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Appendix 1  ABOUT THE AUTHORS ............................................................................................385

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I am delighted to continue to be associated with *The Aviation Law Review*, of which this is the eighth edition. Aviation continues to be among 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 new contributions from France, South Korea and Spain, plus two new chapters concerning covid-19, as well as extending my thanks and gratitude to our other new contributors and to our regular 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 them. All contributors are selected based on their knowledge and experience in aviation law, and we are fortunate to enjoy their support.

Covid-19 is inevitably the focus of attention in our sector as in all others. The loss of life is the paramount concern and dominates one’s thoughts. However, the commercial devastation also has consequences for the wellbeing of humanity given the financial damage it is wreaking, which is particularly pronounced in the travel industry. With airlines grounded by travel bans and the closure of airspace, all the participants in the industry at large are facing financial collapse as revenue disappears and fixed costs remain. Lessors still need to be paid, routine maintenance cannot be ignored, staff have to be paid or discharged, and even with the patchwork of governmental support around the world, there are bound to be many who fail and a few, not necessarily among the most efficient, that survive. At the time of writing, it is too early to forecast the landscape post pandemic, but it will certainly be changed forever, with probably the most significant impacts on leisure and regional carriage, the former being more expensive to address distancing practices and the latter with their smaller balance sheets being less able to withstand the loss of revenue.

Much has been written on the question of whether contractual liabilities will be impacted by the consequences of the pandemic, and in this edition I am pleased to have worked with colleagues in Belgium and Germany, to whom I extend my thanks, on articles addressing these issues and on EU 261. The latter is a work of the Commission in progress at the time of writing with short- and long-term discussions ongoing concerning the pernicious effects of this extensively juridically rewritten regulation. The outcome of those discussions is awaited, albeit with some dread!

When I last wrote this preface, the shocking B737 Max disaster was unfolding. 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, rather than the first, influential regulator to ground the type following the two fatal accidents. The consequences are still unfolding, but in the meantime, Boeing has managed to refinance itself
and continues to deal with the claims of airlines whose fleets were grounded pre pandemic. The intervention of that virus may have perversely given the company some relief from its continuing obligations, though the damage to its reputation for trustworthiness will take longer to repair, leaving Airbus in a much stronger position. In addition, the ending of the merger talks with Embraer may lead to the reemergence of the latter as challenger in at least the single aisle jet market. The Federal Bureau of Investigation continues its criminal investigation of the certification of the type, following the establishment of a grand jury investigation of the certification process and the investigations based on the embarrassing disclosures of emails from within Boeing graphically charting the recognition of their engineers of the unsafety of the type.

It is hoped EASA will 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. The appetite of the EU in this respect and the willingness of Member States to pay in the current financial and political environment, are not reliable grounds for optimism in this respect.

The impact of Brexit on European aviation remains unclear with the latest indications being that a comprehensive deal may not be reached, though an arrangement regarding traffic rights is likely to be made regardless. Major carriers are securing air operator certificates from within states in the EU, and some are also now ensuring they satisfy the European tests for majority ownership. How IAG manages its interests in BA and Iberia/Aer Lingus will be of particular interest.

The second European Aviation Environmental Report (EAER) was published last year and provided 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 recognised that the contribution of aviation activities to climate change, noise and air quality impacts had increased, thereby affecting the health and quality of life of European citizens. Indeed, air pollution has repeatedly been identified as a factor in covid-19. The impact of the pandemic on environmental pollution has been well documented, and the reduction in air travel has contributed to this. There is pressure to attempt to secure the environmental benefits of the lockdown on a more long-term basis, which might accelerate the development of new technologies. If Member States would stop pandering to solipsistic sectional national and labour interests to permit the true operation of the Single European Sky ATM Research (SESAR) programme, massive environmental advantages could be secured, but as usual incompetent short-termism seems likely to prevail in politics to the detriment of industry and the environment. It is hoped one day we will see an unfettered SESAR introduced, although the decision by the EU to prevent UK carriers from using carbon offsets does not suggest an overwhelming dedication to the environment.

The UK airline insolvency review was established by the Chancellor to research better ways to deal with the collapse of airlines following the numerous recent high profile airline bankruptcies of Monarch, Thomas Cook, Flybe and others. 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
The pandemic has highlighted the benefits of drone technology with medical and other supplies being delivered to vulnerable individuals and population centres by use of the technology. Airport closures have of course ceased to be a factor in the current times, but seem likely to resume and possibly even increase, led by environmental groups seeking to address the perceived threat of the industry to the environment. Various jurisdictions are contemplating a range of responses including tighter regulations on the use of drones over a low mass, and registration and insurance requirements for operators of larger and commercial vehicles. New technologies to counter potentially disastrous encounters with commercial aircraft are being developed, but inevitably these solutions will be met by new challenges in the remotely piloted vehicle arms race.

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 2020
Commercial aviation has been decimated by the pandemic, commercial flights to most jurisdictions having become uneconomic, and flights then becoming impossible to operate as governments closed airspace, either selectively or generally. All participants in aviation have been left with substantial contractual liabilities to third parties including, for airlines, prospective passengers, lessees, and suppliers of goods and services and without income to meet those liabilities. Operators have been compelled to investigate their responsibilities under these contracts with a view to determining whether the circumstances permit them to avoid their contractual responsibilities in order to enable them to hibernate and survive until the crisis passes.

Whether contractual responsibilities can be avoided will be decided differently depending upon the jurisdiction in which the question is asked. The starting point for consideration is, therefore, determination of the applicable law and whether, if there is a choice, the laws of one country may be more favourable than those of another. Most contracts contain a jurisdiction clause setting out which law governs and which courts have jurisdiction. These clauses are sometimes expressed to be exclusive, and sometimes non-exclusive, and the contracts may in some cases be silent on these issues. The rules to determine the applicable law in the absence of an express choice by the parties may also vary depending on the subject matter of the contract. For instance, in the European Union, according to the Rome I Convention, which was incorporated by Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations, for a contract of carriage of goods, the law applicable shall in principle be the law of the country of habitual residence of the carrier (whether or not it is the law of a Member State of the EU). For a contract for carriage of passengers, the governing law shall be that of the country where the passenger has his or her habitual residence, providing that either the place of departure or the place of destination is situated in that country. Otherwise, the law of the country where the carrier has his or her habitual residence shall apply. In respect of classes of contracts not specifically regulated by the Regulation, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has habitual residence, and where the law applicable cannot be determined in accordance with the specific provisions of the Regulation, the contract shall be governed by the law of the country with which it is most closely connected.

Once the jurisdiction and applicable law have been established, one can analyse whether the pandemic and consequences such as government actions flowing from it might relieve an

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1 Sean Gates is the CEO of Gates Aviation Limited, Dimitri de Bournonville is a partner and Joanna Langlade is an associate at Kennedys and Peter Urwantschky and Claudia Hess are partners at Urwantschky Dangel Borst and Partners.
Covid-19 impact on aviation contracts

operator of its contractual responsibilities as a consequence of the doctrines of *force majeure* or frustration of the contract. *Force majeure*, sometimes loosely referred to as ‘Act of God’, customarily requires unforeseeable circumstances preventing one of the contract parties from fulfilling its obligations under the contract. Frustration is a common law defence, which provides that where a contract has become impossible to perform, parties to it may be relieved of their legal obligations and the contact is determined.

It is highly unlikely that the courts of a common law country will imply a *force majeure* provision into a contract that does not contain it. In contracts governed by the common as opposed to civil law, if *force majeure* is agreed by the parties to provide a defence, the contract will spell out when it can be relied on. The court will then examine the circumstances and determine whether they fall within the terms of the clause. Most lease contracts will not contain a *force majeure* clause. This is because the vast majority of lease contracts are more or less contracts of adhesion, the terms of which are dictated by the lessor, who usually requires payment of the lessee’s obligations regardless of the circumstances (the ‘hell or high water’ clause). Lease costs will have been calculated in the expectation that those charges will be met regardless of the circumstances. The lessor might reasonably argue that the contract thus drafted allocates risk to the parties and is part of the pricing calculation, and that a different allocation of risk would have led to a different price.

The alternative remedy for the contract party subject to a contract applying common law principles is to seek to aver that the contract has become frustrated. To determine whether a contract has been frustrated one has to show that it has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract: ‘it was not this that I promised to do’ (per Lord Radcliffe in *Davis Contractors Limited v. Fareham Urban District Council* (1956) AC 696). Even if the virus prevents the lessee from earning the funds necessary for it to pay what it owes, the virus does not prevent a solvent lessee from paying its obligations and, therefore, the contract whereby the lessee agrees to pay a certain amount in return for being allowed to operate the aircraft has not become impossible to perform. Payment can still be made. In relation to other contracts into which an operator enters for the supply of goods or services, the situation may be different. If it is not possible for an operator to fly its aircraft to a particular destination, then it cannot take on the fuel for which it contracted at that destination. As has been seen, flights into a number of jurisdictions have been prohibited by local law so that avoidance as a result of frustration may be possible in relation to contracts for the supply of services and goods.

The issues fall to be considered differently in civil law countries.

In France and Belgium, it is common to select either New York law or English law as the governing law for aircraft leasing contracts. Common law considerations will hence apply to those contracts, unless the parties have agreed otherwise.

With regard to contracts of carriage of passengers, EU law governs the matter of compensation for flight cancellation. In the event of cancellation of a flight, passengers are in certain cases entitled to compensation, unless the cancellation was caused by extraordinary circumstances that could not have been avoided even if all reasonable measures had been taken. The European Commission considered that in the context of the covid-19 crisis, certain measures qualify as extraordinary circumstances, for example a ban by the public authorities on flights or traffic of persons or when an airline cancels a flight for reasons of protecting the health of the crew.
Governments have also taken measures for specific types of contracts to decide how the pandemic would affect the obligations of the parties. For instance, Belgium has adopted a Ministerial Decree concerning package travel. According to EU law, there is a possibility for the tour operator or the traveller to cancel the trip without penalty in the event of unavoidable and extraordinary circumstances. The EU decided that it had to be assessed on a case-by-case basis whether the pandemic could constitute such a circumstance authorising the parties to cancel the trip. If so, the traveller has the right to a full refund of any payments made for the package within 14 days. Belgium, however, specified that if a package travel is cancelled because of the pandemic, the operator can give a voucher valid for at least one year to the traveller. If the voucher is not used, the traveller is then entitled to a refund.

More generally, contracts governed by French or Belgian law will usually contain a force majeure clause. In France, force majeure is a statutory exemption found in the Civil Code that applies to all contracts governed by French law even in the absence of a force majeure clause. The parties are however free to derogate from this principle in their contract, or to insert certain clauses to amend the scope and effect of force majeure. Force majeure exists when an event occurs after the conclusion of the contract and prevents a party from performing its obligations. Firstly, the party must be faced with an impossibility to enforce its obligations. The non-performance of the contract must have become unavoidable, and not merely more difficult or more onerous. Secondly, the event needs to be beyond the control of the party, meaning that the debtor of the obligation could neither foresee nor prevent the event.

The EU has recognised that the aviation sector was facing exceptional circumstances because of the pandemic. Indeed, considering that aviation's contribution to the overall performance of the EU economy and its global presence is so significant, the Commission is proposing to take measures to support the aviation sector by temporarily modifying one of the most important Regulations concerning aviation, Regulation 1008/2008, in light of the pandemic. These measures comprise an amendment to the air carrier licensing rules in the event of financial problems caused by the pandemic but also have an impact on aviation contracts as it allows more efficient awarding of ground handling contracts. The EU justifies this proposal by the urgency entailed by the exceptional circumstance, showing that the public authorities regard this situation as exceptional.

Force majeure has the effect of releasing the parties from their correlative obligations. In both countries, if the force majeure event is temporary, the contract is suspended. If the event is permanent, or is temporary but due to its occurrence the contract has lost its purpose, the contract is terminated. The pandemic being a temporary event, would only suspend those contracts for which it is considered to be force majeure, unless the pandemic destroys the purpose of the contract.

In France, for the public sector, the Minister of Economy indicated that companies in charge of the execution of State public contracts could invoke covid-19 as an event of force majeure, exempting them from paying penalties. A French decree was also adopted creating a series of provisions for the consequence of the pandemic on private contracts, by, for instance postponing or paralysing penalties for the non-performance of certain contractual obligations. In Belgium, a draft Royal Decree also contemplated stating that the threat of the covid-19 virus and special measures taken by the authorities should automatically be considered as instances of force majeure, releasing a debtor from its obligations. This was, however, not kept in the final version of the Decree. For most contracts governed by French or Belgian law, a case-by-case assessment will hence have to be made to see whether force majeure can come into play. A party will be able to rely on force majeure in light of the pandemic and its impact if it can show that all the conditions of force majeure are met. An alternative might be to
rely on a hardship clause, if expressly contained in the contract. This customarily authorises the renegotiation of the contract when exceptional circumstances create an unreasonable imbalance in the respective contractual obligations of the parties.

If German law applies and if a contract party is unable to fulfil a contractual obligation as a consequence of covid-19, that contract party may be released under certain conditions from its contractual obligation or from a claim for breach of duty. This release may be based on the following provisions of the German Civil Code.

If circumstances that became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, an amendment of the contract may be demanded to the extent that, taking account of all the circumstances of this specific case, one of the parties cannot reasonably be expected to uphold the contract. If material conceptions that have become the basis of the contract are found to be incorrect, this is equivalent to a change of circumstances. If performance of the contract is not possible or one party cannot reasonably be expected to accept the terms that were agreed, the disadvantaged party may revoke the contract.

In respect of tour operators, the German Civil Code contains a provision which stipulates that, if the travel package is substantially obstructed, jeopardised or impaired as a result of force majeure not foreseeable when the contract was entered into, then both the travel organizer and the traveller may terminate the contract.

If the obligor breaches a duty arising from an obligation, the obligee may, in principle, demand damages for the damage caused thereby. However, this does not apply if the obligor is not responsible for the breach of duty.

The provisions under the German Civil Code mentioned above will not release a debtor from making a contractually agreed payment. As a consequence of covid-19, a debtor may have problems in fulfilling such a payment obligation, but this does not mean that material conceptions that have become the basis of the contract are found to be incorrect so that the debtor could revoke the contract. However, in relation to contracts for the supply of goods or services, the provisions of the German Civil Code may provide appropriate remedies. If a carrier is prevented from flying to a certain place of destination, it has become impossible for him or her to meet contractual obligations. If the reason for this impossibility results from covid-19, the carrier is not liable for damages since he or she is not responsible for the breach of duty.
The European Regulation for compensation and assistance to passengers for delay and cancellation (EU 261) has been pending for revision by the EU for many years. That revision has been delayed as a consequence of the refusal of Spain to engage until the UK agreed to discussions on the status of Gibraltar. Given this deadlock, the Commission published interpretative guidelines in June 2016 regarding the application of the rules. The interpretative guidelines do not address some essential issues in EU 261, such as time limitations on the provision of care and assistance in extraordinary circumstances or ‘trigger times’ for delay compensation, and not all Member States, for instance Germany, apply these guidelines as they are not binding law like the Regulation. However, with the departure of the UK from the EU, the Gibraltar impediment has been removed and the Commission and the EU are actively in the process of drafting and debating revisions to the regulation.

Covid-19 has had an enormous impact on aviation, and all airlines are facing financial ruin as a consequence of being grounded for a protracted period of time, unparalleled since the eruption in 2010 of Eyjafjallajökull, which itself cost the industry more than $2 billion by virtue of its obligation in Regulation 261 to care for passengers. The Regulation also obliges the operating air carrier to offer passengers the choice between reimbursement within seven days or rerouting, either at the earliest opportunity or at a later date at the passenger’s convenience. The second option is of course less popular, if not unfeasible, because of the current situation. But in view of the high number of cancellations, many airlines do not have funds available to meet their salary bills and other fixed costs let alone to provide refunds. Regulation EU 261 and thus also the passengers’ right to ticket refund is binding law in all EU Member States. The Member States cannot deviate from this or create their own ‘emergency law’ without the approval of the EU Commission. Twelve EU Member States, including Belgium, France, Greece, Ireland, The Netherlands and Portugal, have sent a letter to the European Commission, asking it to allow the temporary issuance of vouchers to passengers in the event of cancellation, instead of reimbursement. Independent of this joint statement, the German government has already sent two letters to the European Commission, urging for a voucher solution instead of refunds and stressing that this could help to alleviate the disastrous financial situation of the airlines. The need for revision of EU 261, which creates an economic burden for airlines in a global crisis, has become ever more self-evident.

EU 261 has, since it became European law, been substantially rewritten by the European Court of Justice in a variety of ‘passenger friendly’ decisions extending passenger
rights to compensation far beyond the provisions of the original regulation. Successive decisions have emasculated the defence of an air carrier to claims under the regulation caused by extraordinary circumstances by, for example, determining that a collision with a ground handling vehicle, an unexpected technical issue where the airline has complied with the rules on maintenance, a wildcat strike and numerous other instances of circumstances beyond the control of the carrier do not qualify for the ‘extraordinary circumstances’ defence. The court has also determined that a long delay is to be treated as cancellation for the purposes of determination of the right to compensation, though this was clearly never the intention of the Commission when drafting the Regulation. The Court has also held that the time limit for compensation claims to be made against a carrier is to be determined by national law, giving rise to a patchwork quilt of time limits through Europe and ignoring the logic of the two year time limit in the Warsaw and Montreal Conventions. Indeed, the Court’s willingness to ignore the applicability of the Montreal Convention to 261 claims itself represents a European derogation from an international Convention in favour of ‘domestic’ rules which is starkly in breach of its international obligations.

There have been a number of consequences of the judicial activism of the CJEU. The Court justifies its approach by reference to the obligation in the first preamble to the Regulation that ‘the community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers’ and in the fourth that ‘the community should therefore raise the standards of protection set by that regulation . . . to strengthen the rights of passengers’. Applying this to its interpretation of the Regulation, and interpreting its duty to protect passengers as being to ensure that the maximum level of compensation is paid for any inconvenience, the Court has routinely disregarded the rights of passengers to connectivity, particularly from regional airports as well as the impact of its approach to the safety of air transport. Airline employees releasing aircraft to service, and knowing that any delay in operation will impact its profitability are given a choice by the Court between operating with the highest levels of safety, or their continued employment. The impact of the Regulation as interpreted by the Court has been a major factor in the significant increase in bankruptcies of airlines in recent years. It seems likely that, given the choice, most passengers would regard safety and connectivity as being more important to their protection than a few hundred euros’ compensation. Without being given these choices however, it has to be said that ‘free’ money continues to be popular among consumers.

To some extent the views of the industry have been taken into account in the latest draft text of revisions to the Regulation published by the Croatian presidency. The paper contemplates an exhaustive list of extraordinary circumstances including external labour disputes but not, as yet, a pandemic, flight safety shortcomings have been included in the annex of those extraordinary circumstances, the time limit for delay has been increased from three to five hours as the trigger for compensation at the minimum level, with nine hours and 12 hours being the further trigger points and, among other provisions, the extraordinary circumstances defence can be invoked in relation to the preceding flight as well as the flight in respect of which the passenger was carried.

There are a number of other issues in respect of which the presidency has elected not to take into account other concerns of operators, including the need for exemption of compensation obligations in relation to small airports, PSO (state supported) routes and flights to and from the outermost regions of Europe, and requiring the Court to acknowledge that a long delay impacts not only the affected flight but also subsequent flights scheduled to be operated by the same aircraft. Further work needs to be done in respect of the Regulation
to render it as less of an existential threat particularly to regional operations. It also remains to be seen whether the recommendations of the Presidency will be followed in future discussions, and whether the pandemic will lead to reconsideration of the indefinite duty of care to passengers imposed on airlines by the Regulation.

In the short term, and with a refreshing display of support for the industry, EU Member States Belgium, Bulgaria, Cyprus, Czech Republic, France, Germany, Greece, Ireland, Italy, Latvia, Malta, Netherlands, Poland, Portugal, Romania and Spain have published a letter urging the European Commission to suspend the provision in EU 261 which requires airlines to issue a full, immediate refund for cancelled flights, and instead offer provisions for vouchers. The Commission has been urged to put in place a temporary amendment to EU 261 as well as further non-binding interpretative guidelines for Member States. The Commission is now working on a proposal that will hopefully give some relief to beleaguered airlines at least on the issues of refunds and vouchers as alternatives.
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 (Law No. 17,285), the Air Policy (Law No. 19,030), international treaties and agreements, and all applicable regulations concerning 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. Aerolíneas Argentinas, a state-owned company, receives funds from the national budget and the current administration is highly protective of its operation.

II LEGAL FRAMEWORK FOR LIABILITY

i International carriage

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

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:
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 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.

Other legislation

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.2 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.3

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2 Argentine Criminal Code, Article 190.
3 Argentine Criminal Code, 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.4

Those who, because of imprudence or negligence, lack of skill 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.5

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

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4 Argentine Criminal Code, Article 195.
5 Argentine Criminal Code, Article 196.
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. 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. 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

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6 Aeronautical Code, Article 8.
7 Aeronautical Code, Article 9.
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.\(^8\) 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.\(^9\) ANAC will carry out verifications concerning 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.\(^10\) A mechanic authorised by the Argentine aviation authorities must verify the safety conditions of the aircraft before take-off.

Accident investigations are regulated by Annex 13 of the Chicago Convention, Title IX\(^11\) of the Aeronautical Code and Decree No. 934/1970.

This year the National Safety Board commenced its functions, namely being responsible for the investigation of aviation, maritime, railroad, and road accidents. It was created by Law 27,514. The National Safety Board replaced the Board of Investigations of Civil Aviation Accidents (JIAAC). This agency is in charge of the technical investigation of accidents and incidents to determine their causes and recommend efficient actions aimed at avoiding the occurrence of accidents and incidents in the future.

The JIAAC issued Resolution No. 55/2017 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 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

\(^{8}\) Aeronautical Code, Article 10.
\(^{9}\) Aeronautical Code, Article 11.
\(^{10}\) Aeronautical Code, Article 12.
\(^{11}\) Aeronautical Code, Articles 185 to 190.
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.  

V INSURANCE

Title X of the Aeronautical Code (Sections 191 to 196) provides that the aircraft operator should have the following insurance: (1) labour insurance; (2) liability insurance in relation to passengers, baggage and shipped goods; (3) insurance in relation to liability for surface damage; and (4) 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.

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. 27,442 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) had initiated separate individual legal actions before the Federal Civil and Commercial Court of Appeals against several air carriers (Aerolíneas 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. FAEVYT argued that the terms and conditions of the IATA travel agency agreement should be comprehensively reviewed, in

particular, the terms related to agents’ remuneration. Having reached an understanding, the plaintiff withdrew the complaints filed, having requested to the Court that all proceedings should be terminated.\textsuperscript{13}

\section*{VII \hspace{1em} 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.

\section*{VIII \hspace{1em} ESTABLISHING LIABILITY AND SETTLEMENT}

\subsection*{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


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found that there had been a situation concerning the advertisement for 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.14

ii 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 or was thrown 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 had been opened to receive opinions from any interested party willing to participate and cooperate in the final version of the regulation.

On 6 December 2019, ANAC Resolutions No. 880/2019 and 885/2019 were issued, whereby the new regulation that will enter into force from 1 July 2020 was established.

On 1 July 2020, ANAC Resolution No. 178/2020 was published in the Official Gazette, whereby the date when the new regulation will enter into force was adjourned until 31 December 2020. Due to covid-19 restrictions, the implementation of the needed measures to allow the required training programmes, as well as the adaptation of rules and the reorganisation of applicable registrars, had not been possible.
X  VOLUNTARY REPORTING

The National Safety Board Civil Aviation, a new agency that in 2020 replaced the historical Board of Accident Investigation (JIAAC) continued using the online anonymous form created by JIAAC and the 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

In case No. 2649/2017, Aidelman, Aylen v. El Al Israel Ltd, the Federal Civil and Commercial Courts of Appeals confirmed, on 30 May 2019, the decision held by the lower court. This had held that Argentina could not be considered as the appropriate jurisdiction since it could not be included in any of the possibilities described in Article 33 of the Montreal Convention. The carriage agreement was issued and paid through the internet via a website located in Israel to fly from France to Israel. El Al Israel Ltd had both its domicile and principal place of business in Israel. Both parties appealed the decision held by the First Instance Court. The plaintiff argued that the defendant air carrier had a branch office in Argentina highlighting the fact that the air carrier had a local place of business through which the contract had been made pursuant to Article 33 of the Montreal Convention and the ticket was paid with a local credit card. The Federal Civil and Commercial Court of Appeals rejected plaintiff’s argument on the grounds that Article 33 has not established that the location of the finance entity that issued the credit card used to pay for the ticket through the internet could be admitted to establish the jurisdiction. The Federal Civil and Commercial Court of Appeals further clarified that the foro actoris (consumer’s usual domicile or residence) has not been indicated to establish jurisdiction.

In the case No. 16221/2018, Abraham Rioso, Fernanda v. United Airlines Inc. et al, the Commercial Court of Appeals confirmed on 4 April 2019 the decision held by the First Instance Court. This had dismissed the class action filed by 188 passengers who filed legal actions against UAL and seven travel agencies where claimants filed legal actions seeking either their tickets originally issued by UAL to travel from Santiago de Chile to Sydney or payment of the average amount of a ticket for that route plus emotional distress sustained plus punitive damages, interest accrual, fines, and litigation costs. Claimants argued that during a ‘travel sale’ the defendant air carrier published on its website – as also did several travel agencies that had joined the travel sale – low-cost tickets for the indicated route. Claimants acquired their tickets and received confirmation. However, on the same date, the defendant air carrier cancelled the bookings via email, without offering either an alternative or a compensation. The First Instance Court held that it could not be considered that individual claims would be disregarded taking into consideration the parameters set by the Supreme Court Halabi precedent to determine the admittance of the class action. Claimants appealed, arguing that consumers’ personal and property rights were being affected due to the
same facts and, consequently, that the requirement for a class action has been met. However, the Court of Appeals found that there was no strong need of the state to grant protection to pure individual property rights without any collective incidence since there were no social implications. Furthermore, the Court of Appeals considered that each claimant had individual and different agreements regarding terms of payment, ancillaries that could have been paid and different arising damages, so it could not be held that the facts were absolutely the same for every plaintiff. Finally, the Court also referred to the fact that the affected rights had no connection with any disadvantaged or weakly protected group. Since each claimant could validly defend the rights claimed, the class action as such should be dismissed on the grounds that only property individual rights were at stake without the existence of homogeneous facts and without any social incidence. Pursuant to Section 88 of the Civil and Commercial Procedural Code, the individual actions filed by plaintiffs could be followed as such and linked due to the characteristics of the claims in order to avoid contradictory decisions.

On 23 December 2019, the Law of Social Solidarity and Productive Reactivation (Law No. 27,541) was passed. It was then regulated by Executive Order No. 99/2019 and General Resolution issued by the Tax Authorities No. 4659/2020. These regulations declared and regulated the public emergency in economic, financial, fiscal, administrative, pension, tariff, energy, health and social matters. These new regulations established a new tax called Tax PAIS ‘Tax For an Inclusive and Supportive Argentina’ aimed at controlling foreign currency outflow and imposing a 30 per cent tax to travel- and tourism-related purchases including international air carriage. Law No. 27,541, Section 35 reads as follows:

A state of emergency is established, for the term of five fiscal periods as from the effective day of this law, a tax that will be applicable in all the territory of the country to the following operations: …

(e) Acquisition of land, air, and water way passenger transport services to travel abroad as long as payment of said transaction requires access to the exchange market in order to exchange Argentine pesos to acquire foreign currency according to the terms of the applicable regulations.

Air carriers should act as collection agents. To this end, collection of this tax should be made upon collection of the ticket price, and for payment in instalments, the tax should be completely collected with the first payment being it clearly described in the ticket. The chargeable amount would be 30 per cent upon the price net of taxes and fees of each operation.

XII OUTLOOK

On 27 April 2020, Resolutions No. 143 and 144 issued by the ANAC were published in the Official Gazette. Resolution No. 143/2020 stated that due to the sanitary emergency caused by covid-19, the air carriers could only commercialise air transport services for passengers from, to, or within the national territory as long as they have been formally authorised by the Argentine Civil Aviation Administration pursuant to applicable procedure in accordance with ANAC Resolution No. 100/2020 established for special services or any regulation that
could be published in the future.\textsuperscript{18} Promotion and commercialisation of regular (scheduled) or non-regular (non-scheduled) services in violation of Section 1 would be penalised pursuant to Executive Order No. 326/82.\textsuperscript{19} This measure shall be enforced immediately.\textsuperscript{20} ANAC Resolution No. 144/2020 stated that flights would be authorised as from 1 September 2020.

On 1 July 2020, ANAC Resolution No. 178/2020 was published in the Official Gazette, whereby the date when the new regulation will enter into force was adjourned until 31 December 2020. Due to covid-19 restrictions, the implementation of the needed measures to allow the required training programmes, as well as the adaptation of rules and the reorganisation of applicable registrars, had not been possible.

\textsuperscript{18} Resolution No. 143/2020, Section 1.
\textsuperscript{19} Resolution No. 143/2020, Section 2.
\textsuperscript{20} Resolution No. 143/2020, Section 3.
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, Regional Development and Communications. 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

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1 Andrew Tulloch is a partner at Colin Biggers & Paisley.
3 Air Services Act 1995 (Cth) Section 8(1)(a).
4 Transport Safety Investigation Act 2003 (Cth) Section 12AA.
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 1988.

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:

\(\text{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:}
\(\text{a} \quad \text{Between a place in a State and a place in another State;}
\(\text{b} \quad \text{Between a place in a Territory and a place in Australia outside that Territory;}
\(\text{c} \quad \text{Between a place in a Territory and another place in that Territory; or}
\(\text{d} \quad \text{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.}

\(\text{5 ibid. Section 12AA(3).}\)
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. 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 regulation

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. 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’, 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.

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:

a. 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.
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

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,\textsuperscript{10} which lists the penalty for contravening a direction given under the Section at 50 penalty units (currently listed at A$210).

\textbf{v Other legislation}

\textit{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,\textsuperscript{11} or misuse of market power.\textsuperscript{12}

\textit{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.

\section{III LICENSING OF OPERATIONS}

\textit{i Licensed activities}

\textbf{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.\textsuperscript{13}

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

\textsuperscript{11} Section 45.

\textsuperscript{12} Section 46.

\textsuperscript{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.\(^\text{14}\)

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.\(^\text{15}\) The penalty for flying an unregistered aircraft is a penalty of up to two years’ imprisonment.\(^\text{16}\)

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.\(^\text{17}\) 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)\(^\text{18}\) 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.\(^\text{19}\) 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.\(^\text{20}\)

**ii Ownership rules**

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

- **a** a resident of Australia who is:
  - 18 years of age or older; and
  - an Australian citizen or the holder of a permanent visa;
- **b** a corporation incorporated under the Corporations Act 2001;

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14 ibid. Regulation 47.010.
15 ibid. Regulation 47.100.
16 See footnote 7, Section 20AA(1).
17 See footnote 13, Part 21.
18 See footnote 7.
19 See footnote 7, Sections 27AE(4)(a).
20 ibid. Section 27AE.
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.  

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.  

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

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, 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 480,000 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 2019,28 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 Regulation 9 Subsections (2) and (3).

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).
28 Civil Aviation (Carriers’ Liability) Regulations 2019 (Cth) Regulation 9.
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.\(^{29}\)

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.\(^{30}\) 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.\(^{31}\)

The limit of liability of a domestic carrier in respect of each passenger (for injury or death) is A$925,000, and for carriage to which Part IV applies other than a domestic carrier, the

\(^{29}\) Competition and Consumer Act 2010 (Cth) Section 50.
\(^{30}\) ibid. Sections 45AD(2)–(3).
\(^{31}\) See footnote 6, Section 28.
limit of liability is 480,000 SDR. 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. However, the court is not limited to financial loss resulting from the death of the passenger, 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

There 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.

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. 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.

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.

32 ibid. Section 31 as amended by Civil Aviation (Carriers Liability) Regulations 2019
33 ibid. Section 35(6)–(7).
34 ibid. Section 35(8).
35 ibid. Section 34.
36 See Civil Procedure Act 2010 (Vic) Section 7.
37 Supreme Court (General Civil Procedure) Rules 2015 (Vic) Rule 9.06; County Court Civil Procedure Rules 2018 (Vic) Rule 9.06.
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 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.

The Australian Transport Safety Bureau has reported that the number of ‘near encounters’ between RPAs and manned aircraft has doubled in the past three years, with some 194 occurrences in 2019.

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.

49 The current estimate is that there at least 50,000 and possibly hundreds of thousands of RPAs in Australia.
50 The scheme was established under Regulation 7 Transport Safety Investigation (Voluntary and Confidential Reporting Scheme) Regulations 2012 (Cth) as provided for in Section 20A Transport Safety Investigation Act 2003 (Cth).
51 Regulation 7(2) Transport Safety Investigation (Voluntary and Confidential Reporting Scheme) Regulations 2012 (Cth). Under Regulation 7(3), the meanings of large RPA, small RPA and micro RPA have the same meaning as in the Civil Aviation Safety Regulations 1998 (Cth).
52 Transport Safety Investigation (Voluntary and Confidential Reporting Scheme) Regulations 2012 (Cth) Regulation 8.
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).

