to foreign airlines with no permanent representative office in Israel is neither possible nor desired. Statements of consumer protection bodies such as the Authority for Consumer Protection and Fair Trade (https://www.gov.il/he/departments/general/cpfa_konim_bareshet#anchor1) and Israel Consumer Council (http://www.consumers.org.il/category/cancelling-vacation) do not dispute this view. The issue is currently pending before the Israeli courts (see, for example, C.A. 54491-01-15 Bashan v. EasyJet Airline Company Ltd, and C.A. 57214-09-16 Zabenco v. Aeroflot Russian Airlines).

\(^{14}\) Chapter 3 of the RER.
III LICENSING OF OPERATIONS

i Licensed activities

Commercial operation of aircraft

The Licensing of Aviation Services Law 1963 (LASL) and the ANL regulate the licensing of aviation-related activities. An Israeli individual or entity will not be permitted to operate aircraft for commercial purposes without a commercial operating licence (COL) from the MOT and an air operator certificate (AOC) from the CAAI.¹⁵

Foreign individuals and entities are not eligible for an Israeli COL or AOC. In order to obtain a COL, the applicant operator must submit evidence of its financial resources, details regarding its operations, crew qualifications and experience and consumer-related details. The MOT has the power to grant, suspend and cancel the COL and determine its period of validity.

The issue of an AOC is conditional on possession of a COL and subject to proof that the applicant possesses adequate aircraft and facilities for the operations in question. A detailed list of requirements for the AOC application is set out in the Air Navigation Regulations (Operation of Aircraft and Flight Rules) 1981 (ANR).¹⁶ The CAAI will grant an AOC only if it is satisfied that the applicant is capable of performing the operations in question in a safe manner. The AOC will be valid for a period of two years and may be renewed by application filed at least 60 days prior to expiry.¹⁷

For commercial aviation operations from, to and within Israel, the operator must obtain operating permits from the CAAI (see subsection iii).

 Licensing of aviation-related activities

According to the ANL, an individual shall not perform a function in connection with the operation of an aircraft, the performance of aircraft inspections or the provision of air traffic management services, without possessing a licence from the CAAI unless he or she is in possession of this licence from a competent authority in a contracting party to the Convention on International Civil Aviation 1944 (the Chicago Convention).¹⁸

Other activities that require a licence are the following:

a the training of aviation workers;

b the operation of an entity for aircraft maintenance and repair of a unit for the provision of air traffic management services and of an airport or a landing strip;

c the manufacture of aircraft for marketing;

d the transportation of dangerous goods; and

e training for operating, or the commercial operation of, a hang-glider, powered hang-glider, paraglider, powered paraglider, powered parachute, unmanned flying model, kite or rocket, radio models, small aeroplanes and training aeroplanes.¹⁹

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¹⁵ Section 2 of the LASL.
¹⁶ Section 374 of the ANR.
¹⁷ ibid, Sections 373 and 375.
¹⁸ Sections 2 and 4 of the ANL.
¹⁹ Sections 13, 21, 52, 74, 87, 88 of the ANL

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The conditions for the grant of licences are set out in the ANL and the ANR. The CAAI has the authority to revoke, suspend and limit licences granted if, inter alia, one of the conditions for receiving the licence has ceased to exist or the licensee has violated any of the conditions of the licence or any of the provisions of the ANR.20

ii Ownership rules

According to the LASL, a COL will only be granted to an Israeli operator that is one of the following: (1) an individual who is a permanent resident of Israel without a principal place of business outside Israel or an Israeli citizen who has a principal place of business in Israel, or (2) a company incorporated in Israel without a principal place of business outside Israel and controlled by an Israeli citizen or a permanent resident of Israel, or by another person in accordance with the provisions of an international aviation convention to which Israel is a contracting party.21

Regarding foreign carriers, there are no explicit rules relating to nationality or citizenship, but the LASL authorises the MOT to refuse to grant an operating permit if the applicant carrier is deemed a potential danger to the security of Israel.22 For commercial flights, details of the air carrier’s ownership, including the nationality of owners and their respective shares of ownership, must be provided in the application for an operating permit.23

iii Foreign carriers

Pursuant to the LASL, foreign carriers must obtain an operating permit from the CAAI for operation of passenger24 or cargo flights from, to or within Israel.

Commercial flights

According to the LASL and the AIP, a foreign operator wishing to fly to and from Israel must be eligible to carry out the flights under the provisions of a bilateral or multilateral agreement to which the state of the foreign operator and Israel are contracting parties.

An application for an operating permit for commercial scheduled flights must be submitted to the CAAI according to the provisions of CAAI Directive AT.1.1.400.25 The granting of the permit will be subject to the submission of commercial details relating to ownership; principal place of business, etc.; an AOC issued by an appropriate foreign authority; proof of adequate insurance coverage; confirmation of the appointment of local representatives for service of process and for communications with the Israeli aviation authorities; confirmation of valid licences and medical certificates for the crew according to the Chicago Convention; and certifications relating the registration of aircraft, airworthiness

20 Section 8 of the LASL.
21 Section 1 of the LASL.
22 ibid, Section 5.
23 ATF 1.1.400A, ‘Commercial specifications of a Foreign Air Carrier applying for an operating permit to and from Israel’, Air Transport Handbook, Revision 3 (12 October 2015), Section 4.
24 According to new ‘Criteria for the approval of foreign air carrier flights that may constitute operating a base in Israel’ (AP 1.1.400, Revision 1, Air Operation Certification, issued by the CAAI on 10 February 2019), as of 31 March 2019 operating permits shall not be granted to foreign air carriers for passenger air services using a method of operation in which the same aircraft is based in Israel continuously and operates flights to multiple (approved) destinations, thus effectively operating as if it was an Israeli air carrier.
25 Directive AT.1.1.400 ‘Granting an Operating Permit for Scheduled Flights to and from the State of Israel’.
and noise. Additional documents may be required by the Security Division of the MOT for the approval of the operator with respect to security, such as annually renewed confirmations by the operator and the relevant airport that they will comply with the MOT’s Security Directive, which prescribes security-related standards on subjects such as passenger and baggage checks, aircraft protection and security procedures for in-flight catering services.26

In addition, the applicant must provide a commitment in accordance with the LASL to appoint a representative for provision of assistance to passengers in the exercise of their rights under the ASL at every airport from which the operator commences flights to and from Israel (including flights to Israel with stopovers and serving passengers holding a return ticket to and from Israel),27 as well as appoint an Israeli representative authorised to act on its behalf under the LASL and constituting an address for service of court documents.28

**Non-scheduled commercial flights**

In order to carry out non-scheduled commercial flights, a foreign operator must apply for and be granted an operating permit according to CAAI Directive AT.1.1.402.29 The application requirements are similar to those relating to an application for an operating permit for scheduled commercial flights and also include, where applicable, the submission to the CAAI of any relevant charter agreement.

**Overflight**

According to the AIP, prior permission is not required for overflight of Israeli airspace or technical stops in Israel if the flight is operated by an aircraft registered in a country that is party to the International Air Services Transit Agreement or if the relevant bilateral Air Services Agreement allows overflying the Israeli air space or making stops in Israel for non-traffic purposes. In theory, prior permission should not be required for non-scheduled flights operated by aircraft registered in a country that is party to the Chicago Convention and has diplomatic relations with Israel.30 In other cases, prior permission will need to be obtained. In practice, prior notification of all overflights should be submitted to the ASOC at least five working days prior to the date of the flight.31 In view of Israel’s special geo-political situation such flights may be made subject to the High Risk security requirements set out in MOT’s Security Directive and applicable to flights landing in Israel.

**IV SAFETY**

Israel complies with the accepted international standards in the field of safety. The Israeli safety regulations are based on the Chicago Convention, the safety rules of the International Civil Aviation Organization (ICAO) and the US Federal Aviation Regulations. Israel is a participating state in the European SAFA Programme. Furthermore, in 2016, Israel entered into a collaboration agreement with Eurocontrol, the European Organisation for the Safety of Air Navigation, which engages in airspace planning and air traffic management.

27 Section 8C(a1) of the ASL.
28 ibid, Section 8c(b)(1).
29 Directive AT.1.1.402 ‘Granting an Operating Permit for Charter Flights to and from the State of Israel’.
31 ASOC controls the security procedures for the arrival of aircraft into and passage through Israeli airspace.
The collaboration agreement provides Israel with access to aviation services, including air navigation services and control, in a way that increases its ability to prevent flight delays and manage air traffic more efficiently and safely.

i Airworthiness
The CAAI is responsible for the issue and renewal of airworthiness certificates. The grant of an operating permit by the CAAI will be subject to the submission by the carrier of an airworthiness certificate, according to standards specified in the ANL, the LASL and the Air Navigation Regulations (Procedures for Documentation of Aircraft and Aircraft Parts) 1977 and the CAAI’s directives.32

ii Maintenance
The aviation maintenance requirements are regulated in the ANL, in Chapter 7 of the ANR and in the CAAI directives. The air operator is under a duty to perform routine aircraft inspection and maintenance and to repair any malfunctions detected in the aircraft, and to ensure that all staff members have the proper qualifications.33 In December 2017, in order to bring the Israeli standards in line with the European regulations, the MOT enacted the Air Navigation Regulations (Safety Management System) 2017, which deal with organisational aspects of safety management such as assignment of responsibilities, raising awareness, education and documentation duties.

iii Accident reporting
There is a duty in Israel to report to the chief investigator of the MOT and to the CAAI on the occurrence of safety-related incidents in the aviation field.34 The ANL grants the supervisor of the CAAI investigatory powers, including the authority to demand ‘any information or document’.35 The CAAI maintains and operates a system for reporting investigated incidents for the purpose of improving civil aviation safety.36

V INSURANCE
The MOT regulates the insurance obligations of aircraft operators in Israel. The Air Navigation Regulations (Compulsory Insurance in the Commercial Operation of Aircraft) 2017 (ARCI), which entered into effect on 27 June 2018, are based on the European regulations on this subject. According to the ARCI, an operating permit will be granted only if the aircraft is insured.37 Such insurance cover is required with respect to every aircraft that may be used in

33 Regulation 125 of the ANR.
34 Section 107 of the ANL empowers the MOT to appoint a chief investigator to coordinate the investigation of safety-related incidents.
35 Sections 96 and 114 of the ANL.
37 Regulations 1-2 of the ARCI.
the carrier’s operations, including under charter arrangements, joint ticketing arrangements or any other similar arrangement between air operators. The insurance must cover damage caused to passengers, baggage and third parties, as well as damage caused by terror events.

According to the ARCI, confirmation of existing insurance must include a declaration that it complies with the requirements of the ARCI or Regulation (EC) No. 785/2004 dated 21 April 2004 (as amended in Commission Regulation (EU) No. 285/2010 on 6 April 2010) regarding the insurance obligations of air operators and air carriers.

VI COMPETITION

Supervision of competition in Israel, including in the aviation sector, is by the Israeli Competition Authority in accordance with Israel’s Economic Competition Law 1988 (ECL). The ECL deals with restrictive arrangements, mergers and acquisitions of companies and monopolies. Entering into a restrictive arrangement is prohibited unless the arrangement is expressly permitted by or pursuant to the ECL, by the Competition Tribunal established under the ECL or exempted by the Commissioner of the Competition Authority.

Amendment No. 10 to the ECL enacted in 2007 rescinded the exemption in that Law applying to arrangements in the field of aviation. As a result, arrangements for cooperation in marketing flight capacity became restrictive arrangements necessitating receipt of regulatory approval. Following signature of the US–Israel Open Skies Agreement in 2010 and the EU–Israel Open Skies Agreement in 2012, two block exemptions relating to aviation were enacted: a block exemption for code-share arrangements between air carriers relating to destinations covered by the Open Skies Agreements; and a block exemption relating to technical arrangements between carriers, arrangements for the lease of aircraft, frequent flyer arrangements, interline arrangements and flight capacity marketing arrangements.

A restrictive arrangement that is not covered by the block exemptions or the additional exemptions listed in Chapter B of the ECL requires the prior approval of the Competition Tribunal; although arrangements (1) the principal purpose of which is not the reduction or elimination of competition and which do not contain restrictions not necessary for achieving their principal purpose; and (2) whose restrictions do not limit competition in a substantial portion of the market affected by the arrangement or may limit competition in a substantial portion of the said market, but will not cause significant harm to competition in the said market, are also permitted and do not require the approval of the Competition Tribunal.

38 Regulation 5 of the ARCI.
39 Regulation 4 of the ARCI.
40 Regulation 12 of the ARCI.
41 As amended from time to time, most recently in January 2019 (when the name of the Law was changed from the Restrictive Trade Practices Law to the Economic Competition Law and similar changes were made in terms used in the Law).
42 Restrictive Trade Practices Rules (Block Exemption for Arrangements between Air Carriers Concerning Marketing Flight Capacity to Destinations Covered by Open Skies Agreement) (New Version) 2012. This block exemption is valid until 9 November 2022.
43 Restrictive Trade Practices Rules (Block Exemption for Arrangements between Air Carriers) (No. 2), 5774-2013. This block exemption is valid until 1 December 2023.
The ECL also regulates mergers and acquisitions. A merger will be subject to notification to and the approval of the Commissioner of the Competition Authority.\textsuperscript{45} A merger will not be approved if it there is a reasonable fear that it will significantly affect competition in the sector or will harm the public with regard to: (1) the level of prices of the asset or service; (2) low quality of the asset or service; (3) the quantity of the asset or the scope of services supplied; or (4) the frequency and conditions of the supply.\textsuperscript{46}

The ECL provides that any person who is party to a restrictive arrangement that has not been approved or has not been exempted in accordance with the ECL or by a block exemption pursuant to the ECL or acts otherwise in contravention of the ECL will be liable to imprisonment or a fine, or both.\textsuperscript{47}

VII WRONGFUL DEATH

Owing to the ‘pre-emption of claims rule’ (also known as the ‘exclusivity of grounds of action rule’), which applies by virtue of Section 10 of the ATL, claims relating to the death of passengers in international carriage by air will be subject only to the provisions of the ATL and the Montreal Convention (or other conventions as applicable) adopted by the ATL. Accordingly, in case of death of a passenger, the carrier will not be able to exclude or limit its liability for damages not exceeding 100,000 special drawing rights (SDR).\textsuperscript{48} The carrier is not liable for damages exceeding 100,000 SDR if the death of the passenger is proved not to have been caused by the negligence or other wrongful act or omission of the carrier, its employees and agents, or is proved to have stemmed from the negligence or other wrongful act or omission of a third party.\textsuperscript{49}

The ATL provides that a court dealing with a claim filed for damages resulting from the death of a passenger may issue orders it deems just or helpful having regard to the provisions of the ATL limiting the liability of the carrier, to the rights of other persons entitled to claim damages, whether in or out of Israel, for the death of that passenger and regarding other claims that have been or may be filed, whether in or out of Israel, with respect to the death of that passenger.\textsuperscript{50} The ATL also provides that where there are several claimants as a result of the death of one passenger and the aggregate amount of damages due to all of them exceeds the liability of the carrier under the other provisions of the ATL, the court will award to each of them, out of the aggregate amount of damages due, an amount proportionate to the amount of damages that it would have awarded to such claimant.

We are not aware of Israeli case law relating to the death of a passenger during carriage by air and providing authoritative interpretation of the relevant provisions.

\textsuperscript{45} Section 19 of the Competition Law.
\textsuperscript{46} Section 21(a) of the Competition Law.
\textsuperscript{47} Section 47 of the Competition Law.
\textsuperscript{48} Article 21(1) of the Montreal Convention.
\textsuperscript{49} Article 21(2) of the Montreal Convention.
\textsuperscript{50} Section 13 of the ATL.
VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure
There is no sector-specific regulation regarding the fora and mechanisms to be used in the settlement of claims, so the general rules of Israeli Civil Procedure are applicable.\(^\text{51}\) There is also no compulsory alternative dispute resolution scheme in force in Israel with regard to aviation disputes. However, there is an experimental programme being implemented in several magistrate’s courts, which requires parties to certain civil disputes to attend a mandatory ‘information, familiarity and coordination’ meeting with a court-appointed mediator, in order to consider the possibility of mediation.

In early 2020, new Civil Procedure Regulations will come into force. The new regulations provide\(^\text{52}\) that within 14 days of the filing of the last pleading, the parties shall conduct a preliminary meeting, the purpose of which is, inter alia, to assess the possibility of resolving the dispute by an alternative dispute mechanism. While not sector-specific, this preliminary hearing would be relevant for all civil proceedings, including aviation-related claims.

Claims under the ATL and the Montreal Convention (and other applicable conventions) must be brought within two years from the time the cause of action arises.\(^\text{53}\) Claims under the ASL must be brought within four years from the time the cause of action arises.\(^\text{54}\) In other cases, the general rules relating to prescription of claims laid down in the Israeli Prescription Law 1958, will apply. That Law provides, subject to certain qualifications, that any action, other than an action relating to land, shall not be brought after the expiry of seven years from the date on which the cause of action arose.

Subject to the court having jurisdiction to entertain an action filed against the defendant concerned, there is no restriction regarding whom may be joined as a defendant to the action (e.g., carrier, owner, pilot or manufacturer).\(^\text{55}\) Where the damage is caused to a claimant by the fault of two or more persons, then, in principle, and unless the court directs otherwise, each tortfeasor is liable to the plaintiff for all the damage (i.e., liability is joint and several). However, on the application of one of the tortfeasors, the court may direct the contribution by one tortfeasor to another as it deems just and fit in the circumstances.\(^\text{56}\)

ii Carriers’ liability towards passengers and third parties
The nature of a carrier’s liability will depend on the cause of action concerned. It is strict in respect of convention liability, where the relevant conditions of liability contained in the convention are met.\(^\text{57}\) Any convention liability will also be subject to an applicable limit

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\(^{52}\) Regulations 34-35 of the New Regulations.

\(^{53}\) Section 15 of the ATL and Article 35 of the Montreal Convention.

\(^{54}\) Section 19 to the ASL.


\(^{56}\) Sections 11 and 84 of the Civil Wrongs Ordinance (New Version). The allocation of liability between wrongdoers \textit{inter se} may be the subject of a contract between them (e.g., a contract whereby one party undertakes to indemnify and hold another harmless).

\(^{57}\) See Section II.i and ii, above.
of liability contained therein.\textsuperscript{58} Otherwise, liability will generally be fault-based.\textsuperscript{59} The plaintiff usually bears the burden of proof, but there are circumstances in which the burden is transferred to the defendant. The requisite standard of proof is the balance of probability.

Even though the plaintiff usually bears the burden of proof, in claims that are based on negligence, the \textit{res ipsa loquitur} rule may result in transfer of the burden of proof to the defendant carrier. In claims based on the ASL, the burden to prove that a delay or cancellation was caused because of special circumstances lies on the flight operator.

iii Product liability
There is no Israeli legislation dealing specifically with liability for defective or damaged products in the aviation sector, so that such liability is governed by the general regime under the Defective Products (Liability) Law 1980 (DPLL) and the Civil Wrongs Ordinance (New Version). The DPLL establishes strict liability and provides that a manufacturer must compensate any person who has suffered bodily harm as a result of a defect in a manufactured product.\textsuperscript{60}

iv Compensation
According to the Israeli aviation legislation (giving effect to the international conventions), the duty of the air carrier to compensate an injured party is based on the principle of strict liability, subject to the monetary limits laid down in the conventions and reflected in the Israeli legislation.

The Supreme Court has held that the term ‘bodily injury’ within the meaning of Article 17 of the Warsaw Convention should be construed broadly, so as to enable the award of damages for mental injury alone.\textsuperscript{61} Similarly, the Israeli courts consider themselves competent to award compensation for mental anguish in cases of delayed or cancelled flights to which the Montreal Convention applies although no decision to that effect (and necessary to establish a binding precedent) has yet been issued by the Supreme Court.\textsuperscript{62} The ASL provides for compensation without proof of damage in the case of denied boarding and delay or cancellation of flights, as well of exemplary damages in the case a carrier fails to fulfil its obligations under the ASL.\textsuperscript{63}

The National Insurance Law 1968 (NIL) provides for payment by the National Insurance Institute of a general disability pension to a person covered by the NIL who has a physical, psychological or mental disability resulting in limited earning capacity.

\textsuperscript{58} See, for example, Articles 21 and 22 of the Montreal Convention, as incorporated into Israeli law under Section 6 of the Air Transport Law.
\textsuperscript{59} However, see Section II.iv, above.
\textsuperscript{60} Sections 1 and 2 of the DPL Law. Section 4 of the DPL Law lists a number of defences available to a manufacturer, e.g., that arising if the manufacturer can prove that the defect that caused the damage manifested itself after the product had left the manufacturer’s control, and provided the product had undergone reasonable safety inspections.
\textsuperscript{62} Civ. App. 1346/05 \textit{Iberia Spanish Air Lines SA v. Dr. Lorber Margalit and 57 Others} (9 April 2006).
\textsuperscript{63} Section 11 of the ASL.
IX DRONES
Realising that small drones (weighing from 250 grams to 25 kilograms) pose a threat to air safety and after takeoffs and landings at Israel’s Ben-Gurion Airport were suspended due to the proximity of drones,64 the CAAI is currently circulating draft regulations governing the public use of drones.65 Having regard to the simplicity of the US Federal Aviation Administration regulations66 dealing with this topic and the experience gained from their implementation since their introduction in 2016, the draft regulations prepared by the CAAI rely on the US model, rather than the European one.67 The proposed regulations will deal with the essential aspects of drone operation, such as the requirements relating to the drone operator (principally, minimum age and the need for a licence), requirements regarding drone software and hardware and strict rules regarding the operation of drones in public places (including a ban on operation without direct eye contact, in proximity to an airport or within residential neighbourhoods).68 The draft regulations have been published for review and hearings of objections raised against the draft were held on 10 April 2019 and 6 May 2019.69

X VOLUNTARY REPORTING
To the best of our knowledge, there are no voluntary reporting provisions or initiatives in Israel.

XI THE YEAR IN REVIEW
The past year has borne witness to a developing trend of motions to certify class actions relating to the applicability of Regulation (EC) No. 261/2004 on flights to or from Israel. While some of the actions argue that enforcement of Regulation 261/2004 on flights to or from Israel are in violation of Israeli law and, specifically, of the ASL, other actions take the exact opposite view and contend that Regulation 261/2004 should be applied in Israel. The origin of these actions lies in the differences between Regulation 261/2004 and the ASL and, in particular, those relating to the compensation granted by these statutory instruments. Thus, for example, it has been argued that since Regulation 261/2004 provides monetary compensation in cases where a flight is delayed by three hours, while the ASL allows such compensation only after an eight-hour delay, passengers should be entitled to seek compensation in the Israeli courts in reliance on Regulation 261/2004. In a motion filed against the Israeli airlines Sun D’Or

64 ‘Take-offs and landings were briefly suspended at Ben-Gurion Airport due to drone proximity’, Nir Dvori, Mako News Website, https://www.mako.co.il/news-israel/local-q1_2019/Article-f841e58b33da861004.htm.
68 Sections 5, 8–11, 16–19 and 24 of the Drone Regulations.
and El Al in a District Court in Israel, the plaintiffs agreed to withdraw their claim because they were persuaded that Regulation 261/2004 should not apply to Israeli plaintiffs flying to or from Israel. However, the District Court expressed no opinion on the issue at hand. In a recent ruling of a French court, taking a different view from that prompting the plaintiff in the Israeli case to withdraw, it was held that the subordination of an Israeli airline to the ASL does not exempt it from being subject to Regulation 261/2004 in flights to or from the European Union and that passengers have the right to choose between the ASL and Regulation 261/2004 and seek compensation under either of the enactments as they see fit. Two motions to certify a class action dealing with this issue and still in their preliminary stages in the Israeli district courts seek to establish that the grant of compensation according to Regulation 261/2004 violates the airlines’ obligations under the ASL. Decisions on these motions may dispel some of the ambiguity surrounding this issue, but only a decision of the Supreme Court on an appeal from a lower court can resolve the matter by way of creating a binding precedent.

XII OUTLOOK

Three Israeli domestic airports have closed or are expected to close during 2019, two in or near Eilat (Eilat and Ovda Airports), Israel’s southernmost city, located on the shores of the Red Sea, and one in Tel Aviv. Eilat and Ovda Airports will be replaced by the new Ramon International Airport, which is located 18 kilometres north of Eilat and was inaugurated on 22 January 2019.

Ramon Airport will become Israel’s second international airport (the other being Ben-Gurion Airport) and is designed to accommodate 2 million passengers a year. On 6 January 2019, in order to encourage airlines to operate at Ramon Airport, the Economics Committee of the Israeli Parliament (the Knesset) approved regulations proposed by the Minister of Transport, granting a three-year exemption from aviation fees at the airport. The volume of international passenger traffic passing through Israeli international airports is, therefore, expected to keep growing; the crowded Israeli airspace (which hosts extensive military activity and civilian flights) is expected to become even more crowded and shortage of landing and crossing permits is expected to continue. The pro-consumer tendency of the Israeli regulators and legislators is expected to continue and to evolve. A bill for the amendment of the ASL in favour of the passenger, including the grant of enforcement powers to the Consumer Protection and Fair Trade Authority, is pending approval. Also pending is a bill that would prohibit flight operators from charging a price for a one-way ticket exceeding

71 Arrêt No. 1233 F-D, Pourvoi No. G 17-26.663, El Al lignes aériennes d’Israël dans le litige l’opposant à Mme Annat Rubinstein.
72 Class Action 18746-01-19 Sandelman et al. v. Ryanair DAC; Class Action 58610-01-19 Bar Snyder et. al v. EasyJet.
74 http://www.ramon-airport.com/he/.
75 Regulations of the Airports Authority (Fees) (Temporary Order), 2018.
the price charged by it for a return flight ticket for the same destination; The extent (if any) of the applicability of the Israeli CPL to foreign carriers is expected to be clarified by the district courts.76

Chapter 22

ITALY

Anna Masutti

I INTRODUCTION

The primary domestic legislation governing the aviation sector in Italy is the Navigation Code (the INC, introduced by Royal Decree No. 327/1942), which – as will be seen below – deals with the main civil, administrative, criminal and procedural aspects of this field.

The INC also regulates drones, which are classified as remotely piloted aircraft systems (SAPRs). In addition to the Code, the discipline on drones is contained in European Regulation, precisely in the recent Regulation (EC) No. 1139/2018.

The administration of Italy’s air navigation sector is guaranteed by the Italian Civil Aviation Authority (ENAC), the National Agency for the Safety of Flight (ANSV) and by the Aero Club of Italy. The management of air navigation in its operational profiles has been conferred to ENAC.

ENAC is the agency in charge of regulating aviation in Italy, as provided by Article 687 of the Italian INC and Legislative Decree No. 250/97. It is the responsibility of ENAC to supervise and regulate air carriers, as well as to fine them for breach of regulations. In particular, ENAC shall impose fines on airlines that are in breach of Regulation (EC) No. 261/2004. Additionally, ENAC drafted the Passenger’s Charter and the Charter of Airport Standard Services. The Passenger’s Charter is, in substance, a vade mecum of national, European and international regulations on air passenger protection, detailing the claims and compensation procedures available to passengers in cases of non-compliance with the rules set out in the above-mentioned regulation. The Charter of Airport Standard Services sets out the minimum quality standards airport operators are bound to comply with in providing their services.

In addition, Law No. 214/2011, subsequently amended by Law No. 27/2012, has established the Regulatory Transport Authority (the Authority). The Authority carries out important functions in regulating, promoting and ensuring fair competition in the transport sector. Specifically, it is the Authority’s responsibility to ensure fair and non-discriminatory conditions of access to airports and of movement of passengers and goods at national level. The Authority performs supervisory functions regarding airport charges and shall verify that tender notices do not contain discriminatory conditions or obstruct other markets’ competitors. The first board of the Authority has been appointed by a presidential decree dated 9 August 2013, partially published in the Italian Official Journal (dated 16 September 2013). The Authority has established its main offices in Turin.

Anna Masutti is a senior partner at LS Lexjus Sinacta.
Another agency that comes into play in regulating the aviation sector is the Italian Antitrust Authority. Established under Law No. 287/1990, it is an independent authority in charge of reporting unfair commercial practices and misleading advertisements, with the power to levy fines, if necessary. The Antitrust Authority has already fined several Italian air carriers for unfair commercial practices relating to underpricing or mispricing of tariffs and other reimbursable elements of cost, which tends to prejudice the passenger's interests, in cases of flight cancellation. The Antitrust Authority also considers unfair the practice of acceptance of insurance policies by passengers, given that this service is normally preselected during the carrier's online booking process. As a consequence, consumers who are not interested in purchasing the service would be forced to opt out. More recently, in a landmark decision, the Antitrust Authority awarded seven slots that were previously held by the former Italian flag carrier to a low-cost European air carrier, thus effectively enabling it to consolidate its position in the Italian market.

The Italian administrative courts are the Regional Administrative Court and the Supreme Administrative Court. The Regional Administrative Court has jurisdiction over ENAC's and the Antitrust Authority's decisions. The judgments issued by the Regional Administrative Court can be challenged before the Supreme Administrative Court.

II LEGAL FRAMEWORK FOR LIABILITY

Air carriers' liability for death or injury to passengers, for loss of or damage to goods or baggage, and for delay in international transport is governed by the Montreal Convention of 28 May 1999 on International Air Transport, which came into force in Italy on 28 June 2004, following its simultaneous ratification by 13 Member States of the European Community (now the European Union), the Community itself and Norway. It replaced both the Warsaw Convention of 1929 and subsequent protocols, and the Guadalajara Convention of 1961.

With the entry into force of the Montreal Convention, the European Parliament and the Council adopted Regulation (EC) No. 889/2002 of 13 May 2002, which amended Regulation (EC) No. 2027/97 of 9 October 1997, so as to align the Convention rules with the European ones. This Regulation broadens the extent and scope of Montreal Convention provisions on carriage of passengers, baggage and cargo, as well as carriage by air within a single Member State by the air carriers of the Community countries, including Italy.

After the adoption of Regulation (EC) No. 889/2002, the most important piece of legislation relating to the INC was modified, which affects some international arrangements on the protection of passengers’ rights. Section II of the INC sets out rules that are entirely dedicated to aviation matters, while Section I is devoted to matters related to maritime law.

In 2005 and 2006 numerous amendments were introduced, through Law Decrees No. 96/2005 and No. 151/2006, to the INC’s articles governing the aeronautical sector, with a view to creating national rules in line with international and Community standards, and in particular, with regard to the transport of passengers (and the consequent carrier liability and protection of passengers’ rights).

By means of the above-mentioned amendments, Italy has extended the enforceability of the Montreal Convention to every area of commercial aviation, which includes the ferrying of air passengers and baggage, as well as areas left out by the extension brought about by Regulation (EC) No. 2027/97, as amended by Regulation (EC) No. 889/2002.

The excluded areas relate to transport services carried out by non-Community air carriers, as well as services performed by unlicensed carriers (to date, non-Community air
carriers are not permitted as per the cabotage rights enshrined in the Chicago Convention). Unlicensed operators include, for example, carriers operating with light aircraft, as well as those involved in transport services with points of departure and arrival at the same airport.

Article 941 of the INC, concerning air carriage of passengers and baggage, and Article 951 on the transport of goods, extend the applicability of the Convention to all air transport, to which the domestic laws – Law Decrees No. 96/2005 and No. 151/2006 – become applicable.

Article 941, Paragraph 1 of the INC has extended the applicability of the Convention to personal injury caused to passengers. Although, according to the prevailing interpretation, the Convention applies only to bodily injury and not psychological injury, under national law, the notion of ‘personal injury’ includes psychological damage.

However, it is important to keep in mind that this extension is not applicable to areas of transport to which the Convention applies in its own right, or as a result of Community rules. In fact, the Convention rules prevail in cases where domestic legislation would have been applied.

Article 949 ter of the INC provides that the two-year limitation period laid down by Montreal Convention applies to any passengers’ claims brought before Italian judges. With regard to carrier liability, the INC provides for a compulsory insurance system (Article 942). As Regulation (EC) No. 785/2004 on insurance requirements for air carriers and aircraft operators does not establish a complete regulatory framework on insurance, the civil liability insurance rules contained in the Italian Civil Code apply, as well as the provision contained in Article 942, Paragraph 2 of the INC, which provides that the passenger has the right to bring direct action against the carrier’s insurer for any damage suffered or incurred. As for the transport of passengers and goods by air, the Italian legislature found in 2006 that the regulation on liability for damage caused to third parties on the surface was adequate and comparable to the international regulations in force. Indeed, Article 965 of the INC extends the regulation of the Rome Convention 1952 to damage caused on Italian territory by aircraft registered in Italy, as well as damage caused by state aircraft.

There have been some changes in Italian law with regard to the rules on liability for collision between aircraft. These are in line with the regulation of liability of the operator for damage caused to third parties on the surface’s amendments. Article 972 of the INC states that all rules governing the limitation of compensation and its implementation in the event of liability for damage caused to third parties on the surface (Rome Convention) shall also apply to liability for damage caused by collision between two aircraft in flight, or between an aircraft in flight and a moving ship (where responsibility for damage falls on the aircraft). Article 971 of the INC modifies the extent of the limits laid down in the Rome Convention (which vary according to the weight of the aircraft – Article 11 of the Convention) and fix it in accordance with the minimum amount of insurance required as per Article 7 of Regulation (EC) No. 785/2004. The minimum coverage is determined by the maximum take-off mass of the aircraft and ranges from 750,000 to 700 million special drawing rights.

International carriage

As mentioned above, carrier’s liability for cargo loss, damage or delay in international transport is governed by the Montreal Convention. Article 951, Paragraph 1 of the INC establishes that the air transport of goods is regulated by the rules contained in the Convention. The Montreal Convention does not apply to damages in the event of a carrier’s outright non-performance in
passenger carriage. In fact, the INC (Article 952), recalls the limitation of liability foreseen in the Montreal Convention in case of carriage of goods but not in case of carriage of passengers or baggage (Article 949 bis of the INC).

ii  Internal and other non-convention carriage

Article 951(1)(i) of the INC makes the liability rules set out in the Montreal Convention applicable to all air transport of goods.

The gaps in the Montreal Convention rules regarding the carriage of goods have been filled by the INC; this was done by referring to the INC rules governing the maritime transport, and by adding some rules. In particular, the provision on non-performance of the transport services, contained in Article 952 of the INC, corresponds to the liability regime set out by the Convention regarding the delay.

iii  General aviation regulation

The law governing the liability of the operator in general aviation activities is provided for in the INC and other domestic laws (see President of the Republic’s Decree No. 133 of 9 July 2010).

Article 743, Paragraph 1 of the INC sets out a broad definition of aircraft, describing it as a machine used for transporting passengers and goods by air. Consequently, the activities performed by aircraft are subject to the rules of the INC, which govern these liabilities, including the liability of the carrier and the operator of small aircraft.

On the other hand, with regard to aircraft used for leisure and microlight aircraft, the Italian legislature introduced a special regulation for insurance obligations; however, this special regulation refers to both the Community guidelines on insurance obligations, as well as to the principles established by the INC for such obligations.

Indeed, Decree No. 133/2010 introduces specific insurance requirements for single and double microlights without motor (two-seaters weighing up to 100 kilograms), for powered aircraft (weight not exceeding 330 kilograms for fixed-wing aircraft used for leisure flights, and not more than 450 kilograms for helicopters) and for the two-seater powered aircraft (weighing not more than 450 kilograms, and not more than 495 kilograms on devices with fixed wings used for recreational flying and helicopters). This Decree has amended Law No. 106 of 25 March 1985, in light of developments in technology and the safety needs of leisure aviation.

Article 20 of Decree No. 133/2010 establishes a compulsory insurance for civil liability of the operator for damage caused to third parties on the surface as a result of impact or collision in flight.

Article 21 introduces the requirements for insurance coverage and requires that the insurance contract must be concluded in compliance with Regulation (EC) No. 785/2004, and it also foresees the extension of insurance coverage to damages caused by gross negligence. It also provides for the obligation of the insurer to directly indemnify the injured third party, within the limits of the maximum insured. However, this does not preclude the possibility of recourse by the insurer against the insured, to the extent and circumstances provided for in the contract.
Passenger rights

ENAC has issued the Passenger’s Charter, which contains the rights conferred on passengers pursuant to Regulation (EC) No. 261/2004. It is a practical guide, in which ENAC has summarised useful information for those travelling by air.

The Passenger’s Charter was drawn up for the first time in 2001 and distributed in all Italian airports. A new version (the fifth) was introduced in 2005, together with the introduction of new rules governing delay and cancellation of flights, with a view to report, in particular, the increase in the amount of compensation payable by carriers in the event of denied boarding owing to overbooking, introduction of forms of compensation and assistance in the event of flight cancellations or long delays, as well as the extension of such protection to passengers on charter flights.

In March 2009, ENAC approved a revised edition of the Passenger’s Charter, implementing therein the European provisions on disabled passengers’ rights and regulations regarding security and surveillance on operators. It also allows the implementation of regulations on carrying liquids on board aircraft and published a list of items to be added up to the final cost of an airline ticket, to allow transparency in pricing determination.

ENAC has incorporated the principles established in the judgment of the European Court of Justice in November 2009 on compensating passengers in the event of a long delay. The judgment upheld the rights of passengers to be compensated in the event of reaching their destinations over three hours later than the scheduled time of arrival.

In addition, the Italian legislature introduced into the INC certain provisions aimed at ensuring special protection for passenger rights. Special mention must be made of Article 943, which provides for a specific obligation to provide information. If transport is being carried out by an air carrier other than the carrier indicated on the ticket, the passenger must be adequately informed prior to the issuance of the ticket.

For ticket reservations, the above information must be given at the time of booking. In the event of lack of information, a passenger may request the termination of the contract, reimbursement of the ticket fare and payment of damages. Article 943 also established that carriers cannot operate from Italian territory if they do not fulfil their obligations to provide information referred to in Article 6 of Regulation (EC) No. 2027/1997 (as amended by Regulation (EC) No. 889/2002). In addition, Article 948 introduces rules for passengers’ waiting list. The carrier is obliged to communicate to the passenger its respective waiting list number while putting up a waiting list for a certain flight. Moreover, it must be posted in a location accessible and visible to the public. Passengers whose names have been entered on the waiting list have the right to access transport according to the waiting list number assigned.

Article 783 of the INC obliges air carriers to carry out an annual check of the quality of services offered to passengers, according to indications given by ENAC, which checks compliance with promised quality, and in the event of non-compliance, enforces measures laid down in its rules that can even lead to the withdrawal of the operator’s licence (Article 783 of the INC).

It should be added in the field of the passenger rights that Italy, by Legislative Decree No. 53/2018, has implemented the EU Passenger Name Record Directive (2016/681/EC) on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. It directs Member States to collect
PNR data related to reservations and the check-in process. According to the Directive, airlines must transfer the data collected to the competent authority (i.e., passenger information unit) in the relevant Member State.

Finally, it is worth highlighting Judgment No. 1584 of 23 January 2018, in which the Italian Supreme Court clearly stated that in the case of flight cancellation or delayed arrival, the burden of proof lies with the air carrier. Therefore, in a claim for compensation under Regulation (EC) No. 261/2004, passengers only prove their title (i.e., the flight title) while the air carriers must provide evidence of the proper fulfilment of the flight obligation.

III LICENSING OF OPERATIONS

i Licensed activities

Within the EU, international and domestic air services are governed by Regulation (EC) No. 1008/2008, which provides market access to all carriers who have obtained an operating licence, as well as an air operator's certificate.

This principle was also adopted by the Italian legislature in 2005 and 2006 as it modified the rules of the INC, stipulating services that are allowed to be performed by air carriers. These include air transport services to passengers and carrying of mail and cargo on scheduled and non-scheduled flights on intra-Community routes by carriers who have obtained an operating licence, and previously a certificate (AOC), according to the provisions laid down in the INC and in EU legislation.

ENAC is the body responsible for issuing the AOC. The certificate affirms that the operator has the professional ability and organisation necessary to ensure the exercise of its aircraft in a safe condition for the aviation activities specified therein (Article 777 of the INC). ENAC establishes, through its own internal rules, the content, limitations and procedures for the issuance, renewal, and changes, if any, to the AOC. The Regulation governing ENAC's issuance of a national AOC for air transport undertakings is also applicable to air carriers that have helicopter operations.

ENAC grants air carrier licences to undertakings established in Italy, according to Regulation (EC) No. 1008/2008. The conditions for issuance, formalities and validity of the licence are subject to the possession of a valid AOC specifying the activities covered by this licence.

To issue the licence, ENAC requires the operator to submit evidence of the administrative, financial and insurance requirements referred to in Regulation (EC) No. 1008/2008 and Regulation (EC) No. 785/2004, proof of availability of one or more aircraft, or on the basis of a property deed, or under a contract for the use of the aircraft previously approved by ENAC according to their own regulations.

Supervision of the activities of the air carrier and verification of its ability to meet the requirements on an ongoing basis comes under the authority of ENAC and is a condition for the issuance of the operating licence. A year after its issuance, and every two years thereafter, ENAC has to verify that the requirements for the issuance of licences are being met on an ongoing basis.

ENAC may, at any time, suspend the licence if the carrier is unable to ensure compliance with the licensing requirements, and has the authority to revoke it if it appears that the carrier is no longer able to meet its commitments.

Furthermore, on 17 November 2017 ENAC issued a Regulation regarding fire-fighting air operations in Italy. This Regulation sets out the rules applicable to the release, maintenance,
limitations and revocation of the firefighting air operator certificate (COAN). The COAN is mandatory to perform this type of flight operation, which ENAC defines as: ‘air operation devoted to fire-fighting, including flights for observation and finding of fires, spread of extinguishing and retardant products, transport of specialised personnel and flight training’.

In order to obtain the COAN, the applicant must comply with several requirements regarding the place of business, citizenship and professional ethics of the legal representative and the board members, nationality of the operator, operator’s financial means, registration of the aircraft, aircraft’s property, airworthiness certificate and insurance coverage.

In 2018, ENAC approved several national air carrier service charters, which is an informative tool about the current quality level of the air carrier service and about the improvements to be implemented for the following year. In particular, air carrier service charters for Air Dolomiti, Air Italy, Blue Panorama and Neos have been approved.

Finally, regarding drones, the above-mentioned Regulation (EC) No. 1139/2018 lays down new requirements to ensure their free circulation in the European Common Aviation Area.

ii Ownership rules
ENAC issues the air carrier’s licence according to Regulation (EC) No. 1008/2008 (Article 778 of the INC) and its interpretative guidelines (2017/C 191/01) dated 16 June 2017. The licence is granted to undertakings established in Italy whose effective control, through a shareholding majority, is owned directly or through majority ownership by a Member State or nationals of EU Member States and whose main activity is air transport in isolation or in combination with any other commercial operations of aircraft or the repair or maintenance of aircraft. Moreover, air carriers must own a valid certificate of airworthiness issued by ENAC and one or more aircraft being its property or leased (dry lease) as provided by Article 2.2 of the Circular No. EAL-16 on 27 February 2008. Air carriers must provide satisfactory evidence of administrative, financial and insurance requirements, as provided by Regulation No. 1008/2008.

Among the recent licences released, in October 2016, ENAC issued to Blue Panorama Airlines the Air Transport Licence and AOC, and most recently, on 11 April 2017, to Ernest Airlines the AOC (IT.AOC.175) and the Operating Licence I-L 518.

iii Foreign carriers
Access to European routes is guaranteed to all air carriers (Italian and European) with the AOC and the operating licence granted by ENAC (Article 776 of the INC).

The services of scheduled air transport of passengers, mail or cargo that are conducted, in whole or in part, outside the European Union are governed by bilateral agreements.

Article 784 of the INC, regarding non-EU scheduled air transport services, states that it is an essential condition that the civil aviation authorities of the country parties have a regulatory system for certification and surveillance for air transport services; this is required to ensure a level of safety as provided by the Chicago Convention standards. The air transport services are performed for the Italian part by one or more designated air carriers, established on national territory, with a valid operating licence granted by ENAC or by a Member

2 ENAC – Comunicato Stampa No. 81/2016.
State of the European Union, provided with financial and technical capacity and insurance sufficient to ensure the smooth running of air services in conditions of safety and to safeguard their right to mobility of citizens (Article 784 of the INC).

In December 2014 ENAC issued circular EAL-14A, which implements the INC in relation to the operation of extra-EU scheduled services by regulating the authorisation and designation procedure for both Italian and Italian-based EU carriers in accordance with international air transport agreements. It aims to improve the regulatory framework and assist the industry by broadening business opportunities. Once an EU airline has been recognised by ENAC as an established carrier, it must comply with all national laws and regulations applicable to its specific business in Italy (including any relevant fiscal and employment laws). ENAC has also outlined the criteria in selecting carriers applying for traffic rights to and from extra-EU airports.

ENAC is the only authority that can prepare an agreement that regulates relations with the chosen air carriers. Designated carriers cannot give the service hired to other air carriers without the prior written consent of ENAC, under penalty of exclusion from the hired service (Article 785 of the INC).

Italy allows air carriers holding a licence and the carriers of the state with which there is the air transport service the exercise of non-EU non-scheduled services on condition of reciprocity.

ENAC requires non-EU carriers technical requirements and administrative provisions, including those relating to the prevention of attacks against civil aviation (Article 787 of the INC). ENAC is responsible for regulating the carrying out the services of non-scheduled air transport.

In the event that the carrier does not meet requirements, ENAC may prohibit a non-EU carrier from entering Italian airspace.

The Annual Report and Social Balance 2018, published by ENAC in May 2019, shows that, in Italy, a growth of the non-EU air carriers’ traffic has been recorded together with an increase of accreditations and authorisation, which went from 1,220 in 2017 to 1,800 in 2018.

Traffic of the non-EU air carriers in Italy could also increase in 2019 after that, on 20 May 2019, China and European Union have signed an agreement on civil aviation safety (BASA) and a horizontal aviation agreement to strengthen their aviation cooperation. Prior to the latter agreement, only airlines owned and controlled by a specific Member State or its nationals could fly between that Member State and China, while the new horizontal aviation agreement will allow to all EU airlines to fly to China from any EU Member State, through a bilateral air services agreement with China under which unused traffic rights are available.

In addition, the proposed amendment to the agreement between the EU and United States and the agreement proposal between the EU and Japan were examined in 2018. The negotiations on the Japan–EU bilateral aviation agreement are still ongoing: the last meeting between the parties was held in Tokyo on 3 and 4 April 2019. Negotiations between the EU and the United States are also in progress.

**The national airport plan**

The Ministry of Transport published a national airport plan, which is currently under further revision. It aims to design a balanced development of Italian airports, offering a new governance system, identifying structural priorities and optimising the global transport offer. The plan in question also intends to prevent competition conflicts between airports located
in the same region, favouring the creation of an airports system with a single governing body. The Italian airport plan has been drafted according to the EU principles included in the EU Commission Communication on the draft EU Guidelines on state aid to airports and airlines; these state that: 'except in duly justified and limited cases, airports should be able to cover their operating costs and public investment should be used to finance the construction of viable airports; distortions of competition between airports and between airlines, as well as duplication of non-viable airports should be avoided. This balanced approach should be transparent, easily understood and straightforward to apply.' The plan identifies 10 traffic zones; each zone has one strategic airport with the sole exception of the centre–north zone, where Bologna and Pisa–Florence operate, provided that Pisa and Florence airports become totally integrated. The 10 strategic airports are: Milan Malpensa (north-west), Venice (north east), Bologna and Pisa–Florence (centre–north), Rome Fiumicino (centre), Naples (Campania), Bari (Mediterranean–Adriatic), Lamezia (Calabria), Catania (east Sicily), Palermo (west Sicily) and Cagliari (Sardinia). Other airports of national interest can be identified, provided that they can actually play an effective role in one zone and can achieve at least a break-even point in their annual accounts. The plan also envisages the strengthening of airport infrastructure, the development of intermodality, the creation of a cargo network and facilitation for general aviation.

IV SAFETY

Safety in the aviation field is guaranteed by the maintenance of the airworthiness of aircraft and parts and spares; it requires the certification of management organisations and products, as well as the qualification of technical and operating staff working in the field. Safety technical regulation is established and implemented by ENAC, which issues airworthiness certificates, air operator certificates and approves maintenance programmes in accordance with the international and European rules issued by the International Civil Aviation Organization (ICAO) and by the European Aviation Safety Agency (see Regulation (EC) No. 216/2008 of 20 February on common rules in the field of civil aviation).

However, the basic regulation (i.e., Regulation (EC) No. 216/2008) was amended by Regulation (EC) No. 1108/2009, which enlarged the European Aviation Safety Agency’s (EASA) competences to include aerodromes, air traffic management and air navigation services within the EU safety system. Consequently, Regulation (EC) No. 139/2014 required Member States, civil aviation authorities, airports and their management companies to ensure full compliance with the new rules by 31 December 2017. In parallel, EASA integrated the regulatory framework by setting up the acceptable means of compliance, certification specifications and guidance material for airport facilities.

The Italian implementation process is supervised by ENAC, which developed a road map for ensuring that the Italian airport system complied with the new EU rules by the 31 December 2017 deadline. In line with this, on 10 May 2017, ENAC presented the new Guidelines No. 2017/003-APT, which incorporate detailed interpretative and procedural information. These Guidelines aim to harmonise the national legislation with the European legal framework with regards to the certification proceeding or to the conversion of the existing aerodrome certificates issued by Member States.

The road map identifies four macro-areas of intervention: regulatory management; certifications and conversion of previous certifications; communication; training and education.
Within these four fields the authorities responsible for aerodrome certification and supervision, aerodrome operators and management service providers, must carry out a series of coordinated actions. The road map covers 38 airports distributed throughout Italy, whose certification – previously granted in accordance with a 2003 ENAC Regulation on the construction and management of aerodromes – will be converted into a new certification consistent with the EU provisions.

Civil aviation safety is also guaranteed through the development of the State Safety Programme (SSP), a project provided for by ICAO Annex 19 and still in the execution phase, which in Italy is governed by a special committee that includes ENAC, ANSV, the Ministry of Infrastructure and Transport, the Air Force, the ENAV and the Aero Club D’Italia. The SSP aims to determine an acceptable safety standard for the entire civil aviation system and then identify the activities that the state will have to undertake to achieve or maintain this level of safety. To this end, the SSP provides that each state is equipped with specific indicators (safety performance indicators) to assess the degree of safety achieved in the aviation sector in its national territory.

In 2018, Italy was the first country to adopt such indicators, as stated by ENAC in its Annual Report and Social Balance 2018.

The Italian safety regulation for air operations that do not constitute commercial transport is represented by Circular No. 71-B issued by ENAC on 31 October 2011 on continuing airworthiness management of aircraft not used for commercial activities with a weight over 5,700 kilograms and multi-engine helicopters (large aircraft).

In Italy, the accident reporting system is guaranteed by the pilot in command of the aircraft, who has the duty to record the accident or incident in the flight book immediately after landing and sending a report to ENAC. Articles 826 to 832 of the INC regulate air accidents, establishing several duties for airport management, the Italian air navigation services provider and for the ANSV. Pursuant to Article 826 of the INC, the technical investigation of air accidents and incidents is conducted by the ANSV.

On the subject of safety, Regulation (EC) No. 1139/2018 confers the power on the European Commission, with the support of EASA, to establish the requirements and technical characteristics that drones need to have in order to fly safely.

V INSURANCE

The amendments to the INC, made in 2005 and 2006 (by Decree No. 96 of 9 May 2005 and Decree No. 151 of 15 March 2006), which adapted its provisions to the international and Community standards in force in Italy, have also had an impact on aviation insurance regulation.

The previous regulations on compulsory insurance by air carriers and aircraft operators have been replaced by the current obligations to ensure their civil liability for damage caused to passengers, baggage, cargo and third parties established at European level. The current rules oblige air carriers and aircraft operators to ensure their liability for damage caused to passengers, baggage and cargo in accordance with Community legislation (Regulation No. 785/2004). In this way, Italy applies the same EU regulations, with one specific provision established in favour of passengers. With particular regard to the insurance of passengers, Article 942 of the INC allows the passenger to exercise direct action against the insurer for compensation for damage caused by the air carrier, which is not allowed under Regulation No. 785/2004.
As a result of this provision, an injured person may claim compensation either against the carrier or against its insurer. With regard to the legal action against the insurer, Article 1020 of the INC provides for a limited period of one year. Since the passenger has at his or her disposal a period of two years to bring an action against the air carrier (Article 35 of the Montreal Convention), it is generally believed that if the same passenger intends to act directly against the insurer, he or she should have the same two-year term for the action against the insurer.

As for licensing of operations, ENAC also dictates specific rules concerning drone insurance. Article 32 of the ENAC Remotely Piloted Aerial Vehicles Regulation establishes that: ‘No RPAS shall be operated unless it has in place third-party insurance, adequate for the operations and not less than the minimum insurance coverage of the table in Art. 7 of Regulation (CE) 785/2004.’

The measure refers to the parameters of Article 7 of Regulation (EC) No. 785/2004, provided for manned aircraft, and stipulates that unmanned vehicles within the scope of the Regulation shall be provided with at least the minimum insurance coverage of the table. In particular, this means that operators of unmanned aerial vehicles must obtain insurance in respect of third-party liability that is not less than 750,000 SDR.

VI COMPETITION

The Italian system does not provide specific regulation for the aviation sector. Law No. 287 of 10 October 1990, which introduced to the Italian legal system general rules on competition, is also applicable to the aviation sector.

However, the recent crisis has affected also the scope of competition in the national aviation sector. Since January 2015, Italy’s national airline and flag carrier is jointly controlled by Etihad, the national carrier of the United Arab Emirates.

When the agreement entered into force in August 2014, Etihad acquired 49 per cent of Alitalia’s shares, allowing the latter to recover from a difficult financial situation. In fact, Etihad underwrote a substantial equity commitment towards Alitalia and restructured €695 million of the Italian company’s debt.

In November 2014 the European Commission, pursuant to Council Regulation (EC) No. 139/2004, cleared the proposed acquisition of joint control over New Alitalia by Alitalia Compagnia Aerea Italiana SpA (Alitalia CAI) and Etihad Airways PJSC (Etihad). The aforementioned decision was conditional upon commitments by Alitalia and Etihad, and in this respect the Commission approved the appointment of a Monitoring Trustee to monitor the compliance of Alitalia CAI and Etihad with the commitments attached to the Commission’s decision, and to report to the Commission thereon. This significant case is examined in more detail below.

Another interesting point regarding the Italian aviation sector is that regarding the opportunity to implement public investments in small and regional airports with the aim of giving them a central role in the economic growth and regional development, without distorting competition.

In this regard, on 17 May 2017, the EU Commission approved in principle the Block Exemption Regulations (GBER), amending Regulation (EU) No. 651/2014, released by the EU with the aim of revising exemption criteria for airport investment aid from prior Commission scrutiny under EU state aid rules. The purpose of the GBER is to facilitate public investments that can create jobs and growth, while preserving competition.
The Regulation is specifically designed for ‘regional airports’, which are defined as ‘airports with average annual passenger traffic of up to 3 million passengers’ and to reduce the regulatory burden and costs for public authorities and other stakeholders in the EU.

On 6 December 2016, the Italian authorities presented their position concerning the first Draft of the approved GBER Amending Regulation. Following the public consultation on the Draft, the authorities considered that a real and effective simplification of the administrative burden may be realised under the condition that operating aid to airports would be exempted from the notification procedure. In addition, they underlined the need to clearly define the instances of ‘small airports’, which are exempt from the application of state rules.

On this matter, the Italian authorities consider that airports for general aviation and those with a scant economic traffic should not be considered in competition with other airports because of their small size. Therefore, any public financing given to them should not be considered a way to affect competition or trade relations between Member States.

In addition, the Italian Ministry of Infrastructure and Transport guidelines and the Italian Regulatory Transport Authority intervention on the subject may be revised, in accordance to the approved GBER Amending Regulation (EC) No. 651/2014 for regional airports, as it represents an important support instrument for regional airports, which are a substantial part of airport structure in Italy.

On that matter, the 2019 Budget Law allocated €3 million for each of the years of the three-year period 2019–2021 at Crotone Airport and, in addition, has authorised an expenditure of €15 million for the year 2019 and €10 million for the year 2020 to allow the necessary work of restructuring and security of Reggio Calabria Airport.

With regard to the European rules on competition, the European Council adopted a new Regulation (No. 712/2019) to safeguard the competitiveness of EU air carriers against unfair competition and other practice implemented by non-EU airlines. The new legislation entered into force in May 2019 and goes beyond the existing Regulation (EC) No. 868/2004, which has proved to be ineffective. Under the new Regulation, if the European Commission finds that a practice distorting competition, adopted by a third country or a third-country entity, has caused an actual injury to the Union air carriers concerned, the European Commission may impose redressive measures aimed at offsetting that injury.

Those redressive measures shall take form of ‘financial duties or any operational measure of equivalent or lesser value, such as the suspension of concessions, of services owed or of other rights of the third-country air carrier’ (Article 14.4) but must, however, respect the principle of proportionality. To this aim, the measures must be provisional, limited to a specific geographic area and shall not exceed what is necessary to remedy the injury to the Union air carriers concerned and must never result in the suspension or limitation of traffic rights granted by a Member State to a third country.

For the sake of completeness, the recent introduction into Italian law of the new Code of the Crisis of Business and Insolvency, which modifies the regulation of bankruptcy procedures to which airlines in precarious financial situations could have access in order to facilitate their financial recovery, should also be highlighted. In any case, it should be noted that the applicability of the extraordinary administration of large companies contained in the Marzano Decree (No. 347/2003) and further amended by Decree No. 134/2008 (the ALITALIA Decree) remains unchanged, provided that the air carrier meets the requirements for access.
In addition, ENAC also draws up the three-year plan for the prevention of corruption and transparency, aimed precisely at defining the strategy to prevent the commission of acts of corruption in public administrations, which could potentially be detrimental to free competition among air carriers.

VII WRONGFUL DEATH

The Italian legal system recognises non-pecuniary damages in case of wrongful death, suffered both by the first-degree victim and possibly transferable to the heirs, as well as directly to the relatives with an autonomous right.

The Italian Civil Code does not provide for a definition of non-pecuniary damages but it establishes a right of compensation under Article 2059. However, the Italian courts ruled that non-pecuniary damages include any kind of prejudice caused by the impairment of inviolable personal rights laid down by the Constitution (e.g., right to health).

According to case law and scholars' opinions, the first-degree victim's right to compensation includes the following: biological damages suffered by the deceased that can be recognised solely if there was a noteworthy lapse of time between the events of the wrongful act and the death; moral damages suffered by the victim where the latter was aware of the catastrophic consequences of the wrongful event leading to the loss of life (i.e., catastrophic damages); and damages for loss of life (thanatological damages), which is recognised only occasionally by the Italian courts and some legal commentators.

On the other hand, relatives, on their own, are entitled to claim for biological damages, in case the distress from the loss of someone close to them has evolved into a ‘temporary or permanent injury to a person’s physical and mental integrity which can be identified through a medico-legal assessment and which has a negative impact on the activities of daily life and on the dynamic and interpersonal aspects of the life of the injured party, regardless of any repercussions on his/her capacity to produce income’. This is the meaning of ‘biological damage’ provided in Article 138 of the Italian Code of Private Insurance. Moreover, relatives are entitled to claim in jure proprio for moral damages, intended as a state of subjective anxiety or psychological distress, which may include the loss of a relative (loss of dependency). More controversial is thanatological damages (i.e., loss of life); recently the Supreme Court affirmed that the loss of life cannot lack civil protection, therefore it shall be recognised as compensable damage in itself (as is also the case for immediate death). Based on this statement, the Court accepted the right to compensation per se for the damages of (instantaneous) loss of life (thanatological damages).

Regarding the compensation aspect, the Supreme Court has established that all suffered prejudices must necessarily be connected to a sole notion of non-pecuniary damages, as a macro-category for the purpose of preventing the duplication of claims for compensation. That means that non-pecuniary damages shall include, comprehensively, biological damages (physical and psychological injury); moral damages (e.g., emotional distress; state of anxiety that leads from the loss of a relative); and existential damages, as they represent different aspects of sole recoverable damages.

In particular, the loss of independence is usually included in the moral damages category whether it is intended in its subjective aspect; neither represent independent categories of damages, but they are merely descriptive entities that shape the unitary notion of non-pecuniary damages. In order to avoid duplication, but also non-compensated damages, with particular regard to damage to family relationships, the court shall consider and assess
whether the relatives of the deceased victim, following the harmful event, have suffered a disturbance of their normal living habits to the extent of being compelled to change their lifestyle.

VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure
There is no sector-specific regulation on which fora and mechanisms are used to settle claims, or on the timelines for settlement and limitations for bringing claims. The general Italian Civil Procedure rules (established in the Italian Civil Procedure Code) are applicable.

Similarly, on the matter of which parties may be joined in actions for compensation (carriers, owners, pilots, manufacturers, etc.), the general Italian Civil Procedure rules (established in the Italian Civil Procedure Code) are applicable. The Italian Civil Procedure Code provides the possibility for one party to involve one or more parties in a dispute, provided that the party who promotes the action holds an interest in bringing proceedings against other parties (Article 100).

Liability is allocated among the defendants according to the respective negligence in causing the accident or incident (if fault is established).

ii Carriers’ liability towards passengers and third parties
See Section II.

iii Product liability
There are no sector-specific rules governing manufacturers’ and owners’ liability to passengers and operators; the Italian regulations on product liability are applicable.

iv Compensation
There are no sector-specific rules. The Italian regulations on product liability are applicable.

IX VOLUNTARY REPORTING


For the purpose of this Regulation, ‘occurrence’ means any safety-related event that endangers or that, if not corrected or addressed, could endanger an aircraft, its occupants or any other person and includes in particular accidents or serious incidents.

This Regulation aims to improve aviation safety by ensuring that relevant safety information relating to civil aviation is reported, collected, stored, protected, exchanged, disseminated and analysed.

It provides a reporting system both mandatory (mandatory occurrence reporting (MOR)) and voluntary (voluntary occurrence reporting).

Regarding the Italian system, companies in the aviation sector are required to set up a voluntary reporting system to facilitate the collection of details of occurrences that may not
be captured by the mandatory reporting system and of other safety-related information that is perceived by the reporter as an actual or potential hazard to aviation safety. Any significant information shall be analysed and notified to ENAC by means of the ‘eEMOR’ system.

However, it is also possible to address the voluntary reports directly to the competent authority; in this case, the reporting process works without using the internal company reporting system. The competent authority is the National Agency for Flight Safety (ANSV). Once voluntary reports have been sent directly to the ANSV, and the agency has properly analysed them, they enter into the national events database administered by ENAC, which ensures the appropriate confidentiality and protection of the collected details of occurrences. The ANVS is also concerned with the investigation of aircraft accidents in cooperation with ENAC.

The sole objective of occurrences reporting is the prevention of accidents and incidents and not to attribute blame or liability. The absence of punitive purposes (in the name of a ‘no penalty policy’ or ‘just culture’), as well as the fact that the authors of the information remain anonymous, is intended to remove resistance and fears to communication, and also to realise more complete occurrences reporting. Voluntary reporting – also of confidential information – could bring an important contribution to operational safety in aviation: in particular, these reports may include ‘premonitory’ or ‘near-miss’ occurrences, which could lead to real incidents if not communicated in due time.

X DRONES

Drones are remotely piloted aircraft systems considered for all intents and purposes to be aircraft by Article 743 of the INC. The use of drones is regulated by national laws, EU regulations, ENAC regulations and, for military drones, by the Decrees of the Ministry of Defence. The rapid evolution of the remotely piloted aircraft systems sector has led to the need to innovate the relevant legislation contained in Regulation (EC) No. 216/2008. For this reason, the European Union recently adopted a new Regulation (No. 1139/2018), which is in the process of being implemented by the European Commission with the support of EASA, aimed at establishing common rules on the use of drones to allow their free circulation in the European Common Aviation Area. Indeed, the European Union’s Drone Regulation was published on 11 June 2019 and it consists of two Regulations: Commission Delegated Regulation (EU) 2019/945 and Commission Implementing Regulation (EU) 2019/947. They introduce common rules for operators, whether professional or recreational, enabling them to operate across borders. Once drone operators have received the authorisation in the state of registration, they are allowed to freely circulate in the European Union. The new rules include technical and operational requirements for drones defining the capabilities to be flown safely. For instance, new drones will have to be individually identifiable, allowing the authorities to trace a particular drone, if necessary. The Regulation provides rules covering each operation type, from those not requiring prior authorisation, to those involving certified aircraft and operators, as well as minimum remote pilot training requirements.

Regarding safety matters, the approach taken by the European Commission and EASA is to apply the highest safety standards achieved in manned aviation to drones in order to prevent the occurrence of any type of accident.

Beyond the European Union institutions, in 2018 ENAC also contributed to the development of the international UAS (Unmanned Aircraft Systems) regulation for categories A (open), B (specific) and C (certified) in the JARUS (Joint Authorities for Rulemaking
on Unmanned Systems) context. In particular, ENAC, in coordination with the ICAO Remotely Piloted Aircraft Systems Panel, made a considerable contribution in order to define the emission criteria of the Type Certificate and the Airworthiness Certificate for C Category UAS. On this occasion, preliminary discussions about the concepts and the problems of the UAS autonomous flights have also started.

By 2019, the European Union should complete the implementation of the new Regulation, giving all Member States an innovative, harmonised and necessary legislation on remotely piloted aircraft systems.

XI THE YEAR IN REVIEW

In August 2014, Alitalia reached an agreement with Etihad, the flag-carrying airline of the United Arab Emirates, for the acquisition of 49 per cent of Alitalia’s shares. This agreement came into effect on 1 January 2015, thus creating a newly incorporated subsidiary of Alitalia, which received its operating business by way of subscription of shares. Following this transaction, a new joint venture, New Alitalia or Alitalia SAI, was created, and Etihad acquired sole control over Alitalia Loyalty, a subsidiary of Alitalia CAI that manages the latter’s frequent-flyer programme. Control over New Alitalia is therefore jointly held by Alitalia CAI (51 per cent) and Etihad (49 per cent).

Under the Merger Regulation, concentrations with a Community dimension must be communicated to the European Commission prior to implementation. Etihad’s acquisition of 49 per cent of Alitalia CAI’s shares was, therefore, communicated to the Commission on 29 September 2014. The Commission then undertook its standard investigations to examine possible effects on competition in the internal market, in accordance with the above-mentioned Regulation. In its investigation, the Commission took into account the interests held by Etihad in Airberlin, Darwin Airline and Jet Airways.

The Commission concluded that on all affected routes, with one exception, the transaction did not raise serious competition concerns. However, the Commission’s investigation indicated that the transaction would lead to a monopoly on the Rome–Belgrade route, where Alitalia AIC and Air Serbia are the only carriers offering direct flights.

To dispel the Commission’s competition concerns, Alitalia AIC and Etihad submitted commitments to release up to two daily slot pairs at Rome-Fiumicino and Belgrade airports for interested new entrants. The airlines also committed to provide further incentives, such as the possibility for a new entrant to acquire grandfathering rights after a fixed period.

In November 2014, the Commission cleared the proposed acquisition of joint control over New Alitalia by Alitalia CAI and Etihad under the Merger Regulation. A decision pursuant to Article 6.1.b of the Merger Regulation was therefore issued, with the commitments submitted by the airlines and accepted by the Commission attached as an annex, pursuant to Article 6.2. The acquisition of joint control over New Alitalia was declared compatible with the internal market and the functioning of the European Economic Area Agreement.

The agreement between Alitalia AIC and Etihad represents a challenge to the fifth freedom rights exercised by the airline Emirates. In 2013, it began offering services between the European Union and the United States through direct flights, as well as under special partnerships with other airlines. Emirates requested slots and traffic rights granting the right to extend one of its three daily flights from Dubai to Milan Malpensa onwards to New York’s John F Kennedy International Airport. After an analysis of the relevant traffic flows,
Emirates affirmed the identification of a strong demand for both direct connections as well as the Emirates brand name, which is considered to stand out from the rest, being the only carrier in the region to offer a first-class cabin.

Despite the above-mentioned agreement, Alitalia faced financial difficulty for a number of years and on 24 April 2017 its shareholders decided not to provide additional financing. As a result, in May 2017 Alitalia was placed under extraordinary administration according to Italian bankruptcy law. In light of this difficult financial situation, the Italian state granted a €600 million bridge loan to Alitalia to ensure the company’s financing during this period. This loan was subsequently increased by an additional €300 million. In April 2018, the European Commission opened an in-depth investigation – which is still ongoing – to assess whether Italy’s bridge loan to Alitalia (€900 million) constitutes state aid and whether it complies with EU rules for aid to companies in difficulty.

Furthermore, Alitalia’s extraordinary administrators also started a tender procedure aimed at finding a buyer for the company’s assets. The procedure was initially due to be completed in November 2017 but the government, by means of a Decree, extended the deadline until 30 April 2018. Since a buyer for Alitalia’s assets was not found, a further extension of the deadline for the selling procedure and for the state loan repayment was approved by the Italian senate on 30 April 2018. The extension has been granted until 31 October 2018 for completion of the selling procedure and until 15 December 2018 for the repayment of the loan. In addition, Meridiana and Qatar Airways were working on a potential partnership; in fact, Meridiana Fly (which merged with Air Italy in 2012), reported a net loss of €190 million in 2012 that led the company to start negotiations with Qatar Airways. In February 2016, the two companies signed a memorandum of understanding for a strategic partnership to revitalise the Italian airline and recently Qatar Airways has purchased 49 per cent of Meridiana’s shares. In Autumn 2017, Qatar Airways completed the acquisition of a 49 per cent stake in Italy’s AQA Holding, the new parent company of Italy’s second-largest carrier Meridiana Fly, while the previous sole shareholder Alisarda has kept 51 per cent. In February 2018 Meridiana changed its name to Air Italy.

In April 2018, Air Italy and Qatar Airways have signed a code-share partnership to offer customers of both destinations advanced connectivity between the seven major destinations in Italy, Qatar, the Maldives and Singapore.

Recently, Air Italy has also increased its offer of connection between Italy and the United States with the inaugurations of the routes to Los Angeles and San Francisco.

Regarding Alitalia, the carrier is looking for new buyers. The Italian Prime Minister has granted the company’s extraordinary administrators until 15 July to find new investors.

Currently, Ferrovie dello Stato and the Italian Ministry of the Economy, the latter by means of the conversion of interest on the bridge loan of €900 million, are ready to purchase at least 40 per cent of the company’s shares. In the last period, Delta Airlines, Easyjet, Lufthansa and Atlantia have shown their interest in buying, but no binding offers to purchase Alitalia’s shares have been submitted yet.

A measure that aims to facilitate the exercise of fifth freedom rights in Italy by foreign carriers was presented in November 2014, in the Develop Italy Act, which sought to bring about measures to kick-start the national economy. Under the title ‘Urgent Measures for the Improvement of Airport Functionality’, a sub-article was devoted to establishing the regime for the authorisation of foreign airlines to operate under the fifth freedom rule of the air.

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3 Article 37 of Legislative Decree No. 34/2019.
In 2016, ENAC issued Circular EAL-YY, which determines the implementation procedures of the second edition of the ENAC Regulation on ‘Non-scheduled air services between EU and Third Countries’, approved in December 2015 (implementing Article 787 of the INC). The Circular aims to simplify the procedures concerning traffic rights permissions in favour of non-EU carriers operating non-scheduled services in Italy. In particular, it provides the revision of the accreditation process of non-EU operators performing in Italy, according to the third-country operator authorisation provided for in Regulation (EC) No. 452/2014; two different authorisation procedures respectively for aircraft having a maximum operational passenger seating configuration, not less than 20 seats, and for taxi flights (performed with aircraft having configuration of maximum number of passengers seats less than 20); and the exemption from authorisation for EU carriers that perform taxi flights.

Another interesting ruling in Italy in the past year was issued in February 2015, when the Italian Constitutional Court issued Judgment No. 13 regarding the issue of constitutionality of recently introduced legislation that establishes €0.50 as the maximum rate of regional tax on noise emissions for civil aircraft, due by both national and foreign aircraft operators to an Italian region for every take-off and landing in an airport situated in that region’s territory. Originally the tax on aircraft noise was established by Article 90 and subsequent to Law No. 342/2000. The tax is determined by noise emissions certified by ICAO for each type of aircraft and the take-off weight of the aircraft. Revenue from the tax should be used mainly for the completion of noise-monitoring systems, noise ‘depollution’ and eventual compensation of the population living close to the airport.

In 2011, the above-mentioned tax became the regional tax on civil aircraft noise emissions (IRESA) – a truly regional tax – so each region could regulate the amount. In 2013, the Lazio region established variable rates for IRESA, ranging from a minimum of €1.60 per ton to a maximum of €2.50 per ton. IRESA was applied by some Italian regions with important differences between them. The unequal regulation of the tax could be harmful to competition by adversely affecting the conditions of viability of aircraft operators.

The national legislator, accepting the recommendation of the Competition Authority, defined common criteria for calculating IRESA in Law No. 9/2014, establishing €0.50 as the maximum IRESA rate (i.e., a lower rate than the one fixed by the Lazio region).

The Lazio region raised the issue of constitutionality of the said legislation by virtue of its incompatibility with Article 117 of the Italian Constitution. According to Lazio region, the new rate does not promote competition because older and noisier aircraft will be subject to a regime similar to that for more efficient aircraft. The Constitutional Court, however, rejected the applicant’s arguments and confirmed the constitutionality of the contested legislation.

The Italian regions, therefore, have to amend the IRESA rates in such a way that the maximum amount does not exceed €0.50. In conclusion, national and foreign aircraft operators are set to benefit from the reduction of the tax on noise emissions, due for every take-off and landing at an airport in Italy.

Furthermore, on 30 March 2016, ENAC published the official data on the 2015 air traffic in the national airports, which have highlighted a positive trend of the industry – it registered a 4.5 per cent traffic increase compared to 2014, with more than 156 million passengers. The busiest national airports are still Rome Fiumicino, with a traffic share over 25 per cent (40.2 million passengers), followed by Milan Malpensa with 12 per cent of the market share (18.4 million passengers), Bergamo Orio al Serio with 6.6 per cent of the market share (10.3 million passengers), Milan Linate with 6.1 per cent of the market
share (9.6 million passengers) and Venice Marco Polo with 5.5 per cent of the market share (8.6 million passengers). Likewise, freight air transport has grown by 4.3 per cent since 2014, with 941.107 tons carried (on aggregate of cargo and mail).

Moreover, ENAC Resolution No. 27 of 13 October 2014 limited the number of ground handlers admitted at Rome Fiumicino Airport for the supply of runway operations and baggage, cargo and mail services. In parallel, ENAC launched a public tender to select the admitted operators, which has ended with the award of the handling services to Aviapartner Handling SpA, Aviation Services SpA and Alitalia Società Aerea Italiana SpA. The ENAC Resolution, and the subsequent tender, has been contested before the Regional Administrative Court of Lazio by other interested handlers. However, on 15 April 2016, the Court rejected the requests, considering the tenders legitimate, and confirmed the awards to the mentioned companies.

Finally, the EC proposal for amending Regulation No. 1008/2008 concerning the operation of air services in Europe has been finalised to ensure legal consistency and harmonisation with the international agreements in the wet-lease field.

The amendment proposal provides that third countries can, under certain conditions, derogate to the limits, which is the case in the United States, which would be the first third country with which the European Union stipulates a wet-lease agreement.4

On 14 February 2017, the Italian Senate’s Permanent Committee gave a positive opinion of the proposal for amending Regulation No. 1008/2008, presented by the European Commission.5

XII OUTLOOK

In August 2016, the Italian Ministry of Infrastructure and Transport (MIT) presented new guidelines concerning state aid finalised to the development of air routes by air carriers, aimed at insuring wide availability to air carries to incentive public investment. Subsequently, the new independent Italian Regulatory Transport Authority drafted a comment on such intervention.

The Italian Regulatory Transport Authority’s role is to define the criteria used in setting tariffs according to the competition circumstances actually available in any single market related to local and national transportation services, including airports. In accordance with this function, and to provide greater understanding in the matter, the authority has published an opinion on MIT’s guidelines on the application of the EU Guidelines on aid to airports and airlines (the Guidelines). The Guidelines are aimed at establishing good connections between regions, as well as the mobility of European citizens, while minimising distortions of competition in the single market. They are part of the Commission’s State Aid Modernisation strategy, which aims at encouraging more effective aid measures and focusing on cases with the biggest impact on competition. According to the Guidelines, there are several conditions that must be satisfied before investment aid can be granted.

Financing by public authorities of the construction of airport infrastructure for the provision of airport services to airlines and other airport clients constitutes state aid only if it meets the ‘market economy operator’ test. Therefore, if the test reveals that the sums are

5 Atto Senato. Risoluzione in Commissione 7-00295.
put at the disposal of the airport operator under conditions that would be acceptable to a private market investor (i.e., if the investor could reasonably expect an adequate economic consideration from that investment, taking into account the degree of risk involved), then no aid issue arises. Instead, if the test highlights that those same conditions would not be acceptable to a private investor, then the public financing for the airport constitutes state aid for the purposes of Article 107(1) of the Treaty on the Functioning of the European Union.

For example, after an investigation extended in 2012, the European Commission has approved state aid granted by Italy to the operator of Alghero airport, So.Ge.A.AL, in the form of capital injections, and aid to finance infrastructure upgrades in the period from 2000 to 2010, since it is compatible with EU rules. The Commission assessed past operating aid granted to the airport under the 2014 Aviation Guidelines. The Commission found that the aid was limited to the minimum necessary to ensure the economic viability of the airport and did not give rise to undue distortions of competition. The investigation also found that the aid to finance infrastructure and equipment at Alghero airport complied with both the 2005 Aviation Guidelines and the 2014 Aviation Guidelines because it furthered the connectivity of the Sardinian region without unduly distorting competition in the single market.

However, the Commission found that the agreement concluded by So.Ge.A.AL with Germanwings in 2007, and the agreement concluded with Meridiana in 2010, involved small amounts of state aid to those airlines. The Commission found that this aid constituted operating aid to the airlines, which could not be declared compatible with EU rules, thus the beneficiaries must pay it back.

Alghero airport is one of the recent cases of privatisation as, since January 2017, 72.5 per cent of So.Ge.A.AL is controlled by F2i Found.

Financial aid shall be proportionate to each airport’s investment plan, and subject to the financial analysis for a given project. If this proves that the project can be carried out with less than the maximum level of aid allowed for that airport size, then the aid will be limited to the lower amount.

Therefore, in future the Italian Regulatory Transport Authority should take into consideration the main aspects of the 2014 Aviation Guidelines.
INTRODUCTION

The Japanese aviation market is experiencing continuous growth, especially in the number of international passengers. According to the Ministry of Land, Infrastructure, Transport and Tourism (MLIT), during the 2017 financial year (April 2017–March 2018), Japanese airports handled 93.33 million international passengers, 218.91 million domestic passengers (counted twice, upon departure and arrival), 4,130,453 tonnes of international cargo and 1,747,725 tonnes of domestic cargo (counted twice, upon departure and arrival).

Tokyo is the key hub of the aviation market in Japan. During the 2017 financial year, of the international passengers going to and from Japan, 52.1 per cent (48.62 million passengers) used either Narita International Airport (Narita) or Haneda Airport (Haneda), the two airports in the Tokyo region. Of domestic passengers, 30.3 per cent (66.41 million passengers) used Haneda. As to cargo, 68.7 per cent (2,835,616 tonnes) of international cargo went through Narita or Haneda, and 42.0 per cent (734,706 tonnes) of domestic cargo went through Haneda.

International aviation into and out of Japan is handled by both Japanese and non-Japanese carriers, with non-Japanese carriers having a larger market share. During the 2017 financial year, Japanese carriers carried 22.39 million international passengers (24.0 per cent of all international passengers) and 1,763,226 tonnes of international cargo (42.7 per cent of international cargo overall).

In contrast, domestic aviation in Japan is limited to Japanese carriers and is largely a duopoly by two major network carriers, All Nippon Airways (ANA) and Japan Airlines (JAL). During the 2017 financial year, ANA carried 44,252,322 domestic passengers (44.6 per cent of domestic passengers overall) and JAL together with its subsidiary Japan Transocean Air carried 32,484,124 domestic passengers (32.7 per cent). A number of smaller domestic carriers followed, the largest of these being Skymark Airlines carrying 7,223,683 domestic passengers (7.3 per cent). Low-cost carriers, which started Japanese domestic operations in 2012, comprised much of the remainder, the largest of these being Jetstar Japan, a joint-venture by Australia’s Qantas, JAL, Mitsubishi Corporation and Tokyo Century carrying 4,800,625 domestic passengers (4.8 per cent) and Peach Aviation, an affiliate of ANA, carrying 2,996,051 domestic passengers (3.0 per cent).

Access to the Japanese aviation market has undergone gradual deregulation. In 1985, JAL’s monopoly of international flights among Japanese airlines was abolished. At the same
time, the assignment of domestic routes by the Ministry of Transport (the predecessor of the MLIT) was also abolished, allowing Japanese carriers to compete with their peers on the same routes. JAL was fully privatised in 1987. In 2000, a reform of the Civil Aeronautics Act regarding Japanese carriers (1) replaced route-based operation licences with operator-based licences, (2) replaced advance approval of airfare with an advance notification system, and (3) allowed carriers to determine their own routes and scheduling.

Further, Japan pushed forward its open skies policy and entered bilateral open skies agreements, beginning with the Japan–US Open Skies Agreement in 2010. As of September 2017, Japan has open skies agreements with 33 countries or regions, which cover 96 per cent of the international passengers flying into and out of Japan. Under most bilateral open skies agreements, both Japanese and counterparty state carriers are entitled to decide their preferred routes and scheduling without obtaining specific approval from the other state’s government, with a notable exception of slot allocation at Haneda.

Japan is a party to the International Air Services Transit Agreement 1944, in which the first freedom of the air (the privilege to fly across a foreign country without landing) and the second freedom of the air (the privilege to land for non-traffic purposes) are granted to other contracting states. In contrast, Japan is not a party to the International Air Transport Agreement 1944, regarding the third freedom of the air (the privilege to put down passengers, mail or cargo taken on in the home country), the fourth freedom of the air (the privilege to take on passengers, mail or cargo destined for the home country) and the fifth freedom of the air (the privilege to put down passengers, mail or cargo taken on in a third country and the privilege to take on passengers, mail or cargo destined for a third country). The third, fourth and fifth freedoms are typically addressed in bilateral air transport agreements between Japan and other states.

Japan is not a party to the Convention on International Interests in Mobile Equipment (the Cape Town Convention).

The key regulator of the Japanese aviation market is the MLIT, which has been given overall supervisory power over the aviation market under the Act for Establishment of the Ministry of Land, Infrastructure, Transport and Tourism. The MLIT has also been given licensing and approval authority under the Civil Aeronautics Act, including licensing of air transport services, approval of operation manuals and maintenance manuals, approval of the conditions of carriage and slot allocation at congested airports such as Haneda.

II LEGAL FRAMEWORK FOR LIABILITY

Carriers are liable for damages regarding passengers, baggage, mail and cargo, and for third-party damages attributable to their carriage. Damage incurred by passengers or cargo consignors typically results in contractual liability of the carrier, whereas third-party damage typically results in tort liability.

There is no dedicated national legislation governing liability in the aviation market in Japan. Thus, in principle, general statutes such as the Civil Code, the Commercial Code, the Code of Civil Procedure and the Act on General Rules for Application of Laws apply to liability matters. However, a couple of international treaties are applicable to liability matters related to international carriage. Such treaties include the Convention for the Unification ofCertain Rules Relating to International Carriage by Air of 1929 (the Warsaw Convention) as amended by the Hague Protocol of 1955, the Montreal Protocol No. 4 of 1975 and the Convention for the Unification of Certain Rules for International Carriage by Air of 1999
Japan ratified the Warsaw Convention in 1953, which limits carriers’ liabilities for injury, death or damage up to 125,000 gold francs. Japan then ratified the Hague Protocol in 1967, which doubled the liability limitation to 250,000 gold francs. In 2000, Japan ratified the Montreal Protocol No. 4 and the Montreal Convention. The Montreal Protocol No. 4 amends the Warsaw Convention and primarily pertains to cargo liability. The Montreal Convention established a two-tiered liability regime, under which the carrier is strictly liable up to 100,000 special drawing rights (SDR) for death or injury of passengers, and liable for damages over 100,000 SDR based on fault. The Montreal Convention became effective in 2003.

Japan is not a party to the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (or the Rome Convention of 1952) or the Montreal Protocol of 1978 related thereto.

It is backed by a court precedent that ratified international treaties are accorded a higher status than domestic legislation, and are immediately applicable even without implementing legislation.

ii Internal and other non-convention carriage

General statutes such as the Civil Code, the Commercial Code and the Code of Civil Procedure are applicable. There is no dedicated legislation governing liability in connection with internal carriage or carriage to which the international treaties do not apply.

iii General aviation regulation

General statutes such as the Civil Code, the Commercial Code and the Code of Civil Procedure are applicable. There is no dedicated legislation governing liability in connection with general aviation.
iv Passenger rights

There is no dedicated legislation governing compensation for delay or cancellation of flights or carriage of disabled passengers. Japanese carriers are required to include matters related to liability in their conditions of carriage; however, it is not a requirement to cover compensation for delay or cancellation of flights or carriage of disabled passengers. Although it is not a legal obligation, Japanese carriers typically provide compensation for delay and cancellation of flights and carriage of disabled passengers on a voluntary basis.

The Consumer Contract Act is applicable to contracts between a consumer and a business operator (consumer contracts), and is therefore applicable to the conditions of carriage between passengers and carriers. Under the Act, consumers may cancel consumer contracts if there is a major misrepresentation on the part of a business operator. In addition, clauses in consumer contracts are void if such clauses (1) totally exempt a business operator from its liability to compensate a consumer for damages on the part of a business operator, or (2) partially exempt a business operator from its liability to compensate a consumer for damages caused by intentional acts or gross negligence of a business operator.

v Other legislation

The Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (the Anti-Monopoly Act) is applicable to any private monopolisation, unreasonable restraint of trade or unfair trade practices in the aviation market, and is discussed further in Section VI.

The Product Liability Act (the PL Act) is applicable when damages are caused by a defect in a product, such as aircraft, engines and components.

The Act for Prevention of Disturbance from Aircraft Noise in the Vicinity of Public Airports and related ordinances provide noise standards. Violation of the noise standards may result in the relevant flight crew being subject to criminal fines.

III LICENSING OF OPERATIONS

i Licensed activities

The operation of air transport services requires a licence from the MLIT. Air transport services are specifically defined as any business using aircraft to transport passengers or cargo for remuneration upon demand. The applicant must:

a have an operation plan that is suitable for ensuring transport safety;

b have other appropriate plans for operations of the relevant services;

c be able to conduct the relevant services properly;

d if the applicant intends to engage in international air transport services, it must have a plan conforming to the air navigation agreements or other agreements applicable to the foreign countries concerned; and

e conform with the ownership rules described in detail in Section III.ii.

The operational and maintenance facilities of the operator must undergo and pass an inspection by the MLIT. The operation manual and maintenance manual of the operators must conform to the ordinances of the MLIT and be approved by the MLIT. Conditions of carriage of the operators must also be approved by the MLIT. Domestic routes involving certain congested airports, including Haneda, Narita, Osaka (Itami) Airport and Kansai Airport are subject to approval by the MLIT.
The operation of aerial work services also requires licensing from the MLIT. Aerial work services is defined as any business using aircraft other than for the transport of passengers or cargo for remuneration upon demand. Aerial work services typically include flight training, insecticide spraying, photography, advertising and newsgathering.

Organisations must be approved by the MLIT for the specific activity to conduct any of the following activities:

a. aircraft design and inspection of completed designs;
b. aircraft manufacturing and inspection of aircraft;
c. maintenance of aircraft and inspection of performed maintenance;
d. maintenance or alteration of aircraft;
e. component design and inspection of completed designs;
f. component manufacturing and inspection of completed components; and
g. repair or alteration of components.

Radio transmission is separately regulated by the Ministry of Internal Affairs and Communications (MIC) under the Radio Act. Operators must obtain licences from MIC to establish radio stations, including aircraft radio stations.

ii Ownership rules

An operator of air transport services may not be:

a. a foreign individual, a foreign state or public entity or an entity formed under a foreign law (collectively, foreigners);
b. an entity of which a representative is a foreigner, of which more than one-third of the officers are foreigners or of which more than one-third of the voting rights are held by foreigners;
c. a person whose licence for air transport services or aerial work services was revoked within the past two years;
d. a person who has been sentenced to a penalty of imprisonment or a more severe punishment for violation of the Civil Aeronautics Act within the past two years;
e. an entity of which an officer falls under (c) or (d) above; or
f. a company whose holding company or controlling company falls under (b) above.

Separately, aircraft owned by any person (individual or entity) falling under (a) or (b) may not be registered in Japan.

iii Foreign carriers

Foreign carriers must obtain permission from the MLIT to operate international routes to and from Japan. An application for the permission must describe their corporate information, operation plans (including the origin, intermediate stops, destination and airports to be used along the routes and distance between each point), aircraft information, frequency and schedule of service, outline of facilities for maintenance and operational control, outline of plans for the prevention of unlawful seizure of aircraft and the proposed commencement date of operation, accompanied by evidence of permission of the foreign carrier’s home country regarding the services on the proposed route and its incorporation documents, most recent profit and loss statement and balance sheet and conditions of carriage. The MLIT will consider, among other things, compliance by the foreign carrier with its home country laws, the applicable bilateral agreement and relationship, reciprocity, safety, protection of customers and third parties and prevention of name-lending.
Foreign carriers are not allowed to operate on domestic routes unless specifically permitted by the MLIT. A foreign carrier that intends to obtain such permission must submit an application to the MLIT describing, among other specifics, the necessity to operate on domestic routes.

IV  SAFETY

The Civil Aeronautics Act, enacted in conformity with the Chicago Convention, governs the safety requirements for operators.

The MLIT is responsible for granting airworthiness certifications for aircraft. Upon an application for airworthiness certification, the MLIT inspects the design, manufacturing process and current conditions, and if the aircraft complies with the standards specified in the Civil Aeronautics Act and the related ordinances, the MLIT grants aircraft certification.

Maintenance of or alteration to any aircraft to be used for air transport services must be performed and certified as an approved organisation.

The MLIT is also responsible for personnel licensing. The MLIT holds examinations to determine whether a person has the aeronautical knowledge and aeronautical proficiency necessary for performing as aviation personnel, and grants competence certification upon passing. Medical certification, English proficiency certification (for international flights) and instrument flight certification (for instrument flights) are also required. A person without a pilot competence certificate of the relevant category may undergo flight training only under a flight instructor certified by the MLIT.

A pilot in command is required to report to the MLIT if an accident occurs, and if he or she is unable to report, the operator of the aircraft must do so instead. A pilot in command is also required to report to the MLIT if he or she has recognised that there was danger of an accident.

Japanese carriers are required to prepare safety management manuals, operation manuals and maintenance manuals in accordance with the Civil Aeronautics Act, and to conduct operations and maintenance in accordance therewith.

V  INSURANCE

International carriers are required to maintain adequate insurance covering their liability under the Montreal Convention. The Montreal Convention, which came into effect for Japan in 2003, stipulates that state parties shall require their carriers to maintain adequate insurance covering their liability under the convention, and that a carrier may be required by the state party to furnish evidence that it maintains adequate insurance covering its liability under the Convention.

On the other hand, with regard to domestic carriers, there is no particular requirement for carriers to carry insurance. Nonetheless, carriers do carry aviation insurance including hull all-risk insurance, hull war risk insurance and liability insurance.

The MLIT may order a Japanese carrier to purchase liability insurance to cover aircraft accidents if it finds that the carrier’s business adversely affects transportation safety, customer convenience or any other public interest. The MLIT may also advise applicants to purchase insurance upon their application for an air transport services licence; such advice is not binding on the applicant, but failure to follow such advice may have a negative impact on the review of the application.
Japanese insurance companies together form the Japanese Aviation Insurance Pool (JAIP). When a JAIP member insurance company underwrites aviation insurance, its liability is allocated to each of the member insurance companies. The allocated liability is further reinsured in the international reinsurance market. The insurance premium payable would be determined by the JAIP rather than individual underwriters to ensure that the premium would not differ from one underwriter to another. The JAIP is generally exempted from the Anti-Monopoly Act.

**VI  COMPETITION**

The aviation industry is subject to the Japanese Anti-Monopoly Act and the competition legislation applicable to all industries. The Japan Fair Trade Commission (JFTC) is responsible for regulating and enforcing competition and fair trade policies.

The Anti-Monopoly Act restricts three types of activity: private monopolisation, unreasonable restraint of trade and unfair trade practices.

Private monopolisation means such business activities by which a business operator, individually or by combination or conspiracy with other business operators, or by any other manner, excludes or controls the business activities of other business operators, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.

Unreasonable restraint of trade means such business activities by which any business operator, by contract, agreement or any other means irrespective of its name, in concert with other business operators, mutually restricts or conducts its business activities in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.

Unfair trade practices means any of the following acts that tend to impede fair competition and that are further described in the Anti-Monopoly Act or designated by the JFTC:

- **a** unjust treatment of other business operators;
- **b** dealing with unjust consideration;
- **c** unjustly inducing or coercing customers of a competitor to deal with oneself;
- **d** dealing with another party on such conditions as will unjustly restrict the business activities of said party;
- **e** dealing with another party by unjust use of one’s bargaining position; and
- **f** unjustly interfering with a transaction between a business operator in competition within Japan with oneself or a corporation of which oneself is a stockholder or an officer and another transaction counterparty; or, where such a business operator is a corporation, unjustly inducing, instigating or coercing a stockholder or a director of the corporation to act against the interests of the corporation.

Acts that constitute private monopolisation or unreasonable restraint of trade may result in an elimination order by the JFTC, a penalty payment order by the JFTC, civil action or, subject to accusation by the JFTC, criminal punishment. Criminal punishment includes imprisonment of individuals or criminal fines imposed on individuals as well as corporations. Violation of the restriction of unfair trade practices may result in an elimination order by the JFTC or civil action (including injunction).
The Civil Aeronautics Act provides exemptions from the Anti-Monopoly Act for agreements approved by the MLIT related to (1) joint management on low-demand routes essential for local residents’ lives, and (2) joint carriage, fare agreements and the like on international routes for the purpose of public convenience. The latter at one time included International Air Transport Association (IATA) fare-setting agreements, carriers’ fare-setting agreements, code-sharing agreements, pool agreements, interlining agreements and frequent-flyer programme agreements. The JFTC held a series of discussions to repeal such exemptions from 2007, and IATA fare-setting agreements and carriers’ fare-setting agreements including specific fare or level of fare were decided not to be approved as exceptions after 2011.

Instead, the MLIT has approved exemptions for a number of business coordination and revenue-sharing agreements between airlines, including the trans-Pacific joint venture between ANA, United Airlines and Continental Airlines (now merged with United Airlines) in 2011, the trans-Pacific joint venture between JAL and American Airlines in 2011, the Japan–Europe joint venture between ANA and Lufthansa in 2011 (adding Swiss International Air Lines and Austrian Airlines in 2012) and the Japan–Europe joint venture between JAL and International Airlines Group (the parent company of British Airways and Iberia) in 2012 (adding Finnair in 2013). The MLIT also approved exemptions for cargo joint ventures, between ANA and Lufthansa Cargo in 2014 and between ANA and United Airlines in 2015.

VII  WRONGFUL DEATH

When a person or entity is responsible for causing wrongful death, the types of damages usually payable under Japanese law are medical expenses, nursing expenses, the deceased person’s pain and suffering, the deceased’s lost earnings, funeral and burial expenses, and legal fees. The successors may inherit the right to such damages in accordance with the law or will, as applicable. In addition, the next of kin of the deceased may be entitled to their own pain and suffering, and this type of damage is often used by courts to compensate the family survivors for their financial losses. Punitive damages are not awarded under Japanese law.

Lost earnings are calculated by subtracting the deceased’s estimated annual living expense from his or her annual income, further multiplying the difference by the number of remaining workable years, and applying the statutory discount rate. The statutory discount rate is currently 5 per cent. The legislature has recently resolved lowering the statutory discount rate to 3 per cent effective April 2020 and to be reviewed every three years.

VIII  ESTABLISHING LIABILITY AND SETTLEMENT

i  Procedure

The forum used to settle contractual liabilities depends on the underlying contract and the governing laws and treaties. Dispute resolution clauses in the underlying contract may in some cases be considered invalid by the effect of compulsory provisions of the governing laws or treaties. The forum used to settle non-contractual liabilities depends on the governing laws and treaties.

According to the Code of Civil Procedure, the national legislation governing civil procedure in Japan, the defendant is generally subject to the authority of the Japanese courts when, for example:

a  the defendant’s residence or the place of business is in Japan;

b  the place of performance of a contractual obligation is in Japan;
the place of tort is in Japan; or

with regard to a case against a business operator in relation to a consumer contract, the plaintiff is a consumer resident in Japan.

Although parties may agree to a jurisdiction by contract in some cases, any agreement in a consumer contract to resolve disputes in a country in which the consumer does not reside would be invalid by the effect of the Code of Civil Procedure. Furthermore, under the Montreal Convention, under certain conditions therein, a passenger may bring action before the courts in which, at the time of the accident, the passenger had their principal and permanent residence.

The timeline for litigation in Japan is as follows:

a court-ordered preservation of evidence, upon request and if necessary;
b commencement of litigation;
c oral argument procedures;
d examination of evidence;
e final judgment; and
f enforcement of the judgment, if necessary.

The plaintiff may abandon its claim by admitting that the claim is groundless, the defendant may admit the claim or the parties may settle the claim during the course of litigation proceedings.

Arbitration is an alternative form of dispute resolution. If there is an arbitration agreement, the parties are required to resolve their disputes specified in the agreement through the agreed arbitration process. An arbitration agreement in respect of a consumer contract may be revoked by a consumer by effect of the Arbitration Act.

The statute of limitations for a claim is generally 10 years from when the claim became exercisable. There is a shorter statute of limitations for a claim pertaining to commercial activity, which is five years from when the claim became exercisable, and for a claim pertaining to transportation of passengers or freight, which is one year from when the claim became exercisable. The statute of limitations for a tort claim is three years from the time when the claimant became aware of the damage and the perpetrator, or 20 years from the tortious act, whichever comes earlier.

If there is an identical claim against two or more persons, or if claims against two or more persons are based on the same factual or statutory cause, such persons may be sued as co-defendants. In the context of a typical aviation case such as a claim for damages following an accident, the carrier, owner, pilots and manufacturers may be joined in actions for compensation as co-defendants.

If two or more persons caused damage by their joint tortious acts, each of them would be jointly and severally liable to compensate for the full amount of that damage. According to court precedents, liability is allocated internally among the joint tortfeasors in proportion to each tortfeasor’s fault. A joint tortfeasor may require other joint tortfeasors to reimburse any paid portion allocated to such other joint tortfeasors.

ii Carriers’ liability towards passengers and third parties

In a typical tort claim, the operator's liability to passengers and third parties is established by demonstrating:

a the right or legally protected interest of the claimant;
b the wrongful act of the defendant;
c the defendant’s intent or negligence with respect to the wrongful act;
d the invasion of the right or legally protected interest of the claimant and the amount of
damages caused thereby; and
e the causal relationship between the wrongful action and the damages.

The liability under the Civil Code is fault-based, meaning that the defendant’s intent or
negligence must be demonstrated.

Under the Montreal Convention, operators have strict liability up to 113,100 special
drawing rights (SDR) for death or bodily injury of passengers, which means that the operator
cannot further exclude or limit its liability. Where damages of more than 113,100 SDR are
sought, operators may avoid liability by demonstrating that the harm suffered was not owing
to their negligence or was attributable to a third party. There are liability limits to certain
types of damages: 19 SDR per kilogram in respect of the destruction, loss, damage or delay of
cargo; 4,694 SDR in respect of delay in the carriage of passengers; and 1,131 SDR in respect
of destruction, loss, damage or delay of passenger baggage.

iii Product liability
The PL Act was enacted in 1994 to introduce the concept of strict liability on the part of
product manufacturers, replacing the traditional concept of fault-based liability. Liability that
is not provided in the PL Act remains subject to the Civil Code liability provisions outlined
above.

The PL Act defines ‘manufacturer’ to include any person who manufactured, processed,
or imported the product in the course of trade and any person who provides their name, trade
name or trademark or otherwise indicates themselves as the manufacturer on the product,
or who otherwise makes a representation on the product that holds themselves out as its
substantial manufacturer.

To establish a product liability claim, the plaintiff must demonstrate:
a that the defendant is a manufacturer;
b that the product the manufacturer provided had a defect;
c the invasion on the plaintiff’s life, body or property;
d the amount of damage caused thereby; and
e a causal relationship between the defect and the damage.

In this regard, a defect means a lack of safety that the product ordinarily should provide,
taking into account the nature of the product, the ordinarily foreseeable usage of the product,
the time the manufacturer delivered the product and any other relevant information. A
manufacturer may be exempt from product liability if it demonstrates that the defect in the
product was not foreseeable from scientific or technological knowledge at the time of delivery
of the product.

There is no special legislation covering owners’ liability.

iv Compensation
Compensation under Japanese law in connection with breach of contract or tort is limited to
the actual damage caused. Punitive damages or exemplary damages are not recognised.

A typical damages award would include (1) incurred monetary damage including
medical fees, nurse fees, funeral fees and legal fees; (2) lost earnings owing to an injury,
permanent disability or death; and (3) consolation for mental suffering in relation to an
injury, permanent disability or death.
In practice, a mortality table is often utilised, especially in cases of death or permanent disability. The age, gender and the actual earnings of the victim are the key elements considered in calculating damages.

Those incapacitated in accidents may apply for a physical disability certificate from the local prefectural government, and those certified as such may receive various forms of support from national and municipal governments as well as from private businesses, such as social welfare allowance, discounts on utility charges, discounts on transportation fares, exemption or relief of tax on income, nursing services and provision of assistance devices. The system is generally not designed for support providers to recover costs from third parties.

Although post-accident family assistance is being discussed in study groups, including those led by the MLIT, there is not yet any law regulating the subject.

IX  DRONES

Flight of drones was generally unregulated in Japan until the Civil Aeronautics Act was amended to introduce a regulation focused on drones, which came into effect on 10 December 2015. Under the amended Civil Aeronautics Act, permission from the MLIT is required to fly an unmanned aircraft (namely, an aeroplane, rotorcraft, glider or airship which cannot accommodate any person onboard and can be remotely or automatically piloted, excluding those lighter than 200 grams) in certain areas including (1) airspace more than 150 metres above ground level; (2) airspace around airports; and (3) airspace above densely inhabited districts. Unless specifically approved by the MLIT, operation of unmanned aircraft is subject to additional restrictions, such as operation in the daytime, operation within the visual line of sight, keeping a distance of over 30 metres from persons and properties.

Further regulation of drones was introduced after an incident in which an unidentified drone was found on the roof of the Japanese Prime Minister’s official residence. Effective 7 April 2016, it is prohibited to fly drones around and over key facilities, including the national Diet building, the Prime Minister’s office and official residence, national government buildings, the Supreme Court, the Imperial Palace, certain foreign diplomatic establishments, designated defence-related facilities, nuclear sites, and other facilities designated from time to time. Examples of facilities designated from time to time include sites hosting the G20 summit meetings, the 2019 Rugby World Cup and 2020 Tokyo Olympic and Paralympic Games. Contrary to the Civil Aeronautics Act, which is overseen by the MLIT, the prohibition of flight of drones around and over key facilities is overseen by the National Police Agency.

X  VOLUNTARY REPORTING

As the result of a reform in 2014, the Voluntary Information Contributory to Enhancement of the Safety (VOICES) programme collects voluntarily submitted aviation safety incident/situation reports from pilots, controllers and others. The programme was established by the MLIT but is operated by a third-party body, the Association of Air Transport Engineering and Research, in an effort to mitigate concerns that voluntary reporting may be used against reporters by the supervisory arm of the MLIT. The VOICES programme anonymises all voluntary reporting it received, and discards any information that may identify reporters. The supervisory arm of the MLIT has confirmed it will not access any information that may identify reporters, and that it will not demand the programme operator provide such
information. While the anonymisation and discarding of identifiable information would usually provide comfort to the reporters, there is no formal structure to prevent the reports being used by claimants, in injury and wrongful death actions, or prosecutors.

XI THE YEAR IN REVIEW

On 1 April 2019, an amendment of the Commercial Code came into effect to modernise the transportation and maritime sections therein. The key points related to aviation in the amendment are as follows:

a. the establishment of a common regulation that covers land, maritime and air transportation (the existing Commercial Code covers land and maritime transportation separately and does not cover air transportation);

b. the introduction of consignors’ responsibility to report any dangerous goods in freight;

c. the existing rule of rebuttable presumption of carrier’s negligence rule upon loss, damage or delay of freight, which is applicable to land and maritime transportation only, shall be expanded to air transportation (although the introduction of a strict liability rule, as stipulated in the Montreal Convention, is rejected);

d. changing the existing one-year statute of limitations regarding damages relating to freight transportation (or five-year statute of limitations if a carrier had knowledge of the damage) to a one-year period of exclusion (under which a claimant would lose its claim unless a court action is initiated within one year);

e. the carriers’ liability mitigation clauses should also apply to their employees;

f. a consignee shall have the same status as the consignor upon loss of freight (under the existing Commercial Code, a consignee does not have the rights under transportation contracts until freight arrives at destination. Therefore, a consignee cannot claim damages from the carrier unless the rights under the transportation contract is assigned from the consignor to the consignee); and

g. the introduction of a damage rule applicable to the loss or damage of freight during a transport combining two or more of land, maritime or air carriage.

XII OUTLOOK

Peach Aviation and Vanilla Air, low-cost carrier subsidiaries of ANA Holdings, which is the parent company of the full service carrier ANA, are in the midst of integration into a single low-cost carrier: Peach Aviation. It is reported that the integration will complete by March 2020, when Vanilla Air will merge into Peach Aviation.

In June 2014, an MLIT committee revealed an interim report that illustrated a two-step plan to expand take-off and landing slots at Tokyo’s two airports, Haneda and Narita. The first step is targeted for before 2020, which is when the summer Olympics will take place in Tokyo. The first step involves the readjustment of runway operations and flight paths in Haneda, as well as the readjustment of flight control and installation of rapid-exit taxiways in Narita, which adds up to 40,000 landing and take-off slots at each of the two airports. The second step is targeted for after 2020 and involves the construction of additional runways at both Haneda and Narita. From July 2015, the MLIT has been holding multiple series of briefing sessions about the functional enhancement of Haneda in various neighbourhoods, most of which are under proposed new flight paths.
Chapter 24

KENYA

Sonal Sejpal and Fred Mogotu

I INTRODUCTION

The civil aviation sector in Kenya is regulated primarily by the Civil Aviation Act No. 21 of 2013 (CAA) as amended by the Civil Aviation (Amendment) Act 2016 (the Amendment Act) and the regulations promulgated thereunder. The management and operation of aerodromes is regulated by the Kenya Airports Authority Act (the KAA Act) and the regulations promulgated thereunder. The KAA Act establishes the Kenya Airports Authority (KAA), which is mandated with the construction, management and operation of aerodromes.

For over four years after the enactment of the CAA, the aviation sector in Kenya continued to use most of the regulations promulgated under the repealed Civil Aviation Act (Chapter 394, Laws of Kenya) (the Repealed Act) as only a few new regulations were issued under the CAA during that period. However, in 2018 and 2019 the Cabinet Secretary for Transport, Infrastructure, Housing and Urban Development (the Cabinet Secretary) issued and continues to issue new regulations to give effect to various provisions of the CAA.

The new regulations already in operation include those dealing with: the operation of aircraft for commercial air transport, air operator certification and administration, aircraft nationality and registration marks, certification, licensing and registration of aerodromes, licensing of air services, personnel licensing, air traffic services, aeronautical information services, aeronautical charts, instruments and equipment, approved maintenance organisations, approved training organisations, rules of air, safety management, surveillance and collision avoidance systems, communication procedures, meteorological services for air navigation, air accident and incident investigations, and airworthiness. The new regulations in the pipeline relate to unmanned aircraft systems, aerodrome design and operations, and consumer protection, among others. The Amendment Act legally recognised for the first time in Kenya the operation of unmanned aircraft systems including remotely piloted aircraft and, subsequently, the Kenya Civil Aviation Authority (KCAA) promulgated the Civil Aviation (Remote Piloted Aircraft Systems) Regulations, 2017 to regulate the ownership and operation of remotely operated aircraft. However, on 26 June 2018, the National Assembly Committee on Delegated Legislation on the Civil Aviation (Remote Piloted Aircraft Systems) Regulations, 2017 recommended that these Regulations be annulled in their entirety on, among other grounds, that the penalty for offences in the Regulations exceeded the penalty provided in the parent legislation (the CAA) and that the Regulations did not address issues

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1 Sonal Sejpal is a director and Fred Mogotu is an associate at Anjarwalla & Khanna LLP.
2 The Civil Aviation Act (Chapter 394, Laws of Kenya) was repealed in 2013.
3 Section 24(5) of the Statutory Instrument Act No. 23 of 2013, Laws of Kenya allows a penalty not exceeding 20,000 Kenyan shillings or such term of imprisonment not exceeding six months, or both, which the regulation-making authority may think fit for breach of a statutory instrument.
of privacy and data protection. The National Assembly agreed with the recommendation and annulled the Regulations. Following the annulment, the KCAA started the process of promulgating new regulations that are in compliance with the recommendations of the aforesaid National Assembly Committee and has recently produced the draft Civil Aviation (Unmanned Aircraft Systems) Regulations, 2019 (the Draft Unmanned Aircraft Systems Regulations) and has shared them with the public and stakeholders for comment.

The CAA establishes the KCAA and the National Civil Aviation Administrative Review Tribunal (NCAART). The KCAA regulates virtually every aspect of civil aviation in Kenya, including the licensing of aircraft service providers, operators and aerodromes, undertaking registration of aircraft in Kenya, certifying the airworthiness of aircraft and enforcing the penalties and fines arising as a result of breaches of the statutory provisions. The KCAA also regulates the mechanisms for mandatory and voluntary incident reporting systems through its Aircraft Accident Investigation Departments.4

The KCAA has the statutory power to seize and detain an aircraft for the purposes of securing any unpaid charges or fees for any services performed by the KCAA or as a penalty for the contravention of a specific statutory provision.

The NCAART has the jurisdiction to hear and determine disputes relating to licences issued by the KCAA, any order or direction imposed by the KCAA pursuant to the CAA and the Regulations, and consumer protection compliance in the aviation sector.

Kenya does not have specific laws dealing with slot management, but it has entered into a number of bilateral air services agreements that regulate slots, traffic and transit rights. Slot management in Kenya is coordinated by the Ground Flight Safety Section of the KAA.

Pursuant to Article 2(6) of the Constitution of Kenya (the Constitution), treaties or conventions ratified (whether before or after the promulgation of the Constitution in 2010) by Kenya automatically form part of Kenyan law. In the aviation sector, Kenya has ratified the Convention on International Interests in Mobile Equipment (the Cape Town Convention) and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the Cape Town Protocol), the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Hague Protocol 1955 (the Warsaw Convention), as well as the Convention for the Unification of International Carriage by Air, opened for signature at Montreal on 28 May 1999 (the Montreal Convention). Kenya domesticated the Cape Town Convention and the Cape Town Protocol by enacting the International Interests in Aircraft Equipment Act (No. 27 of 2013), which gives the High Court of Kenya (the High Court) jurisdiction in respect of claims brought under the Cape Town Convention or the Cape Town Protocol, or to grant relief and award damages as provided under the same. Kenya has also domesticated the Warsaw Convention by enacting the Carriage by Air Act No. 2 of 1993 (CBAA). The Montreal Convention is operational in Kenya by virtue of Article 2(6) of the Constitution and the definition of ‘Convention’ in the CBAA. The CBAA, the Warsaw Convention and the Montreal Convention form the law on aviation liability in Kenya.

Labour and employment issues are governed by the employment regime in Kenya, which applies to all employees generally. The current labour law regime in Kenya therefore applies to employers and employees in the aviation sector. The Labour Relations Act 2007 restricts employees providing essential services from participating in strikes or lock-outs. ‘Essential services’ is defined in the Act to mean ‘a service the interruption of which would probably endanger the life of a person or health of the population or any part of the population’. The

4 Regulation 20 of the Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.
employer of an essential employee has the right to delay the employee’s ability to participate in a strike or lockout. There was a recent proposal to amend the essential services under the Fourth Schedule of the Labour Relations Act to include air traffic control services and civil aviation communication services, but this was not passed by Parliament.

For over 15 years there was no systematic case reporting system in Kenya, although in 2005 limited case law reporting recommenced. At present there is no definitive list of the treaties or conventions ratified by Kenya.5

II LEGAL FRAMEWORK FOR LIABILITY

The key legislation governing liability in the aviation sector are the CAA and the CBAA.

Under the CAA, aircraft owners and operators are liable for breach of the following obligations:

\[ a \]
- an operator is liable to a fine for failure to implement an effective drug and alcohol testing system approved by the KCAA;6

\[ b \]
- an aircraft owner is liable for material loss or damage caused to any person or property on land or water by an aircraft, a person in an aircraft or an article or person falling from an aircraft while in flight, take-off or landing;7 and

\[ c \]
- the pilot and the owner of an aircraft are liable where the aircraft is flown in such a manner as to cause unnecessary danger to any person or property on land or water.8

Individual directors and other officers of a body corporate may also be liable for offences under the CAA or regulations made under it.9

The various regulations promulgated under the CAA also contain provisions that render persons liable for breaches of the obligations provided in the regulations.

i International carriage

The Montreal Convention is applicable in Kenya with respect to rights and liabilities of carriers, carriers’ servants and agents, passengers, consignors, consignees and other persons in relation to carriage by air irrespective of the nationality of the aircraft.

The Montreal Convention establishes a liability regime for the death or injury of passengers, loss of or damage to cargo and damage occasioned by delay that occurs during carriage by air. The CBAA substitutes any liability of a carrier under any law in Kenya or at common law with respect to the death of a passenger with the liability imposed by Article 17 of the Warsaw Convention. As indicated above, the definition of the word ‘Convention’ in the

5 For this reason, it is very difficult to be certain whether there may be a treaty or convention that has a bearing on this chapter. While we have tried to be as diligent as we can in researching all applicable conventions and treaties, the treaties and conventions covered in the following sections may not be an exhaustive guide to all of the treaties and conventions that may be relevant or applicable to the matters in this chapter. For a list of treaties ratified by Kenya see the International Civil Aviation Organization’s Treaty Collection: www.icao.int/secretariat/legal/Status%20of%20individual%20States/kenya_en.pdf.

6 Section 48 of the CAA.

7 Section 59 of the CAA.

8 The penalty for contravening this provision will be either a monetary fine not exceeding 200,000 Kenyan shillings or a suspension of privileges, withdrawal or cancellation of licence or any other sanction on the certificate or licence that the Director-General may deem appropriate. Section 61 of the CAA.

9 Section 65 of the CAA.
CBAA includes any other Convention which may amend or replace the Warsaw Convention. Details on aviation liability under the provisions of the CBAA and the Montreal Convention are provided in Section VIII.

ii  Internal and other non-convention carriage
The Warsaw Convention is applicable in Kenya for internal and non-convention carriage. The CBAA provides for non-convention carriage by allowing the Cabinet Secretary to make an order in the Kenya Gazette directing that the provisions of the CBAA relating to carriage by air should apply to other forms of carriage by air to which the Warsaw Convention does not apply.10 Pursuant to the above, the Cabinet Secretary gazetted the Carriage by Air (Application of Convention) Order in 199311 directing that all the provisions of the CBAA and the Warsaw Convention with the exception of Articles 3, 4, 6, 8, 9, 10 and 28 of the Warsaw Convention shall apply to all non-international carriage by air in Kenya. There is no order that has been gazetted with respect to the application of the Montreal Convention for internal or non-convention carriage.

iii  General aviation regulation
This aspect of civil aviation is governed by the Civil Aviation (Operation of Aircraft for Commercial Air Transport) Regulations 2018 (the Operation of Aircraft Regulations) promulgated under the CAA. The Operation of Aircraft Regulations revoked the Civil Aviation (Operation of Aircraft) Regulations 2013. The Operation of Aircraft Regulations regulate the general aviation requirements including aircraft maintenance requirements, flight crew requirements, passenger and passenger handling requirements, flight plans and air traffic control clearance and aircraft operating and performance limitations. There are three levels of liability imposed for breaches of the provisions of the Operation of Aircraft Regulations as set out in Part XIV of the Operation of Aircraft Regulations. The levels of liability are as follows:

\[\begin{align*}
\text{a} & \quad \text{any provision specified as an ‘A’ provision in the Fourth Schedule to the Regulations is liable to a fine not exceeding 1 million Kenyan shillings for each offence or to imprisonment for a term not exceeding one year, or to both;} \\
\text{b} & \quad \text{any provision specified as a ‘B’ provision in the Fourth Schedule to the Regulations is liable to a fine not exceeding 2 million Kenyan shillings for each offence or to imprisonment for a term not exceeding three years, or to both; and} \\
\text{c} & \quad \text{where there is no specific penalty imposed, the fine shall not exceed 2 million Kenyan shillings, and in the case of a second or subsequent conviction for the like offence, the fine will not exceed 4 million Kenyan shillings.}
\end{align*}\]

The operation of aeroplanes is regulated by the Civil Aviation (Operation of Aircraft-General Aviation-Aeroplanes) Regulations, 2018 and the operation of helicopters is regulated by the Civil Aviation (Operation of Aircraft-Helicopter) Regulations, 2018.

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10 Section 11 of the CBAA.
iv Passenger rights

In addition to the provisions of the CAA, the CBAA and the Operation of Aircraft Regulations and other regulations on passenger and passenger handling, passenger rights are also covered under the consumer protection regime in Kenya, which consists principally of Article 46 of the Constitution and the Consumer Protection Act 2012 (CPA). The CPA establishes a comprehensive legal mechanism for consumer protection in Kenya. Article 46 of the Constitution provides that consumers are, inter alia, entitled to the right to goods and services of a reasonable quality and the CPA sets out the rights and obligations of consumers generally and under specific consumer agreements. Further, the CPA provides the means for seeking legal redress for breach of the provisions of the CPA by a supplier of goods and services under certain consumer agreements, prohibits and imposes sanctions for unfair consumer practices and provides for compensation. In relation to aviation, the CPA imposes an obligation on passenger air carriers to provide overnight accommodation or meals to passengers whose flights have been cancelled or are subject to long delays. 12 Kenya is currently in the process of drafting the Civil Aviation (Consumer Protection) Regulations to provide for consumer rights and obligations including the rights of persons with disabilities or special needs, consumer complaint handling and procedures, notification of delays, cancellations, no-show baggage concerns and compensation for passengers. Passengers with complaints may approach the Consumer Protection Section of the KCAA, which is responsible for the enforcement of consumer rights and which facilitates informal settlement schemes with airlines on an ad hoc basis.

v Other legislation

There are various other laws in force that may impose liability for those in the aviation sector. Laws relating to competition and product liability are covered in more detail elsewhere in this chapter. The Bribery Act (No. 46 of 2016) (the Bribery Act) came into force on 15 January 2017. The Bribery Act is modelled on the UK Bribery Act 2010 and was enacted to aid in the prevention, investigation and punishment of bribery in Kenya with particular focus on the private sector. Bribery offences under the Bribery Act are wide ranging and the Ethics and Anti-Corruption Commission has through the Bribery Act been provided with a more robust mandate to combat bribery in the public and private sectors. The Environmental Management and Co-ordination Act (Act No. 8 of 1999) regulates environmental activities for, among other things, operation of aircraft in accordance with specific emission standards and in accordance with the noise levels recommended by the Cabinet Secretary for Transport and the National Environmental Management Authority. The Environmental Management and Co-ordination Act also empowers the National Environmental Management Authority to investigate actual or suspected air pollution by aircraft and make regulations for the control and prevention of pollution of the Kenyan coastal zone by, among others, aircraft.

III LICENSING OF OPERATIONS

i Licensed activities

The licensing of air services is regulated by the Civil Aviation ( Licensing of Air Services) Regulations, 2018 (the Licensing of Air Services Regulations). These regulations license
national and international services performed by means of an aircraft for hire or reward and also regulate franchises in the aviation industry. The categories of services licensed under the Regulations are listed in the First Schedule of the Regulations and include scheduled air services such as transport of passengers or cargo or mail and emergency medical services, aerial work services such as advertising operations, agricultural spraying, seeding and dusting, fire spotting, control and fighting, and recreational flying including micro lights and balloons.

An application for a licence for any of the categories of air services is made to the KCAA in the prescribed form. A licence will be given to an applicant if the applicant satisfies all the requirements of the Air Services Regulations.

An applicant for a licence is also required to demonstrate that he or she is able to comply with the CAA and other applicable laws and has the financial and technical capability to undertake the proposed air services. A licence may be valid for two to five years and may be issued subject to conditions.

ii Ownership rules

In Kenya, aircraft can be owned by the government of Kenya, a Kenyan citizen or persons legally resident in Kenya or any other person approved by the KCAA on condition that the aircraft owned by such person is not used for commercial air transport, flying training or aerial work. In the case of a body corporate, the same must be established under Kenyan law or the laws of such other country that the KCAA may approve.14

Any person seeking to use or operate an aircraft for the provision of any category of air services within Kenya must be licensed under the Licensing of Air Services Regulations. A person will qualify for a licence if that person is a citizen of Kenya or in the case of a body corporate or a partnership, at least 51 per cent of the voting rights are held by the Kenyan state or by a citizen of Kenya, or both.15 A person will be exempt from the above requirements if the kind of services the person wishes to provide will be of a special nature (services of a special nature includes services in the interest of social welfare, charity, for purposes of salvage on humanitarian grounds or of assistance in saving life or in the public interest). In addition, an exempt person who is carrying out services of a special nature must use a Kenyan registered aircraft (unless the KCAA allows the use of a foreign registered aircraft, which it may do if the aircraft meets the operational and technical standards in force in Kenya and the applicant meets the legal requirements relating to aviation safety and security, public health, environmental protection and business operations).16 An aircraft is eligible for registration in Kenya if it is either owned or leased by a citizen of Kenya, an individual citizen of a foreign country who is lawfully admitted for residency in Kenya, a corporation lawfully organised and doing business under the laws of Kenya or a government entity of Kenya and is not registered under the laws of any foreign country.17

13 'International services' means an air service operated within Kenya, and includes an air service that may pass through the airspace of another state without providing air service in that other state and 'international air services' means an air service provided between Kenya and at least one other state and excludes an air service that may pass through the airspace of another state without providing air service in that other state.

14 Regulation 4(2) of the Civil Aviation (Aircraft Nationality and Registration Marks) Regulations, 2018.

15 Regulation 5(1) of the Civil Aviation (Licensing of Aircraft Services) Regulations, 2018.

16 Regulation 5(1) of the Civil Aviation (Licensing of Aircraft Services) Regulations, 2018.

17 Regulation 4 (1) of the Civil Aviation (Aircraft Nationality and Registration Marks) Regulations, 2018.
Licensed air operators are required to notify the KCAA 14 days in advance of the operator’s plans to change its controlling shareholding, changes in the ownership of any single shareholding that represents 10 per cent or more of the total shareholding in the air operator’s parent or ultimate holding company, and changes in the particulars of the key personnel appointed by the licensee to be responsible and accountable for the operation of the air service.18 Where the KCAA deems that the aforementioned changes have had an impact upon the finances or control of the aircraft, it shall require the submission of an application for a new licence.19

iii Foreign carriers
The KCAA may give an operating authorisation to an airline whose principal place of business is outside Kenya to operate scheduled services in Kenya. Such authorisation will be granted in the event that there is in force between Kenya and the state in which the airline has its principal place of business, an air service agreement or arrangement under which scheduled air services may be operated. The airline must also have been designated in accordance with the provisions of the agreement or arrangement and the KCAA is satisfied that the airline conforms to and complies with the terms and conditions of the agreement or arrangement.20

The KCAA may also issue a licence to a foreign air carrier to operate non-scheduled international air services if the carrier is appropriately certificated by a competent authority in the home state for the services. A foreign air carrier issued with the licence to operate non-scheduled air services must only take the traffic that it originally brought in. It must also, among other requirements of the Licensing of Air Services Regulations,21 furnish the authority with any statistics within 30 days of the date of request.22 Non-scheduled foreign aircraft in transit must also get authorisation from the KCAA to fly across Kenya or land in Kenya for non-traffic purposes.

In assessing competence, technical and financial fitness of foreign carriers, the KCAA may accept the production of licences, certificates and documents issued by competent authorities in their home state.23

Foreign-registered airlines wishing to operate as a franchise within Kenya must obtain approval from the KCAA and the prospective franchisee or franchisor must hold an operating authorisation issued in accordance with the Licensing of Air Services Regulations.24

In addition to meeting the operational and maintenance standards, foreign registered operators are not permitted to operate a foreign-registered aircraft in Kenya unless that aircraft displays the nationality and registration markings prescribed in the manner required by the law of the state in which it is registered.25

18 Regulation 21(d) of the Civil Aviation (Licensing of Air Services) Regulations, 2018
19 Regulation 21(3) of the Civil Aviation (Licensing of Air Services) Regulations, 2018.
20 Regulation 13(1) and (2) of the Civil Aviation (Licensing of Air Services) Regulations, 2018.
21 The other requirements are provided in regulation 13 of the Civil Aviation (Licensing of Air Services) Regulations, 2018.
22 Regulation 18 of the Civil Aviation (Licensing of Air Services) Regulations, 2018.
23 Regulation 19(3) of the Civil Aviation (Licensing of Air Services) Regulations, 2018.
IV SAFETY

i General operations requirements

No aircraft in Kenya will be registered until it has been certified as airworthy by the KCAA in accordance with its standards relating to safety. Inspection of airworthiness is undertaken at least every 12 months in accordance with the Civil Aviation (Airworthiness) Regulations 2018 and an aircraft will not be permitted to operate in Kenya if it has not been certified as airworthy.26 In a limited number of scenarios airworthiness exemptions may be available.

Pursuant to the Civil Aviation (Safety Management) Regulations 2018 (the Safety Management Regulations) which regulate aviation safety in Kenya, the KCAA is required to establish a state safety programme (SSP), which is an integrated set of regulations and activities aimed at improving safety in the aviation sector. The Regulations require the SSP to be commensurate with the size and complexity of Kenya’s civil aviation system.27 The SSP will be founded on the state safety oversight system implemented in accordance with the provisions of the CAA, the regulations made under the CAA from time to time, and state systems and functions, among other things. The Regulations require that the SSP will have requirements and set standards relating to, inter alia, safety hazards, maintaining safety on board aircraft and ensuring that an acceptable level of safety is implemented. Aircraft operators, training organisations, approved maintenance organisations, air traffic services providers and organisations responsible for the type, design or manufacturer of aircraft are required to implement a safety management system (SMS) acceptable to the KCAA. The SMS should also be commensurate to the size and complexity of the operations of the above-mentioned bodies and be prepared in accordance with the framework prescribed in the Safety Management Regulations.28 The prescribed framework contains the following minimum elements for SMS implementation:

a safety policy and objectives;

b management commitment;

c safety accountability and responsibility;

d appointment of key safety personnel;

e coordination of emergency response planning;

f SMS documentation;

g safety risk management;

h hazard identification;

i safety risk assessment and mitigation;

j safety assurance;

k safety performance and monitoring;

l the management of change; and

m continuous improvement of the SMS.29


27 Regulation 4 Civil Aviation (Safety Management) Regulations, 2018.


Additionally, the Operation of Aircraft Regulations contain requirements ensuring air safety during flight operations including:

a. a requirement for an operator to establish and maintain a ground training programme that ensures that all flight crew members are adequately trained to perform their assigned duties including training and coordination in all types of emergency and abnormal situations;\(^{30}\)
b. a requirement that an aircraft shall not fly unless it carries crew members of a number and description required by the KCAA;\(^{31}\)
c. a requirement for the operator to establish and maintain training programmes for its crew members on security,\(^{32}\) safe transport of dangerous goods,\(^{33}\) use of all emergency and life-saving equipment required to be carried, and drills in case of an emergency evacuation\(^{34}\) and as required by the Technical Instructions for the Safe Transport of Dangerous Goods by Air issued by the Council of International Civil Aviation (the Technical Instructions);\(^{35}\)
d. a requirement prohibiting any person from carrying dangerous goods in an aircraft unless with written permission from the KCAA and in accordance with the Technical Instructions;\(^{36}\) and
e. a requirement for the KCAA to ensure that operators not approved to transport dangerous goods have established a dangerous goods training programme that meets the requirements of the Technical Instructions, and have established dangerous goods policies and procedures in their operation manual.

In Kenya, a pilot in command of an aircraft is required to observe the rules of the air provided under the Civil Aviation (Rules of the Air) Regulations, 2018 including, observing the visual flight rules and the instrument flight rules. The Rules of the Air Regulations also prohibit any person whose function is critical to the safety of aviation in Kenya from undertaking his functions while under the influence of any psychoactive substance.\(^{37}\)

An operator is required to observe other regulations that facilitate aviation safety including the Civil Aviation (Surveillance and Collision Avoidance System), Regulations, 2018 and the Civil Aviation (Communication Systems) Regulations. The KCAA may also specify on an air operator’s licence conditions relating to safety that require compliance.

V INSURANCE

The Operation of Aircraft Regulations also governs the insurance aspect of civil aviation in Kenya.

All types of aircraft must have an insurance policy in respect of third-party risks.\(^{38}\) The insurance policy for commercial air transport aircraft (passenger, cargo, mail, remuneration

\(^{30}\) Regulation 34 of the Civil Aviation (Operation of Aircraft for Commercial Air Transport) Regulations, 2018.
\(^{33}\) Regulation 87 of the Civil Aviation (Operation of Aircraft for Commercial Air Transport) Regulations, 2018.
\(^{34}\) Regulation 170 of the Civil Aviation (Operation of Aircraft for Commercial Air Transport) Regulations, 2018.
\(^{37}\) Regulation 8 of the Civil Aviation (Rules of the Air) Regulations, 2018.
or hire) must cover: passengers’ liability; cargo; baggage; and mail risks. Notification of the
minimum sum of insurance in respect of third-party risks shall be given by the KCAA. In
accordance with the Insurance Act (Chapter 487, Laws of Kenya), insurance for aircraft
registered in Kenya ought to be taken with a locally registered insurer unless prior approval
from the Commissioner of Insurance has been obtained.\(^\text{39}\) However, a local insurer would be
permitted to reinsure the liability with foreign reinsurers, which is common practice.

Compliance with the insurance requirements extends to aircraft on foreign registers as
well as national registers. Foreign-registered aircraft flying over Kenyan airspace or making a
technical stopover in Kenya (e.g., to refuel) have to provide the KCAA with a copy of their
insurance policy, which must comply with Kenyan insurance requirements.

VI COMPETITION

The Competition Act 2010 (the Competition Act) governs competition matters in Kenya.
The Competition Act deals with restrictive trade practices, mergers, abuse of a dominant
position and consumer welfare. It also establishes the Competition Authority of Kenya, which
is the regulatory body in respect of competition matters; and the Competition Tribunal,
whose function is to hear and determine appeals from those aggrieved by decisions made by
the Competition Authority.\(^\text{40}\)

Cooperation agreements between operators may be construed to be a type of prohibited
agreement under the Competition Act. A prohibited agreement includes an agreement
between parties in a horizontal relationship and parties in a vertical relationship if their
objective or effect is the prevention, distortion or lessening of competition in trade in any
goods or services in Kenya, or a part of Kenya.\(^\text{41}\) Other practices considered to be restrictive
under the Competition Act include directly or indirectly fixing purchase or selling prices;
dividing the market by allocating customers and suppliers; or applying dissimilar conditions
to equivalent transactions with other trading parties.

It is possible to obtain an exemption from the Competition Authority when undertaking
an activity that may be construed as a restrictive trade practice. Kenya Airways and KLM/Air
France have obtained such an exemption in relation to coordinating schedules, setting fares
and using measures to save costs through code-sharing agreements, scheduling alignments
and, where necessary, adjusting capacity on the route between Nairobi and Amsterdam and
beyond.

Kenya is a party to the Common Market for Eastern and Southern Africa (Comesa)
and signed the Common Market for Eastern and Southern Africa Treaty (the Comesa Treaty)
on 5 November 1993. The Comesa Competition Regulations (the CC Regulations), which
were promulgated under Article 55 of the Comesa Treaty, are binding in Kenya and have
wide-reaching implications. The most notable implications of the CC Regulations are the
following:

\(a\) that all mergers (regardless of size) are notifiable to the Comesa Competition
Commission (CCC) if the buyer, the target or both of them ‘operate’ in two or more
Comesa Member States;

\(39\) Section 20 of the Insurance Act (Chapter 487, Laws of Kenya).
\(40\) Section 71(1) of the Competition Act.
\(41\) Section 21(1) of the Competition Act.
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b a penalty of up to 10 per cent of the merging parties' annual turnover in Comesa may be levied if the parties fail to notify the CCC within 30 days of the ‘decision to merge’; and

c the notification attracts a merger fee calculated at 0.1 per cent of the combined annual turnover or combined value of assets in Comesa of the parties to a merger, whichever is higher, provided that the fee does not exceed US$200,000.

VII WRONGFUL DEATH

Kenyan courts have held that the applicable law on wrongful death claims against carriers on international carriage is the CBAA and the Montreal Convention and not normal rules of tort, and accordingly they are subject to the two-year limitation period. Kenyan courts have not made clear pronouncements on whether the Montreal Convention is applicable in Kenya with respect to internal carriage. This has left it to the aviation law practitioners in Kenya to debate on the applicability of the Montreal Convention on internal carriage with one section arguing that it requires the Cabinet Secretary for Transport to make an order for the Convention to apply and the other section arguing that the Convention is applicable by virtue of the Carriage by Air (Application of Convention) Order, 1993 made under the CBAA in respect of the application of the Warsaw Convention to internal carriage. There have been wrongful death claims against Kenya Airways (KQ) before in relation to the January 2000 Abidjan crash. Investigation reports carried out by the French Accident Investigation Bureau revealed that a false stall warner was activated, and in response, the pilots took the aeroplane into a nose dive so as to recover from the stall, but because of the lack of visual reference at night the plane crashed into the sea. KQ compensated the families of 60 deceased Nigerians; each family received 13.4 million Kenyan shillings.

KQ Flight 507 crashed on 5 May 2007 immediately after take-off from Douala International Airport. The Cameroon Civil Aviation Authority released its final report of the crash on 28 April 2010. The investigation found that the aircraft departed without clearance from air traffic control and that loss of control of the aircraft was the result of spatial disorientation and lack of crew coordination. In an out-of-court settlement, KQ compensated the families of the victims with an estimated 1.9 million Kenyan shillings each.

VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

The CBAA gives effect to the liability provisions in the Warsaw Convention. The definition of the Warsaw Convention in the CBAA includes ‘any other convention which may amend or replace the said convention and is ratified or acceded to by the Government’. The Montreal Convention was ratified by Kenya on 7 January 2002 and despite the Kenyan Parliament

45 The Cameroon Civil Aviation Authority, ‘Technical Investigation into the Accident of the B737-800 Registration 5Y-KYA Operated by Kenya Airways that occurred the 5th May 2007 in Douala’ (2010).
not domesticating the Convention to date, the same is applicable in Kenya by virtue of Article 2(6) of the Constitution. Accordingly, the law on liability and settlement in Kenya is the CBAA and the Montreal Convention. In addition, Schedule 2 of the CBAA also contains provisions relating to the liability of a carrier in the event of the death of a passenger. This is as follows:

- **a** liability shall be enforceable for the benefit of members of the deceased passenger’s family who sustains damage by reason of his or her death;
- **b** the action to enforce liability is to be brought by the deceased’s personal representative or a member of his or her family as prescribed by the Schedule;
- **c** only one action shall be brought in Kenya in respect of the death of one passenger;
- **d** the amount recovered from the action shall be divided between entitled persons in such proportions as decided by the court before which the action is brought; and
- **e** the court has powers to make just and equitable orders at any stage of the proceedings in view of the provisions of the Convention limiting liability of the carrier and any proceedings that have been or are likely to be commenced outside Kenya.

An action can be instituted in the High Court of Kenya against the carrier. The CBAA also provides for actions to be instituted before an arbitrator in the circumstances highlighted in the Convention. It is noteworthy that Section 5 of the CBAA provides that references in Section 3 of the Fatal Accidents Act (Chapter 32, Laws of Kenya) to a wrongful act, neglect or default shall include incidents occasioning liability under Article 17 of the Convention. This means that an action for damages can be brought against the carrier by the executor or administrator of the deceased for the benefit of the deceased’s wife, husband, parent or child. The Law Reform Act (Chapter 26, Laws of Kenya) will also apply as it confers rights for the benefit of the estate of the deceased in addition to rights conferred on the dependents by virtue of the Fatal Accidents Act and the Carriage by Air Act.

Section 7 of the CBAA expressly applies the limitation period stated in Article 35 of the Montreal Convention. This provides that no action against a carrier’s servant or agent that arises out of damage covered by the Convention can be brought after more than two years from the date of arrival at the destination; the date on which the aircraft ought to have arrived; or the date on which the carriage stopped.

### ii Carriers’ liability towards passengers and third parties

With the exception of the passenger liability regime established by the CBAA and the Montreal Convention there is no separate regime governing the operator’s liability to passengers and third parties.

### iii Product liability

There is no special aviation regime governing manufacturers’ liability and Kenya does not have an industry involved in the manufacture of aircraft.

An owner’s liability to an operator will prima facie be governed by the contractual agreement between the parties.

Currently, there is no specific statute that expressly governs owners’ liability to passengers.
With respect to third parties, provisions in the CAA make the owner and not the operator of an aircraft liable for material loss or damage caused to any person or property on land or water by: an aircraft; a person in an aircraft or an article; or a person falling from an aircraft while in flight, take-off or landing.

iv Compensation

Under the CBAA, operators are liable to compensate for damage sustained in the event of death or wounding of an air passenger, destruction or loss or damage of baggage and damage occasioned by delay of carriage of air passengers, baggage or cargo.

Kenyan courts have strictly applied the Montreal Convention and in particular the limit provided in Article 21 of the Montreal Convention on compensation in case of injury or death of a passenger. Under Article 21 of the Montreal Convention the damages payable to a passenger are a minimum of 100,000 special drawing rights (SDR) per passenger. The compensation limit shall not exceed 100,000 SDR if the carrier proves that the damage was not due to the carrier’s negligence but due to the negligence of a third party. The sum mentioned in terms of SDR refers to the SDR as defined by the International Monetary Fund. The compensation limit is renewed every five years and is currently at 113,100 SDR (approximately US$150,000 and 15,289,402 Kenyan shillings).

Currently, there is no state-funded social security and medical support scheme for those involved in accidents. Also there are no local laws regarding post-accident family assistance. However, the Fatal Accidents Act (Chapter 32, Laws of Kenya) provides for actions to be brought for the benefit of the deceased’s family whenever the death of a person is caused by a wrongful act, neglect or default is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof.

IX DRONES

Following the annulment of the Civil Aviation (Remote Piloted Aircraft Systems) Regulations, 2017, KCAA started the process of promulgating new regulations to regulate not only the remote piloted aircraft but all unmanned aircraft systems. KCAA has produced the draft Civil Aviation (Unmanned Aircraft Systems) Regulations, 2019 (the Draft UAS Regulations), which has been shared with the public and stakeholders for public participation. The Draft UAS Regulations categorise Unmanned Aircraft Systems (UAS) into low risk, medium risk and high risk depending on the amount of risk the UAS poses to the public and property, and regulates all aspects of UAS including ownership, manufacturing, registration and licensing of UAS personnel. The Draft UAS Regulations also contain provisions on security and privacy of person and property, which were some of the reasons why the first regulations were annulled.

Under the Draft UAS Regulations, a person will be eligible to own a UAS if that person is a Kenyan citizen or a resident in Kenya of at least 18 years of age, a company registered in Kenya or the national government or county government. An owner or operator of a UAS must register the UAS with the KCAA and in determining whether to register the UAS, the KCAA must consider national security and relevant and regional obligations and commitments of Kenya under treaties and agreements, terrorism and organised criminal activities, preservation of regional peace, security and stability among other considerations.

The Draft UAS Regulations require any person who operates a UAS to apply for and be issued with a Remote Aircraft Operator Certificate.
X VOLUNTARY AND MANDATORY REPORTING

The Civil Aviation (Aircraft Accident and Incident Investigation) Regulations 2018 (the Aircraft Accident and Incident Regulations) require the Aircraft Accident Investigation Department (the AAI Department) of the KCAA to establish a mandatory incident reporting system and a voluntary incident reporting system. Any person having knowledge of any safety related event other than an accident or incident may make a voluntary report to the AAI Department and provide any information that the person believes is relevant. The Aircraft Accident and Incident Regulations encourage voluntary reporting to the AAI Department by providing that the details of the person making a voluntary report should not be revealed and guaranteeing that the voluntary report shall not be used against the person who made the report.

Additionally, the Safety Management Regulations require the KCAA to establish a voluntary safety reporting system to collect safety data and safety information not captured in the compulsory reporting system. An operator or other aviation service provider is also required to establish a voluntary safety reporting system to facilitate collection of information on actual or potential safety deficiencies that may not be captured by the compulsory safety reporting system. The safety reporting system should not be punitive and shall afford protection to the source of the information.

Both the Aircraft Accident and Incident Investigation and the Operation of Aircraft Regulations contain procedures on mandatory reporting of incidents and accidents. A pilot-in-command (PIC) is required to notify the nearest appropriate authority, by the quickest available means, of any accident involving the aircraft that results in serious injury, death of any person or substantial damage to the aircraft. The PIC should also submit a report to the KCAA of any accident that occurred while he or she was responsible for the

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46 ‘Accident’ means an occurrence associated with the operation of the aircraft that, in case of a manned aircraft, takes place between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked, or in the case of an unmanned aircraft takes place between the time the aircraft is ready to move with purpose of flight until such time as it comes at the end of the flight and the primary propulsion system is shut down, in which a person is fatally or seriously injured as a result of being in the aircraft, or direct contact with any part of the aircraft, including parts that have become detached from the aircraft, or direct exposure to jet blast (except when the injuries are from a natural cause, self-inflicted or inflicted by other persons, or when the injuries are to stowaways hiding outside the areas normally available for the passengers and the crew); or the aircraft sustains damage or structural failure that adversely affect the structural strength, performance or flight characteristics of the aircraft; and that would require major repair or replacement of the affected component (except for engine failure or damage, when the damage is limited to a single engine (including its cowlings or accessories), to propellers, wing tips, antennas, probes, vanes, tires, brakes, wheels, failings, panels, landing gear doors, windscreen, the aircraft skin (such as small dents or puncture holes), or for minor damages to main rotor blades, tail rotor blades, landing gear, and those resulting from hail or bird strike (including holes in the radome) or the aircraft is missing or completely inaccessible). Regulation 2 Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.