53 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.
54 ibid. Regulations 11 and 12.
56 See footnote 51, Regulation 16(1)(a).
57 ibid. Regulation 16(2).
58 ibid. Regulation 16(3).
59 ibid. Regulation 18.
60 ibid. Regulation 21(1).
61 ibid. Regulation 19(1)–(2).
62 See footnote 7, Section 30DO.
63 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.\footnote{Public Interest Disclosures Act 2012 (Vic), Public Interest Disclosures Act 2010 (NSW), Public Interest Disclosures Act 2010 (Qld), Public Interest Disclosures Act 2002 (SA), Public Interest Disclosure Act 2003 (WA) and Public Interest Disclosure Act 2012 (ACT).}

XI  THE YEAR IN REVIEW

Aside from the increases in limits of liability under the Montreal Convention 1999, which took effect automatically in Australia with effect from 28 December 2019, and a couple of cases in which plaintiffs unsuccessfully sought to recover damages pursuant to the Montreal Convention 1999,\footnote{Salib v. Emirates (No 2) [2019] NSWDC 715 and Di Falco v. Emirates (No. 2) [2019] VSC 654.} the past year was a relatively quiet one for the industry until covid-19 turned the normal activity in the industry upside down.

The covid-19 pandemic and the early enforcement of 14-day compulsory quarantine restrictions on international travellers to Australia, while successfully controlling the spread of the virus, has had a very significant impact on both international and domestic carriage of passengers. Airlines have required significant government support, and the second major domestic airline Virgin Australia ceased trading while sale was negotiated.

Restrictions on movement between some but not all Australian states has also been imposed, which has had a significant effect on the domestic airline industry and on the general aviation sector.

The government continues to provide support for the aviation industry and is likely to be required to maintain support for some time yet.

XII  OUTLOOK

The outlook for the sector in Australia is largely the same as that for the sector globally. The uncertainty regarding the spread and impact of covid-19 will be likely to have a long-term effect on both domestic and international carriage, even though the health impact of the virus in Australia has been much less significant than that in other parts of the world. By way of example, the very significant reduction of aircraft movements between the two major cities of Sydney and Melbourne on what has until covid-19 been one of the busiest domestic carriage routes in the world, is unlikely to recover quickly – as business travellers have become accustomed to cost advantages of online alternatives to face-to-face meetings.

Much will depend on the control of the virus both within Australia and globally as the sector seeks to rebuild. There has been much discussion about a possible opening up of travel between Australia and its near neighbour New Zealand, which has also had a relatively minimal health impact from the virus, but international travel more broadly will be likely to take much longer to be restored to its pre-virus levels and will be dependent on control of the spread and rebuilding of public confidence unless a vaccine can be found.
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 (VIE) 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 VIE, with 31.7 million passengers and 283,806 tonnes of cargo volume (air cargo and trucking) in 2019. It is situated 16km south-east of the city of Vienna and can be reached in 16 minutes by the City Airport Train (CAT), 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 (AUA), which has a fleet of 84 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 is an attorney at Jarolim Partner Rechtsanwälte GmbH.
2 OAG Punctuality League 2016.
3 Luftfahrtgesetz 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\(^4\) also provide (additional) liability and penal provisions. Furthermore, the general damages provisions of the Austrian Civil Code\(^5\) are subsidiarily applicable. Other important laws regulating aviation matters are the Airport Charges Act\(^6\), the Act on Airport Ground Handling\(^7\), the Federal Act on International Air Services\(^8\) and the Air Transport Levy Act\(^9\). In addition, there are several national regulations, such as the Civil Aviation Personnel Licensing Regulation\(^10\), the Rules of the Air\(^11\) and the Air Operator Certificate Regulation\(^12\).

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 the event 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.
\(^6\) Flughafenentgeltgesetz – FEG.
\(^7\) Bundesgesetz über den zwischenstaatlichen Luftverkehr – BGzLV.
\(^8\) Flugabgabegesetz – FlugAbgG.
\(^9\) Flugabgabegesetz – FlugAbgG.
\(^10\) Zivilflugfahrt-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 the event 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 the event 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 for 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 the event 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.13 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. 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. 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 the event 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 eo ipso, but must be claimed explicitly by the carrier. 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 the event 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 12/2 of the Package Travel Act (PRG) explicitly entitles compensation in cases where the non-conformity with the contract is ‘considerable’. The PRG entered into force on 1 July 2018 and replaced Articles 31b-31f of the Consumer Protection Act (KSchG). Similarly to the PRG, the KSchG stipulated in Article 31e/3 that loss of holiday enjoyment is to be compensated. According to the legal provisions (and partly 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 neither Article 31/3 KSchG nor Article 12/2 PRG.

The provisions of the KSchG are applicable to contracts concluded before 1 July 2018.

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 Pauschalreisegesetz.
20 Konsumentenschutzgesetz.
21 Supreme Court 10 October 2002, 6 Ob 11/02i.
22 There are no court decisions re Article 12/2 PRG yet.
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 and freight-handling services. Regarding the noise emissions of the airport, the Protection Against Environmental Noise Act\(^\text{23}\) applies. The statutory provisions are regularly specified by binding national regulations such as the Regulation on Civil Airports\(^\text{24}\) and the Civil Aircraft and Aeronautical Equipment Regulation.\(^\text{25}\)

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 procedure. For 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.\(^\text{26}\) 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.\(^\text{27}\) 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.

\(^{23}\) Bundes-Umgebungslärmverhütungsgesetz.
\(^{24}\) Zivilflugplatz-Verordnung 1972 – ZFV.
\(^{25}\) Zivilflugzeug- und Luftfahrtgerät-Verordnung 2010 – ZLLV.
\(^{26}\) Article 102/1 LFG.
\(^{27}\) Article 102/2 LFG.
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 provides the requirements under which operation and overfly rights are granted to air carriers from third countries.

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:

- operators of civil aircraft;
- civil aerodrome operators;
- organs of the public security service;
- responsible pilots;
- persons who develop manufacture, maintain or modify civil aircraft or their equipment construction or components;
- persons who sign a re-examination certificate or a release certificate for a civil aircraft or its equipment, construction or components;
- persons entrusted with the performance of the duties of the air traffic service;
- persons performing a function related to the installation, modification, maintenance, repair, overhaul, flight inspection or control of air traffic; and
- 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 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, may also be subject to reporting requirements. These shall remain unaffected by the obligation to report as stated in the LFG.

28 Bundesgesetz über den zwischenstaatlichen Luftverkehr 2008 – BGzLV.
29 Zivilluftfahrt-Meldeverordnung – ZMV.
30 Luftverkehrsbetreiberzeugnis- und Flugbetriebs-Verordnung 2008 – AOCV.
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.

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\(^{31}\) 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)\(^ {32}\) 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\(^ {33}\) 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\(^ {34}\) and the Model Protection Act\(^ {35}\) 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

\(^{31}\) Gesetz gegen den Unlauteren Wettbewerb – UWG.

\(^{32}\) Bundeswettbewerbsbehörde.

\(^{33}\) Markenschutzgesetz – MSchG.

\(^{34}\) Patentgesetz – PatG.

\(^{35}\) Musterschutzgesetz – MuSchG.

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Supreme Court only in the case of gross negligence on the part of the injuring party. However, damage to property occurring in the sphere of the surviving dependants must be compensated (e.g., funeral expenses and possible maintenance obligations).

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. 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 Rights 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

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37 Zivilrechts-Mediations-Gesetz – ZivMediatG.
38 Agentur für Passagier- und Fahrgastrechte – APF
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.

Special legal conditions exist for the recourse of the air carrier as an employer to its employees as direct victims. The Employee Liability Act 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 the event of intent (employer’s liability privilege).

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 was implemented in Austria by the Product Liability Act. 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

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39 Dienstnehmerhaftpflichtgesetz.
40 Dienstgeberhaftungsprivileg.
42 Produkthaftungsgesetz.
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 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 accident 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. 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

The Austrian courts have rendered a variety of significant decisions in the past year regarding the Passenger Rights Regulation. As the trend of recent years has already shown, the decisions of the courts can all be characterised as rather consumer-friendly.

The Higher District of Vienna has found that Laudamotion uses clauses in its general terms and conditions which were regarded as inadmissible by the Court. These clauses concern the airport check-in fee, the choice of law as well as the clause on the agreement on the place of jurisdiction. The ruling was appealed, and the Austrian Supreme Court stated that although the airlines were in principle free to set their own prices, a check-in fee of €55, the amount of which was only hidden in the general terms and conditions or under other ‘useful information’ at the time of booking, was inadmissible as it was surprising and disadvantageous for the customer and, therefore, inadmissible. This applies all the more to low-cost airlines with typically very cheap tickets, where the fee of €55 is remarkably high. It is inadmissible if the fee for airport check-in is not automatically displayed during the entire booking process and customers had to research the amount of the fee independently by actively clicking on the tariff information. With regard to another clause on jurisdiction, which was taken up in the same proceedings, according to which Irish courts should have jurisdiction for all disputes, the Austrian Supreme Court suspended the proceedings and referred the matter to the ECJ for a preliminary ruling. The main issue is whether the clause of Directive 93/13/EEC and its national transposition provisions also apply within the scope of Article 25 ECJ Regulation (EU) 1215/2012 on jurisdiction.

In another case, the Regional Court of Korneuburg has declared 23 clauses in the conditions of carriage of the airline Laudamotion to be inadmissible. These concerned changes in flight times, storage charges for luggage, the handling of data and the rights of passengers to enforce their claims against the airline.

In a similar case regarding the GTC of Brussels Airline, the Higher District of Vienna found that eight clauses are inadmissible. One of the clauses relates to the no-show-clause of Brussels Airline.

Besides these largely consumer-friendly rulings, the Austrian courts also showed some airline-friendly tendencies. For example, the Supreme Court ruled that airlines are permitted to unilaterally amend the contract in the way that the operating carrier changes. In the case before the Supreme Court, the two claimants learned at the airport that their booked flight to the Dominican Republic was not, as agreed, operated by the airline Condor, but instead by a HiFly aircraft. As one of the passengers suffers from fear of flying and attaches great importance to the airline operating the flight, they did not take the trip. Because the travellers did not disclose their personal experiences and the importance to them of the fact that they were flying with a particular airline, Condor’s performance of the flight was not made a condition of the contract. The unilateral amendment to the contract was deemed reasonable for consumers. It was regarded as a minor amendment, which was also objectively justified, particularly since, on the one hand, there are no objective grounds for doubting the equivalence of the airlines and, on the other hand, the subjective sensitivities of the travellers

45 OGH 27.02.2020, 9 Ob 107/19x.
46 Landesgericht Korneuburg 27. September 2019, 29 Cg 37/18t.
47 OLG Wien 10.7.2019, 129 R 56/19g.
48 OGH 28.5.2019, 4 Ob 203/18h.
are only to be taken into account insofar as legitimate interests are involved; such interests were not asserted. The fact that the airline may not have been ‘odd’ to the travellers is not sufficient to deny the reasonableness of the change of airline.

With regard to the Montreal Convention, two cases are noteworthy. In one case, the Supreme Court ruled that tipping over coffee is an accident as defined by the Montreal Convention. The accident need not be the result of an aviation-specific risk. Following the corresponding ECJ decision, the OGH has now confirmed the airline’s liability. In another case, the Supreme Court found that carriers are liable without fault for personal injury if the accident occurred on board the aircraft. In this specific case, the question is whether a hard landing, which is still within the normal operating range of the aircraft, can also be understood as such an accident in accordance with the Montreal Convention. The plaintiff claims to have suffered a slipped disc during the landing. The Supreme Court referred the question to the ECJ for a preliminary ruling as to whether a hard landing, which is still within the normal operating range of the aircraft and which results in injury to a passenger, is such an accident giving rise to liability.

**XII OUTLOOK**

The travel industry is particularly hard hit by the effects of the covid-19 pandemic. Airlines have been forced to ground almost all their planes due to a European travel ban, which is why governments have provided or are considering providing aid to state-owned airlines. This is particularly true for AUA, which had 7,000 employees, 83 aircraft, 14.7 million passengers and an annual turnover of €2.2 billion before the covid-19 pandemic. However, on 19 March 2020, AUA suspended its scheduled flights because of the covid-19 outbreak. Since then, the airline has had no income, only costs, and the planes will not take off again before 8 June 2020. In the course of May 2020, the AUA negotiated on state aid amounting to €767 million with the Austrian government. The AUA management’s business plans foresee a plan to shrink the company by about a quarter. The goal is to ensure that the new start is made in the summer of 2020 and that the airline returns to normality over the coming years.

The low-cost airline Ryanair views the state aid as market distortion and is taking legal action before the ECJ against state aid granted to Air France and SAS. It is expected that Ryanair will do the same if AUA (as a Lufthansa Group subsidiary) receives financial aid by the (Austrian) government.

Nevertheless, covid-19 makes it probable that some airlines flying to VIE will discontinue operations or permanently reduce connections, which could create gaps (i.e., new potential) for competitors at VIE after the crisis.

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49 OGH 30.1.2020, 2 Ob 6/20a.
51 OGH 30.1.2020, 2 Ob 138/19m.
Chapter 6

BAHAMAS

Llewellyn V Boyer-Cartwright

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. The information in this chapter was accurate as at July 2019.
2 12 October 1929.
3 12 October 1929.
4 7 December 1944.
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 provides 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 are 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;

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

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.\(^\text{13}\)

\(^{13}\) Schedule 20.170 of the Regulations.
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:

a  maintenance responsibility;
b  approval and acceptance of AOC maintenance systems and programmes;
c  maintenance control manual;
d  mandatory material;
e  maintenance management;
f  maintenance quality assurance programme;
g  aircraft technical log entries; and
h  maintenance records.

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.\textsuperscript{17}

\textbf{iii. Airworthiness}\textsuperscript{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.

\textbf{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.\textsuperscript{19}

\textbf{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{itemize}
  \item[a] in proportion to the injury resulting in the death of any person;
  \item[b] with the deduction of any costs not recovered from the defendant; and
  \item[c] dividing the damages (in such shares as the court orders) among those parties entitled.\textsuperscript{20}
\end{itemize}

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.\textsuperscript{21}

\textsuperscript{17} ibid. Schedule 6.
\textsuperscript{18} ibid. Schedule 5.
\textsuperscript{19} Article 50, Montreal Convention.
\textsuperscript{20} Section 5, Fatal Accidents Act, 2001.
\textsuperscript{21} ibid. 5(3).
The Montreal Convention does provide the claimant with a choice of forum with respect to international carriage.\(^{22}\)

**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\(^{23}\) 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.\(^{24}\)

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.\(^{25}\) 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.\(^{26}\)

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),\(^{27}\) 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.\(^{28}\)

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

The Contributory Negligence Act 2001\(^{29}\) states that Article 21 of the Warsaw Convention contained in the Carriage by Air (Colonies, Protectorates and Trust Territories

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\(^{22}\) Article 33, Montreal Convention.

\(^{23}\) 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.
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.30

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.

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30 Section 3 of the Contributory Negligence Act.
31 Section 43.
32 Section 64(3) National Insurance Act.
33 19.060.
34 19.075.
35 19.080(b).
36 19.085.
There are currently no provisions in the Act or Regulations regarding the protection of whistle-blowers.

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:

a) near airports (within five miles);
b) at excessive heights (above 200 feet);
c) near congested or populated areas (within 500 feet);
d) near an organised open-air assembly (within 500 feet);
e) near a vessel, vehicle or structure (within 100 feet);
f) within close proximity to any person (within 175 feet);
g) ‘in a dangerous or reckless manner so as to endanger other persons or their property’; or
h) 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 83bis 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

37 Section 74, the Act.
38 At the time of writing, the Bahamas has not yet entered in to any agreements.
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.

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 Convention\(^{40}\) 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.


\(^{40}\) International Interests in Mobile Equipment (Aviation Protocol, 2001).
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

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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 this 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.

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.

The above-mentioned Regulations on passenger rights will all remain in place in their current form for the foreseeable future. However, certain temporary measures, which deviate from the rules set out in the current regulations, have been taken in light of the covid-19 pandemic.

In relation to the Belgian Act of 21 November 2017 regulating tour operators and agency contracts, the Belgian government took action with the Ministerial Decree of 19 March 2020 concerning the refund of cancelled package travels. This was subsequently amended following the recommendations by the European Commission, by Ministerial Decree of 3 April 2020. These instruments allow the travel organiser, in the event of a cancellation of the arrangement due to the covid-19 pandemic, to issue a travel voucher, valid for a period of at least one year, to the traveller rather than having to refund the paid booking in money. Travellers are not allowed to refuse a refund by voucher. Nonetheless, if the voucher has not been used within one year, the traveller retains the right to request a refund in money. The travel organiser will in this case be obligated to provide the refund within a period of six months. This softens the economic impact of the covid-19 pandemic on the travel sector as it allows travel organisers to spread out or avoid monetary refunds. As mentioned, this system deviates from the Belgian Act of 21 November 2017 regulating tour operators and agency contracts and is, therefore, a temporary measure. This system is currently valid for cancellations due to the covid-19 pandemic between 20 March and 20 June 2020. It is expected that this arrangement might be further amended in the future following the Commission recommendations of 13 May 2020 on vouchers offered to passengers and travellers.\(^4\)

With regard to Regulation (EC) No. 261/2004, national states do not have the option to implement deviations in their national law as it concerns a binding Regulation. Therefore, the Belgian government, along with several other states, has sent out a communication to the European Commission requesting an amendment to Regulation 261/2004, proposing a system similar to the solution for package travels, which would allow air carriers to initially provide the passengers with a voucher for flights cancelled due to the covid-19 pandemic rather than a monetary refund. Nonetheless, at the time of writing no amendments have been made. This implies that passengers currently retain the choice between a monetary refund and a voucher. For more detail, see the European Union chapter.

iv Other legislation

See the European Union chapter of this publication and Section VI

\(^4\) Commission Recommendation of 13 May 2020 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the covid-19 pandemic, C(2020) 3125 final; see the European Union chapter.
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 that (1) the Belgian Civil Aviation Authority is in charge of delivering, suspending and withdrawing operating licences; (2) 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) 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. Note that at the time of writing, the European Union is proposing certain temporary measures in relation to operating licences in light of the covid-19 pandemic. These might have an effect on Belgian national legislation as well.

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 also 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
Belgium

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.5

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.6

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.

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.

5 www.mobilit.belgium.be/fr/transport_aerien/.

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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. Nonetheless, claims arising out of a contract for transport of passengers are already time-barred after one year. 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 from 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  DRONES
The current main regulation covering unmanned aircraft systems in Belgium is the Royal Decree of 10 April 2016 concerning the use of remotely controlled aircraft in Belgian airspace. This Royal Decree contains, among other aspects, the flight, certification and registration requirements, certain technical aspects and exploitation regulations.

This national regulation shall be replaced by the European Implementing Regulation 2019/947. However, due to the covid-19 pandemic, the date of application of Regulation 2019/947 has currently been extended until 31 December 2020.

X  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 this 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.
XI  THE YEAR IN REVIEW

Concerning legislation, an amendment was 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’.

In the same spirit, the management contract concerning air navigation services in Belgian airspace between the Belgian state and Belgocontrol (now Skeyes) expired on 1 July 2019. Nonetheless, the current contract has been extended by the Decision of 24 June 2019 until a new management contract is concluded.

The Ministerial Decree of 11 April 2000 regulating the conditions of carriage onboard civil aircraft of passengers with special safety risks was amended by Ministerial Decree of 20 June 2019. The amendment not only updates the wording used in the Ministerial Decree but also further regulates the means and methods that can be used by the federal police when dealing with inadmissible passengers or persons who need to be removed from the territory.

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.

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 and subsequent litigation between some affected carriers and Skeyes. In September 2019, Skeyes and the union organisations were able to conclude four social agreements on the work planning of the air traffic controllers. These agreements should put an end to the recurring social unrest at Skeyes and enable the air traffic controllers to perform their duties as foreseen without interruptions.

XII  OUTLOOK

From a socioeconomic point of view, it has become clear during the past year that Brussels Airlines, a subsidiary of Lufthansa and the main air carrier of Belgium, would need to slim down significantly in order to become profitable again. Negotiations between union representatives and the carrier were ongoing regarding the future of the company and its employees. The covid-19 pandemic and the detrimental economic consequences, however, accelerated the need for a slimmer, more profitable organisation. This will most likely lead to a strong reduction of activities and inevitable layoffs of personnel. At the time of this update, negotiations between Brussels Airlines, Lufthansa and the Belgian state are ongoing regarding a monetary aid package that would be granted to Brussels Airlines to deal with
the economic effect caused by the covid-19 pandemic. The outcome of these negotiations will most likely have a major impact on the future of the air carrier. Likewise, other Belgian air carriers, maintenance organisations and ground handlers have also requested financial support of the Belgian government. It remains to be seen in the future which of these requests will be granted.

As previously mentioned, the covid-19 pandemic has impacted the aviation sector in an unprecedented way. This has led to the Belgian federal and regional governments taking certain actions to alleviate the economic impact on the sector in Belgium. The measures that have already been taken or that are on the table at the time of writing have been discussed in their relevant parts of this chapter.

Finally, the impact and reduction of aircraft noise emissions around Brussels Airport is still on the political agenda.
Chapter 8

BERMUDA

Julie McLean and Angela Atherden

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 27 May 2020, the BCAA records indicate a total of 876 aircraft on the Register with 87 aircraft registered in the private category and 789 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.³

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;⁴
- 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.

### 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:

- 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;
- 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
- 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 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.

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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)).
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;
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.

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8 Article 8 of Part IX of the ANOTO.
9 See Schedule 1, Article 2.
A final and conclusive judgment in the superior courts of certain foreign jurisdiction\(^{11}\) 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 \(^{\text{bis}}\) agreements under the Chicago Convention, especially the Article 83 \(^{\text{bis}}\) 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.

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\(^{11}\) Australia, Bahamas, Barbados, Dominica, Gibraltar, Grenada, Guyana, Jamaica, Leeward Islands, Nigeria, St Lucia, St Vincent and the United Kingdom.
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-lessor 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 a further US$429 million in 2019.

V 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.

VI THE YEAR IN REVIEW

Securitisations and capital markets

The use of Bermuda SPVs for aircraft portfolio securitisations has remained popular.

In January 2020, 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 9 January 2020, comprised US$1.1 billion of 2.875 per cent senior unsecured notes due in 2025 and US$650 million of 3.25 per cent senior unsecured notes due in 2027. 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 Limited (NYSE: AYR) did a notes offer of US$650 million principal amount of the company’s 4.25 per cent senior notes due in 2026. The offering closed on 13 June 2019.

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 III Ltd and START Holding III 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$539 million. The notes comprise US$355.047 million series A fixed rate secured notes Series 2019-1, US$56.57 million Series B fixed rate secured notes Series 2019-1, and US$34.72 million Series B fixed rate secured notes Series 2019-1.

Air Navigation (Overseas Territories) Order under Article 68(4).
C fixed rate secured notes Series 2019-1, along with US$87,531,000 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 III Ltd, which is financing its acquisition through issuance of 144A debt and equity. GECAS will continue to service the portfolio and STARR 2019-1, an affiliate of Sculptor will serve as an asset manager.
Chapter 9

BRAZIL

Ana Luisa Castro Cunha Derenusson, Rita de Cassia Fernandes de Godoy, Isabel Sevzatian Silveira, Julia Gazineu Machado Sanches and Ingrid Santos Alves Rosa

I \ INTRODUCTION

The year of 2019 was one of highs and lows for the aviation market in Brazil. There were many difficulties and challenges, such as Avianca’s bankruptcy procedures, that had great impact on the market, causing a concentration of market share for the remaining airlines, issues with application of the Cape Town Convention, offer scarcity and controversy regarding the redistribution of the slots which were used by Avianca. However, despite all challenges that the Brazilian economy had experienced in that year, the aviation market grew and had an increase in revenue of 1.4 per cent in relation to the year of 2018.\(^2\)

Furthermore, there were important regulatory developments made by the Brazilian National Aviation Agency (ANAC), such as the new regulations for fatigue management implemented by the Brazilian Civil Aviation Regulation No. 117 of 19 March 2019, that sets forth the criteria and standards that aircraft operators need to comply with in order to fight crew fatigue, and the increase in penalties for irregular air freight, for example. Both measures seek to increase safety in Brazilian flight operations.

Regarding liability and litigation, for international flights the enforceability of the Warsaw and Montreal Conventions was pacified by the rulings made by the Brazilian Supreme Court in 2017. The ruling, however, is only applicable for material damages. Nevertheless, the Consumer Defense Code is still being applied for moral damages by most courts in cases involving international flights. For national flights, the Consumer Defence Code is still applicable to both material and moral damages, even when conflicting with the dispositions of the Brazilian Aeronautical Code. Also, the rates litigation related to air transport issues has increase significantly in Brazil all though the past year, which contribute to offset the positive impact of applying the Warsaw and Montreal Conventions to airline companies operating in Brazil.

It is important to note that, towards the end of 2019 and the beginning of 2020, a new issue arose: the covid-19 pandemic. The outbreak of the disease began in the Chinese province of Wuhan, quickly spread around the globe, and was declared a pandemic by the World Health Organisation on 11 March 2020. It is still too soon to understand the depth of the impact of the pandemic, but its effects can already be felt on the markets, with civil

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\(^1\) Ana Luisa Castro Cunha Derenusson is the head of the aviation practice and Rita de Cassia Fernandes de Godoy, Isabel Sevzatian Silveira, Julia Gazineu Machado Sanches and Ingrid Santos Alves Rosa are advocates at De Luca, Derenusson, Schuttoff Advogados.

commercial and business aviation being one of the most hard-hit sectors. Certain experts are predicting that the level of the air travel industry will return to the numbers of 2019 only in 2022.

II LEGAL FRAMEWORK FOR LIABILITY

Assessing legal liability in Brazil can be more challenging than it appears at first sight, especially for air transport services, due to the several layers of applicable legislation that need to be considered. Furthermore, the interpretation of the legislation by Brazilian courts is not uniform, so airlines need to resolve litigations mostly on a case-by-case basis. Those factors, along with the facilitated access to legal procedures since the creation of Special Civil Courts for small claims are responsible for the high rates of litigation in Brazil.

Most recently, Brazilian courts have seen a sharp rise in air transport-related litigation: in 2018, the courts registered 64,000 cases, but there was 109,000 new cases registered just in the first semester of 2019, according to a survey made by IBAER (the Brazilian Institute of Aeronautical Law). This spike in aeronautical litigation is attributed mostly to start-ups that offer services to passengers to mediate and seek compensation of damages from airlines.

Nevertheless, for international air transportation, application of the Montreal and Warsaw Conventions is pacified, and is mostly broadly considered by the courts, after an important ruling of general repercussion made by the Brazilian Supreme Court in May 2017 (theme 210/ leading case RE636331). However, the application is limited to material damages, leaving it up to the court to decide on the amount of moral damages based on the full indemnification principle established by the Civil Code (Federal Law No. 10,406 of 10 January 2002) and the Consumer Defence Code (Federal Law No. 8,078 of 11 September 1990).

Even though the excessive litigation in Brazil is cause for attention, airlines and the government are working together to counteract that, searching for alternative forms of conflict resolution, such as mediation, for example. Even with the joint efforts of market players, the culture of the courts to favour full indemnification when possible is unlikely to change in the near future, and the best approach is to search ways for airlines and passengers to work together and reach an agreement outside of court.

i International carriage

Brazil is signatory of several international treaties and conventions regarding air transportation and civil aviation, among which we may mention the following:

\(a\) the Convention for the Unification of certain rules relating to international carriage by air, commonly known as the Warsaw Convention of 1929, incorporated into Brazilian legislation by Decree No. 20,704 of 24 November 1931;

\(b\) the Convention on International Civil Aviation, commonly known as the Chicago Convention of 1944, incorporated into Brazilian legislation by Decree No. 21,713 of 27 August 1946;

\(c\) the Convention for the Unification of Certain Rules for International Carriage by Air, commonly known as the Montreal Convention of 1999, incorporated into Brazilian legislation by Decree No. 5,910 of 27 September 2006; and

\(d\) the Cape Town Convention on International Interests in Mobile Equipment of 2001, incorporated into the Brazilian legislation by Decree No. 8,008/2013.
Regarding application of international treaties, an important development worthy of mention is the Ministerial Order No. 527 of the Ministry of Infrastructure authorising the celebration of bilateral treaties conferring up to the 7th air liberty for air transport of cargo (but not for the transport of passengers).

Further, as already mentioned above, the Avianca bankruptcy has caused an impact in the application of the Cape Town Convention. Avianca’s bankruptcy set a precedent recently for debt reorganisation claim of airline companies, due to it being the first claim made by a relevant airline company since the Brazilian Bankruptcy Law and the Cape Town Convention became enforceable. In the Avianca lawsuit, the designated bankruptcy judge authorised the postponement of payments due to aircraft lessors by 30 days, applying the terms of the Cape Town Convention, but after the 30-day term had ended, the bankruptcy judge decided to extend the postponement term without any legal provision authorising this extension. Eventually the payment suspension granted was overruled by the appeal court and the leased aircraft were successfully repossessed by their respective lessors as per the terms of the Cape Town Convention. It is evident that this precedent will have an impact on future rulings, but its repercussions are still unforeseeable, since, even though the bankruptcy judge order could be seen as a violation of the terms of the 1st paragraph of Article 199 of the Brazilian Bankruptcy Law and of the Cape Town Convention by Brazilian courts, the negative impacts of the violation were mitigated once the decision that postponed rent payments was overruled by the appeal court.

ii Internal and other non-convention carriage

Regarding the internal civil aviation market, that remains outside the scope of international treaties, the most relevant Brazilian legislation is the Federal Law No. 7,565 of 19 December 1986 (commonly known as Brazilian Aeronautical Code (CBA)). The CBA covers most, if not all, of the relevant issues for civil aviation in Brazil, from operational issues, safety, definition of criteria for manufacture of aircraft, air traffic control, aircraft registration, certification and legal liability of air transport carrier (including airline companies and air freight companies).

Nevertheless, many times rulings overlook the CBA criteria for air transport liability, favouring the Consumer Defence Code and the concept of full indemnification and consumer protection. As already mentioned, this is one of the factors that contributes to the judicialisation of conflicts between airlines and passengers, breeding a culture of litigation rather than mediation.

Further, the CBA is undergoing revision and modernisation by the Brazilian legislators, which is an opportunity to promote a more uniform form of damage compensation, more aligned with international standards. On the other hand, there is also pressure from consumer protection entities that may have an impact on the final approved text for the new CBA.

Other relevant pieces of aeronautical legislation include: Federal Law No. 11,182 of 27 September 2005, which created the ANAC, having as purpose to regulate, supervise and manage Civil Aviation issues in Brazil to guarantee the safety and quality of air transport services and transparency of the procedures link to civil aviation; and Decree No. 6,834 of 30 April 2009, that regulates the competence of the Aeronautical Command, the government body that is responsible for air traffic control.

Also, the Brazilian Civil Code sets forth the general rules for civil liability and damage recovery, stating the principle of full indemnification in Articles 186 and 927 and must be
taken into consideration when assessing legal liability in general, including liability for air transportation and civil aviation – in which case, it should be applicable in combination with the provisions of the CBA.

**iii  General aviation regulation**

The same general rules applicable to domestic air carriage are also mostly applicable to civil aviation in general. The Brazilian Civil Code is the broadest legislation and is also applicable to other sectors, not just aviation. Article 186 of the Brazilian Civil Code defines illicit act as the act of causing damage to others, by wilful misconduct, negligence, imprudence or malpractice and Article 927 provides that those that perform an illicit act must compensate the damage.

Further, the sole paragraph of Article 927 provides that those who practice high risk activities are liable for damages even when acting without fault or ill intent (i.e., strict liability). Courts understand that most business practices as high-risk activities, and provisions of the sole paragraph of Article 927 of the Civil Code mostly applies. When the Consumer Defence Code is applicable, most likely strict liability will likewise apply.

Regarding transport in general, Articles 730 to 733 of the Civil Code also apply. The general rule is that the transporter is liable for baggage damage, except in cases of *force majeure* events.

Moreover, for air transportation or civil aviation in general, the provisions of the CBA are applicable, even though most are outdated due to the development of new technologies and changes in market dynamics since the date of the Law. On that note, most of the limitation of liabilities for air transport are defined in a unit that is no longer used. Once the CBA is revised by legislators, these issues hopefully will be resolved.

Aside from all the above, another complex situation is regarding liability in *force majeure* events, since in spite of the legislation excluding liability in these cases, some situations that could be classified as *force majeure* (such as weather conditions, for instance) are considered part of the risk of the activity and, therefore, hold the airline liable for such events.

**iv  Passenger rights**

Passenger rights are mostly contained on the ANAC Resolution No. 400 of 13 December 2016, as amended from time to time. Most of the rights included on Resolution 400 intended for a more transparent and clear relation between passengers and airlines, and to align the Brazilian regulations to international standards, making the Brazilian aviation market more attractive to low-cost airlines.