47 ‘Incident’ means an occurrence, other than an accident associated with the operation of an aircraft which affects or could affect the safety of operation. Regulation 2 Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2013.

48 Regulation 20 of the Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.

49 Regulation 13 of the Civil Aviation (Safety Management) Regulations, 2018.

50 ‘Authority’ in this instance means the KCAA. Regulation 2 Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.

flight. Where an accident or incident occurs in or outside Kenya, the relevant person shall, as soon as practicable after he or she becomes aware of the accident or serious incident, notify the chief investigator or the nearest air traffic service by the quickest means of communication available. The notification is to be made by the relevant person no later than 24 hours after becoming aware of the accident or serious incident through a written notice to the chief investigator. Flight crew members or the operator of an aircraft involved in an accident or incident shall file a report with the Air Accident Investigation Department in the format prescribed by the chief investigator. This should be done within 10 days of the occurrence or within 30 days for an overdue aircraft that is still missing. Each flight crew member involved in an accident or incident shall, if physically able and whenever the circumstances of the occurrence allow, submit a written account of events of the accident or incident to the investigator-in-charge within 72 hours after the occurrence. If the crew member is not able to submit the written account within the stipulated time, the crew shall submit the statement as soon as practicable.

The investigator-in-charge may, by summons under his or her hand, call before him or her and examine any person as he or she deems appropriate; and require such person to answer any question or furnish any information, or produce any books, papers and articles that he or she may consider relevant, and retain any such books, papers, documents and articles until the completion of the investigation.

The final report shall be released to the interested parties in accordance with the Aircraft Accident Regulations and be made publicly available after the release.

There is no substantive law in Kenya for the protection of whistle-blowers and there has been a persistent cry from certain sections of the public and the justice sector for such a law to be enacted. Some existing legislation does contain provisions that protect informants and witnesses. For example, Section 21 of the Bribery Act protects a whistle-blower, informant or a witness in a complaint case of bribery from intimidation or harassment. The Act criminalises disclosure of details of whistle-blowers or any form of harassment. In the aviation industry and, in particular, in mandatory and voluntary reporting, Regulation 13(2) of the Aircraft Accident and Incident Regulations requires a voluntary safety reporting system established by service providers to be non-punitive and to afford protection to sources of information.

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53 A relevant person means the pilot-in-command, operator or the owner of the aircraft at the time of the accident or serious incident, or where the accident or serious incident occurs on or adjacent to an aerodrome in Kenya, the owner or operator of the aerodrome. Section 2 of the Civil Aviation Act No. 21 of 2013.
54 A chief investigator is a person appointed by the Cabinet Secretary to be responsible for aircraft accident and incident investigations.
55 Regulation 8(1) Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.
56 Regulation 8(2) Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.
57 Regulation 8(5) Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.
58 An Investigator-In-Charge is a person charged, on the basis of his or her qualifications and experience, with the responsibility for the organisation, conduct and control of an investigation. Regulation 2 of the Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.
59 Regulation 8(7) Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.
60 Regulation 8(8) Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.
61 Regulation 14(3) Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.
62 Regulation 18 Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.
63 Regulation 19 Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.
XI  THE YEAR IN REVIEW

With an improving regulatory climate in Kenya generally, and East Africa offering attractive investment opportunities, Nairobi continues to be a regional hub for passenger and cargo traffic into the East African region and elsewhere on the continent.

The national flag carrier, KQ, is ranked among the best airlines in Africa and the second best in East Africa after Ethiopian Airlines. KQ commenced daily direct flights to New York, United States for the first time with the maiden flight taking off from Jomo Kenyatta International Airport, Nairobi (JKIA) on 28 October 2018. There are also plans to fly KQ directly to Washington and Atlanta upon establishment of a suitable codeshare agreement with US Airlines. KQ has also increased frequencies on some of its routes within Africa and resumed its Rome and Geneva services on 12 June 2019 after stopping in 1991. KQ scored highly on safety in a recent audit conducted by the International Civil Aviation Organization. The airline scored 78 per cent, which was an improvement from the previous score of 66 per cent in 2008.

As part of the plans to enhance the East Africa hub role of JKIA and in support of the JKIA turnaround strategy, the government through a Cabinet Memorandum (CAB 18/28) proposed a 30-year concession agreement between KQ and the Kenya Airports Authority (KAA) under which KQ was to operate, manage and develop the JKIA through a special purpose vehicle at a concession fee. The government indicated that the proposed concession was to implement its policy which seeks to consolidate key aviation assets to realise significant operational efficiencies and synergies, restoration of the aviation sector's regional and international competitiveness, protection of JKIA's regional hub status, improved diversification and utilisation of JKIA's resources and support for KQ's turnaround. Subsequently, the concession transaction was commenced by a privately initiated investment proposal (PIIP) by KQ to the KAA but the same has been halted because of misplaced political influence and resistance from certain politicians and stakeholders including the National Assembly's Public Investment Committee (PIC). In recommending postponement of the concession transaction, PIC observed that among other reasons for postponement, the transaction was being rushed despite concerns of the transaction's financial viability and concerns on loss of jobs at the KAA and that the KAA was a profit-making state corporation while KQ has been posting losses in its most recent financial statements. Recent news indicates that KQ plans to abandon the concession and try other profit-making ventures.

The cargo express centre established at JKIA in 2017 has increased efficiency in e-commerce logistics, cargo-handling service, electronic customers’ clearance and airport ground-handling services. The express cargo centre is now exporting Kenyan-grown flowers to Sydney and Melbourne, Australia. KQ partnered with the Australian airline Qantas Airways to transport flowers via Johannesburg into Sydney and Melbourne. This venture is expected to see KQ cargo carry over 30 tonnes of flowers to Australia every month, a measure that KQ hopes will increase its revenue as part of the turnaround strategy.

The KAA finalised the first phase of the expansion of the Malindi International Airport in 2017 but the project has not been finalised. Businesses in the coastal town, especially hotel businesses, have complained that the delay in finishing the airport is hurting their business.

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64 Flymags ranks KQ as the fifth best airline in Africa and the third best in East Africa after Ethiopian Airlines and RwandAir and the African Exponent in 2018 ranked KQ the fifth best airline in Africa and the second best in East Africa after Ethiopian Airlines.
65 Routes.
Tourists who want to travel to Malindi have to fly to Nairobi then to Moi International Airport in Mombasa before travelling by road to Malindi. The second phase of the airport is expected to include expansion of the runway from 1.4km to 2.5km. The Isiolo International Airport that was one of the Vision 2030 (the economic blueprint for the country and at the heart of government policy) flagship projects was also completed and is now in use. The construction of a vital access road known as Port Reitz – Moi International Airport Access Road in Mombasa has improved access to and from Moi International Airport in Mombasa. The construction of a runway at Kisumu International Airport is still ongoing. The project includes the construction of a parallel taxiway, cargo apron and public car park.

Additionally, the penetration of low-cost airlines in the Kenyan market has increased following the construction of new airports and airstrips. The Western Kenya route has increased flight frequency from new airlines stepping up competition for existing airlines such as KQ, Jambojet, Fly540 and Britex Airlines. Freedom Airline Express started its maiden flights to Kisumu International Airport in mid 2018 and Safarilink Aviation Limited started operations to the airport at the end of 2018.

XII OUTLOOK

As part of the Vision 2030 objectives, which seek to make Kenya a middle-income economy by 2030, the Kenyan government has identified infrastructural development as an enabler of Kenya’s transformation.

Kenya will join Rwanda as the second African country to regulate the commercial use of drones once the Cabinet Secretary and the KCAA formulate the new UAS regulations (see Section IX). There are plans by Astral Aviation, a Kenyan-based logistics firm to set up a drone academy in Kenya to train drone pilots and Unmanned Aerial Vehicle operators and has already applied for a licence from KCAA. If approved, Kenya will be the second country in Africa (after South Africa) to have such a training facility. Astral Aviation had also proposed to open up a drone airport at Kapese airstrip in Lokichar in a move seen as a means to tap into the opportunities arising from oil exploration activities in the region. This facility will be the first of its kind in Africa and it was expected to be ready by February 2018. At the time of writing, no revised date has been given.

In addition, KQ has aborted its initial plan to buy Boeing 737 Max aircraft following the recent Ethiopian Airline crash and instead it will buy the larger 757 Dreamliner or acquire planes from Boeing’s rival Airbus SE. The acquisition of the aircraft will enable the national flag carrier to achieve its expansion strategy.
Chapter 25

MALAYSIA

Chong Kok Seng and Chew Phye Keat

I INTRODUCTION

The main legislation in relation to civil aviation in Malaysia is the Civil Aviation Act 1969 (the CAA 1969), the subsidiary legislation made thereunder (the Civil Aviation Regulations 2016 (the CAR 2016)), the Malaysian Aviation Commission Act 2015 (MACA), which came into force on 1 March 2016 and the Civil Aviation Authority of Malaysia Act 2017 (CAAMA), which came into force on 19 February 2018.

With the establishment of the Malaysian Aviation Commission (MAVCOM) in 2016 and the coming into force of the CAAMA, the area of civil aviation is now under the joint purview of MAVCOM and the Civil Aviation Authority of Malaysia (CAAM), both of which are under the supervision of the Ministry of Transport (the Ministry). The Aviation Division of the Ministry was previously responsible for all civil aviation affairs in Malaysia and the Department of Civil Aviation (DCA) (now replaced by the CAAM) was established to help achieve and administer the objects and policies of the Ministry. The objectives of the Division are to develop an efficient, economical and safe air transport system for passengers and cargo, and to plan and implement infrastructural projects to meet the demands of air transport.

With the establishment of MAVCOM, the responsibilities of the CAAM (formerly DCA) have become more streamlined, and the CAAM is now essentially the technical regulator in the areas of security, safety and airline and airport supervision. Prior to the coming into force of the CAAMA, the Director General of the DCA (DGCA) was empowered under Section 2B of the CAA 1969 to:

a. exercise regulatory functions in respect of civil aviation and airport and aviation services including the establishment of standards and their enforcement;
b. represent the government of Malaysia in respect of civil aviation matters and to do all things necessary for this purpose;
c. ensure the safe and orderly growth of civil aviation throughout Malaysia;
d. encourage the development of airways and airport and air navigation facilities for civil aviation;
e. promote the provision of efficient airport and aviation services by licensees; and
f. promote the interests of users of airport and aviation services in Malaysia in respect of the prices charged for, and the quality and variety of, services provided by licensees.

1 Chong Kok Seng is a partner and Chew Phye Keat is a senior partner at Raja, Darryl & Loh.
2 The Civil Aviation Regulations 2016 came into force on 31 March 2016.
4 The Aviation Division is made up of six units: Air Transport, Airport Services, Hubbing and Aerospace Industry, Licensing and Regional Cooperation, Rural Air Services, and Safety and Convention.

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With the coming into force of the CAAMA, all the duties and functions of the DCA have been conferred on the CAAM. Section 16 of the CAAMA sets out the functions of the CAAM, which covers the duties and functions of the DGCA under the CAA 1969, and further expands upon these to include, among others, safeguarding the civil aviation industry against unlawful interference, cooperating with any authority in charge of investigating aircraft accidents and serious incidents, and providing technical and consultancy services relating to civil aviation. The CAAM is headed by a chief executive officer (the CAAM CEO), who is appointed on the advice of the Minister of Transport. Further, the Civil Aviation Authority of Malaysia Fund will be established and will be administered and controlled by the CAAM. The decision to set up the CAAM was in line with the International Civil Aviation Organisation’s (ICAO) call for each contracting state of the Chicago Convention to establish and maintain an autonomous civil aviation authority to ensure that civil aviation safety is efficiently managed. The Civil Aviation (Amendment) Act 2017 has been passed to make the necessary amendments to the CAA 1969 when the CAAMA came into force.

MAVCOM meanwhile serves as the economic regulator in relation to civil aviation in Malaysia, with the goal of promoting a commercially viable, consumer-oriented and resilient civil aviation industry that supports the nation’s economic growth. Section 19 of the MACA provides that MAVCOM shall consult the CAAM on technical, safety and security or other related issues. The functions of MAVCOM as set out in Section 17 of the MACA are to:

- regulate economic matters relating to the civil aviation industry;
- provide a mechanism for the protection of consumers;
- provide a mechanism for dispute resolution between the providers of aviation services;
- administer, allocate and manage air traffic rights;
- monitor slot allocation for airlines or other aircraft operators;
- administer and manage public service obligations;
- facilitate and coordinate matters of interest to the Malaysian civil aviation services and government agencies, locally and internationally; and
- perform any other functions that are incidental or consequential to any of its functions under the MACA.

Under the MACA, MAVCOM is responsible for the issuance and renewal of air service licences and permits, ground-handling licences and aerodrome operator licences. Applications for such licences are processed and approved by MAVCOM (provided all the requirements and necessary payments are fulfilled).

The first amendment of the MACA came into force on 9 February 2018 (Malaysian Aviation Commission (Amendment) Act 2018), whereby it further expanded the scope of its authority. For instance, MAVCOM now has the authority to allocate air traffic rights for not just international routes, but also domestic routes. In relation to charges and financial penalties, the amendment has allowed MAVCOM to implement an RM1 regulatory charge that is part and parcel of the airline ticket prices, as a means to fund its operational costs; and penalties for non-compliance with any MAVCOM-issued guidelines have also been imposed.

There is no express restriction under Malaysian laws in relation to investments in or the setting up of aircraft operators, airport operators, public air transportation providers, aircraft maintenance companies and the like. Nonetheless, because their activities require licences that are granted at the discretion of the CAAM and MAVCOM, the CAAM and MAVCOM effectively control investments in licensees.
Similarly, in relation to aircraft operators, while there is no express provision as to their ownership structure under Malaysian law, for an airline to enjoy the traffic rights and privileges agreed by the government of Malaysia with another member state of the Chicago Convention (as defined below), it must be ‘substantially owned and effectively controlled by the party designated by Malaysia or its nationals’.5

On 7 April 1958, Malaysia ratified the Convention on International Civil Aviation 1944 (the Chicago Convention) and became a party to the International Air Services Transit Agreement in relation to transit and traffic rights with effect from 31 May 1945.

With respect to interests in aircraft equipment, Malaysia has acceded to the Convention on International Interests in Mobile Equipment (the Cape Town Convention) and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment in 2005, and the Cape Town Convention and the said Protocol came into force in Malaysia on 1 March 2006.

With regard to labour and employment issues in the aviation sector, there are no specific provisions addressing these under the CAA 1969; hence the general labour law will be applicable.

II  LEGAL FRAMEWORK FOR LIABILITY

i  International carriage

Malaysia has ratified four conventions in relation to the international carriage of passengers, baggage and cargo by air:

a the Warsaw Convention 1929, as amended at The Hague 1955 (the Warsaw–Hague Convention), which is given the force of law by virtue of the First Schedule to the Carriage by Air Act 1974 (the CAA 1974);

b the Warsaw–Hague Convention further amended by Montreal Protocol No. 4, which is given the force of law by virtue of the Fifth Schedule to the CAA 1974 (the Amended Convention);

c the Guadalajara Convention 1961, which is given the force of law by virtue of the Second Schedule to the CAA 1974 (the Supplementary Convention); and

d the Montreal Convention 1999, which is given the force of law by virtue of the Sixth Schedule to the CAA 1974 (the Montreal Convention).

The conventions listed above will be referred to as the Carriage by Air Conventions for the purposes of this chapter.

The Carriage by Air Conventions are self-contained regimes whereby any claim against a carrier falling within the ambit of the conventions will be subject to the conditions and limitations of liability as provided in Article 22 of the Warsaw–Hague Convention, Article 22 of the Amended Convention and Articles 21, 22 and 44 of the Montreal Convention, regardless of the nature of the proceedings by which the claim may be enforced. For the conventions to apply, inter alia, the carriage in question must fall squarely within the special definition provided for international carriage under the Carriage by Air Conventions (Convention Carriage).

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5 International Air Services’ Transit Agreement, Article I, Section 5.
Pursuant to Section 9 of the CAA 1974, the Yang di-Pertuan Agong may, by order, direct that the Carriage by Air Conventions shall apply to or shall cease to apply to any carriage of persons, baggage or cargo for the military authorities of a state to which this section applies in aircraft registered in that state if the whole capacity of the aircraft has been reserved by or on behalf of those authorities. However, no such order has been issued by the Yang di-Pertuan Agong thus far.

At the time of writing, Malaysia has yet to accede to any international convention that regulates the liability of air carriers to third parties on the ground, such as the Rome Convention 1952 on Damage Caused by Foreign Aircraft to Third Parties on the Surface as amended at Montreal in 1978 and the Montreal Convention 2009 on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft.

**ii Internal and other non-convention carriage**

The Carriage by Air (Application of Provisions) Order 1975 (the 1975 Order) governs carriage by air not within the ambit of the Warsaw–Hague Convention (the 1975 Order (Other Carriage)). This order, in essence, adopts the provisions of the Warsaw–Hague Convention as supplemented by the Guadalajara Convention to govern such non-convention carriage with certain minor exceptions and amendments to facilitate the adaptation of these conventions.

The 1975 Order is applicable to (1) non-convention carriage of persons, baggage or cargo performed by aircraft for reward, (2) non-convention gratuitous carriage by aircraft performed by an air transport undertaking, the state or by legally constituted public bodies, and (3) carriage of mail and postal packages.

Other notable exceptions or amendments include the omissions of Chapter II in relation to ‘passenger tickets’, Article 28 in relation to the jurisdiction in which a claim must be made and Article 40A in relation to deemed territory.

Further, the Minister is empowered under the 1975 Order to exempt, subject to such conditions as he thinks fit, any carriage or any person from any of the requirements imposed by the 1975 Order.

The provisions of the 1975 Order relating to the carriage of passengers, baggage or cargo are similar to those set out in the Warsaw–Hague Convention; thus the liability of the carrier for the death or injury of passengers, delay, loss or destruction of baggage or cargo and the limitations thereto are the same as under the Warsaw–Hague Convention.

While it may appear that all non-convention carriages would fall within the 1975 Order, this is not the case. There are certain special categories of carriage that do not fall within the Carriage by Air Conventions or the 1975 Order (Other Carriage). An example would be gratuitous carriage not performed by an air transport undertaking (i.e., by an individual). Such carriage is subject to the ordinary law with regard to carriers. There are a few Malaysian cases in which the application of common law rules to aircraft operation has been discussed, but it seems likely that the courts will proceed by analogy with cases relating to the operation of the various forms of land and water transport.

6 The head state of Malaysia.

iii  General aviation regulation

In Malaysia, liability in the operation of civil aviation aircraft is governed by the CAA 1969 and the CAR 2016. The CAR 2016 regulates various aspects of civil aviation, including but not limited to, registration of aircraft, licensing of aircraft operators, crew and engineers, detention and sale of aircraft, investigations of aircraft accidents, operation of aircraft and mortgage of aircraft. Non-compliance with these requirements may attract criminal liability.

Further, the CAA 1969 also imposes civil liability on owners or lessees, as the case may be, for any material damage that is caused by an aircraft in flight, take-off or landing, or by any person in any such aircraft, or by any article falling from any such aircraft onto any person or property whether on land or water.

The definition of the term ‘aircraft’ under the CAR 2016 is very wide and includes any machine that can derive support in the atmosphere from reactions of the air, other than reactions of the air against the surface of the earth. This definition covers non-power driven objects such as a free balloon, a captive balloon and a glider, as well as any power-driven flying machine such as an airship, an aeroplane, a rotorcraft, a helicopter or gyroplane, an ornithopter and a microlight aeroplane. Accordingly, the CAA 1969 and the CAR 2016 are equally applicable to these air objects though the requirements may differ from commercial aircraft.

iv  Passenger rights

Where the carriage by air is a Convention Carriage, the liability provisions for delay, damage or destruction of baggage and cargo under the Warsaw–Hague Convention or the Montreal Convention (if this has been adopted by the states) would be applicable subject to the limitations therein.

Where the carriage by air is a 1975 Order Carriage, the liability for delay, damage or destruction of baggage and cargo is governed by the 1975 Order. As noted in subsection ii, the 1975 Order in essence adopts the Warsaw–Hague Convention with a few modifications. In this regard, the liability provision for delay and the limitation provisions under Articles 19 and 22 of the Schedule to the 1975 Order are the same as Articles 19 and 22 of the Warsaw–Hague Convention.

Notwithstanding the aforesaid, however, in the case of *Malaysian Airline System Bhd v. Malini Nathan & Anor* [1986] 1 MLJ 330, the court held that Article 19 of the Montreal Convention only applies in a case where, under the contract of carriage, the time for the carriage is fixed. In this case, there was a condition in the contract of carriage providing that the ‘times shown in the timetables or elsewhere are not guaranteed and form no part of this contract’. The judge, on the basis of Article 3(2) of the Montreal Convention, interpreted this condition to be part of the condition of carriage and hence found that there was no delay occasioned. Accordingly, until the aforesaid case is overruled, notwithstanding the adoption of the Carriage by Air Conventions or the 1975 Order, passengers of commercial airlines who experience flight delays would not seem to be able to claim relief other than the remedies set out in the conditions of carriage, which usually involves a seat on the next available flight and some compensation for meals or accommodation, where applicable.

With effect from 1 July 2016, all airlines operating into or out of Malaysia, and all airports in Malaysia are required by law to comply with the Malaysian Aviation Consumer Protection Code 2016 (the Code). The Code addresses, inter alia, minimum service levels and standards of performance for airlines and aerodrome operators, air passengers’ rights covering denied boarding, flight delays, compensation for lost, damaged or delayed baggage, and the
handling of complaints. MAVCOM has the power to investigate any consumer complaints that it receives and to assist consumers and aviation service providers in the resolution of complaints. Under Paragraph 22 of the Code, MAVCOM may impose a financial penalty of up to 200,000 ringgit for non-compliance with certain provisions of the Code, and in the case of a second or subsequent non-compliance, an amount 10 times the financial penalty imposed for the first non-compliance. Late in 2018, AirAsia Berhad and AirAsia X Berhad were imposed a financial penalty amounting to 160,000 ringgit respectively for advertising misleading air ticket prices. Both entities have made the full penalty payment to MAVCOM on 26 October 2018 and 9 November 2018, respectively.8

With regard to the rights of disabled passengers, Sections 26 and 27 of the Persons with Disabilities Act 2008 require the providers of public facilities and public transport facilities to give appropriate consideration and take necessary measures to ensure that the facilities, amenities and services provided conform to universal designs to facilitate access and use by disabled persons. In conjunction with this, the airport operators should ensure that equipment such as aerobridges and wheelchairs are always made available to assist passengers with reduced mobility. Until recently, Malaysia had not passed any legislation to cater for the rights of disabled persons and persons with reduced mobility when travelling by air. With the recent coming into force of the Code, the non-discrimination of persons with disabilities has been addressed in Paragraph 9 and the Second Schedule of the Code. Among other things, an airline must ensure that all of its personnel providing direct assistance to disabled persons have knowledge of how to meet the needs of these persons, and shall provide disability-equality training to personnel working at the aerodrome who deal directly with the travelling public. The Second Schedule of the Code sets out the assistance and arrangements that all airlines are required to provide to persons with disabilities during every step of their journey. This includes making all reasonable efforts to arrange seating to meet the needs of individuals who are disabled or have reduced mobility, and where a disabled person is assisted by an accompanying person, making all reasonable efforts to give that person a seat next to the disabled person.

III LICENSING OF OPERATIONS

i Licensed activities

An aircraft operator in Malaysia would be required to obtain an air operator certificate from the CAAM to operate Malaysian-registered aircraft for the purpose of commercial air transport. Pursuant to the CAR 2016, a person holding an air operator certificate shall be subject to the terms and conditions as may be imposed by the CAAM and shall comply with the terms as specified in the operations specifications. An aircraft operator would also be required to submit an operations manual to the CAAM for approval, establish a ground and flight training programme and include a flight data analysis programme as part of its safety management system. The CAAM may issue a certificate of validation for any foreign air operator certificate granted under the law of any foreign state.

An air service licence or permit is also required from MAVCOM for the provision of air service (i.e., the carriage of passengers, mail or cargo for hire or reward, whether scheduled or non-scheduled, but not including flights carried on under the terms of any

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8 ‘MAVCOM fines AirAsia, AirAsia X for misleading ticket prices’, New Straits Times, 4 December 2018.
agreement or arrangement entered into by the government). The applicant would need to complete the form prescribed by MAVCOM and submit, inter alia, details or information relating to its organisation structure, shareholding structure, financial status and projection, proposed business plan for the next five years, proposed aircraft, aircraft insurance, leasing and financing of the aircraft, complaints management procedure and aircraft maintenance.

MAVCOM, in exercising its discretion to grant or to refuse an air service licence or permit, may impose any conditions and shall have regard to, inter alia, whether the applicant is a company incorporated in Malaysia and is directly under the control of a Malaysian company, as well as the ownership structure of the applicant; demand for air transport in the proposed areas of operation; the experience and competency of the management team of the company; the feasibility of the proposed business plan; the financial viability of the business; and the existence of other similar services, their efficiency and regularity in the industry. The MACA contains provisions to facilitate the transition from the CAA 1969 or the CAR 2016 to the MACA in respect of licences and permits. Section 100 of the MACA provides that a person who holds a valid licence or permit issued to him or her under the CAA 1969 or the CAR 2016, or any air traffic right allocated to him or her for domestic or international service by the Ministry before 1 March 2016 shall continue to be authorised under the MACA until the expiry date of the licence, permit or right, and subject to the terms and conditions attached to the licence, permit or right. Other than the aforesaid activities, flight crews (i.e., pilot and flight engineers) and aircraft maintenance engineers are also required to be licensed by the CAAM.

Lastly, while not specifically a licence, every aircraft (other than aircraft registered with the registry of a member state of the Chicago Convention) is required to be registered with the CAAM and maintain an airworthiness certificate from the CAAM to fly into or over Malaysia.

ii Ownership rules

As stated above, there is no express law enacted or rule issued that prescribes or imposes any ownership rules in relation to an air operator. However, because of bilateral air service agreements signed by Malaysia with other countries, for a local air operator to enjoy the rights under such agreements, the air operator is required to be ‘substantially owned and effectively controlled by the party designated by Malaysia or its nationals’. The percentage of foreign ownership in an air operator allowed by the CAAM can reach 49 per cent.11

Aircraft owned by foreigners can be registered with the CAAM in Malaysia if the aircraft is leased to a Malaysian entity or individual, or to the government of Malaysia. Except as stated, only aircraft owned by the government of Malaysia, a citizen of Malaysia or a body corporate incorporated and having its principal place of business in Malaysia can be registered with the CAAM in Malaysia.

9. Does not include gliders, kites, captive balloons, small balloons, meteorological pilot balloons used exclusively for meteorological purposes, free balloons without payloads, small unmanned aircraft or small unmanned surveillance aircraft, according to Paragraph 4(3) of the CAR 2016.
10. Malindo Air is a joint venture between National Aerospace and Defence Industries of Malaysia and Lion Air of Indonesia.
11. Presenna Nambiar, ‘Shareholders of Malindo Air to meet’, The Sun, 23 May 2014.
iii Foreign carriers

A foreign carrier must obtain an air service licence from MAVCOM. Generally, however, such a licence is issued only where the country of registration of the foreign carrier has entered into a bilateral or multilateral air service agreement with Malaysia.

IV SAFETY

The general rules relating to matters such as the airworthiness of aircraft, maintenance of aircraft, aircraft crew and licensing, operation of aircraft, conduct of operations, air traffic control and investigation of accidents are prescribed in the CAR 2016.

Further to this, airworthiness notices have been published by the CAAM from time to time pursuant to the CAA 1969 to prescribe or supplement the requirements relating to maintenance of aircraft and components, certification or airworthiness of types of aircraft and components, training organisations, licences for maintenance engineers and so on.

For example, in respect of the airworthiness of an aircraft, a certificate of airworthiness is required to be obtained from the CAAM before the import or export of an aircraft. The certificate of airworthiness (whether issued by the CAAM or another state) is also a necessity for the operation of the aircraft.

In relation to maintenance, an aircraft registered in Malaysia must be maintained in accordance with the maintenance programme approved by the CAAM and there must be in force a maintenance release issued by a person who holds a certificate of approval or a person who holds an aircraft maintenance licence under the CAR 2016, confirming that the maintenance work to which the document relates has been completed in a satisfactory manner, either in accordance with the approved data and the procedures described in the maintenance organisation’s procedures manual, or under an equivalent system.

Other than safety requirements imposed on operators as set out above, certain international conventions in relation to the safety of passengers have also been given the force of law by virtue of the Aviation Offences Act 1984 (AOA 1984). In essence, Part IV of the AOA 1984 gives effect to: the Montreal Convention 1971 for the Suppression of Unlawful Acts Against the Safety of Civil Aviation; and the Montreal Protocol 1988 for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation.

V INSURANCE

Article 50 of the Montreal Convention provides that state parties shall require their carriers to maintain adequate insurance covering their liability under the Convention and a carrier may be required by the state party in which it operates to furnish evidence that it maintains adequate insurance covering its liability under the Convention.

There is no other express Malaysian legislation or regulation prescribing the requirements on insurance for carriers, but an applicant for an air service permit or air service licence (i.e., an air operator) will have to provide to MAVCOM, as part of its application, details of the proposed insurance to be taken out by the applicant for liability to passengers, liability to third parties, liability in respect of cargo and baggage, and injury and loss as a result of active hostilities or civil unrest.

12 For the requirements to obtain an air service licence, see Section III.i.
VI COMPETITION

In Malaysia, competition law is generally governed by the Competition Act 2010 (the CA 2010). However, with the MACA coming into force on 1 March 2016, competition matters relating to commercial activity, agreements and mergers within the aviation industry are now specifically regulated under the MACA. The three key prohibitions under the MACA are the prohibitions against:

a. horizontal and vertical agreements that have the object or effect of significantly preventing, restricting or distorting competition in any aviation service market;
b. the abuse of a dominant position by an enterprise having a dominant position in any aviation service market; and
c. mergers that have the effect of substantially lessening the competition in any aviation service market.

While the first and second prohibitions reflect existing provisions in the CA 2010, the provisions on merger control are new and have been introduced into Malaysian legislation on competition for the first time. Under the MACA, a merger occurs if any of the following occurs:

a. two or more previously independent enterprises merge into one;
b. one or more individuals or enterprises acquire control of another enterprise;
c. an enterprise acquires assets of another enterprise which results in the former enterprise replacing the latter in the business; or
d. a joint venture is created to perform, on a lasting basis, all the functions of an autonomous economic entity.

The regulator of the MACA is MAVCOM, which also acts as the enforcement agency under the MACA. The various enforcement remedies available to MAVCOM under the MACA include a financial penalty of up to 10 per cent of worldwide turnover, interim measures and compliance orders. There is a leniency regime in place and MAVCOM may offer leniency to enterprises that have admitted involvement in an infringement and have significantly assisted MAVCOM in other infringement investigations. MAVCOM also has the power to accept undertakings in lieu of penalties. Any person aggrieved by the decision (which includes an act, omission, refusal, direction or order) of MAVCOM has the right to appeal to the High Court within the period of three months beginning from the date on which the decision was communicated to the person aggrieved.

Since the MACA is a relatively recent legislation, there has not been any infringement case to date. However, prior to MAVCOM taking over from the Malaysian Competition Commission (MyCC), which is the regulator under the CA 2010, there was in fact an aviation case under the CA 2010. The MyCC took action against Malaysian Airline System Berhad (MAS), AirAsia Berhad and AirAsia X Sdn Bhd for a collaboration agreement that was purported to have anticompetitive elements. The agreement was alleged to have been entered into among the parties to allow them to operate freely within separate market segments in the airline industry and to impose higher prices to maximise profitability. The MyCC concluded that such an agreement infringed Section 4(2)(b) of the CA 2010, which prohibits horizontal agreements between competitors with the object of sharing markets. In response to MAS’s

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13 The MACA came into force on 1 March 2016.
contention that the MyCC had failed to conduct any ‘anticompetitive effects’ analysis in arriving at the proposed decision, the MyCC relied on Paragraph 2.14 of the Guidelines on Anti-Competitive Agreements that provided that the anticompetitive effect of the agreement need not be examined once the anti-competitive object is shown.

In February 2016, the Competition Appeals Tribunal unanimously overturned the MyCC’s ruling and ordered a refund of the 10 million ringgit fines levied against MAS and AirAsia, stating that they had reviewed the case and determined that the collaboration agreement had not infringed Section 4(2) of the CA 2010.

VII  WRONGFUL DEATH

Sections 7 and 8 of the Civil Law Act 1956 (CLA 1956) provide for damages that may be claimed for causing wrongful death. The two claims that arise from wrongful death are namely, the dependency claim under Section 7 of the CLA 1956 and the estate claim under Section 8 of the CLA 1956. As the name suggests, the dependency claim is brought for the benefit of the deceased’s statutory dependants and such action is brought to compensate the dependants for the loss of support they have suffered, together with expenses reasonably incurred. Generally, the damages claimed under Section 7 may be divided into: general damages, special damages and bereavement. General damages are the damages awarded for the financial loss sustained by the dependant occasioned by the deceased’s death, which is, in essence, the loss of dependency. Special damages are the damages awarded for expenses reasonably incurred by the dependants as a result of the defendant’s tort, including, but not limited to, the funeral expenses. As for bereavement, Section 7(3A) of the CLA 1956 has specified 10,000 ringgit as the sum to be awarded and Section 7(3B) clarifies that it can only be claimed by a spouse in respect of the other spouse’s death, or by the parents of the deceased where the latter was an unmarried child (minor).

In addition to the aforesaid claim for the loss of dependency, the other type of damages that may be awarded arising from wrongful death is the estate claim under Section 8 of the CLA 1956. Different from the dependency claim, the estate claim is brought for the benefit of the estate of the deceased. There are two heads of damages, being special damages and general damages. Special damages awarded under Section 8 are similar to those awarded under Section 7. However, general damages awarded under Section 8 are different from the general damages awarded under Section 7. As explained above, Section 7 addresses the issue of compensation to the dependants of the deceased for loss occasioned by his or her death, which is essentially for the benefit of the dependants. Section 8, however, is a claim brought for the benefit of the deceased. General damages claimed under Section 8 are not a claim for the loss of dependency but for the pain and suffering or loss of amenities of the deceased. To successfully claim for the pain and suffering or the loss of amenities, the claimant must be able to prove that, there was a lapse between the accident and the death of the deceased, and in respect of the claim for the pain and suffering, the claimant must additionally show that the deceased was conscious so as to be able to have felt the pain.

VIII  ESTABLISHING LIABILITY AND SETTLEMENT

i  Procedure

The forum for an action is dependent on whether the carriage is a Convention Carriage (as defined in Section II.i), 1975 Order Carriage or Other Carriage (as defined in Section II.ii).
**Action in relation to a Convention Carriage or 1975 Order Carriage**

The forum for an action claiming for damages is as provided in Article 33 of the Montreal Convention, which generally provides that an action must be brought, at the option of the plaintiff, at: the place where the carrier is ordinarily resident (i.e., its place of business); the place where the carrier has its principal place of business; the place where the carrier maintains an establishment through which the contract has been made; or the place of destination. The parties to the contract may, however, stipulate that any dispute relating to the liability of the carrier under the Montreal Convention shall be settled by arbitration with the proceedings taking place within one of the jurisdictions stated above.

If the claim is for damages resulting from death or injury of a passenger, in addition to the aforesaid fora, the action may also be brought in the country of the passenger’s principal and permanent residence, so long as the carrier provides service to that country.14

The question of procedures shall be governed by the law of the court seized of the case. The right to claim damages is extinguished if an action against the carrier is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived or on which the carriage stopped.15 However, such a limitation does not apply to any proceedings for contribution between tortfeasors.16

Pursuant to Order 22B of the Malaysian Rules of Court 2012, a party may serve an offer to settle to the other party in a prescribed form. The offer to settle is on a without-prejudice basis except as to costs. The offer can be made open for acceptance within a specific period or open ended in that it may be accepted at any time before the court disposes the matter. If the offer is accepted, the court may incorporate any of the terms into a judgment. Failure to comply with the terms of the offer will entitle the other party to make an application to a judge for judgment in the terms of the accepted offer, or to continue the proceedings as if there had been no accepted offer to settle.

**Action in relation to Other Carriage**

As these actions are not governed by convention, the action may be filed in the High Court of Malaya if (1) the cause of action arose in Malaysia, (2) the defendant or one of several defendants resides or has his or her place of business in Malaysia, or (3) the facts on which the proceedings are based exist or are alleged to have occurred in Malaysia.17 The limitation period whether the claim is based on contract or tort is six years from the date of breach or the date the cause of action arose. Order 22B of the Rules of Court 2012 is equally applicable.

**ii Carriers’ liability towards passengers and third parties**

An operator’s liability to passengers is on a strict liability basis whether the carriage is a Convention Carriage, 1975 Order Carriage or Other Carriage.

In relation to a Convention Carriage and 1975 Order Carriage, damage sustained in case of death or bodily injury of a passenger whereby the incident that caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking

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14 This additional form is not available for a claim under the 1975 Order.
15 Carriage by Air Act 1974 Schedule 6 Section 2 Chapter III Article 35. See also Carriage by Air (Application of Provisions) Order 1975 Schedule Part II Chapter III Article 29.
16 Section 7(2) of the Carriage by Air Act 1974.
17 Section 23 of the Court of Judicature Act 1964.
or disembarking, the carrier is liable for proven damages up to 113,100 special drawing rights (SDR)\textsuperscript{18} or 250,000 francs\textsuperscript{19} for each passenger and such liability shall not be excluded or limited. Further, a carrier could be liable for an amount that is more than the stipulated amount if it fails to prove that such damage was not due to negligence or other wrongful act or omission of the carrier or its servants or agents; or such damage was solely due to the negligence or other wrongful act or omission of a third party. In relation to a Convention Carriage, for damage caused by delay in the carriage of persons; destruction, loss, damage or delay to baggage; and destruction, loss, damage or delay to cargo, the liability of the carrier is limited to 4,694 SDR, 1,131 SDR and 19 SDR per kilogram respectively. In relation to 1975 Order Carriage, damage caused by delay in the carriage of persons; and destruction, loss, damage or delay to baggage or cargo, the liability of the carrier is limited to generally 250,000 francs and 250 francs per kilogram, respectively.

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the claimant, the carrier shall be wholly or partly exonerated from its liabilities to the claimant to the extent of the claimant’s fault.\textsuperscript{20} For a Convention Carriage, where an aircraft accident results in death or injury to passengers, the carrier shall make advance payments without delay to persons who are entitled to claim compensation to meet the immediate economic needs of such persons, but such advance payments shall not constitute a recognition of liability and may be offset against any amount payable subsequently as damages.\textsuperscript{21}

In relation to the issue of whether damages in respect of mental injury is claimable, it is likely that Malaysian courts would turn down such a claim, taking into consideration a series of foreign cases that reached the same conclusion of not including purely psychological injury as bodily injury under Article 17 of the Montreal Convention or the Schedule to the 1975 Order, as the case may be.\textsuperscript{22}

Claims for death or personal injury, damages for delay or destruction, loss, damage or delay to baggage or cargo in respect of Other Carriage are generally only subject to limitations expressed in the contract between the parties.

With regard to information regarding the carrier’s liability towards third parties, this can be found above (see Section II.iii). The carrier has strict and unlimited liability for damage to property or injury to third parties on the ground unless such damage or injury was caused by the victim.

### iii Product liability

There are three main areas that cover product liabilities, namely contract, tort and the Consumer Protection Act 1999 (CPA).

In a contract for the sale of goods, terms may be express or implied through statutes such as Section 16 of the Sale of Goods Act 1957, which provides for the implied condition as to the merchantable quality or fitness for the purpose of the goods. Hence, a manufacturer would attract liabilities if it is in breach of any of the terms. Nonetheless, because of the

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\textsuperscript{18} In relation to international carriage within the Carriage by Air Conventions.

\textsuperscript{19} In relation to carriage governed by the 1975 Order.

\textsuperscript{20} Article 20 of Montreal Convention and Article 21 of the Schedule to the 1975 Order, as the case may be.

\textsuperscript{21} Article 28 of Montreal Convention.

Malaysia

document of privity of contract, contractual remedies are generally enforceable only by the other party or parties to the contract, namely, in this case, the purchasers of the goods. A manufacturer of goods would, therefore, not be liable to a passenger in contract.

A manufacturer of defective goods may be liable to an operator or a passenger in tort (e.g., in negligence). To establish liability for the tort of negligence, the claimant must establish that the defendant owed a duty of care to the claimant that was breached by the defendant, and that breach caused the damage or injury complained of. In proving his or her case, if the claimant is able to show that the defect in the goods was the cause of the damage or injury suffered, the onus will be shifted to the manufacturer to show that it had exercised reasonable care, failing which the manufacturer will be made liable.

As for product liability under the CPA, if a product (whether it be the aircraft or any part thereof) is purchased by a consumer for personal use and not for commercial use, the producer of the product (which includes the manufacturer), the importer of the product into Malaysia, and the person who has held himself or herself out to be the producer of the product may be liable for damages caused by defects in the product. The term ‘damage’ in the CPA refers to death or personal injury, or any loss of or damage to any property, including land, as the case may require. The CPA has also provided statutory defences for the producer and the burden of proof lies with him or her. One of the defences that is worth highlighting is that a producer will not be liable if the state of scientific and technical knowledge at the relevant time was not such that a producer may reasonably be expected to discover the defect if it had existed in his or her product while it was under his or her control.

iv Compensation

Generally, damages awarded for a cause of action, whether under the Carriage by Air Conventions, the 1975 Order or otherwise, consist of two limbs, which are, first, general damages for pain and suffering and loss of amenities and, second, special damages in respect of the financial expenses incurred or that may be incurred as a result of the incident.

For the assessment of general damages, the courts will look at previous judgments to determine the upper and lower limits of the award and take into account the nature, extent and duration of the injuries to decide how much to award. Loss of expectation of life is statutorily barred in Malaysia and the claimant can only recover damages for pain and suffering if he or she was conscious, sentient and able to feel the pain and suffering. On the other hand, special damages would include medical expenses, cost of care, loss of future earnings and loss of earning capacity.

As for dependency claims, the statutory dependants are entitled to claim for loss of support from the deceased victim’s earnings; and loss of support in the form of services rendered by the deceased victim to the dependants. In this regard, the calculation for the former will be contributions made by the deceased through his or her earnings, which are exclusive of personal expenses (multiplicand) multiplied by the fixed statutory multiplier that is according to the age of the deceased at the time of death. In addition, the law also provides a sum of 10,000 ringgit to be granted to the spouse of the deceased victim, or to his or her parents if he or she was unmarried.

IX VOLUNTARY REPORTING

With Malaysia being one of the ICAO Member States, the CAAM is responsible for ensuring that the safety and security of flights are consistently maintained at the highest level possible,
and, at the same time, for ensuring that the safety of the Malaysian airspace for aircraft operations conforms to the requirements of ICAO in all aspect of policies, regulations and Standards and Recommended Practices. Pursuant to Chapter 8 of Annex 13 to the Chicago Convention, it is recommended that Member States establish a voluntary incident reporting to facilitate the collection of information that may not be captured by a mandatory incident reporting system. A voluntary incident reporting system shall be non-punitive and shall afford protection to the sources of the information. In this regard, the Ministry has, pursuant to Regulation 186 under Part XXVI of the CAR 2016, issued a directive on 9 May 2016 on ‘Investigation of Aircraft Accident and Incident’ (the Directive) that provides for, inter alia a voluntary incident reporting system that is not captured by the Mandatory Occurrences Reporting System under Part XXII of the CAR 2016. Pursuant to this Directive, where a voluntary report is made to the investigator-in-charge (IIC) pursuant to the voluntary reporting system, no person shall release the identity of the person making the report or any information that could reasonably be expected to reveal that person's identity, unless the person making the report authorises, in writing, its release. Further, a report made to the IIC under a voluntary reporting system shall also not be used against the person who made the report in any disciplinary, civil, administrative and criminal proceedings. The aforesaid protections regarding the identity of the person making the voluntary report shall, however, not apply to situations involving unlawful acts or gross negligence by that person, unless an appropriate authority determines that the value of its disclosure or use in any particular instance outweighs the adverse impact that such action may have on aviation safety. It is interesting that Part XXVI of the CAR 2016, which initially dealt with the investigation of aircraft accidents and incidents, has been amended pursuant to the Civil Aviation (Amendment) Regulations 2016 (CAAR) to apply only to accidents and serious incidents, as opposed to ‘incidents in general’. The definition of serious incidents mirrors that found in Annex 13 of the Chicago Convention, meaning an incident involving circumstances indicating that there was a high probability of an accident and associated with the operation of an aircraft, and includes a list of examples adapted from the non-exhaustive list found in Annex 13.

X THE YEAR IN REVIEW

i The Malaysian Airline System Bhd’s Recovery Plan

The Malaysian flagship carrier, MAS, continued to implement its five-year 12-point plan entitled ‘Rebuilding a National Icon: The MAS Recovery Plan’ in 2017. Pursuant to the Malaysian Airlines System (Administration) Act 2015 (MAS (Administration) Act), the operations, assets and liabilities of MAS have been transferred to Malaysia Airlines Bhd (MAB), the new company that was incorporated to take over the business of MAS.

Izham Ismail, the executive director and group chief executive officer of MAB, said the company will continue to focus on and drive yield to cushion the group from rising fuel costs and foreign exchange volatility. However, a serious shortage of commercial pilots has also been affecting MAB’s five-year recovery plan. Since the MH370 incident, the oversupply

23 The Civil Aviation (Amendment) Regulations 2016 came into force on 12 September 2016.
24 Annex 13 to the Convention on International Civil Aviation – Aircraft Accident and Incident Investigation.
of pilots has reversed into an undersupply. Hence, MAB has put in place an extensive pilot training programme in August 2017, but pilot training will be time-costly. Boeing’s Pilot & Technician Outlook 2018–2037 projects a demand for 240,000 new commercial pilots in Asia-Pacific over the next 20 years. MAB has since revisited its salary package to match that at rival airlines and has recruited nearly 100 pilots. Izham states that the recruitment drives are gaining traction and he is confident that this will stabilise the said shortage by the fourth quarter of 2018 and be back at full steam in 2019 in deploying aircraft to attain MAB’s profit target.26

Following the five-year recovery plan, Izham Ismail stated that improvements in terms of cost base, productivity, information technology systems and customer experience were achieved, and that MAB’s cost base has changed significantly to bring MAB in line with its peer network airlines. Hence, as of December 2018, MAB group has one of the lowest cost bases among its peer network airlines like Singapore Airlines and Cathay Pacific, on a cost per available seat kilometre basis.27 Despite MAB’s efforts, the Malaysian government is still considering the options to either shut down, sell or refinance MAB due to the airline’s struggle.28

In relation to a negligence suit filed against MAB by 76 next-of-kin representing 32 passengers onboard MH370, the High Court granted MAB’s application to strike out the claim against it. The claim was for aggravated and exemplary damages against the department’s director-general, RMAF and the government for, among others, negligence, breach of contract and statutory duty and breach of the Montreal Convention by MAS.29

Late in 2018, the fight for the courts of the United States to be the forum of the MH370 litigation encompassing 40 lawsuits for wrongful death and product liability had been dismissed by US District Judge Ketanji Brown Jackson. The Court emphasised the necessary focus was the availability and adequacy of an alternate forum, rather than juridical advantage.30

ii The search for MH370

With the change of government in the recent general elections, the new Malaysian Prime Minister indicated that the government has no plans to resume the hunt for MH370. The United States based exploration firm, Ocean Infinity, which was contracted by the previous Malaysian government for a three-month search for the missing aircraft on a ‘no find, no fee basis’ was not renewed by the Malaysian government. The contract came to an end on 29 May 2018 after finding no sign of the wreckage.31 However, Transport Minister Anthony Loke had said that the government was willing to consider proposals from Ocean Infinity.

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31 ‘Malaysia no longer bound to Ocean Infinity on MH370 search’, New Straits Times, 1 June 2018.
to resume the search ‘if there is a proposal and credible leads’. Meanwhile, Ocean Infinity chief executive Oliver Plunkett said that the company was looking into new technologies to improve its second attempt of its search for MH370.32

iii The sale and leaseback of AirAsia’s fleet
In 2018, AirAsia Berhad focused on its core operations by selling its aircraft leasing operations to BBAM Ltd Partnership for US$1.185 billion. Under the deal, Asia Aviation Capital Limited, a wholly owned subsidiary of AirAsia Berhad, had sold almost its entire portfolio of 84 aircraft and 14 engines – of which 79 aircraft and 14 engines will be leased back to AirAsia Berhad and its affiliates.33 All but the transfer of five aircraft leased to third-party airlines have been completed. Under the agreement, AirAsia will see more aircraft disposals moving ahead, as the company has entered into agreements with the same BBAM-managed entities to sell 98 aircraft to be delivered in the future up until 2025.34

XI OUTLOOK
In general, the Malaysian economy remains stable notwithstanding the unexpected change in government in 2018. However, MAVCOM revealed that the overall passenger traffic growth in Malaysia significantly declined to 3 per cent in 2018 from 10 per cent in 2017, stating that the projection was partly due to a strong reduction in domestic seat capacity from the second quarter of 2018 onwards. Hence, MAVCOM executive chairman Dr Nungsari Ahmad Radhi advised for local airlines to look into the regional level tie-ups, as well as mergers and acquisitions with foreign firms.35

34 ‘Airasia says transfer of five aircraft incomplete as deals lapsed’, The Star, 10 January 2019.
INTRODUCTION

The aviation industry in Nigeria has come a long way, from an emergency landing in 1925 from a Royal Air Force (RAF) base in Khartoum, Sudan, to a horse race course in Kano, Nigeria, to the present day, in which Nigeria boasts of five international airports, 27 domestic airports and 13 airstrips. Nigeria has become a major air hub in Africa, with the Murtala Muhammed International Airport being the fifth busiest airport in the continent, and the busiest in the West African subregion.

The Minister of Aviation oversees the activities of the regulatory agencies in the industry. The Nigerian Civil Aviation Authority (NCAA) is one of such agencies established by the Nigerian Civil Aviation Act 2006 (CAA). The Act empowers the Authority to not only regulate aviation safety without political interference, but also to carry out oversight functions of airports, airspace and meteorological services, as well as economic regulations of the industry. Other agencies include the Nigerian Airspace Management Agency, which provides air traffic services in Nigeria, including air traffic control, and visual and non-visual aid; the Nigerian Meteorological Agency, which is charged with the responsibility of advising the federal government on all aspects of meteorology, project preparation and interpretation of government policy in the field of meteorology, and issuing weather (and climate) forecasts for the safe operations of aircraft, oceangoing vessels and oil rigs; and the Federal Airports Authority of Nigeria, which is charged with the responsibility of managing all commercial airports in Nigeria and providing service to both passenger and cargo airlines.

In keeping up with global safety standards, the CAA has incorporated provisions of Annex 13 to the Convention on International Civil Aviation (the Chicago Convention), which governs investigations of both international and domestic air accidents, and the Convention for the Unification of Certain Rules Relating to International Carriage by Air (the Montreal Convention 1999) and its Protocol. The cumulative effect of these international conventions domesticated in the CAA is to protect passengers onboard, as well as third parties on the ground.
ground. It covers the liability of air carriers to passengers and third parties and, through various international instruments, apportions liability and provides compensation for victims of mishaps.\(^7\)

II LEGAL FRAMEWORK FOR LIABILITY

i International carriage

The general legal regime for the creation, assessment and apportionment of liability of air carriers is the CAA and other extant international conventions that have been ratified and domesticated in Nigeria. Nigeria is a signatory to the foundational legislation on the issue of carriers’ liability as codified in the Warsaw Convention 1929 and domesticated by the Carriage by Air (Non-International Carriage) Colonies, Protectorates and Trust Territories Order 1953.\(^8\) Furthermore, under the current umbrella legislation in Nigeria, the CAA domesticates the Montreal Convention 1999 by virtue of Section 48 of the CAA in the following words:

Section 48(1):
The provisions contained in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Montreal on 28th May, 1999 set forth in Schedule II of this Act and as amended from time to time, shall from the commencement of this Act have force of law and apply to international carriage by air to and from Nigeria, in relation to any carriage by air to which those rules apply, irrespective of the nationality of the aircraft performing the carriage, and shall, subject to the provisions of this Act, govern the rights and liabilities of carriers, passengers, consignors, consignees and other persons.

Claims in which the cause of action arose before 14 November 2006\(^9\) were adjudged on the basis of the 1953. The CAA has also incorporated provisions of Annex 13 to the Chicago Convention, which governs investigations of both international and domestic air accidents.

ii Internal and other non-convention carriage

The CAA and the Air Transport Economic Regulations 2015\(^10\) provide guidelines governing liability in Nigeria. It deals with matters concerning the establishment of liability arising from death and bodily injury to passengers in the course of carriage by air within or from Nigeria, limits of liability and insurance coverage for third-party liability.

iii General aviation regulation

Pursuant to Section 1 of the CAA, the Minister of Aviation is vested with powers to formulate policies and strategies for promotion and encouragement of Civil Aviation in Nigeria. Nigeria has incorporated regulations set out by the International Civil Aviation Organisation

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\(^8\) This has since been repealed by the CAA 2006. However all regulations, by-laws, orders and subsidiary legislation made therein continues to be in force.

\(^9\) This was the day when the law was assented to by the President.

\(^10\) S.I. No. 36 Vol. 102.
(ICAO) by way of enacting the Nigerian Civil Aviation Regulations 2009 Vol 1 (Parts 1–11) and 2012 Vol II (Parts 12–20) and the Civil Aviation Air Transport Economic Regulations 2015.\textsuperscript{11} In 2016, Nigeria also enacted the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 2016, with emphasis on accident investigation and reporting, including a voluntary reporting regime.

\textbf{iv} \hspace{1cm} \textbf{Passenger rights}

Regulations have also been enacted to comprehensively deal with passengers’ rights and airlines obligations.\textsuperscript{12} Part 19 of the Nigerian Civil Aviation Regulations (NCARs) 2015 deals with passengers and sets out compensation for overbooking and denied boarding, as well as delays or cancellation.

\textbf{v} \hspace{1cm} \textbf{Other legislation}

The Air Transport Economic Regulations 2015\textsuperscript{13} deal with unfair methods of competition and anticompetitive practices in the Nigerian aviation sector. These regulations impose anticompetition rules with a view to promoting competition in respect of a substantial part of the products and services.

Part 16 of the NCARs 2009 deals extensively with environmental protection and sets standards and recommended practices on aircraft noise certification, vented fuel and aircraft engine emissions for aircraft engaged in international air navigation in line with the ICAO standards and recommended practices.

\section*{III \hspace{1cm} LICENSING OF OPERATIONS}

\textbf{i} \hspace{1cm} \textbf{Licensed activities}

The licensing regime of air transport in Nigeria is governed by Section 32(1) of the CAA, which provides as follows:

\begin{quote}
no aircraft shall be used by any person in Nigeria for flying, while carrying passengers or cargo for reward, on such journeys or classes of journeys (whether beginning and ending at the same point or at different points) or for such flying undertaking for the purpose of any trade or business, except under the authority of and in accordance with a licence, permit, or other authorization issued to him by the Authority.
\end{quote}

The licences contemplated in this statute include:

\begin{quote}
Air Transport Licence (ATL), Air operators Permit (AOP), Air travellers Organisers Licence (ATOL), Air Operators Certificate (AOC), Certificates of Airworthiness, Certificate of Registration, Personnel
\end{quote}

\begin{itemize}
\item \textsuperscript{12} See Part 19 of the Civil Aviation Regulations 2012 Vol II.
\item \textsuperscript{13} S.I. No. 36 Vol 102.
\end{itemize}
Licences and Ratings, Aerodrome licence, Aviation Training Organisations Approvals/Certificates, Aircraft Maintenance Organisation approvals/certificates and all other authorizations and approvals issued pursuant to this Act.\textsuperscript{14}

The application for these licences must be made in writing.\textsuperscript{15}

\textbf{ii Ownership rules}

Section 33(1) of the CAA specifies who may obtain a licence or a permit. Section 33(1) (a)–(c) provides as follows:

\begin{quote}
Notwithstanding the provisions of Section 17 of the Nigerian Investment Promotion Commission Act No 16, 1995, the Authority shall refuse to grant a licence, permit, certificate or other authorisation in pursuance of an application if it is not satisfied that-

(a) the applicant is i. a citizen of Nigeria, or ii. being a company or a body corporate, is registered in Nigeria and has its principal place of business within Nigeria, and is controlled by Nigerian nationals.

(b) the applicant is, having regard to: i. his and his employees’ experience in the field of aviation and his and their past activities generally, and ii. where the applicant is a body corporate, the experience in the field of aviation and the past activities generally of the persons appearing to the Authority to control that body, a fit person to operate aircraft(s) under the authority of the licence, permit, certificate or other authorisation which the Authority considers should be granted to him in pursuance of the application; or

(c) the resources of the applicant and the financial arrangements made by him are adequate for discharging his actual and potential obligations in respect of the business activities in which he is engaged if any, and in which he may be expected to engage if he is granted the licence, permit, certificate or other authorisation which the Authority considers should be granted to him in pursuance of the application.
\end{quote}

The NCAA also has the power to issue air operators certificates (AOC) and other certificates relating to the safety of air operations.\textsuperscript{16}

The financial and technical requirements of such operators are within the purview of the NCAA, which is normally set out by regulation.\textsuperscript{17} The regulation presently governing the requirements for issuance of these licences is Part 18 of the NCARs 2012 Vol II.

\textbf{iii Foreign carriers}

Section 32 (4) (a) (b) of the CAA 2006 provides that:

\begin{quote}
Nothing in this section shall restrict the right of a designated air transport undertaking, having its principal place of business in any country outside Nigeria, to provide transport for passengers, mail or cargo:

(a) in accordance with the terms of any agreement for the time being in force between the government of the Federal Republic of Nigeria and the government of that country or,
\end{quote}

\textsuperscript{14} Section 78 (1) CAA 2006.

\textsuperscript{15} Section 35 (1) CAA 2006.

\textsuperscript{16} Section 34 (2) CAA 2006.

\textsuperscript{17} Section 34 (3) CAA 2006.
(b) in accordance with the terms of any permission granted by the Minister pending the completion of the negotiations for such an agreement referred to in paragraph (a) above.

IV SAFETY

The Civil Aviation Act\(^\text{18}\) encourages regional cooperation in the regulation and administration of aviation safety and permits the NCAA to enter into bilateral agreements for cooperative endeavours with other contracting states to the Convention on International Civil Aviation.\(^\text{19}\)

The CAA sets out regulations in 2012 and 2015 to correspond with the current international aviation safety standards published by the ICAO. The NCAA is required to open lines of communication with the state of design or the state of manufacture, so that the NCAA can receive all safety bulletins and airworthiness directives for each type of aircraft operating in Nigeria.\(^\text{20}\) The NCAA carries out routine inspections to ensure that the aircraft conforms to type design and is in condition for safe operation. The Regulations prescribe maintenance systems, training and require all persons operating Nigerian-registered aircraft to notify the NCAA when certain events occur such as accidents, unlawful interferences and suspicious activity.

With regard to accidents, the NCAA\(^\text{21}\) established an Accident Investigations Bureau with the sole objective of the investigation of an accident or serious incident and not to apportion blame or liability. In 2016, the NCAA also set out regulations for Investigation of Air Accidents and Incidents.\(^\text{22}\) On the basis of the findings of accident investigations, as well as incident reporting, corrective actions are taken to prevent similar accidents in the future.

V INSURANCE

It is a compulsory requirement that carriers operating air transport services to, from and within Nigeria, aerodrome operators, aviation fuel suppliers or any providers of ground-handling services or other such allied service providers must maintain adequate insurance covering their liability under the CAA 2006 and towards compensation for damages sustained by third parties for an amount to be specified in regulations by the NCAA.\(^\text{23}\)

Section 18.11.7 of the NCAA Regulations 2015 prescribes the minimum third-party liability insurance limit for aircraft engaged in operations in Nigeria, which is in relation to the maximum take-off weight (MTOW) of an aircraft, as provided in the table below:

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18 Section 68 CAA 2006.
19 A case in point is the Banjul Accord Group Aviation Safety Oversight Organisation (BAGASOO), which has its headquarters in Abuja. It is one of the agencies of the Banjul Accord Group, which is made up of seven West African countries (Gambia, Ghana, Guinea, Liberia, Nigeria, Cape Verde and Sierra Leone) and was created to harmonise policies and procedures on civil aviation, and foster the development of international civil aviation through cooperative arrangements between Member States. Another regional initiative is the Banjul Accord Group Accident Investigation Agency, which was created to investigate aviation accidents in Member States.
20 Part 5 of the NCAA Regulations 2012.
21 Section 29 of the CAA 2006.
22 The Nigerian Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 2016.
23 Section 74 of the CAA 2006.
The minimum insurance cover for aircraft engaged in the carriage of passengers, mail and cargo in Nigeria shall be in relation to the aircraft available capacity.

The CAA ensures compliance with the mandatory insurance rules by prescribing that all operators make quarterly returns to confirm that all conditions required to create an obligation on the insurer to provide indemnity in the event of a loss have been fulfilled. Operators also have to submit copies of valid insurance certificates, evidence of payment of premium and policy documents.

VI | COMPETITION

The CAA gives the NCAA the rights, subject to the approval of the Minister, to make regulations to prohibit and discourage anticompetitive practices. These anticompetitive practices involve charging fares and rates on routes at levels that are in aggregate insufficient to cover the costs of providing the services to which they relate, the addition of excessive capacity or frequency of service, practices that have a serious negative economic effect on or cause significant damage to another airline, and practices that reflect an apparent intent or have the probable effect of crippling, excluding or driving another airline or allied aviation service provider from the market.

The legal framework for unfair competition and anticompetitive practices in the Nigerian civil aviation sector are encapsulated in the Air Transport Economic Regulations (the Regulations), which were adopted by the NCAA in 2015. Section 18.15 of the Regulations makes it unlawful to enter into any contract, arrangement, understanding or conspiracy between two or more parties in the civil aviation industry where such contract, arrangement, understanding or conspiracy constitutes a restraint of competition.

Anticompetitive behaviour is articulated in Section 18.15.2 of the Regulations to include the following:

a. directly or indirectly fixing a charge, fee, rate, fare or tariff, or any other trading condition;

24 Section 74(3) of the CAA and Article 50 of the Montreal Convention 1999.
25 Section 70 CAA 2006 LFN.
dividing the market by allocating customers, passengers, suppliers, slots, territories or specific types of products or services;
being involved in collusive action;
limiting or controlling development or investment in capacity, slots and any other market or operational factor;
applying dissimilar conditions to equivalent transaction with other service providers, thereby placing the other party at a competitive disadvantage; and
making the conclusion of an arrangement, understanding or contract subject to acceptance by the other parties of supplementary obligation and which, by nature or according to commercial usage, have no connection with the subject of the contract.

The regulations do not apply to any agreement authorised by the NCAA that:
contributes to the improvement of the availability or distribution of products and services or the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit;
imposes on the airline, service providers or operators concerned only such restriction as are indispensable to the attainment of objectives referred to above; or
does not afford such airline, service providers or operators the possibility of eliminating competition in respect of a substantial part of the products and services concerned.

The Regulations further list certain agreements that are exempted from the application of the Regulations, namely:
a contract or an arrangement where the only parties are or will be wholly owned subsidiary and holding companies;
a contract of service or a contract for the provision of services insofar as it contains provisions by which a person, not being a body corporate, agrees to accept restrictions as to the work, whether as an employee or otherwise, in which that person may engage during or after the termination of the contract;
a contract for the sale of a business or shares in the capital of a company carrying on business insofar as it contains a provision that is solely for the protection of the purchases in respect of the goodwill of the company;
a contract or an arrangement in as much as it contains a provision that relates to the remuneration, conditions of employment, hours of work or working conditions of employees;
any act done otherwise than in trade, in concert by passengers, consumers of products and services against the suppliers of those products and services;
any act done to give effect to a provision of a contract or an arrangement referred to in points (a) to (e) of this list; and
any act done to give effect to any intellectual property right, which shall mean a right, privilege or entitlement that is conferred as valid by or under any enactment in force.

There is no specific criminal liability for the breach of these anticompetition provisions in the regulations, however, the CAA imposes penalties for offences against the regulations,

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27 Section 18.15.4 of the Air Transport Economic Regulations 2015.
28 Section 18.15.11 of the Air Transport Economic Regulations 2015.
29 See Section 30(9) of the CAA 2006.
including the suspension or revocation of certificates, licences and authorisations, and in
cases of any particular offence such fine as may from time to time be prescribed by the
Authority or imprisonment for at least six months, or both.

VII WRONGFUL DEATH

The Nigerian courts, in assessing liability and awarding compensation for wrongful death
claims, will consider and apply the provisions of the Nigerian Civil Aviation Act and the
Montreal Convention 1999. The relevant provisions are contained in Article 17 of the
Montreal Convention, which is reproduced below as follows:

Article 17- The carrier is liable for damage sustained in case of death or bodily injury of a passenger
upon condition only that the accident which caused the death or injury took place onboard the
aircraft or in the course of any of the operations of embarking or disembarking.

In assessing compensation, the courts will apply the provisions of Article 21, reproduced
below, which prescribes the right of the carrier to limit its liability:

Article 21- For damages arising under paragraph 1 of Article 17 not exceeding 100,000.00 United
States Dollars for each passenger, the carrier shall not be able to exclude or limit its liability.
The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that
they exceed for each passenger 100,000 United States Dollars if the carrier proves that: Such damage
was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents;
or Such damage was solely due to the negligence or other wrongful act or omission of a third party.

However, the Nigerian courts will not apply the limits to the carrier’s liability where the
claimant can successfully prove the wilful misconduct30 or negligence of the carrier. In
that circumstance, the courts will award either general damages31 or special damages after
considering the extent to which the carrier has taken all necessary measures to avoid the
damage.

VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure
The Federal High Court of Nigeria32 is vested with the jurisdiction to hear and determine
matters and offences under the Act, particularly where:

a offences are committed onboard aircraft registered in Nigeria;

30 The concept of wilful misconduct as defined in the English case of Horabin v. BOAC (1952) 2 All ER 1016
as: ‘to be guilty of wilful misconduct, the person concerned must appreciate that he is acting wrongfully, or
is wrongfully omitting to act, and yet persists in so acting or omitting to act regardless of the consequences,
or acts or omits to act with reckless indifference as to what the result may be; all the problems . . . must be
considered in the light of that definition.’
damages is that perceived as a direct and immediate result from the deductive circumstance of the nature
of the injury. Also, in the recent Supreme Court judgment in Mekwunye v. Emirates (2019) LPELR 46553
(Supreme Court) general or special damages may now be awarded in aviation matters.
32 Section 56(6) and 63 of the CAA 2006.
b the aircraft onboard which the offence is committed lands in Nigeria with the alleged offender still onboard;

c the offence is committed onboard an aircraft leased without crew to a lessee who has his or her principal place of business in Nigeria or, if he or she has no principal place of business, his or her permanent residence is in Nigeria; and

d the offence is committed onboard a non-Nigerian registered aircraft while the aircraft is within the territory of Nigeria.

The Federal High Court of Nigeria, in establishing liability and settling claims, adopts the mechanisms set out in international conventions such as the Montreal Convention 1999. 33 The Montreal Convention provides for a two-year limitation period for bringing claims from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived or from the date on which the carriage stopped.

However, the jurisdiction of the Federal High Court does not cover every situation where the subject matter relates to aviation, particularly carriage by air. For the jurisdiction of the Federal High Court to be invoked, there must have been an actual carriage of such goods and or passengers.34

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under the Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as set out in the Montreal Convention without prejudice to the question as to who are the persons who have the right to bring suit and what their respective rights are. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.35 However, in a recent decision of the Supreme Court in Mekwunye v. Emirates, the Court, overruling the decision of the Court of Appeal, held that an airline who breached a contract of carriage by refusing passenger boarding for no reason cannot rely on the Montreal Convention, which limits the liability of an airline towards its passengers when it has breached a fundamental term of the contract.

ii Carriers’ liability towards passengers and third parties

The carriers’ liability to passengers and third parties in the course of carriage by air within or from Nigeria is governed by the provisions of the CAA, its regulations and the Montreal Convention 1999.36

The carriers’ liability is strict, as gleaned from Section 49(2) of the NCAA 2006, which provides that as follows:

\[
\text{Where injury, loss or damage is caused to any person or property on land or water by an article or a person in or falling from an aircraft while in flight, taking off or landing, then, without prejudice to the law relating to contributory negligence, damages in respect of the injury, loss or damage shall be}
\]

33 Nigeria is a party to this Convention and is implemented and domesticated under the CAA 2006.
36 Nigeria operates the modified Montreal Convention 1999 to suit its domestic circumstances. The CAA Act contains two versions of the Montreal Convention (the original document and the modified version. Nigeria currently operates with the modified version).
recoverable without proof of negligence or intention or any other cause of action, as if the injury, loss or damage had been caused by the wilful act, neglect or default of the owner of the aircraft. Provided that where the injury, loss or damage is caused as aforesaid in circumstances in which
(a) damages are recoverable from the owner in respect of the injury, loss or damage by virtue only of the foregoing provisions of this subsection; and
(b) a legal liability exists in some person other than the owner to pay damages in respect of the injury, loss or damage; the owner shall be entitled to be indemnified by that other person against any claim in respect of the said injury, loss or damage.

These laws hold the carrier liable for any death and injury to passengers, provided that the accident that caused the death or injury took place onboard the aircraft or in the course of any of the operations of embarking or disembarking. The carrier is also liable for damage sustained in case of destruction, loss or damage to checked or unchecked baggage and to cargo sustained during the contract of carriage or onboard the aircraft and in its charge. The carrier is not able to exclude or limit its liability for claims arising from death and injury to passengers not exceeding 100,000 special drawing rights (SDR) for each passenger. For delay, baggage and cargo claims, the carriers’ liability can be limited to 1,000 SDR for each passenger.

The trend in awards granted by the courts, as evidenced in *Emirates Airlines v. Aforka*, show that the courts will apply the limits of liability as set by the Montreal Convention once all conditions stated therein are satisfied.

iii Product liability

The CAA and other legislation do not provide a regime for manufacturers’ and owners liability to passengers and operators.

iv Compensation

In awarding damages to a claimant against the carrier in accordance with the CAA and the Montreal Convention, the Nigerian courts lay emphasis on proof of injury, or loss or damage to person or property. However, where the intent is to recover in excess of the carriers’ limits of liability, there is a higher burden of proof on the plaintiff or claimant to show that the carriers’ conduct was reckless and done with the knowledge that damage would probably result in enabling the trial court to award damages outside the limits of liability.

37 Article 17 of the Montreal Convention, 1999.
38 Article 18 of the Montreal Convention, 1999.
40 Article 22 of the Montreal Convention, 1999.
41 (2015) 9 NWLR Pt.95. The trial court had initially failed to apply the limits of liability provided under the Montreal Convention as domesticated in the Nigeria Civil Aviation Act. However, the Court of Appeal upturned the judgment and sought to apply the limits based on the inability of the claimant to prove the exception of wilful misconduct of the carrier.
43 Per Chukuma-Enen JCA (as he then was) in *Cameroon Airlines v. Jumai Abdul-Kareem* (2003) 11 NWLR (pt 830) 1 at page 22, paragraphs D-E.
In cases of air accidents resulting in death or injury of passengers, Article 28 of the Montreal Convention provides that the carrier shall make advance payment to persons entitled to compensation if required by its national law. In Nigeria, the CAA\textsuperscript{44} makes provision for advance payments to be made by the carrier to the natural person or such natural persons who are entitled to claim compensation in cases of aircraft accidents resulting in death or injury to passengers. Advance payments of at least US$30,000 are to be made by the carrier within 30 days from the date of such accident, to meet the immediate economic needs of such persons. It must, however, be noted that such advance payments made will not constitute recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier.

The Montreal Convention\textsuperscript{45} prescribes the types of losses and damages that may be compensated; these include any action for damages, however founded, whether under this convention, in contract, in tort or otherwise. It should be noted that these actions or claims can only be brought subject to the conditions and such limits of liability that are set out in the Convention, without prejudice to the question as to which persons have the right to bring suit and what their respective rights are. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.\textsuperscript{46}

Recent events in Nigeria have revealed the challenges faced by claimants in receiving compensation for death and bodily injury. The failure of air carriers to comply with compensation provisions usually results in class action lawsuits against the air carriers by families of victims. Families of the victims of the Dana Airline plane crash of 2012 instituted actions in 2014, at which time a considerable number of persons entitled to advance payments were still unpaid.\textsuperscript{47}

The Regulations\textsuperscript{48} provide that the NCAA will facilitate the establishment of a family assistance programme, which shall provide succour to aircraft accident victims and their families in accordance with the ICAO Doc 9998 (ICAO Policy on Assistance to Aircraft Accident Victims and their Families). However, this is yet to be established in Nigeria.

\section*{IX \ VOLUNTARY REPORTING}

As the result of a reform and the enactment of new regulations in 2016,\textsuperscript{49} there is now established a statutory framework and protection for voluntary reporting for incident and accidents in the aviation industry. This represents the highest level of protection and comfort for voluntary reporting aimed at encouraging the reporting of incidents in the aviation community, with a view to improving safety while avoiding backlash from such voluntary provision of information on aviation safety. The supervisory arm for such voluntary reporting regime is the Accident Investigation Bureau\textsuperscript{50} established, pursuant to the CAA,

\textsuperscript{44} Section 48(3) of the CAA 2006.
\textsuperscript{45} Article 29 of the Montreal Convention, 1999.
\textsuperscript{46} ibid.
\textsuperscript{48} Section 18.11.12 of the NCAA Air Transport Economic Regulations, 2015.
\textsuperscript{49} Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 2016, which came into force on 25 February 2016.
\textsuperscript{50} www.aib.gov.ng/.
as an autonomous agency. Under this voluntary reporting regime, the Bureau is empowered
to support a voluntary incident reporting system of the relevant authority to facilitate the
collection of information that may not be captured by a mandatory incident reporting
system. It further provides that a voluntary incident reporting system shall be non-punitive
and afford protection to the sources of the information.51

X THE YEAR IN REVIEW

In 2016, the NCAA commenced Aerodrome Certification of Lagos and Abuja airports,
and also the completion of phase three of the Aerodrome Certification programme, as well
as certification of air navigation service providers. The NCAA also concluded the audit of
aerodromes and heliports in the country, and was successful in the ICAO universal safety
oversight audit programme.

The NCAA is accredited as the only helicopter flying school in the subregion to offer
the air transport pilot licence, holds certification of aviation security screeners at the nation’s
airports and has also attained level three in the state safety programme implementation
process, such that Nigeria is now on the same level as the United States and United Kingdom
for safety rating.52

The year 2016 also witnessed the review and amendment of the NCARs, which create
statutory backing and protection for voluntary reporting of accidents and incidents.

In 2017, however, the aviation sector rebounded, resulting in a growth rate of 12.8 per
cent (according to the National Bureau of Statistics (NBS)) such that by the end of 2017,
the government had offloaded all the funds of foreign airlines trapped in Nigeria owing to
the devaluation of the naira and scarcity of foreign exchange in 2015–2016.53 This marked a
significant turnaround in the fortunes of the airlines in the aviation sector.

Air transport increased by 19.8 per cent in 2018, the majority of which was from
domestic air travel (23 per cent for domestic and 13 per cent from international travel). The
NBS noted that air transport contributed about 137.9 billion naira to the GDP.

In 2017, Lagos and Abuja Airports were aerodrome certified and the aerodrome
certification of Port Harcourt and Kano Airports are in the final phases. The government
has also removed duty on the importation of aircraft and spare parts into Nigeria for use in
Nigeria. Value added tax on shared transportation (which covers air transportation) was also
removed and tax waivers introduced to aid ease of doing business in Nigeria (these incentives
are available to operators). The aviation fuel challenge still exists as it is still not refined in
Nigeria, which remains a challenge because approximately 40 per cent of operating costs go
towards aviation fuel.

The Nigerian government attempted to float a national carrier, Nigeria Air, but all
plans relating to this have been put on hold after its initial announcement. Also, C checks on
Boeing 737 aircraft can now be conducted in Nigeria. This development will save Nigerian
operators millions of dollars spent on offshore maintenance.

51 Sections 8(2) b-c of the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 2016.
52 See the NCAA DG scorecard in its 2017 press conference held at the NCAA headquarters annex
53 The US$575 million owed to the airlines in 2016 was reduced to US$175 million, and by the end of 2017
all the foreign airline operators had repatriated their funds.
In December 2018 the International Civil Aviation (ICAO) inaugurated its global security training centre in Nigeria, which will handle all aviation security training in West and Central Africa under the management of the Federal Airports Authority of Nigeria (FAAN).

The year 2018 also saw the birth of the Single African Air Transport Market (SAATM), which is a project of the African Union aimed at unifying and liberalising the air transport market in Africa. Nigeria is one of the 23 countries out of the 58 members of the African Union set to implement the SAATM.

A new Civil Aviation Act has been proposed. The draft bill has been approved by the Federal Executive Council and will soon be submitted to the legislature for consideration. The new Act seeks to remove regulatory powers from certain agencies (e.g., the Federal Airports Authority of Nigeria), leaving the NCAA with the sole regulatory powers as required by the ICAO. It also seeks to address the effects of Sections 21 and 22 of the Fiscal Responsibility Act 2007, as amended in 2011, which stipulate that all government agencies must remit 25 per cent of their revenue to the government.

Eligibility to access the Power and Airline Infrastructure Fund

The Central Bank of Nigeria, in conjunction with the Bank of Industry, set up a 300 billion naira Power and Airline Infrastructure Fund in a bid to catalyse financing of the real sector of the Nigerian economy. Any airline duly incorporated under Nigerian law and operating in Nigeria, or any company registered and operating in Nigeria in aircraft hangar projects capable of servicing existing commercial jets and next generation aircraft series for ‘C’ and ‘D’ checks in Nigeria, is eligible to access the fund.54

XI OUTLOOK

The global aviation market recorded moderate growth in 2018 and the same was true for the Nigerian aviation industry as a result of the economic downturn. The following two factors played a major role: the unavailability of foreign exchange (forex) and the decline in demand for airline services.

During the 2016–2017 aviation challenges, foreign airlines were unable to repatriate revenue as the scarcity of dollars trapped their funds in naira, rendering them essentially unusable for certain periods. There was also the creation of an artificial scarcity of Jet A1 fuel because of the non-availability of forex. The bigger domestic airlines struggled to stay afloat, despite the increased patronage from Nigerians. However, this is no longer the case as things have now stabilised.

The future health of the aviation industry is affected by the direction of global economic performance coupled with the decline in global oil prices. It is predicted that the global economy will see a growth of 3.1 per cent, higher than the 2011–2015 average of 2.61 per cent. The global aviation sector is expected to reflect this trend and expand marginally.

The domestic market will also record marginal improvements based on the following, which we are beginning to witness:

a. Improved forex liquidity: the Central Bank is committed to solving the repatriation crisis by keeping airlines as top priority for forex allocation as a short-term measure.

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54 See the Central Bank of Nigeria guidelines: ‘The CBN 300 Billion Naira PAIF Revised Guidelines (Amendment 8) of June 2016’.

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In the medium to long term, when the benefits of effective forex policy and export diversification begin to come to fruition, the problem of non-repatriated funds will disappear.

Regulation and monitoring: the NCAA is beginning to take note of the uncontrolled unreliability of Nigerian operators. Thus, the agency is aggressively educating its stakeholders on its intentions to impose penalties for unnecessary delays and flight cancellations.

Beyond the challenges, Nigeria’s air transport industry has retained its attractiveness and experienced an increase in bilateral air services agreements. Nigeria currently has bilateral air services agreements with 90 countries. More countries have requested additional and more frequent flight schedules, such as the UAE, the Netherlands, Turkey, Brazil, Qatar and the Ivory Coast.55

The NCAA is also promising to sustain the safety oversight and engage in more regular surveillance and stringent enforcement measures on operators, as well as ensuring airlines’ operational books are sighted with increased regularity. It is expected that Nigeria will continue to maintain high safety standards and culture that earned it the FAA Category 1 recertification. New airlines such as Max Air were established in 2018 and it is expected that even more domestic carriers will start flying in 2019, as more companies are in the process of getting their AOCs.56 It is hoped that with increased competition will come improved services and more options for customers.

55 ibid. 49.
56 18 firm applications, ibid. 49.
Chapter 27

**NORWAY**

*Hanne S Torkelsen*

### I INTRODUCTION

Because of Norway’s long and rugged coastline and low population density (5.2 million inhabitants in an area of 385,252 square kilometres), and in some parts, in particular in the interior and the north, poor rail and road infrastructure, aviation is an important part of the infrastructure. Norway is the country in Europe with the most airline trips per capita, and it is dependent on air transport.

Norway is not a member of the EU; however, it is part of the European Economic Area (EEA), in which the Agreement on the EEA provides for the free movement of persons, goods, services and capital within the European Single Market. The EEA was established in 1994 upon entry into force of the EEA Agreement. The aim of the EEA Agreement is to extend the provisions applied by the European Union in its internal market to the remaining countries of the European Free Trade Association (EFTA). The EEA parties are the 28 EU Member States, as well as three of the four member states of the EFTA (Iceland, Liechtenstein and Norway). Norway is part of the common EU aviation market, through the EEA Agreement.

As a matter of Norwegian law, an international treaty or convention does not have direct domestic effect. When signed and ratified by Norway, an international treaty or convention will only have domestic legal effect when transformed or incorporated into Norwegian law by statute (usually in the form of an act of parliament). As a consequence, the EEA Agreement has been incorporated and transformed into Norwegian law by way of an act of parliament in the EEA law of 27 November 1992. The regulations and directives from the EU are either incorporated or transformed into Norwegian law, especially in the form of administrative regulations.

Norway is a party to many treaties and conventions in the aviation field, the most important being the Chicago Convention and the Montreal Convention.

The Norwegian government department responsible for civil aviation is the Ministry of Transport and Communications (MTC), which has overall responsibility for the framework conditions for, inter alia, civil aviation. The Civil Aviation Authority Norway (CAAN) is an administrative agency responsible for ensuring safe and efficient operation of civil aviation and developing regulations that govern all aspects of civil aviation in Norway. Avinor is a state-owned company that owns state airports and plans civil aviation infrastructure. It provides airport and aviation safety services for passengers and airlines and other users of civil aviation installations. In addition, there is an Accident Investigation Board Norway (AIBN),

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1 Hanne S Torkelsen is an attorney-at-law and partner at Advokatfirmaet SGB Storløkken AS.

which is an administrative agency responsible for investigating accidents in the transport sector, including civil aviation. The AIBN shall not apportion any blame or liability under civil or criminal law.

As a rule, there is an unrestricted right to establish scheduled air service within the EEA, and Norwegian airports must give equal access to Norwegian and EEA/EU air carriers, or foreign carriers if warranted by multilateral or bilateral agreement between Norway and the foreign state in question. However, tender procedures are conducted on the assumption that no operator will choose to operate a flight route area without a tender contract and exclusive rights, typically route areas in the north.

Norway has been a member of the European Aviation Safety Agency (EASA) since 2005.


Avinor operates 46 airports with scheduled service. Oslo Gardermoen (OSL) is the largest airport in Norway, with approximately 24.6 million passengers travelling from it each year. There is competition on most of the main routes. As in the rest of Europe, Norway has seen the emergence of low-cost carriers in Norway and Europe, coexisting with full-service carriers and charter airlines. The impact of low-cost carriers on fares of incumbent carriers is significant on the routes opened up to competition.

The Norwegian aviation industry is dominated by four major players. One is Scandinavian Airlines System (SAS), which is the largest company in Scandinavian aviation. Norwegian Air Shuttle started up as a low-cost company in 2002 and was listed on the stock exchange in 2003. The airline has shown a strong growth domestically and in Europe, and has established a company in Ireland and one company in the UK. Widerøe is currently the largest regional company in the Nordic region, and tendered routes represent a significant part of its operations. Ryanair has flights from Sandefjord Airport Torp and Haugesund, and has run flights from OSL since 2016.

Slots are allocated on a neutral, transparent and non-discriminatory basis, as laid down in Council Regulation 95/93, and incorporated into Norwegian regulation.

II LEGAL FRAMEWORK FOR LIABILITY
i International carriage

Norway is party to the Montreal Convention of 28 May 1999. The Convention was incorporated into Norwegian law by the Act of 16 January 2004, No. 4 Part I (the Aviation Act), and entered into force on 28 June 2004. EU Regulation (EC) No. 2027/97 on air carrier liability in the event of accidents as amended by Council Regulation (EC) No. 889/2002 was simultaneously incorporated into Norwegian law by amending the Aviation Act, Section 10-17a and attached to the Aviation Act. Norway is also a party to the Warsaw Convention of 12 October 1929, which was incorporated by the Act of 12 June 1936; see Section 19-3 in the

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3 Cf. Norwegian Regulation of 15 July 1994, No. 691 regarding incorporation and enforcement of the EEA agreement in aviation.
Aviation Act regarding the Warsaw Convention. Norway has also ratified additional protocols to amend the Warsaw Convention, including the Hague Protocol of 28 September 1955, which is the only protocol incorporated into Norwegian law.5

ii Internal and other non-convention carriage
Non-convention carriage is governed by the Aviation Act, and the incorporated conventions and EU Regulation also apply to internal aviation.

iii General aviation regulation
The main act dealing with both civil and military aviation in Norway is the Aviation Act.

The EEA Agreement applies to the territory of Norway, and Norway's position is that it does not apply to the exclusive economic zone, the continental shelf or the high seas. Thus, it is Norway's position that helicopter operations offshore on the Norwegian continental shelf fall outside the scope of the EEA Agreement. One important consequence is that helicopter operators operating offshore must be located and certified in Norway. The Aviation Act also applies to offshore aviation activity on the Norwegian continental shelf.

Norway may in certain situations choose to incorporate legal acts whose scope encompasses the exclusive economic zone, or the continental shelf into the EEA Agreement, on the condition that the incorporation does not change the principle that the EEA Agreement has a geographical limitation.

An airline domiciled in an EU or EEA country can operate routes within the EU or EEA area without being dependent on a special public permit. This also applies to Norwegian airlines. The EEA Agreement, however, does not apply to third-country relationships. The aviation agreements that the EU has entered into with third countries, therefore, do not apply to Norwegian airlines. The Scandinavian-based airline SAS nevertheless benefits greatly from the EU agreements with third countries, as SAS can also operate as a Swedish or Danish company. A Norwegian airline can establish itself (directly or via a subsidiary) in any EU or EEA country, and it can then fly according to the aviation agreements this county has acceded to.

iv Passenger rights
EU Regulation 261/2004 (on denied boarding, cancellation or long delay) has been transposed into Norwegian law by Regulation No. 141 of 17 February 2005.

Treatment of passenger claims is based on EU Regulation 261/2004, which has also been transposed into Norwegian law; see Aviation Act, Section 10-44 and Section VIII.

v Other legislation
Air carriers are subject to a number of general rules and regulations governing Norwegian undertakings.

The Norwegian Pollution Act applies also to air carriers, under which undertakings may be fined for violations of the Act.

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The Norwegian Working Environment Act also essentially applies to civil aviation. For flight crews, the Norwegian Civil Aviation Authority is responsible for supervision pursuant to public law. The Norwegian Labour Inspection Authority is responsible for the supervision of all other personnel. The Working Environment Act applies to Norwegian territory.

Regarding competition rules, see Section VI.

III LICENSING OF OPERATIONS

i Licensed activities

Commercial activity and regular traffic (scheduled flights) within Norwegian territory requires concession (operating licence) and an air operator certificate (AOC), compliance with environmental requirements, approved operational procedures and an approved aircraft at its disposal.

Aviation operated by authority of an air transport services agreement requires approval from the Ministry, as stipulated in Section 8-1 of the Aviation Act. However, commercial aviation within the EEA only requires a licence in accordance with Regulation (EC) No. 1008/2008. Hence, airlines with a licence from an EU or EEA Member State have free access to the domestic network. This does not apply to helicopter activity on the continental shelf, where a Norwegian licence is required to operate on the Norwegian part of the shelf.

Flight training, display flying, competition flying and other aviation activities of a non-commercial nature need authorisation from the Ministry. On 25 August 2016, Regulation (EC) No. 965/2012, Annex VI for non-commercial aviation operations with complex motor-powered aircraft was implemented into Norwegian law by Regulation BSL D 1-1.

The CAAN is the licensing authority in Norway.

ii Ownership rules

Aviation within Norwegian territory may only be undertaken using aircraft that have either Norwegian nationality, or nationality of an EU or EEA Member State, in accordance with the nationality requirements laid down in Regulation (EC) No. 1008/2008, or nationality in a foreign state that has signed an agreement with Norway regarding aviation rights, or special authorisation granted by the civil aviation authority.

The nationality conditions for entities not covered by the EEA Agreement are regarded as Norwegian if the entities are:

a the Norwegian central government and systems that are controlled by the central government;
b Norwegian local authorities;
c Norwegian citizens;
d foundations with a 100 per cent Norwegian board, headquartered in Norway;
e associations and similar groups with a 100 per cent Norwegian board, headquartered in Norway, at least two-thirds of whose members are Norwegian citizens or have equivalent status under this section;
f private limited liability companies or public limited liability companies with a 100 per cent Norwegian board, headquartered in Norway, in which Norwegian citizens or the equivalent under this section own shares representing at least two-thirds of the share capital and are entitled to exercise at least two-thirds of all votes at the general assemblies of the company; or
other companies that consist exclusively of Norwegian citizens or the equivalent under Section 3-2 of the Aviation Act.

iii Foreign carriers
When flying within Norwegian territory, foreign aircraft must have either a certificate of airworthiness and a certificate of compliance with environmental requirements as mentioned in the Aviation Act, Section 4-4, or similar certificates that have been issued or approved by a foreign state that has entered into agreements with Norway regarding recognition of these certificates in Norway.

IV SAFETY
Safety and security are mainly dealt with at EU level through various regulations established by EASA, which are transformed or incorporated into Norwegian regulations by the CAAN.

Carriers must at all times be airworthy. An aircraft cannot be considered airworthy unless it satisfies all safety requirements, and complies with environmental requirements as laid down by the ministry regarding noise abatement, air pollution, etc. The CAAN performs inspections of aircraft. A certificate of airworthiness is issued by the CAAN, or as equivalent and recognised certificate from another EU or EEA Member State, or from a state where bilateral agreements has been entered into.

The EFTA Surveillance Authorities (ESA) monitors the EEA legislation, and cooperates with the EU transport agencies. ESA can impose fines and periodic penalty payments on companies in the EEA and EFTA States for breaches of provisions of EASA rules upon request of the EASA.

The Norwegian Aviation Act, Chapter XII, regarding notification, reporting and investigation was amended on 1 July 2016, implementing Regulation (EU) No. 376/2014 into Norwegian law by Regulation of 1 July 2016, No. 868.

Regulation (EC) No. 2015/1018 on the reporting, analysis and follow-up of occurrences has been implemented in Norwegian law by Regulation BSL A 1-3.

Reports about accidents and serious incidents shall be sent to the CAAN and AIBN. Other occurrence reports (i.e., incidents that are not serious) must be sent to the CAAN only.

Joint European rules have been established for the working-hour rules for flight crews, which also apply in Norway.

V INSURANCE
All aircraft being used for aviation activities pursuant to the Aviation Act shall have valid, approved insurance or other security to cover liability, as mentioned in the Aviation Act, and insurance in accordance with Regulation (EC) No. 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators.

The specific requirements regarding the insurance coverage are provided in Regulation No. 785/2004, under which air carriers are obligated to establish and maintain insurance in respect of liability for passengers, baggage and cargo, and third parties. The minimum requirement for liability towards passengers, which is 250,000 special drawing rights (SDR) per passenger, is the same, regardless of whether the flight is non-commercial or commercial.
If the mandatory minimum insurance provision is not complied with, the aircraft’s certificate of airworthiness will be invalid (see Section 4-5 of the Aviation Act).

VI COMPETITION

The Norwegian Competition Act, which is partly harmonised with EU competition rules, includes prohibition against cartels and abuse of dominance. The EEA Competition Act of 2004 establishes competence for the Competition Authority to apply Articles 53 and 54 of the EEA Agreement, which correspond to Articles 101 and 102 TFEU and Articles 53 and 54 of the EEA Agreement.6

i Section 10

Section 10 of the Norwegian Competition Act prohibits agreements between competitors, decisions by associations of undertakings and concerted practices that have as their object or effect to prevent, restrict or distort competition (e.g., price and bid fixing, market sharing, retail price maintenance). The prohibition applies to both horizontal and vertical relations (e.g., non-compete clauses, exclusivity agreements).

Section 10(2) provides that agreements (or clauses that infringe the prohibition in Section 10(1)) are wholly or partially void. This means that a court will not be able to order the parties to fulfil their contractual obligations if the provisions in question infringe Section 10. Moreover, fines of up to 10 per cent of the company's turnover may be imposed for the infringements of the Competition Act. An agreement that falls within Section 10(1) of the Competition Act is not necessarily automatically void. If the restrictive agreement produces sufficient net benefits (effectiveness), the agreement may be exempted under Section 10(3) of the Act.

On 2 May 2018, the EFTA Surveillance Authority (ESA) adopted a statement of objections informing Widerøe’s Flyveselskap AS of its preliminary conclusion that Widerøe may have abused a dominant position in Norway in breach of the EEA competition rules. Previously, airlines needed a specific satellite-based approach system to compete in public tender processes to service several Norwegian PSO routes. The system is called SCAT-1 and was installed at many regional airports in Norway for safety reasons. At the airports where this system was installed, PSO aircraft were required to have certain SCAT-1 receivers onboard. Widerøe owns all of the available receivers.

ESA’s preliminary view is that Widerøe infringed Article 54 of the EEA Agreement by refusing to supply the SCAT-1 receivers to possible competitors. Consequently, Widerøe appears to have been the only airline able to win a number of the PSO tenders. The case is still ongoing, and ESA has not yet taken a final decision.

ii Section 11 of the Competition Act

Section 11 of the Norwegian Competition Act corresponds to Section 102 TFEU and Article 54 of the EEA Agreement. As under the EU rules, the undertaking in question must (1) have a dominant position, and (2) in some way have abused its market position to the detriment of competition.

6 Equivalent to the TFEU Articles 101 and 102.
EU case law and the Commission’s Guidance on the Commission’s enforcement priorities (Article 82) play important roles in the interpretation of the Norwegian provisions.

iii Sanctions and leniency
An undertaking that has breached the Competition Act may be sanctioned either by administrative penalties (up to 10 per cent of the company’s turnover), or by penalties or imprisonment.

Leniency may be granted to undertakings that assist the Competition Authority by revealing that it or others have infringed the prohibition of anticompetitive agreements in Section 10 of the Competition Act. To be granted full leniency, a company must be the first company involved in the infringement to, on its own initiative, provide the Competition Authority with evidence, cooperate with the Competition Authority during the entire process and cease any further involvement in the infringement or any other actions related to the case.

iv State aid
The development of the aviation sector is the responsibility of public authorities. At the same time, granting subsidies and compensation underlies the strict state aid regulations. The state aid rules in the EEA Agreement are broadly equivalent to the state aid rules in the EC Treaty. ESA monitors the EEA legislation, and cooperates with the EU transport agencies, also in the aviation sector.

ESA has adopted Aviation Guidelines for state aid to airports and airlines, corresponding to similar guidelines adopted by the European Commission.

Hence, the EU state aid rules apply to airports, which have to behave as ‘commercial undertakings’ and are not allowed to favour certain carriers.

v Procurement of air services (public service obligation routes)
As a rule, there is an unrestricted right to establish scheduled air services within the EEA. However, public procurement of air services is conducted on the assumption that no operator will choose to operate a flight route area without a tender contract and exclusive rights. The contracting authority is the Ministry of Transport and Communication (MTC). Tender procedures for scheduled routes that are considered public service obligations (PSO) are announced according to the rules of Regulation (EC) No. 1008/2008.7 The successful tenderer is awarded exclusive rights to operate the flight route areas covered by the tender procedure. At present, Widerøe is the dominant actor with regard to the PSO routes. This is owing to the requirements for the type of aircraft, type of navigational equipment, etc. According to Institute of Transport Economics (TØI) report 1116/2010, satisfactory competition for the PSO routes has not been established. In order to remedy this, the Institute of Transport Economics has proposed changes to the airport structure, and suggested using smaller aircraft to avoid the requirement for a specific navigational system, etc. In the current route tenders, loyalty programmes are banned.

VII WRONGFUL DEATH

See Section VIII concerning compensation for loss of financial support for dependants (a dependant is typically a child or in some circumstances a spouse) and for reasonable funeral costs.

Further compensation might be granted if the wrongful death was caused intentionally or as a result of gross negligence.

VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

Passengers may bring their complaint against air carriers to a travel complaint handling body, according to Regulation 20 January 2012, No. 84 (the APCB Regulation) if a complaint to the service provider (airline) is not successful. The time limit for filing a complaint with the body is in all cases four weeks from the date on which the passenger received a definitive response from the airline. The decision of the travel complaint handling body is not legally binding. Internal flights and flights to and from Norway are covered by the travel complaint handling body. The establishment and operation of the body is financed through fees paid by the airlines and airport operator (Chapter 8 of the APCB Regulation).

The APCB Regulation contains provisions on how the body is organised, its secretariat and the board, and procedural regulations. Pursuant to Section 5-1 (2) and (3), the body will not consider complaints where the passenger has not first filed a complaint with the airline and the airline has rejected or refused the passenger’s complaint, or where the airline has not made any reply or response to the complaint within four weeks. Should the airline not have a publicly known address or if they have not made arrangements for the passengers' possibility to file a complaint, these provisions will not apply. The time limit for filing a complaint with the body is in all cases four weeks from the date on which the passenger received a definitive response from the airline (Section 5-2).

Claims for damages are settled through the Norwegian courts, in the first instance, the district courts. However, as long as a case is pending before the travel complaint handling body, the case cannot be brought before the court.

Claims are generally brought against the carrier. Pilots and crew members are rarely joined in the proceedings and will, as a general rule, not be found liable if the injured person has also claimed compensation from the owner or carrier.

ii Carriers’ liability towards passengers and third parties

The Aviation Act, Section 10-17 provides that the carrier is liable for injury or death caused to passengers while on board the aircraft, including embarking and disembarking. The carrier’s liability includes liability for loss of provider. Pursuant to Section 10-17(a), Regulation No. 889/2002 amending Council Regulation (EC) No. 2027/97 on air carrier liability in the event of accidents applies as law.

Section 10-18 of the Aviation Act provides for liability for luggage, in the case of destruction or complete or partial loss of checked-in luggage, provided that the occurrence that caused the damage took place on board the aircraft or in the course of the passenger’s embarking or disembarking from the aircraft, or while the luggage was in charge of the
carrier. Exception is made to the extent that the damage was caused by the inherent nature of the goods or by deficiencies in the goods. The carrier is only liable for hand luggage in the case of negligence on its part.

The Aviation Act, Section 10-22a provides that in the event of injury or death of a passenger caused by an aircraft accident, an advance payment shall be made as soon as possible, and no later than 15 days after the identification of the passenger is established, to the natural person entitled to compensation, to cover their immediate economic needs on a basis proportional to the suffered damage. In case of death of the passenger, an advance payment of no less than 16,000 SDR per passenger shall be paid.

Under Section 10-20, the carrier is liable for loss resulting from delay in the transport by air of passengers, luggage or goods, unless he or she proves that he or she personally, and his or her agents, took all precautions that can reasonably be expected to avoid such loss, or that it was not possible for them to take such precautions.

Regulation No. 9 of 6 January 2011 regarding the Carrier Liability Regulation contains provisions on the limits for the carrier’s liability pursuant to the Aviation Act 1993, Section 10-22.

Under Section 10-22, the carrier’s liability is limited to 113,100 SDR in the event that the damage was not caused by wrongdoing of the part of the carrier, his or her employees or others for whom he or she is responsible for, or if the damage was exclusively caused by wrongdoing of a third party.

Carrier liability for loss incurred as a result of delay in the carriage of passengers shall be limited to 4,694 SDR per passenger.

Carrier liability for loss incurred in connection with the transport of luggage and as a result of luggage being delayed, damaged or completely or partly lost shall be limited to 1,131 SDR per passenger.

Carrier liability for loss incurred in connection with the transport of goods and as a result of goods being delayed, damaged or completely or partly lost shall be limited to 19 SDR per kilogram.

Strict liability for damage to third parties is laid down in Section 11-1 of the Aviation Act. The owner or lessee (pursuant to a lease agreement approved by the CAAN) of an aircraft is invariably liable for damage or losses that are suffered outside the aircraft as a result of the aircraft being used for aviation.

iii Product liability

Several laws, including non-statutory law, govern Norwegian product liability and apply to all businesses producing or selling a product. According to these laws, Norwegian businesses are responsible for ensuring that their products are safe and do not pose a hazard to consumers. Moreover, businesses may be held liable for any damage or harm caused by their products.

Under Norwegian law, product liability claims typically fall into three categories: negligence, strict liability and contractual. Negligence claims against manufacturers are based on customary norms derived from court rulings and legal theory.

The EU Product Liability Directive 85/374 is incorporated into the Norwegian Product Liability Act, in order to harmonise the Norwegian law with EU legislation.

Strict liability under the Product Liability Act focuses on the product and the damage it causes, rather than the negligent behaviour of the manufacturer.
Section 1-1 of the Norwegian Product Liability Act applies to the liability of a producer for damage caused by a product made or supplied for sale as part of its profession, business or equivalent activity.

Based on Section 1-2 of the Product Liability Act and also Article 2 of the EU Product Liability Directive, the term ‘products’ includes goods and movables, whether a natural product or industrial product, raw material or finished product, part product or main product, as well as products incorporated into other movables or real property.

Section 1-3 of the Product Liability Act includes not only the manufacturer in its definition of ‘producer’, but also the person importing a product for sale or distribution in the course of its business. Therefore, the term producer in the Product Liability Act encompasses manufacturers, importers, suppliers and sellers, among others, ensuring that nearly everyone in the chain of distribution may be held responsible.

Damages recoverable under the Product Liability Act include personal injury claims relating to bodily injuries and mental harm. Damage to property is also recoverable, provided that the property is meant for private use or consumption and was used by the claimant mainly for private purposes or consumption.

Additionally, Section 3-5 of the Product Liability Act provides compensation for pain and suffering (non-material damages) if the damage is caused intentionally or is the result of gross negligence.

iv Compensation

The basic principle under Norwegian law is that the injured person should be placed in the same financial position he or she would have been in had the accident not happened. Under the Norwegian Act on Compensatory Damages, an injured person may claim compensation for loss of earnings, compensation for expenditures (such as medical care and related expenses), compensation for loss of ability to work, and compensation for permanent injury. Damages for non-economic loss requires that the damage was caused intentionally by a wilful act or as a result of gross negligence.

Loss of earning is calculated as the actual loss of earning from the time of the accident until the injured person returns to work.

If the injured person has suffered permanent injury, this will be converted to a percentage rate representing the degree of injury suffered, according to a separate disablement table, and the person will be entitled to compensation.

If a passenger is killed in an accident, the relatives or persons who were dependent upon the deceased may claim compensation for loss of provider, and direct expenses, including, inter alia, funeral expenses.

In cases of damage to goods, it is the actual loss suffered that should be compensated.

Deduction is made for costs covered by social security, such as hospital costs and health services from the national insurance scheme, sickness benefit, disability pension and damage covered by insurance paid by the injured. The state cannot recover any cost from third parties in relation to support paid under social security.

Punitive damages are not recognised under Norwegian law.

IX DRONES

Flying a drone is legal in Norway, but anyone flying a drone should be aware of and compliant with the General Rules for Flying a Drone in Norway.

The use of drones in Norway is increasing at a significant pace. According to information from the CAAN, the commercial use of drones has increased from 200 operators in 2015 to approximately 4,000 operators in 2018. The government is working actively with the European Union to develop common rules regarding use of drones. In 2018, the MTC launched its first strategy concerning drones, which predicts Norway as being a pioneer country in the use of drones, due to its combination of plentiful airspace, well-developed infrastructure and high availability of technical expertise in this field.

Drone pilots must maintain a visual line of sight with their drone throughout operations. Recognising the risk to aircraft and airport operations, drones may not fly within 5 kilometres of an airport or airfield without permission. The rules have been put in place to ensure that drone operations do not create a hazard for people or property, or for other airspace users (aeroplanes, gliders, helicopters, etc.). Professional drone operators flying over the territory of an EU or EEA Member State must comply with Regulation (EC) 785/2004 on Insurance Requirements for Air Carriers and Aircraft Operators.

There have been several incidents in 2019 when airports have been shut down for shorter periods in Norway. Bearing in mind the illegal drone activity at Gatwick Airport in the United Kingdom, resulting in the closure of the airport for a couple of days, the NAAC has implemented regulation which includes allowing producers to make use of ‘geofencing’. The NAAC has also, on two occasions in 2019, brought charges against two enterprises (a film producer and a company engaged in photographing properties) for breach of the drone regulations.

X VOLUNTARY REPORTING

An electronic reporting form called NF-2007 can be accessed through the state portal (www.altinn.no). This makes it easy for foreign operators and individuals to sign up and report any occurrence that could compromise the safety of aviation, which is part of the mandatory reporting system in line with Regulation (EU) No. 376/2014. In addition, there is a voluntary reporting template online available to members of the general public who wish to report an unsafe event experienced on a commercial airline or on a business flight to the CAAN. The reports filed are subject to confidentiality. Reported occurrences will be made anonymous and filed in the Norwegian national database, where they will be included in different statistics and summaries used to improve aviation safety. The Norwegian Employment Act regulates whistle-blowing, and protects employees and contractors against repercussions from the employer due to reporting information ‘worthy of criticism’. All companies regularly employing five or more employees must have a written whistle-blowing policy.

XI THE YEAR IN REVIEW

In 2019, the airline Norwegian won an important labour case in the Supreme Court. Originally, all pilots and cabin crew based in Norway were employed by a company that also held the airline’s air operator’s certificate (AOC). Over six years, Norwegian carried out a reorganisation, and the operational activities were moved away from the company holding
the AOC. The court accepted a reorganisation whereby the cabin crew and pilots were employed in subsidiaries, and hired in as contractors. Various factors led the court to find that the supply of personnel constituted an acquisition of services and not a hiring of personnel.

An historic event in Norwegian aviation took place on 15 May 2019, when the Chinese company Hainan Airlines opened a direct route between Beijing and Oslo.

XII OUTLOOK

Norwegian aviation has seen strong domestic and international growth for decades. There are now signs of domestic traffic growth flattening out, but continued growth is expected for international traffic.
I INTRODUCTION

The significant growth of tourism in the past years is having a positive effect on the domestic economy, which translates into the modernisation of the aviation legal sector.

At present, the legal framework for civil aviation in Portugal is the product of many different sources, namely international law (conventions or treaties), EU law and national law.

The National Civil Aviation Authority (ANAC) has administrative and financial autonomy and is responsible for ensuring the proper planning of all activities regarding the civil aviation sector, as well as regulating and supervising the conditions in which they are developed. One of its most important tasks is to ensure high standards of safety.

As part of its regulatory role, ANAC is responsible for the licensing, certification, authorisation and approval of the activities and procedures, entities, personnel, aircraft, infrastructure, equipment, systems and other resources allocated to civil aviation. ANAC is under the supervision of the Ministry of Planning and Infrastructures.

ANAC’s registrations are performed by the National Aeronautical Registry, which records the following facts: the aircraft registration number, the manufacturer’s serial number of the aircraft and of the engines, the name and address of the owner or lessor, and of any lessee, as well as any other interest or lien on the aircraft (co-ownership, mortgages, etc.). The obligation to register aircraft mortgages is set forth in Decree No. 20062 of 1931 – Air Traffic Regulation.

Portugal has implemented the EU Regulation on aviation market access through Decree-Law No. 116/2012, 29 May, which establishes the legal regime of market access, guided by the principle of non-discriminatory treatment, allowing Community air carriers the access to available air routes in all air service agreements signed by Portugal.

Although the Portuguese Labour Code is applicable to civil aviation employees, there are some specific aspects such as working schedules, resting periods and specific duties imposed on captains, among others.


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1 Luís Soares de Sousa is a partner at Cuatrecasas, Gonçalves Pereira. The author would like to acknowledge, with thanks, the assistance of the following colleagues: Conceição Balcão Reis, Telma Carvalho and Rita Caçador. The information in this chapter was accurate as at July 2018.
This Decree-Law also focuses on two relevant entities: ANA Airports of Portugal, which was privatised in 2013, and coordinates and facilitates the slot-allocation process; and the National Coordination Committee, which has consultancy and mediation functions on these matters.

Since 1994 Portugal is not authorised by the European Commission to grant state aid to TAP, the national airline of Portugal. Therefore, banks and financial entities are the sole recourse for financing TAP.

II LEGAL FRAMEWORK FOR LIABILITY

i International carriage

In Portugal, liability in the aviation sector is governed by national, international and EU law. As regards major international air law treaties, Portugal is a party to:

a the 1944 Convention on International Civil Aviation (Chicago Convention), signed on 12 October 1929, ratified on 20 March 1947;
b the 1948 Geneva Convention on the International Recognition of Rights in Aircraft signed on 7 December 1944, ratified on 27 February 1947;
c the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929, ratified on 20 March 1947; and

Portugal has approved but has not yet ratified the 1933 Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

Portugal is a party to the New York Convention of 1958 (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards), and will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting state.

TAP is a party to the International Air Transport Association Intercarrier Agreement on Passenger Liability and the Agreement on Measures to Implement the IATA Intercarrier Agreement.

ii Internal and other non-convention carriage

Both domestic and EU air carriage of passengers and baggage are governed by Regulation (EC) No. 889/2002 of 13 May, amending Regulation (EC) No. 2027/97 of 9 October, which sets out air carrier liability in the event of accidents.

Additionally, Decree-Law No. 321/89, 25 September, contains specific provisions on liability arising from the air transportation business. For more information, see Section VII.

Air carriage that does not fall within the scope of the aforementioned legislation, namely gratuitous air carriage by an air transport undertaking or gratuitous air carriage performed by a private entity, are governed by the general rules applicable to liability established in the Portuguese Civil Code and by the applicable conventions.

iii General aviation regulation

The general rules set forth in the Civil Code are applicable to all flights that are not included in scheduled air services and non-scheduled operations for remuneration or hire.
In Portugal, there is a specific legal framework established for free-flight aircraft and microlights – Decree-Law No. 238/2004 of 18 December, amended by Decree-Law No. 283/2007 of 13 August.

Generally, free-flight aircraft and the microlights can only be used for training, recreational and sport purposes. However, provided certain conditions are met, microlights can be flown in different situations.

iv  Passenger rights

Regulation (EC) No. 261/2004 of 11 February, establishing the common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, was implemented through Decree-Law No. 209/2005 of 29 November, which created the legal framework for sanctions applicable to violations of the Regulation.

The supervision and administrative procedure related to passenger rights is carried out by ANAC. Air carriers have a legal duty to provide all relevant data to ANAC.

The legal regime of civil aeronautical administrative offences established by Decree-Law No. 10/2004 of 9 January should be added to the administrative offences established in the above-mentioned Decree-Law No. 209/2005.

In addition, Regulation (EC) No. 1107/2006 of 5 July, regarding the rights of disabled persons and persons with reduced mobility when travelling by air, was adopted in Portugal through Decree-Law No. 254/2012 of 28 November, which sets out the scope and conditions for the application of the said Regulation.

v  Other legislation

The aviation sector is ruled by the same general liability provisions applicable in Portugal to other activities, which besides the Civil Code, include Decree-Law No. 383/89 of 6 November, regarding product liability (see Section VII.iii), and the Competition Act – Law No. 19/2012 of 8 May – that provides several fines for cases of anticompetitive practices (see Section VI).

Furthermore, in a chapter dedicated to crimes against the safety of communications, the Portuguese Criminal Code sets out four types of crimes involving air transport (see Section VIII.ii).

The Portuguese Environmental Framework enacted by Law No. 19/2014 of 14 April, establishes the rights and obligations regarding environmental protection, as well as a liability principle through which compensation can be obtained from those who threaten or provoke damage to the environment.

III  LICENSING OF OPERATIONS

i  Licensed activities

Commercial air carrier services, scheduled and non-scheduled for passengers and their baggage, mail and cargo, require prior licensing by ANAC.

The main piece of legislation applicable to the licensing of aviation operations in Portugal is Regulation (EC) No. 1008/2008 of 24 September, on common rules for the operation of air services in the Community.
A Portuguese air carrier must hold an operating licence as well as an air operator’s certificate, which is granted by ANAC. The aircraft has to be registered and hold a valid certificate of airworthiness.

Additionally, pursuant to Decree-Law No. 275/99 of 23 July and further amendments, which transposed Directive No. 96/67/CE of 15 October, handling services including self-handling are also subject to licensing.

For more information, see the European Union chapter in this publication.

ii Ownership rules

Regulation (EC) No. 1008/2008 of 24 September is applicable and, therefore, for an undertaking to be granted an operating licence, Member States or nationals of Member States must own more than 50 per cent of the undertaking and effectively control it, whether directly or indirectly, through one or more intermediate undertakings.

iii Foreign carriers

EU carriers

Pursuant to Article 15 of Regulation (EC) No. 1008/2008 of 24 September, EU air carriers that have been granted an operating licence by another Member State are entitled to operate intra-Community services.

Non-EU carriers

In Portugal, extra-community air services are governed by the Chicago Convention, as well as by several bilateral treaties.

The rights for the conduct of international air transportation by non-EU carriers to and from Portugal airports is governed by the air transport agreements entered into by and between Portugal and certain non-EU states, or, in the case of the United States, by the European Community and its Member States on the one hand, and the United States on the other.

Traffic rights (meaning the right of an airline to carry passengers, cargo or mail on an air service between two airports) require an operating authorisation and a technical permission that must be obtained from ANAC.

Code-sharing also requires prior authorisation from ANAC.

IV SAFETY

The main piece of legislation applicable to air safety in Portugal is Regulation (EC) No. 216/2008 of 20 February, plus further amendments, on common rules in the field of civil aviation, and establishing a European Aviation Safety Agency (EASA), whose main objective is to establish and maintain a high, uniform level of civil aviation safety in Europe.

Internally, Decree-Law No. 289/2003 of 14 November, regarding the certification of air operators, establishes several safety requirements for operators, which include the applicable requirements for continued airworthiness of aircraft, parts and spares, maintenance and crew members’ training.
Furthermore, Decree-Law No. 17-A/2004 of 16 January establishes the general regime for licensing civil aeronautical personnel for the performance of the following activities: private pilot for aircraft or helicopters; commercial pilot for aircraft or helicopters; air carrier pilot for aircraft or helicopters; flight engineers; and maintenance-certifying staff.

Additionally, Decree-Law No. 40/2006 of 21 February, which transposes Directive No. 2004/36/CE of 21 April, provides the rules applicable to the safety of third-country aircraft using EU airports, and creates the procedures applicable to the inspections to be conducted on such aircraft. In accordance with Decree-Law No. 40/2006 of 21 February, as amended, any aircraft to be found in non-compliance with international safety standards may be grounded until corrective measures are adopted by the aircraft operator.

V INSURANCE


The purpose of these pieces of legislation is to set out minimum insurance requirements for air carriers and aircraft in respect of passengers, baggage, cargo and third parties, for both commercial and private flights.

Pursuant to the applicable law, the obligation to conclude an insurance agreement is applicable irrespective of the nationality of the operator or of the aircraft, provided that the operator is authorised to operate between two or more locations situated in national territory.

Additionally, Decree Law No. 223/2005 of 27 December, sets forth the insurance requirements applicable regarding non-commercial operations by aircraft with a maximum take-off mass of 2,700kg or less.

Insurance and reinsurance activities are regulated and therefore the exercise of said activities by, and the incorporation of, insurance or reinsurance companies in Portugal is subject to specific requirements set forth in the Portuguese legal regime applicable to insurance and reinsurance activities approved by Law No. 147/2015 of 9 September, which was implemented into Portuguese law through Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency) (as amended).

Moreover, compliance with insurance requirements described in the provisions of Decree-Law No. 321/89 of 25 September is ensured by ANAC. The evidencing of insurance certificates or policies is mandatory whenever the supervisory authority so demands. Lack of evidence of the above-mentioned insurance documents leads to the seizure of the aircraft.

VI COMPETITION

In Portugal there are no specific regulations regarding competition for the aviation sector. Therefore, the applicable regime is the one provided in the competition legal regime enacted by Law No. 19/2012 of 8 May (the Competition Act) and EU antitrust law.
Regulation (EC) No. 487/2009 of 25 May establishes the possibility of non-application of antitrust rules in certain agreements or concerted practices in the aviation sector. These exemptions are granted only for a limited period and are only justified by the need for adaptation required by the airlines to operate in a more competitive market.

The provisions of the Competition Act are enforced by the Portuguese Competition Authority.

In general terms, in Portugal, all agreements, collective decisions and recommendations, as well as concerted practices or decisions by associations of undertakings that aim or achieve to prevent, restrict or distort competition are prohibited.

For that reason, undertakings must determine their market behaviour independently. Where this is not the case, and there is evidence of coordination or collusion, the existence of anticompetitive practices is likely and has to be corrected.

There are different kinds of anticompetitive practices. However, the most relevant concerning the civil aviation sector are probably the collusive practices, namely horizontal agreements or cartels (i.e., coordination between competing undertakings positioned at the same level of the production or distribution chain, such as airlines).

These practices include: price-fixing; limiting or controlling production, distribution, technical development or investment; sharing markets or sources of supply or applying dissimilar conditions to equivalent transactions.

Hence, these prohibited agreements and practices, save for some exceptions, are null and void and may be punishable, depending on the severity of the restriction on competition, with fines of up to 10 per cent of the total annual turnover of the offender.

Additionally, the rules provided in the general regime of administrative offences are alternatively applicable to collusive practices.

VII WRONGFUL DEATH

Please refer to Section VIII.iv.

VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

The Civil Code and the Civil Procedure Code are applicable to the procedure for establishing liability and settlement. Regarding mechanisms used to settle claims, and timelines for settlement, no further specific rules exist on civil aviation.

The limitation period for bringing claims, according to Regulation (EC) No. 889/2002 of 13 May is two years.

Pursuant to the Civil Code, all parties (e.g., carriers, owners, pilots or manufacturers) responsible for damage caused are jointly and severally liable.

Liability is allocated according to the respective fault or negligence, and the consequences, arising from the same. Therefore, the court may allocate a share of liability to some of the parties or to all of them.

ii Carriers’ liability towards passengers and third parties

Portuguese Law contains some specific provisions on liability arising from the air transportation business, which are set out in Decree-Law No. 321/89 of 25 September, as amended by Decree Law No. 208/2004 of 19 August.
For the purposes of determining potential liabilities, the law classifies three types of entities:

- **a** the owner (i.e., the registered owner of the aircraft);
- **b** the operator (i.e., the entity with effective control of the use of the aircraft); and
- **c** the air carrier (i.e., the entity authorised to provide air services by transporting persons, luggage, cargo or mail in such an aircraft).

The owner and operator of the aircraft shall be liable, regardless of any fault or negligence, for:

- **a** all damage sustained by third parties at ground level caused by the flight of the aircraft or by any debris falling therefrom, including cargo dropping out as a result of force majeure circumstances; and
- **b** any damage caused by the aircraft when moving on the ground or even when immobile.

The obligation of compensation emerging from such liability shall, in principle, rank *pari passu* with the amount of damage actually originated, but the maximum aggregate amount (regardless of the number of injured parties), of such compensation is annually determined by a governmental order. This order determines also the minimum ceilings depending on the maximum weight of the aircraft on arrival, provided, however, that those ceilings shall be deemed not to apply should the injured party (or its successors or assignees) prove that the damage was caused by the wilful action or neglect of the owner, the operator or any of its representatives. Such liability is, therefore, unlimited.

The owner and the operator's liability is, however, excluded in cases concerning damage caused by the aircraft as a result of acts of God or force majeure events, such as earthquakes or other natural cataclysms; armed conflicts, war, revolutions, insurrections or riots; and use by third parties of nuclear weapons or explosive devices.

In the event that the aircraft is stolen or used illicitly by an unauthorised person, the liability in first hand of its owner or operator persists, for compensation of any damage caused by such action; the owner or operator is naturally entitled to a remedy from whoever caused the situation.

The liability of the owner or operator also persists in the event of any damage caused to third parties if the aircraft was piloted or guided by the representatives of the owner or operator, even if overstepping their functions, without prejudice, of course, to the right of recourse.

If two or more aircraft collide in the air or on ground manoeuvres, the obligation of compensation for damage falls on the owner and operator of the aircraft causing the crash. If the collision was caused by more than one aircraft, the obligation of compensation shall be divided on a pro rata basis, except if it is impossible to accurately determine who was responsible for the accident; in such an event, liability shall fall on an equal basis on all parties involved.

Pursuant to the aforementioned legislation, air carriers are strictly liable for:

- **a** death or personal injuries towards passengers in relation to accidents occurring during transportation or during boarding or disembarking;
- **b** damage, loss, destruction or deterioration of baggage and cargo whenever this originated during air transportation or during boarding or disembarking; and
- **c** damage resulting from delays.
Liability may also be based on criminal grounds. Decree-Law No. 10/2004 of 9 January adapts the general regime of administrative offences (Decree-Law No. 433/82 of 27 October) to the laws and regulations regarding civil aviation. The aforementioned legislation establishes the legal framework applicable to all civil aeronautical offences implicating a violation of any legal rules for which a sanction is imposed, except in relation to state aircraft.

The legal types of administrative offences range through all the legislation applicable to the aviation sector.

ANAC is the entity empowered to initiate, conduct, decide and apply sanctions in respect of legal proceedings concerning aeronautical administrative offences.

In light of this, and provided that a complaint has been sent to the air carrier and the air carrier has not answered within six weeks of the date of receipt of the complaint, or the air carrier’s response did not satisfy the passenger, passengers have the right to address a complaint to ANAC, which shall then analyse the possible breach situation and may initiate an administrative offence procedure.

Passenger behaviour is also a concern in the aviation sector. Thus, Decree-Law No. 254/2003 of 18 October, was enacted to focus on the prevention and repression of unlawful acts carried out by disruptive passengers in commercial flights.

As previously mentioned, the Criminal Code also provides for four types of crimes related to air transport. These crimes are set out in a chapter entitled ‘Crimes against communications safety’ and are the following:

a Pursuant to Article 287, the hijacking or capture of an aircraft shall be punishable with a penalty of five to 15 years’ imprisonment.

b Pursuant to Article 288, attempting an attack against the security on air transport shall be punishable with a penalty of one to eight years’ imprisonment.

c Pursuant to Article 289, a person who pilots an aircraft and is not in a condition to comply with the safety requirements or is in violation of the applicable piloting rules and, therefore, creating danger to life or the physical integrity of another person, or to high-value assets, is punishable with one to eight years’ imprisonment. If the crime is committed through negligence, the penalty is one to five years’ imprisonment.

d Pursuant to Article 293, a person who throws a projectile against a moving vehicle (applicable to aircraft) may be punished with up to one year’s imprisonment or with a fine.

iii Product liability


Pursuant to the aforementioned Decree-Law, the producer is: (1) the manufacturer of a finished product, the producer of any raw material or of a component part and any person who presents him or herself as producer by trademark or name; (2) any person who imports into the Community a product for sale, hire, leasing or any form of distribution; (3) where the producer of the product cannot be identified, each supplier of the product, unless the supplier informs the injured person, within a reasonable time, of the identity of the producer or of the person who in turn supplied the product.

Pursuant to the aforementioned legislation, the producer or manufacturer is liable, regardless of fault, for all damage caused by a defect in the product.
According to the legislation, the compensable damage is that which results from death or personal injury or the damage caused to any item of property other than the defective product itself, provided that the item of property is of a type ordinarily intended for private use or consumption; and was used by the injured person mainly for that person’s own private use or consumption.

The injured person shall be required to prove the damage, the defect and the causal relation between the defect and the damage.

Should two or more persons be liable for the same damage, they shall be severally liable and in the event of doubt, liability shall be apportioned equally. There is also a right of return that shall be decided according to the extent of the fault and its consequences.

The liability of the producer may be reduced or disallowed by the court when, having considered all the circumstances, the damage is caused both by a defect in the product and by the fault of the injured person.

This regime is applicable to the liability of the manufacturer of the aircraft or the manufacturer of its parts or spares towards passengers.

As regards the liability of the manufacturer of the aircraft or the manufacturer of its parts or spares towards operators, the general rules of the Civil Code are applicable as well as the Conventions already mentioned.

For owners’ liability, see Section V.ii.

iv Compensation

In Portugal, in matters involving death or injuries, the main categories of compensatory damages are material and moral damages.²

Material damages include the reimbursement of medical costs and expenses, economic losses resulting from the damage as well as loss of income. In cases of death, funeral expenses shall also be reimbursed.

Pursuant to the applicable law, moral damages that compensate pain and suffering depend on the extent of the fault, on the economic situation of the guilty party and the victim as well as on any other justifying circumstances.

The amount of the compensation will depend, for example, on the extent and magnitude of the medical treatment, inability to work, number of dependents, psychological consequences and permanent damage.

In cases of death, the compensation for moral damage shall be assigned together to the spouse or partner, ascendants and other descendents. If the deceased had no spouse or descendents, the compensation shall be assigned to the deceased’s parents or other ascending relatives, or ultimately the deceased’s brothers and sisters or nephews.

According to the latest Portuguese court decisions on compensation for moral damage to the relatives of the deceased, the amounts range from €60,000 up to €100,000.

Even though there is no specific state-funded social security support for the victims of aircraft accidents, the state provides proper medical care for injured or incapacitated people through public hospitals and social security.

According to Law No. 48/90 of 24 August (the Basic Health Act), the national health service in Portugal is universal, providing healthcare services.

² Pursuant to a decision of the Lisbon Court of Appeal dated 29 April 2010, moral damages can only be awarded if the intention of causing the damage is proven, even if the damage was caused by imprudence or negligence.
Furthermore, state employees benefit from a special assistance scheme, which also includes their respective spouses, ascendants and descendants.

If an accident results in a permanent loss of the ability to work, social security beneficiaries are awarded a disability pension.

In the event of death, subsidies are assigned regardless of the cause of the accident and regardless of the requirements applicable to civil liability. Thus, the only condition that needs to be verified for the subsidy to be assigned is the fact itself (i.e., death). In light of this, there is no record of cases in which the Portuguese social security system has recovered costs from third parties.

In addition, EU Regulation No. 996/2010 obliges the air carrier to provide the passenger list within a maximum period of two hours after an accident. The air carrier shall take actions by other means at its reach to locate any family members of victims with regard to whom nobody has shown concern. It will also deal with calls and queries about the accident victims, gathering all possible information about their families.

IX  VOLUNTARY REPORTING

The legislation applicable to occurrence reporting in civil aviation is Decree-Law No. 218/2005 of 14 December, which transposes Directive No. 2003/42/CE of 13 June, and is applicable to all occurrences related to (1) aircraft with a Portuguese registration number, (2) aircraft with a foreign registration number provided they are used by national air carriers or foreign air carriers established in Portugal, and (3) aircraft with foreign-registered numbers whenever the occurrence takes place in Portuguese national territory or airspace.

This Decree-Law is applicable to any events that endanger or, if not corrected, may endanger the aircraft, its occupants and any third parties.

Decree-Law No. 218/2005 lists a number of occurrences that shall be notified to ANAC by any entity or single person that becomes aware of such events as per the performance of their duties. Serious occurrences shall be notified within six hours. Non-serious occurrences shall be notified within 72 hours.

The information resulting from the occurrences reporting is analysed by ANAC in order to ensure, internally and externally, confidentiality of data and of information sources as well as the civil aviation personnel’s trust. Also, pursuant to this diploma and without prejudice to the powers attributed by law to judicial authorities, the identification of the person communicating the occurrence or incident as well as of any other person intervening is confidential.

In addition, ANAC shall refrain from initiating any proceedings in respect to unpremeditated or negligent infringements that come to its attention only because they have been reported under the national mandatory occurrence-reporting scheme, save for cases of gross negligence.

Lastly, employees who report incidents of which they may have knowledge cannot be subjected to any disciplinary procedures.

X  THE YEAR IN REVIEW

The Portuguese government entered into a memorandum of understanding with ANA Aeroportos de Portugal on 16 February 2017, through which the latter prepared an environmental impact study for implementing a new airport in Montijo. Although there are
concerns regarding the impact on local fauna and flora, the study finds the project feasible and suggests a series of compensatory measures in order to reduce said impact. The study will be analysed by the Portuguese Environment Agency and will be in public consultation for 40 days. It is expected that the construction works of the new Montijo Airport will start next year and be completed in 2022.

Cadet pilot training and practice and aeronautical mechanics continues to represent an important market in Portugal. In 2017, new players entered this market, offering tailored international training solutions for aspiring cadets thus contributing to meet the growing worldwide demand for pilots.

XI OUTLOOK

Portugal is taking the initial steps to follow the European financing trend on the aviation market by assessing the possibility of raising capital through the use of take-off and landing slots as collateral to secure debt and to make new investments.

One of the first companies that employed this mechanism was Virgin Atlantic, using its slots at London Heathrow Airport as collateral for a private placement bond, the largest non-bank related debt-financing arrangement involving slots gates and routes as collateral, the proceeds of which were used to finance new aircraft orders.

The legislative trend of reducing the involvement of courts in the judicial system has progressively extended mediation to a number of legal areas, with the intent of turning this mechanism into a valid and effective dispute resolution alternative.

Mediation can be public or private, and makes it possible for one or several parties in dispute to voluntarily reach an agreement with the participation of one or several conflict mediators.

According to Law No. 67/2013 of 28 August, as amended by Law No. 12/2017 of 2 May (which establishes the legal framework of autonomous administrative entities with regulatory functions for the economic activity of the private, public and cooperative sectors), as well as ANAC’s Organic Law, ANAC may promote voluntary arbitration for the resolution of disputes and provide conflict mediation services.

Pursuant to the aforementioned Law, regulatory entities are empowered to solve conflicts between operators and consumers upon the request of the interested parties by proceeding with complaint-handling procedures through mediation, conciliation or arbitration; these procedures shall be simple, fast and generally free.

However, this mediation activity has not yet been implemented by ANAC.

In relation to the operation of unmanned aircraft systems (e.g., drones), EC Regulation No. 216/2008 of 20 February 2008 mandates EASA to regulate these systems when used for civil applications and with an operating mass of 150kg or more. On 14 December 2016, Regulation No. 1093/2016 was published in the Portuguese Official Gazette, setting out the operating conditions applicable to the use of airspace by remotely piloted civilian aircraft systems (drones).

Lastly, fees applicable to the licensing of activities are under review.
Chapter 29

ROMANIA

Adrian Iordache and Raluca Danes

I INTRODUCTION

Located at the crossroads of central, eastern and south-eastern Europe, Romania is a member of the European Union and has 16 commercial airports.

The biggest and busiest airport in Romania is Henri Coanda International Airport, which serves approximately 70 international destinations and nine internal destinations. Henri Coandă International Airport is located in the north of Bucharest and has two terminals and two runways, both 3,500 metres long, with over 7.5 million passengers transported annually. It is named after Romanian flight pioneer Henri Coandă, builder of the Coandă-1910 aircraft and discoverer of the Coandă effect of fluids.

The national authorities in Romania are the Ministry of Transportation and the Romanian Civil Aeronautic Authority. The Ministry of Transportation has delegated some of its duties to the Romanian Civil Aeronautic Authority.

The Romanian Civil Aeronautic Authority, as it now stands, was established in 1993 and acts as the safety regulator and oversight authority for civil aviation in Romania. The goals are aligned with those established by the International Civil Aviation Organization (ICAO) and the European Civil Aviation Conference and the European Aviation Safety Agency, to maintain and increase aviation safety by effective and efficient processes and measures in the areas of safety regulation and oversight.2

II LEGAL FRAMEWORK FOR LIABILITY

The principal legislation in Romania in a combination of international, European and national.

i International carriage


The provisions of the Montreal Convention are binding on all carriage, international or internal, by EU operators, pursuant to Regulation No. 2027/97, as amended by Regulation No. 889/2002.

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1 Adrian Iordache is a managing partner and Raluca Danes is a senior associate at Iordache Partners.
2 www.caa.ro.
ii Internal and other non-convention carriage
The Montreal Convention, through Government Ordinance No. 107/2000 and Regulation (EC) No. 2027/97, as amended, is directly applicable to carriage in Romania. The national law regulating air carrier liability on internal carriage and the national law regulating passengers’ right to compensation were abolished by Law No. 234/2007 following Romania’s accession to the European Union.

iii General aviation regulation
The most important regulation is the Romanian Civil Air Code (the Air Code), which sets the general rules applicable in civil aviation. The Air Code expressly provides that civil aeronautical activities within the territory and in the national airspace of Romania are governed by the Code and other relevant legislation, by the Convention on International Civil Aviation, signed in Chicago on 7 December 1944 (the Chicago Convention), and by the bilateral and multilateral treaties to which Romania is a party.

The Air Code regulates all civil aeronautical activities carried out in the national airspace and in the territory of Romania, including any activities that disturb flight safety and aeronautical security.

The Air Code provides that secondary regulation can be issued by the Ministry of Transport and by the Romanian Civil Aeronautic Authority.

iv Passenger rights
Passenger rights are covered by Regulation (EC) No. 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. Regulation No. 261/2004 has direct effect in Romania.

The National Authority for Consumer Protection is the body responsible for enforcement of passenger rights. 3

Non-compliance with the provisions of Regulation No. 261/2004, regarding the right to compensation, the right to reimbursement or rerouting, the right to care and the obligation to inform can result in a fine of up to €520 for each passenger.

The rights of the disabled persons or persons with reduced mobility are covered by Regulation No. 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air. This Regulation is directly applicable in Romania and the responsible body for enforcing its provisions is the National Authority for Disabled Persons. The responsible body can apply fines to the air carriers, tour operators and managing bodies of the airports for up to €520 for failure to comply with the obligations to accept reservations, with the obligation to designate points of arrival and departure within the airport, the obligation to provide assistance, the obligation to compensate for lost or damaged wheelchairs, other mobility equipment and assistive devices, etc.

v Other legislation
The aviation sector is ruled by the same general liability provisions applicable in Romania to other activities, which include, in addition to the Civil Code, the Competition Act (Law No. 21/1996), Emergency Ordinance No. 77/2014 regulating state aid and the Environment Protection Regulations.

III LICENSING OF OPERATIONS

i Licensed activities

The licensing of air carriers, the right of air carriers to operate in Romania, the air services and the pricing of Romanian air services is regulated under Regulation (EC) No. 1008/2008 on common rules for the operation of air services in the Community (Recast).

In Romania, the procedure for the issuance, suspension and revoking of the operating licence was approved through Government Order No. 808/2011.

All air services require an operating licence, except (1) those performed by non-power-driven aircraft or ultralight power-driven aircraft, and (2) local flights.

The request for the issuance of an operating licence shall be submitted to the Aviation Division of the Ministry of Transport, together with the following documents:

a air operator certificate (AOC);
b certificate of incorporation of the air operator;
c insurance policies, in accordance with Regulation (EC) No. 785/2004;
d articles of incorporation of the air operator;
e shareholders’ structure and details of the shareholders;
f description of the previous activity of the company;
g balance sheet for the previous year;
h three-year business plan, which includes an indication of the geographical areas where the air carrier will operate, an indication of the aviation activities to be performed, any potential commercial collaborations and information on the sales system;
i analyses of the envisioned costs for the activities and of the financing methods; and
j proof of good standing for the persons who will continuously and effectively manage the operations.

The Aviation Division has the power to request further documents before issuing the operating licence. Usually the licence is issued in 60 days, from the date that the documentation is complete. If the Aviation Division decides not to issue the operating licence, the air carrier can oppose the decision.

An operating licence shall be valid as long as the air carrier complies with the requirements imposed by Regulation No. 1008/2008.

ii Ownership rules

In addition to the restrictions provided in Article 4 of Regulation No. 1008/2008, which state that Member States or nationals of Member States shall own more than 50 per cent of the undertaking and effectively control it, whether directly or indirectly, through one or more intermediate undertakings, there are no other restrictions imposed on air carriers.

However, in accordance with the provisions of the Chicago Convention, civil aircraft must hold a registration certificate to operate in national airspace, as stipulated in the Air Code. The Ministry of Transportation may establish, by specific regulations, categories of civil aircraft that can operate in the National Mining Area without holding a registration certificate. If a civil aircraft is registered in Romania, it cannot be registered in another state.

The ownership rights or the transfer of the ownership and any other rights related to civil aircraft are governed by the national law and entered in the Civil Aircraft Register. Though registration alone does not give effect to the right, it allows the right to be enforced against third parties.
iii Foreign carriers

Pursuant to Article 15 of Regulation No. 1008/2008, EU air carriers that have been granted an operating licence by another Member State are entitled to operate intra-Community services.

Non-EU air services are governed by the Chicago Convention and other bilateral treaties.

The rights for the conduct of international air transportation by non-EU carriers to and from Romanian airports is governed by the air transport agreements entered into by Romania and certain non-EU states, or as the case may be, with other Member States. According to Article 50 of the Air Code, foreigner carriers can perform air services in Romanian national air only in accordance with the traffic rights that are granted by the Ministry of Transport.

IV SAFETY

Flight safety is a mandatory requirement and also a fundamental performance criterion for any civil aeronautical activity. In Romania, in accordance with the Air Code, flight safety includes issuing specific regulations, including the setting of safety targets and minimum acceptable levels of safety; providing the framework for the implementation of regulations, objectives and safety levels; and also supervision of the flight safety.

The Romanian Civil Aeronautical Authority was designated as the national supervisory authority and specialised technical body for performing the civil aviation safety oversight function at national level. Its main responsibilities include (1) certification of civil aeronautical agents, civil aviation personnel and aeronautical techniques in accordance with the applicable national and Community regulations; (2) certification of civil aerodromes; (3) approval of works in areas subject to civil aviation servitude; (4) flight safety inspection; and (5) the exercise of registry activities in civil aviation.

In exercising its duties, the Romanian Civil Aeronautical Authority can temporarily prohibit or restrict flights of foreigner air carriers if it receives information that the operation or maintenance of the aircraft does not meet the minimum safety standards established under the Chicago Convention. It can also decide to detain the civil aircraft in case of non-compliance with the minimal safety standards until the deficiencies have been remedied.

For the purposes of the air safety, certification of the aeronautical agents (air carrier, developers of the aeronautical equipment and aeronautical infrastructure, air navigation agents, etc) and of the aeronautical personnel is required by the Air Code.

V INSURANCE

Liability insurance of air carriers and aircraft operators is regulated by Regulation No. 785/2004 on insurance requirements for air carriers and aircraft operators.

This Regulation applies to all air carriers and to all aircraft operators flying within, into, out of or over the territory of an EU country. Air carriers and aircraft operators must be insured, in particular in respect of passengers, baggage, cargo and third parties, and risks associated with aviation-specific liability (including acts of war, terrorism, hijacking, acts of sabotage, unlawful seizure of aircraft and civil commotion).
Air carriers and aircraft operators registered in Romania must submit to the Romanian Civil Aeronautic Authority copies of their respective insurance policies. When registering for an operating licence, insurance for cargo and third parties must be provided.\(^4\)

All aircraft that flies into or out of Romania must have on board copies of the insurance policies and upon request must provide the copies to the agents of the competent body.

Failure to present a valid insurance policy when operating a flight in the Romanian air space may result in fines.

**VI  COMPETITION**

Competition between air carriers is regulated by competition law. Romanian national competition law is mainly set out in Law No. 21/1996 on competition. In addition to the national legal framework, European competition law is applicable. Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and Regulation (EC) No. 139/2004 on the control of concentrations between undertakings are relevant. In addition, Regulation (EC) No. 411/2004, which repealed Regulation (EEC) No. 3975/87 and amended Regulation (EEC) No. 3976/87 and Regulation No. 1/2003, in connection with air transport between the Community and third countries, extends the applicability of European Competition law to air transport between the European Union and third countries.

The applicable competition rules are applied by the Romanian Competition Council.

**VII  WRONGFUL DEATH**

Under the Air Code, Regulation (EC) No. 2027/79 on air carrier liability in the event of accidents, and also under the Montreal Convention, the liability of the air carrier in case of wrongful death is not limited. For damages up to 100,000 special drawing rights (SDR) the air carrier cannot contest claims for compensation. Above that amount, the air carrier can defend itself against a claim by proving that it was not negligent or otherwise at fault.

In case of wrongful death, the air carrier must make an advance payment to cover immediate economic needs, within 15 days from the identification of the person entitled to compensation. In the event of death, this advance payment shall not be less than 16,000 SDR.

Generally, the liability of the air carrier for the passengers is regulated in the Civil Code, in the Transport Agreement Chapter. The carrier is responsible for the death of, or injury to, the integrity or the health of the passenger. Any provision removing or limiting the liability of the carrier for the damage shall be deemed unwritten.

In the event of a passenger’s death, under the Montreal Convention the air carrier is liable for the material and non-material damage suffered by persons entitled to claim damages. In the absence of a contractual relationship between the carrier and the heirs, liability cannot be attributed on a contractual basis. In this situation, it is the air carrier’s tort liability to the deceased’s family.

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\(^4\) Article 4(1)(d) of the Procedure on Issuance, Suspending and Revoking the Operating Licence, approved through Government Order No. 808/2011.
Therefore, wrongful death is a civil liability, regulated as tort in the Civil Code. The Civil Code provides that only the persons who were dependent on the deceased are entitled to compensation. In determining the compensation, the judge will take into account the needs of the entitled persons and the income normally earned by the deceased.