Despite the fact that Resolution 400 gave more flexibility for airlines to customise their products, there are still rules that are mandatory in order to protect passenger rights, with a minimum mandatory criteria of passenger protection that need to be complied by airline companies. Those rights regulate, inter alia, baggage claims, mandatory compensation for flights delayed or cancelled and the right for a full refund in the event of ticket cancellation within 24 hours of its purchase.

It is also relevant to consider that provisions of the Consumer Defence Code are applicable to airline–passenger relations in complementation to Resolution 400 and is broadly applied by courts for air transport liability.
Other legislation

Labour law

For carriers, labour claims are one of most relevant issues when assessing liability, aside from consumer claims. Recently the general Labour Law (Decree No. 5,452 of 1 May 1943) was revised and several of its dispositions were altered by Federal Law No. 13,467 of 13 July 2017. The modification's intended to facilitate and allow for more flexibility in negotiations between employers and employees and to update the provisions of the Labour Law to accommodate modern work relations. One of the changes with the greatest impact was regarding use of outsourcing in a broader way, which has benefited airlines through the use of outsourced labour for a wider range of activities within the organisation.

Regarding air crew workers, specifically (i.e., pilots, flight attendants and aeronautical mechanics), there were also an update to the applicable legislation, by Federal Law No. 13,475 of 28 August 2017, which regulates aspects that are specific to these types of service, such as time limits for shifts, criteria for crew scheduling, the limits and responsibilities of crew members, among other relevant issues.

Competition law

The Competition Protection System in Brazil is established by Federal Law No. 12,529 of 30 November 2011 and airlines, as well as its employees, are liable in case they perform acts that are considered harmful for the competition and for Brazilian economy as per the terms of the applicable legislation. Further, some mergers, acquisition of companies and company reorganisation may need approval of the CADE.

Anti-corruption law

To combat acts of corruption, Brazilian legislators have edited Federal Law No. 12,846 of 1 August 2013, which defines acts of corruption and establishes penalties for individuals performing the act and the companies involved.

Environmental law

Environmental risk is one of the most relevant concerns that need to be addressed by carriers and in aviation operations in general, as both individuals and companies can be held liable for environmental damage (in civil, criminal, and administrative stances). It is important to note that environmental risk cannot be limited and liability extents to include even force majeure events, therefore, proof of a relation of cause and effect between the act and the damage is enough for an individual or entity to be considered liable. Environmental protection is enforced by a complex system of laws and regulations, that has its basis on the Federal Constitution.

Aviation has many environmental effects that need to be considered, such as waste management, CO2 emissions, for instance, and companies could be held responsible for their environmental impact. A way to mitigate the risk would be the voluntary acquisition of carbon emissions credits or create a more efficient waste management programme, for example.
Data protection law

Data protection has come to be a cause of concern in recent years, as technology advanced and access to private information has become more vulnerable to violations. Due the foregoing, Brazilian legislators have recently approved the Data Protection Law (Federal Law No. 13,709 of 14 August 2018, as amended from time to time) that is not yet fully enforceable. Companies have until 3 May 2021 to conform and comply to its terms.

III LICENSING OF OPERATIONS

i Licensed activities

The ANAC, created by the Federal Law No. 11.182 of 27 September 2005, is the governmental agency that has the purpose to regulate, supervise and manage Civil Aviation issues in Brazil to guarantee the safety and quality of air transport services and transparency of the procedures linked to civil aviation.

The ANAC’s activities include, inter alia, the definition of certification procedures for aviation crew members (pilots, flight attendants and aeronautical mechanics), registration and record-keeping for aircraft (made by the Brazilian Aeronautical Registry (RAB)), the definition of certification procedures for airlines, air taxi companies and other aviation activities and definition of procedures to ensure safety of aircraft manufacture process.

According to the applicable laws and regulations, companies rendering services in aviation, such as air transport of passengers and cargo, air taxi services, aerial photography and other aviation-related businesses need to be previously subject to licencing and certification procedures by the ANAC. Also, flight crew members, such as pilots, flight attendants and aeronautical mechanics and engineers also need to be certified by the ANAC.

Furthermore, the Aeronautical Command is responsible for the air traffic control, as per the terms of the Decree No. 6,834 of 30 April 2009.

ii Ownership rules

In June 2019, legislators approved the revision of the CBA, authorising the increase of the allowance for foreign capital participation in airlines from 20 per cent to 100 per cent. It is expected that the revision promotes more competition, with the possibility of new companies participating in the local aviation market and to increase foreign investment in existing carriers.

iii Foreign carriers

Brazilian laws and regulations regarding licencing and certification establish three steps for foreign carriers to operate regular airlines to and from Brazil: (1) designation by the country where the company is organised; (2) the ANAC issuing an authorisation for the foreign company to function in Brazil; and (3) the ANAC issuing an authorisation for the foreign company to operate in Brazil.

In addition to the foregoing, it is necessary to register the company and to obtain a taxpayer ID number from the Brazilian tax authorities. Further obligations may be requested, depending on the location where the carrier will operate.
Once the designation is in place, the following two steps of ANAC procedures can be initiated.

The authorisation to function in Brazil depends on validation by ANAC of the applicant’s corporate documents, in order to verify that they meet the criteria set forth in the applicable legislation and of the legal representative of the company in Brazil. The representative can be a Brazilian citizen or a registered foreign citizen, as long as they have a CPF (taxpayer ID card) issued by Brazilian federal tax authorities.

To issue the authorisation to operate, ANAC evaluates documents related to the company’s operational security program and its operational specifications. In addition, the company need to present documents proving the absence of debt owed to the Brazilian government and ANAC.

IV SAFETY

Brazil is a signatory to ICAO, the International Civil Aviation Organization. It follows its guidelines and the determinations for the adoption of the operational safety programme (SPO) created the SGSO (operational safety management system), which should be implemented by Brazilian operators. The ASSOP (Operational Safety Advisory) created in 2019 is responsible for supervising and managing the SPO.

The CBA gives the attribution to the Aeronautical Accident Investigation and Prevention System (SIPAER) the competence to plan, guide, coordinate, control and execute air accident investigation and prevention activities, carried out by the Accident Investigation and Prevention Center Aeronautics (CENIPA).

In addition to the rules established by the CBA there are a number of rules regarding safety which are regulated by ANAC and the Ministry of Defense.

The Brazilian Civil Aviation Regulation (RBAC) No. 121 established among other things safety requirements to be met by Brazilian companies that are certified to perform scheduled air transport services, such as: (1) requirements for operation on certain routes; (2) communication capabilities; (3) minimum requirements for ground handling; (4) minimum requirements for aircraft maintenance; (5) maintenance programmes; (6) limitations for aircraft operations; (7) aircraft configuration requirements; (8) training and training programmes; (9) qualification standards; and (10) licences required for crew, mechanics and flight dispatchers.

On the other hand, RBAC No. 135 establishes among other things safety rules applicable to companies that perform charter flights, air taxi companies and companies that render specialised air services.

The RBAC No. 145, which provides for aeronautical product maintenance organisations, required that all maintenance organisations, until 8 March 2019, adopt the SGCO. This evidences the importance of maintenance in managing security levels. In terms of professional certifications, in August 2019, the ANAC implemented the CAT (digital technical qualification certificate), allowing civil aviation professionals to have their licences in full digital format as well as reissuing Level 6 of language proficiency.
V INSURANCE

Insurance in Brazil is regulated by the following framework:

- the Brazilian Civil Code;
- Decree-law No. 73 of 21 November 1966; and
- Complementary Law No. 126 of 15 January 2007, as amended from time to time.

Any individual or company exploring an aircraft has the legal duty to hire insurance covering damages to passengers, crew, the aircraft itself and damages on the ground. The amount of the insurance policy will be calculated considering the liability limitations established in the CBA and the international treaties to which Brazil is a party. The requirements for mandatory insurance demands that the aircraft owner or operator obtains air operator third party liability insurance – RETA Insurance – under the following conditions:

- regular or non-regular air transport services: RETA Insurance, covering the owner or operator third party liability for future risk of damages caused to: (1) passengers and passengers’ assets; (2) crew; (3) people and assets in the ground; and (4) the aircraft total value; all of them under the limits provided for in the CBA; and
- private air transport: RETA Insurance, covering the owner or operator third party liability for future risk of damages to: (1) the crew; (2) people and assets on the ground; and (3) the aircraft total value.

Note that the Brazilian government is authorised to assume the third party liability for damage caused to assets or people (passengers or not) by terrorist attacks, war acts or any connected event against aircraft registered in Brazil, operated by Brazilian public air transport services companies.

VI COMPETITION

The Brazilian Federal Constitution regulates the principle of free competition, providing that economic agents with market power cannot restrict competition. Thus, any practice adopted that causes or may cause damage to free competition qualifies as an anticompetitive behaviour.

As a policy of defence of competition and economic regulation, Brazil adopts the Brazilian System for the Defense of Competition carried out by the CADE and by the Seprac (Secretary for the Promotion of Productivity and Competition Advocacy) of the Ministry of Finance. This system has a preventive and repressive character to violations against the economic order.

The same competition regulations that apply to any other market also apply to the aviation industry in Brazil. These regulations are applied by the CADE. The ANAC also regulates the landing and departure rights and fares charged. The CADE and the ANAC enacted a convention on mutual assistance and cooperation for competition matters in aviation. The CADE applies the regulations to operations that can impact competition in a certain relevant market. The CADE usually adopts a four-step methodology to analyse the competition particulars of a determined transaction: (1) relevant market; (2) market share; (3) exercise of economic power; and (4) efficiencies.

The non-exhaustive list of infractions considered anticompetitive are listed under Article 36 of Law No. 12.529 of 30 November 2011 followed by sanctions provided by
Article 37. Among the anticompetitive acts are cartels, predatory prices, resale price fixing, territorial and customer base restrictions, exclusivity agreements, abuse of dominant position, refusal to hire, sham litigation and creation of difficulties for the competitor.

The cartel, considered the worst anticompetitive behaviour, not only will be punished on an administrative basis but it is also qualifies as a crime as provided by Law No. 8,137 of 27 December 1990 with a penalty of imprisonment from two to five years and a fine for directors and administrators.

VII WRONGFUL DEATH

In air accidents as a result of the transportation of passengers, the victims (their families) will have the right to compensation. The repair will cover material and moral damage caused by the harmful event. The material damages shall encompass all expenses borne by the family, from the identification of the deceased to the funeral ceremony. It is also understood that the dependents of the deceased must be compensated, based on the income received, projections and life expectancy of the deceased. On the other hand, moral damages shall encompass an indemnification to compensate emotional suffering caused by the loss of the loved one. Quantification varies according to the case-by-case analysis made by the courts.

VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

The commercial relationship between passenger and airlines in Brazil is characterised as a consumer relationship and is mainly regulated by the Consumer Protection Code for domestic flights demands and by the Warsaw and Montreal Conventions. In 2017, there was a major shift in the jurisprudence when the Brazilian Supreme Court has ruled that the Warsaw and Montreal Conventions to which Brazil is a signatory shall take precedence on international flight demands over the Brazilian Consumer Code with respect to material damages.

If there is a conflict between a passenger and an airline, it can be resolved: (1) directly with the airline through its customer care services; (2) the Consumer Protection Agency (PROCON); (3) the ANAC; or (4) the Brazilian Courts (Small Claim Courts or Civil Courts).

PROCON shall defend and protect consumers’ rights and interests. Therefore, in the event of a conflict between a passenger and an airline, the passenger may file a claim with PROCON, which in turn forwards the registered claim to the airline. The latter must submit a response within a specified period, usually of five working days. PROCON’s operation is similar to a conflict mediator, and it aims to reach a resolution or a settlement that serves both the consumer and the airline. However, if the matter brought to PROCON affects not just one individual but consumers in general, PROCON is authorised by law to penalise the airline and apply pecuniary sanctions.

The ANAC offers consumers a direct communication channel, exclusively available for the registration of complaints regarding the airline’s violation of the consumer code or of any laws/regulations of the industry. The flow of responses works similarly to PROCON: once the claim is filed it is forwarded to the airline for the purpose of reaching a resolution for the matter or a settlement, which will end the matter definitively and without the intervention of the justice system. The ANAC is also authorised to penalise any airline which acts might be affecting the of consumers on a collective basis.
The consumer can also choose to file its claim before a special civil court (only for the total amounts of less than forty times the Brazilian minimum wage), in which the lawsuit follows a simpler procedure and the timeline for judgment takes an average of six months to one year. Another option is for the claim to be brought to a Civil Court in which the procedures tend to be more complex and the timeline for judgment takes longer and increases costs. Settlements can be reached at any time by the parties and are often encouraged by the judges in court. Additionally, the Brazilian Civil Procedure Code instigates the parties settling by offering the parties a mediation hearing, which must be attended by the parties, once a lawsuit is filed.

In Brazil, most claims involving passengers and airlines are usually filed before the Special Civil Courts due to the nature of the pleading and no cost to the consumer. If the pleading sum is an amount equal to or less than 20 times the Brazilian minimum wage, there is no need for the assistance of an attorney.

Regarding the limitation period for consumers to file a claim, for a long time, the judiciary constantly applied the five-year term established by the Brazilian Consumer Code for both national and international flights, often disregarding the two-year term established in the Warsaw and Montreal Conventions (which should have been applied for international flights), to which Brazil is a signatory.

In 2017, however, with the recognition of the supremacy of the international conventions of Warsaw and Montreal over the Consumer Protection Code, the Brazilian judiciary started to apply the two-year term, as per the provisions of the Warsaw and Montreal Conventions, whenever the claim filed involved an international flight.

ii Carriers’ liability towards passengers and third parties

According to Brazilian Law, air transportation is considered to be a service and the carrier or airline is considered the provider, and the person who uses air transportation is considered a consumer. The relationship between them is ruled by the Brazilian Consumer Code. Therefore, the air carrier as the recipient of the profits must assume the risk of the activity.

The liability of the airline towards its consumers is considered to be objective and independent on an analysis of fault or intent, according to the Brazilian Consumer Code. Therefore, carriers’ liability to its passengers is based on the link between the damage caused and action or lack thereof from the service provider. Therefore, having identified this link, the airline shall indemnify the passenger for the damages suffered. The only exception is if the airline can prove that the consumer or a third party has exclusively caused the damages, or that the service was provided flawlessly.

The carrier’s liability towards third parties, on the other hand, will be subjective and the Brazilian Civil Code will guide its analysis (not the Brazilian Consumer Code). In this case, for the airline to be compelled to indemnify a third party (which is not a consumer), it must be proven the service provider’s fault or intent, and that the damage or illicit claimed is irrefutable. The judge will first confirm if the damage or illicit did in fact occur and whether if it was caused by an action (voluntary), omission, negligence, recklessness or malpractice of the supplier.

The limitations brought by the international conventions of Warsaw and Montreal regarding international air transportation were often disregarded by the Brazilian judiciary on the grounds that in view of being a consumer relationship, the Brazilian Consumer Code would prevail, which guarantees full compensation of damage suffered by the consumer, regardless of proof of fault or intent.
Regarding compensation for material damage on international flights, as with the recognition of the supremacy of the international conventions of Warsaw and Montreal on the Brazilian Consumer Code by the Supreme Court in 2017, the Brazilian judiciary has applied a limitation on property (material) damages whenever the lawsuit was based on an international flight.

iii  Product liability

In most cases, the liability for providing air transport would be, exclusively, to the airline registered as the operator of that certain aircraft before the RAB.

It is important to mention, however, that the Brazilian Consumer Code establishes that everyone involved in the supply chain (air transport) is considered liable for the damage, both material and immaterial. For example, in the event of loss of luggage, unjustified delay or flight cancellation, the airline will be held responsible.

Therefore, in the event of an accident, according to the Brazilian Consumer Code, the consumer (or its heirs) shall be able to involve all those who are directly or indirectly in the provision of air transport services (including, without limitation, both the aircraft manufacture and owner), as they are considered jointly liable according to the Brazilian Consumer Code.

iv  Compensation

A large part of the lawsuits filed before the Brazilian judiciary involving airlines are based on flight delays, cancellations and loss of luggage, situations that may cause some discomfort, annoyance and losses to passengers.

In this context, the question is how to define in which hypotheses the psychological disorder is capable of characterising indemnifiable moral damage and which are the parameters to quantify the moral damage once characterised, since the current legislation does not establish parameters or criteria for its characterisation.

Since the recognition of the supremacy of the international conventions of Warsaw and Montreal over the Brazilian Consumer Code by the Supreme Court in 2017, the Brazilian judiciary applied limits to the payment of indemnities for property (material) damages whenever the claim is based on an international flight. However, in relation to claims pleading compensation for moral damages, the judiciary continues to apply the Brazilian Consumer Code.

In addition to the payment of indemnities for material and moral damage, in the case of an accident, the airline may also be compelled to pay for medical expenses, funeral expenses, in addition to eventual compensation for permanent damage that causes an incapacity to the injured individual (the quantification of which depends on the degree of disability caused). Also in the event of death, family members will be compensated (i.e., children and wife, in addition to those who demonstrate that they were financially and emotionally dependent on the victim).
IX  DRONES

Operations with drones in Brazil are mainly ruled by three institutions: (1) the Airspace Control Department (DECEA), which is responsible for controlling the access to Brazilian airspace; (2) the ANAC which approves the drone's operation; and (3) ANATEL (the National Telecommunications Agency), which is responsible for the certification and approval of the equipment.

Although the use of drones has increased throughout the years, their operation has brought new risks to air transport operations. Hence the DECEA and ANAC have intensified the rules for their use, as well as the inspection of operations.

The main perils of the use of drones are: (1) the risk of collision between an aircraft and a drone, which could cause serious damage to the aircraft, especially to its wings, nose, windshield and mainly its engines; and (2) the risk of what we call ‘ripple effect’ to the air transportation network structure, which is caused by the temporary suspension of operations. A simple collision may cause the aircraft to crash. Therefore, in order to bring greater security to airspace, airports must close their terminals once the presence of a drone is reported or identified. Disruption in flight schedules might result in successive delays, a fact that may affect airlines negatively.

The ANAC and DECEA have recently intensified restrictions on drone operations, focusing on minimising risks at airport areas. Current restrictions forbid any drone operation of any kind within airport’s grounds and in a perimeter of 5.4km around it. In the perimeter from 5.4km to 9km, drones are permitted to fly up to an altitude of 30 metres, and only from a perimeter of 9km from the airport are drones permitted to fly to an altitude of up to 120 metres. Different permission can be granted by individual permits, allowing drones to fly in otherwise forbidden areas.

X  VOLUNTARY REPORTING

According to the CBA, any person who becomes aware of an aircraft accident or the existence of aircraft wreckage has a civil obligation of reporting to any Brazilian Authority (preferably the Air Force Command) through the fastest available means. In order to secure the confidentiality of the information, as well as the protection of whoever reported it, the process is confidential and anonymous.

SIPAER is responsible for investigating claims arising from accidents, incidents or ground events involving aircraft. Therefore, whenever a claim is filed, CENIPA shall conduct the investigation, which is SIPAERs main centre.

SIPAER's investigation has the purpose of improving aviation safety and preventing the recurrence of accidents, incidents or ground events involving aircraft. The main idea is to analyse and identify acts, conditions or circumstances that, individually or together, may represent risks to the integrity of people, aircraft and other assets. Further, a final report shall be issued pointing out the possible elements, which have contributed, directly or indirectly, to the occurrence of the accident and making safety recommendations, which, if adopted, can help to eliminate or, at least, mitigate the potential risk of recurrence.

Finally, it is important to mention that all sources of information and the whole investigation (including all materials, analysis and reports), as a rule, cannot be used as evidence in any legal or administrative proceedings except if determined to be presented by a court order.
XI  THE YEAR IN REVIEW

In 2019, the commercial aviation industry demonstrated significant growth in comparison to 2018,\(^3\) despite all the challenges the Brazilian economy had to face during this period, as previously pointed out in Chapter I of this publication.

Looking back through the year, there were several ups and downs that directly affected the aviation industry in Brazil. One of the events with the highest impact in the industry was Avianca’s bankruptcy, causing the concentration of market share for the remaining airlines and certain issues with the application of the Cape Town Convention within the scope of the judicial recovery of Avianca, and the controversy regarding the use of slots (especially the ones that were being used by Avianca). Other relevant events were the opening of the Brazilian market to the operation of new airlines with 100 per cent foreign capital, as well as the auction of twelve airports by ANAC, which represents 9.5 per cent of the domestic market in Brazil, as a continuation of the Brazilian programme of airport concessions launched back in 2011.\(^4\)

The attention of international players towards Brazil has been growing since the then recently elected President Mr Jair Bolsonaro approved Law No. 13,842 on 17 June 2019,\(^5\) which approved the increase of the allowance for foreign capital participation in airlines from 20 per cent to 100 per cent. Currently, at least five low-cost airlines were authorised to operate in Brazil, raising expectations and creating a completely new scenario.

Furthermore, there were important regulatory developments made by ANAC, such as the rules that were enacted to regulate fatigue of pilots and crew (RBAC N.117/2019), and the increase in penalties for irregular air taxi companies. Both measures are intended to increase safety in Brazilian flight operations for commercial and business aviation sectors.

The covid-19 outbreak has caused impacts of enormous importance in the social and economic environment of people throughout the world, and that it is not different in Brazil. These impacts include the aviation industry (both commercial and business aviation sectors), which is facing the increasing challenges to adapt to new guidelines. The outbreak of the disease began at the very end of 2019 in China and quickly spread across borders. At this point in time, it is hard to predict how the pandemic will evolve and continue to affect businesses and industries, especially the aviation industry, and what changes will be permanent after this situation is solved.

XII  OUTLOOK

In 2019, Law No. 13,842 of 17 June 2019 which authorised the participation by foreign capital of 100 per cent in Brazilian airlines stimulated the sector’s competitiveness. As a result of such change of law, low cost companies started to include Brazil in their routes, for example, the Chilean Sky Airline, the Norwegian, the Argentine FlyBondi and the Chinese Air China, as well as interested ones such as the Chilean subsidiary of the American JetSmart, the Colombian Avian and the foreign company GulfAir that does not operate at low cost.

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Despite the covid-19 pandemic scenario, the aviation industry is under a process of carrying out several measures implemented by ANAC as well as by the international aviation regulatory bodies. Such measures aim for to maintain of the viability of operations, while complying with all safety and health recommendations under the new scenario, which was imposed as a result of the covid-19 pandemic. It also seeks to fill the gaps left by the decreased demand of consumers of air transportation, in order to distribute operational activities among their categories, authorising or easing permissions and prohibitions, imposing additional security mitigations to maintain the same level of operational security.

Brazil has plans to enter into agreements with several countries, such as Canada, Chile, China, Peru, Russia, the United Kingdom and the United States. In addition, it joined the Aviation Leaders Council at the invitation of IATA, the International Air Transport Association, assuming a prominent role in the discussion on the resumption of air transport.

Worldwide cooperation is expected in planning the resumption of air transportation again. In addition, airlines and the business aviation industry in general very much welcome the modernisation and update of civil aviation regulations to bring more players and certainty to the business.
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

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.
Chapter 11

CAYMAN ISLANDS

Wanda Ebanks and Shari Howell

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.

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. 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. 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.

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. Despite its relatively small size, the Registry has evolved as a highly regarded private aircraft registry.

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1 Wanda Ebanks is a partner and Shari Howell is of counsel 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).
6 Only six approved AOC holders are reported in the 2017 CAACI Annual Report.
7 As at 22 May 2020, the CAACI records indicated a total of 268 aircraft were registered on the Cayman Islands Aircraft Registry (Active Aircraft Register on CAACI website at www.caacayman.com).
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 the 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 or in the public interest for the aircraft to be or to continue to be registered in the Cayman Islands.

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;

8 Air Navigation (Overseas Territories) Order 2013, Article 16(1).
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 Islands AOC operate a Cayman Islands office. A physical presence can be established by means of a Cayman Islands Special Economic Zone company in the Cayman Maritime and Aviation Services Park. 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.

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.10

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9 More detailed information is available from the CAACI directly.

10 Air Navigation (Overseas Territories) Order 2013, Article 188(1).
No registration of leases

Leases are not required to be registered with the Registry in relation to Cayman Islands 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):

a. the registered owner or the person responsible for the aircraft, must provide the CAACI with instructions to deregister the aircraft;

b. 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;

c. the registered owner’s financial account with the CAACI must be fully settled;

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);

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:
   • the mortgage will not be discharged;
   • the mortgage remains in force; and
   • a notation will remain on the Mortgage Register; and

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.

In a default enforcement scenario, the above deregistration procedure applies save that the following will also be required:

a. a notarised or original deregistration power of attorney (in favour of the person seeking to instruct the CAACI);

b. proof of default under the agreement giving rise to the right to deregister the aircraft and the details thereof;

c. proof of right to deregister the aircraft in an event of default (i.e., reference to the relevant section of the agreement);

d. confirmation that the adversely affected party is seeking to enforce its rights under the agreement; and

e. 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.

References to ‘registered owner’ mean either the owner or the charterer by demise (as relevant).
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 interests over Cayman Islands 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;

b 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);12 and

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

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12 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.
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.13

**Discharge of mortgage registered with the CAACI**

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

- a submission of a mortgage discharge form signed by the mortgagor and mortgagee (together with copies of signing authorities);
- 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
- c payment of the applicable mortgage discharge fee.

**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.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.

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

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 Islands

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 commonly understood 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 carried out work on an aircraft, upon authorisation from its owner, enhancing the aircraft’s value. That person will have a lien on the aircraft to the extent that they remain unpaid for the work carried out on the aircraft; 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

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15 Enforcement by a Cayman Islands court requires originals of the relevant documents (with Cayman Islands 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.
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.

The Cayman Islands are not a signatory to international conventions that relate to aircraft liens. 18 However, the Cayman Islands 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. 19

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. 20

c Crimes: where a person is convicted of an offence, any aircraft 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. 21

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. 22

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;

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 (2020 Revision) to order the confiscation of property derived from the proceeds of criminal conduct. (Applications for compensation in these situations are dealt with thereunder.)
registered mortgages; and
unregistered mortgages.

The priority of foreign aircraft liens before a Cayman Islands 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:

a damages are recoverable in respect of the said loss or damage by virtue only of the foregoing provisions of this subsection; and

b 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**

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

At the time of writing of this chapter, half of the world’s population remained in lockdown due to the global pandemic known as covid-19. It is difficult to predict how the industry will react once restrictions (travel and otherwise) are lifted. Prior to the pandemic, there existed 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. Asset-backed securitisation platforms structured using Cayman Islands 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  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.

ii  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 12

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.

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.

Gao Feng is a senior partner at Grandall Law Firm (Beijing).
Market access

The Foreign Investment Law and its implementing regulations came into effect as of 1 January 2020. This law and its implementing regulations have strengthened the principles of promoting and protecting foreign investment generally in China, which may also have an impact on investment in the aviation industry.

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 Industry Guidelines on Encouraged Foreign Investment (Year 2019) (the Guidelines, which may be amended from time to time) and Special Administrative Measures for Admission of Foreign Investment (Year 2019) (the Negative List, which may be amended from time to time), both published by the National Development and Reform Commission (NDRC) and Ministry of Commerce (MOFCOM). As per the Negative List, the special administrative measures for foreign investment in the aviation industry are as follows:

a 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;

b 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;

c the construction and operation of civil airports must be controlled by Chinese parties; and

d 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.

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.

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, aviation development funding 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. The 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 damage 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 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 State Administration for Market Regulation (SAMR) 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 SAMR 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. It must have two or more airworthy aircraft registered in China and have qualified personnel, facilities and equipment.

Services operated by an established public air transportation/GA enterprise requiring a licence include operation specifications of carriers, scheduled and unscheduled domestic and international air transportation, dangerous goods transportation, airport construction and operation.

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:

a. the individual identification or business certificate;
b. the nationality registration certificate; and
c. 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:

a. obtain the Operating Norms for Foreign Air Transportation Carrier, as approved by the CAAC;
b. file for record with the CAAC its security plan; and
c. 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 the 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 SAMR is responsible for the enforcement of the AML and has been promoting the revision of the AML in recent years. Monopolistic activities stipulated in the AML include: (1) monopolistic agreements between undertakings; (2) abuse of dominant market position by undertakings; and (3) concentration of undertakings that has or may have an effect of
eliminating or restricting competition. The SAMR proactively, and on its own initiative, investigates business operations it suspects may be monopolistic. Those who undertake monopoly behaviour may face severe punishment if they cannot be exempted according to law.

Only administrative responsibilities and civil liability can be imposed for monopolistic behaviour, 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 damage 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, disputes are to be filed with normal courts (e.g., there is no special court for civil aviation as there is for maritime 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.

ii  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 not governed by relevant international treaties, 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 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.

iii 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.

iv 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 VOLUNTARY REPORTING

China has established a voluntary and confidential reporting system, known as Sino Confidential Aviation Safety Reporting System (SCASS), which is run by a subordinate body of the Civil Aviation University of China. Any person may submit a report to the voluntary reporting system by letter, fax, email, online filing, phone calls or mobile apps. The legitimate rights and interests of the reporting persons are protected by relevant laws. The types of reports collected on the SCASS may include:

\( a \) reports on poor operational environment of the aircraft, and the defects of equipment and facilities;
\( b \) reports on violation of rules or incidents due to human factors that result from carelessness or inadvertence;
\( c \) reports concerning difficulties in implementing standards or flight procedures; and
\( d \) reports on events that may affect the aviation safety other than accidents, incidents, or crimes.

XI THE YEAR IN REVIEW

In the past year, some events of far-reaching significance have taken place, in particular the following.

The CAAC issued the Measures for the Monitoring and Management of International Air Traffic Rights in May 2019. It is expected to enhance the international competitiveness of domestic airlines and to better coordinate the slot resources for all market players.

In 2019, the CAAC publicly solicited opinions on a dozen of newly formulated or amended regulations and normative documents in the field of civil aviation, including the Provisions on Airworthiness Certification for Civil Aviation Products and Parts (Amendment); the Provisions on Operating Licence for Domestic Routes of Civil Aviation of China (Amendment); the Decision on Revising the Provisions on Registration of Civil Aircraft Nationality (Draft) and the Provisions on the Administration of Civil Aviation Security Incident Information (Amendment); and the Provisions on Passenger Services in Public Air Transport.
In January 2019, the Aircraft Airworthiness Certification Department of the CAAC issued the Guiding Opinions on Operational Risk-based UAV Airworthiness Certification, establishing a UAV risk classification based on operational risks and managing UAV airworthiness certification accordingly. The Guiding Opinions focused on standards in airworthiness certification of cargo UAVs, patrolling UAVs and passenger-carrying UAVs. It explores possible guidance for future UAV airworthiness certification.

Several public air transport carriers were newly incorporated in early 2020, including Zhongzhou Airlines Co, Ltd, and One Two Three Airlines Co, Ltd, the subsidiary of China Eastern Airlines.

**XII OUTLOOK**

In the near future, special attention should be paid to the following.

According to the Commission of Legislative Affairs of the Standing Committee of the National People's Congress, the Personal Information Protection Law and the Data Security Law will be formulated in 2020, which may provide clearer and stricter behavioural criteria for airlines to protect the passengers’ data.

On 15 January 2020, the Ministry of Transport issued the Circular on Issuing the 2020 Legislation Plan. The planned laws and administrative regulations includes several aviation-related matters. The CAL (Amendment) would be examined and revised by the Law Department of Ministry of Transport and the CAAC in cooperation with the Ministry of Justice. The revision would, to give one example, streamline the air carrier certificate and the air operator's certificate and turn them into one operation certificate. In addition, the Regulation on Standardised Management of Civil Aviation Flights and Regulations on the Investigation of Civil Aircraft Accidents was drafted by the CAAC and reviewed by the Law Department of Ministry of Transport.
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 2019 a record number of 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 of which Cyprus is a member.

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1 Christos Clerides is the managing partner at Phoebus Christos Clerides & Associates LLC and Andrea Nicolaou is a registrar at the Supreme Court of Cyprus.


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.

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4 As incorporated into Article 1A of the Cyprus Constitution.
5 Article 169.3 of the Constitution.
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 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.6 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.7 Such a sanction may result in the imposition of a fine8 or the suspension or revocation of a licence.9

Interestingly, in the course of Action No. 189/2016 between DZ v. Blue Air Management Solutions SRL, the District Court of Larnaca requested for a preliminary ruling under Article 267 TFEU on issues relating to denied boarding, passengers’ rights and the responsibility of the air carrier that arose. The CJEU gave its ruling on 30 April 2020 in case C-584/18, holding that an air carrier’s refusal of boarding based on the allegedly inadequate

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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.
nature of travel documentation does not deprive, per se, the passenger from protection under Regulation 261/2004. Accordingly, in the event of challenge, it is for the competent court to assess whether the denied boarding is reasonably justified or not. In this regard, Regulation 261/2004 precludes a provision, included in the air carrier’s general terms, which limits or excludes its liability in the event of denied boarding for reasons relating to the allegedly inadequate nature of the passenger’s travel documentation and thus deprives the passenger of any right to compensation he or she may have.