If entitlement to an allowance or pension is recognised in social security, the compensation is only due to the extent that the damage suffered by death exceeds the allowance or the pension.

VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

If the Romanian courts are competent to settle the claims that have arisen from international carriage, the provisions of the Civil Procedure Code shall apply.

In the event of the death of a passenger, in accordance with the provisions of the Montreal Convention, a case for the liability of the carrier may be brought by the deceased’s heirs.

With regard to air carrier liability, the Montreal Convention provides that the time limit for bringing a claim is two years from the date of arrival of the aircraft at the destination or from the date on which the aircraft should have arrived at the destination. If the two-year period is exceeded, the right to compensation is lapsed. The method of calculating this period is set by the law governing transport contracts. The two-year term is a term from which states signatories to the Montreal Convention cannot derogate because it was set up to establish uniform rules on airline liability issues. In international jurisprudence, the two-year period is not considered to be susceptible to interruption or suspension, although in France it was considered to be a limitation period that can be interrupted and suspended on the grounds of common law.

Where Regulation No. 261/2004 is applicable, the passenger should first submit a complaint to the air carrier operating the flight concerned. Should the air carrier fail to provide with a reply within six weeks of receipt or if the response is not satisfactory, a request should be sent to the National Authority for Consumer Protection.

ii Carriers’ liability towards passengers and third parties

The liability of the air carrier is primarily regulated by the provisions of the Montreal Convention, which provides maximum liability limits. The air carrier is primarily held accountable.

The liability of the air carrier results from the contract of carriage concluded with each passenger at the time of purchase and payment of the flight ticket. Under this contract, the air carrier has the obligation to carry the passenger in maximum security, guaranteeing the protection of the health and life of the passenger in question, who is benefiting from transport services under a contract. Injury or death of the passenger is a breach by the air carrier of the contractual obligations mentioned above. As a result, airline liability to the passenger for the damage suffered by him or her as a result of injury is a contractual liability.

In accordance with the provisions of Regulation No. 593/2008, the contract of passenger transport is governed by the law of the country of residence of the passenger provided that the place of departure or arrival is also located in that country and only if the parties have not chosen another applicable law. If these requirements are not met, the law of the country of the habitual residence of the carrier shall apply.
In the event of passenger death under both the Warsaw Convention and the Montreal Convention, the airline is liable for the material and non-material damages suffered by persons entitled to claim damages. In the absence of a contractual relationship between the carrier and the heirs, liability cannot be attributed on a contractual basis. In this case, it is the airline's tort liability to the deceased's family.

The Civil Code states that the carrier shall be liable for the death of, or injury to, the integrity or the health of the passenger and for all direct and immediate damage resulting (1) from the non-performance of the carriage, (2) from its performance under conditions other than those laid down or (3) from the delay in its performance. If the contract is no longer of interest to the passenger owing to the delay in the execution of the carriage, the latter may denounce it, requesting the reimbursement of the price.

The carrier shall not be liable if the damage was caused by the passenger, intentionally or by gross negligence (the burden of proof is on the carrier).

In addition, the carrier is not liable when it proves that the damage was caused by the passenger's health, by the action of a third party for whom it is not held responsible or by force majeure. However, the carrier remains liable for the damage caused by the aircraft as a result of a technical fault or the actions of crew members.

The carrier is liable for the loss or damage of the luggage or other property of the passenger unless it is proved that the damage was caused by a defect of the carrier, an action of the passenger or force majeure. The carrier shall be liable for the luggage or other property of the passenger within the limit of its declared value or, if the value has not been declared, by what would be considered the normal contents according to the circumstances.

An air carrier can make a recourse claim against a third party. A recourse claim may be considered, for example, if the damage is caused by several injuring parties that are liable in solidarity with the injured party. If the injured party only takes action against the airline, the airline has to pay the full amount, but may recover the corresponding shares of damages from the other injuring parties.

### iii  Product liability

Council Directive No. 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products was implemented in Romania by Law No. 240/2004 on the liability of the producers. The national law stipulates that the producer is liable for the current and future damage caused by the defect of its product, if the injured party can prove the damage, the defect and the causal relationship between the defect and the damage. In certain situations, the producer will not be held liable, if it proves the following:

- a that it did not put the product into circulation;
- b that, having regard to the circumstances, it is probable that the defect that caused the damage did not exist at the time the product was put into circulation by it or that this defect came into being afterwards;
- c that the product was neither manufactured by it for sale or any form of distribution for economic purposes nor manufactured or distributed by it in the course of its business;
- d that the defect is owing to compliance of the product with mandatory regulations issued by the public authorities;
- e that the state of scientific and technical knowledge at the time when it put the product into circulation did not allow the defect to be discovered; or
in the case of a manufacturer of a component, that the defect is attributable to the
design of the product in which the component has been fitted or to the instructions
given by the manufacturer of the product.

A limitation period of three years is applicable to proceedings for the recovery of damages as
a result of a defective product. The limitation period runs from the day on which the injured
party became aware, or should reasonably have become aware, of the damage, the defect and
the identity of the producer.

The rights conferred upon the injured party pursuant to the law on the liability of
the products shall be extinguished 10 years after the date on which the producer put into
circulation the actual product that caused the damage.

iv Compensation

The injured parties and their beneficiaries must take necessary action to identify the liable
persons or entities and their insurers in order to negotiate the compensation (except for the
mandatory payment imposed on European air carriers).

Under Romanian civil law, all damage suffered has to be fully compensated. This
compensation will always be recoverable, provided that the cause of the accident is proved.
Moral and material damage can be compensated.

If the damage is of a continuous nature, the compensation is granted in the form of
periodic benefits.

In the case of future damage, compensation, regardless of the form in which it was
granted, may be increased, reduced or suppressed if, after it is determined, the damage has
increased, diminished or ceased.

In the case of injury to the physical integrity or health of a person, the compensation
must account for loss of earnings (wages) as a result of the injured person being unable to
work or as a result of reduction of the ability to work. The compensation must also include
the cost of medical care and, if appropriate, the cost of increasing the life needs of the injured
party, as well as any other material damage.

Compensation for loss of earnings (wages) shall be determined by the judge on the
basis of:

\[ a \] the average net monthly work income of the injured person in the last year before the
loss or reduction of his or her working capacity; or

\[ b \] the net monthly income the injured person could have earned, taking into account the
professional qualifications he or she would have had.

If the injured party is a minor, the compensation shall be determined as mentioned above,
but it shall be calculated as due from the date when the minor has reached the age prescribed
by law to be part of a work relationship.

Moreover, in case of injury to the physical integrity or health of a person, compensation
may be granted for damage as a result of the restriction of family and social life.

In the event of death, the persons who were dependent on the deceased are entitled
to compensation. In determining the compensation, the judge will take into account the
needs of the entitled persons and the income normally earned by the deceased. The parents,
siblings, spouse and children of the deceased can request compensation for the pain suffered as a result of the victim's death. This right can be exercised by any other person who could prove the existence of such an injury.

The person who has incurred expenses for the care of the victim's health or, in the event of his or her death, for the funeral, has the right to be reimbursed for the expenses by the person responsible for the act that caused these costs.

However, if entitlement to an allowance or pension is recognised in the social security system, the compensation is due only to the extent that the damage exceeds the allowance or the pension.

IX DRONES

According to the national stipulations regarding drones (unmanned aerial vehicles), to operate a drone an operator needs the following documents:

i A registration certificate

In order for an unmanned-on-board motorised aircraft to be operated in the national airspace it must hold an identification/registration document. This certificate can be obtained by submitting the request together with the relevant documents to the Romanian Civil Aeronautic Authority, in accordance with the Airworthiness Directive No. DN: 14-02-001. The fee for obtaining the registration certificate is €90 plus VAT per aircraft (according to OMTI 1305/2012).

In the event the unmanned-on-board motorised aircraft already holds a registration certificate or an equivalent document issued by another country, the RCAA may recognise such document.

ii National flight permit for aircraft with a maximum takeoff mass of more than 15 kilograms

The requirements for the national flight permit are contained in the Romanian Civil Aeronautical Regulation RCAR-FACA ‘Flight Admissibility of Certain Civil Aircraft Categories’ Chapter VI ‘Unmanned Aerial Vehicles (UAV)’. The fee for obtaining the national flight licence is €540 plus VAT per aircraft, (according to OMTI 1305/2012).

iii Third-party liability insurance

The insurance for unmanned-on-board motorised aircraft with a maximum takeoff mass greater than 20 kilograms is mandatory and it shall be issued in accordance with Regulation (EC) No. 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators.

The insurance for unmanned-on-board motorised aircraft with a maximum takeoff mass of less than 20 kilograms is optional and the operator shall have sole responsibility.

iv Operating licence

Depending on the activity the operator will perform, the operator will seek and obtain approvals and endorsements and conclude the protocols specified in Government Decision

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No. 912/2010 for the approval of the procedure for the authorisation of flights in the national airspace as well as the conditions under which the takeoff and landing of civil aircraft may also be performed on other land or water surfaces than certified aerodromes (GD No. 912/2010):

a Meeting the conditions for which flights are considered to be authorised in the controlled airspace or area of airspace where no air traffic control services are provided, in accordance with the stipulations of GD No. 912/2010.

b Approval for shooting or aerial photography. Such approval is requested in accordance with GD No. 912/2010 from the Romanian Ministry of Defence.

c Approval for operation below minimum safety heights. Such approval must be requested in accordance with GD No. 912/2010 from the Romanian Ministry of Defence for operating below 3,000 metres above the area of Bucharest. For other areas, the request must be submitted to the Romanian Civil Aeronautic Authority.

d Approval for flights in the border area.

e Takeoff and landing approvals.

v Overflight authorisation for operating in the area of the Danube Delta Biosphere Reserve

According to the stipulations of Law No. 82/1993 on the establishment of the Danube Delta Biosphere Reserve, as subsequently amended and supplemented, air operators intending to conduct flights in the airspace of the Danube Delta Biosphere must request the Danube Delta Biosphere Reserve Administration to issue an overflight permit.

X VOLUNTARY REPORTING

In Romania, voluntary reporting is regulated by the Romanian Civil Aeronautical Regulation on Civil Aviation Event Reporting (RACR–REAC) of 20 July 2016 approved by Government Order No. 600/2016. The RACR–REAC is ensuring the national application of the relevant provisions of Regulation (EU) No. 376/2014 on the reporting, analysis and follow-up of occurrences in civil aviation.

The reporting system is managed by the Civil Aviation Safety Investigation and Analysis Center (CIAS). All persons are encouraged to report voluntarily any event or information perceived as a real or potential threat to aviation safety, to the internal function or structure of their organisation or directly to the CIAS.

The voluntary reporting system set up by the CIAS at the national level includes the possibility of reporting online on the CIAS website or by downloading the reporting forms from the website and submitting them using alternative means (fax, email, etc.).

The CIAS ensures the anonymity of the reporters and of the persons nominated in the reports and uses the information in compliance with the provisions of Regulation No. 376/2014.

The person who voluntarily reports a civil aviation event also has the possibility to send the report in a sealed envelope marked as confidential. Subsequently, in order to determine the treatment of the event, the CIAS reserves the right to contact the person who reported it. The original report is recorded in the database and classified as ‘Confidential, without Reporters Identification Data’.
According to the RACT–REAC, the CIAS will manage the reports to prevent the use of information for purposes other than aviation safety and to properly ensure the confidentiality of the identity of the report and of the persons mentioned in the event reports. The aim is to promote the concept of just culture (Article 4.2 of RACT–REAC).

XI  THE YEAR IN REVIEW

On 1 July 2018, the Cape Town Convention and the Aircraft Protocol entered into force in Romania. They were ratified through Law No. 252/2017. Romania made the following declaration:

a  In accordance with the provisions of Article 39(1)(b) of the Convention, Romania declares that nothing in this Convention shall affect its right or that of any entity thereof, intergovernmental organisation or other provider of public services in Romania, to arrest or detain an object under the laws of Romania for payment of amounts owed to such entity, organisation or provider directly relating to those services in respect of that object or another object.

b  In accordance with the provisions of Article 54(2) of the Convention, Romania declares that the options available to the creditor that are not expressly outlined in the Convention can be exercised with the approval of the Romanian courts.

c  In accordance with Article XXX(1) of the Protocol to the Convention on International Interests on Mobile Equipment on Matters specific to Aircraft Equipment, Romania will apply this Article.
INTRODUCTION

In Russia, aviation is regulated by various federal bodies including the Ministry of Transport, the Federal Air Transport Agency, the Federal Service for Transport Supervision, the Ministry of Defence, the Federal Air Navigation Service and the Interstate Aviation Committee (IAC).

The Ministry of Defence regulates the use of airspace while the other bodies have executive powers in the aviation sector: the Ministry of Transport develops aviation state policies and legal regulations; the Federal Agency of Air Transport is responsible for the registration and certification of airports; and the Federal Service for Transport Supervision deals with aero-navigational services, registration of aircraft and other services.

Some of the functions of the IAC (which have recently been substantially reduced – see Section IV) are monitoring flight safety, investigating accidents and issuing accident reports. Furthermore, the IAC compiles statistics on accidents and incidents involving passenger, military, transport and corporate aircraft.

Aviation law in Russia comprises the Air Code of the Russian Federation 1997 (the Air Code) as amended, the Civil Code of the Russian Federation 1994 (the Civil Code) and extensive subordinate legislation.

LEGAL FRAMEWORK FOR LIABILITY

International carriage

Under Russian law, international treaties to which Russia is a party are deemed to be an integral part of the Russian legal system. Russia is a party to the Warsaw Convention 1929 and the Hague Protocol 1955.

On 3 April 2017, Russia ratified the Montreal Convention 1999 through Federal Law No. 52-FZ on the accession of the Russian Federation to the Convention for the Unification of Certain Rules for International Air Carriage, which came into force in August 2017 and marks the beginning of substantial change. However, the ratification was subject to the right not to apply the terms of the Montreal Convention to non-commercial international air carriage and transportation for military purposes. Despite this, joining the Montreal Convention will ensure that there are equal conditions for air carriers and legal certainty for those using their services.

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1 Alexandra Rodina is a partner at Kennedys Law LLP.
In particular, there will be substantial changes to the limits of liability, which will exponentially increase the value in roubles for the limits to cargo claims. The financial unit of damages will now be special drawing rights (SDR).

While the upper limit of liability for damage has increased, accession to the Montreal Convention will also allow Russian carriers to avoid certain liabilities, if it can be successfully argued that an act or omission of the passenger contributed to the damage. There is also a provision in the Montreal Convention that exempts carriers from liability for death of a passenger that exceeds 113,000 SDR if it can be demonstrated that the damage was solely a result of third-party actions, or the harm was not caused by the negligence or improper actions of the carrier or its employees.

The amendments to the Air Code came into force on 27 May 2018, which led to the revision of the Air Code in accordance with the Montreal Convention. In addition, the concept of air transportation was clarified in the Air Code, and amendments were also made to the regulations on the use of shipping documentation in electronic form.

There were other amendments to the Air Code in 2018 that came into force, which establish the procedure for maintaining a blacklist of passengers who may be denied air transportation. These provisions establish the procedure for entry of passengers in a special register who violated public order during transportation, as well as the term for such passengers to be in the register (one year). A carrier may refuse to transport a passenger who is included in such a register. The passenger may appeal this decision in court. These provisions are aimed at reducing in-flight brawlers. The laws concerning domestic carriage remain out of the scope of the Montreal Convention and, as such, will need to be addressed by Russian law.

ii  **Internal and other non-convention carriage**

Domestic contracts of carriage are governed by the Air Code and the Civil Code. From 1 January 2013 new legal instruments were enforced in Russia on the compensation of damages in death and personal injury cases (see Section VI.iv).

iii  **General aviation regulation**

See Section II.ii. There are no separate provisions governing liability of operators of helicopters, and light and ultralight aircraft. On 30 March 2016, the Federal Law on introducing amendments to the Air Code of the Russian Federation regarding the use of unmanned aerial vehicles came into force. The Law regulates the use of drones and aims to increase the general level of aviation security.

iv  **Passenger rights**

The General Rules of Air Carriage of Passengers, Baggage, Freight and Requirements to Servicing Passengers, Shippers, Consignees of 2007, last amended in 2016 (the Rules), are applicable both to domestic and international flights of Russian operators.

Under the Rules, in cases of delay or cancellation of flights in certain circumstances passengers are entitled to a range of services including accommodation, food, and transfers to and from the airport. The Rules also deal with carriage of minors and disabled passengers.

Passenger rights have been widened by Russia’s accession to the Montreal Convention. Notably, passengers will be able to make a claim for damage, injury or death before a court in a Montreal Convention Member State where the passenger is domiciled provided that the carrier has an office in and a connection to that country.
III LICENSING OF OPERATIONS

i Licensed activities

Under the Air Code, commercial flights, development, manufacture, repair and testing of aviation equipment requires mandatory licensing. This includes drones weighing more than 30kg.

The licensing requirements for the carriage of passengers, baggage and cargo are set out in the Air Code and numerous federal laws. The body responsible for the licensing of certified commercial operators is the Federal Air Transport Agency of Russia. The application for a licence should contain a prescribed list of documentation including confirmation of the identity of the applicant, a list of intended services, copies of operator’s certificates and confirmation of the payment for the licence.

Two types of commercial operator licences have recently been introduced by the Federal Aviation Rules: licences for commercial air carriage of passengers and freight, and licences for aviation works. As at May 2019, there were 104 registered commercial operators and as at March 2019 there were 210 registered aviation works operators.

On 28 November 2015, the government issued Decree No. 1283, relieving the IAC of its authority to carry out aircraft type certification.

Such authority will now be vested in the Federal Air Transportation Agency.

Further, the government redistributed other powers including certification for aircraft design, engines, propellers and airfields to other federal executive authorities including the Ministry of Transport, Ministry of Industry and Trade, and the Federal Air Transport Agency, although the new scheme is not yet clear. The IAC has been certifying aircraft and aerodromes since 1994 and the change is seen as a positive move by the government. From 5 July 2018, drones weighing from 0.25kg to 30kg have to be registered with the Federal Air Transport Agency of Russia.

ii Ownership rules

Russian law imposes certain limitations on foreign participation in Russian companies operating in the aviation sector. According to the Air Code, aviation enterprise may be established only if the share of foreign capital does not exceed 49 per cent of its charter capital, its manager and executive officers are citizens of Russia, and the number of foreign citizens in the governing body of the operator does not exceed one-third of the composition of the governing body.

The participation share of foreign capital in an existing company established before 10 April 2012, engaged in maintenance and repair of aircraft or parts (other than line maintenance and similar maintenance services undertaken by the airlines, their agents or contractors), may not exceed 25 per cent. Prior approval of the Government Commission for Control over Foreign Investments in the Russian Federation is required in relation to establishment or acquisition of a participation share exceeding 25 per cent or more of the charter capital of a company engaged in development, production, testing and repair of aircraft and aircraft equipment or aircraft safety control; and post factum notice to the Government Commission is required in relation to establishment or acquisition of a participation share exceeding 5 per cent or more of the charter capital of a company engaged in development, production, testing and repair of the aircraft and aircraft equipment or aircraft safety control.
Foreign carriers

Flights of foreign aircraft to or from Russia are effected on the basis of international treaties between Russia and the respective states, or on the basis of permissions issued by the Federal Air Transport Agency.

The foreign carrier effecting such flights should, inter alia:

a) comply with the relevant laws and rules of Russia, and conditions for effecting international carriages;

b) not have any indebtedness for the aero-navigational services rendered in Russia;

c) ensure availability of necessary documentation on board, as established for international flights, by complying with the aviation standards recognised by Russia; and

d) obtain insurance of other security regarding liability for causing harm to third parties and aircraft.

To gain authorisation to operate flights to and from Russia, foreign-registered operators must obtain flight permits from the Federal Air Transport Agency.

On 8 July 2015, Resolution of the Government No. 138 introduced amendments to the Federal Rules on Using the Russian Airspace. One of the aims of the Resolution is to expand the opportunities for using Russian air space. From 14 February 2017, the Ministry of Transport will be responsible for regulating the airdromes of Russia.

Owing to the vast air traffic that will be generated by Russia hosting the World Cup, Russia has permitted foreign carriers to operate domestic services. However, this is subject to Russian carriers being unable to fulfil demand.

IV SAFETY

Russia is a party to the Chicago Convention 1944 and therefore complies with the safety standards as set out in the Convention and its annexes. Safety requirements for operators in Russia are set out in the Air Code and in the extensive Federal Aviation Rules.

The Air Code provides that no aircraft shall be operated in Russia unless it has a valid certificate issued by the designated aviation authorities. The Federal Aviation Rules on certification of the commercial operators stipulate mandatory conditions with which the operator has to comply when applying for the certificate. These include the following:

a) ensuring the continual airworthiness of the aircraft;

b) collecting and analysing data related to safety of the equipment and the flights;

c) ensuring personnel are qualified and certified to undertake particular duties as well as ensuring there is constant professional training of its employees, increasing their qualifications; and

d) having sufficient financial and equipment resources to ensure safe operation and maintenance of the airworthiness of the aircraft.

Russia has had a chequered history in terms of safety, partially owing to the sheer increase in flights. In April 2018, a routine domestic flight from Moscow to Orsk, crashed four minutes after take-off, killing 65 passengers and six crew members. This crash is symptomatic of a dearth of qualified personnel and extreme weather conditions.

Pilot training is under the control of the state and the federal transport programme for 2010 to 2015 includes substantial investment in pilot academies. In a major U-turn from previous policies, the state training academies recognised the need to train pilots for Western-built aircraft.
Given the serious shortage of qualified pilots, Russian aviation authorities have agreed to allow local carriers to employ foreign pilots. On 21 July 2014 the amendments to Article 56 of the Air Code of the Russian Federation pursuant to Federal Law No. 73-FZ of 20 April 2014 came into force. Under the new law the airlines can hire foreign pilots over the next five years. It is understood that no recruitment of new foreign aircrew will be permitted after 2019, but those already employed in Russia should be able to remain in employment. There is an initiative to repeal the amendments of 2014 that is not supported by Russian airlines.

While the big Russian airlines such as Aeroflot and S7 Airlines have ameliorated their safety procedures in 2018, by achieving global standards, smaller carriers are still faced with the task of exponentially improving their safety in order to continue servicing one of the world’s biggest nations.

New legal developments in 2015 include the new law regulating the use of drones, which aims to increase the general level of aviation security (see Section II.ii).

The July 2015 Resolution of the Government No. 138 aims to increase flight safety and the bring the Federal Rules on the Use of the Air Space of the Russian Federation in conformity with the standards and recommended practices of the ICAO.

A legal initiative published in 2017 (60-FZ), which introduced changes to the Criminal Code ensuring that individuals are liable for gross violations of public order while on board, has been clarified over the past year. In 2017, a passenger was given a custodial sentence for smoking on board an aircraft, and there have been more examples in 2018, as part of a wider attempt to safeguard passengers while on board aircraft.

In February 2018, the Federal Air Transport Association of Russia signed an agreement with the European Aviation Safety Agency, with the ultimate goal of improving Russia’s airworthiness regulation and ensuring fewer catastrophic injuries occur. In order to achieve this goal, the Federal Air Transport Association and the European Aviation Safety Agency will promote the exporting of Russian-built aircraft to foreign markets. Following in the same vein, Russia and Turkey bilaterally signed an agreement for the mutual recognition of aircraft certificates, in order to ameliorate aircraft worthiness.

V INSURANCE

Following the passenger cruise accident in the Volga River in July 2011, when a tourist boat sank killing 128 people, the Russian legislature decided to review current legal provisions relating to an operator’s liability. On 25 May 2012, the State Duma approved a law on obligatory liability insurance for carriers for life, health and property of passengers, which was enforced on 1 January 2013 and affects, among others, aviation operators.

The main mandatory types of liability insurance applicable to the aviation operators are third party, crew, passengers, consignees and cargo owners.

The obligatory requirements of cover in terms of the passenger liability are as follows:

- $a$ death: up to 2,025 million roubles per passenger;
- $b$ personal injury: up to 2 million roubles per passenger;
- $c$ baggage: up to 600 roubles per kilo; and
- $d$ personal belongings: up to 11,000 roubles per passenger.

On 23 May 2016, Article 132(2) of the Air Code has been amended. The amended provision increases the minimum insurance for each cabin crew to 1 million roubles.
Compliance with the above requirements is controlled by the Federal Service for Transport Supervision. The carrier is under obligation to provide full information as to its insurance for passengers including the contact details of its insurer together with the details of its insurance agreement. There are no exemptions from the obligatory insurance requirements.

Recent modifications to Russian insurance law have resulted in the introduction of a mandatory reservation of up to 10 per cent of the reinsured risks under the vast majority of reinsurance policies created by Russian insurers.

Pursuant to the Montreal Convention, carriers are obligated to take up insurance towards passengers and cargo owners.

VI COMPETITION

i Structure of Russian competition law

Competition law in Russia is established by the Constitution of the Russian Federation as amended in 2008, by primary legislation and by the Criminal and Administrative Codes.

The Constitution guarantees shared economic space, free transfer of goods and services, support of competition and freedom of economic activity, and prohibits economic activity aimed at monopolisation and unfair competition.

The legislation comprises:

- the Federal Law on Natural Monopolies dated 17 August 1995, FZ-147, last amended in October 2015, FZ-275, which came into force on 5 January 2016;
- the Federal Law on Foreign Investments in Companies having Strategic Importance dated 29 April 2008, as most recently amended in November 2014, FZ-343, which came into force on 6 December 2014;
- the Code on Administrative Offences of the Russian Federation, dated 30 December 2001, as most recently amended in April 2017, FZ-75, which came into force on 18 May 2017; and

Russian competition law is enforced by the Federal Antimonopoly Service (FAS) and its local bodies. It applies to individuals, corporations (both public and private), federal, regional and local governmental authorities and the Central Bank of Russia.

Most of the competition rules applicable to aviation are not specific to aviation. However, the Law on Foreign Investments in Companies of Strategic Importance applies to some aviation enterprises including aviation organisations involved in the development, production, testing, operation and repair of aircraft and aircraft equipment, as well as aviation safety control.

ii Substantive competition rules

Competition law in Russia covers cartels, other anticompetitive agreements, the abuse of a dominant position, and merger control.

In 2015 a number of changes were made to the antimonopoly legislation in Russia, the most significant being the ‘Fourth Antimonopoly Package’. The Fourth Antimonopoly
Package changed the rules about obtaining prior consent of the FAS to a number of transactions, abuse of dominance and entry into anticompetitive agreements as well as rules governing unfair competition.

### iii Cartels

In January 2012, important amendments to Russian competition law (the Federal Law on Protection of Competition dated 26 July 2006, as most recently amended in July 2016, FZ-266) were enacted. These affect the laws prohibiting cartels. One of the significant changes was the introduction of the definition of a cartel being a horizontal agreement between competitors that leads or may lead to:

- fixing or maintaining of prices, discounts, bonus payments or surcharges;
- division of market by territory, volume of sales and purchases, assortment of goods and services, or range of sellers or purchasers;
- reduction or termination of production of goods;
- refusal to enter into a contract with a particular customer or seller; or
- increasing, reducing or maintaining prices on tenders.

The cartel prohibition has both an administrative and criminal nature. Under Article 178 of the Criminal Code there is a criminal liability for individuals that arises when a cartel causes a loss that either exceeds 10 million roubles or derives illegal income of over 50 million roubles.

On 25 May 2012, procedural rules for FAS inspections of compliance with competition law have been published (FAS Decree No. 340 dated 25 May 2012). Under these rules, in certain circumstances the FAS is permitted to conduct unannounced inspections where the FAS can be accompanied by prosecution agencies.

Before the adoption of the Fourth Antimonopoly Package, a prohibited cartel was a written or oral agreement between seller companies leading or capable of leading to the setting or maintaining of prices, division of the market or other negative consequences. The Fourth Antimonopoly Package expands the application of the cartel prohibition to agreements between purchasers as well.

On 20 March 2015, Federal Law No. 45-FZ dated 8 March 2015 made a number of amendments to Article 178 of the Criminal Code of the Russian Federation. Under the new Law, abuse of dominance has been decriminalised and there will only be criminal liability for competing business entities that use a cartel to restrict competition.

### iv Abuse of a dominant position and monopolistic prices

Rules on ‘monopolistic prices’ were introduced into the Law on Protection of Competition in 2009, with further amendments enacted in July 2012, FZ-132. Any price increase or decrease by a dominant company will now be subject to a set of restrictions and conditions. Even maintaining prices at the same level can be considered a violation if conditions exist for their reduction.

In 2012, five airlines were investigated by the FAS for abusing their dominant position and charging excessive prices on a particular route, and two were fined. One airport was fined for overcharging operators for fuel and abusing its dominant position. Another airport was investigated by the FAS for discrimination against non-Russian airlines, where it was charging them 45 per cent more for ground handling services; it was ordered to treat all operators equally.
Predatory pricing in Russia is defined for goods as a ‘monopolistically low commodity price’ and for financial services as ‘unjustifiable low prices’. Article 7 of Law No. 135 on the Protection of Competition prohibits a dominant firm from setting a price that is lower than the sum of expenses necessary for production and sale of the commodity. There have so far been no reported cases of predatory pricing in the aviation sector.

v Merger control
Mergers and acquisitions are subject to the Russian merger control rules contained in the Russian Law on Protection of Competition dated October 2006, as amended. Merging parties subject to these rules are required to seek and obtain approval prior to an acquisition from the FAS.

Further to the introduction of the Fourth Antimonopoly Package, joint venture agreements will be subject to merger clearance by the FAS if the aggregate book value of assets of the parties entering into such agreements (or assets of their groups of persons) exceeds 7 billion roubles or the aggregate book value of their annual turnover exceeds 10 billion roubles.

Should companies fail to seek and obtain prior approval, sanctions will be stringently applied. The FAS can apply to invalidate, either partially or entirely, transactions for which prior authorisation was required but not obtained. The FAS also has the power to liquidate companies incorporated without the necessary approval. Despite having these powers, the FAS rarely exercise them.

vi Natural monopolies
The tariffs of natural monopolies (including the airports), are determined by the Federal Tariff Service, which maintains a registry of natural monopolies. Mergers between the natural monopolies are governed by Law 147-FZ of 17 August 1995 (amended in 2015).

The management board of the FAS has considered changes in the regulation of natural monopolies’ activities at the airports in Moscow and the Moscow region, and made a decision to abandon the regulation of prices in the markets of airport services across the Moscow air hub.

vii Governmental initiatives
The Russian aviation sector is currently experiencing various problems. Twenty years ago the regional and local airports serviced 75 per cent of the passenger traffic in Russia and now the Moscow hub serves 80 per cent of all of the traffic, leaving just a 20 per cent share for the regional and local airports. The level of competition is high within the Moscow hub as there are five or more airlines operating on the same routes. However, on the regional and in particular local routes there will usually be only one or two carriers operating, which consequently results in a high cost of carriage.

In over 20 years, the number of airports in Russia has decreased by over 80 per cent (1,302 in 1992 compared with 228 in 2014) and this has had an impact on the number of regional and local carriers. By way of example, in 1992 there were 4,780 scheduled routes connecting 432 cities, but in 2011 there were just 834 routes connecting 202 cities. The airport infrastructure is in desperate need of modernisation. The Russian aviation authorities are trying to resolve this by inviting private investors to finance various projects aimed at developing the airports as well as various subsidies. Competition among the ground-handling companies has not substantially increased, resulting in high costs of services. Slot allocation
remains an issue where both airports and operators refuse to allow new carriers to share the slots. To resolve this problem and other issues and to ensure the development of service providers in the airports, the FAS has developed Rules 599 dated 22 July 2009 on providing access to services of the natural monopolies in the airports. Further amendments have been developed by the FAS to the Rules, which are currently being considered by the relevant authorities.

Furthermore, the Russian government developed a number of initiatives, and issued the following documents:

a. a list of measures dealing with lowering the costs of domestic flights (No. 395p-P9 dated 31 January 2013);

b. a list of measures on developing competition and optimising antimonopoly policy (No. 2579 dated 28 December 2012); and

c. measures on developing regional flights (AD-P9-7212 dated 27 November 2012).

These documents are aimed at developing competition in the airports, encouraging the development and competition of regional aviation, creating conditions for the formation of low-cost carriers, and optimising the tariff system of airport service providers.

The government is trying to provide the necessary support to the aviation industry by way of various initiatives and subsidies. In 2012, a payment of 2 billion roubles was made by direct subsidies to partially reimburse the lease payments of the regional operators. State subsidies were paid to the state-owned airport companies in Siberia and the far east of Russia. State-owned leasing companies are becoming more actively involved in the regional aviation sector. Customs duties were waived for passenger aircraft with up to 50 seats and a further waiver is expected for passenger aircraft with up to 75 seats. Regional airlines are planning to further expand their business with the help of state subsidies. The government assists Russian operators financially with leasing Russian-built aircraft.

In order to benefit from reduced withholding tax rates under any applicable double tax treaty, a foreign entity that has a source of income in Russia will need to provide its Russian agent with a statement confirming its beneficial ownership right to said income. A confirmation of its tax residency will also be required and this must be certified by the relevant foreign state authority. Both documents must be provided before the due date of payment of the taxable lease income. If the tax agent fails to receive this documentation, it is legally bound to withhold from the payment tax at the rate applicable under Russian domestic law, otherwise the lessee is open to incurring substantial fines and late payment interest.

A number of state-financed infrastructure projects have been undertaken in Russia in the past few years, including a new runway at Mineralnye Vody Airport, passenger terminals in the airports of Yakutsk, Vladivostok, Samara and Simferopol, and air traffic control centres in Kaliningrad and Khabarovsk.

In a bid to improve air connectivity within Russia, with an ultimate goal of creating a nationwide, regional carrier, Russia has introduced a bill that seeks to introduce zero value added tax for flights to the far east of Russia and back. This bill fits in to a wider context of Russia endeavouring to facilitate air travel within the country.

VII **WRONGFUL DEATH**

See Section VIII.iv.
VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

Under the Aviation and Civil Codes a claim for compensatory damages can be brought against the operator and against the insurer of the operator. The limitation period for issuing proceedings against the insurer is three years. However, there is no time bar on bringing a claim against the operator.

Settlement agreements are unenforceable under Russian law and court approval of any settlement in a case involving death is recommended. Multiparty cases involving multiple defendants are allowed and encouraged under Russian procedural legislation. Proceedings can be brought against all of the above-mentioned parties; however, in practice and to date claims have only been brought against the operator and its insurer.

ii Carriers’ liability towards passengers and third parties

Under the Air and Civil Codes, a carrier is automatically liable for damages arising from death or bodily injury occurring during the course of carriage by air. There is no limitation of liability, and damages are subject to proof of loss (death).

iii Product liability

The Law on Protection of the Rights of Consumers governs the liability of manufacturers in Russia. The major international carriers in Russia that transport the majority of passengers use predominantly Western-built aircraft. The Russian Soviet-era aircraft are mainly used by the smaller carriers. There were no known claims against manufacturers of Russian-built aircraft by the operators for a number of reasons. Until recently, product liability insurance simply did not exist, so there was not much point even considering a recourse to the manufacturers, who would not be financially viable in any event. Additionally, the recent tendency of the Russian authorities following a major loss has simply been to shut down the airline, which again keeps the manufacturers out of the courts.

Amendments have been made to the Code of Administrative Offences of the Russian Federation that have established liability for failure to take product recall measures. Measures will include but will not be limited to the following: informing the relevant authorities about the deviation from product requirements; taking active measures to prevent harm as a result of the product defect; and suspending the production and sales of the defective product, and ultimately recalling the product from the market if necessary.

iv Compensation

Assessment of damages in cases involving death is carried out in accordance with the Civil Code, which provides that the main categories of damages to be compensated are material (economic) damages, moral damages and funeral expenses.

In death cases, material damages for loss of support in cases of dependency are calculated on the basis of the income of the deceased and the number of dependants. Moral damages compensate for pain and suffering of the claimant and are awarded at the discretion of the court. Courts making a decision in this regard would take into account any aggravating circumstances. As to funeral expenses, the maximum payment in this regard amounts to 25,000 roubles. Under the Montreal Convention, carrier liability for a passenger’s death remains capped at 9 million roubles, and it is only possible to exceed this limit if it can be proved that the accident was a result of the carrier’s negligence.
The amendments to the Air Code and Law FZ-67, which was enforced from 1 January 2013, provides that in death cases a carrier or its insurer shall pay within 30 days following receipt of all the prescribed documents the amount of 2.025 million roubles by way of compensation on account of damages due.

Furthermore, from 1 January 2013 the interim payments of 100,000 roubles became obligatory if requested and are to be paid by the operator or its insurer within three days of receipt of the application supported by the prescribed documentation.

The Air Code provides that if the damages, determined according to the Civil Code, are more than 2.025 million roubles, then payment of the sum of 2.025 million roubles does not release the carrier from the obligation to make additional payments until the claimants are fully compensated.

The average amount of damages for death of a passenger in Russia is 10 million roubles. All employed Russian citizens are subject to obligatory state social insurance. In the event of an insured accident taking place (e.g., temporary or permanent professional disability) the Social Insurance Fund is obliged to fix temporary disability pay, which is usually equal to 100 per cent of the victim's salary.

In cases where a deceased passenger was travelling on business, material damages will have to be paid by the Social Insurance Fund. Where a deceased passenger was an employee of the police, prosecutor’s offices, military personnel or of the Federal Security Service of the Russian Federation, the compensation is to be paid by an insurance company in accordance with certain procedures established by the Federal Law on Obligatory Life and Health Insurance of the Military Personnel Citizens Drafted to Periodical Military Training, the Rank and File and Officers of the Internal Affairs Bodies, State Fire Fighting Service, Drug Control Agency, Employees of Penal Institutions and Bodies and Employees of Federal Bodies of the Tax Police. Damages awarded in respect of the above-mentioned categories of persons shall be paid within the deadline fixed by law, which is 30 days or 15 days depending on the applied statutory Acts, upon provision of the prescribed documentation. The above organisations are entitled to claim a refund of the paid amounts from the operator.

This is a grey area of law and in a number of aviation cases involving death double compensation is possible.

With regard to personal injury cases, from 1 January 2013 Resolution 1164 on Affirming Rules on Calculation of Insurance Compensation in Personal Injury Cases (the Compensation Rules) entered into force in Russia, introducing a new system of calculating damages. There are 70 main categories of injuries ranging from skull damage to food poisoning, and over 100 subcategories. Each and every type of injury is specifically allocated a percentage rate, which varies from 0.1 per cent for bruises up to 75 per cent for spinal cord injury.

In accordance with the Compensation Rules, the insurance compensation payable to injured passengers has to be calculated by multiplying the insurance sum that is specified per passenger in the agreement on the obligatory insurance (2 million roubles) by the percentage allocated for a particular injury.

By way of example and taking the above in consideration, injury to the spinal cord would attract compensation of 1.5 million roubles (75 per cent of 2 million roubles). Should the costs for the damage incurred by the injured passenger be higher than the obligatory compensation, then the full amount is to be compensated as damages.

As a corollary of ratifying the Montreal Convention, passengers, who can establish liability subject to the Convention, are now able to claim against Russian carriers for fixed
compensation dependent on the liability. The upper limit of compensation for damages for each passenger is now significantly higher than under the Warsaw Convention, with a limit of up to 113,000 SDR.

IX VOLUNTARY REPORTING

To the best of our knowledge, there are no voluntary reporting initiatives in Russia.

X THE YEAR IN REVIEW

The most notable and tangible change to Russian aviation law has been the accession to the Montreal Convention, and the Russian aviation industry will continue to feel the effects of this decision in the years to come.

The aviation industry continued to grow in 2018, resulting in a sharp increase in air traffic. Russian policy and government initiatives have been focused on establishing a comprehensive Russian carrier and ameliorating the air worthiness of its aircraft, both for domestic flights and for international exports. This has led to the establishment of various Russian airlines, which will ultimately increase accessibility to air travel and provide a boost to the Russian economy.

The US and EU sanctions introduced as a result of Crimea joining Russia continue to affect the Russian aviation industry.

A noticeable decrease in the number of Western-built aircraft continues. As a result of the sanctions, rouble devaluation and decline in the price of oil, Russian airlines can no longer afford new acquisitions. Many aircraft had to be returned to the leasing companies because the Russian airlines can no longer afford the lease payments.

Russian manufacturing projects are gaining more support from the government. Russia is looking to resurrect its production of civilian aircraft, including the Sukhoi Superjet 100 and the Ilyushin II–114, and Russian carriers are encouraged to support Russian manufacturers. In June 2016, Russia unveiled a medium-range passenger aircraft – MC-21 – that Russian state media hailed as superior in many ways to Western-built aircraft.

On 28 May 2017, the maiden flight of Irkut MC-21-300 airliner was successfully completed. The prototype took flight from Irkutsk Aviation Plant airfield in Siberia about 2,600 miles east of Moscow.

Whether the safety initiatives will successfully change the perception of Russian air safety remains to be seen, but the government will continue to make concerted efforts to achieve this.
Chapter 31

SERBIA

Goran Petrović

I INTRODUCTION

Serbia was among the first countries in the world to enact regulation in the field of civil aviation. The newly formed Kingdom of the Serbs, Croats and Slovenes was one of the 10 signatories of the International Convention for the Regulation of Air Traffic in Paris in 1919. From 1920, the Kingdom of the Serbs, Croats and Slovenes began to establish more intense development of civil aviation and air transport. Notwithstanding the efforts made until World War II, civil aviation has remained under the authority of the air force. A Regulation dated 19 July 1920 established the Department of the Air Force to work on aviation, naval aviation and civil aviation. In 1929, Yugoslavia became a party to the Warsaw Convention, and then at the end of World War II, a signatory to the Chicago Convention. Commercial aviation in the country developed alongside treaty obligations starting with the establishment of Aeroput in 1927, which was the 10th airline to be established in Europe, and the 21st in the world.

The disintegration of SFR Yugoslavia and the beginning of civil wars brought discontinuity to the development of civil aviation in Serbia. Enforcement of sanctions by the UN against the newly formed Federal Republic of Yugoslavia (FRY) constituted by Serbia and Montenegro created problems for civil aviation. Political events, economic decline caused by the sanctions of the UN and the intervention of NATO in bombing Yugoslavia in 1999 led to the devastation of a significant part of the aviation infrastructure in Serbia.

The civil aviation sector began to take a more positive direction following the political changes that occurred in the FRY in 2000. After the political changes that followed the FRY in 2000, the civil aviation sector decided to go in a new, positive direction. With its gradual integration with international aviation and air traffic, civil aviation in Serbia is slowly starting to return to its previous level.

Following the UN sanctions which took place in the 1990s, the FRY could not automatically continue its membership of the International Civil Aviation Organization (ICAO), although it continued to respect ICAO regulations. The ICAO Assembly adopted Resolution A29-2 precluding the FRY’s further participation in the work of the Assembly.
of ICAO and ordering it to apply for full membership, on the basis of UN resolutions.\(^5\) A formal return to the work of ICAO continued in 2000,\(^6\) and in 2006 Serbia became an independent ICAO member.

Subsequently, following the end of 2003, the Civil Aviation Directorate (CAD) was established at the beginning of 2004. At the same time, the Serbia and Montenegro Air Traffic Services Agency (SMATSA)\(^7\) was created as an air navigation service provider (ANSP). These were key steps in an effort to create a modern, competent and efficient aviation authority that would regulate the field of civil aviation and preserve secure and safe conduct of civil aviation.

After signing the European Common Aviation Area (ECAA) Multilateral Agreement in 2006, Serbian aviation had legislated its aviation laws in accordance with EU regulations. Further legal regulation of air traffic in 2006 brought the Serbian aviation legislation in line with EU regulations, with the signing of the European Common Aviation Area (ECAA) Multilateral Agreement. In fact, on 29 June 2006 in Brussels, Serbia signed the Multilateral Agreement between the European Community and its Member States with the countries of the Western Balkans, Norway and Iceland on the establishment of an ECAA Agreement, which was the first international treaty signed by Serbia since its re-proclamation of independence in 2006.\(^8\) Subsequently, civil aviation regulation in Serbia became harmonised with international regulation, primarily from the EU.

Serbia has gone through a series of turbulent years since 1991 and, inevitably, this has had an effect on air transport. However, in recent years, positive changes have been taking place and, according to the International Air Transport Association’s Air Passenger Forecasts Global Report (2015), the Serbian air transport market is one of the five fastest growing markets (at a rate of 7.8 per cent). Some of the key reasons for this increase in air traffic relate to the following:

\(\begin{align*}
a & \text{ increase in GDP;} \\
b & \text{ ECAA Agreement;} \\
c & \text{ better organisation of aviation institutions (i.e., the CAD, the Centre for Traffic Accident Research and the airport, as well as the establishment of Air Serbia);} \\
d & \text{ greater influence of low-cost airlines; and} \\
e & \text{ the abolition of visas for Serbian citizens to travel in the EU.} \\
\end{align*}\)

Although Serbia has 23 airports, there are only two international airports: Belgrade Nikola Tesla Airport (Belgrade Airport) and Niš Constantine the Great Airport (Niš Airport). The Civil Aviation Authority and the Ministry of Defence have had legal disputes throughout the years over the conversion of Morava Airport (Kraljevo) for public use. According to the latest information\(^9\) that has been made public at the time of writing, Morava Airport

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\(^6\) 14 December 2000 (A) FRY ratified, effective from 13 January 2001 and from 13 July 2006, Serbia continued to exercise its rights and honour its commitments deriving from international treaties.

\(^7\) SMATSA ANSP is unique in Europe as a joint venture in charge of controlling air traffic in the two states, Serbia and Montenegro, established by the governments of two countries.

\(^8\) The legislation of Serbia does not recognise this legal instrument. Still, after the interpretation of the European Commission stated that the legal basis for the ‘administrative application’ ECAA Agreement represents the Salzburg Declaration of May 2006, the precise point IV of this declaration.

Serbia

(Kraljevo) will have its grand opening for civil use at the end of June. Based on the number of passengers almost the entire air transport market belongs to Belgrade Airport, which has had a respectable increase in total passenger and freight traffic in the past few years. In 2018 Belgrade Airport had 5.6 million passengers (an increase of 5.6 per cent compared with 2017), while Niš Airport had 351,581 passengers (compared with 331,582 in 2017).

Serbia’s national air carrier, Air Serbia, was established in 2013 following the Serbian government’s decision to restructure JAT Airways and enter into a strategic partnership with the UAE’s Etihad Airways (see Section VI). The government owns 51 per cent of Air Serbia, and the other 49 per cent belongs to Etihad. Air Serbia currently operates in 49 destinations, mainly covering Euro-Mediterranean traffic, although in June 2016, it introduced a line to New York, which up until recently was the only non-stop service in the region of 11 neighbouring countries. There is no other significant airline in Serbia. Until 2015, there was a charter company called Aviogenex. Five airlines have an operating licence to transport air taxi passengers in Serbia. Unfortunately, Serbia does not possess domestic scheduled airline operations. To date, no airline has expressed a desire to connect Belgrade and Niš, thus resulting in Serbia not having domestic air traffic.

II LEGAL FRAMEWORK FOR LIABILITY

i International carriage

The Kingdom of Yugoslavia is one of the High Contracting Parties to the Warsaw Convention.10 The Socialist Federal Republic of Yugoslavia acceded to the Hague Protocol and the Montreal Convention. The FRY did not accede to the Montreal Convention in 1999,11 but accepted it a decade later, on 4 April 2010. By doing this, Serbia replaced the old Warsaw Convention and subsequent protocols with far more sophisticated and internationally uniform legal resolutions related to international air transport, for determining the liability of air carriers and the corresponding compensation for damage to passengers, luggage and cargo. These changes have led to a different approach to the carrier’s liability; the air carrier becomes liable for death or bodily injury of passengers (two instances), and thus gets a system that is far more equitable. Fairness is reflected in the quicker compensation of damage, which avoids unnecessary and expensive court processes, and improves the protection of passengers. All this leads to a balance of the interests of carriers and passengers.

The amendments made to the Law on Amendments to the Obligations and Property and Legal Relations in Air Transport in accordance with the provisions of the 1999 Montreal Convention made concrete improvements in the field of passenger rights, prescribing a procedure on how travellers can enforce their rights. This was also done to comply with the regulations that apply in the EU including Regulation 261/2004 on common rules in respect of damages and assistance to passengers in the event of denied boarding and flight cancellations or delays of flights (Regulation 261/2004), and Regulation 1107/2006 concerning the rights of disabled persons and persons with reduced mobility in air transport.

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11 Because of the UN sanctions and the impossibility of continuing membership in ICAO.
ii Internal and other non-convention carriage

For many years, Serbia has had two basic laws that regulate legal relations concerning aviation and air traffic. They are the Air Transport Law, and the Law on Obligations and Basic Property Relations in Air Transport Law on Obligations and the Basics of Property Relations in Air Transport. The Air Transport Law regulates the public air transport sector. It is based on the provisions of the Chicago Convention and prescribes the jurisdiction of the Serbian authorities to act in aviation matters. It also empowers the CAD to issue by-laws and other documents that fully regulate air transport.

The Law on Obligations and Basic Property Relations in Air Transport has, since 2011, dealt with private law matters in aviation, and includes a number of original provisions as well as mirroring provisions found in foreign legislation and in the Montreal Convention 1999.

Other significant laws recently enforced are the Law on Accident Investigations for Aviation, Railways and Waterborne Transport of 2015 and the Law on Airport Management of 2016 (which is the most recent law adopted in the field of air traffic).

iii General aviation regulation

Any air transport for commercial or non-commercial purposes is subject to the Air Transport Law, under Article 74. However, any type of flying is subject to Article 4a ‘Rules of the Air’ of the same Act. Serbian airspace is classified into three classes: C, D and G. As determined by the Regulation on aircraft operation (Official Gazette of the Republic of Serbia, No. 61/15), the rules of flight of airplanes carrying out general traffic in Serbian airspace are prescribed, as well as the content, manner of submission, modification and closure of the flight plan in general air traffic.

With the above-mentioned Regulation, and the amendment to the Air Transport Law, Sections 1–5, 11 and 12, and Appendices 1–3 and 5 of the Annex to Commission Regulation (EU) No. 923/2012 of 26 September 2012 were replaced.

The key subjects in Serbian air traffic such as airlines, airport operators, ANSP (SMATSA), aeronautical technical organisations and organisations designated by the CAD are primarily responsible for the safe conduct of their business or services, as well as making sure that employees perform their tasks safely.

iv Passenger rights

The provisions on the rights of passengers in case of refusal of boarding, flight cancellation or long delay are dealt with by Article 19 of the Law on Obligations and Basic Property Relations in Air Transport. If an airline that denies boarding, cancels a flight or incurs long delays fails to comply with the legally prescribed procedure, it is necessary to address the

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12 Air Transport Law (Official Gazette of the Republic of Serbia, Nos. 73/10, 57/11, 93/12, 45/15, 66/15 – other law and 83/18).
13 Law on Obligations and Basic Property Relations in Air Transport Law on Obligations and the Basics of Property Relations in Air Transport (Official Gazette of the Republic of Serbia, Nos. 87/11 and 66/15).
14 Law on Accident Investigations for Aviation, Railways and Waterborne Transport (Official Gazette of the Republic of Serbia, Nos. 66/15 and 83/18).
15 Law on Airport Management (Official Gazette of the Republic of Serbia, No. 104/16).
16 Airspace Class G was introduced by the Regulation on the classes of airspace RS and the conditions for their use (Official Gazette of the Republic of Serbia, No. 106/2013).
passenger aviation authorities and the CAD. The CAD prescribes the procedure for passengers
who have been denied rights to file claim forms with the air carrier or the CAD. There are
additional documents that clarify the legal provisions of the Law on Obligations and Basic
Property Relations in Air Transport. The CAD has issued rules on ‘The rights of passengers
in case of denied boarding, flight cancellations or delays of flights and accommodation in
economy class’ and ‘The rights of passengers with disabilities and reduced mobility’. The CAD
is competent to supervise and ensure the implementation of the provisions of the Act relating
to the right of passengers in denied boarding, cancellation or flight delays or investigate when
the provisions have violated the rights of persons with disabilities and reduced mobility.

v Other legislation

Travel

In addition to the provisions governing the conditions and manner of planning and
development of tourism, and tourist organisations for promotion of tourism, the Law on
Tourism17 defines the work of travel agencies and tour operators as being to protect tourists
and users of services of travel agencies. The provisions governing the relationship of each
airline and travel agency or operator is determined by the Law on Obligations and Basic
Property Relations in Air Transport, Article 2, Paragraphs 1 and 2, and Articles 4 and 7. These
Articles regulate contractual matters in air transport and general conditions of air transport.

Environmental

The Air Transport Law in Section 9, Articles 200 and 203 cover the question of regulating
environmental protection, the duties of the airport operator, the permissible noise levels and
emissions at airports, measurement of noise and the area of noise protection. In practice, rules
related to this topic completely rely on provisions from the Directive 2002/49/EC, as well as
Recommendation 2003/613/EC. The Minister of Transport is responsible for enforcing these
Directives, with the consent of the Minister of Environmental Protection.18

Serbia plans to adopt a Regulation on operating restrictions related to noise emissions
at airports, which would be superseded by Regulation (EU) No. 598/2014.

When it comes to specific airport operators, environmental issues related to noise in
particular have been topical in recent years, and this has related primarily to Belgrade Airport.
Specifically, Belgrade Airport has recently experienced a significant increase in traffic, and
has acquired ‘hub’ status, exceeding the limit of 50,000 operations a year.19 Regulated by
European regulations that are transposed into national frameworks, it is now obligatory to
measure noise at the airport continuously and to develop strategic noise maps.20

17 Official Gazette of the Republic of Serbia, Law on Tourism (Official Gazette of the Republic of Serbia,
Nos. 36/09, 88/10, 99/11 – Law on the Procedure of Registration with the Serbian Business Registers
18 The Ministry performs state administration, stipulated in Article 5a of the Law on Ministries (Official
19 According to the Air Transport Law, Article 203, the operator an the airport that, during the previous
calendar year, conducted more than 50,000 takeoffs and landings of civil aircraft is required to provide
continuous measurement of noise at the airport and its surroundings.
20 The deadline was originally 30 June 2015, but was extended twice.
The ministry responsible for environmental protection must draw up strategic noise maps by the end of 2020. If there are areas where the noise of the aircraft will exceed the permitted level, an action plan to deal with the environmental noise must be submitted.²¹

### III LICENSING OF OPERATIONS

#### i Licensed activities

The provisions of the law that relate to the licensing of air traffic operations can be found in Chapter V of the Air Transport Law, as well as in the following legislation: the Regulation on commercial air transport operations and non-commercial operations and the Regulation on operating licences for the operation of commercial air transport. Chapter V of the Air Transport Law defines air traffic and what it includes. Articles 77 to 86 specifically address licensing to perform commercial air transportation. The CAD is responsible for checking compliance with these legal requirements.

The performance of commercial air transport services in Serbia requires both an air operator certificate (AOC) and an operating licence. Suspension or revocation of the AOC obliges the CAD *ex officio* to suspend or revoke the operating licence. Also, changes to the AOC may, depending on the circumstances, cause modification of the operating licence.


The certification of operators performing public transport is carried out by the CAD when it is satisfied that the requirements are met. Therefore, the certificate containing the corresponding operational specifications is required. To start the certification process, the operator must submit an application to the CAD containing the following information:

- **a** official and business name of the applicant, address and address for delivery of mail;
- **b** description of the proposed activities, including the type and number of aircraft to be used;
- **c** description of the management system, including organisational structure;
- **d** the name of the accountable manager;
- **e** the names of the persons who are required under ORO.AOC.135, Paragraph (a), together with their qualifications and experience;
- **f** a copy of the operations manual required by ORO.MLR.100; and


²² Regulation on the condition for air operations (Official Gazette of the Republic of Serbia, Nos. 9/18, 56/18 and 12/19).


²⁴ The application of provision ORO.AOC.110, Paragraph (d), items 1 and 2, in Annex III of Regulation No. 965/2012 has been suspended pending Serbia’s full membership of the EU or fulfilment of the conditions foreseen by the ECAA Agreement.
a statement that the applicant has checked all the documents that have been submitted to the competent authorities and it is determined that it is in compliance with the applicable requirements.

Besides certification, entities must prove to the competent authorities that they comply with the requirements contained in Annex IV of Regulation (EU) No. 216/2008 Annex IV (Part – SAT) and Annex V (Part – SPA) and also have a certificate of airworthiness (COA) in accordance with Regulation (EU) No. 748/2012.

The procedure for issuing the certificate consists of five stages:

a. pre-application phase;
b. request and initial compliance statement;
c. review and evaluation of documentation;
d. audit and demonstrations; and
e. certification.

The operator must make an application to the CAD at least 90 days before the planned start of operations.

The lease agreement requires prior approval by the CAD for each certified aircraft that is intended for use by the operator. If an aircraft is leased from a third-country operator, there are additional requirements, which differ depending on whether the aircraft takes either a wet lease or a dry lease.

With regard to a wet-lease aircraft from third-country operator, the initial operator is obliged to provide the CAD with a valid AOC that is in accordance with ICAO Annex 6, stating that the safety standards of the third-country operator are the same as those in Regulation (EU) No. 2042/2003, and that the aircraft has a COA, in accordance with ICAO Annex 8. If an operator from Serbia takes a dry-lease aircraft, the operator must demonstrate to the CAD that there are operational requirements that may not be satisfied by the lease of an aircraft registered in the European Union and that the duration of the lease contract does not exceed seven months in any consecutive 12-month period.

In addition to performing commercial traffic, an AOC holder may perform non-commercial flights with aircraft used for public transport, which are listed in the operations specifications of its certificate on the condition a detailed description of such flights is kept in the operational manual (OM), with a clear indication of any differences between operating procedures that apply when conducting commercial and non-commercial flights.

The operator of public transport must determine the person accountable for the following fields of management and control:

a. flight activities;
b. crew training;
c. ground-based activity; and

There are specific requirements for using appropriate equipment on the ground, providing operational support in the main base and providing the available workspace. Through checking the OM, the check for minimum reliability of equipment is also performed.

The operator must keep manuals and other required documentation. Delivering operational instructions and other information to the CAD is mandatory. The OM is the
most important manual. The competent authority will review the OM and must certify that it has all necessary information to comply with applicable regulations relevant to the performance of public air transport. The operator must maintain the OM as specified in Clause 8.b of Annex IV of Regulation (EC) No. 216/2008.

An air carrier must have an insurance policy that covers events related to the means of transport and staff, and that covers the liability of the airline with regard to third parties. Regarding financial obligations, all of an airline’s relevant financial information must be submitted to the CAD. If a change takes places regarding the airline’s ownership or management structure, or that affects the business in any way, this must also be registered with the CAD.

Public transport services may not be carried out without an operating licence, in addition to an AOC. To obtain the licence, the subject must pass an initial audit, which is carried out by the CAD. This procedure determines whether the request meets the required conditions. Commercial air transport may be performed by a company that:

a has its headquarters in Serbia;
b possesses a valid AOC;
c owns or holds a dry lease over at least one aircraft;
d is registered for public air transport as a primary activity;
e is majority owned by the Serbia or a citizen of Serbia and under its actual control, direct or indirect, if a ratified international agreement provides otherwise;
f meets the financial requirements prescribed in the Air Transport Law;
g meets the requirements of the Law on Compulsory Traffic Insurance;
h has a business reputation; and
i has an internal organisation that implements the provisions above.

The financial requirements for an operating licence are based on specific periods and amounts of money. The airline must prove its ability to meet its actual and potential obligations within 24 months. In the first three months of the business, it must be able to cover all costs, regardless of operating revenues. If the air carrier performs transport services with an aircraft that has a maximum take-off weight of less than 10 tonnes or fewer than 20 seats, it must demonstrate that its capital is at least €100,000 or dinars equivalent to that sum, or, at the request of the CAD, provide all data necessary for assessing its financial capacity.

One of the conditions for obtaining the operating licence is that the air carrier company or other legal entity has a good reputation. As evidence that the airline has a good reputation, it must be accompanied by confirmation from the competent authorities that there has been no finding of certain criminal offences or prohibited activities, and confirmation that it is not involved in open bankruptcy proceedings or liquidation, or compulsory settlement is completed; confirmation that the entity's business account has not been blocked for six months immediately preceding the date of application; and a certificate of taxes and contributions.

The CAD issues operating licences for an indefinite time and they remain valid provided that the air carrier meets the conditions for its issuance. Thus, the air carrier must be able at any time, at the request of the CAD, to demonstrate that it meets the requirements for the issuance of an operating licence.

By issuing the operating licence, the authority must, after 24 months, check whether the air carrier continues to meet the conditions required for its issuance when there is doubt as to the fulfilment of prescribed conditions. However, if some of the conditions regarding
operating licences are no longer fulfilled, the CAD must be approached, and the licence may be suspended or even revoked. The operating licence can in circumstances be changed at the air carrier’s request.

ii Ownership rules

The CAD must carry out basic checks of the operating licence. Through this procedure, it must be established whether the requirement of majority ownership of Serbia or nationals of Serbia is met, whether it is under the actual control of Serbia or its nationals, directly or indirectly, or whether a ratified international agreement provides otherwise.

iii Foreign carriers

Based on the Air Transport Law, Article 169, Paragraph 2, inspection of foreign aircraft is carried out according to procedures and standards specified by the competent authority of the EU. The CAD developed the Regulation on safety assessment of foreign aircraft, which is in compliance with EU regulations, including Regulation Nos. 2111/2005 and 473/2006, and Directive 2004/36/EC. The CAD is authorised to publish a list of carriers that are prohibited from flying within the EU. The list takes over from the Commission Implementing Regulation (EU) No. 2015/2322 of 12 October 2015. There is a list of air carriers that are banned from operating or are subject to operational restrictions within the European Union (Official Gazette of the Republic of Serbia, No. 8/18).

There had been concerns over Etihad’s investment in Air Serbia, but the shared ownership of Etihad in Air Serbia was examined by the European Commission on 25 August 2016 and it decided that Etihad’s investment in Air Serbia complied with EU regulations on foreign investment.

IV SAFETY

Regulating aviation safety remains a major focus of the CAD. Basic provisions on aviation safety are defined in the Air Transport Law, Chapter II, which determines what constitutes safety in aviation and aerospace, and which are the primary entities responsible for the safe conduct of their business or services. To achieve an acceptable level of safety in accordance with the standards and recommended practices in international civil aviation, the government of Serbia adopted the national safety programme in civil aviation on the proposal of the relevant ministry. The CAD is responsible for the implementation of the national safety programme. For the purposes of organisation and coordination of, and recommendations to improve, the safety regime, the government has taken steps towards establishing the National Committee for Safety in Air Transport.

Every aviation entity must establish a safety management system (SMS). The CAD is responsible for establishing the conditions of the SMS, and a part of these responsibilities is the development of a manual on safety management. In accordance with the SMS, it is mandatory for aviation entities and accountable persons to report every occurrence in civil

25 The list of air carriers that are banned from operating or are subject to operational restrictions within the European Union (Official Gazette of the Republic of Serbia, No. 12/19).

26 Decision on the establishing of the National Committee for the Safety of Aircraft (Official Gazette of the Republic of Serbia, No. 69/15).
aviation: accidents, serious incidents and serious accidents. The CAA must apply the personal data protection rules to the data collected from such occurrences. Article 17a of the Air Transport Law provides something new regarding reporting events and perceived mistakes without fear that the perpetrators be punished. This should be the basis for the concept of ‘just culture’.

Each aviation operator, when planning the introduction of functional changes that affect the safe performance of the activity or the provision of services, must notify and get permission from the CAD. To systematically spot the danger and reduce the risk, aviation operators must work to ensure that acceptable levels of safety are met.

Safety in Serbian aviation is controlled both internally and externally. The European Aviation Safety Agency (EASA), the EU institution responsible for safety in EU air transport, also checks the safety compliance of the CAD and the aviation entities in Serbia. Serbia is not a full member of EASA but has had observer status since 2007. In 2009, EASA began carrying out air traffic checks and overseeing whether regulation is harmonised with EU rules. In 2014, the CAD was rated Category I by the US Federal Aviation Authority’s International Aviation Safety Assessment Program.

According to the data provided by the CAD, from 2006 to the end of 2018, it investigated 68 accidents and 28 serious incidents. Six accidents that involved aircraft from the Serbian registry were investigated in cooperation with the civil aviation authorities of other countries through an authorised representative.

CAD was audited by ICAO between 19 and 26 March 2019 (ICAO Coordinated Validation Mission). After the verification ICAO gave an assessment of civil aviation of Serbia, whereby it found the degree of compliance of the system to be 93.71 per cent.27

V INSURANCE

The Law on Insurance,28 Article 9, Paragraph 1, items 5 and 11, refers to non-life insurance, including the insurance of aircraft, insurance covering damage to or loss of aircraft and liability insurance resulting from use of aircraft, which includes responsibility for transport. The Law on Compulsory Insurance in traffic through (Official Gazette of the Republic of Serbia, No. 51/2009, 78/2011, 101/2011, 93/2012 and 7/2013 – decision of the Constitutional Court) Article 2, Paragraph 1, item 3 stipulates compulsory insurance for aircraft owners against liability for damage caused to third parties and passengers. The Special Law on Obligations and Basic Property Relations in Air Transport is engaged with insurance in air traffic in a more specific way.

Serbia has acceded to the provisions of the Montreal Convention of 1999 and adopted the Law on Ratification of the Convention for the Unification of Certain Rules for International Carriage by Air of 13 May 2009, which entered into force on 4 April 2010. For this reason, the former Law on Obligations Relations and Basic Property Relations in Air Transport of 1998 was amended in 2011 and 2015. The changes that the Montreal Convention adopted in 1999 in relation to the old Warsaw Convention inevitably affected the provisions concerning insurance of aircraft.

As previously determined, air carriers with a valid operating licence must have adequate insurance in air transport covering liability for damages in accordance with the provisions of

28 The Law on Insurance (Official Gazette of the Republic of Serbia, No. 139/14).
the Montreal Convention. The conditions for the issuance of operating licences, Article 4, Paragraph 1, are subject to the fulfilment of the requirements relating to insurance provided for in Article 9 of the Regulation on operating licences for the operation of commercial air transport\(^\text{29}\) and Regulation (EC) No. 785/2004.

According to the provisions of Article 27 of the Law on Obligations and Basic Property Relations in Air Transport, airlines must be insured up to a level that is adequate so that all persons entitled to compensation receive the full amount. That obligation of insurance is required by Article 4, Paragraph 1, sub-item 1(h) of the European Parliament and Council Regulation (EC) No. 1008/2008 of 24 September 2008 on common rules for the operation of air transport in the Community. Therefore, unless the law governing the compulsory traffic insurance provides otherwise, insurance in air transport under the provisions of this law covers the following:

\(a\) aircraft and its equipment, as well as goods to be transported by aircraft;

\(b\) passengers and baggage from the accident; and

\(c\) the owner or user of the aircraft from liability for damage caused to third parties’ aircraft on the ground.

In addition to the above, insurance can provide for freight, insurance costs, the expected gain, lien and other rights and material benefits that are available or can reasonably be expected related to air transport and can be estimated in money.

The contract of insurance in air transport is concluded for a definite period of time, but it can be concluded for a specific flight. Liability for damage caused by operation of an aircraft on a specific flight can arise when the engine starts for take-off in departure specified in the contract of insurance, up to the moment of stopping the aircraft shortly after landing and shutdown the engine in the place of destination specified in the contract of insurance.

The insurer will be liable for damage caused directly or indirectly owing to an aircraft fault that affects safe air transport, if the insurer knew or should have known about the fault having conducted due diligence and failed to prevent the damage, although it could have done so. A claim under the contract of carriage and recourse claims related to this contract expire in two years.

The law applicable to the contract of insurance in air transport and relations resulting therefrom will be that of the seat (head office) of the insurer under the conditions that:

\(a\) the parties have not expressly determined which law must be applied to the contract, and their intentions on the implementation of a right cannot be determined from the circumstances of the case; and

\(b\) the law whose application the parties determined not be applied to part of that contract or any relationship for that contract – or just that part of the contract, relatively on the legal relationship of the contract.

The applicable law for insurance contracts relates to the head office of the insurer, granted that the parties did not explicitly determine the right that must be applied to the contract, and their intention to apply a certain right cannot be determined even from the circumstances of the case. This comes with the exception of the relations of insurance contracts in air transport,

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\(^{29}\) Regulation on operating licences for the operation of commercial air transport (Official Gazette of the Republic of Serbia, Nos. 10/14, 16/15 and 50/18).
which shall apply the national law only if all stakeholders in that contract are Serbian nationals with permanent residence in Serbia or legal persons whose seat is in Serbia, and it insures coverage of the objects that are exposed to risks in the territory of Serbia.

VI COMPETITION

The signing of the ECAA Agreement introduced a legal framework for further integration in the field of aviation, free access to the European aviation market without any discrimination, and common rules in the fields of safety, security, air traffic management and environmental protection, and also increased the competitiveness of domestic aviation operators and simplified procedures in international air transport.

This allowed a greater occurrence of low-cost companies in the market, which has increased competition among carriers. Belgrade Airport followed this trend, with an increase from 2.2 million passengers in 2006 to over 5.6 million in 2018. Niš Constantine the Great Airport has started to change its business setup and its ownership by the local government has been transferred to state ownership. The concept that has worked over the past few years has begun to change. After a few years of only low-cost companies flying from the Niš Airport, this year, Air Serbia introduced many new routes. Positive changes in air traffic can be seen, particularly with regard to the number of operations and participants involved (principally, Air Serbia and SMATSA).

Serbia is not a full member of the European Union but is a candidate for EU membership, and this is currently under negotiation. EU regulations do not apply directly in Serbia, but are additionally transposed into national legislation. According to a European Commission report on Serbia’s progress towards becoming a member of the EU, it is moderately prepared in the field of competition. Serbian legislation dealing with issues of competitiveness largely corresponds to Article 101 of the Treaty on the Functioning of the European Union, on restrictive agreements and Article 102 TFEU on the abuse of a dominant position. The Law on Protection of Competition regulates the protection of competition in the Serbian market, to achieve economic progress and improve the welfare of society, and especially benefit consumers. This law is based on the EU Acquis Communautaire.

The Commission for Protection of Competition established by this law as a regulatory body must, in accordance with Article 73 of the Stabilisation and Association Agreement with the EU, apply the appropriate criteria resulting from the rules governing competition in the market in the European Union. Merger control rules governing the content and manner of submitting notification on concentration of previous control of the impact on competition beyond a certain threshold of turnover have also been introduced. By-laws also provide guidance on how to apply the rule of competition, which is also in accordance with current regulations and instructions of the Commission.

30 Air Serbia has recently introduced an additional 12 lines from Niš Airport.
31 The annual report 2018 for Air Serbia is not available.
32 The number of IFR flights reached its highest number of 703,347 in 2018.
Much has been done to the legal framework when it comes to bringing competitiveness into line with the regulations that apply in the EU. Certain shortcomings still exist in the procedural rules. Even certain sectors of the economy are covered here, such as transport and insurance.