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.

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 in 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.\(^1\) The conditions and procedure for issuing, suspending and withdrawing an AOC are defined in the JCAA Regulations, which are in force in the Republic.\(^1\)

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.\(^2\)

\(^1\) ibid. Articles 2 and 123.

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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:

- the aircraft must not be registered in a foreign registry;
- the aircraft has a valid certificate of airworthiness;
- the aircraft’s environmental compliance is attested by noise certification; and
- 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.

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 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

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16 AIC 004/10, Section 2.
17 Article 241(1) of the Civil Aviation Law.
18 ibid. Article 241(2).
19 ibid. Article 241.
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)\textsuperscript{20} per passenger. In respect of liability of third parties, the Circular also states the minimum insurance cover per accident for each aircraft.

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.’\textsuperscript{21} Hermes 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\textsuperscript{22} 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.\textsuperscript{23} 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.

\textsuperscript{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).

\textsuperscript{21} https://ec.europa.eu/transport/modes/air/airports_en.

\textsuperscript{22} The full judgment is available on the CPS’s website in Greek (dated 16 May 2018).

\textsuperscript{23} Article 240.
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*,24 the children of two of the passengers killed brought an action against the Republic claiming damages for bereavement.25 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, 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

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25 Article 58, Cap. 148.
28 Article 20 of the Montreal Convention.
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, 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 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

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30 Action No. 424/2012, 23 June 2017.
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 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.

As stipulated by Article 233, the carriers’ liability is strict, hence not based on fault. It is further mentioned 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.

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 mutatis mutandis.

The 2002 Law states that the Criminal Code also applies in the field of civil aviation. 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.

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

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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).
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.
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 *Marcos Pantelides a.o. v. Aerotrence Aviation & Tours Ltd a.o.*, the District Court awarded the amount of €1,000 to each claimant for the psychological distress 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’.

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.

**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. 402/2015* and *Civil Aviation Decision No. 403/2015*, 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, 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. 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.
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, 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.

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 the meantime, an application to the DCA for the establishment of a new Cypriot airline company is pending, aiming to fill the ‘travel gap’ left by Cyprus Airways.

Importantly, by the end of July 2019, the Cyprus Parliament passed the new Law on the Provision of Aeronautical Services (Law No. 114(I)/2019), which provides that a state-owned company, instead of the DCA, is now in charge of air traffic management and the provision of aeronautical services. Such a company, which exists in most EU countries in collaboration with Eurocontrol, is expected to provide more flexibility in managing air traffic today, while increasing the state's revenues and reducing flight delays. The said state-owned air navigation company is expected to fully operate in 2021.

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. Nevertheless, public concerns remain regarding high airfares, given that the latter negatively affect the island's connectivity.
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 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 Member States.\textsuperscript{51}

Meanwhile, the Ministry of Transport, in cooperation with Hermes Airports, has already proceeded with the incentive programmes aimed at strengthening connectivity. In parallel, the regulatory framework applied in the EU as well as the ‘open skies’ policy, as implemented by the Cyprus government in its relations with third countries (for instance the bilateral agreements with Egypt, Lebanon, Australia, Kuwait and Saudi Arabia) have also contributed to the development of air transport.

DENMARK

Jens Rostock-Jensen and Jakob Dahl Mikkelsen

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 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 Ministry of Transport and Housing has the overall responsibility for maintaining the Aviation Act while the Transport, Construction and Housing Authority (the 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 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 Convention of 1999. The Aviation Act is supplemented by a number of Ministerial Orders and Provisions for Civil Aviation (BLs) issued by the Transport Authority, which contains detailed and technical requirements for air carriers.

1 Jens Rostock-Jensen is a partner and Jakob Dahl Mikkelsen is a director and attorney at Kromann Reumert.
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 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 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 and Housing, 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 and Housing. 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:

- 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;
- the owner is an EU or EEA citizen or company; or
- 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 and Housing.

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 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 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 as amended, 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 1,131 SDR per passenger in commercial operations; and
- for liability in respect of cargo: a minimum insurance cover of 19 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. 155 of 1 March 2018) 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) are competitors and have a combined market share of less than 10 per cent or non-competitors and have a market share of less than 15 per cent. However, the de minimis rule does not apply if the agreement, decision or concerted practice has as its direct or indirect object the prevention, restriction or distortion of competition.

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:

a strengthens efficiency in the production or distribution of goods and services;

b promotes technical or economical development; and

c 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 most cases evidence of a dominant position in itself. 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 or 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. Under Section 23a, a company that brings a cartel infringement to the attention of the authorities may be granted a withdrawal of the charge that would otherwise have led to a fine or imprisonment being imposed for participating in the cartel. Without bringing a cartel infringement to the attention of the authorities, a company may nonetheless receive a reduction in any fine up to 50 per cent (for the first applicant), up to 30 per cent (for the second applicant) or up to 20 per cent (for a later applicant) by cooperation with the authorities in a cartel investigation. The amount of the reduction is left to the discretion of the authorities.

VII 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.
VIII ESTABLISHING LIABILITY AND SETTLEMENT

i 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.

ii 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:

a it did not put the product into circulation;
b it can be assumed that the defect that caused the damage did not exist at the time when the product was put into circulation;
c that the product was neither 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; or
e 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 210 kroner for each day the injured is off work, up to a maximum of 80,000 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 9,180 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 9.638 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 173,000 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

In 2019, there were no noteworthy judgments from an aviation law perspective. The most noteworthy judgment in 2018 was related to Regulation 261/2004 concerning passenger rights and the Travel Package Directive (2015/2302/EU).

On 23 January 2018, the 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.
I 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 2019, more than 14,450,000 passengers travelled to and from the Dominican Republic, which is an increase of 5.2 per cent compared to the rest of the Caribbean Region, 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, 91.2 per cent (13,190,082) were mobilised through regular flights, and 8.8 per cent (1,268,960) 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 2019, approximately 65 national and 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.

1 Rhina Marielle Martínez Brea is a partner and María Pía García Henríquez 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:

- 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;
- 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;
- 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
- 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 68 sovereign states through the execution and ratification of air service agreements. The 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.
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.\textsuperscript{13}

Foreign air operators must fulfil the following two requirements:

- the obtainment of an operation permit\textsuperscript{14} 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>5 August 2012</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 by the Dominican Republic.\textsuperscript{15} 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.

\textsuperscript{13} Both certificates may be requested concurrently.

\textsuperscript{14} The operation permit is the permission granted to foreign air operators by the JAC.

\textsuperscript{15} Article 2 of the Civil Aviation Law.
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, the Bahamas, Belgium, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Curaçao, the 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, Malaysia, Mexico, Morocco, the Netherlands, New Zealand, Nicaragua, Norway, Oman, Panama, Paraguay, Peru, Portugal, Poland, Qatar, Russia, Rwanda, Saint Martin, Saudi Arabia, Serbia, the Seychelles, Spain, Switzerland, Sweden, Singapore, South Africa, Sri Lanka, Trinidad and Tobago, Turkey, the United Arab Emirates, the United Kingdom, the 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 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.

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17 Article 193 of the Civil Aviation Law.
18 Article 194 of the Civil Aviation Law.
19 Article 197 of the Civil Aviation Law.
20 Article 3 of the Civil Aviation Law.
The following types of authorisation are granted by the above-mentioned institutions:
a economic authorisation certificate for national air carriers;
b operation permit for foreign air carriers;
c air operator certificate for national air carrier;
d consignee licences;
e aircraft registration for national aircraft;
f mortgage registration for national aircraft;
g charter flight authorisations;
h code-share agreement authorisations;
i security manual approval; and
j 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:
a 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;
b at least 51 per cent of the company's managers (who are not members of the board) must be Dominicans;
c the principal place of business shall be located in the Dominican Republic; and
d 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.

To obtain the corresponding certificate of economic authorisation, the JAC requires that national air carriers file the following documents24 (among others):
a certified copies of the company's corporate documents;25
b certification of no criminal record, issued by the General District Attorney's Office, for each shareholder of the company;

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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.
24 The Requirement Manual of the JAC was amended by Resolution No. 131-(2019).
25 Other requirements apply depending on the capacity of the aircrafts that will be operated. Additionally, depending on the type of operation, the JAC may require proof of availability of funds for sustainment
e evidence of approval of the company’s Security Manual by CESAC;26  
d original Insurance Policy on Civil Liability, issued in accordance to the requirements of the JAC;  
e Passenger compensation policy;  
f the company’s financial statements corresponding to the previous fiscal period;  
g 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;27  
h certification issued by the Social Security Treasury (TSS) confirming their enrolment;  
i copy of taxpayer identification card;  
j Annual declaration of Income Tax (IR-2) presented before the Internal Taxes General Directorate (DGII), if applicable;  
k certification issued by DGII confirming that the company is up to date with the payment of its fiscal obligations.

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.28

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 and a taxpayer identification number. This process takes approximately two months. Once this process is completed, the foreign air carrier must proceed with filing the application for the obtainment of the corresponding operation permit from the JAC.

of operations. The manner in which this proof can be provided, as well as the funds that shall be available varies depending on the capacity of the aircraft that will be operated. In addition, social capital requirements vary depending on the type of corporate vehicle of the applicant.

26 The JAC will also accept evidence of application for approval of the Security Manual before CESAC.  
27 These requirements may vary depending on the capacity of the aircraft that will be operated.  
28 Article 240 of the Civil Aviation Law.
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 operation specifications approval, and usually takes 30 days.²⁹

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:

- authorisation for the exploitation of the requested routes from the country where the foreign air carrier is established;
- 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);
- power of attorney for the local representative, duly notarised and apostilled;
- copy of its mercantile registry certificate;
- copy of valid air operator certificate;
- original of the insurance certificate;
- certificate from the CESAC, indicating that the foreign air carrier’s security complies with the AVSEC requirements;³⁰
- copy of the taxpayer identification card;
- passenger compensation policy;
- 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;³¹
- payment of a fee of US$5,000.

The JAC may request additional documents or information it considers necessary. Once the filing is completed, the JAC legal department will review 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 operation 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:

- the company’s name, address, main base of operations abroad and in the Dominican Republic, fax number, email addresses and website information;

²⁹ This period is usually subject to substantial delays due to backlog.
³⁰ The JAC will also accept evidence of application for approval of the Security Manual before CESAC.
³¹ 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.
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 in the Dominican Republic;
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 chief operations inspector and chief maintenance inspector, from the country of origin of the air carrier;
j runway analysis of the destination and alternative airports in the Dominican Republic (in digital format);
k 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);
l maintenance control manual, approved by the authorities of registration of the aircraft (in digital format);
m copy of the maintenance manual and maintenance programme for each type of aircraft (in digital format);
n copy of operations manual indicating the sections that have been approved by the country of origin (in digital format);
o registration certificates of all the authorised aircraft;
p configuration of the aircraft: number of passengers, cargo capacity, maximum take-off weight, and proof of compliance with the traffic collision avoidance system, make, model, registration number, serial number, navigation equipment (in digital format); and
q minimum equipment lists, approved by authorities of registration of the aircraft.

The IDAC approval takes approximately 40 working days from the filing of all the aforementioned 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 carrier 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;
- hold baggage security;
- crew hand and hold baggage security;
- passenger and cargo collation;
- aircraft security;
- provisions, supplies and spare part security;
- security of the aircraft cleaning operations;
- cargo, mail, packages and correspondence security;
- staff hiring;
- staff training;
- contingency planning;
- incident reporting procedures;
- supervision and vigilance;
- 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. 32

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 in accordance with the following provisions: 33 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:

- death and injury to passengers; damage to baggage (Articles 17 and 21, Montreal Convention 34 of 1999);
- damage to passengers, baggage or cargo as a result of air carrier delays (Articles 19 and 22, Part I, Montreal Convention of 1999);
- damage caused by destruction, loss or harm to the cargo (Article 18, Part I and Article 22, Part III, Montreal Convention 1999);

33 Requisite Manual of the JAC.
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 Montreal Convention of 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</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) (i.e., concerning antitrust), 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.35 In addition, the Dominican Constitution reserves the right to create monopolies in favour of the Dominican government.36

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.37 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;

35 Article 1 of Law No. 42-08.
36 Article 50, Paragraph 1 of the Dominican Constitution.
37 Article 3 of Law No. 42-08.
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. As of October 2019, the JAC had approved 16 code-share agreements involving more than 41 routes.

VII WRONGFUL DEATH

Law No. 491-06 on Civil Aviation provides that air operators, both national and foreign, must indemnify damage caused by death or injuries suffered by a passenger due to transportation. In addition, damage to individuals located at land level must be indemnified, provided damage is derived from the operation of the aircraft or from parts that fall off it.

Law No. 491-06 further indicates that the term ‘injury’ includes bodily injuries, as well as damage caused to an individual's mental capacity. This indemnification obligation also applies in cases where damage is caused by fortuitous events or force majeure.

VIII 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.

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.

38 Article 5 of Law No. 42-08.
39 Articles 214 and 257 of the Civil Aviation Law.
40 Article 35 of the Montreal Convention.
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 Law41 – 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.42

The Dominican Republic does not have state-founded social security or medical support for those incapacitated in aviation accidents.

IX  DRONES
The use of remotely piloted aircraft systems (RPAs) or drones in the Dominican Republic has increased, with more individuals and companies using them for the construction industry, agriculture, marketing and other activities. As a result, in 2015 the IDAC issued Resolution 008/2015, which regulates the use and operation of RPAs or drones within the national territory. This Resolution is transitory, as it will be replaced once the ICAO adopts and publishes regulations regarding RPAs and consequently, the IDAC issues a new Resolution on this regard.

Pursuant to Resolution 008/2015, individuals and entities that perform recreational activities with RPAs weighing less than 4.4 pounds, are not required to obtain authorisation from the IDAC to operate the RPAs. However, they need to comply with the flying requirements and restrictions included in the Resolution. On the other hand, individuals and entities that carry out air operations with RPAs weighing from 4.4 pounds up to 55 pounds, will need to (1) register the RPAs before the IDAC and obtain the corresponding registration card for the aircraft, and (2) register as RPA operators and obtain the corresponding licence, which will be valid for 24 months.

42 Article 196 of the Civil Aviation Law.
X VOLUNTARY REPORTING

Law No. 491-06 on Civil Aviation provides that owners, operators and crew members of a civil aircraft must notify the IDAC immediately regarding accidents and incidents affecting said aircraft within the territory of the Dominican Republic or abroad, if said aircraft has Dominican registration.\(^43\) Authorities must also notify IDAC of the occurrence of any accident.\(^44\)

In addition to the aforementioned mandatory reporting obligations, by means of Resolution No.003/2015\(^45\) the IDAC created the Operational Security State Program of the Dominican Republic (PEGSO). This programme describes the responsibilities of the state in regard to operational security management and provides that the IDAC will implement means for voluntary and confidential reporting of matters that might negatively affect operational security.\(^46\)

In this sense, the IDAC created the confidential voluntary reporting system (SIAGA RVC), which is an online platform that facilitates the gathering of information regarding operational security deficiencies, real or potential, which might not be detected through mandatory reporting mechanisms. This platform allows for voluntary and confidential reporting, by means of an online form, which can be filled out anonymously.

XI THE YEAR IN REVIEW

The year 2019 was an important one for the Dominican Republic, especially for the civil aviation sector. For instance, passenger flow continued to increase, owing in part to the registration of at least 13 new routes, including destinations in Europe, North America, South America and the Caribbean. The most prominent of these routes was Vnukovo-Moscow, Russia–La Romana, which mobilised more than 13,500 passengers on average during the months of January to June 2019.\(^47\)

Additionally, the Dominican Republic executed more than 18 new air services agreements, thus increasing its connectivity with countries such as Antigua and Barbuda, the Bahamas, China, Curacao, Germany, Israel, Jamaica, Kenya, the Netherlands, Peru, Poland, Portugal, Rwanda, Saint Martin, the Seychelles and Uruguay. In fact, the country not only climbed 15 positions in the Air Connectivity Index of the World Bank, going from position 62 to 47, but also received the ‘Outstanding Global Connectivity’ award, awarded by the United Arab Emirates’ GCAA.

In June 2019, the Ninth North American, Central American and Caribbean Directors of Civil Aviation Meeting (NACC/DCA/9) selected the Dominican Republic as subject of case study due to its successful management model and policies in civil aviation. The Meeting’s report indicated that the country had improved its effective implementation level (EI) from 85.98 per cent in 2009, to 90.52 per cent. With regard to the global EI average of

\(^{43}\) Article 276 of Law No. 491-06 on Civil Aviation.

\(^{44}\) Article 277 of Law No. 491-06 on Civil Aviation.


\(^{47}\) Statistic Report of Air Transport 2018 issued by the JAC.
66.32 per cent, the Dominican Republic ranked number 4 out of 21 in the NAAC region. In particular, the study showed that policy reforms implemented by the country in the aviation sector contributed to the increase in passenger flow to the Dominican Republic.48

The aforementioned results are consistent with an audit performed in 2017 by the International Civil Aviation Organization (ICAO), where civil aviation security in the Dominican Republic was classified as exceptional and it was stated that the country had achieved tremendous progress in terms of compliance with the ICAO’s Standards and Recommended Practices (SARPs).49 More recently, in 2018, the regional director of the ICAO referred to the country as a ‘reference for historic achievements’ in air transport.50 Finally, in 2019, the Dominican Republic was elected for the third time as a member of the ICAO’s Council having won 154 of 177 votes of the delegations participating in the election.51

XII OUTLOOK

Despite certain negative marketing situations affecting local tourism occurring in 2019, 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 was ranked as the second busiest airport in the Caribbean, receiving a total of 5.9 million passengers from October 2018 to June 2019.

Finally, between 2018 and 2019, the Dominican Republic executed more than 18 agreements by means of which aerocommercial relations were established or updated with several countries. The civil aviation authorities have also prioritised the modernisation of their services to air operators, implementing new online platforms for the approval of charter flights and aviation security services. With the aforementioned accomplishments for the country’s connectivity, as well as achievements in air security and policy making, the Dominican Republic plans to become a logistic cargo hub and a consolidated and preferential tourist destination.

49 www.arecoa.com/transportes/2017/04/03/seguridad-de-la-aviacion-civil-dominicana-es-excepcional-oaci/.
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.

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.

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\(^9\) 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.
7 Ratified in August 1963.
8 Ratified in August 1964.
9 Ratified in February 1996.
11 Articles 285(2) and 285(3) of the Commercial Code.
12 Article 287 of the Commercial Code.
lands in.\textsuperscript{13} 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.\textsuperscript{14}

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 \textit{force majeure}, a defect in the transported product, the error of the consignor or consignee, or the passenger.\textsuperscript{15}

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.\textsuperscript{16} 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.\textsuperscript{17} 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.\textsuperscript{18}

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.\textsuperscript{19}

\section*{iii Other legislation}

Airlines should also be cognisant of Egyptian environment legislation. The Egyptian Environment Law (EEL)\textsuperscript{20} aims at protecting the environment and ensuring compliance with international environmental standards.\textsuperscript{21} Egypt is a party to several international environmental instruments including the Kyoto Protocol\textsuperscript{22} and the Vienna Convention for the Protection of the Ozone Layer.\textsuperscript{23} 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;\textsuperscript{24} 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.\textsuperscript{25}

\textsuperscript{13} Article 288 of the Commercial Code.
\textsuperscript{14} Articles 289(1) and 289(2) of the Commercial Code.
\textsuperscript{15} Article 290 of the Commercial Code.
\textsuperscript{16} Article 286 of the Commercial Code.
\textsuperscript{17} Article 292(1) of the Commercial Code.
\textsuperscript{18} Article 292(2) of the Commercial Code.
\textsuperscript{19} Article 294 Commercial Code and Article 217 of the ECC.
\textsuperscript{20} Law No. 4 of 1994.
\textsuperscript{21} Law No. 4 of 1994.
\textsuperscript{22} Ratified in December 2005.
\textsuperscript{23} Ratified in September 1988.
\textsuperscript{24} Articles 1(27) and 90 of the EEL.
\textsuperscript{25} 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 flights, 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.

26 Article 30 of the Civil Aviation Law.
27 Article 155 of the Civil Aviation Law.
28 Egypt applies Annex 1 to the Chicago Convention relating to the licensing of personnel; see Article 46 of the Civil Aviation Regulations.
29 Article 48 of the Civil Aviation Regulations.
30 Articles 49 and 50 of the Civil Aviation Regulations.
31 Article 78 of the Civil Aviation Regulations.
32 Article 99 of the Civil Aviation Regulations.
33 Articles 9, 10 and 75 of the Civil Aviation Law.
34 Article 122 of the Civil Aviation Regulations, as amended in 2019.
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:

\[ a \] being registered in its state of nationality;
\[ b \] having a valid AOC issued by its state of nationality;
\[ c \] bearing the marks indicating its nationality and registration;
\[ d \] having licensed pilots and crew (who must be in the number and of the level provided in the aircraft manual); and
\[ e \] 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.

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 it 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, 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.

The Ministry of Civil Aviation’s General Administration for Investigation and Prevention of Aircraft Accidents investigates aircraft accidents on Egyptian territory. 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.

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. All crew members and workers employed by the carrier that are exposed to the dangers of operating an aircraft must also be insured. The insurer must be authorised to provide insurance services by the laws of the state where the aircraft is registered. In Egypt, only Egyptian joint-stock companies with minimum issued capital of 60 million Egyptian pounds may provide insurance services. 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.

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.

VI COMPETITION

The Egyptian Competition Act 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, 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.  

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. 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.

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.

Cooperation agreements between operators will be scrutinised by the Competition Authority if they have negative effects on competition in Egypt. Egyptian competition legislation deems agreements between competitors to be anticompetitive if they tend to cause any of the following:

- raising, decreasing or stabilising product or service prices;
- allocating markets on the basis of geographical zones, distribution centres, types of customers or products or services, market share, seasons, or periods of time;
- coordinating with respect to participating or refraining from entering in tenders, bids and other supply offers; or
- 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.

The Competition Authority may provide an exemption to the foregoing if the benefits of an agreement between competitors (to customers) outweigh its anticompetitive effects. This exemption can be relied on by the aviation industry.

VII ESTABLISHING LIABILITY AND SETTLEMENT

**i 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.

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53 Article 21 of the Competition Act.
54 Article 7 of the Competition Regulations.
55 Article 9 of the Competition Act.
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).
57 Article 5 of the Competition Act.
58 Articles 6 of the Competition Act and 11 of the Competition Regulations.
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).\(^{72}\) The law also provides for joint and several liability when multiple persons are responsible for an injury.\(^{73}\) 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.\(^{74}\)

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’.\(^{75}\) Egyptian law deems fraud (wilful breach) and gross negligence to amount to acts that prevent the limitation of liability.\(^{76}\)

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\(^{77}\) and prescribes within one year of the sale unless the manufacturer wilfully hides the defect.\(^{78}\) Passengers or their heirs may pursue manufacturers in torts, where the action will prescribe after three years.\(^{79}\)

iii Compensation

Unless capped by agreement or law,\(^{80}\) 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.\(^{81}\) 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.\(^{82}\)

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.

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\(^{72}\) Articles 174 and 175 of the ECC.

\(^{73}\) Article 169 of the ECC.

\(^{74}\) Article 293 of the Commercial Code.

\(^{75}\) Article 43 of the Montreal Convention.

\(^{76}\) Articles 217 of the ECC and 294 of the Commercial Code.

\(^{77}\) Article 453 of the ECC.

\(^{78}\) Article 452 of the ECC.

\(^{79}\) Article 172 of the ECC.

\(^{80}\) Article 223 of the ECC.

\(^{81}\) Article 221 of the ECC.

\(^{82}\) Article 222 of the ECC.
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 activities\(^{86}\) 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 16 March 2020, the Egyptian Cabinet began taking measures to prevent the spread of the covid-19 pandemic, by issuing Decree No. 718 of 2020 suspending all regular international air travels in all Egyptian airports from 19 March 2020 until 31 March 2020 as a precautionary measure within the framework of the Egyptian Government’s plan to deal with the possible consequences of covid-19.\(^{88}\) Cargo and charter flights, as well international ambulance or domestic flights were not affected by the Cabinet Decrees in order to allow the flow of goods and the return of groups of tourists to their countries.

This Cabinet Decree was one of several decrees and decisions taken by the Egyptian cabinet and ministries in relation to covid-19.

The Prime Minister revealed in a press conference that while the suspension of flights into and out of Egypt may cause serious damage to Egyptian Airlines, the safety of Egyptian citizens remained the government’s priority.

Cabinet Decree No. 718 of 2020 was extended by a series of Decrees, resulting in the suspension of international travel until the time of writing.\(^{89}\)

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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.
88 Cabinet Decree No. 718 of 2020.
89 Cabinet Decrees Nos. 768, 852, 1024 and 1069 of 2020.
The Egyptian Civil Aviation Ministry and EgyptAir operated several emergency flights to repatriate Egyptian citizens stranded abroad.

XI  OUTLOOK

Sphinx International Airport (SPX), which opened in January 2019, received its first international charter flight in January 2020 after it had been servicing domestic flights only since its inauguration.

SPX is located 12km from the great pyramids of Giza. It was constructed with the aim of promoting one-day tourism.

Furthermore, its location in Western Cairo will alleviate the existing pressure on Cairo International Airport, Egypt’s main airport.
Chapter 17

EUROPEAN UNION

Dimitri de Bournonville and Joanna Langlade

The European Union comprises 27 Member States and finds its origins in the 1957 Treaty of Rome.

For a long time, air transport was not addressed by the European institutions, partly because the extent of the competence of the EU in the field was debated. European air transport law only emerged in the late 1980s from the work of the European Commission, the European Parliament and the European Council.

European legislation mainly comprises Regulations, which are directly applicable in EU Member States, 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 February 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. It is of relevance for the European Economic Area (EEA): the 27 members of the EU as well as Iceland, Liechtenstein and Norway.

Interpretative guidelines of the Regulation have also been issued by the European Commission in 2016 to explain more clearly a number of provisions contained in the Regulation, in particular in light of the Court of Justice of the European Union (CJEU) case law.

i Scope

The Regulation applies to passengers departing from an airport located in the EEA (whether they travel with a European Union carrier or not), and to passengers departing from an airport in a third country to an airport situated in the EEA 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 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.

The question of cancellation has been quite sensitive in the context of the covid-19 pandemic, as the Regulation obliges the operating air carrier to offer passengers the choice between reimbursement within seven days or rerouting. The second option is of course...
less popular, if not unfeasible, because of the situation. But in the context of the crisis, the first option is also challenging as many airlines do not have enough funds available. A large number of EU Member States, including Belgium, France, Greece, Ireland, the Netherlands and Portugal, have hence urged the Commission to allow the temporary issuance of vouchers to passengers for cancellation, instead of reimbursement. On 13 May 2020, the Commission issued a recommendation on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the pandemic (C(2020) 3125). The Commission acknowledged this possibility under strict recommended conditions: the vouchers should be valid for a minimum of 12 months; carriers and organisers should automatically reimburse the amount of an unused voucher within 14 days at its expiry if the voucher is valid for 12 months or upon request of the passenger any time after 12 months if the voucher has a longer validity; carriers should ensure that vouchers allow passengers to travel on the same route; airlines should consider extending the possibility to use the vouchers for bookings with other airlines of the same group and the vouchers should be transferable to other passengers.

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.

On 18 March 2020, the European Commission issued a notice with interpretative guidelines on EU passenger rights regulations in the context of the pandemic (2020/C 89 I/0). It stated that certain measures could qualify as extraordinary circumstances, for example a ban by public authorities on flights or traffic of persons or when an airline cancels a flight for reasons of protecting the health of the crew.

## 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 Bossen 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.

On 24 October 2019, in the LC and MD case (C-756/18), the Court decided that passengers on a flight with a delay of three hours or more on arrival who have a confirmed reservation on that flight cannot be denied compensation solely on the ground that, upon claiming compensation, they failed to prove that they were present for check-in for that
flight, in particular by means of a boarding card, unless it can be established that those passengers were not transported on the delayed flight at issue, which is matter for the national court to determine.

In the Flightright case of 30 April 2020 (C-939/19), the Court ruled that for the purpose of fixing the amount of compensation in the event of a long delay, in the case of air transport booked by a passenger as a whole and consisting of two or more flights, the total distance from the place of departure of the first flight to the final destination should be taken into account, even if only the last of the flights concerned has suffered such a delay. This creates an additional burden for airlines as the amount of compensation increases with the distance.

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.
xix  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.

xx  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.

xvi Evolution and revision of the Regulation

In 2013, the Commission issued a Proposal to amend Regulation 261/2004 (COM (2013) 130 final of 13 March 2013), with the aim 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, but the legislative process to review the Regulation is still ongoing as the Council has to take position. The file was blocked in the Council as a consequence of the refusal of Spain to engage until the United Kingdom (UK) agreed to discussions on the status of Gibraltar. With the departure of the UK, the EU is actively in the process of drafting and debating revisions to the Regulation.

In the meantime, the Commission published interpretative guidelines in June 2016, essentially summarising the case law of the CJEU. As stated above, on 18 March 2020, interpretative guidelines were also issued by the European Commission on how to apply the Regulation in the context of the covid-19 pandemic (2020/C 89 I/0).

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.

Among other things, the Proposal of the Commission to amend Regulation 261/2004 clarifies the definition of extraordinary circumstances and the role of the National Enforcement Bodies, explicitly includes the right of compensation for delay and trigger points based on the duration of delay and distance of the flight, introduces the right to be rerouted with other carriers or modes of transport after a delay of twelve hours and limits the obligation of carriers in circumstances of strikes, storms or snows to pay for accommodation to three nights and €100 per night and passenger.

In 2019, the Finnish Presidency of the Council restarted discussions on the proposal and on 12 February 2020, the Croatian presidency made further progress and tabled a first draft compromise proposal (5123/20) with the objective of reaching a general approach within the Council. The aviation industry reacted to that proposal and a new text was put forward by the Council on 6 March 2020 (5123/1/20 REV1) with a few amendments.
The last Council proposal contains a definition of extraordinary circumstances and an exhaustive list of such circumstances, including external labour disputes but not, as yet, a pandemic. It also provides that extraordinary circumstances can be invoked in so far as they affect the flight concerned or the preceding flight.

In accordance with the proposal of the Commission, the Council increased the time limit for delay from three to five hours as the trigger for compensation at the minimum level, with nine hours and twelve hours being the further trigger points.

The proposal also includes a new definition of an operating carrier and compensation for delay at arrival of a journey after a missed connection. It excludes the possibility to exempt from compensation delays and cancellations of flights to and from small airports and state supported routes. This exclusion, if kept, can have a negative impact on connectivity.

It remains to be seen whether the proposals of the Presidency will be followed in future discussions, and whether the covid-19 pandemic will lead to reconsideration of the indefinite duty of care to passengers imposed on airlines by the Regulation.

**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. Its purpose is to protect such passengers from discrimination as well as to ensure that they receive assistance. 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. In that situation, the PRM and accompanying person should be offered reimbursement or rerouting as provided in Regulation 261/2004. 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

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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.

In the Niki Luftfahrt decision of 19 December 2019 (C-532/18), the Court decided that Article 17(1) of the Montreal Convention must be interpreted as meaning that the concept of ‘accident’ within the sense of that provision covers all situations occurring on board an aircraft in which an object used when serving passengers has caused bodily injury to a passenger, without it being necessary to examine whether those situations stem from a hazard typically associated with aviation.

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, amended in 2019, deals with the licensing of Community air carriers, the right of Community air carriers to operate intra-Community air services and the pricing of intra-Community air services.

Undertakings established in the European Union are not permitted to provide air services unless they have received an appropriate operating licence from the competent 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 the following requirements at all times: (1) its principal place of business must be located in the licensing Member State; (2) it holds an air operator’s certificate (AOC) granted by the same licensing Member State or the European Union Aviation Safety Agency (EASA); (3) 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); (4) its main occupation is to operate air services in isolation or to combine this activity with any other commercial operation of aircraft 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; (5) 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; (6) it meets certain financial and insurance requirements; and (7) the physical persons who will compose the management of the air carrier must be of good repute.

The financial and insurance requirements notably include the ability to demonstrate that it can meet actual and potential (financial) obligations for a period of 24 months from the start of operations and the obligation to communicate audited accounts to the licensing authority no later than six months following the last day of the respective financial year and notwithstanding Regulation (EC) No 785/2004 on insurance requirements for air carriers and aircraft operators, be insured to cover liability in case of accidents with respect to mail.

In certain circumstances, the operating licence has to be resubmitted for approval. 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). The licensing authority may also review the status of the operating licence 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, of any intended 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, confer the possibility of directly or indirectly exercising a decisive influence on an 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\(^3\) 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 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.

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\(^3\) 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.
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 wet-leases 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.

In 2020, in the context of the coronavirus crisis, the EU recognised that the aviation sector was facing exceptional circumstances, especially with the sharp drop in air traffic causing liquidity problems for carriers. On 25 May 2020, to support the aviation sector, Regulation 2020/696 was adopted, temporarily modifying the provisions of Regulation 1008/2008 in view of the pandemic. The Regulation suspends, until 2021, the obligation to revoke or suspend the operating licence of a carrier with financial problems caused by the
pandemic; it allows Member States to refuse, limit or impose conditions on the exercise of traffic rights if it is necessary in order to address covid-19; and it includes the possibility to extend some ground handling contracts and to award them more efficiently during the crisis. 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 (EU) 2018/1139 of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency aims, inter alia, to establish and maintain a high uniform level of civil aviation safety in the Union. It repealed Regulation (EC) No 216/2008, the latest ‘EASA basic regulation’.

It applies essentially to the design, production, maintenance and operation of aeronautical products, parts and appliances, as well as personnel and organisations involved.

The EASA, which was established and is based in Cologne, Germany, provides, among other things, technical expertise to the Commission in the preparation of the necessary legislation and assist, where appropriate, the Member States and industry in its implementation. 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.

With the entry into force on 11 September 2018 of Regulation 2018/1139, which amended and repealed previous regulations, even more competences were transferred to EASA. 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 EASAs 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. 2015/1998 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
European Union

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.

On 21 May 2020, as mandated by the Commission, the EASA and the European Centre for Disease Prevention and Control issued Operational Guidelines for the management of air passengers and aviation personnel in relation to the covid-19 pandemic, with the purpose of providing guidance to airports, airlines, national aviation authorities and other relevant stakeholders on how to facilitate the safe and gradual restoration of passenger transport, and maintain safe and secure operations whilst minimising the risk of virus transmission. The guidelines will be evaluated and updated regularly in line with the evolution of the pandemic. The recommended measures cover every stage of the passenger journey, specifying which actions need to be taken in each travel segment. Before arriving at the airport, airlines and airport managers should, for instance, inform future passengers of the travel restrictions for any person presenting symptoms. At departure airport, measures such as the limitation of access to terminals; frequent cleaning and disinfection of surfaces; and the installation of protective screens for staff members should be observed. On board the aircraft, measures should be taken to, among other things, avoid queuing, reduce on-board service, ensure proper ventilation and physical distancing to the extent possible. Finally, for the last stage, arrival, the guidelines, for instance, recommend governments to simplify border control formalities. Airports are also required to appoint a coordinator to ensure the application of the measures and airport operators, airlines and service providers should issue the necessary protective equipment to their staff members and ensure that they are trained.

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.
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.

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. Since 2018, the British Competition and Markets Authority is investigating the Atlantic Joint Business Agreement (American Airlines, British Airways, Iberia and Finnair).

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.

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.

In November 2019, IAG announced that it planned to acquire the Spanish company Air Europa for around €1 billion. The process is ongoing, but there was a price adjustment mechanism because of the covid-19 situation, and the Commission has not yet approved the deal.

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;
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. On 28 February 2020, the Commission opened an in-depth investigation and is working with the Italian authorities to assess whether Italy’s €400 million loan granted to Alitalia constitutes state aid and whether it complies with the rules on state aid to companies in difficulty.
The coronavirus crisis has had an enormous financial impact on airlines and airports. In this context, the Commission issued on 20 March 2020 a Temporary Framework for State aid measures to support the economy in the COVID-19 outbreak (2020/C 91 I/01) and accepted certain measures of states in support to the aviation industry. On 31 March 2020, it found a French scheme deferring the payment by air carriers of certain aeronautical taxes to be compatible with the state aid rules. In April, it accepted the Danish and Swedish guarantee of up to approximately €137 million on a revolving credit facility in favour of Scandinavian airline SAS. On 4 May, it approved the €7-billion French aid measure to Air France consisting of a state guarantee on loans and a shareholder loan to provide urgent liquidity to the company. On 12 May 2020, it permitted an additional operating aid from Germany of €18.2 million to the small regional airport of Saarbrücke, as it suffered a significant reduction of its services as a result of the imposition of travel restrictions. Most of these measures were challenged by Ryanair.

With regard to passengers’ rights and Regulation 261/2004, in its 13 May 2020 recommendation on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the covid-19 pandemic (C(2020) 3125), the Commission stated that Member States may decide whether to introduce specific schemes to provide support to airlines to ensure that reimbursement claims caused by the pandemic are satisfied and should actively consider setting up guarantee schemes for vouchers to ensure that in the event of insolvency of the issuer of the voucher, passengers or travellers are reimbursed.

VII OTHER DEVELOPMENTS

i Airport charges

On 19 May 2014, the European Commission issued its report on the application of Directive 2009/12 on airport charges (the Directive). It applies to around 70 airports in the EU and covers almost 80 per cent of passenger traffic. 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 intends to revise the airport charges Directive as part of its next aviation package.

In the Deutsche Lufthansa AG case of 21 November 2019 (C-379/18), the CJEU decided that the Directive had to be interpreted as precluding the possibility for an airport managing body to determine, together with an airport user, airport charges different from those set by the airport operator and approved by the independent supervisory authority.

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.

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 took a step forward in its political will to regulate the use of unmanned aircraft systems (UAS), commonly known as drones. Regulation 2018/1139 of 4 July 2018 introduced essential requirements for the design, production, maintenance and operation of unmanned aircraft. 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.

On 24 May 2019, the Commission adopted an Implementing Regulation on the operation of unmanned aircraft (2019/947). It principally lays down obligations for Member States with regard to the certification, registration of unmanned aircraft as well as the establishment of geographical zones where UAS operations are restricted or excluded.

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
On 31 January 2020, the UK left the European Union. A transition period has been established until 31 December 2020, during which the EU–UK relationship on aviation has to be determined. During the transition period, EU law, including aviation law, will continue to apply to the UK. Hence, until the end of the year, Britain remains in the European Common Aviation Area (ECAA), it will continue to participate in EASA, UK operating licences remain valid in the EU, and the UK remains a party to the air service agreements between the EU and third country.
I INTRODUCTION

Access to the market

According to European Union law, any Community air carrier may freely set fares and rates for the carriage of passengers and cargo and may access any route within the European Union without permit or authorisation if it has an air operator’s certificate and an operating licence.\(^2\)

Moreover, to operate a civil aerodrome that receives commercial traffic, it is necessary to have an airport safety certificate for that aerodrome from the Minister responsible for civil aviation.\(^3\)

Finally, the construction of an aerodrome intended for public air traffic, when it does not belong to the state, is subject to the conclusion of an agreement between the Minister in charge of civil aviation and the natural person or legal entity that builds the aerodrome.\(^4\)

Regulation of slots

Council Regulation (EEC) No. 95/93 of 18 January 1993, as amended, lays down in its Article 8 the procedure for the allocation of slots. The available slots constitute a ‘pool’ from which the coordinator draws in order to satisfy air carriers requesting them for a given scheduling period. At the end of this period the slots are returned to the pool.

A carrier that has operated a slot approved by the coordinator may apply for the same slot in the next corresponding scheduling period. However, when all requests for slots made by carriers cannot be accommodated, the coordinator informs the requesting air carrier of the reasons therefor and indicates the nearest alternative slot.\(^5\)

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1 Aurélia Cadain and Nicolas Bouckaert are partners at Kennedys. They are grateful to Madeleine Motte for her invaluable assistance in the preparation of the chapter.


3 Article L.211-3 of the Civil Aviation Code.

4 Article L.221-1 of the Civil Aviation Code.

Slots at congested airports must be allocated to air carriers on a neutral, non-discriminatory and transparent basis by an independent slot coordinator. In France, the association in charge of the slots allocation is called the ‘Cohor’; it brings together most air carriers and the most important airports.

**Treaty based commitment regarding transit and traffic rights**

Pursuant to European harmonisation, European air carriers can operate flights within the European Union without prior authorisation. However, other scheduled and unscheduled flights from or to France still require a prior authorisation.

Non-scheduled and scheduled air services from and to France are regulated by bilateral conventions, by Regulation (EC) No. 1008/2008 of 24 September 2008 on common rules for the operation of air services in the Community, and by the Civil Aviation Code.

**Interest in aircraft equipment**

Any aircraft listed in the French register can be subject to a conventional mortgage. The mortgage must be in writing and the deed of incorporation may be authenticated or signed privately. Finally, every mortgage shall be entered in the Register.

**Government policy and state aid**

According to the guidelines published on 4 April 2014 by the European Commission on State aid to airports and air carriers, public subsidies must comply with Articles 107 et seq. of the Treaty on the Functioning of the European Union (TFEU). An aid measure is considered compatible with the internal market provided that the following cumulative conditions are met:

- a contribution to a well-defined objective of common interest;
- b need for state intervention;
- c appropriateness of the aid measure;
- d incentive effect: The aid must change the behaviour of the undertakings concerned in such a way that they engage in additional activity that they would not carry out without the aid or they would carry out in a restricted or different manner or location;
- e proportionality of the aid (aid limited to the minimum);
- f avoidance of undue negative effects on competition and trade between Member States; and
- g transparency of aid.

**Labour and employment issues**

Labour and employment issues are governed by the Labour Code and the relevant collective agreements.

In the particular context of covid-19 sanitary crisis, Decree No. 2020-435 of 16 April 2020 on emergency measures for partial activity was adopted.

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8 Article L.6122-1 of the Transports Code.
9 Article L.6122-8 of the Transports Code.

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In order to try and fight some abuse in respect of some favourable provisions of the European-posted workers Regulation, Article R.330-2 of the Civil Aviation Code provides that French employment law applies as long as an activity is carried out on a stable and continuous basis in France.

**Civil aviation regulatory regime**

Civil aviation is subject to the Civil Aviation Code and the Transports Code. It is also subject to several international conventions (the Warsaw Convention of 1929, the Montreal Convention of 1999 and the Chicago Convention of 1944). It is also subject to professional sources (in particular, the general conditions of carriage of the International Air Transport Association), and European sources, via numerous regulations. EU regulations apply concurrently with national provisions, as they are directly applicable to domestic law pursuant to Article 288 of the TFEU.

**The regulators and their powers**

Air transport is a highly regulated activity. The European Aviation Safety Agency (EASA) is responsible for ensuring safety and environmental protection in air transport in Europe.

In France, the industry is regulated by the Directorate General for Civil Aviation (DGCA, i.e. DGAC in French), attached to the Ministry of Sustainable and Ecological Transition. The mission of the DGCA is to guarantee the safety and security of air transport. It deals with all the areas of civil aviation, inter alia, sustainable development, safety, security, air traffic control, economic regulation, support for aircraft construction, general aviation and aeronautical training.

Finally, the Transport Regulatory Authority regulates aerodromes whose annual traffic in the last completed calendar year exceeded five million passengers. The Transport Regulatory Authority approves the tariffs of charges for airport public services rendered at aerodromes open to public air traffic, and their modulations.

**II LEGAL FRAMEWORK FOR LIABILITY**

**i International carriage**

France, in addition to applying EU regulations, is part of several international conventions related to carrier liability:

- *a* the Warsaw Convention: signed and ratified on 15 November 1932 and entered into force on 13 February 1933;
- *b* the Hague Protocol of the Warsaw Convention: ratified on 19 May 1959 and entered into force on 1 August 1963;
- *c* the Guadalajara Supplementary Convention: ratified on 24 January 1964;
- *d* the Guatemala City Protocol: signed and ratified on 8 March 1971;
- *e* the Tokyo Convention: ratified on 10 September 1970 and applicable since 10 December 1970;
- *f* Protocols 1 and 2 of the Montreal Convention: ratified on 11 February 1982;

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11 Article L.6327-1 of the Transports Code.

12 Article L.6327-é of the Transports Code.
the Montreal Convention of 28 May 1999; entered into force on 28 June 2004; the Beijing Convention on the suppression of unlawful acts relating to international civil aviation: entered into force on 1 July 2018; and other conventions were signed by France but not ratified, such as the Rome Convention of 7 October 1952.

Once they have been duly ratified and published, the conventions are directly applicable in France and are directly referred to in the Civil Aviation Code and in the Transports Code. However, references to the international conventions still leave room for national law. This is particularly the case with the concepts of inexcusable fault and fraud, which are contemplated by international conventions and then clarified and defined in the Transports Code.13

### ii Internal and other non-convention carriage

Internal carriage is subject in priority to the national rules of French law, which refer to the liability rules of the Montreal or Warsaw International Conventions.

The legislative provisions of French law relating to the contract of carriage of persons and goods are contained in the Transports Code.14 They apply to both onerous and gratuitous carriage, disregarding the status of the carrier. Their application requires the existence of a real contract of carriage.

Regarding onerous carriage of passengers, the Transports Code refers to the liability regime provided for by Regulation (EC) No. 889/2002 and the Montreal Convention where the carriage is performed by a professional carrier holding an operating licence,15 and to the liability regime as provided for in the Warsaw Convention (as amended by The Hague Convention) when the carriage performed by a carrier who does not hold an operating licence.16

A special case is reserved for transport carried out for free by a non-professional air transport operator. By derogation from the principle of Article 17 of the Warsaw Convention the liability of the person who assumes the status of carrier may be engaged only if it is established that the damage is due to a fault on his or her part.17

With respect to the carriage of goods, the Transports Code refers, without distinction as to the status of the carrier, to the liability regime set out in the Warsaw Convention, as amended by The Hague Convention.18

### iii General aviation regulation

The Civil Aviation Code and the Transports Code both regulate general aviation. The Civil Code may apply as well when the Transports Code refers to it.

### iv Passenger rights

France applies several EU regulations protecting the passengers before, during, and after their flight.

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13 Article L.6422-3 and L.6422-4 of the Transports Code.
14 Articles L.6421-1 to L.6422-5 of the Transports Code.
15 Article L.6421-3 of the Transports Code.
16 Article L.6421-4 of the Transports Code.
17 Article L.6421-4, para. 2 of the Transports Code.
18 Article L.6422-2 of the Transports Code.
Before travelling, EU law (Regulation (EC) No. 1008/2008, Article 23) and French law (Decree of 10 April 2017 on price information for the provision of certain public passenger transport services) guarantee the possibility of comparing services and prices. Regulation (EU) No. 261/2004 protects air passengers in the event of denied boarding, cancellation or flight delay. Air carriers must offer assistance and compensate passengers except in the event of extraordinary circumstances. The classification of extraordinary circumstances depends on each jurisdiction; in practice French courts are very protective of passengers and do not recognise the existence of extraordinary circumstances very often. Regulation (EC) No. 1107/2006 also protects the rights of disabled or reduced mobility air passengers when travelling by air.

Regulation (EC) No. 2111/2005 adds the obligation for the air carriage contractor to inform the passenger of the identity of the operating air carrier, whatever the means used to make the reservation. The Transports Code is stricter, as any person marketing a ticket on flights of a banned operating air carrier must clearly inform the passenger of the ban.19

According to Law No. 78-17 of 6 January 1978 on Data Processing, Data Files and Liberties, air carriers must process personal customer data in a loyal, fair, and adequate manner.20 They shall be kept in a form that permits identification of data subjects for no longer than is necessary for the purposes for which they are collected and processed.21

v Other legislation

According to Article L.6361-12 of the Transports Code, the Airport Pollution Control Authority can impose administrative fines on a person exercising a public air transport activity or for whose benefit an air transport activity is carried out, if they do not comply with the measures taken by the administrative authority at an aerodrome regarding:

a permanent or temporary restrictions on the use of certain types of aircraft on the basis of their polluting air emissions, noise classification, seating capacity or maximum certified take-off weight;
b permanent or temporary restrictions on the exercise of certain activities because of the environmental nuisance they cause;
c special take-off or landing procedures in order to limit the environmental nuisance caused by these phases of flight;
d rules relating to engine tests; and
e maximum noise or air pollutant emission values not to be exceeded.

III LICENSING OF OPERATIONS

i Licensed activities

First, to be put in circulation, an aircraft must be registered. To be registered in France, the aircraft must comply with the requirements laid down at Article L6111.3 of the Transports Code.

19 Article L.6421-2-1 of the Transports Code.
20 Article 6 of the Law No. 78-17 of 6 January 1978 on Data Processing, Data Files and Liberties.
21 Article 6 of the Law No. 78-17 of 6 January 1978 on Data Processing, Data Files and Liberties.
Also, EU air carriers need to meet requirements of technical and economic reliability and credibility. Compliance with these requirements is evidenced by the holding of an air operator’s certificate and an operating licence.22

The certificate is a document issued by the Minister of civil aviation attesting that the air carrier concerned has the professional ability and organisation required to operate aircraft safely.23

The operating licence is a document authorising the undertaking to carry out carriage by air of passengers, mail or cargo for remuneration as specified and within the limits defined by the document. In France, the Minister for transport, under advice from the Higher Council of Civil Aviation, is responsible for decisions regarding the granting of public air transport licences. Air carriers must be treated equally, irrespective of the Member State in which they are licensed. In this respect, Regulation (EC) No. 1008/2008 specifies the conditions of financial and technical capacity that must be met.

ii Ownership rules
According to Article 4 of the Regulation No. 1008/2008, one of the conditions for an undertaking to be granted an operating licence is that Member States and/or nationals of Member States own more than 50 per cent of the undertaking and effectively control it, whether directly or indirectly through one or more intermediate undertakings.

Under French law, Articles L.6411-2 et seq. of the Transports Code, and L.360-2 of the Civil Aviation Code specify what requirements need to be met by publicly traded companies owning an operating licence in order to respect the 50 per cent rule.

iii Foreign carriers
According to Article 15 of the Regulation No. 1008/2008, France cannot subject the operation of intra-Community air services by a Community air carrier to any permit or authorisation, neither can it require Community air carriers to provide any documents or information which they have already supplied to the competent licensing authority.

However, non-Community aircraft may only fly over the French territory if their airworthiness certificate has been validated by the DGCA. The application form – called DGCA LP6 – must be sent to the DGCA Airworthiness Division. The applicant must specify the purpose of the flights in France and the period of time during which the flights are to be operated. He must provide a copy of his foreign airworthiness document (and associated documents), which must be valid for the period at stake.24

IV SAFETY
i Accident reporting

22 Article L.6412-2 of the Transports Code.
24 https://www.ecologique-solidaire.gouv.fr/aeronefs-etrangers
Any operator who has its registered office or principal place of business in France and who operates an aircraft or, failing this, any captain of such an aircraft must inform the BEA (French safety investigation authority) without delay of any civil aviation accident or incident that has occurred to this aircraft.25

The safety investigation authority must notify without delay the Commission, EASA, the International Civil Aviation Organisation (ICAO), the Member States and third countries concerned in accordance with the international standards and recommended practices, of the occurrence of all accidents and serious incidents of which it has been notified.26

ii Airworthiness

Regulation (EU) No.1321/2014 establishes common technical requirements and administrative procedures for ensuring the continuing airworthiness of aircraft, such as the aircraft maintenance programme and the aircraft continuing airworthiness records system. It also specifies that the operator – in case of commercial air transport – must use an aircraft technical log system containing the current maintenance statement giving the aircraft maintenance status.

Finally, Regulation No. 1321/2014 states conditions to be met by the persons or organisations involved in such continuing airworthiness management.

iii Maintenance

Regulation (EU) No. 1321/2014 also specifies the maintenance standards to be followed regarding the maintenance data, the performance of maintenance, and the aircraft defects. It also states the requirements to be met by an organisation to qualify for the issue or continuation of an approval for the maintenance of the aircraft.

iv Training

The Regulation (EU) No.1178/2011 of 3 November 2011 lays down detailed rules for:

a different ratings for pilots’ licences, the conditions for issuing, maintaining, amending, limiting, suspending or revoking licences, the privileges and responsibilities of the holders of licences;

b the conditions for issuing, maintaining, amending, limiting, suspending or revoking cabin crew attestations, as well as the privileges and responsibilities of the holders of cabin crew attestations; and

c the conditions for issuing, maintaining, amending, limiting, suspending or revoking certificates of pilot training organisations and of aero-medical centres involved in the qualification and aero-medical assessment of civil aviation aircrew.

It has been implemented in France by the Decree of 5 April 2012 and modified by the Decrees of 2 April 2015 and 14 April 2016.

25 Article R.722-3 Civil Aviation Code.
V INSURANCE

Air carriers and aircraft operators must prove they comply with insurance requirements by providing the DGCA with an insurance certificate or other evidence of valid insurance.

Insurance obligations are defined in Article 50 of the Montreal Convention and detailed in EU Regulation No. 785/2004 on insurance requirements for air carriers and operators, as follows:

a for liability in respect of passengers, the minimum insurance cover is 250,000 special drawing rights (SDR) per passenger. However, in respect of non-commercial operations by aircraft with a maximum take-off weight (MTOM) of 2,700 kg or less, EU countries may set a lower level of minimum insurance cover, but not below 100,000 SDR per passenger.

b for liability in respect of baggage, the minimum insurance cover must be 1,131 SDR per passenger in commercial operations; and

c for liability in respect of cargo, the minimum insurance cover must be 19 SDR per kilogram in commercial operations.

For liability in respect of third parties (i.e., any legal and natural person, excluding passengers and crew) the minimum insurance cover per accident and per aircraft depends on the MTOM of the aircraft. It can vary between 750,000 SDR and 7 million SDR.

With respect to overflights of France by non-Community air carriers or aircraft registered outside the Community which do not involve a landing on or take-off from any Member State, France may, in accordance with international law, request evidence of compliance with the insurance requirements of this Regulation, for example by carrying out random checks.27

VI COMPETITION

i Relevant competition provisions

Competition in the aviation sector is regulated by the TFEU (Treaty on the Functioning of the European Union) and the French Commercial Code.

The French Commercial Code forbids concerted actions or agreements when their purpose or effect is or may be to prevent, restrict or distort competition on a market.28 The abusive exploitation by an undertaking or group of undertakings of a dominant position on the domestic market or a substantial part is also prohibited.29 Offers of prices or selling price practices to consumers which are unreasonably low are prohibited where such offers or practices have as their object or effect the elimination from a market of an undertaking.30 Moreover, when necessary, the TFEU provisions are applied and enforced in France by the French Competition Authority. The TFEU applies to the aviation sector when this activity alters trade between Member States.

30 Article L.420-5 of the Commercial Code.
ii Regulatory regime for anticompetitive behaviour

In case of anticompetitive behaviour, the Competition Authority may examine whether the practices violate competition provisions or may be justified (for example if they ensure economic progress).31

The Competition Authority may order the parties to put an end to anticompetitive practices within a specified period of time or impose special conditions. It may also impose a financial penalty applicable either immediately or in the event of failure to comply with the injunctions it has accepted.32

The financial penalties are proportionate to the seriousness of the facts at stake, the extent of the damage caused to the economy, the situation of the body or undertaking penalised and any repetition of the practices prohibited. The maximum amount of the penalty for a legal entity is 10 per cent of its worldwide turnover.33

iii Cooperation agreement between operators

Cooperation agreements are not – per se – prohibited under French law or European law as they can under certain circumstances contribute to research and development and therefore improve competition. Cooperation agreements are, however, assessed according to the European Commission’s Guideline regarding horizontal cooperation.

iv Criminal liability

According to Article L.420-6 of the Commercial Code, a four-year prison sentence and a fine of €75,000 may be imposed on any natural person who fraudulently takes a personal and decisive part in the design, organisation or implementation of anticompetitive practices.

If during its investigation the Competition Authority finds that such practices should be criminally investigated it can send the file to the public prosecutor. This transmission interrupts the statute of limitations on public action.

VII WRONGFUL DEATH

In France, the general principle is the one of full compensation of all types of damage suffered in relation to the accident. Both moral and material damage are compensable.

In the event case of the death of a passenger, the relatives can seek compensation for the loss of income due to the death of the victim. Compensation is then calculated based on the income and age of the deceased. It is also possible to seek compensation for the recovery of funeral expenses.

Family members who have suffered the loss of the victim may also be compensated for their moral damage. The amounts awarded in this respect vary according to whether the victim lived with the relative and to their degree of kinship. The amounts awarded also vary from one court to another.

The ‘loss of opportunity to have one's life extended in accordance with the life expectancy of a person of his or her age’ may also be compensated under specific conditions, such right being transmitted to the victim's heirs.

31 Article L.420-4 of the Commercial Code.
32 Article L.464-2 of the Commercial Code.
33 Article L.464-2 of the Commercial Code.
The prejudice of death anxiety may also be compensated. The purpose is to compensate the anguish of imminent death suffered by the victim who, between the occurrence of the accident and his death, has remained sufficiently conscious to have contemplated his or her own end.34

It should also be mentioned that claims against the air carriers for damages pursuant to the Warsaw and Montreal Conventions must be brought before civil courts and cannot be made in the context of criminal proceedings.

VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

In France there is no specific jurisdiction, timeline, or mechanism to settle air travel claims. In the event of a death or a bodily injury, the Montreal and Warsaw Conventions as well as the Regulation (EC) No. 889/2002 of 13 May 2002 apply. In accordance with these texts, the time limitation to bring a claim against an air carrier is of two years, and actions for compensation can be brought against any liable party.

ii Carriers’ liability towards passengers and third parties

The Montreal Convention regulates the operator’s liability towards passengers, in accordance with Article 1 of Regulation (EC) No. 889/2002 of 13 May 2002. The carrier is liable for the damage sustained in the event of death or bodily injury of a passenger as long as the accident took place on board the aircraft or in the course of embarking or disembarking operations.35

According to Article 21 of the Montreal Convention on the compensation in case of death or injury of passengers, the carrier cannot exclude or limit its liability for damages not exceeding 128,821 SDR for each passenger. However, for damages arising which exceed 128,821 SDR, the carrier can exclude its liability only if it proves that the damage:

a was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

b was solely due to the negligence or other wrongful act or omission of a third party.

The carrier’s liability toward passengers in relation to delay, baggage and cargo is limited by Article 22 of the Montreal Convention to:

a 22 SDR per kilogram for the carriage of cargo in the case of destruction, loss, damage or delay unless a special declaration of interest was made by the consignor;

b 1,288 SDR per passenger for the carriage of baggage, in cases of destruction, loss, damage or delay of the baggage unless a special declaration of interest was made by the passenger; and

c 5,346 SDR per passenger for damage caused by delay in the carriage of persons.

Pursuant to article L.6131-2 of the Transports Code, the operator of an aircraft is systematically liable for ground damage caused by the aircraft or objects that come off it to a third party. However, damage caused to persons on the ground bound by contract to the operator (i.e.,

34 Cass Crim, 23 October 2012, No. 11-83,770; CA Bordeaux, 27 June 2017, No. 16/00225.
35 Article 17 of the Montreal Convention.
passengers) fall outside the scope of such article. Article L.6131-1 of the Transports Code adds that in case of a damage caused by one aircraft to another aircraft, the liability of the pilot and the aircraft operator is governed by the provisions set out in the Civil Code.

### iii Product liability

Product liability is governed by Articles 1245 et seq. of the Civil Code. In accordance with these provisions, the manufacturer is liable for damage caused by a defect in his product, whether or not he is bound by a contract with the victim. A manufacturer, when acting as a professional, is deemed to be the manufacturer of a finished product, of a raw material, or of a component part.

If the manufacturer cannot be identified, the seller, the lessor, or any other professional supplier, shall be liable for the lack of safety of the product, under the same conditions as the manufacturer, unless it designates its own supplier or the manufacturer, within three months of the date on which the victim’s request was notified to it.\(^36\)

The manufacturer may be liable for the defect even though the product has been manufactured in accordance with existing standards or has been the subject of an administrative authorisation.\(^37\)

### iv Compensation

In France, the principle is the one of full compensation of the damage (i.e., the victim must be compensated for his or her ‘whole but sole’ loss). Punitive damages are forbidden as they would lead to the enrichment of the victim, which is contrary to the principle of full compensation. In practice, French courts admit three main types of damages: property damage, bodily injury, which includes economic loss, and moral damage. In order to be admitted, the damage must have a causal link with the accident.

In the event of the death or injury of a passenger, the air carrier must make an advance payment to cover immediate economic needs within 15 days of the identification of the person entitled to compensation. For Community carriers, the European Regulation has set this advance payment, in the event of death, at an amount not less than 16,000 SDRs per passenger.\(^38\) This advance payment is the only obligation imposed to air carriers, consequently victims and their beneficiaries must take legal action to be fully compensated.

The Interministerial Instruction of 26 April 2017 introduced the emergency plan in the event of a civil aviation accident, required by Article 21 of European Regulation No. 996/2010 of 20 October 2010 and sets the plan regarding the assistance to victims and their families.

### IX DRONES

Apart from certain exceptions, a permit issued by the DGCA is required to fly a drone. When the drone weighs more than 800 grams, the drone pilot must also follow an online training course on the DGCA website and pass an evaluation test. In the event of piloting the

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\(^{36}\) Article 1245-6 of the Civil Code.

\(^{37}\) Article 1245-- of the Civil Code.


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drone without a certificate of success, the pilot may pay a fine of €450. In addition, a drone weighing more than 800 grams must be registered with the DGCA, otherwise the pilot may have to pay a fine of €750.39

Moreover, from 29 June 2020, a drone weighing more than 800 grams will have to issue an electronic signal. If a drone is registered before 29 June 2020, the owner will have until 29 December 2020 to bring it into compliance.40

Finally, when piloting a drone, the following rules must be applied:

\[ a \] not to fly over people;
\[ b \] respect the maximum flying heights (150 metres in general);
\[ c \] never lose sight of the camera and not to use it at night;
\[ d \] not to fly the drone over public areas in built-up areas;
\[ e \] not to fly the drone near airfields;
\[ f \] not to fly over sensitive or protected sites, such as nuclear power plants, military land, and nature reserves; and
\[ g \] respect the privacy of others, by not broadcasting pictures without the consent of the persons concerned, and by not using them for commercial purposes.41

X VOLUNTARY REPORTING

Pursuant to the concept of ‘just culture’, several provisions have been enacted to encourage the voluntary reporting of incidents, in order to ensure and improve safety.

Among others, France applies the Regulation (EU) No. 376/2014 – as amended by Regulation (EU) No. 2015/1018 – which regulates the reporting, analysis and follow-up of occurrences in civil aviation and aims to protect the reporter and the persons mentioned in occurrence reports, in particular by anonymising these reports. Accidents and serious incidents occurring in France must be reported to the BEA, which then notifies the Commission, the EASA, the ICAO and the Member States and third countries concerned.

Moreover, according to Articles L.6223-1 et seq. of the Transports Code, a person who, in the exercise of an activity related to the civil aviation, becomes aware of an event is required to report it without delay to the Minister responsible for civil aviation or, where appropriate, to his or her employer. An event is any type of operational interruption, anomaly or failure, or other unusual circumstance, which has had, or is likely to have had, an impact on air safety and which has not given rise to an accident or serious aircraft incident. No administrative, disciplinary or professional sanction may be imposed on the person who reported an event, whether or not he or she was involved in the event, unless he or she is himself or herself guilty of a deliberate or repeated failure to comply with safety rules.

XI THE YEAR IN REVIEW

Following the covid-19 sanitary crisis, the International Air Transport Association (IATA) released its assessment that the impact of the covid-19 health crisis is of 80 million fewer passengers resulting in a US$14.3 billion revenue loss, risking 392,500 jobs and a US$35.2 billion contribution to France’s economy.

40 Decree of 30 October 2019 and Order of 27 December 2019.
41 https://www.service-public.fr/particuliers/vosdroits/F34630.
In this context, the Order No. 2020-315 of 25 March 2020 concerning the financial conditions for terminating certain tourist travel and holiday contracts in the event of exceptional and unavoidable circumstances or force majeure was published in the Official Journal of 26 March 2020.

This Order, issued pursuant to the Health Emergency Law of 23 March 2020, provides for the exceptional conditions for the termination of tourist travel contracts notified between 1 March and 15 September 2020. More specifically, it allows traders to provide a voucher to their client instead of a reimbursing them. However, this Order does not apply to air only flights (i.e., plane tickets purchased alone and without any other service); they, therefore, remain subject to the previous rules, namely Regulation (EU) No. 261/2004. This means air carriers cannot impose a voucher for these passengers to use and must reimburse them for the cancelled flight if the clients wish so.

On 13 May 2020, the European Commission published guidance on how to safely resume travel and reboot Europe’s tourism in 2020 and beyond. It reaffirmed that under EU rules, travellers have the right to choose between vouchers or cash reimbursement for cancelled transport tickets or package travel.

In practice though, most of the IATA air carriers do not accept reimbursing passengers and only offer vouchers. As a consequence, the consumer association UFC QUE CHOISIR announced on 19 May 2020 that it has taken 20 air carriers to court for failing to comply with the rules on refunds in the event of flight cancellations. Among the targeted companies are French air carriers, such as Air France, Corsair, Air Corsica and Air Austral.

XII OUTLOOK

In the context of the covid-19 health crisis, the IATA has published on its website a guide for air transport operators providing recommendations for:

a  the transport of covid-19 samples;
b  the addition of alcohol-based hand disinfectant as aircraft equipment; and
c  the carriage of hand sanitiser in the luggage of crew members and passengers.
Chapter 19

ISRAEL

Eyal Doron and Hugh Kowarsky

I 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 90 per cent between 2012 (12.4 million) and 2019 (24.036 million). This number was expected to grow further during the past year, 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, but in view of the current covid-19 pandemic, it is unlikely to happen, at least this year.