In the aviation market in Serbia, the recent entry of low-cost air carriers undermined the former quasi-monopoly of the flag carrier JAT Airways. This inevitably led to a change in the market, particularly in air ticket prices. The decision of 30 November 2009 of the EU Justice and Home Affairs Council to abolish the visa requirement for Serbian citizens with biometric passports from 19 December 2009 by amending Council Regulation 539/2001, allowing passengers to destinations in Europe without a visa, has also increased demand. Competitiveness in air transport is inevitably affected by commercial growth in Serbia’s only true international airport, Belgrade Airport. Unlike Belgrade Airport, which is handled by a public-private partnership, Niš Airport has become part of a new established public company, Airports of Serbia.

Six years ago the Serbian government decided to find a strategic partner for Air Serbia and found a solution in a framework agreement between the government, Etihad Airways and Air Serbia. Air Serbia was established with a 51 per cent stake owned by the government and 49 per cent owned by Etihad. This resulted in a change to their previous business and the emergence of a new low-cost airline that quickly positioned itself as one of the strongest in south-eastern Europe.

VII WRONGFUL DEATH

The regulations that regulate wrongful death in aviation matters are the Law of Contract and Torts, which applies generally, and the specific Law on Obligations and Basic Property Relations in Air Transport.

Under Article 200 of the Law of Contract and Torts, compensation can be awarded for the death of a close person if the court finds that the circumstances of the case, particularly the intensity and duration of suffering, make it just to award it, irrespective of any material damage caused by the person’s absence.

The deceased person’s closest relatives (i.e., spouse, children and parents) are entitled to compensation for mental anguish. This compensation may be also awarded to siblings if they shared the same household as the deceased person on a permanent basis. In addition, compensation can be awarded to an extramarital partner if he or she and the deceased shared a household on a permanent basis.

Article 26 of the Law on Obligations and Basic Property Relations in Air Transport incorporates the relevant provisions of the Montreal Convention with respect to air carrier liability. Article 28 of the same Act sets forth that the amount of compensation for damage caused by passenger death complies with Articles 21 and 22 of the Montreal Convention.

The Act does not define the third parties that can make a claim. Under Article 1, Paragraph 3 of the Law on Obligations and Basic Property Relations in Air Transport, the general regulations governing contractual relations (Article 201 of the Law of Contract and Torts) will determine which third parties may seek damages.


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VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

Disputes regarding civil aviation contracts in the Serbian judicial system are heard by the civil courts using the standard civil procedures. On the basis of claims submitted in the proceedings, the court has jurisdiction to decide the limits of the request. The parties may waive their claims, recognise the claim of the opposing party and settle.

ii Carriers’ liability towards passengers and third parties

In the period after Serbia signed the Montreal Convention, the Law on Obligations and the Basics of Property Relations in Air Transport was amended and supplemented by regulations in 2011 and 2015. The 2015 amendments, based on the ECAA Agreement, established rules guaranteeing certain minimum rights of passengers relating to denied boarding, flight cancellation and flight delays.

Before the amendments there were certain inconsistencies with the Regulation of the European Parliament and the Council (EC) No. 261/2004, specifically as to the number of passengers’ claims being dependent on the length of the flight. The amendment brought the Serbian rules into line with the European regulation so that the amount of passenger claims relates to flight delay. The amendments also offered passengers a choice between reimbursement and new flights.

Passenger complaints should be submitted to the airline carrier in writing along with supporting evidence. The deadline for submission of claims is no later than 90 days after the flight was scheduled. If the carrier does not accept or fails to respond to the claim, the injured party may report a procedural violation to the CAD. Passengers who file complaints with the CAD are not precluded from filing a concurrent complaint with the competent court. The CAD has begun providing advisory opinions to air passengers, either in writing or by receiving passengers in person at the CAD’s offices. According to official data, during 2018 the CAD carried out five inspections of both Belgrade Airport and Niš Airport and 18 inspections of various air carriers as part of its regular activities, and prescribed responsibilities regarding the implementation of laws and relevant international regulations relating to respect for the rights guaranteed to passengers and persons with disabilities and reduced mobility.

Part II of the Law on Obligations and Basic Property Relations in Air Transport deals with liability. The owner or user of the aircraft (the responsible person) is responsible for the damage an aircraft in flight causes to third parties and things on the ground, including death or bodily injury, except if it proves that there was no direct causation.

Under Article 120 of the Law on Obligations and the Basics of Property Relations in Air Transport, the responsible person is exonerated from liability if it can be proved that the damage resulted from:

a action of the injured party or other person who has worked by order of or on behalf of the injured party;

b act of a third party; or

c some circumstances that are outside of the aircraft, but that could not be predicted in advance, avoided or eliminated.
The responsible person will be partly and proportionately exonerated from liability on proving that the injured party or another acting at the request or on behalf of the injured party contributed to the damage. In case of illegal use of aircraft for which the responsible person is not to blame, the person who unlawfully seized the aircraft is wholly liable.

In a collision or other air safety-related occurrence involving two or more aircraft, liability is joint and several.

Liability of the responsible person is limited to the value (price) of a new aircraft at the time of the accident, up to the amount of actual damage caused. There are also cases where the responsible person cannot limit liability, primarily when it is proved that the damage was caused intentionally or by gross negligence. The above liability provisions apply to foreign aircraft on the basis of reciprocity.

iii Product liability

In recent years, efforts have been made to improve overall consumer rights. The law regarding this matter is the Consumer Protection Act. The provisions of this Act are in line with EU legislation and it contains provisions from 12 EU Directives. Further, five regulations have been issued under the Consumer Protection Act.

Product safety is provided for in the Law on General Product Safety, and through its related regulations, which mirror the provisions of Directive 2001/95/EC.

The Air Transport Law makes general provisions for aeronautical products including provisions relating to the design and manufacture of aeronautical products, parts, appliances and equipment, testing of aviation products and error in the design. Also, the Air Transport Law gives the CAD jurisdiction over control and inspection of these products. Notwithstanding, pursuant to the terms set forth in ratified international agreement, EASA can perform checks and issue certificates. Article 258, item 80 of the Air Transport Law provides for penalties for operators who design or produce aeronautical products, parts, appliances and equipment contrary to the conditions prescribed by the CAD in Article 152, Paragraph 5 of the same law.

Rules are also laid out on the certification of aircraft and other aeronautical products, parts and appliances in the field of airworthiness and environmental protection, and on the issuance of licences to conduct activities of aviation technical organisations for production and design.

iv Compensation

According to the provisions of the Law of Contract and Torts, regardless of the material damage caused, the court may, if it considers it just, award monetary compensation for non-material damage. Persons entitled to financial compensation in case of death or severe disability include the closest relatives.

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37 Law on General Product Safety (Official Gazette of the Republic of Serbia, No. 41/09).
38 Regulation on the certification of aircraft and other aviation products, parts and appliances and licensing of manufacturing and design organisations (Official Gazette of the Republic of Serbia, Nos. 5/18 and 1/19).
In practice, Serbian civil court judgments have on rare occasions awarded compensation for material and non-material damage. Typically, claims for non-material damage are approximately up to €5,000 and in some cases higher. In practice, Serbian courts tend not to favour parties that submit claims for non-material damage.

IX DRONES

The popularity gained by drones all over the world did not bypass Serbia. Every year there is a growing number of registered drones and the number of people who have passed the exam to use unmanned aircraft. Their use for commercial purposes has significantly increased and therefore so did the number of requests for allocation of airspace where unmanned aircraft can be used. According to Air Transport Law, Article 10, unmanned aircraft, aero-models, missiles and other flying objects can be used for economic, scientific, educational, sports and other purposes provided they do not jeopardise the safety of air traffic. Provisions for the safe use of drones are prescribed by the Regulation on Unmanned Aircraft (Official Gazette of the Republic of Serbia, No. 108/15).

To fly a drone, it is necessary to pass an exam set by the CAD to obtain a certificate. For each use of the drone, the operator shall submit a request for the allocation of airspace to the Airspace Military Cell (AMC) Unit and this request shall be filed no later than five working days before the intended flight of the drone.

Pursuant to the Regulation on Unmanned Aircraft (Official Gazette of the Republic of Serbia, No. 108/15), Article 8, Paragraphs 1, 2 and 3, unmanned aircraft can fly only during the day, and must be within the sight of the person who manages it at all times. The maximum permitted flight altitude of an unmanned aircraft is 100 metres above floor level unless the CAD has approved a flight at a higher altitude and the maximum permissible horizontal distance the unmanned aircraft will be from the person who manages it will be 500 metres.

Pursuant to the Regulation on Unmanned Aircraft, Article 17, Paragraph 1, it is not possible to fly foreign drones in Serbian airspace without prior permission of the Ministry of Defence.

As drones are divided into four classes (1–4), the procedure is not the same for all types of this aircraft. The least demanded unmanned aircraft is category 1. 39

To fly in Class D of Serbian airspace, which extends up to 5 kilometres away from the aerodrome reference point (ARP), the operator must have special permission from the CAD. If the distance from the ARP is greater than 5 kilometres and is located in Class D of Serbian airspace, it is permitted to fly at a height of 30 metres above the ground.

Any violation of the provisions of the Regulation of unmanned aircraft entails fines which vary depending on whether it is a legal (25,000 to 1 million dinars) or a natural person (10,000 to 50,000 dinars). If the use of a drone causes harm to or the death of a person, the person who managed the drone will be held criminally liable.

39 Operating mass less than 0.5 kilograms, with a maximum flight altitude up to 50 metres, a maximum air speed of 30 metres per second and maximum range of up to 100 metres.
X  VOLUNTARY REPORTING


Regulation (EU) No. 376/2014 has not yet been transposed, which would fully harmonise Serbian regulations governing this matter with EU rules. According to the plan of the CAD, the full application of Regulation 376/2014 is expected by 2021. In addition to the primary objective of improving overall aviation safety, transposing the regulation would better regulate the system of voluntary reporting.

The existing rules established by the CAD for voluntary reporting are based on:

a  voluntary reporting of occurrences; and
b  voluntary reporting of occurrences related to aviation security or potential harm in aviation security.

The CAD may not act on a voluntary report to impose any economic, criminal, disciplinary, civil or any other liability. Information about the voluntary report applicant must be protected and can be sent to another person solely on the request of the judicial authorities of Serbia.

Work to encourage and explain the reasons for voluntary reporting and to create a just culture must remain a priority. In this sense, although a just culture has long been recognised in the Serbian aviation community, it has not adequately taken root among aviation professionals out of fear of liability or professional discredit. This will require additional work by the CAD or greater understanding of the matter among the judicial authorities.

XI  YEAR IN REVIEW

EU civil aviation regulations are continuously monitored by the CAD to ensure harmonisation with Serbian law. This includes regulating air traffic (as in EU countries), which is required of an EU candidate country.

The key civil aviation laws in 2018 have not been amended: the Law amending the Air Transport Law (Official Gazette of the Republic of Serbia, No. 83/18) and also the Law amending the Law on accident investigations for aviation, railways and waterborne transport (Official Gazette of the Republic of Serbia, No. 83/18). In 2018 there was a similar

40  Official Gazette of the Republic of Serbia, Nos. 54/12 and 86/16.
41  Official Gazette of the Republic of Serbia, No. 86-16.
number of by-laws adopted in civil aviation compared to in 2017. Further harmonisation and compliance with EU civil aviation regulations will lead to overall improvement in the standard and safety of Serbian aviation.

Among more than 20 by-laws issued by the CAD, Regulation on conditions for performing air operations (Official Gazette of the Republic of Serbia, Nos. 9/18, 56/18 and 12/19) is one of the most important.

During 2018, the progress of the Serbian aviation authorities in the field of safety, security, safety oversight, inspection and compliance with EU regulations continued.

The trend of passenger growth and good business results for Belgrade Airport continued in 2018, with the total number of passengers reaching 5.6 million. According to officials, the third international airport, Morava Airport (Kraljevo) will be opened during the summer of 2019.

Air Serbia continues to maintain its position as the busiest national airline in the former Yugoslavia, despite a drop in the number of passengers handled.42

The Serbian government continued its activities related to bilateral cooperation in air transport in 2018. The competent Ministry of Construction, Transport and Infrastructure prepared and realised several bilateral agreements in air transport.43

XII OUTLOOK

Besides the progress of the Serbian aviation authorities in the field of safety, security, safety oversight and inspection, Serbia as an EU candidate strives to keep pace and national regulations in line with changes in EU regulations.

Further harmonisation and convergence with EU civil aviation regulations will lead to an overall rise in standards and safety in Serbian aviation. There has been significant effort in the application of regulations in the field related to civil aviation, which concerns some other areas, including tourism, insurance and environmental protection.

The CAD is responsible for the implementation of the national programme for civil aviation safety, which involves different methods of gathering data. In March 2019, the CAD was subject to oversight conducted by ICAO experts (ICAO Coordinated Validation Mission (ICVM).

Unlike the ICAO audit from 2009 with numerous findings of non-compliance with ICAO regulations, the 2019 audit results were much better. Currently, Serbia’s civil aviation system is 93.3 per cent compliant with ICAO regulations and recommended practice.

42 According to Belgrade Airport’s quarterly report, the carrier welcomed roughly 2,043,000 travellers during the first three quarters of the year, representing a decrease of 4.9 per cent; https://www.exyuaviation.com/2018/11/ex-yu-airlines-handle-52-million.html.

43 During 2018 Serbia signed air services agreements with Iran, India and Canada.
I  INTRODUCTION

Switzerland is a democratic state with a modern society and an advanced and open economy. Even though geographically in the centre of Europe, it is not a member of the European Union or the European Economic Area, but of the European Free Trade Association (EFTA). The EU and its Member States are the most important trading partners of Switzerland. Therefore, close cooperation with the EU and its Member States is instrumental for Swiss politics and economy. Cooperation was institutionalised with the bilateral agreements between Switzerland and the EU, which covers various areas, including air transport.2

Aviation plays an important role in Switzerland. Zurich Airport (2018: 31.1 million passengers) is one of the major European airports and a hub for Swiss International Airlines Ltd, the Swiss national carrier that is part of Lufthansa Group and a member of Star Alliance. The two other national airports are those of Geneva (2018: 17.7 million passengers) and Basel-Mulhouse-Freiburg, the tri-national EuroAirport on French territory (2018: 8.6 million passengers). Pilatus Aircraft Ltd is a Swiss manufacturer of small aircraft and business jets. Geneva hosts the executive offices of the International Air Transport Association (IATA).

Civil aviation is governed by the Swiss Aviation Act3 and numerous implementing ordinances. Switzerland is party to most international treaties in the field of aviation, including the Chicago Convention of 1944, the Geneva Convention of 1948, the Warsaw Convention of 1929 and the Montreal Convention of 1999. Switzerland also signed the Cape Town Convention of 2001; however, it is not yet in force. Based on the EU-CH Agreement on Air Transport, aviation-related EU legislation is also applicable in Switzerland; usually, European law is implemented a few months or a few years later than in the EU.

II  LEGAL FRAMEWORK FOR LIABILITY

Liability for carriage is shaped by international law. Switzerland is a party to the Montreal and Warsaw Conventions. Based on the EU-CH Agreement on Air Transport, Regulation (EC) No. 2027/97, as amended by Regulation (EC) No. 889/2002, Regulation (EC) No. 785/2004 and Regulation (EC) No. 261/2004 are applicable also in Switzerland. To the extent liability

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1 Heinrich Hempel and Daniel Maritz are partners at Schiller Rechtsanwälte AG.
2 Agreement between the European Community and the Swiss Confederation on Air Transport of 21 June 1999 (SR 0.748.127.192.68; the EU-CH Agreement on Air Transport).
3 Federal Act on Aviation of 21 December 1948 (SR 748.0; the Aviation Act).
for carriage does not fall within the scope of these international treaties and EU Regulations, liability has to be determined either based on the Air Transport Ordinance (see below) or in accordance with general legislation on liability.

The Aviation Act contains special provisions for damage caused by aircraft in flight to persons and objects on the ground. Where no special legislation has been adopted, aviation is subject to the same legislation as all other industries.

i  International carriage
Switzerland is a party to the Warsaw and Montreal Conventions. Based on Regulation (EC) No. 2027/97, as amended by Regulation (EC) No. 889/2002, the liability for international carriage by Swiss or EU carriers for passengers and baggage has to be determined in accordance with the Montreal Convention even if this treaty is not applicable. The carriers are also obligated to make an advance payment as provided by Article 5 of this Regulation. Issues not covered by the Warsaw or Montreal Convention or the Regulation, such as, for instance, the validity of contract or the calculation of damages, have to be determined in accordance with general contract or tort law.

ii  Internal and other non-convention carriage
Switzerland also implemented the Montreal system of liability into its national legislation by enacting the Air Transport Ordinance when the Montreal Convention was ratified. The Ordinance applies to certain internal and other flights not covered by the international treaties or EU law.

In substance, liability under the Air Transport Ordinance is more or less the same as under the Montreal Convention. However, certain differences exist. In particular, the Ordinance does not stipulate a place of jurisdiction. Therefore, certain actions based on the Ordinance may not be brought before the court at the domicile of the passenger (see Article 33(2) of the Montreal Convention for claims thereunder).

iii  General aviation regulation
Carriage by aircraft for reward as well as carriage by an air transport undertaking (for reward or gratuitous) either fall under the Montreal Convention or the Regulation (EC) No. 2027/97 (international carriage or carriage by an EU carrier), or under the Air Transport Ordinance (national carriage or international carriage not covered by the Montreal Convention or Regulation (EC) No. 2027/97).

In cases of gratuitous carriage by other, non-licensed carriers, the above legal instruments do not apply. Liability has to be determined in accordance with general contract and tort law that is found in the Code of Obligations. If the flight is a mere courtesy to the passenger, there may be no contract and liability may have to be based on tort. A reduced standard of care applies, but there is no limitation of the liability amount in statutory provisions.

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4 Ordinance on Air Transport of 17 August 2005 (SR 748.411; the Air Transport Ordinance). The competence to enact such an important piece of legislation in an ordinance (enacted by the governmental body), and not in a federal act (enacted by parliament), is provided for in Article 75 of the Aviation Act. This provision, however, constrains the government to use the applicable international treaties as guidance.


6 BGE 137 III 539.
The parties may by agreement limit the liability within the limits provided by the Code of Obligations (in particular, according to Article 100(1) of the Code of Obligations, the exclusion for unlawful intent and gross negligence is deemed void). For this reason, private pilots often require a reward and issue a document of carriage so the Air Transport Ordinance applies.

The above system regarding the liability of carriers to passengers (and transported goods) applies to all types of aircraft, such as aeroplanes, helicopters, airships, balloons, ‘ecolight’ aircraft, etc.

Further, Article 64 seq. of the Aviation Act provide for an unlimited strict no-fault liability of the operator for any damage to persons and objects on the ground caused by an aircraft in flight or by any person or object falling therefrom. ‘In flight’ encompasses, according to Article 64(3) of the Aviation Act, the time from the beginning of the departure manoeuvre until the end of the landing manoeuvre, thus excluding, for example, damage caused during taxiing. In the event of a collision of two or more aircraft, the operators of these aircraft are jointly and severally liable to the claimant (the internal distribution of the damage follows the ordinary rules on recovery between jointly liable parties). The Aviation Act does not provide for an exclusion or reduction of liability if a third party or an act of God was the cause of the accident. However, for damage caused by a person on board the aircraft and not being a crew member, the operator’s liability is limited to the minimum insurance to be taken (see Section V). In the event of a terroristic act of a person who is not on board the aircraft, it is arguable that, by analogy, the same liability limitation applies.

Passenger rights

Switzerland has not enacted specific legislation concerning passenger rights but, based on the EU-CH Agreement on Air Transport, Regulation (EC) No. 261/2004 is applicable in Switzerland.7 According to the introductory comments in the Annex of the Agreement listing the applicable EU Acts, references to EU Member States in such Acts shall, for the purpose of the Agreement, be understood to equally apply to Switzerland, and the term ‘Community air carrier’ shall include an air carrier having its principal place of business in Switzerland. Further, Article 1(2) of the Agreement provides that Acts mentioned in the Annex of the Agreement shall be interpreted in conformity with decisions of the Court of Justice of the European Union (CJEU) and the European Commission rendered prior to the date of signature of the Agreement (21 June 1999), and decisions rendered after that date shall be communicated to Switzerland and their implications shall be determined by the Joint Committee, which is composed of Swiss and EU representatives to ensure the proper implementation of the EU-CH Agreement on Air Transport. The scope and content of these provisions give rise to several questions; in particular the following.

The EU-CH Agreement on Air Transport grants traffic rights to EU carriers and Swiss carriers between any point in Switzerland and any point in the EU (Article 15 of the Agreement). In particular this limitation of the territorial scope of the Agreement gives rise to the argument that Regulation (EC) 261/2004 is not applicable to flights from Switzerland to a country outside the EU or EFTA. A Basel court declined application to flights to and

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7 AS 2006 5987.
from third countries. The German Federal Court of Justice, in its decision of 9 April 2013,\(^8\) submitted this question to the CJEU, but the proceedings were completed without addressing the issue.

Decisions of the CJEU rendered after the adoption of Regulation (EC) No. 261/2004 were not officially communicated to Switzerland. Therefore, the direct application particularly of the following judgments in Switzerland is questionable: Wallentin-Hermann,\(^9\) where the CJEU applied a restrictive interpretation of ‘extraordinary circumstances’ of Article 5(3) of the Regulation; and Sturgeon\(^10\) and related decisions, in which the CJEU introduced an obligation to pay compensation in the event of a delay of three hours or more. The Swiss courts are not bound by these decisions, but they are, of course, free to follow them. The District Court of Bulach confirmed this in a decision of 2 February 2016. Based on an interpretation of Regulation (EC) No. 261/2004 in accordance with the standards applicable in Switzerland, the Court held that passengers are not entitled to compensation in case of delay.

\(v\) Other legislation

The aviation sector is submitted to the same general liability rules applicable to all businesses in Switzerland. However, specific provisions for the aviation sector apply based on the EU-CH Agreement on Air Transport. Particularly, EU competition law applies to all cases where trade between the EU and Switzerland may be affected (see Section VI, for more details). In addition, product liability law may grant a legal basis for claims against manufacturers or importers of aircraft (see Section VIII.iii).

III LICENSING OF OPERATIONS

\(i\) Licensed activities

Commercial carriage of passengers or cargo requires a licence from the Swiss civil aviation authority, the Federal Office for Civil Aviation (FOCA).\(^11\) Air transport is deemed commercial if it is offered to an undefined number of customers and any form of remuneration has to be paid to cover the costs of use of the aircraft, the fuel, airport and air transport services.\(^12\) All flights of licensed operators are considered commercial.\(^13\)

Aviation law distinguishes between services provided by national carriers and services provided by foreign carriers. A national carrier may fly within the Swiss territory as well as to and from foreign destinations to the extent permitted under the bilateral agreements of Switzerland with other states. A foreign carrier may serve only the routes between Switzerland and its home state as provided by such bilateral agreements of Switzerland with the home state.

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\(^8\) Judgment of the Federal Court of Justice of Germany of 9 April 2013, Case X ZR 105/12.
\(^11\) Article 27(1) of the Aviation Act.
\(^12\) Article 100(1) of the Ordinance on Aviation of 14 November 1973 (SR 748.01; the Aviation Ordinance).
\(^13\) Article 100(2) of the Aviation Ordinance.
A national carrier must meet the following requirements\(^{14}\) (for foreign carriers see Section III.iii):

\(\text{a}\) the undertaking meets the ownership requirements described in Section III.ii;

\(\text{b}\) the undertaking has the technical qualification and organisation required to ensure the safe and, to the extent feasible, ecological operation of aircraft. In particular, it must hold an air operator certificate (AOC) covering the services to be rendered. The AOC is issued by the FOCA in accordance with the European Operation Regulation\(^{15}\) and the International Civil Aviation Organization (ICAO) five phases model;

\(\text{c}\) the undertaking disposes of the number of aircraft required for the intended use, and such aircraft are registered in Switzerland or in another state that, based on a bilateral agreement, allows use equal to that of the Swiss registration. At least one aircraft must be owned by the undertaking or leased for a period of six or more months;

\(\text{d}\) the undertaking has the right to use the airport at the place of operation to the extent required to provide the services;

\(\text{e}\) the undertaking has sufficient insurance cover;

\(\text{f}\) the aircraft meet the actual technical standards, at least the internationally agreed minimal standards, regarding noise and pollution; and

\(\text{g}\) operators of aeroplanes and helicopters are required to introduce and maintain a safety management system in accordance with ICAO Standards and Recommended Practices.

Undertakings that operate balloons, gliders or special categories of aircraft are exempt from some of the above requirements. Special licences may be granted for short-term operations or a limited number of flights.

Pursuant to Article 28 of the Aviation Act, commercial carriage of passengers or cargo on a specific route additionally requires an authorisation by the FOCA. However, this does not apply to destinations in the EU and EFTA. Based on the EU-CH Agreement on Air Transport and Regulation (EC) No. 1008/2008, every Swiss and EU/EFTA carrier may serve any routes between Switzerland on the one hand and EU/EFTA Member States on the other. Swiss carriers may also serve routes between EU/EFTA Member States. The authorisation to serve routes between Switzerland and non-EU/EFTA states on a regular basis is granted to national carriers for a limited period only. The operator requires an operating licence in accordance with Article 27 of the Aviation Act. The FOCA has to take into account the public interest and how the national airports are served. In its application the operator has to submit route plans, timetables, tariffs, information about the aircraft that shall be used, cooperation agreements with other airlines and information about the commercial aspects of the operation. Other airlines that could operate the same route are involved in the proceedings. For its decision, the FOCA will take into account the effect on competition as well as economical and ecological aspects. The maximum term for the authorisation is eight years but it is renewable. The authorisation can be transferred to another operator with the consent of the FOCA.

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\(^{14}\) Article 27 of the Aviation Act and Article 103 et seq. of the Aviation Ordinance.

\(^{15}\) Council Regulation (EEC) 3922/91.
ii Ownership rules

A national carrier is a company with domicile in Switzerland. It must be registered in the Swiss commercial registry, have the objective to commercially operate aircraft and be owned and controlled by a majority of Swiss citizens or companies controlled by a majority of Swiss citizens. The EU-CH Agreement on Air Transport provides, however, that EU and Swiss companies shall be treated alike. This means that a national carrier may also be owned and controlled by a majority of Swiss or EU/EFTA companies or citizens.

This only applies, however, to the relation between Switzerland and EU/EFTA states. With respect to the relation between Switzerland and non-EU/EFTA states, the respective bilateral agreements with the non-EU/EFTA states define the nationality requirement. While Switzerland favours liberalised definitions that focus on the place of business and also allow ownership and control by foreign individuals or companies, many bilateral agreements rely on traditional strict ownership requirements.

The undertaking must further be economically sound and have a reliable accounting system. The undertaking has to demonstrate that it can likely meet its obligations for a period of 24 months from the start of operations and meet its fixed and operational costs incurred by operations according to its business plan for a period of three months from the start of operations without taking into account any income from its operations.

iii Foreign carriers

Undertakings with a domicile outside Switzerland that commercially carry passengers or cargo to and from Switzerland require an operating licence unless an international agreement provides for an exemption. Such an exemption can be found in particular in the EU-CH Agreement on Air Transport and the agreement on air transport of the EFTA states.\textsuperscript{16} EU/EFTA operating licences are accepted in Switzerland (as are Swiss operating licences in EU/EFTA Member States).

A non-EU/EFTA undertaking will be granted the operating licence if:

a it holds a licence of its home state for the international carriage of passengers and cargo;

b it is under the effective supervision by the authorities of its home state in technical and organisational respects;

c it can ensure the safe and, to the extent feasible, ecological operation of aircraft in accordance with internationally agreed standards;

d the grant of licence does not violate essential Swiss interests;

e the home state of the undertaking grants licences to Swiss carriers to the same extent as Switzerland does to the carriers of such a state;

f liability for damages on the ground is covered; and

g there is sufficient insurance cover for other third-party liability.

As national carriers, also foreign carriers, including EU/EFTA carriers, require an authorisation for commercial carriage of passengers or cargo on a specific route to and from non-EU/EFTA states. Such authorisations will be granted in accordance with the bilateral agreements of Switzerland with the non-EU/EFTA states. The FOCA is also free to grant an authorisation if there is no basis in a bilateral agreement.

\textsuperscript{16} Annex Q (Air transport) to the Convention establishing the European Free Trade Association of 4 January 1960 (SR 0.632.31).
IV SAFETY

Based on the EU-CH Agreement on Air Transport, the EU Regulations on safety are also applicable in Switzerland. The Swiss authorities strive for the highest possible safety standards in accordance with EU legislation and ICAO Standards and Recommended Practices.

V INSURANCE

Based on the EU-CH Agreement on Air Transport, the revised Regulation (EC) No. 785/2004 is also applicable in Switzerland. In accordance with this Regulation, air carriers and aircraft operators flying within, into, out of, or over Swiss territory have to meet the following level of insurance:

a Insurance in respect of the operator’s liability for damage caused by an aircraft in flight to persons and objects on the ground: the minimum insurance cover depends on the take-off weight. It starts at 750,000 special drawing rights (SDR) for a take-off weight of below 500 kilograms and reaches 700 million SDR for a take-off weight of 500 tons or more. The Swiss authorities may request evidence of compliance in the event of overflights by non-EU/EFTA carriers or aircraft registered outside EU/EFTA as well as with respect to stops by such aircraft for non-traffic purposes.

b Insurance in respect of liability for passengers, baggage and cargo: the minimum insurance cover shall be 250,000 SDR per passenger for bodily injury (100,000 SDR in respect of non-commercial operations by aircraft with a minimum take-off weight of 2,700 kilograms or less), 1,131 SDR per passenger for baggage in commercial operations and 19 SDR per kilogram for cargo in commercial operations. These requirements do not apply to flights over Swiss territory carried out by non-EU/EFTA carriers or by operators using aircraft registered outside the territory of the EU/EFTA.

The law does not include any provisions on how the insurance cover has to be evidenced.

VI COMPETITION

Article 8 seq. of the EU-CH Agreement on Air Transport prohibit agreements and concerted practices between undertakings with anticompetitive effects as well as the abuse of a dominant position. According to these provisions, such anticompetitive behaviour shall be controlled by the EU institutions in accordance with Community legislation, taking into account the need for close cooperation between EU and Swiss authorities. Only anticompetitive behaviour that exclusively affects trade within Switzerland shall be subject to Swiss law and remain under the competence of the Swiss authorities. Thus, standards of EU competition law apply also in the relation between Switzerland and the EU.

Swiss competition law prohibits agreements or conduct that eliminate or substantially restrict trade without having beneficial economical effects. Heavy fines may be imposed on undertakings – not, however, on individuals – for anticompetitive behaviour. Swiss competition law further provides for a merger control.

Cooperation agreements will usually affect trade in the EU and therefore be controlled by the EU authorities in accordance with EU law. There is no case law as to merely national cooperation agreements concerning aviation.
VII  WRONGFUL DEATH

In case of wrongful death, the ensuing expenses, in particular the funeral expenses, shall be compensated (Article 45 of the Code of Obligations). Persons who lose their source of support are entitled to compensation for this loss, including the household damage (i.e., compensation for the loss of the deceased’s contribution to the daily chores). Further, persons close to the deceased – spouse, children, parents – are entitled to compensation for pain and suffering (moral damages) up to an amount of 50,000 Swiss francs. See Section VIII.iv.

VIII  ESTABLISHING LIABILITY AND SETTLEMENT

i  Procedure

Usually, in liability cases the parties first try to reach an amicable solution. If the dispute cannot be settled out of court, the claimant may bring an action against the defendants before the competent court. The proceedings are governed by the Civil Procedure Code.17

In principle, the ordinary civil courts are competent for liability disputes. However, before the litigation starts, usually an attempt at conciliation has to be made before a conciliation authority. In the four cantons, Aargau, Berne, Zurich and St Gallen, however, specialised commercial courts are competent to adjudicate commercial cases (e.g., disputes between insurers) if the value in dispute is at least 30,000 Swiss francs. In these cases, no conciliation proceedings will be held. Parties can bring the case before an arbitral tribunal if they have concluded an arbitration agreement.

The limitation periods for bringing the claim to court are part of substantive law. Liability claims under a contract of carriage against the carrier have to be brought within a period of two years from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped (Article 35(1) of the Montreal Convention; Article 14 of the Air Transport Ordinance). This two-year limitation cannot be extended, thus the claim is forfeited if the action is not brought before the expiration of this limitation.

Claims against the operator for personal or property damage on the ground caused by an aircraft in flight, have to be brought within one year from the date when the claimant could have knowledge of the damage and the liable party, in any event no later than three years after the accident. This statutory limitation period can be waived by the defendant or interrupted by debt enforcement proceedings. In addition, any time limitation may be met by application for conciliation (if applicable), or submission of a statement of claim to a court or arbitral tribunal in due time.

The plaintiff can bring an action for compensation against one or more of jointly and severally liable defendants, for example against the carrier (for breach of contract), against the manufacturer (for product liability) or against a third party (action in tort). However, there is no direct claim against the liability insurer of the carrier. The plaintiff can choose to sue only one or more of the possible defendants (for a joinder of actions the court must have jurisdiction against all defendants under the applicable jurisdictional provisions). A party (usually the defendant) may notify a third party of the dispute if, in the event of being unsuccessful, the notifying party might take recourse against a third party (third-party...
notice). In addition, the notifying party may bring an action against the notified third party in the court that is dealing with the main action in the event that the notifying party is unsuccessful (third-party action).

Where two or more parties are jointly and severally liable, recovery can be sought based on Article 50 seq. of the Code of Obligations. The damage has to be borne first by the party liable in tort, second by the party in breach of contractual obligation and third by the party deemed liable by statutory provision. A recent decision of the Federal Supreme Court lifted the barriers to recovery by insurers (see Section XI).

Civil litigation may be complemented by criminal prosecution, for example against a pilot for bodily injury caused by negligence, or against any person breaching a generally accepted rule of transportation and endangering persons or goods on the ground (Article 90 of the Aviation Act). Further, criminal sanctions may be imposed on the operator in the event of repeated or serious breach of obligations towards passengers under international treaties (Article 91(4) of the Aviation Act). This provision was adopted in particular to address breaches of Regulation (EC) No. 261/2004. In certain instances, for example, in case of bodily injury, civil claims may be brought in the criminal proceedings.

ii  Carriers’ liability towards passengers and third parties

The court forms its opinion based on its free assessment of the evidence (Article 157 of the Civil Procedure Code). It is up to the parties to present to the court the facts in support of their case and submit the related evidence (Article 55(1) of the Civil Procedure Code). According to Article 8 of the Civil Code, the burden of proving the existence of an alleged fact rests on the party deriving rights from that fact. Therefore, it is, in principle, up to the plaintiff to assert the relevant facts, and to establish them, so that the court may award compensation.

The liability of carriers under the Montreal Convention and under the Air Transport Ordinance is, in principle, a liability for breach of contractual obligations. The plaintiff has to prove the damage that occurred because of an accident on board or during embarking or disembarking that caused the death or bodily injury of a passenger. The carrier is liable for personal injury of passengers up to the amount of 113,300 SDR irrespective of whether or not the carrier committed a fault. If the plaintiff claims higher compensation, the carrier is liable for damages exceeding the mentioned limits unless it proves that the damage (1) was not the result of the negligence or other wrongful act or omission of the carrier or its servants or agents; or (2) that such damage was solely the result of the negligence or other wrongful act or omission of a third party.

Claims for damage to persons and objects on the ground caused by an aircraft in flight are based on a strict liability of the operator (no fault of the operator is required).

In principle, Swiss law does not limit the liability. For certain exceptions, see Section II.iii.

18 Swiss Civil Code of 10 December 1907 (SR 210).
Product liability


The Product Liability Act particularly provides for compensation in personal injury cases. The amount of compensation in the event of death or bodily injury and the possible amounts for moral damages are established according to the relevant provisions in the Code of Obligations (see Section VIII.iv). Damage to property only entitles the claimant to compensation if the product is ordinarily intended for private use or consumption. The commercial user of an aircraft, for example, is not entitled to bring a claim under the Product Liability Act against the manufacturer or importer of the aircraft. In the event of damage to commercially used products, the claimant may possibly base a claim alternatively on Article 55 of the Code of Obligations (liability of the employer for damage caused by its employees or ancillary staff).

According to Article 7 of the Product Liability Act, several parties liable for a damage caused by a defective product are jointly and severally liable. According to leading authors in Switzerland, the joint and several liability also applies if the other party is liable on a legal basis other than the Product Liability Act. Therefore, in the event of an air accident, the manufacturer and the carrier may be jointly and severally liable. The internal distribution of the damage will be established in accordance with Article 51 of the Code of Obligations (see Section VIII.i).

The statutory limitation for product liability claims is three years from the date when the party suffering harm has or should have knowledge of the damage and the liable party; in any case, the claim expires 10 years after the date when the product was put into circulation (Articles 9 and 10 of the Product Liability Act).

Compensation

In principle, Swiss law requires that the claimant substantiates and proves the damage, the unlawfulness of the damage, a sufficient causal link between damaging conduct and damage, and (if required by the respective legal basis) negligence or other wrongful conduct of the wrongdoer. These requirements will be elaborated in further detail below.

Swiss law is based on the principle that the economic damage has to be compensated, neither more nor less. Compensation will be awarded if and to the extent the unlawful conduct caused a reduction of assets or an increase of debts. Damages, therefore, are established as the difference between the actual financial situation of the claimant as a consequence of the incident on the one hand, and the hypothetical financial situation without the incident on the other hand. In this regard, Swiss law accepts various compensable types of damage. In personal injury cases, damage owing to death or bodily injury includes any financial consequences of the death or injury, for example, funeral costs, medical costs and loss of income. In addition, reasonable and adequate costs for legal representation have to be compensated. Finally, damage interest of 5 per cent has to be paid for the time between the date when the damage occurred until the date of payment. An abstract loss of use without causing costs, will normally not qualify for compensation. For example, frustration owing to

Federal Act on Product Liability of 18 June 1993 (SR 221.112.944; the Product Liability Act).
the impossibility of going on vacation does not give rise to a claim for compensation. As an exception to the calculation and compensation of the actual loss or damage, the household damage can be calculated abstractly. Where a person can no longer, or only to a reduced extent, do the household chores because of injury or death, the damage will be established irrespective of whether or not there actually is a financial damage. It suffices to establish what a substitute would cost. The household damage is usually calculated based on statistical data with regard to a person of the same gender, similar age and family situation (number of people in the same household) as the deceased or injured.

Liability requires an unlawful act or omission. Any violation of the human body or integrity and any damage to property is unlawful, and all damage that is the consequence of such a violation is to be compensated. The causation of mere financial damage is unlawful only if a contract or a specific legal provision prohibiting such conduct is violated. This distinction may be relevant in cases where a party is only indirectly damaged because of the damage of another party, for example the employer in the case of bodily injury to its employee, or a creditor in the case of the death of his or her debtor. In principle, the (third) party suffering indirect damage is not entitled to compensation. There is one exception provided in Article 45(3) of the Code of Obligations. Where somebody is deprived of his or her means of support as a result of homicide, he or she is entitled to compensation for that loss. Such damages owing to loss of support are often at stake in cases of death of a passenger in an aircraft accident, particularly for claims of the widow or the widower and the children of the deceased.

In addition, there must be a sufficient causal link between the unlawful conduct and the damage. Acts of God, gross contributory negligence of the injured, or gross contributory negligence of a third party may exclude liability. In the event of contributory negligence of the injured the compensation may be reduced. In cases of strict liability (such as the liability of the operator for damage caused by an aircraft in flight on the ground), even gross negligence of the injured or of third parties does not exclude liability.

In most aviation law cases, the liability of the carrier is irrespective of the question whether the carrier is at fault. This is certainly true for the claims of the injured based on the strict liability under Article 64 of the Aviation Act (see Section II.iii). In personal injury cases concerning passengers, the question of fault may (only) be of relevance for damage exceeding the amounts stipulated in Article 21 of the Montreal Convention and Article 7 of the Air Transport Ordinance: (1) if such damage was not the result of the negligence or other wrongful act or omission of the carrier or its servants or agents; or (2) if such damage was solely the result of the negligence or other wrongful act or omission of a third party.

If liability is established according to the above, there may be an additional claim for moral damages. In cases of death or personal injury, the court may award the victim of personal injury or the dependants an appropriate sum. The amounts to be awarded depend on the relevant circumstances in the individual case. In cases of serious bodily injury leading to invalidity, the injured may be entitled to moral damages of up to 200,000 Swiss francs. The next of kin are also entitled to moral damages. For example, a widow may be entitled to approximately 50,000 Swiss francs in the event of the death of her husband, similarly in the event of serious bodily injury of the husband; a child to 30,000 Swiss francs in the event of the death of the child’s father or mother. In addition, unmarried partners are entitled to claim moral damages in the event of the death or serious bodily injury of their partner.

In personal injury cases, there are usually payments of social security institutions. For example, accident insurance pays medical costs, daily allowances in the event of loss
of income and a pension if the accident causes permanent incapacity to work. There may be additional payments of the invalidity insurance or (in the event of death) the survivors’ insurance. Additionally, the pension fund may make payments to the injured or his or her next of kin. The payments of such institutions have to be deducted from the compensation owed to them by the liable party insofar as they are intended to cover the damage. The social security institutions subrogate into the claims of the insured (or their survivors respectively) up to the amount of the payments made based on social security law. The insured (or their survivors) are only entitled to claim compensation from the liable party for the remaining damage not covered by such social security institutions (the direct damage).

IX  DRONES

Drones (i.e., remotely controlled, usually very small aircraft) are subject to the same legislation as model aircraft.

The criteria for the operation of drones with a weight of up to 30 kilograms are specified in the Ordinance on Special Category Aircraft. The general rule is that drones weighing less than 30 kilograms may be operated without a permit, as long as the operator maintains visual contact with the device at all times. Also, drone flights using video eyewear do not require a special permit as long as direct eye contact can be established with the drone at any time. FOCA authorisation is required in all other cases, in particular in the absence of direct eye contact.

Prior authorisation is required to operate a drone within 5 kilometres of landing fields and heliports. There is an interactive map published by the FOCA which shows the locations where restrictions and bans apply.20

Further, it is prohibited to operate a drone above gathering people without authorisation of the FOCA. Plain standard application forms exist for weddings and company events.

X  VOLUNTARY REPORTING

Switzerland introduced a system for voluntary reporting in 2011. On 1 April 2016, this system was replaced by Regulations (EU) Nos. 376/2014 and 2015/1018, which are applicable in Switzerland based on the EU-CH Agreement on Air Transport. The Regulations provide for mandatory reporting of occurrences that may present a serious risk, encourage voluntary reporting and protect the information source to some degree.

The website of the FOCA includes comprehensive information and refers to the EASA website for the submission of requests.

XI  THE YEAR IN REVIEW

Since 2001 the overflight of southern German territory, which is essential for the traditional northern approach of Zurich Airport, has been a major issue in the relations between Switzerland and Germany. Unilateral limitations of overflight by Germany, designed to protect the German population from noise, forced the airport to change the approach. As a

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consequence, a considerable part of the population living near the airport is exposed to noise beyond the limits that should not be exceeded. The ratification of a bilateral agreement seems destined to fail, thus leaving the issue unresolved. The unilateral restrictions by Germany adversely affect Zurich Airport’s capacity. The federal government is examining various measures to enhance capacity. On 23 August 2017, the Federal Council approved the Sectoral Plan for Aviation Infrastructure for the future development of Zurich Airport, which will enhance the airport’s capacity. Yet, because of the unilateral restrictions by Germany, certain approach and take-off routes cannot be implemented, which means that various noise-related issues remain unresolved. Strong opposition is therefore to be expected.

The Federal Supreme Court changed its practice to the recovery of insurers in its landmark decision of 7 May 2018 (4A_602/2017). In the past, recovery claims by certain insurers (e.g., hull insurers) required negligence, and in many cases even gross negligence or wilful misconduct of the tortfeasor. Based on the new decision, the insurer may seek recovery whenever the insured party is entitled to a claim against the tortfeasor.

XII OUTLOOK

Discussions regarding the overflight of southern Germany (see Section XI) will continue as Germany is pushing hard to further reduce the number of flights over this territory. Political discourse about Zurich Airport’s capacity will continue with uncertain results. Future passenger claims in Swiss courts may lead to more Swiss precedents and thus contribute to further clarification of open questions regarding Regulation (EC) No. 261/2004 (see Section II.iv).

Furthermore, Brexit will affect aviation not only between the EU and the United Kingdom but also between the United Kingdom and Switzerland. Switzerland and the United Kingdom entered into a bilateral agreement which shall be effective in the event of Brexit and provides that the existing traffic rights survive a hard Brexit.

The proposed Regulation of the EU on safeguarding competition in air transport, repealing Regulation (EC) No. 868/2004, will also be implemented in Switzerland in accordance with the EU-CH Agreement on Air Transport. The interpretative guidelines on Regulation (EC) No. 1008/2008 – rules on ownership and control of EU air carriers of 8 June 2017 will presumably be taken into consideration by Swiss authorities, even if not yet formally applicable.
Chapter 33

UNITED KINGDOM

Robert Lawson QC and Jess Harman

I INTRODUCTION

The United Kingdom has three constituent legal jurisdictions: England and Wales, Scotland, and Northern Ireland. However, civil aviation is regulated at national level. The UK government department responsible for civil aviation is the Department for Transport (DfT). The Secretary of State for Transport (SST), who heads that department, is charged by statute with the general duty of organising, carrying out and encouraging measures for the development of civil aviation; designing, developing and producing civil aircraft; promoting safety and efficiency in the use thereof; researching questions relating to air navigation; and organising, carrying out and encouraging measures for safeguarding the health of persons on board aircraft. The SST is also charged with carrying out specific duties in furtherance of the interests of air transport users regarding airport operation services. The SST is given a wide range of statutory powers in relation to the discharge of these duties.

The DfT currently states its aviation policy to be:

Our airports and airlines support the UK economy. We’re making sure they provide the domestic and international connections the UK needs to grow and prosper. We’re looking at the impact of air travel on climate change and also on noise levels for people living near airports. We’re continuing to make sure that air travel is safe and secure.

The principal regulator of civil aviation in the UK is the Civil Aviation Authority (CAA). It is a statutory body, with its constitution, functions and duties set by the Civil Aviation Acts of 1982 and 2012 as amended (CA Act 1982 and CA Act 2012 respectively).

The CAA has a wide remit. Its functions and duties embrace the licensing of air transport and the provision of accommodation in aircraft; the provision of air navigation services; the licensing and economic regulation of aerodromes; the registration of aircraft;

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1 Robert Lawson QC is a partner and Jess Harman is an associate at Clyde & Co LLP.
2 Although the Channel Islands (i.e., the Bailiwicks of Guernsey and Jersey) and Isle of Man enjoy a unique relationship with the United Kingdom through the Crown, in the person of the Sovereign, they are not part of the United Kingdom but rather are Crown Dependencies. See, for example, R (Barclay) v. Lord Chancellor and Secretary of State for Justice [2015] AC 276.
3 In relation to the DfT generally, see www.gov.uk/government/organisations/department-for-transport.
4 Civil Aviation Act 1982 (as amended), Section 1.
5 Civil Aviation Act 2012, Section 2.
6 As set out in the Civil Aviation Acts 1982 and 2012.
8 In relation to the CAA generally, see www.caa.co.uk/home.
the safety of air navigation and aircraft; the health of persons on board aircraft; the control of air traffic; the certification of aircraft operators; the licensing of air crew; and certain responsibilities concerning national security. The CAA is also designated as the UK body responsible for exercising a number of powers under EU regulations concerning civil aviation in areas falling within its responsibility. It is given a wide range of statutory powers in relation to the discharge of its duties.

The CAA has the general objective that it must perform its functions in the manner that it considers best calculated to ensure that British airlines provide air transport services that satisfy all substantial categories of public demand at the lowest charges consistent with a high standard of safety in operating the services, an economic return to efficient operators on the sums invested in providing the services and securing the sound development of the UK's civil air transport industry. In addition, it aims to further the reasonable interests of users of air transport services.

As a matter of UK law, an international treaty or convention does not have direct domestic effect. Accordingly, even when signed and ratified by the UK, an international treaty or convention will only have domestic legal effect when incorporated into UK law by statute, whether directly or indirectly.

The UK is party to the Chicago Convention on International Civil Aviation 1944. It is also party to the 'Two Freedoms' agreement of the same date.

The UK is currently a Member State of the European Union, and for as long as this remains the case it is thereby subject to EU law. In particular, EU regulations have direct application in the UK.

The law related to aviation in force in the UK is therefore currently to be found in UK statute, secondary legislation made pursuant to such statute (by way of statutory instrument or Order in Council), EU regulations and related jurisprudence of the Court of Justice of the European Union (CJEU), as well as the common (i.e., judge-made) law.

As and when the UK does exit from the European Union, which is currently scheduled to be no later than on 31 October 2019, the then existing EU derived domestic legislation, EU regulations and related jurisprudence of the CJEU will continue to form part of the UK's law by reason of the European Union (Withdrawal) Act 2018 unless, until or to the extent that the UK legislates to the contrary (but EU law created after that date will not do so). The UK has introduced a considerable volume of statutory instruments that amend UK legislation and amend or revoke extant EU Regulations in order to determine what is to be retained in UK law from the exit date, including many related to aviation.

As an EU Member State, the UK is part of the 'single aviation market' for Community air carriers within the EU, as provided for by Regulation (EC) No. 1008/2008. Outside of this area, route access to and from the UK is via either a horizontal agreement made between

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9 See, in particular, CA Act 1982, Section 3.
10 Principally, as set out in and under the CA Acts 1982 and 2012.
11 i.e., those having power to provide air transport services and appearing to the CAA to have their principal place of business in the UK, the Channel Islands and the Isle of Man, and to be controlled by persons who are UK nationals or from the time being approved by the SST for this purpose: CA Act 1982, Section 4(2).
12 So far as British airlines may reasonably be expected to provide such services.
13 CA Act 1982, Section 4 and CA Act 2012, Section 1.
14 The Chicago Convention is given domestic effect in the UK largely by and under the CA Act 1982.
15 As to which, see Sections XI and XII, below.
16 As to which, see Sections XI and XII below.
the EU and the non-Member State or a bilateral air services agreement made between the
UK and the state concerned. 17 As and when the UK exits the EU, all route access to and from
the UK will be by bilateral air services agreements. The CAA has the task of determining
the allocation of scarce capacity on any route that is the subject of any such air services
agreement. 18

The UK is also currently subject to EU law on such matters as state aid and slots. 19 As
to competition law, see Section VI.

The Cape Town Convention 2001 and associated Aircraft Protocol have force of law in
the UK in the form of and as provided by the International Interests in Aircraft Equipment
(Cape Town Convention) Regulations 2015.

II LEGAL FRAMEWORK FOR LIABILITY

i International carriage

The UK is party to the Warsaw Convention 1929, Hague Protocol 1955, Montreal Additional
Protocols (MAP) Nos. 1 to 4 of 1975, the Guadalajara Convention 1961 and the Montreal
Convention 1999.

The Montreal Convention 1999 has force of law in the UK in respect of the liability of
a ‘Community air carrier’ 20 concerning passengers and their baggage by reason of Regulation
(EC) No. 2027/97 (as amended), 21 and in respect of any other carriage to which it applies by
reason of Section 1 of the Carriage by Air Act 1961 as amended (1961 Act) and as Schedule
1B to that Act. 22 The revised liability limits of the Montreal Convention set by ICAO, with
effect from 30 December 2009, have been implemented in the UK. 23

Subject to specified defences, it is a criminal offence for a Community air carrier
to fail to comply with the tariff requirement contained in Article 3a of Regulation (EC)
No. 2027/97 or the notification provisions contained in its Article 6. 24

17 Article 6 of Chicago Convention maintains such a requirement for schedule services (in respect of
contracting states), c.f. the general waiver for non-scheduled services in its Article 5.
18 As to which, see the Civil Aviation (Allocation of Scarce Capacity) Regulations 2007. As from the UK's
EU exit, these will apply as amended by the Operation of Air Services (Amendments etc.) (EU Exit)
Regulations 2018.
19 As from the UK's EU exit, these will apply as amended by the Air Services (Competition) (Amendment)
(EU Exit) Regulations 2019 and the Airport Slots Allocation (Amendment) (EU Exit) Regulations 2019
respectively.
20 Namely, a carrier within the meaning of that phrase in Regulation (EC) No. 2027/97: 1961 Act, Section
14. Its Article 2 defines this as a carrier with a valid operating licence granted by a Member State in
accordance with Regulation (EEC) No. 2407/92. That regulation has since been repealed and replaced by
Regulation (EC) No. 1008/2008, as to which, see Section III.i, below.
22 By reason of amendment made by the Air Passenger Rights and Air Travel Organisers’ Licensing
(Amendment) (EU Exit) Regulations 2019, upon the UK's EU exit the former route will only apply in
relation to UK air carriers.
23 By the Carriage by Air (Revision of Limits of Liability under the Montreal Convention) Order 2009.
24 Air Carrier Liability Regulations 2004 (as amended). By reason of amendment made by the Air Passenger
Rights and Air Travel Organisers’ Licensing (Amendment) (EU Exit) Regulations 2019, upon the UK's EU
exit this will only apply in relation to UK air carriers.
It is a general rule of UK law that authorities on the Warsaw Convention 1929 are equally referable to the Montreal Convention 1999. Further, it is established that where either convention applies, it provides the exclusive causes of action and remedy.

The Warsaw Convention 1929 as amended at The Hague 1955 (Warsaw-Hague) has force of law in the UK as set out in Schedule 1 to the 1961 Act, while the Warsaw-Hague Convention as further amended by MAP No. 4 has force of law as set out in Schedule 1A to the same Act. The Guadalajara Convention also continues to have force of law in relation to carriage governed by the latter two conventions.

The 1961 Act provides that if more than one of the aforesaid conventions applies to a carriage by air then the most recent one has force of law.

In relation to international carriage to which none of the aforesaid conventions apply, the Warsaw Convention 1929 as amended by MAP No. 1 and the Guadalajara Convention 1961 continue to have force of law as set out in Schedule 3 to the Carriage by Air (Applications of Provisions) Order 2004 (2004 Order), while the Warsaw and Guadalajara Conventions continue to have force of law as set out in Schedule 2 to that Order in relation to carriage, to which Schedule 3 does not apply.

The UK is not a party to the Rome Conventions of 1933 or 1952 on surface damage, nor to the Montreal Protocol of 1978 on that topic. Further, it has yet to even sign the Unlawful Interference Compensation Convention 2009 or the General Risk Convention 2009.

Liability for surface damage is, however, provided for in relation to all carriage (irrespective of whether it is international) by Section 76(2) of the CA Act 1982. It permits damages to be recovered on a strict liability basis for material loss or damage caused to any person or property on land or water by, or by a person in, or an article, animal or person falling from, an aircraft while in flight, take-off or landing (unless the loss or damage was caused, or was contributed to, by the negligence of the person by whom it was suffered); with that liability being upon the owner of an aircraft unless it has been bona fide demised, let or hired out for any period exceeding 14 days to any other person by its owner, and no pilot, commander, navigator or operative member of its crew is in the employment of the owner, in which event the liability is upon the person to whom the aircraft has been so demised, let or hired out.

ii Internal and other non-convention carriage

By reason of Regulation (EC) No. 2027/97, the liability of a Community air carrier in respect of all passengers and their baggage is governed by the Montreal Convention 1999 for the purposes of English law, regardless of whether the carriage is international or domestic (see Section II.i).

25 See, for example, 
27 As set out in the Carriage by Air (Supplementary Provisions) Act 1962.
28 Section 1(4).
29 By reason of amendment made by the Air Passenger Rights and Air Travel Organisers’ Licensing (Amendment)(EU Exit) Regulations 2019, upon the UK’s EU exit this will only apply in relation to UK air carriers.
Any other UK domestic carriage of persons, baggage or cargo performed by an aircraft for reward, or gratuitously by an air transport undertaking, is governed by Schedule 1 to the 2004 Order. This applies a slightly modified version of the Montreal Convention to such carriage. It has been held in relation to its predecessor (which made the same provision in relation to the Warsaw-Hague-MAP No. 4 Convention)\(^\text{30}\) that it applies when the place of departure, place of destination or an agreed stopping place is within the UK or other British territory.\(^\text{31}\)

Where carriage by air falls outside the above provisions (such as gratuitous carriage by a private person) any liability of the carrier in respect of passengers, baggage or cargo will fall to be determined according to the common law – predominantly via the tort of negligence, or an express or implied contractual duty of reasonable skill and care. With regard to tortious liability there is persuasive authority that the maxim *res ipsa loquitur* applies in respect of an air crash against the owner or operator of the aircraft concerned, so as to impose a rebuttable presumption of liability in negligence.\(^\text{32}\)

As to surface damage, see Section II.i.

### iii General aviation regulation

The convention-based schemes (outlined in subsections i and ii) of liability in relation to ‘aircraft’ have been held to apply to helicopters\(^\text{33}\) and hot-air balloons,\(^\text{34}\) but not to a tandem heavier than air non-powered paraglider.\(^\text{35}\) Liability in respect of any means of carriage not by an ‘aircraft’ will fall to be determined according to the common law (i.e., the law of contract and/or tort, in particular, negligence).

As to surface damage, see Section II.i.

### iv Passenger rights

Regulation (EC) No. 261/2004 (on denied boarding, cancellation or long delay) currently has direct effect in the UK (see the European Union chapter of this publication).\(^\text{36}\) Non-compliance with certain provisions of this regulation is a criminal offence.\(^\text{37}\) However, to date, no successful prosecutions have been recorded, although the CAA, which is the UK’s national enforcement body for this regulation, has undertaken numerous compliance investigations and initiated enforcement proceedings against several air carriers at various times.

Regulation (EC) No. 1107/2006 (on rights of disabled persons and persons with reduced mobility when travelling by air) also currently has direct effect in the UK and is

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\(^{32}\) *George v. Eagle Air Services Ltd* [2009] 1 WLR 2133 at [12]-[13].

\(^{33}\) See, for example, *Fellows (or Herd) v. Clyde Helicopters Ltd* [1997] AC 534.


\(^{35}\) *Disley v. Levine* [2002] 1 WLR 785.

\(^{36}\) Upon the UK’s EU exit, it will continue to apply as amended by the Air Passenger Rights and Air Travel Organisers’ Licensing (Amendment) (EU Exit) Regulations 2019.

\(^{37}\) The Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005. Upon EU exit, this will apply as amended by the Air Passenger Rights and Air Travel Organisers’ Licensing (Amendment) (EU Exit) Regulations 2019.
addressed in the ‘European Union’ chapter of this publication. Contravention of various articles of this regulation is a criminal offence. Although a claim by a qualifying person may be made for any infringement of this EU Regulation, including for compensation for injury to feelings, no such damages are recoverable where the complaint falls within the scope of the Montreal Convention.

Directive (EU) 2015/2302 has been given effect in the UK in the form of the Package Travel and Linked Travel Arrangements Regulations 2018. These give various rights to consumers in respect of any contract for carriage by air sold or offered for sale with other travel services so as to form a ‘package’ or ‘linked travel arrangement’. They include information requirements, transferability of bookings, protection against price revision, alterations to essential terms and improper performance, rights of termination and to refund, and protection against insolvency. See further Section V.

The UK does not have any other domestic provisions dealing specifically with the rights of air passengers. The general UK statutory consumer protection law is, however, applicable, except where its application to contracts of carriage by air is expressly excluded.

v Other legislation

No person may make available in the UK accommodation for the carriage of persons on flights in any part of the world unless they are the operator of the relevant aircraft, the holder of an Air Travel Organiser’s licence (ATOL) granted by the CAA, or are exempt or exempted from the need to hold an ATOL. Non-compliance with these restrictions is a criminal offence.

The general provisions of UK law may also give rise to liability. However, no action lies in respect of trespass or nuisance by reason only of the flight of an aircraft over any property at a height above the ground, which, having regard to wind, weather and all the circumstances of the case, is reasonable, or the ordinary incidents of such flight, so long as the provisions of any Air Navigation Order and any orders under Section 62 of the CA Act 1982 have been duly complied with. For these purposes, ‘flight’ is not restricted to lateral travel from one fixed point to another, but rather embraces all movement that takes place between the take-off and landing of an aircraft.

38 Upon the UK’s EU exit, it will continue to apply as amended by the Air Passenger Rights and Air Travel Organisers’ Licensing (Amendment)(EU Exit) Regulations 2019.
39 The Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2014.
42 Upon the UK’s EU exit, these regulations will continue to apply as amended by the Package Travel and Linked Travel Arrangements (Amendment)(EU Exit) Regulations 2018.
43 For the meaning of these terms see Regulation 2(5) and 2(3) of the Package Travel and Linked Travel Arrangements Regulations 2018.
44 Civil Aviation (Air Travel Organisers’ Licensing) Regulations 2012 as amended (2012 Regulations), Regulation 9. Upon the UK’s EU exit, these will continue to apply as amended by the Air Passenger Rights and Air Travel Organisers’ Licensing (Amendment)(EU Exit) Regulations 2019.
45 2012 Regulations, Regulation 69.
46 CA Act 1982, Section 76(1).

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It is to be noted that the UK has stringent anti-bribery rules, as contained in the Bribery Act 2010. As to competition law, see Section VI. As to product liability law, see Section VIII.iii.

III LICENSING OF OPERATIONS

i Licensed activities

A person must not operate an aeroplane registered in the UK on a commercial air transport operation other than under and in accordance with the terms of an EU air operator certificate (AOC)\(^{48}\) granted to that person by the CAA.\(^{49}\)

In order to be able to carry passengers, mail or cargo for remuneration or hire, that person will also need a valid operating licence granted by the CAA pursuant to Chapter II of Regulation (EC) No. 1008/2008.\(^{50}\) This requires, among other things, that its principal place of business is located in the UK (see further Section III.ii). It is dealt with substantively in the ‘European Union’ chapter of this publication.\(^{51}\)

Although such a (UK) Community air carrier\(^{52}\) is entitled to operate intra-Community air services as of right as part of the single EU aviation market,\(^{53}\) it can only operate services to or from elsewhere if it holds a route licence granted by the CAA that authorises it to operate those flights\(^{54}\) (and subject to the availability of traffic rights under any relevant air services

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\(^{48}\) Namely, whichever of an EU-OPS AOC or a Part-CAT AOC is applicable to the operation in question. An EU-OPS AOC is one granted pursuant to Annex III of Regulation (EEC) No. 3922/91 as amended: Air Navigation Order 2016 (ANO), Article 2 and Schedule 1. It is required for A to A commercial transport aeroplane operation, i.e., an operation performed by an aeroplane powered by a propeller engine with a maximum operational passenger seating configuration of nine or fewer seats and a maximum take-off mass of 5,750 kg or less; for the purpose of transporting passengers, cargo or mail for remuneration or other valuable consideration; starting and ending at the same place: see ANO, Articles 102 and 2, and Schedule 1. A Part-CAT AOC is one granted under Annex II to Regulation (EU) No. 965/2012 (EASA Air Operations Regulation) authorising the holder to operate commercial transport operations: ANO, Article 2 and Schedule 1. It is required for the purposes of transporting passengers, cargo or mail for remuneration or other valuable consideration that is carried out in accordance with Annex III and IV of the EASA Air Operations Regulation, but that is not an A to A commercial operation: see ANO, Articles 103 and 2, and Schedule 1.

\(^{49}\) ANO, Articles 102 and 103. Upon the UK’s EU exit, this will be subject to amendment by the Aviation Safety (Amendment etc.)(EU Exit) Regulations 2019, so as to omit Article 102 (requirement for an EU OPS air operator certificate).

\(^{50}\) Certain related provisions are contained in the Operation of Air Services in the Community Regulations 2009.

\(^{51}\) Upon the UK’s EU exit, the same provisions of Regulation (EC) No.1008/2008 and the Operations of Air Services in the Community Regulations 2009 will apply to UK air carriers as modified by the Operation of Air Services (Amendment etc.)(EU Exit) Regulations 2018.

\(^{52}\) That is, an air carrier with a valid operating licence granted by a competent licensing authority in accordance with Chapter II of Regulation (EC) No. 1008/2008, in this instance by the CAA.

\(^{53}\) See Regulation (EC) No. 1008/2008, Chapter III.

\(^{54}\) As to which, see CA Act 1982, Section 69A, and Civil Aviation Regulations 1991, Part III. Upon the UK’s EU exit and subject to any agreement with the EU, including in relation to transitional arrangements (as to which see Sections XI and XII, below), UK air carriers will lose their right to operate intra-Community services as of right. From that time the route licensing requirement of Section 69A of the CA Act 1982 will apply generally, as amended by the Operation of Air Services (Amendment etc.)(EU Exit) Regulations 2018. Significantly, it is a condition of a route licence that the applicant (carrier) is a UK national or a body
agreement with the destination state (see Section I). In practice, such a licence will allow any operations within the area permitted by the holder’s AOC, although it may be subject to restrictions in specific circumstances.

A person without an applicable EU AOC must not operate a UK-registered aircraft for the purposes of any public transport flight other than under and in accordance with a national AOC granted to that person by the CAA. Further, any such other carriage for reward of passengers or cargo can only be performed if the operator holds and complies with the terms of an air transport licence granted by the CAA.

ii Ownership rules

It is a requirement of an EU operating licence (see Section III.i) that Member States or nationals of Member States own more than 50 per cent of the undertaking to which it is granted and effectively control it, whether directly or indirectly through one or more intermediate undertakings (except as provided for in an agreement with a third country to which the EU is a party). This and other requirements of Regulation (EC) No. 1008/2008 for the licence holder are dealt with in the ‘European Union’ chapter.

As mentioned in Section III.i, it is also a requirement of an EU operating licence that the applicant’s principal place of business is in the issuing Member State (i.e., in the current context, the UK).

A UK national AOC is not subject to any express statutory ownership rules. However, unless the SST otherwise consents, an air transport licence can only be granted to a UK national or a body that is incorporated under the law of a part of the UK or a relevant overseas territory, and is controlled by UK nationals.

which is incorporated under the law of any part of the UK and is controlled by UK nationals, unless the SST otherwise consents to the grant of the licence. The 1991 Regulations will then apply as amended by the Aviation Safety (Amendment etc.)(EU Exit) Regulations 2019.

The meaning of ‘public transport’ for these purposes is rather convoluted and is qualified by various special rules and exceptions, as to which, see ANO, Articles 6 to 16. However, at its core, it embraces any flight that is not for the purposes of commercial air transport but for which valuable consideration is given or promised for the carriage of passengers or cargo.

The CAA must grant such a certificate if it is satisfied that the applicant is competent to secure the safe operation of aircraft of the type specified in the certificate on flights of the description and for the purpose specified, having regard in particular to the applicant’s previous conduct and experience, equipment, organisation, staffing, maintenance and other arrangements: Article 101(2).

Upon the UK’s EU exit, a UK air carrier that has a valid operating licence granted by the CAA pursuant to Regulation (EC) No. 1008/2008 as amended by the Operation of Air Services (Amendment etc.)(EU Exit) Regulations 2018 will continue to not need an air transport licence as a result of the exception to that requirement contained in Section 64(2)(d) of the CA Act 1982. For the position in relation to the 1991 Regulations see footnote 54.

CA Act 1982, Section 65. As to the grant of such a licence see Section 65 and the Civil Aviation Regulations 1991, Part III. Upon the UK’s EU exit, a UK air carrier that has a valid operating licence granted by the CAA pursuant to Regulation (EC) No. 1008/2008 as amended by the Operation of Air Services (Amendment etc.)(EU Exit) Regulations 2018 will continue to not need an air transport licence as a result of the exception to that requirement contained in Section 64(2)(d) of the CA Act 1982. For the position in relation to the 1991 Regulations see footnote 54.


Upon the UK’s EU exit, the operating licence holder requirements contained in EU Regulation (EC) No. 1008/2008 will apply to UK air carriers as amended by the Operation of Air Services (Amendment etc.)(EU Exit) Regulations 2018. Significantly, the amendments exclude the ownership and control requirements per Article 4(f), and also provide a new, narrower, definition of ‘principal place of business’.

For the position after EU exit see the preceding footnote.

CA Act 1982, Section 65(3).
iii Foreign carriers

An aircraft registered elsewhere than in the UK must not take on board or discharge any passengers or cargo in the UK where valuable consideration is given or promised for their carriage, unless the operator or charterer of the aircraft, or the government of the country in which the aircraft is registered, has been granted permission to take on board or discharge any passengers or cargo for such purpose by the SST or the CAA, and any conditions to which such permission may be subject are satisfied; or the aircraft is flying pursuant to traffic rights conferred upon a Community air carrier as part of the single EU aviation market; or an AOC has been issued to the operator of the aircraft pursuant to the Air Navigation (Overseas Territories) Order 2013.62

The decision to grant such permission is normally made by the CAA, but it must take into account any advice given to it by the SST (including as to circumstances in which the SST expects to determine an application for permission).63,64

IV SAFETY

Regulation (EU) No. 2018/1139 on common rules in the field of civil aviation (the Basic EASA Regulation) and its implementing regulations currently have direct effect in the UK, with their application being acknowledged and enforced by the ANO. Together these regulate safety in relation to, among other things, airworthiness, flight crew licensing and training, and aircraft operation with regard to EASA aircraft.65 They are dealt with in the ‘European Union’ chapter of this publication.66 The corresponding national regulation in relation to non-EASA aircraft is provided for separately in the ANO. The CAA is the relevant UK regulator in both instances.

The ICAO Annex 13 civil aviation safety investigation authority for the UK is the Air Accidents Investigation Branch of the DfT (AAIB).68 Its functions, duties and powers are set by a combination of the Civil Aviation (Investigation of Air Accidents and Incidents)
Regulations 2018 and Regulation (EU) No. 996/2010 (EU Regulation 996). All air accidents and serious incidents occurring in or over the UK must be reported to it pursuant to these regulations. A report of the AAIB is admissible in civil proceedings in England and Wales as evidence of the facts that it states and as expert evidence in relation to the opinion it gives where that is the product of a special expertise that its authors can be taken to or do have, but is not admissible for the opinion it expresses on facts that require no such expertise to evaluate. In contrast, information and evidence obtained or created in the course of its investigations cannot be disclosed by the AAIB to any other person for purposes other than safety investigation, unless the court orders it to do so upon satisfaction that the benefits of the disclosure for any other purpose permitted by law outweigh the adverse domestic and international impact that such action may have on that or any future safety investigation. Although a voice or flight data recorder may be ordered to be disclosed on this basis, it is almost inconceivable that an order would be made for the disclosure of a statement made to the AAIB in the course of its investigations.

Regulation (EU) No. 376/2014 on the reporting, analysis and follow-up of occurrences in civil aviation has direct effect in the UK. The CAA is the competent UK authority for such mandatory occurrence reporting.

V INSURANCE

Regulation (EC) No. 785/2004 (as amended) has direct effect in the UK. It specifies minimum insurance requirements for all aircraft operators and air carriers flying within, into, out of or over the territory of an EU Member State in respect of liability for passengers, baggage and cargo, and third parties. The CAA is the designated UK authority for monitoring compliance with this regulation.

The Civil Aviation (Insurance) Regulations 2005 create sanctions for non-compliance with various provisions of Regulation (EC) No. 785/2004, including a number of criminal offences. They also specify the minimum level of passenger insurance for non-commercial operations by light aircraft.