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 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.

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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.
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.4

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.5

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.6 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.7

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.

4 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).
5 Civil Appeal 36/84 (Supreme Court) Teichner 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).
6 Section 5(a) of the ATL.
7 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.

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8 As in European Regulation 261/2004, the sum of compensation is dependent on the flight distance.
9 The relevant provision has been inserted in the Licensing of Air Services Law 1963 by Section 23 of the ASL.
It should be noted, however, that due to the covid-19 outbreak, on 23 April 2020 the Israeli government approved a proposal to amend the ASL temporarily and enact the Aviation Services Law (Compensation and Assistance for Flight Cancellation or Change of Conditions) (Temporary Order – the New Coronavirus), 2020 (the CV Temporary Order). According to the explanatory notes published in conjunction with the proposed amendment, the CV Temporary Order is directed to modifying the internal balance in the ASL between the interests of consumers and airlines, in light of the unprecedented financial distress caused by the covid-19 crisis to airlines, many of which are on the verge of bankruptcy. Among the main amendments to the ASL proposed in the CV Temporary Order are a provision exempting airlines from paying passengers statutory compensation for cancellation of all flights scheduled to depart between 1 March 2020 and 31 August 2020 and a provision extending the period for refund by airlines of fares paid for cancellation of flights in the said period from the current 21 days to 90 days. At the time of writing, the proposal for amendment has been approved by the government but has not yet been adopted by the Israeli legislature. If and when adopted, the amendment will have retroactive effect, and subject to changes that may be introduced in the course of the legislation, the period to which it relates may be extended by the Minister of Transport by one month at a time up to a total of nine months.

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, 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.

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. 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

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12 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 the Israel Consumer Council (http://www.consumers.org.il/category/cancelling-vacation) do not dispute this view. The issue has recently been dealt with by an Israeli District Court in C.A. 54491-01-15 Bashan v. Easyjet Airline Company Ltd, where it was decided that the CPL does not apply to foreign airlines with no permanent presence in Israel.

13 Chapter 3 of the RER.
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.

v 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.

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.14

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).15 The CAAI will grant an AOC only

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14 Section 2 of the LASL.
15 Section 374 of the ANR.
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.\(^{16}\)

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).\(^{17}\)

Other activities that require a licence are the following:

- the training of aviation workers;
- 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;
- the manufacture of aircraft for marketing;
- the transportation of dangerous goods; and
- 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.\(^{18}\)

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.\(^{19}\)

### 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.\(^{20}\)

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

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\(^{16}\) ibid. Sections 373 and 375.

\(^{17}\) Sections 2 and 4 of the ANL.

\(^{18}\) Sections 13, 21, 52, 74, 87, 88 of the ANL

\(^{19}\) Section 8 of the LASL.

\(^{20}\) Section 1 of the LASL.
the applicant carrier is deemed a potential danger to the security of Israel.\textsuperscript{21} 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.\textsuperscript{22}

\section*{iii \quad Foreign carriers}

Pursuant to the LASL, foreign carriers must obtain an operating permit from the CAAI for operation of passenger\textsuperscript{23} or cargo flights\textsuperscript{24} from, to or within Israel.

\section*{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.\textsuperscript{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 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.\textsuperscript{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),\textsuperscript{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.\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{21} ibid. Section 5.
\item \textsuperscript{22} 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.
\item \textsuperscript{23} According to relatively 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 are not 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.
\item \textsuperscript{24} See the following subsection on cargo flights.
\item \textsuperscript{25} Directive AT.1.1.400 ‘Granting an Operating Permit for Scheduled Flights to and from the State of Israel’.
\item \textsuperscript{26} Security Directive 0101-16 (2016) of the MOT Emergency, Security and Cyber Division.
\item \textsuperscript{27} Section 8C(a1) of the ASL.
\item \textsuperscript{28} ibid. Section 8c(b)(1).
\end{itemize}
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. 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.

Cargo charter flights

CAAI Directive AT.1.1.402 also applies to cargo charter flights. A ‘cargo charter flight’ is defined as a flight where a person or a tour operator hires the entire capacity of the airplane for the sole purpose of cargo transportation. Additional requirements, pertaining specifically to cargo, are stipulated in AIP Israel GEN 1.4, which covers issues relating to customs, agricultural shipments and live animal importation. Further, as part of the approval process, and in obtaining ASOC’s approval, the flights must meet the security requirements set out in Security Directive 0303-16, which apply to all commercial flights (scheduled or charter). The main purpose of Security Directive 0303-16 is to prevent the loading of explosives, incendiaries and other destructive substances or items onto aircraft.

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. 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. In view of Israel's special geopolitical 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

30 Section 2.4.3 to Directive AT.1.1.402.
31 AIP Israel GEN 1.4 ‘Entry, Transit and Departure of Cargo’ (20 January 2020).
33 Security Directive 0303-16, Section 4.2.
35 ASOC controls the security procedures for the arrival of aircraft into and passage through Israeli airspace.
into a collaboration agreement with Eurocontrol, the European Organisation for the Safety of Air Navigation, which engages in airspace planning and air traffic management. 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.36

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.37 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.38 The ANL grants the supervisor of the CAAI investigatory powers, including the authority to demand ‘any information or document’.39 The CAAI maintains and operates a system for reporting investigated incidents for the purpose of improving civil aviation safety.40

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.41 This insurance cover is required with respect to every aircraft that may be used in

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37  Regulation 125 of the ANR.
38  Section 107 of the ANL empowers the MOT to appoint a chief investigator to coordinate the investigation of safety-related incidents.
39  Sections 96 and 114 of the ANL.
41  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, or 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: (1) a block exemption for code-share arrangements between air carriers relating to destinations covered by the Open Skies Agreements; and (2) 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.

42 Regulation 5 of the ARCI.
43 Regulation 4 of the ARCI.
44 Regulation 12 of the ARCI.
45 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).
46 Restrictive Trade Practices Rules (Block Exemption for Arrangements between Air Carriers Concerning Marketing Flight Capacity to Destinations Covered by Open Skies Agreement) (Temporary Order) 2012. This block exemption is valid until 9 November 2022.
47 Restrictive Trade Practices Rules (Block Exemption for Arrangements between Air Carriers) (No. 2), 2013 (the Block Exemption Rules 2013). This block exemption is valid until 1 December 2023.
48 Section 7a of the Block Exemption Rules 2013.
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. A merger will not be approved if 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.

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.

In January 2020, the Central District Court in Israel certified a class action suit against four airlines (El-Al Israel Airlines, British Airways, Lufthansa and Swiss Airlines), alleging that the airlines were parties to a global cartel concerning the carriage of cargo to and from Israel between 2000 and 2006. According to the action, the airlines coordinated prices of several items in the cargo carriage tariff, agreed to avoid discounts and exchanged information on earnings and prices. The amount claimed in the class action is 613 million shekels. An appeal against the certification has been filed to the Supreme Court.

Following the exposure of the existence of the alleged cartel in 2006, investigations against various airlines, including the four defendants in the class action, have been initiated around the world; criminal proceedings have been conducted, some of which have ended in convictions in accordance with plea bargains; and several civil lawsuits, most of which by way of class action, have ended in settlements.

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 the event 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). 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.

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49 Section 19 of the ECL.
50 Section 21(a) of the ECL.
51 Section 47 of the ECL.
52 CA 10538-02-13 Hatzlaha Foundation v. El-Al Israel Airlines et al. (19 January 2020).
54 Article 21(1) of the Montreal Convention.
55 Article 21(2) of the Montreal Convention.
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. 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.

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. 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 September 2020, new Civil Procedure Regulations are expected to come into force. The new regulations provide 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.

56 Section 13 of the ATL.
57 Section 14 of the ATL.
59 Civil Procedure Regulations 2018 (the New Regulations). The New Regulations were originally planned to come into force in late 2019, but were postponed several times by the Minister of Justice. The last postponement took place in September 2019.
60 Regulations 34–35 of the New Regulations.
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. Claims under the ASL must be brought within four years of the time the cause of action arises. 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). 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.

### 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. Any convention liability will also be subject to an applicable limit of liability contained therein. Otherwise, liability will generally be fault-based. 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 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 Liability for Defective Products Law 1980 (LDPL) and the Civil Wrongs Ordinance.

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61 | Section 15 of the ATL and Article 35 of the Montreal Convention.
62 | Section 19 of the ASL.
64 | Sections 11 and 84 of the Civil Wrongs Ordinance (New Version). The allocation of liability between wrongdoers 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).
65 | See Section II.i and ii.
66 | See, for example, Articles 21 and 22 of the Montreal Convention, as incorporated into Israeli law under Section 6 of the ATL.
67 | However, see Section II.iv.
(New Version). The LDPL 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.68

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 Convention69 should be construed broadly, so as to enable the award of damages for mental injury alone.70 In November 2019, the Tel Aviv District Court rendered a fundamental ruling reaffirming that, in accordance with Israeli law, compensation for mental anguish in baggage claims may be awarded by virtue of the Montreal Convention. However, the total compensation would still be limited to the maximum amount specified in the Convention for baggage claims.71 An application for leave to appeal the said ruling has been filed with the Supreme Court.72

The ASL provides for compensation without proof of damage in the case of denied boarding and delay or cancellation of flights, as well as exemplary damages in the case a carrier fails to fulfil its obligations under the ASL.73

In addition to compensation stemming from aviation legislation, passengers who have sustained physical or mental injury in connection with air carriage may also be eligible for additional compensation under Israeli law. For example, 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.

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,74 the CAAI is currently circulating draft regulations governing...

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68 Sections 1 and 2 of the LDPL. Section 4 of the LDPL 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.

69 Equivalent to Article 17(1) of the Montreal Convention.


71 Small Claim App. (Tel Aviv) 23465-07-17 Iberia Airlines v. Flissher-Peled et al. (20 November 2019).

72 Leave to Appeal 8456/19 Iberia Airlines v. Flissher-Peled (16 January 2020).

73 Section 11 of the ASL.

74 ‘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.
the public use of drones.\textsuperscript{75} Having regard to the simplicity of the US Federal Aviation Administration regulations\textsuperscript{76} 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.\textsuperscript{77} 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).\textsuperscript{78} 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.\textsuperscript{79} Although comments were received from the public and from the Israel Drone Alliance, no changes in the draft were made, and it will be considered as planned.\textsuperscript{80}

\section*{X \ VOLUNTARY REPORTING}

To the best of our knowledge, there are no voluntary reporting provisions or initiatives in Israel.

\section*{XI \ THE YEAR IN REVIEW}

The past year has borne witness to a rise in motions for certification of class actions against airlines, for example, in the context of the covid-19 pandemic and the consequential financial crisis\textsuperscript{81} – several airlines withheld refunds from passengers for cancelled flights and offered vouchers for future flights in lieu thereof, in prima facie violation of the CPL and the ASL and leading to class action proceedings.

Further, the Israeli District Court approved a motion to certify a 30.5-million-shekel class action against El-Al Israel Airlines.\textsuperscript{82} The basis of the action was the allegation that El-Al does not refund no-show customers with airport taxes collected from them upon purchase of the ticket, even though El-Al does not transfer these taxes to the aviation authorities. In its decision to certify the class action, the court identified two relevant types of airport taxes:\textsuperscript{83} fees relating to incoming passengers – for which an airline is liable to the airport authority


\textsuperscript{76} 14 CFR 107 – SMALL UNMANNED AIRCRAFT; https://ecfr.io/Title-14/cfr107_main.

\textsuperscript{77} Explanatory notes to the Bill of the Drone Regulations, pp. 36–41.

\textsuperscript{78} Sections 5, 8–11, 16–19 and 24 of the Drone Regulations.

\textsuperscript{79} As can be viewed on the CAAI’s website: http://caa.gov.il/index.php?option=com_content&view=article&id=1621:2019&catid=339&Itemid=753&clang=he.


\textsuperscript{82} Class Action 15049-01-15 Cohen v. EL AL (10 September 2019).

\textsuperscript{83} A third type was mentioned but was not relevant to the decision.
and which are collected by the airline from the passengers (e.g., porter fees and incoming passenger services fees); and fees relating to outbound passenger in international aviation – for which the passenger is liable to the airport authority, and are collected by the airline and transferred by it to the airport authority. The court ruled that in both cases El-Al should be treated as a trustee and as such obliged to refund the taxes collected from its customers. The court clarified that, as a matter of law, the passengers’ right to a refund of airport taxes arises even if they have not yet contacted El-Al with a request for the refund.84

Three other fundamental aviation law rulings were rendered this year by the Israeli District Courts. The first dealt with the question whether it is possible, under Israeli law, and taking into consideration the provisions of the Montreal Convention, to award compensation for mental anguish in baggage claims filed against airlines.85 The court answered this question in the affirmative, but held that the amount awarded would be limited to the maximum specified in the Montreal Convention. Leave to appeal to the Supreme Court has been filed86 and the decision of the Supreme Court on the matter will create a binding precedent. In another case, the District Court held that the CPL does not apply to foreign carriers with no permanent presence in Israel.87 This ruling significantly reduces the rights and remedies under Israeli law available to passengers against such foreign carriers, but it may be appealed to the Supreme Court. In the third of these cases, the District Court held that the statutory compensation provided for in the First Schedule to the ASL (such as the fixed sums payable for cancellation of flights and denied boarding) should be treated as ‘compensation which does not require proof of damage’ for the purpose of Section 20(e) of the Class Actions Law, 2006, which does not allow the filing of class actions based on claims for compensation of that kind.88

XII OUTLOOK

The impact of covid-19 pandemic on the Israeli aviation market was dramatic. Passengers’ flights were completely suspended for a while. Given Israel’s geopolitical situation, it can be seen as an island surrounded by water: in these circumstances air traffic is essential and even critical. Passengers’ flights are planned to resume during the next couple of months, although there is a lot of uncertainty and no guarantee that returning to the previous routine will be possible any time soon. Health concerns are still great, and for the first time ever they are in the main focus, rather than security. The repurposing of passenger planes to fly cargo, to help the local airlines weather the financial storm caused by the sharp reduction and suspension of

84 It should be noted, that In addition to the class action certified against El-Al, numerous similar cases are pending in the Israeli courts against various airlines, including Delta, United Airlines, Swiss Airlines, Turkish Airlines, Air France, EasyJet, Pegasus Airlines, Wizz Air, Austrian Airlines, Air Europa, Transavia Airlines and Israir Airlines.
85 Small Claim Leave to Appeal 23465-07-17 Iberia Airlines v. Flisher Peled (20 November 2019). See also footnote 74.
86 Leave to Appeal 84560/19 Iberia Airlines v. Flisher Peled. See also footnote 75.
passengers flights is assisting the local airlines to get much necessary cash flow and survive for the time being, although El Al Israel Airlines is in a dire financial situation and heading towards a huge debt settlement under government sponsorship.

The pro-consumer tendency of the Israeli regulators and legislators is expected to resume once the covid-19 crisis is over. 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 still pending approval. Also pending is a bill that would prohibit flight operators from charging a price for a one-way ticket exceeding the price charged by it for a return flight ticket for the same destination. Likewise, the extent (if any) of the applicability of the Israeli CPL to foreign carriers is expected to be clarified by the district courts.

89 See for example: Israeli airlines Arkia and Israir: https://www.ynet.co.il/economy/article/qkhopt0S (18 March 2020); El Al https://www.globes.co.il/news/article.aspx?did=1001328944 (18 May 2020); https://www.calcalist.co.il/world/articles/0,7340,L-3808295,00.html (16 April 2020).


Chapter 20

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 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 (RPAS). In addition to the Code, the discipline on drones is encompassed in European Regulations, precisely in Regulation (EU) No. 1139/2018, Commission Delegated Regulation (EU) 2019/945 and Commission Implementing Regulation (EU) 2019/947. Both the Delegated Regulation and the Implementing Regulation entered into force on 1 July 2019.

The administration of Italy’s air navigation sector is ensured by the Ministry of Infrastructure and Transport, the Italian Civil Aviation Authority (ENAC), the National Agency for the Safety of Flight (ANSV) and the Aero Club of Italy, while 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 INC and by Legislative Decree No. 250/1997. It is ENAC’s responsibility to supervise and regulate air carriers, as well as to fine them for breach of regulations. Furthermore, ENAC is in charge of laying down implementing rules for air traffic services.

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 that 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 (ART). ART carries out important functions in regulating, promoting and ensuring fair competition in the transport sector. ART performs supervisory functions regarding airport charges and shall verify that tender notices do not

1 Anna Masutti is partner at R&P Legal and tenured professor of Air Law at Bologna University.
2 The Commission has recently adopted Implementing Regulation (EU) No. 2020/639 of 12 May 2020 amending Implementing Regulation (EU) 2019/947 as regards standard scenarios for operations executed in or beyond the visual line of sight. This Regulation is not entered into force yet.
3 See ENAC Regulation of 8 June 2015 on air traffic services, 2nd Edition.
contain discriminatory conditions or obstruct other markets’ competitors. With particular regard to airport charges, it should be noted that ART is currently deciding which airport charges system shall apply since there is a debate between the main Italian airports (i.e., Milan, Rome and Venice), which are in favour of the dual-till system, and the air carriers, which are asking for a single-till or hybrid approach. The Authority has established its main offices in Turin.

Another body 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. The Antitrust Authority has already fined several air carriers for unfair commercial practices relating to underpricing or mispricing of tariffs and other reimbursable elements of cost, which tend 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.

Recently, the Italian Antitrust Authority has ordered two air carriers to suspend the implementation of their new hand baggage policy providing the payment of a surcharge to bring on board the cabin luggage with standard measures. For the Antitrust Authority, this new policy would cause a misleading representation of the actual price of airfares, it would misled consumers and it would distort competition with carriers that transported cabin luggage for free. The order has been subsequently annulled by the Italian Regional Administrative Court because the new policy complies with the current regulation.

It is worth highlighting that in the Italian legal system there are the regional administrative courts 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 entered 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.


After the adoption of Regulation (EC) No. 889/2002, the most important piece of legislation relating to the INC was modified. Section II of the INC set outs rules that are entirely dedicated to aviation matters, while Section I is devoted to matters related to maritime law. In 2005 and 2006 several amendments were introduced, through Law Decrees
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No. 96/2005 and No. 151/2006, to the INC’s provisions governing the aviation 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. 2027/1997, as amended by Regulation (EC) No. 889/2002. The excluded areas concern transport services carried out by non-Community air carriers (in Italy, these services are governed by the above-mentioned ENAC Regulation of 21 December 2015) 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 the entire air transport sector, 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. Article 949 ter of the INC provides that the two-year limitation period laid down by the 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). Since 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 legislator 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 rules 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 fixes 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.

i  International carriage

As mentioned above, an air 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 for the carriage of goods but not for the carriage of passengers or baggage (Article 949 bis of the INC).

ii  National carriage

Article 951 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 introducing 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 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 the transport of passengers and goods by air. Consequently, the activities performed by aircraft are subject to the rules of the INC.

With regard to aircraft used for leisure and microlight aircraft, a special regulation for insurance obligations has been introduced through Decree No. 133/2010. 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. 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 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 limit of the maximum coverage. 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.

iv 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 November 2009, ENAC issued a new version of the Passenger’s Charter including information on the provisions issued by the European Union on the rights of persons with disabilities or reduced mobility, the rules on airport security checks and the surveillance of foreign operators. In this edition of the Charter, ENAC has also incorporated the principles established in the judgment of the European Court of Justice in November 2009 on passengers’ compensation 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 legislator introduced into the INC certain provisions aimed at ensuring special protection for passenger rights. Special mention shall be made to Article 943, which imposes a specific obligation to provide information. If transport is 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. While for ticket reservations, the 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 has the obligation to communicate to the passenger its respective waiting list number while putting up a waiting list for a certain flight. Moreover, the list 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 assigned waiting list number.

Article 783 of the INC requires 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 noted that the Italian legislator, by issuance of Legislative Decree No. 53/2018, has implemented the EU Passenger Name Record Directive (Directive No. 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. According to the Directive, airlines must transfer the data collected to the competent authority (i.e., passenger information unit) in the relevant Member State.

Moreover, it is worth recalling 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.

Finally, it should be noted that, because of the covid-19 outbreak, ENAC with the press release n. 12/2020 of 29th of February 2020 informed passengers, whose flights are cancelled and passengers who are subject to the restrictions imposed by third countries, that they have the right to reimbursement of the ticket price, but do not have the right to compensation provided for in Article 5 (3) of Regulation No. 261/2004 because, in such circumstances, the cancellation of the flight – or the impossibility of flying – is not dependent on the carrier. Subsequently, Law No. 27 of 24 April 2020 – which converted into law the Law Decree No. 18 of 17 March 2020 – in Article 88 bis, Paragraphs 11 and 12, establishes that air carriers can offer a voucher instead of the reimbursement of the ticket’s price. The voucher has a validity of one year from the date of issuance. Hence, the issuance of the voucher fulfils the reimbursement obligation and does not require any form of acceptance by the passenger. In this regard, it should be noted that ENAC, in a press release issued on 18 June 2020, established that, since the covid-19 restrictions have been lifted, the cancellations made after 3 June 2020 are not attributable, except in specific cases, to the pandemic. Hence the air carriers must reimburse the ticket price to passengers whose flight has been cancelled.

Also the European Commission addressed the matter and on 18th of March 2020 issued Interpretative Guidelines4 aiming at clarifying how certain provisions of the EU passenger rights legislation apply in the context of the covid-19 outbreak. The Commission Guidelines establishes that in case of cancellation due to covid-19 restrictions passengers have the right to choose between the reimbursement or rerouting, and they must also be offered care by the operating air carrier, free of charge. In addition, and in line with ENAC press release's content, the Commission affirms that measures adopted to contain the covid-19 pandemic cannot be considered inherent in the normal exercise of the activity of carriers and they have to be seen as outside their actual control. Hence, the measures taken to contain covid-19 should be regarded as ‘extraordinary circumstances’ precluding the right of passengers to claim compensation as established by Article 5(3) of Regulation 261/2004.

III LICENSING OF OPERATIONS

i Licensed activities

Within the EU, international and domestic air services are governed by Regulation (EC) No. 1008/2008 (and subsequent amendments), 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 legislator 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

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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 the issuance of the AOC. The certificate proves that the operator has the professional ability and the 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 performing 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.

For the issuance of 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 on the basis of a property deed or under a contract for the use of the aircraft previously approved by ENAC.

In accordance with Article 779 INC, within one year from the issuance of the licence, and every two years thereafter, ENAC must recheck all the requirements in terms of ownership, control, financial support, guarantees, etc.

ENAC may, at any time, suspend the licence if the carrier is unable to ensure compliance with the licensing requirements and it has the authority to revoke it if it appears that the carrier is no longer able to meet its commitments. The procedures carried out by ENAC in order to verify the licensing requirements established by Chapter II of Regulation (EC) No. 1008/2008 are laid down in ENAC Circular of the 23 December 2015.5

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 operations, which ENAC defines as: ‘air operations 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.

Finally, with particular regard to the drones’ sector, it is worth recalling both Regulation (EC) No. 1139/2018 laying down new requirements to ensure drones’ free circulation in the European Common Aviation Area, and the third edition of ENAC regulation on remotely piloted aerial vehicles’ operations falling within its competence.6

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Ownership rules

ENAC issues the air carrier’s licence according to Regulation (EC) No. 1008/2008 (Article 778 of the INC) and the EC 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 as provided by paragraph 4 (c) of ENAC Circular No. EAL-16 of 23 December 2015. In addition, air carriers must provide satisfactory evidence of administrative, financial and insurance requirements, as provided by Regulation No. 1008/2008.

Finally, it is worth highlighting that, in its Work Programme 2020, the European Commission highlights – among the new initiatives to be taken within the aviation services package’s policy objective – the necessity to revise ownership and control rules in order to help air carriers to mitigate the economic impact of the crisis on the air transport sector.

Foreign carriers

Access to European routes is ensured to all air carriers (Italian and European) in possession of 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.

Regarding non-EU scheduled air transport services, Article 784 of the INC provides that it is an essential condition that the civil aviation authorities of the states that are parties of the agreement 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 designated air carriers, established on national territory, with a valid operating licence granted by ENAC or by a Member 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).

With regard to the operation of extra-EU scheduled services, in December 2014 ENAC issued Circular EAL-14B encompassing guidelines on authorisation and designation procedure for both Italian and Italian-based EU carriers in accordance with international air transport agreements. The Circular aims to improve the regulatory framework and to 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.

In 2016, ENAC issued Circular EAL-23, 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

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7 A minimum wage for air transport personnel has been established by Article 203 of Law Decree No. 34/2020.
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 services in Italy, according to the third-country operator authorisation provided for in Regulation (EU) No. 452/2014, and subsequent amendments. The Circular provides for two different authorisation procedures respectively for aircraft having a maximum operational passenger seating configuration of not less than 20 seats, and for taxi flights (performed with aircraft having configuration of maximum number of passengers’ seats less than 20). The choice of carriers shall be made by ENAC on the basis of criteria established in advance and made public and through transparent and non-discriminatory procedures. 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).

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, since on 20 May 2019 China and European Union signed an agreement on civil aviation safety (BASA) and a horizontal aviation agreement to strengthen their aviation cooperation. Prior to this 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, on 7 March 2019, the US and the EU agreed to amend Annex 1 to the Agreement on cooperation in the regulation of civil aviation safety, and in June 2020, the European Commission signed two bilateral aviation agreements, respectively with Japan and South Korea.

iv The national airport plan
In accordance with Article 698 of INC, in 2015 the Ministry of Transport published the last version of the national airport plan, which has been formally approved by the issuance of a decree of the President of the Republic. 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 2014 EU Commission Guidelines on state aid to airports and airlines. 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

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8 The Annual Report and Social Balance 2019 has not been published yet.
9 Decree No. 201 of the President of the Republic of 17 September 2015.
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, parts and spares. Safety 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 (EASA).10

The basic Regulation (i.e., Regulation (EU) No. 1139/2018) – which repealed Regulation (EC) No. 216/2008 – whose purpose is to establish and maintain a high uniform level of civil aviation safety in the Union, restates the role covered by European Aviation Safety Agency’s and expands it in drones and urban air mobility. The Regulation gives the agency a coordinating role in cybersecurity in aviation and widespread scope in research and development, international cooperation and environmental protection.

The Italian implementation process is supervised by ENAC, which issued Guidelines No. 2017/003-APT11 incorporating interpretative and procedural information on aspects relating both to airport certification and to the conversion of certificates issued by ENAC on the basis of national legislation. These Guidelines are intended to provide operators with a comprehensive framework of the criteria for the application of the requirements of the Basic Regulation No. 1139/2018 and the related implementing rules.

Civil aviation safety is also ensured through the issuance of the State Safety Programme (SSP),12 a project provided for by ICAO Annex 19 (entered into force in November 2019), 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.

It is worth to highlight that ENAC has been the first aviation authority adopting such indicators and to subsequently issue, in 2019, the basic edition of the Safety Performance Indicators’ document.

The basic edition of the SSP encompasses the requirements provided for in the new basic Regulation (EU) No. 1139/2018, and it introduces the principles of ‘Just Culture’, as required by Regulation (EU) No. 376/2014. With the fourth edition, the SSP fully complies with the standards defined by the second edition of ICAO Annex 19, thus completing the implementation of the safety principles in the management of Italian Civil Aviation.

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 for air carriers and aircraft operators have been replaced by the current obligations to insure 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 insure their liability for damage caused to passengers, baggage and cargo in accordance with EU legislation (Regulation No. 785/2004). In this way, Italy applies the same EU regulations, with one specific provision established in favour of passengers. Indeed, Article 942 of the INC allows passengers to exercise direct action against the insurer for compensation for damage caused by the air carrier; this action is not envisaged by Regulation No. 785/2004.

As a result of this provision, an injured person may claim compensation directly against the air carrier’s 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.

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.

An interesting point on the Italian aviation sector concerns 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 14 June 2017, the EU Commission adopted Regulation (EU) No 2017/1084 which amended the General Block Exemption Regulation (GBER)\textsuperscript{13} and extended its scope to ports and airports. The amended Regulation’s rules exempt support measures for

\textsuperscript{13} Commission Regulation (EU) No 651/2014 of 17 June 2014 and subsequent amendments.
ports and airports from prior Commission scrutiny, thus simplifying the procedure for public investments in ports, airports. The aim of the GBER is to facilitate public investments that can create jobs and growth.

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.

Prior to the issuance of GBER amending Regulation the Italian authorities presented their position concerning the first Draft of this 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.

With the 2020 budget law, measures have been introduced to ensure territorial continuity with Sicilian airports and social tariffs for certain categories of travellers to and from Sicily. In this regard, the Italian state allocated €25 million.

The 2020 Budget Law also left the regulation of the financing system for the performance of the coordination function for the slots allocation at national airports designated as coordinated or schedules facilitated to a ministerial decree. This new regulation, in order to ensure that coordination activities are carried out in an impartial, non-discriminatory and transparent manner, will also establish the distribution of the related costs for 50 per cent to be borne by the operators of the airports concerned and for the remaining 50 per cent to be borne by the operators of aircraft requesting to use those airports, without charge to the state. Finally, a fund for the preliminary study necessary for the introduction of the ‘tourist flights’ has been set up with a budget of €100,000 for each of the years 2020–2022.

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, authorised an expenditure of €15 million for the year 2019 and €10 million for 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 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 EU air carriers, 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 EU 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 (Legislative Decree No. 14/2019), 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. Due to the covid-19 pandemic, the entry into force of the new Code has been postponed from 15 of August 2020 to 1 September 2021.

In any case, it should be noted that the applicability of the extraordinary administration of large companies contained in the Decree No. 347/2003, and further amended by Decree No. 134/2008, remains unchanged, provided that the air carrier meets the requirements for access.

In addition, on 28 January 2020, ENAC adopted 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 that could potentially be detrimental to free competition among air carriers.14

VII WRONGFUL DEATH

Italian law allows for the recovery of actual damages as pecuniary damages (economic loss, out-of-pocket expenses and loss of profit) and non-pecuniary damages – those resulting from wrongful death, personal injury, the loss of physical or mental integrity (or both), or pain and suffering. The Italian legal system recognises non-pecuniary damages for wrongful death, suffered by the ‘secondary victim’. Despite there being no statutory definition of ‘secondary victim’, the notion encompasses family members. A distinction is, however, made by Italian courts between secondary claimants who live in the same house as the primary victim (such as a spouse, or dependent children) and secondary claimants who are closely related to the primary victim but live separate, independent lives, when assessing the gravity of life disruption arising from the accident and the quantum of non-pecuniary damages. Secondary claimants have to demonstrate the blood relationship and the existing close and loving bond with the primary victim. This close bond may also be presumed for the spouse or young children living with the victim (although such a presumption does not exonerate the secondary claimant from the burden to prove the strength of the relationship).

For the assessment and liquidation of non-pecuniary damages for the secondary victims, Italian courts rely on parameters set out in the tables elaborated and regularly updated by the Court of Milan (the latest edition of the Milan tables was adopted in 2018). These tables contain a section for the calculation of damages secondary victims are entitled to claim for pain and suffering in the event of death or severe injury of the primary victim. The system is based on a chart containing the various hypothesis of family relationship. These tables essentially sum up compensation for either biological or psychological damage, considering

14 ENAC’s Board of Directors’ resolution no. 6/2020.
the specific circumstances and features of the case. The Milan tables have become the reference throughout Italy, following the indications given by the Italian Supreme Court. As a general rule, the compensation must be ‘tailor-made’. In applying the Milan tables, the judge must consider all relevant factors (like the severity of the injury and the age of the victim) and find a figure within limits set by the chart fitting best with the circumstances of the case. These tables, in essence, contain two sections: one for the calculation of the non-pecuniary damage suffered by the primary victim, as well as the secondary victim (known as the danni riflessi) if he or she is physically or mentally affected by the event, in order to compensate temporary and permanent invalidity arising from the accident and another for the calculation of non-pecuniary damages for secondary victims, in the event of loss or disruption of the family relationship arising from the death or a severe permanent inability of the primary victim. A secondary victim’s non-pecuniary damages must be duly proven; courts require the claimants to confirm that the event has caused such a substantial disruption in the standard and ordinary habits to impose a choice of life radically different. The Italian Supreme Court has furthermore repeatedly held that the secondary victims must prove the intensity and strength of the family bond, the sharing of life and habits.

Moreover, it is worth highlighting that under Italian law, a sudden death (that is to say a death immediately following the event) does not give rise to a right to claim transferred to heirs, on the assumption that as soon as a person dies, he or she is no longer a legal person and loses the capacity to suffer damage caused by death.

The principle was confirmed in 2015 by the Joint Chambers of the Supreme Court, resolving a conflict emerged in case law over the years.

The successors of the primary victim are entitled to claim non-pecuniary damages suffered by the primary victim before dying, as far as a reasonable lapse of time incurs between the event and the death, and may also claim the danni catastrofale, consisting in the affliction by the primary victim deriving from the awareness of the imminent death.

VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure
Liability is allocated among the defendants according to the respective negligence in causing the accident.

ii Carriers’ liability towards passengers and third parties
See Section II.

iii Product liability
There are no specific rules governing manufacturers’ liability; the Italian regulations on product liability and the Italian Consumer Code apply.

15 Cassazione, Sezioni Unite, 15350/2015.
16 Among many others see Cassazione 32372/2018.
17 Among many others see Cassazione 29492/2019.
18 Legislative Decree No 206 of 6 September 2005.
Compensation
There are no sector-specific rules. The Italian regulations on product liability apply.

IX 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 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. As previously said, on 12 March 2019 the European Commission adopted Delegated Regulation (EU) 2019/945 establishing common rules setting technical requirements for drones and on 24 May 2019 the it adopted the Implementing Regulation (EU) 2019/947 on the rules and procedures for the operation of unmanned aircraft. The legislation introduces 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. It is worth highlighting that on 12 December 2019 EASA published Easy Access Rules for the Basic Regulation (Regulation (EU) 2018/1139) in order to provide stakeholders with an updated and easy-to-read publication.

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 2019 ENAC adopted the third edition of the Regulation on Remotely Piloted Aerial Vehicles laying down requirements to be met to ensure the safety levels for the different types of RPAS operations, the provisions for operating RPAS and those regarding air navigation in national airspace and common provisions applying to RPAS. ENAC Regulation also lays down provisions and limitations that must be complied with for the operation of model aircraft in national airspace. 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.

X VOLUNTARY REPORTING

Regulation (EC) No. 376/2014 lays down rules on the reporting, analysis and follow-up of occurrences in civil aviation. Article 3(2) of this Regulation has been recently amended by Regulation (EC) No. 1139/2018. 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 occurrence 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.

XI THE YEAR IN REVIEW

i Key facts

On 12 December 2019, the Ministry of Economic Development issued a Decree for the appointment of Alitalia’s special commissioner, replacing the previous three special commissioners, who resigned from their office.

Moreover, the covid-19 emergency required the adoption of Law Decree No. 18 of 17 March 2020 – then converted into Law and amended by Law No. 27 of 24 April 2020 – which lays down new provisions for the companies Alitalia SpA and Alitalia Cityliner SpA. Article 79, Paragraphs 3 to 8 of the said Law Decree, authorises the renationalisation
of Alitalia by the establishment of a new public company entirely controlled by the Ministry of Economy and Finance, or by a company with a prevalent direct or indirect public participation. Article 79, Paragraph 7 also provides for the establishment of a special fund in favour of Alitalia with a financial endowment of €500 million for the year 2020.

Furthermore, and always with the aim of addressing difficulties due to the covid-19 pandemic, another Law Decree – not yet coverted into law – has been adopted (Law Decree No. 34 of 19 May 2020). It should be noted that Article 202 of this Law Decree provides for a government capital injection of €3 billion in Alitalia.

On 11 February 2020, following shareholders’ meetings, Air Italy announced its entry into voluntary liquidation and the suspension of operations from 25 of February 2020. The airline has two shareholders: Alisarda, which is the majority owner with 51 per cent, and Qatar Airways, which holds its 49 per cent minority stake through AQA Holding. In a statement, Qatar Airways said that ‘[e]ven with the changing competitive environment and the increasingly difficult market conditions severely impacting the air transport industry, Qatar Airways has continually reaffirmed its commitment, as a minority shareholder, to continue investing in the company . . . . Qatar Airways was ready once again to play its part in supporting the growth of the airline, but this would only have been possible with the commitment of all shareholders.’

With regard to Public Service Obligations (PSOs), it should be noted that on 21 February 2020 the Minister for Infrastructure and Transport signed a Decree providing for the extension, until 31 December 2020, of the PSOs imposed on the routes connecting Sardinia to the main national airports (i.e., Rome and Milan). The routes between the main national airports and Cagliari and Alghero airports are operated by Alitalia, which was also assigned the routes to Olbia, previously operated by Air Italy. Moreover, as previously mentioned, PSOs have also been imposed for the routes connecting national airport and the Sicilian airports of Trapani and Comiso. In light of the covid-19 pandemic, these PSOs are suspended for the moment.

Lastly, on 11 May 2020, ENAC issued a decision establishing the suspension of the Italian airports’ concessions’ fees until 31 January 2021. This suspension is granted under the condition that airports’ authorities (concessionaires) do not ask the rentals’ payments to sub-concessionaires (involved in aviation activities and not in commercial ones).

ii The covid-19 pandemic

Almost all the measures taken for the year 2020 are due to the fact that no industry has been so affected by the covid-19 pandemic such as air transport and tourism industries. Indeed, it is worth highlighting that the potential impact of the covid-19 pandemic has been determined by the IATA as a US$252 billion loss of passenger revenue in 2020, which means some 44 per cent below 2019’s figure, and a threat for 2.7 million airline employees. While the ICAO estimated an impact on scheduled international passenger traffic during first half 2020 equal to an overall reduction of 41 to 51 per cent of seats offered by airlines, a reduction of 443 to 561 million passengers and a potential loss of gross operating revenues of airlines of US$98 to 124 billion. On 27 April 2020, air traffic in the Eurocontrol area was 86.9 per cent down on the same date in 2019.

22 https://www.eurocontrol.int/covid19.
With particular regard to Italy, the ICAO estimated the impact of the covid-19 outbreak on scheduled international passenger traffic from and to the Italy during first half 2020 as:

<table>
<thead>
<tr>
<th>Impact</th>
<th>From Italy</th>
<th>To Italy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Seat capacity reduction</td>
<td>54 per cent</td>
<td>64 per cent</td>
</tr>
<tr>
<td>Passenger reduction</td>
<td>36 million</td>
<td>42 million</td>
</tr>
<tr>
<td>Loss of gross operating revenues of airlines</td>
<td>US$4.3 billion</td>
<td>US$5.1 billion</td>
</tr>
</tbody>
</table>

In light of these data, the EU decided, over the past months, to implement broad measures regarding:

- air cargo operations;
- slot allocation; and
- state aid.

**Air cargo operations**

In light of the strategic importance of air cargo – which plays a vital role in the quick delivery of medicines, medical equipment and supplies needed to combat the current pandemic – the European Commission, through the issuance of Guidelines, requested Member States to implement appropriate operational measures to facilitate air cargo transport and reduce its additional costs.

The measures listed in the Commission Guidelines include:

- for transport from outside the EU, granting without delay all necessary authorisations and permits, including, where legally possible, temporary traffic rights for additional air cargo operations, even when conducted with passenger aircraft;
- temporarily removing, or applying flexibly, night curfews or slot restrictions at airports for essential air cargo operations;
- facilitating the use of passenger aircraft for cargo-only operations;
- ensuring that air cargo crew as well as handling and maintenance personnel are qualified as critical staff in cases of lockdown or curfew; and
- exempting from travel restrictions asymptomatic transport personnel, including aircrew, engaged in the transport of goods.

The Commission stresses that the containment measures adopted for the covid-19 emergency should be limited to the movement of passengers and they are not deemed to limit the movement of aircraft. Thus, restricting the movement of travellers rather than flights will prevent the disruption of air cargo.

**Slot allocation**

The Parliament and the Council of the EU issued Regulation (EU) No. 2020/459 aiming at ensuring airlines the access to slots for the 2020 summer season and reducing the risk of ‘ghost flights’ that would have been operated only to maintain slots. The Regulation provides for a suspension of the airport slot requirements until 24 October 2020. Until then, airlines are not, therefore, required to use at least 80 per cent of their take-off and landing
slots in order to keep them the following year. More specifically, the waiver applies from 1 March 2020 to 24 October 2020 and it has also retroactive effects – from 23 January 2020 to 29 February 2020 – for flights between the European Union and China or Hong Kong.

Regarding the above-mentioned period, the Council of the EU specified that the measure can be extended if the covid-19 situation persists, by means of European Commission delegated act. It is precisely the European Commission that shall monitor the situation and report back by 15 September 2020.

**State aid**

Based on Article 107(3)(b) of the TFEU, the Commission adopted a Temporary Framework for State Aid Measures in order to support companies during the covid-19 outbreak.

The Temporary Framework allows Member States to set up schemes to direct grants, selective tax advantages and advance payments up to €800,000. Furthermore, it allows Member States to provide state guarantees on bank loans, subsidised public loans to companies and safeguards for banks that channel state aid to the real economy and to grant short-term credit insurance. Based on the exception provided for in Article 107(2)(b) TFEU, the Commission enables Member States to compensate companies for the damage directly caused by exceptional occurrences even if they have received rescue aid in the past 10 years.

To date, several European airlines (for example, Lufthansa group, EasyJet, Virgin Atlantic and Air France–KLM) have requested state aid from their respective governments. As previously mentioned, the Italian government announced its decision to renationalise Alitalia – which is currently undergoing a restructuring procedure – by the establishment of a new company entirely controlled by the Ministry of Economy and Finance or by a company with a prevalent direct or indirect public participation. In 2020, the new company will receive up to €500 million for the fulfilment of the financial commitments and until the completion of the sale procedure plus €3 billion of the above-mentioned government capital injection.

In conclusion, it is worth highlighting that, in light of the current scenario due to the covid-19 pandemic, on 13 May 2020 the European Commission issued guidelines laying down general principles applicable to all transport services and specific recommendations designed to address the characteristics of each mode of transport. These guidelines aim to provide a common framework to support authorities, stakeholders, social partners and businesses operating in the transport sector during the gradual re-establishment of connectivity and free movement while protecting the health of transport workers and passengers.

**XII OUTLOOK**

The European Commission, in its Work Programme 2020, indicated that initiatives for the amendment of ownership and control rules as well as of those on PSOs should be taken. Among the future initiatives – within the aviation services package’s policy objective (i.e.,

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24 Article 107(3)(b) TFEU provides for an exception of aid to remedy a serious disturbance in the economy of a Member State.


revision of airport charges and of the provision of air services) – there is the necessity to revise ownership and control rules in order to help air carriers to mitigate the economic impact of the crisis on the air transport sector. The current rules related to ownership and control are provided for in Regulation (EC) No 1008/2008 which establishes that a Community carrier must be more than 50 per cent owned and effectively controlled by Member States or nationals of Member States. It precisely regarding this strict rule, which ensures the preservation of the majority of shares and the exercise of the control by EU nationals, that the EC aims to adopt a ‘more relaxed approach’. This is an important objective that the EU would like to pursue in order to ensure an increased globalisation of the airlines based in Europe.

With regard to Italy, it should be noted that in July 2020 the Italian Regulatory Transport Authority (ART) should issue its Decision – which follows the call for inputs launched by ART on 201927 – determining the airport charges system to apply (i.e., dual-till system versus single-till or hybrid approach).

27 ART Resolution No. 118/2019.
Chapter 21

JAPAN

Tomohiko Kamimura and Miki Kamiya

I INTRODUCTION

Before the steep drop of demand caused by covid-19, the Japanese aviation market experienced continuous growth for a decade, especially in the number of international passengers. According to the Ministry of Land, Infrastructure, Transport and Tourism (MLIT), during the 2018 financial year (April 2018–March 2019), Japanese airports handled 100.19 million international passengers, 223.31 million domestic passengers (counted twice, upon departure and arrival), 3,934,776 tonnes of international cargo and 1,605,445 tonnes of domestic cargo (counted twice, upon departure and arrival). Passenger numbers started to drop in February 2020 and further dropped in March 2020. The depth and length of the impact of covid-19 is not yet certain.

Tokyo is the key hub of the aviation market in Japan. During the 2018 financial year, of the international passengers going to and from Japan, 52 per cent (52.09 million passengers) used either Narita International Airport (Narita) or Haneda Airport (Haneda), the two airports in the Tokyo region. Of domestic passengers, 30.2 per cent (67.53 million passengers) used Haneda. As to cargo, 69 per cent (2,711,354 tonnes) of international cargo went through Narita or Haneda, and 42 per cent (673,613 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 2018 financial year, Japanese carriers carried 23.4 million international passengers (23.4 per cent of all international passengers) and 1,446,565 tonnes of international cargo (36.76 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 2018 financial year, ANA carried 44,436,733 domestic passengers (43.9 per cent of domestic passengers overall) and JAL together with its subsidiary Japan Transocean Air carried 33,599,391 domestic passengers (33.2 per cent). A number of smaller domestic carriers followed, the largest of these being Skymark Airlines carrying 7,385,004 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 JAL, Australia’s Qantas and Tokyo Century carrying 4,771,452 domestic passengers (4.7 per cent) and Peach Aviation, an affiliate of ANA, carrying 3,266,028 domestic passengers (3.2 per cent).

1 Tomohiko Kamimura and Miki Kamiya are attorneys at Squire Gaikokuho Kyodo Jigyo Horitsu Jimusho.
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 of Certain Rules Relating to International Carriage by Air of 1929 (the Warsaw Convention)
Japan

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 (the Montreal Convention), to which Japan is a party. These treaties are directly applicable without implementing legislation. The Warsaw Convention and the Montreal Convention are applicable to international carriage only, so liability related to domestic carriage is governed by general domestic laws.

The Civil Aeronautics Act governs aviation regulation generally. The Civil Aeronautics Act was enacted to conform to the Convention on International Civil Aviation of 1944 (the Chicago Convention) and the standards, practices and procedures adopted as annexes thereto. Violations of the Civil Aeronautics Act may result in criminal liability.

Conditions of carriage, as established by the carriers, are important sources of contractual liability. Under the Civil Aeronautics Act, Japanese carriers are required to establish conditions of carriage and obtain approval from the MLIT. The conditions of carriage must stipulate matters related to liabilities, including compensation for damage. Foreign carriers are required to attach their conditions of carriage upon application to the MLIT for permission to operate international routes to and from Japan. There are no detailed requirements for conditions of carriage of foreign carriers, as foreign carriers are subject to the regulation of the aviation authority in the aircraft’s state of registration.

i International carriage

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 3 per cent 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:

- the defendant's residence or the place of business is in Japan;
- 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:

- court-ordered preservation of evidence, upon request and if necessary;
- commencement of litigation;
- oral argument procedures;
- examination of evidence;
- final judgment; and
- 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 or five years from when the claimant became aware that the claim became exercisable. The statute of limitations for a tort claim is three years (or five years if the tort claim is caused by death or injury) 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 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 discard 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

JAL, which had had 33.3 per cent of the shares of Jetstar Japan, acquired all the shares held by Mitsubishi Corporation by 30 September 2019. Mitsubishi Corporation is no longer the shareholder of Jetstar Japan, and JAL has 50 per cent of the shares now.

Peach Aviation and Vanilla Air, low-cost carrier subsidiaries of ANA Holdings, which is the parent company of the full service carrier ANA, completed the integration into a single low-cost carrier, Peach Aviation, on 1 November 2019.

The outbreak of covid-19 seen in 2020 caused the Japanese national government to request all people in Japan to practice social distancing and to avoid non-essential travel or travelling abroad in general. In particular, on 7 April 2020, Prime Minister Shinzo Abe declared a state of emergency for seven prefectures including Tokyo, and on 16 April 2020 the state of emergency was expanded to cover all of Japan. The state of emergency was lifted by 25 May 2020, and businesses in Japan started to reopen. The recovery of air traffic seems slow, however, and reportedly, approximately 95 per cent of international flights and approximately 70 per cent of domestic flights were reduced compared to the previous year for June 2020. Reportedly each of ANA Holdings and JAL secured several hundred billion yen of financing amid the covid-19 pandemic, easing some of the concerns, although the end of covid-19 is yet to be seen. Further support is under consideration by the Japanese government.

XII  OUTLOOK

The Japanese government decided to introduce a registration system for drones at the Cabinet meeting on 28 February, 2020. The summary of the registration system is as follows:

- owners of drones have to register some information online with the government such as the name of the owner or the users, drone serial number and telephone number, immediately after the purchase;
- ID plates issued by the government after the registration must be attached to all the drones; and
- drones must transmit their ID numbers via radio to notify the information of the owner to the police.

The registration requirements are planned to be implemented in 2022, subject to the approval by the national Diet.
Chapter 22

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, since 2018 the Cabinet Secretary for Transport, Infrastructure, Housing and Urban Development (the Cabinet Secretary) has been regularly issuing 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, airworthiness and aviation security. The Cabinet Secretary also promulgated the Civil Aviation (Unmanned Aircraft Systems) Regulations, 2020 (the UAS Regulations) on 30 March 2020 replacing the Civil Aviation (Remote Piloted Aircraft Systems) Regulations, 2017 that were annulled in 2017 by the Kenyan Parliament. The unmanned aircraft systems including remotely piloted aircraft were legally recognised for the first time in Kenya in 2016 under the Amendment Act, 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

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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.
the parent legislation (the CAA)\(^3\) and that the Regulations did not address issues 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 culminating in the recent promulgation of the UAS Regulations in March 2020.

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

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\(^3\) 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.

\(^4\) Regulation 20 of the Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.
applies to employers and employees in the aviation sector. The employees of KAA are, however, public officers pursuant to the definition of public officers in the Public Service Commission Act, No 10 of 2017.

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 employer of an essential employee has the right to delay the employee’s ability to participate in a strike or lockout. There was a proposal in 2018 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.

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5 For this reason, it is very difficult to be certain whether there may be a treaty or convention that has a hearing 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.
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 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 XIII of the Operation of Aircraft Regulations. The levels of liability are as follows:

a  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;

b  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

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10  Section 11 of the CBAA.
c 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.

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.

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. 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

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12 Section 91 of the CPA.
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.

Kenya also enacted the Data Protection Act, 2019 in November 2019 to regulate the processing of personal data and to provide for the rights of data subjects and the obligations of data controllers and data processors. A data processor is defined in the Data Protection Act as a natural or legal person, public authority, agency or other body that processes personal data on behalf of the data controller, and a data controller is defined as a natural or legal person, public authority, agency or other body that, alone or jointly with others, determines the purpose and means of processing of personal data. Aircraft owners and operators and their agents in collecting passenger information will qualify as data processors and controllers and will, therefore, be required to comply with the provisions of the Data Protection Act.

The Data Protection Act requires every data processor and controller to ensure that data is processed in accordance with the principles of data protection including, processing the data lawfully, fairly and in a transparent manner and ensuring that data is not kept for no longer than is necessary. For sensitive personal data including data on the health of the passenger, the Data Protection Act provides more stringent protection measures and prohibits transfer of any personal data out of Kenya unless in compliance with the Act. A data controller who, without lawful excuse, discloses personal data in any manner that is incompatible with the purpose for which the data was collected commits an offence and is liable to a fine not exceeding 3 million Kenyan shillings. A data processor who without lawful excuse discloses personal data processed without prior authority of the data controller also commits an offence and is liable to a fine not exceeding 3 million Kenyan shillings.

III/licensing of operations/i

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.

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13 Section 2 of the Data Protection Act, 2019.
14 Sections 72 and 73 of the Data Protection Act, 2019.
15 '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.
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.

Air navigation services including air traffic services are licensed under the Civil Aviation (Certification of Air Navigation Service Providers) Regulations, 2018.

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.  

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. 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). 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.

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. 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.

16 Regulation 4(2) of the Civil Aviation (Aircraft Nationality and Registration Marks) Regulations, 2018.
17 Regulation 5 of the Civil Aviation (Licensing of Air Services) Regulations, 2018.
18 Regulation 5 of the Civil Aviation (Licensing of Air Services) Regulations, 2018.
19 Regulation 4 (1) of the Civil Aviation (Aircraft Nationality and Registration Marks) Regulations, 2018.
20 Regulation 21(d) of the Civil Aviation (Licensing of Air Services) Regulations, 2018.
21 Regulation 21(3) of the Civil Aviation (Licensing of Air Services) Regulations, 2018.
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. This 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.22

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,23 furnish the authority with any statistics within 30 days of the date of request.24 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.25

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.26

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.27

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.28 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

22 Regulation 13(1) and (2) of the Civil Aviation (Licensing of Air Services) Regulations, 2018.
23 The other requirements are provided in Regulation 18 of the Civil Aviation (Licensing of Air Services) Regulations, 2018.
24 Regulation 18 of the Civil Aviation (Licensing of Air Services) Regulations, 2018.
25 Regulation 19(3) of the Civil Aviation (Licensing of Air Services) Regulations, 2018.
26 Part V of the Civil Aviation (Licensing of Air Services) Regulations, 2018.
27 Regulation 3(3) Civil Aviation (Aircraft Nationality and Registration Marks) Regulations, 2018.
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.\textsuperscript{29} 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.\textsuperscript{30} The prescribed framework contains the following minimum elements for SMS implementation:

\begin{itemize}
\item[a] safety policy and objectives;
\item[b] management commitment;
\item[c] safety accountability and responsibility;
\item[d] appointment of key safety personnel;
\item[e] coordination of emergency response planning;
\item[f] SMS documentation;
\item[g] safety risk management;
\item[h] hazard identification;
\item[i] safety risk assessment and mitigation;
\item[j] safety assurance;
\item[k] safety performance and monitoring;
\item[l] the management of change; and
\item[m] continuous improvement of the SMS.\textsuperscript{31}
\end{itemize}

The Safety Management Regulations further require KCAA to establish a safety data collection and processing system (SDCPS) to capture, store, aggregate and enable the analysis of safety data and information together with a mandatory and voluntary safety reporting system. The safety data and information collected through the SDCPS and other systems are protected pursuant to the provisions of the Third Schedule to the Safety Management Regulations and the Data Protection Act, 2019. The Safety data and information may be shared among users of the aviation system in Kenya and with other states in accordance with Regulation 16 of the Safety Management Regulations and subject to the provisions of the Data Protection Act.

\textsuperscript{29} Regulation 4 Civil Aviation (Safety Management) Regulations, 2018.
\textsuperscript{30} Regulation 9 Civil Aviation (Safety Management) Regulations, 2018.
\textsuperscript{31} The Second Schedule of the 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;32

- **b** a requirement that an aircraft shall not fly unless it carries crew members of a number and description required by the KCAA;33

- **c** a requirement for the operator to establish and maintain training programmes for its crew members on security,34 safe transport of dangerous goods,35 use of all emergency and life-saving equipment required to be carried, and drills in case of an emergency evacuation36 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);37

- **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;38 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.39

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.

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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. The insurance policy for commercial air transport aircraft (passenger, cargo, mail, remuneration 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. 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.

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. 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; abuse of buyer power 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

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41 Section 20 of the Insurance Act (Chapter 487, Laws of Kenya).
42 Section 71(1) of the Competition Act.
43 Section 21(1) of the Competition Act.
44 The Competition Act was amended in 2019 to include abuse of buyer power as a restrictive practice.
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;

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 these claims are subject to the two-year limitation period.45 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 on 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 warning 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.46 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.47 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.48 In an out-of-court settlement, KQ compensated the families of the victims with an estimated 1.9 million Kenyan shillings each.

48 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).
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 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 for international carriage is the CBAA and the Montreal Convention and for domestic carriage is the CBAA and the Warsaw 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 (as reviewed under Article 24 in December 201949) are a minimum of 128,821 special drawing rights (SDR) (approximately 17.6 million Kenya shillings) per passenger. The compensation limit shall not exceed 128,821 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.

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 culminating in the promulgation of the UAS Regulations in March 2020. The 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 of UAS and licensing of UAS personnel.50 The 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 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 UAS Regulations require any person who operates a UAS to apply for and be issued with a Remote Aircraft Operator Certificate from the KCAA. A person who wants to import and export a UAS will be required to apply for and obtain a permit from the KCAA, and any person who wants to manufacture and assemble a UAS in Kenya will be required to apply for and obtain authorisation from the KCAA. Operation of a UAS in Kenya requires authorisation from the KCAA, and operation of a UAS from Kenya to another state will in addition require the authorisation of the state of destination. The UAS must also be operated within the limits provided under the UAS Regulations.

X VOLUNTARY REPORTING

This Section covers both 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.

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53 ‘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 to 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.
54 ‘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.
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.\textsuperscript{55}

Additionally, the Safety Management Regulations also require the KCAA to establish a mandatory safety reporting system\textsuperscript{56} and a voluntary safety reporting system to collect safety data and safety information not captured in the compulsory reporting system.\textsuperscript{57} 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,\textsuperscript{58} 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.\textsuperscript{59} The PIC should also submit a report to the KCAA of any accident that occurred while he or she was responsible for the flight.\textsuperscript{60} Where an accident or incident occurs in or outside Kenya, the relevant person\textsuperscript{61} shall, as soon as practicable after he or she becomes aware of the accident or serious incident, notify the chief investigator\textsuperscript{62} or the nearest air traffic service by the quickest means of communication available.\textsuperscript{63} 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.\textsuperscript{64} 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.\textsuperscript{65} 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

\textsuperscript{55} Regulation 20 of the Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.
\textsuperscript{56} Regulation 12 of the Civil Aviation (Safety Management) Regulations, 2018.
\textsuperscript{57} Regulation 13 of the Civil Aviation (Safety Management) Regulations, 2018.
\textsuperscript{58} 'Authority' in this instance means the KCAA. Regulation 2 Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.
\textsuperscript{59} Regulation 81(1) of the Civil Aviation (Operation of Aircraft for Commercial Air Transport) Regulations, 2018.
\textsuperscript{60} Regulation 81(2) of the Civil Aviation (Operation of Aircraft for Commercial Air Transport) Regulations, 2018.
\textsuperscript{61} 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.
\textsuperscript{62} A chief investigator is a person appointed by the Cabinet Secretary to be responsible for aircraft accident and incident investigations.
\textsuperscript{63} Regulation 8(1) of the Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.
\textsuperscript{64} Regulation 8(2) of the Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.
\textsuperscript{65} Regulation 8(5) of the Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.
incident to the investigator-in-charge\textsuperscript{66} within the 72 hours after the occurrence.\textsuperscript{67} 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.\textsuperscript{68}

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.\textsuperscript{69}

The final report shall be released to the interested parties in accordance with the Aircraft Accident Regulations\textsuperscript{70} and be made publicly available after the release.\textsuperscript{71}

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 Safety Management Regulations and Regulation 20(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.

XI THE YEAR IN REVIEW

The global outbreak of covid-19 from a novel coronavirus has hit the world of aviation hard, and Kenya has not been spared. The rapid spread of the highly infectious disease and the lockdowns and declarations of a state of emergency in most nations has forced airlines to suspend passenger flights and cut schedules significantly. Kenya, like many other nations, suspended international passenger flights for two weeks effective 25 March 2020 midnight and extended the suspension for 30 days on 5th April 2020. We expect the government to extend the suspension further until the spread of covid-19 in Kenya reduces or until airlines operating international passenger flights to and from Kenya wish to resume flights with relevant preventative measures acceptable to the Kenyan government.

Following the suspension of international passenger flights to and from Kenya, the national flag carrier KQ suspended all its international passenger flights but retained the operation of all its cargo flights and domestic passenger flights to Mombasa and Kisumu. The suspension of the international passenger flights has negatively impacted the financial position of the national carrier, and on 1 April 2020 KQ announced a raft of measures to enable it to survive. The measures announced included salary cuts of between 25 per cent to

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\textsuperscript{66} 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.

\textsuperscript{67} Regulation 8(7) of the Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.

\textsuperscript{68} Regulation 8(8) of the Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.

\textsuperscript{69} Regulation 14(3) of the Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.

\textsuperscript{70} Regulation 18 of the Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.

\textsuperscript{71} Regulation 19 of the Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018.
50 per cent for its ordinary staff and 75 per cent for the management staff. The chief executive officer took a pay cut of 80 per cent. In addition to the salary cuts, the national carrier has appealed to the government for a bailout. KQ has been posting significant losses for over five years, and it issued a profit warning in December 2019, indicating that its losses for the year 2019 will be in excess of the 7.5 billion Kenyan shillings loss recorded in December 2018.

Aside from the challenges of covid-19, Nairobi remains the regional hub for passenger and cargo traffic within the East African region and elsewhere on the African continent. KQ is the sixth-largest airline in Africa, and it flies to 53 destinations and operates a fleet of 59 aircraft. To try to reverse KQ’s fortunes, the government has proposed a restructuring of the aviation industry that will see KQ renationalised. The restructuring will involve the formation of a national aviation holding company (Kenya Aviation Holding Company) with four subsidiaries managing different components of the aviation sector, namely (1) the Jomo Kenyatta International Airport (JKIA) Company to manage the JKIA; (2) the Kenya Airways Company to manage KQ; the (3) Kenya Airports Authority to manage and operate all the other airports in Kenya; and (4) Kenya Aviation Academy Limited to manage aviation training in Kenya. The restructuring is aimed at reducing the risk profile of KQ, which would aid in renegotiating KQ’s aircraft leases, ultimately reducing the carrier’s operating costs. Operating under a holding company will also enable KQ to enjoy concessional rates of taxation and other charges that would facilitate cost-competitive tickets. The structure is similar to the structure in respect of the national carriers in the United Arab Emirates, Ethiopia and Qatar. There are also similar structures in different sectors in various other countries including Prestwick Airport in Scotland, Railtrack in the United Kingdom, electricity in California and the Steel Industry in France. The above proposal was arrived at after a proposed 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 was rejected by Kenya’s National Assembly.

The cargo express centre established at JKIA in 2017 continues its activities in e-commerce logistics, cargo-handling service, electronic customers’ clearance and airport ground-handling services and has been operating during this covid-19 period when cargo aircraft operation is the main operational activity at Kenyan airports. The KAA has finished upgrading the Kisumu International Airport and continues to upgrade and expand other airports and ancillary facilities including the Malindi International Airport and the Port Reitz – Moi International Airport Access Road in Mombasa. In 2019, Kenya with the assistance of the World Bank’s International Development Association constructed state-of-the-art facilities in the East Africa School of Aviation (EASA) increasing the capacity of the school in training students in various aviation sectors including air traffic control. The World Bank has also partnered with Kenya in improving airports. The improvement of facilities in EASA and the JKIA and other smaller airports were (before covid-19) expected to boost the aviation sector’s contribution to Kenya’s GDP beyond the current 5.1 per cent share. The KCAA promulgated new security regulations on 1 December 2019 following a stowaway falling out of a KQ plane into a garden in London.

Lastly, whereas the penetration of low-cost airlines in the Kenyan market continued to increase before covid-19 following the construction of new airports and airstrips, operation of domestic airlines has significantly decreased following the government’s cessation of movements from and to Nairobi, the capital.

XII OUTLOOK

In its presentation on the study on the economic value of air transport and tourism to Kenya at the IATA Regional Aviation Forum held in Nairobi in September 2019, IATA noted that the Kenyan aviation market could more than double in size, resulting in an additional 11.3 million passenger journeys, over 449,000 more jobs, and a US$11.3 billion boost to GDP by 2037 if key investments in infrastructure and policy reforms are made. IATA identified the following four areas where government action can promote aviation’s growth and bring even more value to Kenya:

a. improving air transport infrastructure to accommodate the future growth of air traffic in collaboration with users: IATA recommended that improving operational efficiency at JKIA is essential if Nairobi is to remain a competitive connecting hub and East Africa’s main air cargo hub;

b. implementing the Single African Air Transport Market (SAATM): IATA recommended that Kenya makes a statutory framework to implement SAATM;

c. improving safety: IATA recommended that improvements in the safety performance of Africa’s turboprop fleet remain a priority – including in Kenya – and noted that the IATA Standard Safety Assessment programme (ISSA) enhances and complements the state’s safety oversight role; and

d. adoption of new innovative technology: IATA noted that integrating technology such as biometrics and AI will improve efficiency and passenger experience.74

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 including the improvement of air transport infrastructure as an enabler of Kenya’s transformation. Kenya continues to implement the objectives of Vision 2030, and we also expect it to implement IATA’s recommendations to transform the aviation sector.

Kenya promulgated the UAS regulations in March 2020 to regulate the operation of drones in Kenya (see Section IX). Operation of drones had been banned in Kenya, but the promulgation of the UAS Regulations will see increased and coordinated operation of drones in Kenya. Astral Aerial, a Kenyan-based logistics firm has already set up a drone training institution in Kenya (RPAS Training Academy) to train drone pilots and Unmanned Aerial Vehicle operators. Kenya is the second country in Africa (after South Africa) to have such a training facility. Astral Aerial has also proposed opening 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.

Chapter 23

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.
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’.

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 (the Convention Carriage).

5 International Air Services Transit Agreement, Art. 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 have 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.

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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. The Code was amended with effect from 1 June 2019 to provide for, inter alia, the requirement for full disclosure of the final price of the air fare when advertising an air fare.

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. The non-discrimination of persons with disabilities is 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. The 2019 amendment of the Code also provides that a person with disability are entitled to use the wheelchair service free of charge upon production of a ‘Kad OKU’.

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.

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8 ‘MAVCOM fines AirAsia, AirAsia X for misleading ticket prices’, New Straits Times, 4 December 2018.
11 A card that is conclusive evidence that a person is registered as disabled under the Persons with Disabilities Act 2008.
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 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 aircraft12 (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 operator13 allowed by the CAAM can reach 49 per cent.14 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

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12 This 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.
13 Malindo Air is a joint venture between National Aerospace and Defence Industries of Malaysia and Lion Air of Indonesia.
14 Presenna Nambiar, ‘Shareholders of Malindo Air to meet’, The Sun, 23 May 2014, Sun Biz section.
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.