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69 Upon the UK’s EU exit, the latter will continue to apply with the modifications made by the Aviation Safety (Amendment etc.)(EU Exit) Regulations 2019.
71 EU Regulation 996, Article 14. A Coroner has no power to order such disclosure: R (on the application of the Secretary of State) v. Her Majesty’s Senior Coroner for Norfolk [2016] EWHC 2279 (Admin).
72 See, for example, Lord Advocate, Petitioner [2015] SLT 450.
73 Chief Constable of Sussex Police v. Secretary of State for Transport [2016] EWHC 2280 (QB). In BBC v. Secretary of State for Transport [2019] 4 WLR 23, the court refused an application made by media organisations for disclosure of film footage taken by a pilot from the cockpit of an aircraft involved in a fatal accident even though it had been played to the jury in open court during a criminal trial of that pilot.
74 Upon the UK’s EU exit, it will continue to apply with the modifications made by the Aviation Safety (Amendment etc.)(EU Exit) Regulations 2019.
75 Upon the UK’s EU exit, it will continue to apply with the modifications made by the Civil Aviation (Insurance)(Amendment)(EU Exit) Regulations 2018.
76 Upon the UK’s EU exit, they too will continue to apply in the UK with the modifications made by the Civil Aviation (Insurance)(Amendment)(EU Exit) Regulations 2018.
VI  COMPETITION

The aviation sector is subject to the general provisions of UK competition law, the principal components of which are: in relation to anticompetitive behaviour and abuse of dominant position, Chapters I and II of the Competition Act 1998 (as amended) respectively, which reproduce Articles 101 and 102 of the Treaty on the Functioning of the European Union; and in relation to merger control, Part 3 of the Enterprise Act 2002 (as amended) and the EU Merger Regulation No. 139/2004.77 The UK’s national competition authority for these purposes is the Competition and Markets Authority (CMA).78 Its powers and duties are set out in the aforementioned Acts as amended. Part 6 of the Enterprise Act 2002 imposes criminal liability upon individuals in relation to the making and implementation of cartel arrangements. As to state aid see Section I.

The CA Act 2012 makes specific provision for the regulation of the operators of ‘dominant airports’ and gives the CAA related duties and powers. These are concurrent with the CMA’s duties and powers.79 The CAA also has competition powers in respect of air traffic services. The CAA has set out how it will apply its powers and duties in its Guidance on the Application of the CAA’s Competition Powers.80

VII  WRONGFUL DEATH

In England and Wales,81 if death is caused by any wrongful act, neglect or default, then any action for damages against another person that the deceased could have brought (had his or her death not ensued) can be brought for the benefit of his or her dependants.82 The recoverable damages are for their loss of dependency on the deceased (calculated on a multiplicand/multiplier basis), for loss of the pecuniary value (including gratuitous services) that was or would have been provided by the deceased, as well as for funeral expenses.83 Any benefits that have accrued or will or may accrue to any person from the deceased’s estate or

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77 For the position upon the UK’s EU exit, see the Competition (Amendment etc.)(EU Exit) Regulations 2019.
78 In relation to the CMA generally see www.gov.uk/government/organisations/competition-and-markets-authority.
79 As to this concurrent relationship, see: the Competition Act 1998 (Concurrency) Regulations 2014; and the Memorandum of Understanding between the Competition and Markets Authority and Civil Aviation Authority – concurrent powers (9 February 2016).
81 As to Scotland and Northern Ireland see Section VIII.i, below. There are broadly similar, but in some respect distinct, rules as to damages in these two jurisdictions. However, a review of the differences is beyond the scope of this chapter.
82 Fatal Accidents Act 1976 (as amended) (FAA 1976), Section 1. Section 1(3) gives a list of who may qualify as a ‘dependant’ for these purposes. Section 2 sets a general rule that the action must be brought in the name of the executor or administrator of the deceased. It also provides that only one action may be brought in respect of the death.
83 Where the death is not instantaneous, the deceased’s pre-death losses are recoverable by his or her estate pursuant to the Law Reform (Miscellaneous Provisions) Act 1934. This could include any pre-death pain and suffering.
otherwise as a result of his or her death are to be disregarded.\textsuperscript{84} Damages for bereavement are also recoverable, but only for the benefit of a limited class of persons\textsuperscript{85} and in a prescribed amount – currently £12,980.\textsuperscript{86} See Section VIII.i.

\textbf{VIII \hspace{1em} ESTABLISHING LIABILITY AND SETTLEMENT}

\textit{i \hspace{1em} Procedure}

Each of the UK’s three legal jurisdictions has a separate court system, each with their own rules of procedure but subject to a common apex in the UK Supreme Court. There is also some variation between the substantive law in each jurisdiction, in terms of both applicable domestic statute and common law.

In each jurisdiction, civil proceedings may be commenced in one of two levels of court depending on the value and complexity of the claim: in England, in the High Court of Justice or county court; in Scotland, in the Outer House of the Court of Session or sheriff court; and in Northern Ireland, the High Court of Justice or county court. In all of these courts the determination is, in general, by judge alone.

There is currently no compulsory alternative dispute resolution scheme in force in the UK with regards to any class of aviation dispute, including in respect of claims against carriers by consumers.

The time limit for bringing a claim in the UK depends on the nature of the cause of action relied upon. In relation to convention-based liability an action must be brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.\textsuperscript{87} In England and Wales, the general law as to time is set out in the Limitation Act 1980 (as amended). It sets primary (but in certain circumstances displaceable) requirements that an action founded on tort, contract or to obtain any sum recoverable by virtue of any enactment, shall not be brought after the expiration of six years from the date on which the cause of action accrued,\textsuperscript{88} and that an action for personal injury or death shall not be brought after three years from the later of the date of accrual of the cause of action or of knowledge.\textsuperscript{89} A claim for fixed compensation under Regulation (EC) No. 261/2004 is subject to a six-year limitation period.\textsuperscript{90}

Subject to the court having jurisdiction to entertain an action made against the defendant concerned,\textsuperscript{91} there is no artificial restriction upon who may be added as a defendant to any action (whether carrier, owner, pilot, manufacturer or otherwise).

\begin{itemize}
\item \textsuperscript{84} FAA 1976, Section 4.
\item \textsuperscript{85} i.e., the wife or husband or civil partner of the deceased; or where the deceased was a minor who was never married or had a civil partner, his or her parents if he or she was legitimate and his or her mother if he or she was illegitimate.
\item \textsuperscript{86} FAA 1976, Section 1A.
\item \textsuperscript{87} i.e., per Article 29 of the Warsaw Convention and Article 35 of the Montreal Convention.
\item \textsuperscript{88} See its Sections 2, 5 and 9 respectively.
\item \textsuperscript{89} See its Sections 11 and 12 respectively.
\item \textsuperscript{90} Dawson v. Thomson Airways Ltd [2015] 1 WLR 883.
\item \textsuperscript{91} Including as provided for by any exclusive jurisdictional code, such as that in respect of a claim against a carrier as contained in the Warsaw and Montreal Conventions, at Articles 28 and 33 respectively; see Deaville v. Aeroflot Russian International Airlines [1997] 2 Lloyd's Rep 67.
\end{itemize}
In England and Wales, where the same damage is caused to a claimant by the default of two or more persons then each wrongdoer is liable for the whole damage, regardless of whether any other person is also held liable. The allocation of liability between wrongdoers may be the subject of contractual agreement (e.g., providing for guarantee or indemnity). Any person liable in respect of any damage suffered by another may also be entitled to recover a contribution from any other person liable in respect of the same damage via the Civil Liability (Contribution) Act 1978, in such amount ‘as may be found by the court to be just and equitable having regard to the extent of that person’s responsibility for the damage in question’.

ii Carriers’ liability towards passengers and third parties
The nature of a carrier’s liability will depend upon the cause of action concerned. It is strict in respect of convention liability, where the relevant conditions of liability contained in the convention are met, and for surface damage. Otherwise, liability will generally be fault-based. The person making a claim bears the burden of proof. The requisite standard of proof is the balance of probabilities.

Any convention liability will be subject to any applicable limit of liability contained therein. There is no artificial financial limit in respect of surface damage or for fault-based liability at common law.

iii Product liability
Directive 85/374/EEC (on liability for defective products) has been implemented into UK law by the Consumer Protection Act 1987 (CPA) as amended. It provides that (subject to the provisions of its Part I) the producer, any person who holds himself or herself as the producer, the importer and, if the supplier fails to state whom he or she bought the product from, the supplier, of a product is liable where any damage ‘is caused wholly or partly by a defect in [the product concerned]’. For these purposes, a ‘product’ means ‘any goods’, including aircraft, and a product that is comprised in another product; there is a ‘defect’ if ‘the safety of the product is not such as persons generally are entitled to expect’; and ‘damage’ means ‘death or personal injury or any loss of or damage to any property (including land)’.

a property that, at the time it is lost or damaged, is not ‘of a description of property ordinarily intended for private use, occupation or consumption’ and not ‘intended by the person suffering the loss or damage mainly for his own private use, occupation or consumption’;
b  loss of or any damage to the product itself; or

c  loss of or any damage to the whole or any part of any product that has been supplied
with the product in question comprised in it.\(^{100}\)

It therefore does not provide for liability in respect of damage to business property or pure
economic loss, and does not require proof of fault. It is subject to specified defences, including
state of the art.\(^{101}\)

Liability under the CPA is joint and several, and without prejudice to liability on
any other basis.\(^{102}\) It cannot be limited or excluded by any contract term, notice or other
provision.\(^{103}\)

Aside from the CPA, there is no specific statutory scheme for product liability of
relevance to the aviation sector.\(^{104}\) Outside the CPA’s scope, product liability therefore falls
to be determined according to the general common law of contract or tort (in particular,
negligence).

iv  Compensation

An award of damages by UK courts is determined by a judge, rather than a jury. As a general
rule, an award is limited to an amount equalling the loss actually suffered, and exemplary or
punitive damages are not recoverable (and in the case of Montreal Convention-based liability
they are expressly prohibited).\(^{105}\)

In the case of personal injury, in England and Wales, general damages are recoverable
for pain, suffering and loss of amenity. The amount awarded is usually set by reference to
the Judicial College Guidelines and past case law. General damages may also be awarded
for such things as handicap on the labour market and loss of congenial employment. In
addition, special damages may be awarded for the pecuniary loss suffered for such things as
loss of earnings and pension, medical or other expenses, cost of care and the cost of adaptive
equipment. Future loss is calculated on a multiplicand/multiplier basis, with the multiplier
set by reference to actuarial tables. As to compensation in cases of wrongful death, see Section
VII.

The UK government provides a comprehensive system of social security benefits and a
National Health Service (NHS), which is essentially free to users. There is statutory provision
for the recovery from a tortfeasor of certain benefits and NHS charges by the Compensation
Recovery Unit of the Department for Work and Pensions.\(^{106}\) Benefits paid by an agency of
another EU Member State may also be recoverable.\(^{107}\)

\(^{100}\) CPA, Section 5.
\(^{101}\) CPA, Section 4.
\(^{102}\) CPA, Section 2(5) and (6).
\(^{103}\) CPA, Section 7.
\(^{104}\) Save with reference to employees, as to which see the Employer’s Liability (Defective Equipment) Act
1969.
\(^{105}\) See its Article 29.
\(^{106}\) In respect of England and Wales, see the Social Security (Recovery of Benefits) Act 1997 and Part 3 of the
Health and Social Care (Community Health and Standards) Act 2003 (as amended) respectively.
\(^{107}\) See Donkers v. Storm Aviation Ltd [2015] 1 All ER (Comm) 282.
IX DRONES

The CAA has regulatory responsibility for drones (referred to as ‘unmanned aircraft’ in the UK regulations) weighing less than 150kg in the UK. 108 The safety regulations for unmanned aircraft are set out within the Air Navigation Order.

Drone operations in the UK must be approved by way of a special permission from the CAA, except where a ‘small unmanned aircraft’ 109 is operated for recreational purposes and in accordance with particular operating conditions. 110 Those operating conditions include: (1) that a person does not cause any article or animal to be dropped from the drone so as to endanger person or property; (2) that the remote pilot is reasonably satisfied that the flight can be safely made; (3) that the remote pilot maintains direct, unaided visual contact with the drone sufficient to monitor its flight path in relation to other objects, property or persons; (4) that the operations will be conducted at a height of no more than 400 feet above the surface; and (5) that the flight does not enter a flight restriction zone of a protected aerodrome. 111 Additional operating requirements apply to drones fitted with surveillance equipment. 112

The CAA has recently extended the flight restriction zone at and around protected aerodromes, within which flights by small unmanned aircraft must not take place without permission from the relevant air traffic control unit, flight information service unit or airport operator. 113 The regulations place responsibility on both the drone operator and the remote pilot to ensure that a drone is not operated with a flight restriction zone. 114

Further regulations will come into force on 30 November 2019 requiring all operators of drones weighing more than 250 grams to register with the CAA and for all remote pilots of a drone to pass an online test prior to commencing operations. 115 The new registration system is being developed to align with the requirements set out by EASA for the proposed future EU drone registration system. Although the UK government has not yet committed to whether or not it will adopt EASA’s future Europe-wide drones regulations, the CAA has stated that its recent work to develop drone regulations aligns with future EASA plans. 116

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108 Pursuant to Regulation (EC) No. 216/2008, unmanned aircraft weighing 150 kilograms or more are regulated by EASA and are subject to the same regulatory requirements as manned aircraft.
109 A ‘small unmanned aircraft’ is defined in the ANO, Schedule 1, as any unmanned aircraft, other than a balloon or a kite, having a mass of not more than 20kg without its fuel but including any articles or equipment installed in or attached to the aircraft at the commencement of its flight.
110 ANO, Articles 23 and 94. The CAA has also published a simple summary of these rules in its ‘UK Dronecode’ to improve safety. See https://dronesafe.uk/.
111 ANO, Articles 94 and 94A as amended by Air Navigation (Amendment) Order 2019.
112 See ANO, Article 95.
113 ANO, Article 94A. These rules came into force under the Air Navigation (Amendment) Order 2019 on 13 March 2019.
114 See ANO, Article 94A.
115 ANO, Articles 94C–94E. Of these, Articles 94D and 94F do not come into force until 30 November 2019.
116 See https://info.caa.co.uk/eu-exit/drones/. Also, to see the progress of the EASA’s common rules for operating drones in Europe, see https://www.easa.europa.eu/easa-and-you/civil-drones-rpas.
X VOLUNTARY REPORTING

The UK has a Confidential Human Factors Incident Reporting Programme (CHIRP), which is run by a charitable trust.\textsuperscript{117} It provides a totally independent, confidential (but not anonymous) reporting system for all individuals employed in or associated with the aviation industry, making available a means by which they are able to raise safety-related issues of concern without being identified to their peer group, management or regulatory authorities. This allows for the collection of confidential safety data. When appropriate, CHIRP acts or advises on information gained through the confidential reports it has received.

There is also an independent UK Airprox Board (UKAB),\textsuperscript{118} to which a report can be made of a situation in which, in the opinion of a pilot or air traffic services personnel, the distance between aircraft, as well as their relative positions and speed, have been such that the safety of the aircraft involved may have been compromised (an ‘Airprox’). The UKAB provides impartial assessments on cause and risk for all Airprox reported in UK airspace. When appropriate, it makes safety recommendations aimed at reducing the likelihood of a recurrence of any given Airprox event. No names are published in UKAB’s reports, in order to encourage an open and honest reporting environment.

Protection is afforded to whistle-blowers within the civil aviation industry pursuant to the general provisions of the Public Interest Disclosure Act 1998, which protects them from detrimental treatment from their employer where they make a protected disclosure.\textsuperscript{119}

As to mandatory reporting, see Section IV.

XI THE YEAR IN REVIEW

Over the past year, aviation in the UK has been affected, and distracted, by the uncertainty caused by the unfolding saga of Brexit. On 23 June 2016, the UK government held a referendum asking whether the UK should leave the EU. It resulted in a majority voting in favour of Brexit (51.9 per cent to 48.1 per cent). On 29 March 2017, the UK government acted upon this result by giving notice to the European Council that the UK is to leave the EU. Pursuant to the terms of Article 50 of the Treaty of Lisbon, this meant that the UK would cease to be an EU Member State on 29 March 2019 unless the European Council, in agreement with the UK, unanimously decided to extend the UK’s membership beyond that date. Formal negotiations between the UK government and the EU on the terms of Brexit and the UK’s future relationship with the EU, including with regard to the application of EU law in and by the UK, commenced in June 2017 and remain ongoing. In 2018 an agreement was reached between the negotiators that there would be a transition period from 30 March 2019 until 31 December 2020 during which the UK would retain all of the advantages and benefits of EU membership,\textsuperscript{120} but not on what the position would be thereafter. In the event, the UK government failed get approval from the UK Parliament before the expiry of the 29 March 2019 exit deadline for the draft withdrawal agreement that it had negotiated with the EU, and the UK’s exit date has now been extended until no later

\textsuperscript{117} See www.chirp.co.uk.
\textsuperscript{118} See www.airproxboard.org.uk/home. The UKAB is sponsored and funded by the CAA and its military equivalent, the Military Aviation Authority.
\textsuperscript{119} This includes a disclosure that a criminal offence, failure to comply with a legal obligation, or the endangerment of the health and safety of any individual, has occurred, is being or is likely to occur.
than 31 October 2019. It remains unclear whether the UK will in fact exit on that date or if so what its relationship with the EU will be thereafter. As to the consequences of Brexit, see Section XII.

As might have been anticipated, the UK government has faced a series of applications for judicial review relating to the publication of its ‘Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of England’ in June 2018, which concluded that the need for additional airport capacity in the south-east of England is best met by a third, north-west runway at Heathrow Airport. To date they have been dismissed by the courts.121

In December 2018, the UK government launched a consultation on the future of UK aviation to 2050. The consultation period ended on 20 June 2019.

The final report of the Airline Solvency Review was published in May 2019.122 It proposes, among other things, a new Flight Protection Scheme, which would protect passengers if an airline became insolvent while they are abroad and reforms to the UK’s airline insolvency regimes so an airline’s own aircraft can be used to repatriate its passengers should it fail.

XII OUTLOOK

As can be seen in this chapter, EU law currently plays a very significant role in the law applicable to aviation in the UK. It also provides the basis upon which UK air carriers have access to the single EU aviation market and, similarly, the air carriers from other EU Member States have access to the UK. As matters stand at present, it is far from clear whether, and on what terms, this will continue to be the case upon the effective date of Brexit, or what the wider economic implications of Brexit will be. The UK aviation market and aviation law are therefore likely to endure a considerable period of uncertainty over the next few years: undoubtedly, these will prove to be at least evolutionary times.

I INTRODUCTION

Civil aviation in the United States is regulated almost entirely by the federal (national) government – as opposed to the separate governments of the 50 states. The federal government agencies that primarily regulate aviation are the Federal Aviation Administration (FAA) and the Department of Transportation (DOT).

The FAA regulates US air commerce with the interest of promoting safety and efficiency. FAA rules are published annually in the Code of Federal Regulations and address virtually all aspects of both commercial and general aviation, including aircraft design and certification, design of airspace, air traffic control procedures, operating rules for carriers, certification of pilots, mechanics and carriers, and enforcement of rules in administrative proceedings.

The DOT regulates international air services and coordinates with other countries and international organisations in developing and managing international air routes. It also regulates international aviation pricing and intercarrier agreements between foreign and US airlines.

Remaining aspects of aviation law not falling within the broad federal control are reserved to the states, including the power to tax and to regulate state law liability claims.

II LEGAL FRAMEWORK FOR LIABILITY

The US government structure is divided between the national and state governments. These two systems share power under a doctrine known as federalism as prescribed in the US Constitution. The national government regulates aviation based on the need for uniformity in aviation law and certain constitutional powers granted to the federal government.
The federal government consists of three separate branches: legislative, executive and judicial. Each branch plays a role in the development of aviation law. The legislative branch, or the Congress, enacts the laws. The executive branch, which includes the US President and many agencies, executes and enforces the laws. The judicial branch applies and interprets the laws.

The agencies responsible for most aviation regulation are the DOT and FAA, which are part of the federal government’s executive branch and established by acts of Congress. Most legal disputes concerning agency actions are adjudicated in administrative law courts, which are part of the federal executive branch of government.

Civil lawsuits are heard in either the state or federal courts. The federal courts are of limited jurisdiction and entertain only certain cases as authorised by Congress or the US Constitution. State courts, by contrast, are of general jurisdiction. Aviation cases are heard in either state or federal courts, depending on the case circumstances.

Defendants are subject to a court’s jurisdiction in a civil lawsuit only where the court has ‘personal jurisdiction’ over the defendant, which is a constitutional doctrine limiting the court’s authority over out-of-state or foreign defendants. To be within a court’s personal jurisdiction, the defendant must have a sufficient connection to the court’s forum.

Litigants have a right to a jury trial in most cases. Juries consist of randomly selected US citizens. The judge instructs the jury on the law to apply. The jury renders a decision based on its determination of facts after all the evidence has been presented. There is generally a right to appeal from the trial court level. Most cases are resolved before the case reaches the jury trial, either by motion or by settlement.

International carriage

The United States is party to several multilateral agreements and conventions relating to international carriage, including the following main conventions, which US courts are often called upon to interpret.

5 State governments have similar structures.


7 Certain agency actions may be challenged directly in a federal district court, including, for example, if a challenged FAA penalty meets certain thresholds. 49 U.S.C.A. Section 46301(d)(4) (West, Westlaw through P.L. 116–19).

8 The two most common bases for federal court jurisdiction are cases arising under federal law; and cases between citizens from different states, or between a US citizen and a foreign country citizen. U.S. Const. Article III, Section 2, cl. 1. A foreign carrier that qualifies as a ‘foreign state’ under the Foreign Sovereign Immunities Act may remove a state-court lawsuit to federal court. 28 U.S.C.A. Section 1441(d) (West, Westlaw through P.L. 116–19).

9 See, for example, Goodyear Dunlop Tires Operations SA v. Brown, 564 U.S. 915 (2011) (North Carolina court lacked personal jurisdiction over a European tyre manufacturer arising from an accident in France, where only a small percentage of tyre products were distributed in North Carolina).

10 A foreign carrier that qualifies as a ‘foreign state’ under the Foreign Sovereign Immunities Act is entitled to a non-jury trial. 28 U.S.C.A. § 1441(d) (West, Westlaw through P.L. 116–19).

The Chicago Convention

US courts recognise that Articles 5, 8, 15, 16, 20, 24, 29, 32, 33 and 35 are self-executing, and thus do not require Congress to act to implement them. 13

Regulation of foreign carrier operation in US airspace incorporates and requires compliance with International Civil Aviation Organization (ICAO) standards. 14 A court applied ICAO standards in a case involving a passenger who suffered cardiac arrest and claimed that the lack of an automated external defibrillator constituted an ‘accident’ under the Montreal Convention. 15 The court rejected the claim, noting that the foreign carrier operated under ICAO standards, which recommended, but did not require, a defibrillator. 16 The court concluded that the failure to comply with the ICAO’s recommendation was insufficient to constitute an ‘accident’ under the Montreal Convention. 17

The FAA assesses foreign ICAO members’ compliance with ICAO safety standards under its International Aviation Safety Assessment programme. The FAA examines each country’s efforts to ensure its air carriers comply with ICAO requirements. 18 Countries deemed in compliance with ICAO standards are designated Category I countries whose carriers are allowed to operate freely to the United States. Countries deemed not to meet ICAO standards are designated Category II countries. Carriers originating from Category II countries that were already operating to the United States at the time of the FAA investigation may continue subject to heightened FAA surveillance. All other Category II carriers are prohibited from commencing service to the United States unless their operations

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14 14 C.F.R. Section 129.5 (West 2019). In implementing this regulation the FAA recognised that ICAO standards ‘define the minimum level of safety necessary for the recognition by Contracting States to the Chicago Convention of certificates of airworthiness, certificates of competency and licences that allow for the flight of aircraft of other States into or over their territories’. Dep’t of Transp. (DOT) Fed. Aviation Admin. (DOT 19 February 2013) 2013 WL 1793680. By contrast, US airlines must comply with operating specifications set forth in 14 C.F.R. pt. 121. By statute, foreign carriers may navigate in US airspace ‘only – (1) if the country of registry grants a similar privilege to aircraft of the United States; (2) by an airman holding a certificate or licence issued or made valid by the United States Government or the country of registry; (3) if the Secretary of Transportation authorises the navigation; and (4) if the navigation is consistent with terms the Secretary may prescribe’. 49 U.S.C.A. Section 41703 (West, Westlaw through P.L. 116–19).
16 id. at 1153.
17 id.
are performed using aircraft wet-leased from a Category I country. To encourage greater international compliance, the FAA drafted the model Civil Aviation Safety Act and model regulations, which may be adopted by other Convention member states.19

**The Montreal Convention**20

The United States ratified the Montreal Convention in 2003.21 In interpreting the Montreal Convention, courts rely on precedent interpreting the predecessor Warsaw Convention.22

The Convention contains a two-year statute of limitations for initiating claims, which has been interpreted in the United States as a condition precedent to suit, and therefore not subject to tolling.23

US courts interpret ‘accident’ for purposes of Article 17 liability as occurring where a passenger’s injury or death is ‘caused by an unexpected or unusual event or happening that is external to the passenger, and not where the injury results from the passenger’s own internal reaction to the usual, normal, and expected operation of the aircraft’.24

More recent cases have further clarified this definition. For instance, an accident under the Convention may be found where a passenger suffers from an in-flight medical condition such as an asthma attack, heart attack or stroke, and makes an express request for medical assistance that goes unanswered.25

A variety of events have been held to constitute accidents in cases addressing non-medical injuries, including injury caused by a hypodermic needle protruding from an aeroplane seat;26 a flight attendant spilling hot water on a passenger;27 bottles falling from an open overhead compartment;28 and a ‘jolt’ from another passenger causing a tray table to shake and hot tea to spill.29 Conversely, a federal court in New York held that tripping over luggage in the aisle while boarding is not an accident because ‘there is nothing unexpected or unusual about the
presence of a bag in or near the aisle during the boarding process’. 30 Deviations from airline policies and procedures may be considered unexpected and unusual enough to constitute an accident under the Convention.31

Whether an injury occurs during ‘embarking’ or ‘disembarking’ is considered a question of law to be decided by the court.32 A federal court in New York held that the embarking process had not begun merely because a passenger had checked in for his flight because he ‘had ample time to roam freely about the [public] terminal before his flight was called’.33

Based on US Supreme Court cases that construed ‘bodily injury’ under the Warsaw Convention as not including pure mental distress,34 most US courts have held that conditions such as fear and post traumatic stress do not constitute bodily injury under the Convention.35 A federal appellate court recently rejected reliance on cases decided under the Warsaw Convention, holding instead that the Montreal Convention permits recovery of mental anguish damages by a passenger who claimed fear of contracting a contagious disease after being pricked by a hypodermic needle in a seatback pocket.36

US courts are split on the pre-emptive scope of the Montreal Convention. By analogy to the Warsaw Convention, state-based claims that do not fall within the scope of delay, damage, loss or injury to passengers, baggage or cargo are arguably not pre-empted by the Convention.37 However, at least one court extended the Montreal Convention in this regard by focusing on the intent of the treaty to promote international uniformity.38 US courts have also held that the doctrine of forum non conveniens applies under the Montreal Convention.39 In a case arising from the 2005 crash of West Caribbean Flight 708, a US Circuit Court of Appeals rejected the plaintiffs’ attempt to circumvent a forum non conveniens dismissal by invoking the Convention and purposefully rendering the alternative forum unavailable.40


36 Doe v. Eihad Airways, PJSC, footnote 26, above.


40 Galbert v. W Caribbean Airways, 715 F.3d 1290 (11th Cir. 2013).
Internal and other non-convention carriage

General rules governing tort liability apply to non-convention carriage within the United States. Tort law is traditionally based on state common law, in which courts define what claims are actionable. Many statutes also define the contours of tort law. A carrier will be subject to tort liability when found to have acted negligently in causing harm. Negligence is determined by assessing the carrier’s conduct under an applicable standard of care, which generally is conduct lacking reasonable care under all the circumstances. Courts may adopt statutes, regulations or even international treaty provisions in formulating the standard of care. Most states hold common carriers to an elevated standard of care.

In some instances, federal law will pre-empt state law, such that state law has no force. Pre-emption is based on constitutional supremacy of federal law over state law in certain areas, and may apply where ‘it is impossible for a private party to comply with both state and federal requirements’. In *Abdullah v. American Airlines Inc*, plaintiffs brought state tort claims against the airline after suffering injuries from severe turbulence. The court determined that state standards of care were pre-empted, because FAA regulations completely established ‘the applicable standards of care in the field of air safety, generally, thus pre-empting the entire field from state and territorial regulation’.

An act of Congress known as the Airline Deregulation Act (ADA) expressly pre-empts state law relating to ‘a price, route or service of an air carrier that may provide air transportation’. Before the ADA, many commercial aspects of aviation were regulated, including entry into the market, routes and fares. In enacting the ADA, Congress determined that ‘maximum reliance on competitive market forces’, rather than regulation, would best further ‘efficiency, innovation, and low prices’ as well as ‘variety [and] quality . . . of air transportation services’.

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43 See, for example, Cal. Civ. Code Section 2100 (West, Westlaw through 2019 legislation) (‘A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.’).
44 See, for example, *Gade v. Nat’l Solid Wastes Mgmt Ass’n*, 505 U.S. 88, 109 (1992) (‘First, Congress can adopt express language defining the existence and scope of pre-emption. Second, state law is pre-empted where Congress creates a scheme of federal regulation so pervasive as to leave no room for supplementary state regulation. And third, “state law is pre-empted to the extent that it actually conflicts with federal law”.’).
47 id. at 367. But see *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016) (clarifying the scope of *Abdullah* and holding that federal pre-emption of the field of aviation safety does not extend to state law products liability claims); *Sikkelee v. Precision Airmotive Corp.*, 901 F.3d 701 (3d Cir. 2018) (holding that state tort law was not conflict pre-empted where engine manufacturer could have simultaneously complied with both state tort law and federal regulations).
50 id. at 378 (majority opinion); 49 U.S.C. Sections 40101(a)(6), (12) (West, Westlaw through P.L. 116–19); *cf. Hickcox-Huffman v. US Airways Inc*, 855 F.3d 1057 (9th Cir. 2017) (distinguishing state law breach of contract claim relating to baggage fee based on a voluntarily assumed obligation and thus not pre-empted).
Admiralty accidents are governed exclusively by federal law.\textsuperscript{51} In the aviation context, federal admiralty law will govern where the claimed tort bears ‘a significant relationship to traditional maritime activity’.\textsuperscript{52} Another act, known as the Death on the High Seas Act (DOHSA), also applies federal law to accidents involving commercial aviation that occur on the high seas beyond 12 nautical miles of the US shoreline.\textsuperscript{53} For non-commercial aircraft, DOHSA applies if the accident occurs beyond three nautical miles from the US shore.\textsuperscript{54} Claims for pre-impact pain and suffering and punitive damages are unavailable under DOHSA.\textsuperscript{55}

Choice of law rules may also affect carrier liability. Courts must often decide which state’s law to apply in aviation cases because of the interstate nature of aviation. For example, in determining which state’s punitive damages law applied in litigation arising from the 1979 DC-10 crash at Chicago’s O’Hare airport, the court considered the laws of numerous states with a connection to the case, including: the plaintiffs’ residences (Connecticut, Hawaii, Indiana, Massachusetts, New York, Japan and Saudi Arabia, among others);\textsuperscript{56} the defendant aircraft builder’s and airline’s places of incorporation and operation (Maryland, Missouri, Delaware, New York, Texas and Oklahoma); and lastly, the place of the crash (Illinois) and the intended destination (California). The court applied the ‘most significant relationship’ analysis and determined that the law of the place of the injury governed, which did not permit recovery of punitive damages.\textsuperscript{57}

iii General aviation regulation

As noted, the FAA promulgates administrative regulations (FARs), which govern most aspects of aviation.\textsuperscript{58} Congress created the FAA in order ‘to provide for the safe and efficient use of the airspace by both civil and military aircraft, and for other purposes’.\textsuperscript{59} The FAA’s purview accordingly extends to making and enforcing rules ‘on all safety matters relating to the operation of airports, the manufacture, operation, and maintenance of aircraft, and the

\textsuperscript{52} Exec Jet Aviation Inc v. City of Cleveland, Ohio, 409 U.S. 249, 268 (1972).
\textsuperscript{53} 46 U.S.C.A. Section 30307 (West, Westlaw through P.L. 116–19).
\textsuperscript{54} 46 U.S.C.A. Section 30302 (West, Westlaw through P.L. 116–19) (defining general applicability); Helman v. Alcoa Global Fastener Inc, 637 F.3d 986 (9th Cir. 2011) (interpreting DOHSA to apply in the area between three and 12 nautical miles from the US shore for non-commercial aircraft accidents).
\textsuperscript{56} In re Air Crash Disaster Near Chicago, Illinois on 25 May 1979, 644 F.2d 594 (7th Cir. 1981).
\textsuperscript{57} id. at 613; see also Restatement (Second) of Conflict of Laws Section 146 (1971).
\textsuperscript{58} Sikkeløe v. Precision Airmotive, footnote 47, above at p. 721 (Roth, J., dissenting) (’FAA regulations and the Act itself prescribe the operative safety standards for the manufacture of airplanes and their components’).
efficiency of the National Airspace System’. The FAA also develops the nation’s airports and navigation systems, implements new technologies and maintains the aircraft ownership registry.

iv Passenger rights

DOT regulations cover, among other topics, a carrier’s liability to passengers for domestic baggage, the overbooking of flights, tarmac delays, and related procedures.

The baggage liability regulations apply to domestic flight segments using large aircraft. For qualifying flights, a carrier cannot limit its liability for the damage, loss or delay in delivery of passenger baggage to less than US$3,500 per passenger. Notice of limitations relating to baggage liability must be conspicuous, and failure to provide notice may be considered unfair and deceptive practice.

Overbooking regulations apply to flights with 30 or more seats on domestic or non-stop foreign flights originating in the United States. Compensation for passengers involuntarily denied boarding depends on the alternate transportation that the carrier offers, and can range from no compensation to 400 per cent of the fare, with a maximum of US$1,350.

Tarmac delay regulations apply to certified or commuter domestic carriers that operate scheduled passenger or public charter service on aircraft with 30 or more seats. These regulations also apply to foreign carriers when new passengers are picked up in the United States. Carriers must adopt contingency plans for lengthy tarmac delays, which must provide for adequate food and water no later than two hours after leaving the gate or landing. The plan must also assure operating bathrooms, and medical attention if needed. Passengers must be allowed to deplane within three hours of tarmac delay for domestic flights, and within four hours of tarmac delay for international flights, in the absence of safety concerns. A delay is measured for US carriers from the point when the main aircraft door is closed to when the carrier begins its return to a suitable disembarkation point. Airlines that fail to comply with tarmac delay rules are subject to civil penalties of up to US$32,140 for each violation.

60 49 C.F.R. Section 1.82 (West 2019). Regulations are subject to judicial review if the regulation exceeds the statute authorizing the agency to act, or if the regulation is arbitrary, capricious or an abuse of discretion, among other grounds. 5 U.S.C.A. § 706 (West, Westlaw through P.L. 116–19); Pinney v. Nat’l Transp. Safety Bd., 993 F.2d 201 (10th Cir. 1993) (FAA regulation allowing for suspension of pilot licence for unlawfully importing marijuana held to be within FAA’s jurisdiction based on reasonable relationship between drug law conviction and safety of flight).
61 id.
62 14 C.F.R. Section 254.4 (West 2019).
63 id. (relating to ‘provable direct or consequential damages resulting from the disappearance of, damage to, or delay in delivery of a passenger’s personal property, including baggage’).
64 id. at Section 254.5.
65 id. at Section 399.85.
66 id. at Section 250.2.
67 id. at Section 250.5.
68 id. at Section 259.2.
69 id. at Section 259.4.
71 See 14 C.F.R. Section 259.4(f) (citing 49 U.S.C.A. Section 41712 (West, Westlaw through P.L. 116–19)); 14 C.F.R. Section 383.2; 49 U.S.C.A. Section 46301 (West, Westlaw through P.L. 115-140). The DOT takes the position that a separate violation occurs for each passenger forced to remain on
Qualifying carriers must provide information regarding flight cancellation, delays of 30 minutes or more, and diversions, within 30 minutes of becoming aware of such changes.\(^{72}\)

The Air Carrier Access Act (ACAA) prohibits air carriers from discriminating against individuals on the basis of a physical or mental impairment that substantially limits one or more major life activities.\(^{73}\) A majority of courts hold that the ACAA does not create a private right of action.\(^{74}\)

**v Other legislation**

**US environmental policy**

The National Environmental Policy Act of 1969 (NEPA) requires an environmental impact statement (EIS) whenever major federal actions significantly affect the quality of the human environment.\(^{75}\) Thus, an EIS is necessary for any airport expansion or major change in flight routes. Some states have similar requirements.\(^{76}\) The FAA ensures that the aviation and space industry complies with NEPA.\(^{77}\) Litigation over FAA NEPA compliance is extensive. Pursuant to the Clean Air Act of 1970, the Environmental Protection Agency (EPA) regulates air pollution from aircraft.\(^{78}\) In setting aircraft engine emission standards, the EPA consults with the FAA, and largely follows ICAO standards.\(^{79}\)
US anti-corruption law

US law criminalises bribery to influence any official government act.\textsuperscript{80} Bribery is broadly interpreted, and includes ‘illegal gratuities’ – or direct or indirect giving, offering or promising of anything of value to any federal public official for or because of any official act performed or to be performed.\textsuperscript{81} Violations of US bribery law are punishable by up to 15 years in prison.\textsuperscript{82} Conspiracy to commit bribery constitutes a separate offence. Each state also has its own bribery laws.

The Foreign Corrupt Practices Act (FCPA) contains anti-bribery provisions relating to foreign officials. It applies to American individuals or corporations, and foreign corporations publicly traded in the United States.\textsuperscript{83} In 1995, Lockheed paid a US$24.8 million penalty for FCPA violations after admitting to bribing a member of the Egyptian parliament to influence the sale of three transport planes to Egypt.\textsuperscript{84} The largest FCPA penalty ever imposed was in 2008 for US$450 million against Siemens, a US exchange-listed foreign corporation.\textsuperscript{85}

The FCPA includes international anti-corruption commitments relating to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.\textsuperscript{86} The United States is also a party to the Inter-American Convention Against Corruption.\textsuperscript{87}

III LICENSING OF OPERATIONS

i Licensed activities

All aircraft operation in the United States, including intrastate operation, is subject to federal regulation. Consequently, operators must obtain and maintain appropriate certification from the DOT and the FAA, in addition to any pertinent state permits.

Aircraft certification

Aircraft must be registered and certified airworthy. An aircraft may be registered if it is not registered in another country, and is owned by: (1) a US citizen; (2) a resident alien; (3) a US governmental unit or subdivision; or (4) a non-citizen corporation lawfully organised and doing business under US law, provided that the aircraft is based and primarily used in the United States.\textsuperscript{88} Applicants must show proof of ownership.

\textsuperscript{80} 18 U.S.C.A. Section 201(b) (West, Westlaw through P.L. 116–19).
\textsuperscript{81} id. at Section 201(c).
\textsuperscript{82} id. at Section 201.
\textsuperscript{83} 15 U.S.C.A. Sections 78m(b), 78dd-1, 78dd-2, 78dd-3 (West, Westlaw through P.L. 116–19).
\textsuperscript{88} 14 C.F.R. Section 47.3 (West 2018).
Airworthiness certification indicates that an aircraft conforms to its approved design and is safe for operation. The two types of certificates are a standard airworthiness certificate, issued for normal, utility, acrobatic, commuter, transport and special classes of aircraft; and a special airworthiness certificate, issued for primary (personal use), restricted (e.g., agricultural), multiple or limited categories, experimental, special flight permit (e.g., flying to a point for repair) and provisional aircraft.

Owners of foreign-registered civil aircraft who do not have the equivalent of a US standard airworthiness certificate must apply for a special flight authorisation to operate the aircraft within the United States. In addition, DOT authorisation is required for foreign civil aircraft registered in a country that is not a member of the ICAO.

The FAA certifies that the design for aircraft, engines and propellers meets airworthiness and related requirements. The FAA also certifies aircraft components by issuing technical standard orders, and approves design modifications and replacements by issuing parts manufacture approval. The FAA does not approve products manufactured outside the United States, unless a bilateral airworthiness agreement has been signed between the United States and the country of manufacture.

**Carrier certification**

US carriers must obtain two separate authorisations to conduct operations: (1) economic authority from the DOT; and (2) safety authority from the FAA. The DOT evaluates all applicants to determine if they are ‘fit, willing and able’ to conduct airline operations and to ensure ownership and control by US citizens (see Section III.ii, infra). The DOT assesses the carrier’s managerial competence, operating and financial plans, and compliance and safety record. Certificates are available for interstate or foreign transport of passengers or cargo and mail, and commuter air carriers. The DOT continues to monitor operations and financial conditions of certified air carriers to ensure continued compliance with the regulations.

FAA Flight Standards District Offices issue safety authority certifications: 14 CFR Part 121 governs operating requirements for domestic, flag and supplemental operations, while 14 CFR Part 135 governs commuter and on-demand operations. The FAA determines the applicant’s ability to comply with regulations and safety standards, and to manage risks in the operating environment. The FAA utilises an Air Transportation Oversight System to assess the safety of Part 121 operations. The FAA ensures compliance with regulations when a new aircraft type is added to an existing certificate by examining hardware, programme and procedural issues pertinent to the new aircraft.

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91. 14 C.F.R. Section 21.21 (West 2019). Design certification is confirmed by a type certificate that includes the design type, operating limitations, a certificate data sheet and any applicable conditions. id. at Section 21.41.
Other FAA certifications

The FAA also certifies airmen, and has broad authority to modify, suspend or revoke the certificates when deemed necessary for safety and public interest. The FAA also certifies all airports that serve both scheduled passenger-carrying operations conducted in aircraft designed with more than nine passenger seats, and unscheduled passenger-carrying operations conducted in aircraft designed with at least 31 passenger seats.

The FAA is also authorised to issue commercial space transportation licences for launch or re-entry vehicles.

Ownership rules

US carriers must be owned and controlled by a US citizen to obtain and maintain US carrier certification. ‘Citizen of the United States’ is defined as: (1) an individual who is a citizen of the United States or one of its possessions; (2) a partnership whose partners are each individuals with US citizenship; or (3) a corporation or association organised under US laws, of which the president and at least two-thirds of the directors and other managing officers are US citizens, and which is under the actual control of US citizens, with at least 75 per cent of the voting interest owned or controlled by US citizens.

Foreign carriers

Foreign carriers must likewise obtain two separate authorisations to conduct operations in the United States: (1) economic authority from the DOT; and (2) safety authority from the FAA.

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93 See W. J. Dunn, Annotation, Revocation or Suspension of Airman’s License or Certificate, 78 A.L.R. 2d 1150 (1961).
94 14 C.F.R. pt. 139.
95 id. at Sections 413.3, 413.19 (2016).
97 14 C.F.R. , at Section 204.2(c).
98 A ‘foreign air carrier’ is defined as ‘a person, not a citizen of the United States, undertaking by any means, directly or indirectly, to provide foreign air transportation’. 49 U.S.C.A. Section 40102(a)(21) (West, Westlaw through P.L. 116–19). ‘Foreign air transportation’ is ‘the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft, between a place in the United States and a place outside the United States when any part of the transportation is by aircraft’. id. at Section 40102(a)(23). Domestic carriers operate under a certificate while foreign carriers operate under a permit. In re Korean Air Lines Co., Ltd., 642 F.3d 685, 692 (9th Cir. 2011).
100 id. at § 44711(a)(1). The FAA has authority to grant exemptions to foreign carriers. id. at § 44711(b).
The DOT’s Foreign Air Carrier Licensing Division reviews foreign air carrier applications, which must be filed in the public docket.\(^{101}\) The carrier must provide information about the ownership, management personnel, financial condition, operating plan and the ability of the company and its personnel to comply with US laws and regulations. In addition, the carrier must provide evidence of operating authority granted by its homeland state. Foreign air carriers must also comply with, among other things, accident plan requirements and requirements concerning energy and passenger manifest information.\(^{102}\)

Carriers with operating authority from the European Union, Norway and Iceland undergo an abbreviated application process based on procedures for the reciprocal recognition of regulatory determinations. The DOT accepts the determinations made by the authorities of Member States instead of making independent evidentiary findings.\(^{103}\) Additionally, a shortened process exists for Canadian charter air taxi operators.\(^{104}\)

FAA safety authority for foreign airlines is referred to as ‘operation specifications’.\(^{105}\) To obtain operation specifications, a carrier must have an economic or exemption authority from the DOT, as well as airworthiness and registration certificates. A foreign carrier must also comply with security requirements, be properly equipped to conduct operations and hold a valid air operator certificate issued by the homeland state. A carrier must strictly comply with the operation specifications, which include each regular and alternate airport to be used in scheduled operations, the type of aircraft and registration markings of each aircraft, the approved maintenance programmes and minimum equipment list of US registered aircraft authorised for use. The FAA has broad authority to amend, suspend or revoke operation specifications. Foreign airworthiness certificates are accepted via bilateral airworthiness and aviation safety agreements.

### IV SAFETY

The fatality risk for commercial aviation in the United States dropped by 83 per cent from 1998 to 2008,\(^ {106}\) and the United States has not suffered a fatal large commercial aviation accident since February 2009.\(^ {107}\) The FAA’s Safety Management System (SMS) has been recognised as a worldwide standard for safety in aviation. The SMS is similar to the Quality Management System published by the International Organization for Standardization, but focuses on the safety of a service or product rather than its quality. The FAA is also

\(^{101}\) 14 C.F.R. Sections 211.1, 302.3 (West 2019).

\(^{102}\) 49 U.S.C.A. Section 41313 (West, Westlaw through P.L. 116–19); 14 C.F.R. Sections 313.5(a), 243.7 (West 2019).


\(^{104}\) 14 C.F.R. Section 294.1 (West 2019).

\(^{105}\) id. at Section 129.5.


implementing the Next Generation Air Transportation System (NextGen), a series of technological and system capabilities to advance air carrier operations by enhancing safety, reducing travel delays, saving fuel and reducing aviation’s environmental impact.  

FAA regulations and airworthiness requirements also promote safety, and cover a wide range of topics from maintenance to aircraft design to pilot training. The FAA may issue immediately effective orders when it determines an emergency exists related to air safety. FAA Airworthiness Directives (AD) notify certified owners and operators of known safety deficiencies that must be corrected to maintain the aircraft’s airworthiness. Operators must document AD compliance in the aircraft logbook. ADs usually derive from service difficulty reports provided by operators or accident investigators, and can be issued on an emergency basis. For example, in January 2013, the FAA issued an emergency AD grounding all Boeing 787 Dreamliners because of a fire hazard created by its lithium battery. This AD was lifted in April 2013 after approval of a revised battery design.

The FAA Office of Aviation Safety enforces FAA safety regulations and directives. Depending on the violation, the FAA may impose a civil fine or refer the matter for criminal prosecution.

The prompt and accurate reporting of accidents and incidents in the field enhances safety and accident prevention. To gather this information, the FAA administers the Aviation Safety Action Program, a voluntary safety reporting programme. The FAA also requires owners and operators to self-report any maintenance incidents or difficulties through the Service Difficulty Reporting System. These reports are publicly available through the FAA’s website and are meant to identify trends or problems with service.

The National Transportation Safety Board (NTSB) is an independent agency charged by Congress with investigating transportation accidents, including aviation accidents. The NTSB issues factual findings and a probable cause determination (if found) for each accident, as well as safety recommendations to prevent future accidents. These recommendations are not regulatory, but can be adopted by the industry. NTSB safety recommendations have led to important changes in aviation safety, such as mid-air collision avoidance technology,

108 Fact Sheet – General Aviation Safety, Fed. Aviation Admin. (high altitude air traffic control system completed in March 2015; by 1 January 2020, all aircraft in controlled airspace must be equipped with Automatic Dependent Surveillance-Broadcast which enhances general aviation pilots’ awareness of other traffic and improves safety in areas that radar does not reach), www.faa.gov/news/fact_sheets/news_story.cfm?newsId=21274 (last visited 10 May 2019).

109 FAR Part 121 contains requirements for domestic, flag and supplemental operations, including manual and equipment requirements, maintenance, training, crew member qualifications, flight time limitations, continued airworthiness and safety improvements, among other topics. 14 C.F.R. pt. 121. FAR Part 135 provides operation requirements for commuter and on-demand operations. 14 C.F.R. pt. 135. FAR Part 91 provides additional general operating and flight rules such as keeping a logbook of all historical data for the aircraft, among other requirements. 14 C.F.R. pt. 91.


114 49 U.S.C.A. § 1111 (West, Westlaw through P.L. 116-16); 49 C.F.R. § 800.3 (West 2019).
ground proximity warning systems, and smoke detectors in lavatories. In the litigation context, only the NTSB’s factual findings are admissible as evidence at trial; probable cause findings are not.

V INSURANCE

The FAA mandates that US and foreign direct air carriers have aviation accident liability insurance coverage to operate in interstate or foreign air transportation.115 This coverage can be provided by a US authorised insurer, or a self-insurance plan. The carrier must make the insurance policy available for inspection by the DOT and ensure that the current insurance certification or summary of self-insurance is on file with the DOT’s Office of Aviation Analysis and available for public inspection. Required minimum insurance coverage is set forth in 14 CFR Section 205.5. If insurance cannot be obtained on reasonable terms, the FAA may issue aviation insurance to US certificated carriers, in the interests of air commerce, national security and US foreign policy.116

The FAA does not presently mandate that aircraft owners, operators or service providers carry insurance. While some states within the United States have adopted their own more stringent insurance requirements, there is no overarching federal policy on this issue. In a recent FAA publication, the FAA stated simply that ‘responsible aircraft owners always carry sufficient insurance on their aircraft’.117

VI COMPETITION

US antitrust or anti-competition law is a combination of federal and state statutes that regulate business to promote fair competition for the benefit of consumers. The main federal statutes governing antitrust are the Sherman Antitrust Act of 1890 and the Clayton Antitrust Act of 1914.118 These Acts restrict the formation of cartels (or agreements among competing firms), restrict mergers and acquisitions between companies that would lessen competition, and prohibit monopolies.

The Sherman Act outlaws ‘every contract, combination, or conspiracy in restraint of trade’, and any ‘monopolisation, attempted monopolisation, or conspiracy or combination to monopolise’. Price-fixing is strictly forbidden by the Sherman Act. The Clayton Act prohibits mergers and acquisitions where the effect ‘may be substantially to lessen competition, or to tend to create a monopoly’. The Clayton Act requires that companies planning large mergers or acquisitions notify the government in advance.

The Federal Trade Commission119 and the Department of Justice (DOJ) both enforce antitrust laws. Private individuals may also file civil lawsuits for antitrust violations, and may seek up to three times their proven damages.

119 The Federal Trade Commission (FTC) also has authority to regulate a commercial firm’s cybersecurity practices. FTC v. Wyndham Worldwide Corp, 799 F.3d 236 (3d Cir. 2015).
Antitrust violations can also lead to criminal prosecution, which is generally limited to intentional and clear violations. The criminal penalty for a corporation can be up to US$100 million, and for an individual up to US$10 million and 10 years in prison.120

Regulation of airline mergers is based on a rationale of competition for the benefit of the consumer.121 Proposed mergers are analysed by considering the markets in which passengers buy air travel, which are identified by the origin and destination city pairs on which passengers fly. A proposed merger that would eliminate competition between city-pair markets (i.e., that would reduce a passenger’s option for travel between two cities to one airline) would not be permitted. The government also ensures that passengers have the option of choosing to pay more for a direct flight or accept the inconvenience of stops at a decreased fare. The government also analyses the financial condition of the proposed merging companies.

Several mergers by large commercial carriers have been approved by the US government, including American and US Airways in 2013, United Air Lines and Continental Airlines in 2010, and Delta Airlines and Northwest Airlines in 2008.

Global alliances between airlines, such as Oneworld or Star Alliance, raise antitrust regulation issues.122 Currently, the DOT has allowed antitrust immunity for global alliances where the home countries of the immunity-seeking carriers that are part of the alliance enter liberal ‘open-skies’ aviation trade accords with the United States. The DOJ has criticised this, and believes there should be a presumption against such alliances.123

VII WRONGFUL DEATH

Although early decisions by US courts did not recognise wrongful death claims, recovery for wrongful death has been permitted by statute in every state for some time.124 The state statutes lack a uniform approach and vary on many aspects such as statutes of limitation, survivors entitled to sue, types of damages recoverable and methods for calculating damages. The statutes often distinguish between wrongful death and survival actions, the former creating a new action to compensate heirs, and the latter preserving a decedent’s claim suffered before death.125 Most states measure wrongful death damages based on loss of the decedent’s financial support and aid to survivors, including compensation for lost advice, assistance and

120 See FTC Guide to the Antitrust Laws, footnote 118 above.
124 Restatement (Second) of Torts Section 925 cmt. a. Federal statutes govern in certain contexts, such as admiralty and international carriage. Jones Act, 46 U.S.C. Section 30104 (West, Westlaw through P.L. 116–19); Death on the High Seas Act, footnote 53, above; Montreal Convention, footnote 20, above.
125 For example, recovery for wrongful death in California is distinct from a survival claim, each with different and mutually exclusive categories. Cal. Code of Civ. Proc. Section 377.60 (West, Westlaw through 2019 legislation) (allowing wrongful death claim by certain enumerated survivors); id. at § 377.30 (allowing survival claim by decedent’s personal representative or successor in interest).
companionship. Other states base damages on loss to the estate, which focuses on the loss of the decedent’s accumulation of property had he or she lived, as opposed to support. Other variations include whether recovery is permitted for pain and suffering, and for punitive damages. Levels of compensation payable for wrongful death consequently vary based on the jurisdiction where the claim is filed.

VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

A lawsuit is commenced by the filing and service of a complaint by an aggrieved party. The complaint must identify the premise of the claim and the asserted damages. In the case of an aviation accident, the plaintiff may sue any individual or company believed to be responsible for causing or contributing to the accident, including the aircraft owner and operator, the manufacturers of the aircraft and component parts, the pilots and any maintenance providers. With regard to equipment designed for the US government by contractors, the government’s immunity to suit may extend to government contractors.

A plaintiff may file a lawsuit in any state or federal court in the United States, whether or not plaintiff is a US citizen, and irrespective of the plaintiff’s state of residence. However, a defendant may move to dismiss an action based on the chosen court’s lack of jurisdiction, improper venue or unfairness of the forum (forum non conveniens).

Venue is typically considered proper in the county (state court) or district (federal court) where the event giving rise to the lawsuit occurred or where the defendant resides. In the absence of an otherwise available forum, any venue where the court has personal jurisdiction over all the defendants is proper. Even where the venue is technically proper, a case may be dismissed under the doctrine of forum non conveniens if the venue is unfair to one or more parties, typically where the events giving rise to the litigation occurred in a foreign country.

Statutes of limitation set the maximum amount of time in which a lawsuit can be filed following the injury-causing event. These vary by the nature of the claim (e.g., personal injury or breach of contract) and by state. Statutes of repose also set time limits, but based on

126 Restatement (Second) of Torts Section 925 cmt. b.
127 id.; see also, for example, Ga. Code Ann. Section 51-4-1 (West, Westlaw through 2019 legislation) (permitting wrongful death recovery in Georgia for the ‘full value’ of life, including intangible factors which supplement economic value that are said to ‘elude precise definition’); Miller v. Jenkins, 412 S.E.2d 555, 556 (Ga. Ct. App. 1991).
128 For example, punitive damages are the only type of damages recoverable under Alabama’s wrongful death act, which ‘rests upon the Divine concept that all human life is precious’. Atkins v. Lee, 603 So. 2d 937, 942 (Ala. 1992). In California, punitive damages are not recoverable for wrongful death, but are recoverable in a survival claim. Cal. Code of Civ. Proc. Code Section 377.34 (West, Westlaw through 2019 legislation); Boeken v. Philip Morris USA Inc, 48 Cal. 4th 788, 796 (2010). Pain and suffering damages are not recoverable in a California survival claim, but such damages are recoverable in a survival claim under Ohio law. 30 Ohio Jur. 3d Death Section 92 (Third Ed.).
129 28 U.S.C.A. Section 2680(a) (West, Westlaw through P.L. 116–19); Boyle v. United Technologies Corp, 487 U.S. 500 (1988). This is commonly referred to as the ‘government contractor defence’.
an event other than the injury-causing event. An important statute of repose in the aviation context is the General Aviation Revitalization Act of 1994 (GARA), a federal statute that bars lawsuits against manufacturers of general aviation aircraft that are more than 18 years old at the time of the accident. Several states have their own statutes of repose, some with more stringent time limits.

If the plaintiff presents a colourable claim against the defendant, the parties then engage in fact and expert discovery to assess the merits of the plaintiff’s claims and defendant’s defences. Discovery typically consists of depositions and written requests for information or documents. If after the completion of discovery, a party believes either that there is no evidence to support the other side’s claim or defence, or that the only dispute is one of law, that party may file a motion for summary judgment, which, if granted, is likely to end the case.

Each litigant normally has the right to a trial by jury. If more than one defendant is found liable for the same injury, those defendants may be jointly liable, severally liable, or jointly and severally liable, depending on the structure adopted by the jurisdiction where the case is tried. Joint liability means that each defendant is liable up to the full amount of the damages awarded, although the plaintiff can recover no more than the awarded amount. Where the defendants are severally liable, each defendant is liable only according to its specific percentage of fault. Joint and several liability combines these concepts, and allows a plaintiff to recover the full damage award from any of the defendants found liable, and provides for contribution claims among the defendants for payments in excess of their percentage of fault. Most courts and state legislatures have adopted some form of comparative responsibility that relates to these various approaches.

Settlement of lawsuits is strongly encouraged by US courts. Mediation or mandatory settlement conferences are typically required to encourage pretrial resolution.

### ii Carriers’ liability towards passengers and third parties

The civil liability of aircraft carriers to passengers and third parties is generally governed by fault-based negligence principles, requiring evidence that the carrier breached a duty owed to the claimant, which proximately caused the claimant’s damages.

Carriers may also be sued for intentional tort such as fraud, assault, battery, false imprisonment, intentional infliction of emotional distress or defamation. Carriers also face

132 ‘Statutes of limitations are designed to encourage plaintiffs “to pursue diligent prosecution of known claims” . . . [and] begin to run “where the cause of action accrues” . . . [typically] “when the injury occurred or was discovered.” In contrast, statutes of repose are enacted to give more explicit and certain protection to defendants. These statutes “effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time.” . . . For this reason, statutes of repose begin to run on “the date of the last culpable act or omission of the defendant.”’ California Pub Employees’ Ret Sys v. ANZ Sec Inc, 137 S. Ct. 2042, 2049 (2017).

133 See footnote 147 et seq., below.

134 See, for example, Or. Rev. Stat. Section 30.905(2)(a) (West, Westlaw through 2018 legislation) (limiting the period in which the product manufacturer can be sued to 10 years following the date of the first sale of the product).


136 A foreign carrier that qualifies as a ‘foreign state’ under the Foreign Sovereign Immunities Act is entitled to a non-jury trial. 28 U.S.C.A. § 1441(d), footnote 10, above.

liability for discrimination under the ACAA based on race, colour, national origin, religion, a perceived physical or mental impairment, gender or ancestry.\textsuperscript{138} In making a claim under the ACAA, no proof of intent to discriminate is required so long as there is proof of a violation.\textsuperscript{139}

Courts may apply the doctrine known as ‘federal pre-emption’, which precludes a plaintiff from basing liability on state law tort standards where such standards conflict with federal regulations – which in effect provides a defence to carriers that comply with FAA regulations.\textsuperscript{140} Similarly, the ADA contains an express pre-emption clause that a ‘state . . . may not enact or enforce a law, regulation, or other provision having the force or effect of law related to a price, route or service of an air carrier’.\textsuperscript{141}

There are typically no limits to the economic damages sought by and awarded to a claimant who proves liability for such damages. Non-economic damages, such as those for pain and suffering or emotional distress, are occasionally capped by statute. In instances where the carrier’s conduct is proven to be fraudulent, malicious or grossly negligent, the claimant may also recover punitive damages, which are designed to punish reprehensible behaviour. The US Supreme Court has placed limits on the amount of punitive damages that may be awarded,\textsuperscript{142} and many states impose their own limits on punitive damages.

The contract of carriage may limit the amount of damages recoverable by the passenger. For instance, most carriers limit the recovery for lost luggage to US$3,500, which is the minimum set by the DOT.\textsuperscript{143} Damages in claims under the Montreal Convention are also limited.\textsuperscript{144}

\section*{iii Product liability}

Civil actions against product manufacturers and sellers are generally based on the theory of strict liability, in addition to negligence.\textsuperscript{145} Under strict liability, a claimant need only prove that the product was defective when it left the manufacturer, and that the defect caused the claimed injury. Strict liability does not require the claimant to prove any negligence on the part of the manufacturer, and in fact the manufacturer can be liable even if it exercised all possible care in the production and sale of the product.

Strict liability cases are based on a claim of design defect, manufacturing defect or the failure to warn of an inherent danger. Possible defences to a strict liability claim are misuse by the consumer, assumption of risk and contributory or comparative fault by the consumer.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{138} 49 U.S.C.A. Section 41705 (West, Westlaw through P.L. 116-16); 14 C.F.R. pt. 382 (DOT regulations).
\item \textsuperscript{139} \textit{Rowley v. American Airlines}, 885 F. Supp. 1406 (D. Or. 1995).
\item \textsuperscript{140} See, for example, \textit{Abdulah v. Am Airlines Inc}, 181 F.3d 363 (3d Cir. 1999); \textit{Witty v. Delta Air Lines Inc}, 366 F.3d 380 (5th Cir. 2004); \textit{Montaldo v. Spirit Airlines}, 508 F.3d 464 (9th Cir. 2007). But see \textit{Sikkelee v. Precision Airmotive Corp}, 822 F.3d 680 (3d Cir. 2016) (holding that federal pre-emption of the field of aviation safety does not extend to state law products liability claims); \textit{Sikkelee v. Precision Airmotive Corp.}, 907 F.3d 701 (3d Cir. 2018) (holding that state tort law was not conflict pre-empted where engine manufacturer could have simultaneously complied with both state tort law and federal regulations).
\item \textsuperscript{141} 49 U.S.C.A. § 41713(b) (West, Westlaw through P.L. 116-16); see \textit{Morales v. Trans World Airlines, Inc.}, 504 U.S. 374 (1992).
\item \textsuperscript{142} \textit{State Farm Mut Auto Ins Co v. Campbell}, 538 U.S. 408 (2003).
\item \textsuperscript{143} 14 C.F.R. Section 254.4 (West 2019).
\item \textsuperscript{144} See Montreal Convention, footnote 20, above.
\item \textsuperscript{145} Restatement (Second) of Torts Section 402(A) (1965).
\end{itemize}
\end{footnotesize}
With respect to a design defect claim, the absence of an economically feasible alternative safer design may be an additional element of the claimant’s proof or may be a defence available to the manufacturer, depending on the jurisdiction.

Liability may also be based on breach of an express or implied warranty. The Uniform Commercial Code, which has been adopted by all 50 states with slight variations and which generally governs the sale of goods, includes warranties of fitness and merchantability. An express warranty generally requires a contract between the parties and express statements about the product’s fitness or merchantability.

The economic loss rule applies where damage is limited to the product itself, with no further property damage or personal injury. This rule limits recovery to contract damages, and precludes recovery in tort. Tort remedies are generally broader than contract damages, and thus application of the economic loss rule may result in reduced recovery. Most states have adopted an economic loss rule.146

The General Aviation Revitalization Act

The General Aviation Revitalization Act of 1994 (GARA) is a federal statute of repose that places an 18-year time limit on bringing a products liability action against manufacturers of allegedly defective general aviation aircraft or component parts.147 GARA sought to rejuvenate the general aviation market by limiting long-term liability exposure. GARA applies only to accidents involving ‘general aviation aircraft’.148 ‘Aircraft’ is broadly defined under GARA and thus can include virtually anything that is built for leaving the ground that meets the statute’s criteria.

A new replacement part resets GARA’s repose period as to that part.150 Aircraft flight manuals that are continuously revised may reset the repose period if the plaintiff alleges that those revisions caused the accident.151

146 HDM Flugservice GmbH v. Parker Hannifin Corp, 332 F.3d 1025, 1029 (6th Cir. 2003) (“The economic loss rule, in some form, is the rule in the majority of jurisdictions”). Most states also apply exceptions to the rule. Illinois, for example, has three exceptions to the economic loss rule: (1) where the plaintiff sustained damage, i.e., personal injury or property damage, resulting from a sudden or dangerous occurrence [cite omitted]; (2) where the plaintiff’s damages are proximately caused by a defendant’s intentional, false representation, i.e., fraud [cite omitted]; and (3) where the plaintiff’s damages are proximately caused by a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transactions’. In re Chicago Flood Litig, 680 N.E.2d 265, 275 (Ill. 1997).


148 GARA defines ‘general aviation aircraft’ as any aircraft that: (1) has been granted a type certificate or airworthiness certificate by the FAA; (2) has a maximum seating capacity of fewer than 20 passengers; and (3) was not engaged in scheduled passenger-carrying operations at the time of the accident. GARA Section 2(c).


150 GARA Section 2(a)(2).

151 Caldwell v. Enstrom Helicopter Corp, 230 F.3d 1155, 1157 (9th Cir. 2000) (allowing the application of GARA and distinguishing the basis of the cause of action from Alter v. Bell Helicopter Textron, 944 F. Supp. 531 (S.D. Tex, 2010), which did not apply GARA to an alleged breach of the duty to warn); see also S. Side Tr. & Sav Bank of Peoria v. Mitsubishi Heavy Indus. Ltd, 927 N.E.2d 179 (Ill. App. Ct. 2010) (affirming that GARA applies to flight manuals, but declining to extend to aircraft maintenance manuals).
GARA contains four exceptions: (1) the knowing misrepresentation exception, where the manufacturer misrepresents information required for FAA certification; (2) the emergency exception, when a passenger for medical or emergency treatment is injured; (3) the ‘not aboard’ exception, for those injured on the ground; and (4) the written warranty exception, where the manufacturer’s warranty extends beyond 18 years.\(^{152}\)

Similar protections may be available under state repose laws, and repose periods vary. GARA expressly pre-empts state laws that allow civil actions to be brought beyond the 18-year period of repose.\(^{153}\)

**iv Compensation**

Recoverable damages in a personal injury case consist of compensatory damages that are intended to make the injured plaintiff whole. Compensatory damages consist of (1) special (economic) damages, such as those for past and future medical expenses, lost wages, loss of earning capacity and damage to property; and (2) general (non-economic) damages, such as those for pain and suffering, loss of consortium or emotional distress. Several states have enacted statutes limiting non-economic damages. In certain cases, plaintiffs may also claim punitive damages, which are designed to punish the tortfeasor.

If a person is injured while working in the course and scope of employment, he or she may be entitled to compensation from the employer for medical expenses and lost wages. If the injury is caused by a third party, the employer may seek reimbursement of the sums paid to the employee from the responsible third party. The employer may intervene in a lawsuit brought by the injured employee against that third party, or file its own subrogation lawsuit against the third party for reimbursement.

In the event the injured plaintiff receives or anticipates medical benefits from Medicare – a national insurance programme – the federal government is entitled to reimbursement for those costs from any award received by the injured plaintiff from a third party. To protect its interest, the government has instituted a Medicare secondary payer recovery programme, which requires plaintiffs and defendants alike to regularly report personal injury claims and qualifying settlements to Medicare, or risk steep penalties.\(^{154}\)

All certificated carriers, including foreign carriers, must submit a family assistance plan to the DOT and NTSB addressing the needs of families of passengers involved in an aircraft accident in the US resulting in a major loss of life.\(^{155}\) The plan must include a process for notifying families of passengers after verifying passenger identity, and state how the carrier will publicise and operate a reliable, toll-free telephone number for calls from families of passengers.\(^{156}\) The plan must also contain several other assurances, including concerning the return of possessions, consultation with family about construction of monuments, and compensation for travel, care and assistance.\(^{157}\)

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152 GARA Sections 2(b)(1)-(4).
153 id. at Section (2). Repose periods for the ‘useful safe life’ of a product will be interpreted to be limited to 18 years to retain consistency with GARA. Christopher C McNatt, Jr and Steven L England, *The Push for Statutes of Repose in General Aviation*, 23 Transp. L.J. 323, 327-42 (1995).
155 49 U.S.C.A. Sections 41113 (US carriers), 41313 (foreign carriers) (West, Westlaw through P.L. 116–19); see also id. Section 1136 (NTSB responsibilities) (West, Westlaw through P.L. 116–19).
156 id., at Sections 41113(b)(1)-(3), 41313(c)(1)-(3).
157 id., at Sections 41113(b)(5)-(8), (10)-(12), 41313(c)(5)-(8), (10)-(12).
The DOT fined Asiana Airlines US$500,000 for failure to adhere to its family assistance plan following the crash of flight 214 at San Francisco International airport on 6 July 2013.\textsuperscript{158} The DOT faulted Asiana for delaying by one day the publicising of a telephone number for family members, for taking two days to contact only 75 per cent of passenger families, and for taking two days to send an adequate number of trained staff to San Francisco.\textsuperscript{159} The DOT stated the fine ‘establishes a strong deterrent to future similar unlawful practices’, despite practical concerns raised by Asiana, such as that the crash occurred on a US holiday weekend, when it was 3.30am in Korea, that passengers and particularly travel agencies did not provide next-of-kin contact information when booking, and that Asiana had only 12 representatives located at the San Francisco airport, which stopped operations after the crash.\textsuperscript{160}

IX DRONES

The FAA regulates drones or ‘unmanned aircraft systems’ (UAS) pursuant to congressional directives to ‘safely accelerate the integration of civil unmanned aircraft systems into the national airspace system’.\textsuperscript{161}

The FAA has promulgated regulations in phases, balancing demands of the burgeoning drone industry\textsuperscript{162} with safety concerns that pose risk to manned aircraft and persons and property on the ground.\textsuperscript{163} The Small UAS rules took effect in August 2016 and apply to UAS weighing less than 55 pounds.\textsuperscript{164} Absent a waiver, small UAS may be flown only in daytime hours and within 400 feet above the ground. The pilot must maintain visual line of sight with the UAS and may not fly near airports or in other restricted airspace. Small UAS operators must possess a remote pilot certificate and register the UAS with the FAA.\textsuperscript{165}

The ubiquitous nature of UAS has resulted in regulation at the state and local level.\textsuperscript{166} Overlapping federal and local regulation raises jurisdictional issues. The FAA takes the position that local ordinances may result in ‘fractionalized control of the navigable airspace’, which

\textsuperscript{161} FAA Modernization and Reform Act of 2012, PL 112-95, 14 February 2012, 126 Stat 11, Section 332(a)(1), codified at 49 U.S.C. Section 40101 note.
\textsuperscript{162} More than 1 million drones are registered with the FAA. U.S. Dept. of Transportation, Press Release, FAA Drone Registry Tops One Million (10 January 2018), available at https://www.transportation.gov/briefing-room/faq-drone-registry-tops-one-million (as of 17 May 2019).
\textsuperscript{163} Operation and Certification of Small Unmanned Aircraft Systems, 81 FR 42064-01.
\textsuperscript{164} 14 C.F.R. Section 107.3 (West 2019). Model aircraft flown strictly for hobby or recreational use are exempt from certain small UAS requirements. id., Sections 107.1, 101.41; Taylor v. Fed. Aviation Admin., 895 F.3d 56 (D.C. Cir. 2018).
\textsuperscript{165} 14 C.F.R. Sections 107.12, 107.13, 107.29, 107.31, 107.41, 107.43, 107.51 (West 2019). Deviations from these limitations may be authorised by obtaining a certificate of waiver from the FAA. id. Section 107.200.
\textsuperscript{166} See e.g. Cal. Civ. Code Section 1708.8 (West 2019) (expanding liability for physical invasion of privacy to knowing entry into the airspace above the land of another person without permission); Ark. Code Ann. § 5-60-103 (West 2019) (A person commits the offense of unlawful use of an unmanned aircraft system if
could ‘severely limit the flexibility of the FAA in controlling airspace and flight patterns.’

A federal court ruling in *Singer v. City of Newton* acknowledged the possibility of parallel regulations, and adopted ‘conflict pre-emption’ as the basis to determine the enforceability of local ordinances.

The FAA publishes reports of drone sightings near airports and manned aircraft and warns that such unauthorised operation is subject to fines and criminal charges. The NTSB determined that a drone’s collision with a US Army Black Hawk helicopter in 2017 was caused by the drone operator intentionally flying the drone out of visual sight.

### X VOLUNTARY REPORTING

The FAA established its most prominent voluntary and confidential reporting programme in 1975, known as the Aviation Safety Reporting Program, which is designed to encourage all users of the national air system to report incidents concerning aviation safety. To ensure anonymity, the programme is managed by the National Aeronautics and Space Administration, which states that no reporter’s identity has ever been breached in over 1 million submissions to date. The FAA is precluded by regulation from using reports in any enforcement action, except reports of accidents or criminal activity. A finding of violation may still occur, but a penalty will not be imposed if the report is made within 10 days following the violation, the reporter has not committed a violation in the preceding five years and the violation was not deliberate. The database containing reports is publicly available.

Congress enacted a whistle-blower protection act in 2000 known as AIR21 that prohibits discrimination against employees who report information relating to air carrier safety.

The programme applies to US air carriers and their contractors who perform

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173 14 C.F.R. Section 91.25 (West 2019).

174 FAA Advisory Circular 00-46E (16 December 2011); See *Nehez v. Nat’l Transp Safety Bd*, 30 F.3d 1165 (9th Cir. 1994) (pilot’s self-reported violation affirmed, but 30-day suspension of licence not imposed).

safety-sensitive functions.\textsuperscript{176} The FAA and Department of Labor’s Occupational Safety and Health Administration (OSHA) enforce the law and respectively address air safety and employment discrimination complaints.\textsuperscript{177} OSHA publishes data on the outcome of all whistle-blower complaints including AIR21 complaints.\textsuperscript{178}

\section*{XI  THE YEAR IN REVIEW}

Congress enacted the FAA Reauthorization Act of 2018, which continues to mandate accelerated integration of drone or UAS operations ‘into the low-altitude national airspace system.’\textsuperscript{179} The new law requires the FAA to update existing regulations by October 2019 to authorise small UAS carriage of property for compensation.\textsuperscript{180} The law also requires the FAA to authorise UAS manufacturers to ‘self-certify’ UAS compliance with ‘risk-based consensus safety standards’ relating to design and production of small UAS.\textsuperscript{181} The new law also exempts small UAS flown strictly for recreational purposes from FAA certification and operating authority.\textsuperscript{182}

The FAA Reauthorization Act of 2018 also addresses various passenger rights and requires among other things that the FAA issue regulations establishing minimum dimensions for passenger seats that are necessary for passenger safety.\textsuperscript{183} The Act also prohibits air carriers from denying a checked-in passenger permission to board, or involuntarily removing a passenger, once their boarding pass has been collected or scanned.\textsuperscript{184} The Act also requires any carrier with passenger seating of 30 or more seats to include a telephone number, email and mailing address on the carrier’s website for submission of complaints, as well as the

\textsuperscript{176} \cite{id, Section 42121(a), (e); Fact Sheet: Whistleblower Protection for Employees in the Aviation Industry, available at https://www.osha.gov/OshDoc/data_General_Facts/factsheet-whistleblower-aviation-industry.pdf (as of 16 May 2019).}


\textsuperscript{179} 49 U.S.C.A. Section 44802 (West, Westlaw through P.L. 116–19).

\textsuperscript{180} id. Section 44808. The FAA must consider the views of communities impacted by UAS package delivery in promulgating regulations. id. Subsection (b)(4)(D).

\textsuperscript{181} id. Section 44805.

\textsuperscript{182} id. Section 44809. The FAA announced in response that it will permit limited recreational operation in certain ‘fixed sites’ in controlled airspace, instead of reviewing requests on a case-by-case basis as under prior regulations, and that ‘in the future’ it will allow recreational flyers to obtain authorisation to fly in controlled airspace. News and Updates, FAA, FAA Highlights Changes for Recreational Drones (16 May 2019), available at https://www.faa.gov/news/updates/?newsId=93769.


address for the DOT Aviation Consumer Protection Agency. The Act also directs the Secretary of Transportation to require US carriers to submit a one-page summary describing passenger rights including compensation guidelines for flight delays, diversions, cancellations, mishandled baggage, overbooking and involuntary denial of boarding. The Act also directs the DOT to create an ‘Airline Passengers With Disabilities Bill Of Rights’, and to conduct rulemaking concerning service animals, including consideration of measures to ensure pets are not claimed as service animals.

A federal court addressed the Montreal Convention’s ‘fifth jurisdiction’ and determined that the airline must directly conduct business from US premises for an American passenger on a Malaysia-to-Cambodia flight to bring suit in the US. The court determined that the plaintiff must meet each element of the Convention’s Article 33(2), including that the ‘carrier conducts its business of carriage . . . from premises’ in the forum country. The court rejected arguments that Article 32(2) could be satisfied based on an affiliate carrier’s flights to the US, or based on the fact that the carrier’s website was accessible to American passengers.

A federal district court determined that the Montreal Convention’s two-year limitations period barred a passenger’s lawsuit, concluding that the claim of unjustified confinement did not extend beyond the passenger’s disembarkation process where the plaintiff alleged an airline employee unjustifiably held him on the aircraft and then walked him into the terminal 400 yards, where he was kept for 15 minutes before returning to the aircraft area.

American Airlines and Southwest Airlines settled class action antitrust lawsuits by passengers asserting that various large airlines conspired to fix prices by colluding to limit capacity. The plaintiffs alleged that the airlines carried out the conspiracy by airline executives who made repeated assurances beginning in 2009 that their companies were engaging in ‘capacity discipline’. American settled for US$45 million and Southwest settled for US$15 million. United Airlines and Delta Airlines continue to defend against the lawsuits.

Another product liability pre-emption ruling was issued in the long-running Sikkelee litigation, in which the plaintiff alleged that an engine design defect caused a crash. In 2016, an appellate court reversed a district court ruling that the claims were subject to field pre-emption, and remanded the case to the district court to consider conflict pre-emption. On remand, the district court ruled that the claims were subject to conflict pre-emption. The appellate court most recently reversed again, concluding the defendant failed to show

187 id.
189 id. at p. 7.
193 In re Domestic Airline Travel Antitrust Litig., footnote 191, above, 2019 WL 2082906, at pp. 2–3.
that it was impossible to simultaneously comply with federal regulations that certified one design and state law requiring a different design because the evidence showed that the FAA likely would have permitted a design change.\textsuperscript{196}

The FAA exercised its emergency power authority and issued an order grounding Boeing 737 Max aircraft.\textsuperscript{197} The order was in response to the recent crashes of aircraft operated by Lion Air and Ethiopian Airlines. The order prohibits the affected aircraft from being operated in the US and by US certified operators.

\section*{XII OUTLOOK}

In response to legislative directives, the FAA and DOT will conduct rulemaking proceedings on several topics, including minimum seat size on commercial airlines and standards governing service animals on board aircraft.\textsuperscript{198}

The FAA will continue promulgating rules designed to integrate drones into the national airspace. The agency is developing traffic management systems for drones, and has opened rulemaking to relax prohibitions on flying over people and at night.\textsuperscript{199} The FAA will also propose rules for marking drones with identification and for delivery of cargo.\textsuperscript{200}

Recent crashes of two Boeing 737 Max aircraft and the FAA's response have raised questions regarding the FAA's certification process and the agency's safety oversight generally. The DOT recently announced that the FAA plans to revamp its oversight process and approach by July 2019.\textsuperscript{201}

Federal pre-emption of state product liability laws remains hotly contested after the most recent decision in \textit{Sikkelee v. Precision Airmotive Corp}, which held that state tort law was not conflict pre-empted by FAA regulations where evidence suggests the FAA would have approved a design change consistent with state law requirements.\textsuperscript{202} A petition for US Supreme Court review has been filed in the case.

\textsuperscript{196} \textit{Sikkelee v. Precision Airmotive Corp.}, 907 F.3d 701, 714 (3d Cir. 2018).
\textsuperscript{202} \textit{Sikkelee v. AVCO Corp.}, footnote 195, above.
Appendix 1

ABOUT THE AUTHORS

DIETER ALTENBURGER
Jarolim Partner Rechtsanwälte GmbH

Dr Dieter Altenburger, MSc is partner of Jarolim Partner Rechtsanwälte GmbH. He graduated from the University of Vienna in 2000 and obtained his law doctorate in 2004. In addition, he acquired a Master of Science degree in environmental management in 2006.

Dr Dieter Altenburger has been intensively engaged with aviation law for many years and is considered an established expert in this area. His expertise has been highlighted by numerous awards and top rankings. He counsels and represents numerous airlines in all affairs.

Dr Dieter Altenburger has also been devoted to public law for many years, and published numerous reference books and articles. He is not only well acquainted with civil litigation, but also with administrative proceedings. This constitutes a crucial advantage, in terms of the numerous administrative challenges that an air carrier has to face and the close linkage of both fields of law in the aviation sector.

GUILHERME AMARAL
ASBZ Advogados

Guilherme is the head of the firm’s aviation practice and is recognised by Chambers Latin America and The Legal 500 Latin America. He is also recognised as a distinguished lawyer in the aviation sector by the legal Brazilian publication Anuário Análise Advocacia 500. He actively participates in discussions regarding this sector in governmental and private forums in Brazil and abroad. He graduated as Bachelor of Laws at Pontifical Catholic University of São Paulo (PUC-SP) and has been assisting Brazilian and international clients on regulatory and litigation matters for more than 15 years.

ALVIN AMBARDY
Assegaf Hamzah & Partners

Alvin Ambardy is a senior associate at Assegaf Hamzah & Partners. As a member of the firm’s alternative disputes resolution (ADR) and court litigation practice group, his practice area focuses on domestic and international arbitrations under SIAC and UNCITRAL rules. He has particular experience in defending clients against annulment petitions and setting aside arbitration awards before Indonesian courts.
Alvin regularly acts as counsel for clients in aviation matters, both for operators and consumers. He also extends his expertise in advising clients on government contracts and compliance with the Indonesian anti-corruption and anti-money laundering laws. He is frequently involved in the dissemination of legislation, including the recent Indonesian government regulation that requires the reporting of money laundering by practising lawyers and the Indonesian presidential regulation on the disclosure of the ultimate beneficial owner in Indonesian companies.

ANGELAATHERDEN
Conyers
Angela Atherden is counsel in the corporate department in the Bermuda office of Conyers. Her practice covers all aspects of corporate and commercial law, including international asset finance with a focus on aviation finance and debt and equity offerings. Angela is the co-author of the Bermuda chapter of Aircraft Finance (Sweet & Maxwell, 2018 and 2019). Angela has extensive experience advising banks, airlines and leasing companies in connection with financing of commercial and private aircraft, aircraft portfolio securitisations, sale-leasebacks, pre-delivery payment and warehouse facilities, and has worked on several of the most significant aircraft securitisations and financings in the market.

TAREKBADAWY
ShahidLawFirm
Tarek Badawy is a partner in Shahid Law’s international business and dispute resolution groups, and heads the firm’s international trade, and aviation, shipping and transportation teams. He is a licensed barrister and solicitor (Ontario, non-practising) and a member of the Egyptian Bar Association.

Tarek represents clients in trade, commercial and investor-state disputes, and advises clients on transactional and compliance matters, notably in the following industries: aviation, shipping and transportation; banking and finance; energy, oil and gas; insurance and financial services; pharmaceuticals; and TMT. He also sits as an arbitrator, and regularly serves as an expert on Egyptian law before foreign courts and international arbitral tribunals.

In addition, Tarek advises lenders and borrowers in finance transactions, and has particular experience in project and aircraft financing deals. His expertise in banking and finance has been commended by The Legal 500 (banking and finance, 2016 to 2019) among other things. He has degrees from the American University in Cairo (BA), Cairo University (LLB), Essex University (LLM), and McGill University (BCL/LLB).

OMOBOLABAKARE
F O Akinrele & Co
Omobola is an associate in the firm’s aviation and transport law group. She also works in the firm’s corporate and infrastructure group which gives support on a transactional basis to the aviation and transport law group. She has advised on corporate and aviation matters.

She has an LLB (2015) and LLM (2016) from Coventry University, United Kingdom. She was admitted to the Nigerian Bar in 2018.
LLEWELLYN V BOYER-CARTWRIGHT
Callenders & Co

Llewellyn Boyer-Cartwright is a partner in Callenders & Co, the Bahamas’ oldest law firm.

He is a former commercial airline pilot who combines a passion for aviation with advanced legal training and specialises in aviation law. The first Bahamas member of the Lawyer-Pilots Bar Association, he was appointed to serve on the Bahamas Ministry of Transport and Aviation Consultative Committee, created to determine the feasibility of enhancing the Bahamas’ Aircraft Registry. In 2013, in a country of more than 1,000 attorneys, he was the sole private practice lawyer nominated for Bahamas Financial Services Board Excellence Award. Mr Boyer-Cartwright was the leading proponent for the establishment of a competitive international aircraft registry and is currently a member of the consultative committee appointed by the Minister of Tourism and Aviation for the implementation of the enhancement of the Bahamas’ current aircraft registry.

Mr Boyer-Cartwright is the chairman of the National Aviation Policy Working Group.


He has presented to the American Professional Sleep Societies on assessing fatigue in commercial airline pilots, and to several symposia and workshops on aircraft registries including meetings in Malta, Frankfurt, Grand Cayman, Aruba, Florida and the Bahamas.

CHEW PHYE KEAT
Raja, Darryl & Loh

Phye Keat has been with the firm since 1987. He has a Bachelor of Laws (Honours) and a Master of Laws from the University of Malaya. He is a senior partner of the firm with a focus on intellectual property and technology, as well as generally on corporate and commercial matters. Recently, Phye Keat has been handling matters relating to competition law and the personal data protection act. He was also part of the consultation group interacting with the Malaysian government on the drafting of the Competition Bill. The Competition Act subsequently came into force on 1 January 2012. From the second half of 2011 onwards, Phye Keat has been very active in helping various clients become compliant with the Competition Act by giving seminars and training sessions to create awareness of the impact of competition law on business; giving specific advice on various transactions and agreements from a competition law standpoint; undertaking competition law audits for companies; drafting guidelines on competition law for company manuals, handbooks or codes of conduct; and generally assisting companies with their competition law compliance programmes.

CHONG KOK SENG
Raja, Darryl & Loh

Kok Seng is the firm’s specialist in aviation law, having acted for major airlines, aircraft lessors and banks or collateral agents or security trustees in advising on local laws in relation to the sale and purchase, lease or financing and securitisation of aircraft. Kok Seng obtained his bachelor’s degree in law from the University of London in the United Kingdom in 2001 and subsequently sat for and obtained the Certificate in Legal Practice from the Malaysian
Qualifying Board. He was called to the Peninsular Malaysian Bar in November 2003 after having read in chambers with the firm. Kok Seng joined the ranks of the partners on 1 March 2011.

CHRISTOS CLERIDES

Phoebus, Christos Clerides & Associates LLC

Dr Christos Clerides got his LLB (Hons) from Brunel University, Uxbridge having been awarded first prize for the best examination performance in 1976. In 1977 he received his LLM specialising in maritime law, carriage of goods by sea, marine insurance and general insurance from University College London. His performance made him eligible for scholarship. In 1981 he was awarded his PhD at King’s College London, specialising in EEC law. For his PhD at KCL he worked under the supervision of Professor A Chloros, later the Greek judge of the European Court of Justice, and Professor Francis Jacobs, later Advocate General of the European Court of Justice in Luxembourg.

He worked in England as part of his LLB (Hons) ‘sandwich’ course with CITY Solicitors, Barlow, Lyde and Gilbert, under the supervision of the late President of the Law Society, Sir Denis Marshall. He was called to the Cyprus Bar in 1982. He is a practising advocate and has been head of the Nicosia offices since 1982.

Dr Clerides has handled numerous cases before the Supreme Court of Cyprus. He also practises in the European Court of Human Rights in Strasbourg. He was a co-founder with Judge of the European Court of Human Rights in Strasbourg, L Loucaides, of the International Association for the Protection of Human Rights in Cyprus in 1999.

He served as Honorary President and President of the Association. He was Deputy Chairman of the New Horizons Party and elected Member of House of Representatives of the Nicosia District 2001–2006 and Deputy elected in 2006–2011 with the European Party.

He was a member of the National Council, the highest authority advising the President of the Republic on the Cyprus problem up to December 2004.

He served in the Human Rights Committee, the European Law Committee and the Legal Affairs Committee of the House of Representatives. He has tabled numerous laws and questions to Ministers in the House and has participated in numerous official delegations on behalf of the House of Representatives. He served in the Assembly of the Western European Union and its Committees in Paris as a member of the Cyprus team.

He also attended numerous meetings of the Mediterranean dialogue of the NATO Assembly. He has written numerous studies and articles in legal affairs magazines and in the local press. He served as a member of the Family Law Reform Committee 1983–1986 the report of which was adopted in substance culminating in the amendment of the Cyprus Constitution and the introduction of the New Family Law in Cyprus, abolishing the exclusive jurisdiction of the Ecclesiastical Court, in matters of divorce.

He has participated and organised numerous human rights conferences and meetings in Cyprus.

He is head of the law department at Frederick University, where he has taught since 2012. Dr Clerides was recently elected as a Professor of European and Civil Law at the university.

He has written three published legal books since 2017 with the titles *Advocacy in Cyprus*, *The Cyprus Legal System* and *Evidence Law in Cyprus*.
JAKOB DAHL MIKKELSEN
*Kromann Reumert*

Jakob Dahl Mikkelsen became an associate with Kromann Reumert in 2006, was admitted to the Danish Bar in 2011 and was given right of audience before the High Courts in 2014. In 2018, he became a senior attorney at Kromann Reumert. Jakob specialises in insurance and tort law, aviation law and general procedural law, and advises and represents clients in legal proceedings before the Danish courts as well as in arbitration proceedings. Jakob Dahl Mikkelsen has extensive experience with cases concerning Regulation 261/2004.

RALUCA DANES
*Iordache Partners*

Raluca Danes is a senior lawyer specialised in commercial law, with a focus on international contracts and international arbitration.

DIMITRI DE BOURNONVILLE
*Kennedys Brussels LLP*

Dimitri de Bournonville is a partner at Kennedys and heads its Brussels office.

   Dimitri is an attorney at the Brussels Bar, with close to 25 years of experience in aircraft purchase, finance and operating leases and commercial transactions in relation to aircraft and aviation activities, both cargo and passenger-related. Dimitri also assists airlines and other organisations in the aviation sector with regulatory matters, particularly in matters concerning the European Union. Before joining Kennedys, Dimitri was a partner in the niche global aviation firm of Gates and Partners LLP in Brussels and also held the position of legal and insurance director of the TNT Express group. Before that, he was an attorney in Brussels and Paris with Wilkie Farr & Gallagher. Dimitri possesses significant expertise in the general transportation, logistics and supply chain sectors. He is one of the ‘Leading Individuals’ in the aviation sector, according to all the latest editions of *The Legal 500* and *Who’s Who Legal*. Dimitri was a lecturer at Brussels University from 1997 to 2004 for the courses of Introduction to Private Law and Commercial Law. Dimitri graduated from Brussels University (1994, *magna cum laude*) and holds an LLM in commercial and corporate law from King’s College London (1995).

AZRA DIZDAREVIC
*Jarolim Partner Rechtsanwälte GmbH*

Azra Dizdarevic, LLM is an associate at Jarolim Partner Rechtsanwälte GmbH. She graduated from the University of Vienna in 2012 and obtained her LLM degree at Queen Mary University of London in 2015.

   Azra specialises in the field of aviation law, especially air passenger rights, and public law. Moreover, she has acquired valuable litigation expertise in the past years.

EYAL DORON
*S Horowitz & Co*

Eyal Doron is co-chair of the firm’s aviation and transport practice group. He is a commercial litigator with extensive experience acting for international and domestic clients on a broad
range of civil, contractual and commercial matters before the entire range of Israeli courts. His clients include large airlines and major players in the aviation field, financial institutions, universities, high-tech companies and other commercial corporations.

Mr Doron is experienced in representing global companies on cross-border high-value and multi-party claims, and accrued significant experience in the complexities of private international law including in relation to areas such as banking, inheritance and foreign philanthropic law, breakdowns in agency and distribution agreements, and insolvency.

Mr Doron was the recipient of the prestigious Pegasus Scholarship of 1999, a full-board scholarship awarded to outstanding law students worldwide for master's degree studies at Oxford University. He has had practical training with a City of London law firm and a barrister. He gained his Bachelor of Civil Law degree from Worcester College, Oxford University, as well as Bachelor and Master of Law degrees, magna cum laude, from Tel Aviv University.

He is licensed to practise law in Israel and in New York, and was certified pursuant to the IATA International Air Law For Lawyers training.

WANDA EBANKS
Maples Group
Wanda Ebanks is a partner with Maples Group in the Cayman Islands. She is a member of the finance team, where she specialises in repackaging and structured finance transactions. Her area of practice includes general corporate and commercial matters, ship and aircraft finance and registration, licensing and equity formation, as well as local licensing and operations. Wanda also has experience working with export credit agencies in Europe and Latin America, and with airlines globally in the set-up and operation of Cayman Islands special purpose vehicles to participate in aircraft lease financing transactions.

BARNABAS FINNIGAN
Maples Group
Barnabas Finnigan is an associate in the finance team at Maples Group in the Cayman Islands. He has extensive experience in structured, project and asset finance transactions, with a particular emphasis on aircraft and ship finance transactions, repackaging transactions and securitisation platforms. Barnabas regularly acts for airlines, aircraft and ship financing banks and aircraft lessors, and has advised the Issuer vehicles in a number of recent aircraft ABS securitisation transactions.

GARRETT J FITZPATRICK
Fitzpatrick & Hunt, Pagano, Aubert, LLP
Gary is the managing partner of Fitzpatrick & Hunt, Pagano, Aubert, LLP and has been practising in the areas of product liability and aviation law for over 35 years, representing various companies all over the world. Gary is lead defence counsel for his clients in claims and complex litigation arising from major airline catastrophes, military crashes and general aviation accidents.
His expertise in product liability played an instrumental role in creating and adopting the ‘government contractor defence’ in military defence litigation. One of his cases for a major defence contractor was the first to uphold this defence at the Federal Appellate Court level, and was subsequently adopted by the US Supreme Court.

Gary serves as the legal head of the Aircraft Builders Council Program, which is one of the longest-running aviation product insurance programmes anywhere in the world. In addition to handling the defence of claims and litigation of the numerous diversified companies insured under this programme, he has been instrumental in providing a variety of claims prevention services to these companies, including product liability seminars. For companies manufacturing various commercial product lines, these seminars also cover important related subjects including active product integrity programmes; contractual reviews; document management; post-sale responsibilities and warnings and other preventative measures. These seminars are conducted at each company’s facilities across the United States as well as abroad.

Gary has also lectured on product liability and aviation law at various legal and insurance conferences, and is the author of articles published in both legal and insurance journals and periodicals.

GAO FENG

*Grandall Law Firm (Beijing)*

Gao Feng is a senior partner at Grandall Law Firm (Beijing). He completed his undergraduate degree in law at Shandong University, his master’s degree in international economic law at Dalian Maritime University, and has been in the law profession for over 20 years. He is a permanent member of council and a researcher in aviation legal studies for the China Law Society, and a researcher of aviation law at the research centre in the China University of Political Science and Law, Beijing. He is a visiting professor at the Civil Aviation Management College of China and China Civil Aviation University. He is also an arbitrator in the Beijing Arbitration Commission and Shanghai International Arbitration Center. He specialises in civil aviation law, corporate restructuring and other related fields.

Gao Feng used to work with China North Airlines, where he was in charge of legal affairs of the company, and established and maintained good relationships with civil aviation authorities. This has allowed him to accumulate enriching experiences. The comprehensiveness of Gao Feng’s understanding of the civil aviation industry and extensive knowledge in aviation enable him to resolve the most complex legal issues for clients. Enjoying close relationships with many respected industry bodies, Gao Feng has maintained his understanding of laws and regulations, potential threats and best practices, and been able to advise clients on probable future developments.

MARIA PIA GARCIA HENRIQUEZ

*Squire Patton Boggs Peña Prieto Gamundi*

Maria Pia Garcia focuses her practice on corporate law, mergers and acquisitions, intellectual property, contracts, regulatory matters and civil aviation. Maria Pia represents multinational clients regarding the structuring and reorganisation of their business interests and investments in the Dominican Republic, and assists sellers and purchasers in mergers and acquisitions of business entities and assets. Maria Pia also assists clients in creating and implementing corporate structures.
Maria Pia obtained her LLM in civil law (Panthéon-Assas, Paris II) and a master's degree in administrative law and economic regulation (Pontificia Universidad Católica Madre y Maestra, Santo Domingo). Maria Pia is a native Spanish speaker. She is also fluent in French and English.

SEAN GATES
Gates Aviation Ltd
Mr Gates is an aviation lawyer whose clients include airlines, airports, ground handlers, financiers, manufacturers and their insurers. He has been involved in more than 50 international aviation disasters through his career. He was senior partner of the leading aviation law firm Beaumont and Son before founding Gates and Partners, which employed 60 lawyers specialising in various aspects of aviation law, with offices in five jurisdictions worldwide.

From 1998 to 2013, Mr Gates was the legal adviser to the International Union of Aviation Insurers (IUAI) representing it at the diplomatic conferences resulting in the Montreal Conventions of 1999 regarding passenger liability and 2013 in respect of surface damage and the meetings discussing changes to the Tokyo Convention on Offences Committed on Board Aircraft 1963.

Mr Gates is CEO of Gates Aviation Ltd specialising in risk, disaster, dispute resolution and safety management. He is also senior vice president of legal affairs at Kenyon International Emergency Services, legal adviser of the European Regions Airlines Association, a member of the legal advisory committee of the Flight Safety Foundation, and an arbitrator registered with the London Centre for International Arbitration and the Shanghai Dispute Resolution Centre. In his spare time Mr Gates is also director of Latimer Vintners Ltd and enthusiastic amateur oenophile.

ANA LUISA GONDAR
Gondar & Asociados
Ana Luisa Gondar is a legal counsel and attorney, and founder of Gondar & Asociados. She graduated from the University of Buenos Aires and was admitted to the Bar Association of the City of Buenos Aires. She is a member of the legal committee of the Argentine Board of Air Carrier Representatives.

ALBERTINE GUEZ
Squire Patton Boggs
Albertine Guez is an associate within the internal dispute resolution team of Squire Patton Boggs’ Paris office. Her legal practice focuses primarily on aviation, life sciences, insurance and litigation, advising on proceedings, pre-litigation stages and on out-of-court settlements.

Albertine graduated from Paris X Nanterre University (master's degree in French and Anglo-American law) and holds a Juris Doctor from American University Washington College of Law.

Albertine was admitted to the New York bar in 2017 and to the Paris bar in 2018. Prior to joining Squire Patton Boggs, Albertine worked as in-house counsel for a food distributor in the United States.
JESS HARMAN  
*Clyde & Co LLP*

Jess Harman is an associate at Clyde & Co LLP working on aviation-related regulatory, commercial and litigation matters. She is currently completing an advanced master’s degree (LLM) in air and space law at Leiden University alongside her work at Clyde & Co. Jess has experience in non-contentious and contentious work in aviation law matters in the UK and Australia.

HEINRICH HEMPEL  
*Schiller Rechtsanwälte AG*

Heinrich Hempel is a partner at Schiller Rechtsanwälte. Over the past decades, Schiller Rechtsanwälte has been involved in all major cases of accidents affecting Swiss airlines or passengers. Heinrich Hempel has practised aviation law since he joined Schiller Rechtsanwälte. He advises international and national airlines and insurers, as well as airports and other clients in the field of aviation on cases including liability and regulatory matters. He represents these clients in civil as well as in administrative and criminal proceedings.

Heinrich Hempel graduated from Zurich University in 1987 and obtained a doctorate degree from Zurich University in 1991 and an LLM from Columbia Law School, New York in 1996. He was admitted to the Bar in 1993. He was a clerk at the District Court of Bülach, joined Schiller Rechtsanwälte in 1993 and became a partner in 1997.

Heinrich Hempel also practices general contract and commercial law. He lectures on aviation law at the Zurich University of Applied Sciences and is the author of a number of aviation-related articles in various publications, including the *Cologne Compendium on Air Law in Europe*. He is also an author of the Basel Commentary on the Civil Procedure Code, for which he wrote on the jurisdiction for tort claims. He is president of the Swiss Aviation and Space Law Association.

ERI HERTIAWAN  
*Assegaf Hamzah & Partners*

As a senior partner and co-head of the alternative dispute resolution (ADR) and court litigation practice group at Assegaf Hamzah & Partners, Eri Hertiawan is a seasoned litigator and arbitration specialist with extensive experience in commercial disputes in the aviation, real estate, shipping and energy sectors. He is certified as an accredited mediator by the Indonesian National Mediation Centre (Pusat Mediasi Nasional) and the Centre for Effective Dispute Resolution (CEDR) in the United Kingdom. In addition, he is a member of the Chartered Institute of Arbitrators and the SIAC Users Council. Most recently, Eri was appointed as a member of SIAC’s Court of Arbitration. He is the first Indonesian advocate ever appointed by SIAC.

As an all-round litigator, Eri has practical, hands-on experience of advising and defending clients throughout the aviation community. His clients include Indonesia’s national flag carrier, Garuda Indonesia, AirAsia and various state airport operators. He also regularly works on high-profile tort, corporate/banking, antitrust and criminal cases.

Eri is consistently recommended and ranked by various legal publications as a highly regarded practitioner. *The Legal 500* describes him as ‘having extensive experience in ADR’, while *Chambers and Partners* states that Eri is ‘an expert who is very informative and detailed’.
in providing information’. He has continuously been named as a ‘Dispute Resolution Star’ by Benchmark Litigation since 2013, and a ‘Market-Leading Lawyer’ for dispute resolution by Asialaw since 2011.

JAMES W HUNT
Fitzpatrick & Hunt, Pagano, Aubert, LLP

After college, Jim proudly served for three years in the US Army as an artillery officer and helicopter pilot before attending law school. He practised for several years with a criminal defence firm, and for the past 35 years has specialised in litigating civil cases. Jim has been lead counsel in numerous large and complex lawsuits, including both multi-district and class-action cases, in a variety of state and federal trial courts, as well as in the context of private alternative dispute resolution. He has also argued numerous cases before both state and federal appellate courts.

Jim’s experience as a litigator has involved many interesting legal questions pertaining to treaties and international law, and the regulatory, tort, contract and criminal law of the United States, numerous states and many foreign jurisdictions. The subject matter of these cases often related to complex scientific and engineering issues arising in the context of mass disasters involving transportation accidents, fires, explosions and other mishaps, as well as disputes pertaining to contractual intent and alleged bad faith or fraud.

Jim is a frequent lecturer at legal seminars and his advice is sought by many clients on issues related to loss prevention, contractual protections and litigation. He has been an instructor on legal subjects at the USC Aviation Safety Course. Jim has been designated as an Outstanding Advocate by the Public Council Law Center Children’s Rights Project and has been rated AV for many years by Martindale Hubbell.

Jim is admitted to practise in the state and federal courts of New Jersey, New York and California, numerous appellate courts and the United States Supreme Court.

ADRIAN IORDACHE
Iordache Partners

Adrian Iordache is an international lawyer with particular interests in business law, commercial disputes and international arbitration, as well as aviation law. Adrian is admitted to practise in England and Wales (solicitor), New York, Bucharest and the District of Columbia. He is a fellow of the Chartered Institute of Arbitrators and ASA member and is a listed practitioner of the BIAC – Bucharest International Arbitration Court (www.bucharestarbitration.org), LCIA and DELOS Arbitrator Network (Paris).

MARK R IRVINE
Fitzpatrick & Hunt, Pagano, Aubert, LLP

Mark is a partner in the firm’s Los Angeles office. Mark’s previous work as a Court Attorney in both the California State Court of Appeal and the California Superior Court gives him a unique background for his practice, which emphasises appellate and civil law and motion proceedings. Mark has extensive experience handling a wide range of litigation matters in both state and federal courts, in areas of product liability, aviation, toxic torts, premises liability, insurance coverage and bad faith, e-discovery and public entity liability. His insurance
experience involves general and professional liability, first-party property and primary/excess. Mark also provides advice to corporate clients on contractual indemnity issues, and handles amicus briefing.

Representative cases include obtaining summary judgment for a military defence contractor, which was affirmed on appeal in a published opinion; defence of a successor product manufacturer resulting in a favourable published appellate opinion; defence of a multimillion-dollar attorney-fee claim under a private attorney general theory; obtaining summary judgment for a professional liability insurer against a claim for defence costs, which was affirmed on appeal; and an administrative challenge to the National Transportation Safety Board, resulting in reversal of an adverse probable cause finding.

While attending Pacific McGeorge School of Law, Mark served as articles editor of the *Pacific Law Journal*.

**TOMOHIKO KAMIMURA**
*Squire Gaikokuho Kyodo Jigyo Horitsu Jimusho*

Tomohiko Kamimura is an attorney at Squire Gaikokuho Kyodo Jigyo Horitsu Jimusho (the Tokyo office of Squire Patton Boggs). His practice focuses on aviation, aircraft finance, banking and finance and cross-border commercial transactions. Mr Kamimura has represented a range of Japanese and foreign airlines on regulatory, aviation finance, M&A and investigation matters. In aircraft financing, he has represented banks, leasing companies and equity investors, in addition to airlines. Mr Kamimura is admitted to practise in Japan and in New York and is a member of Japan’s Daini Tokyo Bar Association. He is a native speaker of Japanese and is fluent in English.

**MIKI KAMIYA**
*Squire Gaikokuho Kyodo Jigyo Horitsu Jimusho*

Miki Kamiya is an attorney at Squire Gaikokuho Kyodo Jigyo Horitsu Jimusho (the Tokyo office of Squire Patton Boggs). Her practice focuses on various corporate and regulatory matters including aviation, aircraft finance, M&A, and domestic and international transactions. Ms Kamiya has assisted airlines, air charter companies and banks in addition to the other business companies. Ms Kamiya is admitted to practise in Japan and is a member of Japan’s Daiichi Tokyo Bar Association.

**HUGH KOW ARSKY**
*S Horowitz & Co*

Hugh Kowarsky is co-chair of the firm’s aviation and transport practice group. He has vast transactional and litigation experience, spanning aviation law, intellectual property, investment banking and financial services, securities law, mergers and acquisitions and corporate law.

Hugh advises airlines, global courier companies, trade associations, global distribution transport ticketing system operators, insurance companies and shippers on all legal, regulatory and contractual issues affecting the transport and aviation industry. His clients include major players in the aviation and transportation industry.
Ranked in the first tier of Chambers Global’s transportation category, Hugh has been described by Chambers as ‘one of the best’ and ‘totally dedicated to aviation and very respected’. His work in the field has been recognised as being ‘very impressive, intelligent, and professional’ (The Legal 500).

Mr Kowarsky is a graduate of the University of the Witwatersrand, South Africa and of Magdalen College, Oxford. He has served as the honorary legal adviser to the British ambassadors in Israel for more than 40 years and was awarded the OBE in recognition of legal services rendered to the United Kingdom.

ROBERT LAWSON QC

Clyde & Co LLP

Robert Lawson QC is a partner of Clyde & Co LLP and chair of its aviation global practice group. His practice covers all aspects of aviation-related liability, regulation and contentious commercial work. Before joining Clyde & Co in February 2017, Robert spent 26 years in independent practice at the English Bar, during which time his work focused upon the world of, and law relating to, aviation. He obtained the rank of Queen’s Counsel in 2009 and is a fellow of the Royal Aeronautical Society. For further details, see www.clydeco.com/people/profile/rob-lawson-qc.

SHARI MCFIELD

Maples Group

Shari McField is of counsel in the finance team at Maples Group in the Cayman Islands. She has extensive experience advising on asset finance transactions with an emphasis on aircraft financing and leasing transactions, including transactions with a capital markets or Islamic element, aircraft registrations, vessel financing and registrations, and general corporate commercial matters. She principally advises commercial banks, financial institutions, European export credit agencies, airlines and aircraft lessors.

JULIE MCLEAN

Conyers

Julie McLean is a director in the Bermuda office of Conyers and is global head of the aviation finance team. Her practice covers asset finance with particular focus on aircraft finance and registrations, as well as investment funds with particular focus on partnerships and private equity. Julie advises investment banks, airlines, leasing companies and investment managers.

Julie regularly contributes to industry publications and is the author of the Bermuda chapter of Aircraft Finance (Sweet & Maxwell) and the co-author, Bermuda chapter of Aircraft Liens and Detention Rights (Sweet & Maxwell). Julie works closely with the Bermuda Civil Aviation Authority and was a leading participant in the industry group considering the Cape Town Convention’s extension to Bermuda by the United Kingdom, which took effect on 1 January 2018.

She is recognised as a leader in her industry by The Legal 500 Caribbean (corporate and commercial), Who’s Who Legal (aviation/transport), IFLR1000 and the Expert Guides: Women in Business Law (aviation).
**DANIEL MARITZ**  
*Schiller Rechtsanwälte AG*  
Daniel Maritz is a partner at Schiller Rechtsanwälte. As a certified specialist by the Swiss Bar Association in torts and insurance law, he has specialised in all aspects of liability and insurance law, including social security law. He advises national and international insurers and aircraft operators, and represents his clients before courts and governmental bodies.

Daniel Maritz graduated from the University of St Gallen Law School in 1988. He was admitted to the Bar in Switzerland in 1992. He obtained a Master of Laws (LLM) from the Vrije Universiteit Brussel in Brussels, Belgium in 1993. He has worked as clerk to a judge at the Zurich Court of Commerce and as a legal adviser in the Integration Office of the Federal Department of Foreign Affairs and of the Department of Economics (relations between Switzerland and the EU).

Daniel Maritz also practises general contract and commercial law. He has published in the fields of aviation law, liability and insurance law, and general commercial law. He is president of the Zurich Bar Association.

**RHINA MARIELLE MARTÍNEZ BREA**  
*Squire Patton Boggs Peña Prieto Gamundi*  
Ms Martínez focuses her practice on corporate, lending, banking and securities, civil aviation, and real estate matters. She advises and assists clients with the drafting and negotiation of a variety of contracts including joint venture, shareholder, stock purchase, escrow, services, aircraft lease and mortgage, consulting, stock pledge and chattel mortgage agreements. Ms Martínez also provides legal advice to non-Dominican and Dominican corporate clients, including US and European banks, in the structuring, implementing and securing of international financial transactions.

Rhina is a member of the Dominican Bar Association and of the Bar Association of Madrid.

Ms Martínez has more than 18 years of experience in the aviation field, including the structuring, implementing and securing of aircraft sales, financing, leases, and advice on obtaining necessary permits and authorisations from the Dominican Republic civil aviation authorities, as well as the rendering of general advice on regulatory, corporate, tax, contractual and labour matters to foreign and national air carriers.

**ANNA MASUTTI**  
*LS Lexjus Sinacta*  
Anna Masutti is head of the department of aviation and aerospace. Her experience includes the drafting of contracts for the aviation sector, in particular purchase, sale, leasing (wet or dry lease) aircraft and helicopters and related financial transactions and warranty. Her practice focuses on advising and representing business enterprises and public institutions and she regularly advises on a wide variety of regulatory matters concerning aerospace industries, airlines and airports and assists clients on aviation litigation before both Italian and international courts.

She is currently very active in the implementation of the Single European Sky and SESAR programmes. She frequently contributes to projects on the SES and she is a partner of the following: SWIM-SUIT (System-Wide Information Management Supported by
Innovative Technologies) with SELEX Sistemi Integrati, a Finmeccanica Company; ALIAS, Assessing Liability Issues of Automated Systems (ALIAS) with Eurocontrol and SESAR JU, ULTRA project ‘Unmanned Aerial Systems in European Airspace’ promoted by Indra Sistemas SA.

She is on the board of EALA (European Air Law Association), a board member of IBAA (Italian Business Aviation Association) and member of the Executive Committee of CESMA (Centre for Aeronautical Military Studies). In addition, Professor Anna Masutti is editor of The Aviation and Space Journal, and the Italian representative on the international panel of Air and Space Law. Furthermore, she is member of the Aviation Committee of the IBA (International Bar Association).

RENAN MELO
ASBZ Advogados

Renan Melo is a lawyer in the civil area, with more than four years of experience working with aeronautical, civil and consumer law. His performance stands out in the fulfilment of demands involving civil aviation in the consumer, regulatory, administrative, civil and advisory areas. He graduated from Pontifical Catholic University of São Paulo (PUC-SP) with a study period at the University of Coimbra, Portugal, in 2012; has a postgraduate degree specialising in contractual law from the Pontifical Catholic University of São Paulo, 2015; completed postgraduate studies in international law at the Paulista School of Law (EPD); and is studying for a master’s degree in philosophy of law from the Pontifical Catholic University of São Paulo (PUC-SP) and a doctorate in civil law from the University of Buenos Aires (UBA).

FRED MOGOTU
Anjarwalla & Khanna LLP

Fred Mogotu is an associate in the real estate and finance department of Anjarwalla & Khanna and for the past two years he has practised in the aviation section of the corporate department of the firm. His practice focuses on finance and property work, aircraft transfer, aircraft leasing and aircraft financing. Fred holds an LLB from the University of Nairobi and is an advocate of the High Court of Kenya.

ANDREA NICOLAOU
Phoebus, Christos Clerides & Associates LLC

Andrea got her LLB (Hons) from the University of Leicester in 2014, with first class honours. She was awarded a prize from the university’s school of law for the best overall final year performance. In 2015 she was awarded her LLM specialising in human rights law with distinction from University College London. She was admitted to the Cyprus Bar Association in 2016. She has been working as an advocate since then, appearing before the Cyprus courts. Andrea has been an assistant lecturer to Dr Christos Clerides since 2017 at the law department of Frederick University in Nicosia and has also conducted legal research for the purposes of publishing Dr Clerides’ three published legal books.
ANTHONY NKADI  
*FO Akinrele & Co*

Anthony is a senior associate in the transport law, energy and resources law group of the firm. His work covers the key range of core practice areas within the firm’s transport law, energy and resources law group.

He has worked extensively with local and international clients in diverse transactions, and has worked on the reviewing and redrafting of various aviation regulations, agreements and documentation. He has rendered legal advice and opinions on many aspects of aviation law and treaties, and has been extensively involved in the settlement of aviation claims and financing issues in relation to aircraft leasing and regulatory compliance. He is well versed in review of contract and bidding documentation and licensing. He has also dealt extensively with regulatory authorities in the industry.

Anthony has an LLB Hons from the University of Benin (1999) and an LLM from the University of Lagos. He was admitted to the Nigerian Bar in 2002.

KEMI OLUWAGBEMIRO  
*FO Akinrele & Co*

Kemi is an associate in the firm’s aviation and transport law group. She also works in the firm’s corporate and infrastructure group, which gives support on a transactional basis to the aviation and transport law group. She has advised on PPPs, and is versed in aircraft financing (purchasing, leasing, mortgages), review of aviation-related contracts, and licensing and deregistration of aircraft and airframes. She has also aided local and international air carriers in navigating the legal and regulatory framework for operating in the Nigerian aviation sector.

She has an LLB from the University of Lagos (2010–2015) and was admitted to the Nigerian Bar in 2016.

GORAN PETROVIĆ  
*SMATSA ANS Personnel Training Centre and SMATSA Aviation Academy*

Goran Petrović is a lawyer and lecturer of aviation law at SMATSA ANS Personnel Training Centre and SMATSA Aviation Academy. The primary fields of practice that Goran covers are aviation law, telecommunication law and labour law. He is the author of textbooks in aviation law for the training of air traffic controllers, air traffic safety electronic personnel and meteorological staff in air traffic control. He has also published several professional papers. Goran is very experienced in public international air law, international organisations, especially the ICAO, personnel licensing, providing air navigation services and cross-border service, IFATSEA, ATCEUC, Air Traffic Control Union and SRBATSEPA are organisations in which Goran is very active. He is also a member of the EALA-European Air Law Association. Goran is a native speaker of Serbian and is fluent in English.

AUDREY M ROBERTSON  
*Conyers*

Audrey M Robertson is a counsel in the corporate department of Conyers in the British Virgin Islands.

Audrey’s practice covers general corporate and commercial matters with particular focus on public offerings and joint ventures. She has extensive experience in a wide variety
of international asset finance and corporate transactions. Audrey has particular expertise in financings involving aircraft, including aircraft acquisitions and dispositions, sale and leasebacks and pre-delivery payment and warehouse facilities. Audrey advises leading financial institutions, leasing companies, development agencies and companies.

Audrey is recognised in a number of international legal directories, including Chambers Global, The Legal 500, Who's Who Legal and Expert Guides: Women in Business Law for her corporate and commercial and aviation law expertise.

ALEXANDRA RODINA
Kennedys Law LLP

Alexandra specialises in aviation liability and claims handling. Her area of practice comprises handling of all types of aviation liability claims, including management of complex multi-jurisdictional claims, baggage, cargo, hull, personal injury and general aviation business. Alexandra has experience of legal systems throughout the world but with an emphasis on Russia, former Soviet Union countries and eastern Europe.

Alexandra trained with law firm Beaumont & Son, where she qualified. Following its merger with Clyde & Co, Alexandra worked at Clyde & Co for five years. In 2010, she joined law firm Gates and Partners as a partner. As a result of its merger with Kennedys, Alexandra joined the firm as a partner. She has worked in the industry for over 19 years. Alexandra is the lead counsel in handling claims arising from the following major accidents: Cubana de Aviacion, B737-200 at Havana, Cuba (2018); Metrojet A321 Sharm el-Sheikh, Egypt (2015); and Tatarstan Airlines, B737-500 at Kazan (2013). She also played an active role in the handling of claims arising from the following major accidents: Aeroflot, B737-500 at Perm (2008); Sibir, A310 at Irkutsk (2006); KAM Air, B737-200 near Kabul (2005); UM Air, YAK-42D Turkey (2003); Sibir, TU154 Black Sea (2001); Vlad Avia, TU154 at Irkutsk (2001); and Aeroflot A310 at Mezhdurechensk (1994).

JENS ROSTOCK-JENSEN
Kromann Reumert

Jens Rostock-Jensen was admitted to the Danish Bar in 1986 and was given right of audience before the Danish Supreme Court in 1991. Jens Rostock-Jensen became a partner at Kromann Reumert in 1993. He specialises in insurance and tort law, notably product liability and coverage. Jens also deals with reinsurance and has advised and represented both ceding companies and reinsurers in legal proceedings. In addition, he advises on aviation law, including liability, insurance and concession. He represents clients in court and arbitration proceedings both in Denmark and abroad, acts as an arbitrator in commercial disputes, and has also conducted cases before the European Court of Justice.

Jens Rostock-Jensen is a member of the Danish government’s standing committee for procedural law, vice president of the Danish Bar and Law Society’s expert committee for civil procedure, arbitration and mediation, and is the author of books and articles on product liability, the law of damages and procedural subjects.
LAURA SAFRAN QC
DLA Piper (Canada) LLP
Laura M Safran QC, is a senior partner in DLA Piper (Canada) LLP’s Calgary office and the head of DLA Piper’s Canadian aviation practice. She is also a part-time member of the federal Transportation Appeal Tribunal of Canada and taught aviation law as a sessional lecturer at the Faculty of Law of the University of Calgary.

Laura held the position of vice president, law and corporate secretary of the former Canadian Airlines International for a number of years, culminating a distinguished legal career with the airline industry. Since returning to private practice a number of years ago, she has represented a wide variety of aviation industry clients, including fixed-wing and helicopter carriers, aircraft leasing companies, charterers, international aviation associations, foreign carriers, aviation underwriters, manufacturers, aircraft maintenance and repair facilities, aviation employee associations and aircraft financiers in a variety of aviation law matters, including aircraft purchases, sales, leases and financings, airport-related issues, aviation safety issues, aviation employment issues, airline operational matters, fractional ownership issues, Canadian aviation regulatory issues (including licensing and certification) and international air law issues, and has been a member of the board of directors of a major Canadian international airport for a number of years.

GEORG SCHWARZMANN
Jarolim Partner Rechtsanwälte GmbH
Mag Georg Schwarzmann is an associate at Jarolim Partner Rechtsanwälte GmbH. He graduated from the University of Vienna in 2016 and obtained an additional qualification in mediation and alternative dispute resolution. Georg specialises in the field of aviation law, especially air passenger rights, and public law.

SONAL SEJPAL
Anjarwalla & Khanna LLP
Sonal Sejpal is a partner with Anjarwalla & Khanna (A&K), a leading corporate law firm in Kenya, for over 21 years. Sonal also provides support to A&K Tanzania. Prior to joining A&K, Sonal worked at Franks Charlesly & Co in London for 11 years (six of these as a partner). She is a solicitor of the Supreme Court of England and Wales and an advocate of the High Court of Kenya with considerable experience in aviation finance, banking, syndicated and project finance, mergers and acquisitions, corporate commercial matters and insolvency. She is also recognised for her expertise in Tanzanian law.

Sonal is a regular speaker at various seminars on various aspects of banking and commercial law. She has contributed to a number of publications, including the Kenyan chapters for Aircraft Finance: Registration Security and Enforcement and Aircraft Liens and Detention Rights published by Sweet & Maxwell. Sonal has also written articles and spoken at a number of seminars, including seminars hosted by AFRAA, the legal issues relating to the oil and gas sector and the UK-based Loan Market Association. She has until very recently sat on the board of directors of both Liberty Life Insurance and Heritage Insurance, and is the vice chairperson of the British Chamber of Commerce.

She is ranked as a leading lawyer in Kenya in Chambers Global, IFLR1000, The Legal 500 and other publications.

Sonal graduated as a Bachelor of Laws from the University of Westminster, England.
JESCONIAH SIAHAAN
Assegaf Hamzah & Partners

Jesconiah Siahaan started his legal career as a trainee associate at a reputable litigation firm, focusing mainly on litigation related to consumer protection. In 2011, he joined Assegaf Hamzah & Partners as an associate. Currently, he is a member of the alternative disputes resolution (ADR) and court litigation practice group, focusing mainly on commercial litigation, aviation law and insolvency.

Jesco’s frequent participation in national moot court competitions during his university days proved to be a solid starting ground for his legal practice. In AHP, Jesco’s experience ranges from providing legal advisory and in- and out-of-court representation, to assisting in criminal investigation up to the court examination process and representation in the insolvency process.

Besides being qualified to practise as an advocate in Indonesia, Jesco is also licensed to practise as a bankruptcy receiver and administrator as a member of the Indonesian Bankruptcy Receiver and Administrator Association.

RAVI SINGHANIA
Singhania & Partners LLP

Ravi Singhania is the managing partner of Singhania & Partners LLP (established 1999), which is headquartered in Delhi, with branch offices in Hyderabad and Bangalore and associate offices in prominent cities across India.

Ravi has been bestowed with innumerable legal accolades and has been consistently rated as India’s top corporate M&A, dispute resolution, project finance and aviation law expert by *Chambers and Partners, The Legal 500, Chambers Asia* and *Asialaw*. He is counted among top legal luminaries of India in independent surveys conducted by LexisNexis and the Indian Corporate Counsel Association.

Ravi is a board member of CRISIL Ltd. He is also present on the board of Indian subsidiaries of numerous Fortune 500 companies such as McGraw-Hill, American Bureau of Shipping and National Instruments.

In his illustrious practice, he has advised on cross-border transactions, compliances under SEBI Takeover Regulations, M&A, investment structuring, corporatisation, debt and equity offering, and dispute resolution. His clients include numerous Fortune 500 companies, domestic and foreign businesses, and public-owned enterprises.

He frequently speaks at national and international conferences and has to his credit a number of publications in reputed legal journals. Ravi is also a governing board member of the Indian Council of Arbitration and a board member of TerraLex Inc, which is a global network of 160 law firms, with more than 19,000 attorneys in 100+ countries, with 600 law firm offices worldwide. His areas of practice are arbitration, M&A, project finance, aviation, automotive, construction, defence, food, highways and power.

LUÍS SOARES DE SOUSA
Cuatrecasas, Gonçalves Pereira

Luís Soares de Sousa’s practice focuses on advising and representing airlines, banks, manufacturers and leasing companies on cross-border leasing operations. He represents both Portuguese and foreign clients in all kinds of transactions, in particular, purchase and
sale of aircraft, aircraft leasing, aircraft finance, insurance, mortgages, import, export, and aircraft repossessions. He also deals with the registration of aircraft in Portugal as well as with all legal formalities required to obtain operation licences, air operator’s certificate and other regulatory permits required for the use and operation of aircraft. He focuses on the incorporation of non-regular air carrier companies in Portugal and in relation to the purchase of several aircraft, certification of the aircraft in Portugal, negotiation of lease agreements, the obtaining of the required authorisations and clearances to operate seasonal charter flights, and in the incorporation of airline companies in Portugal.

His main areas of practice include not only aviation and aviation finance, but also procurement, mergers and acquisitions, real estate, projects and infrastructure, insolvency and business reorganisation proceedings and sports law.

He is recommended by several directories, including Chambers Europe (ranked as Tier 1 in Aviation).

He has a law degree from the Lisbon Universidade Livre (1984), and has been a member of the Portuguese Bar Association since 1985. He started practising in aviation in 1986. In 2001, he joined Cuatrecasas, Gonçalves Pereira as a partner, heading the firm’s corporate and aviation practice area.

He regularly contributes to publications regarding aviation matters.

CAROLE SPORTES
Squire Patton Boggs

Carole Sportes is the managing partner of the Paris office of Squire Patton Boggs and heads its international dispute resolution practice. She has broad expertise in handling complex multi-jurisdictional disputes and representing parties in commercial and investment arbitrations as well as recognition and enforcement of foreign judgments and arbitral awards.

Her practice encompasses the areas of aviation, insurance, reinsurance and product liability disputes including pharmaceutical products. She has extensive experience in handling mass tort litigation and correlative ability to craft and ensure coherent defensive strategies in multi-district litigation.

She has been nominated Lawyer of the Year 2018 in transportation by Best Lawyer, is ranked by Chambers Europe 2018 in France Transportation – Aviation Band 3, in the 2018 edition of Best Lawyers in product liability litigation and is among the few recommended lawyers in France by The Legal 500 EMEA 2018 for insurance and aviation.

Carole is the co-author of the French chapter for the ICGL publications, Class & Group Actions Guide and Product Liability Guide.

Carole is a member of the International Aviation Women’s Association, the French Society of Air and Space Law and the International Insurance Law Association/Association Internationale du Droit des Assurances.

RUDRA SRIVASTAVA
Singhania & Partners LLP

Rudra is a corporate-commercial lawyer with 13 years of professional experience in assisting and advising domestic and foreign clients on their transactions relating to M&A (shares, business, assets), private equity, joint venture and real estate (leasing and acquisitions), due diligence and documentation (drafting, review and negotiation). In his over-a-decade-long
career he has assisted reputed and well-known organisations across various sectors such as e-commerce, real estate, broadcasting, franchising, retail, food and beverages, telecom infrastructure, manufacturing, automobile parts, chemicals, edible oil, etc.

He regularly advises domestic and foreign clients on issues relating to general corporate law, foreign exchange, external commercial borrowing, foreign direct investment, employment, regulatory compliance, etc.

**PRASAD TAKSAL**

*DLA Piper (Canada) LLP*

Prasad Taksal is a member of DLA Piper (Canada) LLP’s aviation law practice group in Calgary and has represented clients in aircraft sale and purchase transactions, engine lease and sale transactions, certification and regulatory matters before Transport Canada and proceedings before the Canadian Transportation Agency.

In addition to aviation, Prasad represents clients in securities and corporate finance transactions such as private placements, exempt market offerings and securities offerings, and mergers and acquisitions and corporate and commercial matters. Prasad is also a member of the firm’s international risk management group and India practice group.

Before joining the Calgary office, Prasad practised as a lawyer for many years in India, primarily in the areas of mergers and acquisitions, general corporate and commercial law. In India, Prasad advised clients engaged in various industries including aviation, manufacturing, mining, information technology, research and development, banking and finance and pharmaceuticals, on a wide range of transactions, including stock and asset acquisitions, private equity investments and establishment of joint ventures and greenfield projects. He has advised clients extensively on Indian foreign investment policies and regulations. He has also advised state and municipal governments in India on information technology initiatives and procurements.

**CHARLOTTE THIJSSEN**

*Kennedys Brussels LLP*

Charlotte Thijssen is a senior associate at the Brussels office of Kennedys.

Charlotte Thijssen is an attorney at the Brussels Bar. She has seven years of experience in the aviation legal industry and has been with Kennedys since 2014. She is a Dutch lawyer who cross-qualified to the Belgian legal system. Fluent in English, Dutch and French, she focuses on international and aviation law, and regulatory affairs. Charlotte gained extensive experience in the airline industry, within airlines, manufacturing companies and consultancy firms. During her time at Kennedys, she has been seconded to a Belgian cargo airline as well as to a foreign passenger airline.

She is the author of many publications on air law-related topics. She completed an advanced LLM in air and space law at Leiden University (2012, *cum laude*) and an LLM in public international law at Utrecht University (2012). *Who’s Who Legal* (2018 and 2019) recognised her as a leading individual in the category ‘Aviation Contentious’ and she was recognised as a Next Generation Lawyer by *The Legal 500* for aviation in 2018 and 2019. Additionally, Charlotte is a member of the European Aviation Club and the International Aviation Women's Association.
HANNE S TORKELSEN
Advokatfirmaet SGB Storløkken AS

Hanne S Torkelsen has been a partner in the law firm Advokatfirmaet SGB Storløkken AS, and specialises in EEA/EU competition law, public procurement and state aid law, and employment law. She has been in legal practice since 1996, and was admitted to the Norwegian Bar in 1999. She has experience from a major aircraft crash case, and cases regarding handling of passenger claims, and giving legal opinions on sale and leaseback of aeroplanes. She assists companies in the transport sector in tender competitions, with prior legal risk analysis, negotiations and contractual issues, as well as labour law questions, inter alia, in the situation of transfer of undertakings.

ANDREW TULLOCH
Colin Biggers & Paisley

Andrew Tulloch heads the Colin Biggers & Paisley transport and logistics practice and has extensive experience in all aspects of transport law. Andrew’s primary focus is on litigation, disputes and insurance issues, and he has over 25 years of experience in these areas. Andrew’s clients include aviation insurers, freight forwarders and airline carriers. He is regularly instructed in relation to claims arising from aircraft accidents. He has considerable knowledge of the application of international conventions including the Montreal Convention 1999. He is a past president of the Aviation Law Association of Australia and New Zealand and a founding member and current Secretary of the Australian Aviation Insurance Forum. He is listed regularly as a leading aviation and transport lawyer in various directories. Colin Biggers & Paisley have offices in Sydney, Melbourne and Brisbane.

KIM VERHAEGHE
Kennedys Brussels LLP

Kim Verhaeghe is an associate at the Brussels office of Kennedys.

Kim Verhaeghe completed his studies at the Catholic University of Leuven (Belgium) in 2016 (Master of Laws, cum laude), after which he went to specialise in air law at the University of Leiden in the Netherlands (LLM 2017 in Air-and space law, cum laude). Kim has worked as a lawyer since 2017 where he mainly focuses on the aviation industry both from a contractual and from a litigating point of view. He joined the Brussels office of Kennedys, led by Dimitri de Bournonville, in 2019.

NICOLE VILLA
ASBZ Advogados

Nicole Fontolan Villa graduated as Bachelor of Laws at Mackenzie Presbyterian University and has a postgraduate degree in civil procedure law from the Pontifical Catholic University of Sao Paulo (PUC). Nicole Villa has extensive experience in litigation and consumer law. She coordinates a heavy caseload and has a good relationship with several legal departments of large corporations. She has worked for leading law firms and renowned companies. She focuses her practice on the civil aviation industry assisting domestic and international airlines.
PRISCILA ZANETTI

ASBZ Advogados

Priscila Zanetti is a litigation lawyer with more than five years’ experience in matters involving aviation and consumer law. She specialises in advising national and international airline companies mainly on civil aviation cases with an emphasis on consumer, regulatory and administrative matters. She graduated as Bachelor of Laws from Universidade Presbiteriana Mackenzie and has a postgraduate degree in civil procedure law from Fundação Getulio Vargas (FGV).
Appendix 2

CONTRIBUTORS’ CONTACT DETAILS

ADVOKATFIRMAET SGB STORLØKKEN AS
Parkveien 53 B
PO Box 2004 Vika
0125
Oslo
Norway
Tel: +47 970 41 624
Fax: +47 22 54 20 91
ht@storlokken.no
www.storlokken.no

ANJARWALLA & KHANNA LLP
ALN House, Eldama Ravine Close
Off Eldama Ravine Road, Westlands
PO Box 200-00606 Sarit Centre
Nairobi
Kenya
Tel: +254 20 364 0000 /
+254 703 032 000
ss@africalegalnetwork.com
fom@africalegalnetwork.com
www.africalegalnetwork.com/kenya

ASBZ ADVOGADOS
Brigadeiro Faria Lima Av. 4285, 4th floor
São Paulo, SP
Brazil
Tel: +55 11 3145 6000
guilhermeamaral@asbz.com.br
nicolevilla@asbz.com.br
renansousa@asbz.com.br
priscilazanetti@asbz.com.br
www.asbz.com.br

ASSEGAF HAMZAH & PARTNERS
Capital Place, Levels 36 and 37
Jalan Jenderal Gator Subroto Kav 18
Jakarta 12710
Indonesia
Tel: +62 21 2555 7800
Fax: +62 21 2555 7899

Pakuwon Centre
Superblok Tunjungan City
Lantai 11, Unit 08
Jalan Embong Malang Nos. 1, 3 and 5
Surabaya 60261
Indonesia
Tel: +62 31 5116 4550
Fax: +62 31 5116 4560
eri.hertiawan@ahp.id
www.ahp.co.id

CALLENDERS & CO
One Millars Court
Nassau
Bahamas
Tel: +1 242 322 2511
Fax: +1 242 326 7666
lboyer-cartwright@callenders-law.com
www.callenders-law.com
CLYDE & CO LLP
The St Botolph Building
138 Houndsditch
London
EC3A 7AR
United Kingdom
Tel: +44 20 7876 5000
Fax: +44 20 7876 5111
rob.lawson@clydeco.com
jess.harman@clydeco.com
www.clydeco.com

COLIN BIGGERS & PAISLEY
Level 23
181 William Street
Melbourne
Victoria 3000
Australia
Tel: +61 3 8624 2009
Fax: +61 3 8624 2031
andrew.tulloch@cbp.com.au
www.cbp.com.au

CONYERS
Clarendon House, 2 Church Street
Hamilton HM 11
Bermuda
Tel: +1 441 295 1422
Fax: +1 441 292 4720
julie.mclean@conyers.com
angela.atherden@conyers.com

Commerce House, Wickhams Cay 1
PO Box 3140
Road Town, Tortola, VG1110
British Virgin Islands
Tel: +1 284 852 1111
Fax: +1 284 852 1001
audrey.robertson@conyers.com

www.conyers.com

CUATRECASAS, GONÇALVES PEREIRA
Praça Marquês de Pombal, No. 2
1250-160 Lisbon
Portugal
Tel: +351 21 355 38 00
Fax: +351 21 353 23 62
lsoaressousa@cuatrecasas.com
www.cuatrecasas.com

DLA PIPER (CANADA) LLP
Suite 1000, Livingston Place West
250 2nd Street SW
Calgary
Alberta T2P 0C1
Canada
Tel: +1 403 698 8778 / 8796
Fax: +1 403 697 6625 / 213 4461
laura.safran@dlapiper.com
prasad.taksal@dlapiper.com
www.dlapiper.com

DQ ADVOCATES
The Chambers
5 Mount Pleasant
Douglas
Isle of Man
IM1 2PU
Tel: +44 1624 626999
Fax: +44 1624 626111
mail@dq.im
www.dq.im

F O AKINRELE & CO
188 Awolowo Road
Ikoyi, Lagos
Nigeria
Tel: +234 1 463 0283 / +234 1 463 0470 2 / +234 1 295 2042
Fax: +234 1 269 2889 / +234 1 4630 473
tony_nkadi@foakinrele.com
jacinta_obinugwu@foakinrele.com
kemi oluwagbemiro@foakinrele.com
www.foakinrele.com

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FITZPATRICK & HUNT, PAGANO, AUBERT, LLP
Tower 49, 31st Floor
Twelve East 49th Street
New York, NY 10017
United States
Tel: +1 212 937 4000
Fax: +1 212 937 4050
garrett.fitzpatrick@fitzhunt.com

633 West Fifth Street, 60th Floor
Los Angeles, CA 90071
United States
Tel: +1 213 873 2100
Fax: +1 213 873 2125
james.hunt@fitzhunt.com
mark.irvine@fitzhunt.com
www.fitzhunt.com

GATES AVIATION LTD
68 King William Street
London
EC4N 7DZ
United Kingdom
Tel: +44 20 7469 6437 / +44 7768930441 (mobile)
sgates@gatesaviation.com
www.gatesaviation.com

GONDAR & ASOCIADOS
Av Santa Fe 1480, Office D, 8th floor
C1060ABN Buenos Aires
Argentina
Tel: +54 11 5199 0100
Fax: +54 11 5199 0100 ext. 120
alg@gondaryasociados.com.ar
www.gondaryasociados.com.ar

GRANDALL LAW FIRM (BEIJING)
9/F Taikang Financial Tower
38 North Road
East Third Ring, Chaoyang District
Beijing 100026
China
Tel: +86 10 6589 0718
Fax: +86 10 6589 0799
gaofeng@grandall.com.cn
www.grandall.com.cn

IORDACHE PARTNERS
21 Calea Mosilor, 4th floor
Bucharest 030141
Romania
Tel: +40 374 616 161
Fax: +40 374 676 767
adrian@iordache.partners
raluca@iordache.partners
iordachepartners.com

JAROLIM PARTNER
RECHTSANWÄLTE GMBH
Volksgartenstraße 3/2nd floor
1010 Vienna
Austria
Tel: +43 1 253 7000
Fax: +43 1 253 7000 43
dieter.altenburger@jarolim.at
azra.dizdarevic@jarolim.at
georg.schwarzmann@jarolim.at
www.jarolim.at
KENNEDYS
Kennedys Brussels LLP
4th Floor, 350 Avenue Louise
1050 Brussels
Belgium
Tel: +32 2 554 0590
Fax: +32 2 554 0591
dimitri.debournonville@kennedyslaw.com
charlotte.thijssen@kennedyslaw.com
kim.verhaeghe@kennedyslaw.com

Kennedys Law LLP
25 Fenchurch Avenue
London
EC3M 5AD
United Kingdom
Tel: +44 20 7667 9667
Fax: +44 20 7667 9777
alexandra.rodina@kennedys-law.com

MAPLES GROUP
PO Box 309
Ugland House
South Church Street
George Town
Grand Cayman KY1-1104
Cayman Islands
Tel: +1 345 949 8066
Fax: +1 345 949 8080
wanda.ebanks@maples.com
shari.mcfield@maples.com
barnabas.finnigan@maples.com
www.maples.com

KROMANN REUMERT
Sundkrogsgade 5
2100 Copenhagen East
Denmark
Tel: +45 70 12 12 11
Fax: +45 70 12 13 11
jrj@kromannreumert.com
jdm@kromannreumert.com
www.kromannreumert.com

PHOEBUS, CHRISTOS CLERIDES & ASSOCIATES LLC
Agias Elenis 2
Stasinos Court
Nicosia, 1514
Cyprus
Tel: +357 22753015
Fax: +357 22752085
c.clerides@clerideslegal.com
a.nicolaou@clerideslegal.com
www.clerideslegal.com

RAJA, DARRYL & LOH
Level 26, Menara Hong Leong
No. 6, Jalan Damanlela
Bukit Damansara
50490 Kuala Lumpur
Malaysia
Tel: +603 2632 9999
Fax: +603 2632 9850 / 9851 / 9852
koksgeng@rdl.com.my
chewphykeat@rdl.com.my
www.rajadarrylloh.com

LS LEXJUS SINACTA
Via Larga 19
20122 Milan
Italy
Tel: +39 051 232495 / +39 335 5971572 (mobile)
Fax: +39 051 230407
a.masutti@lslex.com
www.lslex.com
S HOROWITZ & CO
31 Ahad Ha’am Street
Tel Aviv 6520204
Israel

PO Box 2499
Tel Aviv 6102402
Israel

Tel: +972 3 5670700
Fax: +972 3 5660974
eyald@s-horowitz.com
hughk@s-horowitz.com
www.s-horowitz.com

SCHILLER RECHTSANWÄLTE AG
Kasinostrasse 2
PO Box 1507
8401 Wintthur
Switzerland
Tel: +41 52 269 16 16
Fax: +41 52 269 16 00
hempel@schillerlegal.ch
maritz@schillerlegal.ch
www.schillerlegal.ch

SINGHANIA & PARTNERS LLP
P-24, Green Park Extension
New Delhi 110016
India
Tel: +91 11 4747 1410 / 1423
Fax: +91 11 4747 1415
ravi@singhania.in
rudra@singhania.in
www.singhania.in

SMATSA – SERBIA AND
MONTENEGRO AIR TRAFFIC
SERVICES LLC
Trg Nikole Pašića 10
11000 Belgrade
Serbia
Tel: +381 11 3814513
Fax: +381 11 3814525
goran.petrovic@smatsa.rs
www.smatsa.rs

SQUIRE PATTON BOGGS
Squire Patton Boggs Peña Prieto Gamundi
Av Pedro Henríquez Ureña No. 157
La Esperilla
Santo Domingo
Dominican Republic
Tel: +1 809 472 4900
Fax: +1 809 472 4999
rhina.martinezbrea@squirepb.com
maria.garcia@squirepb.com

Squire Gaikokuho Kyodo Jigyo Horitsu
Jimusho
Ebisu Prime Square 16F
1-39 Hiroo 1-chome
Shibuya-ku
Tokyo 150-0012
Japan
Tel: +81 3 5774 1800
Fax: +81 3 5774 1818
tomohiko.kamimura@squirepb.com
miki.kamiya@squirepb.com

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