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
i 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.

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15 For the requirements to obtain an air service licence, see Section III.i.
ii Security

With effect from 30 March 2019, the National Civil Aviation Security Authority (NCASA) was established to safeguard civil aviation against any act of unlawful interference and to regulate the security of civil aviation in compliance with the provisions of Annex 17 to the Chicago Convention. Regulation 3 of the Civil Aviation (Security) Regulations 2019 (CASR) sets out the functions of NCASA, which are to:

a. establish civil aviation security policies and review such policies from time to time;
b. monitor the implementation of the provisions of the CASR;
c. conduct a review on the national security programmes as established under the CASR;
d. approve a security programme and to conduct a review on the approved security programme;
e. define and allocate tasks and co-ordinate civil aviation security activities between the government entities, operators and aerodrome operators, air traffic control service providers and any other persons responsible for the implementation of the NCASP;
f. conduct a review on the level of threat to civil aviation;
g. conduct regular security risk assessments for civil aviation security;
h. re-evaluate security control and procedures on civil aviation security;
i. respond to meet any increased threat to civil aviation security; and
j. perform any other functions that are incidental or consequential to any of its functions under the CASR.

In this regard, approval by the NCASA is required for the ten categories of applications associated with screening and security controls introduced under Part V of the CASR. The fees which are payable for these applications have been set out in the Civil Aviation (Fees and Charges)(Amendment) Regulations 2019.

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.

16 Means any act such as to jeopardise the safety of civil aviation, including (1) unlawful seizure of an aircraft, (2) destruction of an aircraft in service, (3) hostage-taking on board an aircraft or on aerodromes, (4) forcible intrusion on board an aircraft, at an airport or on the premises of an aeronautical facility, (5) introduction on board an aircraft or at an airport of a weapon or hazardous device or material intended for criminal purposes, (6) use of an aircraft in service for the purpose of causing death, serious bodily injury, or serious damage to property or the environment, and (7) communication of false information such as to jeopardise the safety of an aircraft in flight or on the ground, of a passenger, crew, ground personnel or the general public, at an airport or on the premises of a civil aviation facility.

17 Means the programmes established under Regulation 7 of the CASR.

18 Means any ministry, department, office, agency, authority, commission, committee, board or council of the federal government, or of any of the state governments, established under any written law or otherwise, or any local authority.

19 Means the National Civil Aviation Security Programme for safeguarding the civil aviation operation against any act of unlawful interference.
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.

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:

- horizontal and vertical agreements that have the object or effect of significantly preventing, restricting or distorting competition in any aviation service market;
- the abuse of a dominant position by an enterprise having a dominant position in any aviation service market; and
- 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:

- two or more previously independent enterprises merge into one;
- one or more individuals or enterprises acquire control of another enterprise;
- an enterprise acquires assets of another enterprise which results in the former enterprise replacing the latter in the business; or
- 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.

To date, there has not been any infringement case reported. 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 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.20

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.21 However, such a limitation does not apply to any proceedings for contribution between tortfeasors.22

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.23 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.

20 This additional form is not available for a claim under the 1975 Order.
21 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.
22 Section 7(2) of the Carriage by Air Act 1974.
23 Section 23 of the Court of Judicature Act 1964.
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 or disembarking, the carrier is liable for proven damages up to 113,100 special drawing rights (SDR)\(^{24}\) or 250,000 francs\(^{25}\) 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.\(^{26}\) 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.\(^{27}\)

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.\(^{28}\)

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.

\(^{24}\) In relation to international carriage within the Carriage by Air Conventions.

\(^{25}\) In relation to carriage governed by the 1975 Order.

\(^{26}\) Article 20 of the Montreal Convention and Article 21 of the Schedule to the 1975 Order, as the case may be.

\(^{27}\) Article 28 of the Montreal Convention.

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 doctrine 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.

29 The Civil Aviation (Amendment) Regulations 2016 came into force on 12 September 2016.
30 Annex 13 to the Convention on International Civil Aviation – Aircraft Accident and Incident Investigation.
THE YEAR IN REVIEW

i Possible merger between AirAsia and Malaysia Airlines amidst the covid-19 pandemic

The Malaysian flagship carrier, Malaysia Airlines Berhad (MAB), has been struggling financially and is still trying to recover from the tragedy of the MH370 disappearance and the shooting down of MH17 in 2014. That said, there is now a further urgency for financial support from the Malaysian government due to the effect of the covid-19 pandemic.31

In this regard, five proposals have been submitted to the then Malaysian Prime Minister, Tun Dr Mahathir Mohamed32 (now succeeded by Muhyiddin bin Haji Muhammad Yassin) whereby four of the proposals have been shortlisted to help save the airline.33 Since the covid-19 pandemic, Datuk Seri Azmin Ali, Malaysia’s Minister of International Trade and Industry has stated that the possible merger between MAB and low-cost airline AirAsia Group Berhad is still being considered as the Malaysian government has been looking for a strategic partner for MAB since 2019.34

ii Dissolution of MAVCOM or Merger between MAVCOM and CAAM

The Ministry has announced and subsequently released a statement on 12 December 2019 that the government will be dissolving the MAVCOM, and the main functions of MAVCOM will be merged with/transferred to the CAAM. This decision is said to be consistent with the current policy of the Malaysian government to rationalise the public sector, while enhancing the efficiency and competency of the government’s agency delivery system. The Ministry also added that this would encourage the competitive development of Malaysia’s civil aviation industry internationally.35

XI OUTLOOK

In general, the Malaysian economy has hit a new low amidst the covid-19 pandemic as Malaysia goes through its worse economic recession in its history.³⁶ The low air travel demand, losses from highly hedged airlines due to the lower oil price environment³⁷ and the covid-19 containment measures such as national quarantines and travel bans worldwide present a bleak outlook for the industry this year. Even the once thriving AirAsia Berhad has been severely impacted leaving it with no other options but to cut jobs and restructure its operations as announced by its CEO Riad Asmat on 4 June 2020.³⁸

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 Coandă 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

LEGAL FRAMEWORK FOR LIABILITY

The principal legislation in Romania is a combination of international, European and national.

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.
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. A new Air Code was adopted on 19 March 2020 and entered into force on 19 June 2020. 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.

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3 www.anpc.gov.ro/.
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
Romania

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 national safety objectives and the minimum safety requirements are set up in the National Civil Air Safety Programme, approved by the Ministry of Transportation.

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 police 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 the event 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.

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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.
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.

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:

- that it did not put the product into circulation;
- 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;
- 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;
- that the defect is owing to compliance of the product with mandatory regulations issued by the public authorities;
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

f 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 the event 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

The Civil Air Code defines drones as unmanned aircraft that can perform a scheduled or remotely controlled flight, and all the provisions from the Civil Air Code regarding aircraft are applicable to unmanned aircraft, except where provided otherwise. 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 this 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 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):

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:

a approval for shooting or aerial photography: This approval is requested in accordance with GD No. 912/2010 from the Romanian Ministry of Defence;
b approval for operation below minimum safety heights: This 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;
c approval for flights in the border area; and
d 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’.

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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.

On 19 March 2020, a new Civil Air Code was adopted by Romania. The new legislation regulates civil and military aeronautical activities in the national airspace and is adapted to the new realities in the context of fulfilling Romania’s obligations as a member state of the European Union.

The new legislation also includes provisions on:

a. the establishment, operation and certification of civil and military aerodromes,

b. measures for the protection of areas in the vicinity of civil and military aerodromes,

c. the legal framework for land use planning in the vicinity of aerodromes,

d. the legal framework for environmental protection,

e. the primary legislative framework for the operation of unmanned aircraft on board in national airspace;

f. the certification of civil and military aeronautical personnel, aviation equipment and aeronautical agents;

g. aviation accident investigation;

h. establishing the responsibilities of state institutions conducting search and rescue missions for victims and survivors of an aviation accident;

i. the control of the use of airspace and search and rescue missions; and

j. mandatory requirements for equipping civilian and military aircraft with emergency location devices, as well as devices and equipment for identifying the position of the aircraft in flight.
I 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.

II LEGAL FRAMEWORK FOR LIABILITY

i 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.

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.
iii 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:

- comply with the relevant laws and rules of Russia, and conditions for effecting international carriages;
- not have any indebtedness for the aero-navigational services rendered in Russia;
- ensure availability of necessary documentation on board, as established for international flights, by complying with the aviation standards recognised by Russia; and
- 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:

- ensuring the continual airworthiness of the aircraft;
- collecting and analysing data related to safety of the equipment and the flights;
- 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
- 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 included 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. Federal Law No. 87-FZ of 1 April 2020 extended the recruitment of new foreign aircrew for 10 years. 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 included 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 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:

- death: up to 2,025 million roubles per passenger;
- personal injury: up to 2 million roubles per passenger;
On 23 May 2016, Article 132(2) of the Air Code was 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:

a  the Federal Law on Protection of Competition dated 26 July 2006, last amended in March 2020, FZ-33, which came into force on 12 March 2020;

b  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;

c  the Federal Law on Foreign Investments in Companies having Strategic Importance dated 29 April 2008, as most recently amended in July 2017, FZ-165, which came into force on 30 July 2017;

d  the Code on Administrative Offences of the Russian Federation, dated 30 December 2001, as most recently amended in April 2020, FZ-99, which came into force on 1 April 2020; 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 March 2020, FZ-33) 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, as most recently amended in May 2017). 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.

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.

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 (amendments came into force in 2016).

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.

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, now expired); 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 the 30 days following the 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 2019, 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.
I  INTRODUCTION

The early years of the twentieth century created development in the field of aviation, and in that regard several countries adopted national regulations governing civil aviation, including Serbia. The disintegration of SFR Yugoslavia and the beginning of civil wars brought discontinuity to the development of civil aviation in former Yugoslavia. After difficult years in the 90s, the civil aviation sector began to take a more positive direction following the political changes that occurred in the Federal Republic of Yugoslavia (FRY) in 2000. 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 implement 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. A formal return to the work of ICAO continued in 2000, and after the dissolution of FRY, as a successor Serbia in 2006 became an independent ICAO member.

At the end of 2003 and early 2004, the Civil Aviation Directorate (CAD) – as civil aviation authority (CAA) – and Serbia and Montenegro Air Traffic Services Agency (SMATSA) – as an air navigation service provider (ANSP) – were created. 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.

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1 Goran Petrović is a lawyer and instructor for complex theoretical training and aviation law specialist at SMATSA ANS Personnel Training Centre and SMATSA Aviation Academy.
2 On 21 February 1913, Serbia enacted the Regulation of the transportation system of devices that run in the air and became the sixth country in the world to implement a legal framework for the field of civil aviation.
5 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.
6 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.
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 proclomation of independence in 2006. Subsequently, civil aviation regulation in Serbia became harmonised with international regulation, primarily from the EU.

From July 2015, after the adoption of a special Law on the investigation of accidents in air, rail and water transport, the investigation of accidents and serious accidents in air traffic falls within this regulated area. For that purpose, a special centre has been established, whose competence is the activities required for the investigation of air traffic accidents over the territory of competence in accordance with international standards and recommended practice. The obligation of this institution includes the development and proposal of policies, programmes, documents, measures and procedures for the improvement of accident research within its competences. The experts of the centre are independent of criminal investigations conducted by judicial bodies for the purpose of determining criminal, economic criminal, misdemeanour, disciplinary, civil or other responsibilities in the performance of professional tasks of conducting air traffic accident investigations.

In recent years, positive changes have been taking place and, according to the IATA’s World Air Transport Statistics 2019, the Serbian air transport market continues to grow (4.5 per cent). Although Serbia has 23 airports, there are only three international airports: Belgrade Nikola Tesla Airport (Belgrade Airport), Niš Constantine the Great Airport (Niš Airport) and Kraljevo (Morava) Airport. Based on the number of passengers, almost the entire air transport market belongs to Belgrade Airport. In 2016, the government established the company Aerodromi Srbije, and in 2019 the company become vested with two airports: Constantine the Great Airport (Niš Airport) and Kraljevo Airport. Serbia's flag carrier, Air Serbia, a partner with the UAE’s Etihad Airways, currently operates in 62 destinations, mainly covering Euro–Mediterranean traffic, with one long-haul route to New York. Five airlines have an operating licence to transport air taxi passengers in Serbia. Unfortunately, Serbia does not possess domestic scheduled airline operations.

7 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.
10 Niš Airport had 422,255 passengers in 2019 (compared to 351,581 in 2018, 26.1 per cent) while Kraljevo started with its first commercial flights in December and has one scheduled route to Vienna.
II LEGAL FRAMEWORK FOR LIABILITY

i International carriage

The importance of regulating contractual legal relationships and damage caused by air traffic was recognised, and the Kingdom of Yugoslavia was one of the High Contracting Parties to the Warsaw Convention. Serbia accepted the Montreal Convention (1999) as a successor of FRY 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.

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. 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. From its first issuing, the Air Transport Law had five Laws amendings. The last one was in the beginning of 2020 and amended the Chapter on aviation security in relation of security staff and security oversight.

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.

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).
Other significant laws recently enforced are the Law on Accident Investigations for Aviation, Railways and Waterborne Transport of 2015\(^{14}\) and the Law on Airport Management of 2016 (which is the most recent law adopted in the field of air traffic).\(^{15}\)

### 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 the event 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 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.

The appearance of covid-19 at the beginning of March 2020 also affected air traffic in Serbia. In the circumstances of the pandemic, all the activities of the airlines could not be in line with the usual ones. Following the document of the European Commission ‘Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19’, Brussels 18 March 2020 C (2020) 1830 final, the government of Serbia decided to treat passengers’ compensation claims in accordance with the circumstances of force majeure thus exempt airlines from paying damages to passengers. In this regard, on 8 May 2020 the

\(^{14}\) 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).
government issued Conclusion 343-3718 / 2020-1 recommending airlines to issue a voucher to passengers for cancelled flights due to extraordinary circumstances caused by covid-19 based on when passengers will be able to exercise their rights. The rights can be used until 31 December 2021.

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 Tourism16 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.

The emergence of covid-19 was reason for the government suspending air operations in the Republic of Serbia for all commercial flights17 and causing complete disruption of the work of travel agencies in terms of organising air travel.

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

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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.
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 the condition for air 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

g. 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.

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21 Regulation on condition for performing air operations (Official Gazette of the Republic of Serbia, No. 9/18, 56/18 and 12/19).

22 Regulation on operating license for the operation of commercial air transport (Official Gazette of the Republic of Serbia, No. 10/14, 16/15 and 50/18).


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.
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
- **d** continued airworthiness in accordance with Regulation (EC) No. 2042/2003.

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.25 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.26

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 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,

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).
Serbia

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 2019, it investigated 70 accidents and 30 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.

V INSURANCE

The Law on Insurance, 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 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 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

27 The Law on Insurance (Official Gazette of the Republic of Serbia, No. 139/14).
28 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).
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, 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 6.15 million in 2019. 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).

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.

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.

Competitiveness in air transport was increased with two key decisions of Serbian government concerning Belgrade Airport and Air Serbia. On 22 March 2018, VINCI Airports and the Serbian government signed a 25-year concession contract for Belgrade Airport. The concession agreement covers financing, development, maintenance and management of infrastructure. Also, in 2013 former Serbian flag carrier JAT was renamed and rebranded and became Air Serbia, after a business partnership between the Serbian government and Etihad Airways.

29 Air Serbia has recently introduced an additional 12 lines from Niš Airport.
30 Air Serbia in 2019 passenger numbers increased by 9.5 per cent to 2.81 million, a record high.
31 The number of IFR flights reached its highest number of 750,468, in 2019.
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.

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.

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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 the event 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.

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Product safety is provided for in the Law on General Product Safety, which mirrors 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 91 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 the event of death or severe disability include the closest relatives.

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. 1/20), Article 16, Paragraph 1, the unmanned aircraft can fly only during the day, and must be within the sight of the person who manages it at all times, and it also

36 Law on General Product Safety (Official Gazette of the Republic of Serbia, No. 41/09).
37 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).
provides that flight at night requires the prior approval of the CAD. The maximum permitted flight altitude of an unmanned aircraft is 100 metres above ground 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. Greater distances require CAD approval by risk assessment.

Pursuant to the Regulation on Unmanned Aircraft, Article 24, 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, whose operating mass less than 0.9kg.

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 (50,000 to 2 million dinars) or a natural person (50,000 to 500,000 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.

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.

38 Official Gazette of the Republic of Serbia, Nos. 54/12 and 86/16.
39 Official Gazette of the Republic of Serbia, No. 86-16.
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 THE 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 law, the Air Transport Law, was ready for amending by the end of 2019. The activity of the aviation authorities in 2019 regarding new bylaws was significantly higher than in 2018. 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, the Regulation on conditions for performing air operations and the Regulation on issuing approval to a foreign air carrier for the operation of international commercial air services with the Republic of Serbia are among the most important.

During 2019, 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. The trend of passenger growth and good business results for Belgrade Airport continued in 2019, with the total number of passengers exceeded 6 million. After several years of delay, the third international airport – International Airport Kraljevo – was 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. Air Serbia continues to maintain its position as the busiest national airline in the former Yugoslavia, with significant increase in the number of passengers handled.

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.

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41 Official Gazette of the Republic of Serbia, No 12/19.
42 Official Gazette of the Republic of Serbia, No 8/19.
43 During the year, the airline carried a total of 2.81 million passengers on scheduled and charter flights: https://www.airserbia.com/fr/footer_menu_corporate/news/news?id=342.
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 fairly good. Currently, in comparison with ICAO regulations and civil aviation system recommended practice level of compliance, Serbia is 93.3 per cent compliant with a trend of becoming even better.
I  INTRODUCTION

The Aviation Business Act, Aviation Safety Act, Airport Facilities Act, Aviation Security Act and the Aviation/Rail Accident Investigation Act are the main statutes relating to aviation in Korea. The national agency responsible for matters relating to aviation is the Ministry of Land, Infrastructure and Transport (MOLIT).

In order to operate an airline business in Korea, an air operator certificate that permits the operation of an air transport business must be obtained from the MOLIT. The air operator certificate is issued depending on the type of air transport business (e.g., international and domestic air transport business, small-size air transport business and aircraft use business).

Aircraft registration, ownership, security rights and lease rights are regulated by the Aviation Safety Act, Aircraft Registration Decree and Aircraft Registration Rules. Compulsory execution, provisional attachments and provisional dispositions of aircraft are regulated by the Civil Execution Act and Civil Execution Rules. Notably, Korea has not ratified the Rome Convention, the Geneva Convention or the Cape Town Convention and Protocol.

In order for international air transport operators to operate specific international routes, international air transport rights and airspace passage rights must be allocated by the MOLIT in accordance with the Rules on the Allocation of International Air Carriage Rights and Airspace Passage Rights. Allocation of carriage rights is an area requiring aviation policy judgment, which must take into consideration the route and carriage capacity of the airline, level of contribution to route development, market conditions relating to routes and utilisation of allocated routes, promotion of fair competition and the administration thereof, and public interest considerations; therefore a certain level of discretion is afforded to the administrative authority.2

The allocation of slots at international airports is regulated by the Rules for Adjusting and Distributing Flight Times and handled by the head of the Seoul Regional Aviation Administration upon receipt of an application from an airline. If an airline wishes to exchange the flight time allocated by the air transport operator with the flight time allocated to another airline, it must obtain approval from the MOLIT.3

The MOLIT is also in charge of civil aviation matters. The Civil Aviation Office, which is affiliated with the Aviation Policy Department under the MOLIT’s Second Deputy,
comprises an aviation police officer, an aviation safety officer and an aviation navigation policy officer. The future drone transportation officer is also under the direct supervision of the Second Deputy Department.

In the event of a passenger death in the course of air transportation, the relevant carrier may be found liable for financial damages.

The Aviation Safety Act and the Aviation Security Act requires voluntary reporting systems to be established.\(^4\) The MOLIT is prohibited from disclosing to third parties or to the general public information received through voluntary reporting (except in accordance with the law) and must not subject any persons who have provided a voluntary report to disadvantageous treatment.

II LEGAL FRAMEWORK FOR LIABILITY

i International carriage

Korea did not sign up to the Warsaw Convention but ratified the Hague Protocol on 13 July 1967, which came into effect on 11 October 1967. The Supreme Court has held that the term ‘Contracting State’ (as used in Article 1(2) of the Warsaw Convention, as amended) must be interpreted to include not only those countries that signed up to both the Warsaw Convention and the Hague Protocol but also those countries, like Korea, that did not sign up to the Warsaw Convention but signed up to the Hague Protocol (and thereby effectively acceded to the Warsaw Convention) and those countries that signed up to the Warsaw Convention but have not yet ratified the Hague Protocol.\(^5\)

Korea is also a party to the Montreal Convention, which took effect on 29 December 2007. In order for the Montreal Convention to apply, both the country of departure and destination must be Contracting States. In a case involving an international freight transport from Korea to Haiti, the Supreme Court held that the Montreal Convention did not apply because Haiti was not a contracting state.\(^6\)

ii Internal and other non-convention carriage

Part 6 (on ‘Carriage by Air’)\(^7\) of the Commercial Act will apply to domestic transport and international transport where international treaties do not apply and where the lex fori, in accordance with private international law, is Korea.

iii General aviation regulation

Those who operate aircraft, lightweight aircraft (including rotary wing aircraft) for commercial purposes are subject to the liability provisions under Part 6 of the Commercial Act. However, the Commercial Act does not apply to the operation of ultralight flight devices under Article 2(3) of the Aviation Safety Act;\(^8\) instead, operators of ultralight flight devices are subject to the Civil Act, and the terms of or contracts for carriage.

\(^4\) Aviation Safety Act, Article 61; Aviation Security Act, Article 33-2.
\(^5\) Supreme Court Decision 82DaKa1372, 22 July 1986.
\(^6\) Supreme Court Decision 2013Da81514, 24 March 2016.
\(^7\) Came into force on 24 November 2011.
\(^8\) Commercial Act, proviso to Article 896.
iv Passenger rights

An aviation operator must establish damage relief procedures to protect air transport users from failure to transport or delays, loss of or damage to luggage, oversale of airline tickets, delays in the refund of cancelled tickets, and damages resulting from the operator's failure to provide boarding information.9

If an airline rejects passengers due to overbooking but provides the passengers with an alternative flight, the airline may be liable to compensate the passengers between US$200 and US$600 depending on the flight time and wait time of the alternative flight.10

In order to protect mobility-disadvantaged persons under Article 2(1) of the Act on Promotion of Transportation Convenience of Mobility Disadvantaged Persons, the MOLIT may issue an ordinance regarding the type of information that aviation operators must provide to mobility-disadvantaged persons and the method of dissemination, the types of services to be rendered to mobility-disadvantaged persons regarding boarding and alighting, and the types of services to be rendered in-flight to mobility-disadvantaged persons.11 Aviation operators must comply with the standards set by such ordinances.12

Aviation operators must ensure that an aircraft with passengers on board is not waiting in a traffic control area13 for more than three hours for domestic flights or four hours for international flights, unless the head of the relevant authority determines that the alighting of passengers will cause significant disorder to aviation operations, or that it is necessary to keep the passengers on board for reasons of weather, calamity, catastrophe or terror.14 Should a passenger-filled aircraft be delayed in a traffic control area, the aircraft operator must update such passengers of the cause and status of delay every 30 minutes.15

v Other legislation

Competition Law

Under the Aviation Business Act, where an aircraft operator enters into, with another aircraft operator (including foreign aircraft operators), agreements regarding air transportation, such as codeshare agreements or cooperation agreements regarding flight schedules, airfares, marketing and sales, such aircraft operator must obtain the approval of the MOLIT in accordance with the ordinance of the MOLIT.16 Codeshare agreements or cooperation agreements must not (1) substantially restrict competition among aircraft operators, (2) unjustly infringe upon the interests of users or discriminate against specific users, or (3) unjustly restrict the admission or withdrawal of other aircraft operators.17

International carriers and small-scale aircraft operators shall determine airfares for passengers or airfreight fees of cargo (excluding mail) on international routes in accordance with the ordinance of the MOLIT.18

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9 Aviation Business Act, Article 61(1).
10 The Fair Trade Commission Notice No. 2019-3 on Consumer Dispute Resolution Standards. Note, these standards are only a recommendation.
11 Aviation Business Act, Article 61(11).
12 Aviation Business Act, Article 61(12).
13 Means those areas, such as the runway, the taxiway or mooring sites, used for take-off, landing and parking of aircraft.
14 Aviation Business Act, Article 61-2(1).
15 Aviation Business Act, Article 61-2(2).
16 Aviation Business Act, Article 15(1).
17 Aviation Business Act, Article 15(3).
with aviation agreements relevant to international routes and obtain the approval of or file a report to the MOLIT. The foregoing applies where the aircraft operator intends to modify airfare or airfreight fees.18

The Supreme Court has held that if agreements between aircraft operators on international routes go beyond simply modifying the fare system to limiting the scope of discounts on certain categories, such agreements fall outside the scope of aviation law, aviation agreements and cannot be deemed ‘necessary and minimal action within legislation or orders which specifically recognises exceptions to free competition’.19

**Product Liability Act**

The Product Liability Act provides for the liability of manufacturers for damages caused by their products. A manufacturer shall compensate for damages to life, body or property of a person caused by a defect in its product (excludes damages arising only in respect of the product itself).20

**Environmental Laws**

The Act on the Allocation and Trading of Greenhouse-Gas Emission Permits came into force on 17 January 2019. Aviation operators are making a lot of effort to increase fuel efficiency by using fuel-efficient aircraft, periodically cleaning engines, lightening on-board loads such as cabin carts, lowering engine output during ground movement, and using high-fuel-efficient ground power instead of the aircraft’s own power during ground operations. In 2019, the first year of the emission trading system, the total quota for seven airline companies was found to have 32.6 million tons in excess.

Under the Aviation Safety Act, no person shall operate an aircraft that has failed to obtain certification of conformity with noise standards or to meet technical standards for aircraft.21 Under Article 39(1) of the Noise and Vibration Control Act and Article 9(1) of its enforcement decree, if the Minister of Environment determines that the noise level of the aircraft exceeds the noise limit of the aircraft (90 WECPNL for areas around the airport; 75 WECPNL for other areas)22 the aircraft operator shall be entitled to undertake all measures necessary to soundproof the aircraft. In practice, it is common for the courts to treat airports and military airfields as establishments under Article 5 of the State Compensation Act and as such to see damages claims in respect of the installation and defects (including functional defects) thereof.23

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18 Aviation Business Act, Article 14(1).
19 Supreme Court Decision 2012Du13689, dated 16 May 2014.
20 Product Liability Act, Article 3(1).
21 Aviation Safety Act, Article 25(2).
22 In the case of aviation noise, a special noise measurement unit called the aircraft noise impact (WECPNL, Weight Equivalent Continuous Perceived Noise Level) is used. The Ministry of Environment amended the enforcement decree of the Noise and Vibration Control Act to use Lden (day, evening, night) from 2023.
23 Supreme Court Decision 2013Da23914, 15 October 2015.
III LICENSING OF OPERATIONS

i Licensed activities

‘Aviation business’ means a business conducted after obtaining a licence, permission or approval from the MOLIT or after registering or filing and comprises the following: air transport business (domestic carriers, international carriers and small aircraft), aircraft use business (which involves the use of aircraft for the needs of others, in order to, for example, spray pesticides, transport construction materials, photography, flight training and such other activities prescribed by the MOLIT), aircraft maintenance business, aircraft handling business (which involves the refuelling of aircraft, unloading of cargo or baggage from aircraft and such other ground operations as prescribed by the MOLIT), aircraft rental business, use of ultralight flight equipment, aviation leisure or sports business and courier service business.

Domestic and international flight operators must be licensed by the MOLIT. Operators of an aircraft use business, aircraft maintenance business, aircraft handling business, aircraft rental business, ultralight flight equipment and aviation leisure/sports business must register with the MOLIT. Courier service businesses must file a report with the MOLIT.

ii Ownership rules

Anyone who owns or leases an aircraft, and thereby has the right to use the aircraft, must register the aircraft with the MOLIT. The acquisition, loss, or alteration of ownership of an aircraft shall come into effect upon registration, and the right to lease an aircraft shall come into effect against a third party upon registration.

The following persons are exempt from the above rule: (1) a person who is not a citizen of the Republic of Korea; (2) a foreign government or foreign public organisation; (3) a foreign corporation or organisation; (4) a corporation whose majority shareholder is a person falling under any of (1) to (3) above or whose business is substantially controlled by such person; and (5) a corporation whose representative as stated on its business registration certificate is a foreigner or for which foreigners account for at least half of its executives as stated on its business registration certificate, provided that the foregoing exceptions will not apply to an aircraft which citizens or corporations of Korea have the right to lease and use. Notwithstanding this proviso, aircraft of foreign nationality are not registrable in Korea.

The licence standards for domestic air transport business or international air transport business are as follows:

a the business must not disrupt the safety of air traffic when ensuring the safety of the aircraft and securing personnel, such as flight attendants;

b the business must be for the convenience of users, taking into consideration the status and prospects of the aviation market;

c the licence applicant must have the financial capacity to operate the business in accordance with the standards prescribed by the Presidential Decree; and

d the business must meet the following requirements:

24 Aviation Business Act, Article 2(1).
25 Aviation Safety Act, Article 7
26 Aviation Safety Act, Article 9(1).
27 Aviation Safety Act, Article 9(2).
28 Aviation Safety Act, Article 10(1).
29 Aviation Safety Act, Article 10(2).
• capital must be at least 5 billion won or more than the amount prescribed by the Presidential Decree;
• must meet the standards (such as having more than one aircraft) prescribed by the Presidential Decree; and
• such other requirements as prescribed by the MOLIT.

### Licence Standards for Domestic Air Transportation and International Air Transportation (related to Article 12)

<table>
<thead>
<tr>
<th>Classification</th>
<th>Domestic (passenger), Domestic (cargo), International (cargo)</th>
<th>International (passenger)</th>
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<tbody>
<tr>
<td>1. Financial Capacity</td>
<td>Must have the financial capacity (includes anticipated income and other revenues) to cover operational costs and expenses anticipated during the three years (from the date of commencement of operations under Article 19(1)) of operating the business in accordance with the business plan under Article 7(4) of the Aviation Business Act, provided that for the first three months of operation, the financial capacity must cover operational costs and expenses excluding income and other revenues.</td>
<td>(a) Corporation: capital must be at least 15 billion won (b) Individual: asset valuation must be at least 20 billion won</td>
</tr>
<tr>
<td>2. Capital or Asset valuation</td>
<td>(a) Corporation: capital must be at least 5 billion won (b) Individual: asset valuation must be at least 7.5 billion won</td>
<td>(a) Corporation: capital must be at least 5 billion won</td>
</tr>
<tr>
<td>3. Aircraft</td>
<td>(a) Number of Aircraft: one or more (b) Aircraft Specifications: (i) have flight capacity (ii) have at least twin engines (iii) the cockpit and the cabin (in the case of passenger carriers) and the cargo compartment (in the case of cargo planes) must be separate (iv) must have a function which allows for the aircraft’s position to be verified automatically (c) Passenger planes must have at least 51 seats (d) The maximum take-off weight for cargo planes must exceed 25,000 kilograms</td>
<td>(a) Number of Aircraft: five or more (to be achieved within 3 years of operations commencement date) (b) Aircraft Specifications: (i) have flight capacity (ii) have at least twin engines (iii) the cockpit and the cabin must be separate (iv) must have a function which allows for the aircraft’s position to be verified automatically (c) Must have at least 51 seats</td>
</tr>
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</table>

### iii Foreign carriers

**Permit requirements for foreign international air transport businesses**

Any of the following persons may, after obtaining MOLIT permission, operate flights described in Article 100(1) of the Aviation Safety Act (including flights between regions in Korea in relation to such flights) for remuneration, in order to provide passenger or cargo air transport services to meet the demands of others. In granting its permission, the MOLIT may restrict the frequency of flights and the type of aircraft to be used to the extent of not interfering with the development of international aviation of domestic air transport services:

- a person who is not a citizen of the Republic of Korea;
- a foreign government or foreign public organisation;
- a foreign corporation or organisation;
- a corporation, who is majority-owned or whose business is substantially controlled by any person under (a) to (c) above; provided that, where an air services agreement entered into by Korea and the relevant country (including the United Nations or an economic community) stipulates otherwise, the air services agreement shall apply; or
- a corporation, whose representative, as stated on its corporate registration certificate, is a foreigner or where foreigners account for at least half of the number of executives stated.

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30 Enforcement decree to the Aviation Business Act, Table 1 (as of 30 October 2018).
on its corporate registration certificate; provided that where an air services agreement entered into by Korea and the relevant country (including the United Nations or an economic community) stipulates otherwise, the air services agreement shall apply.31

**Air Transportation by Foreign Aircraft for Remuneration**

Where the user of an aircraft with foreign nationality (excludes aircraft used by a foreign provider of international air transport services) operates flights (including flights operated between regions within Korea in relation to such flights) under Article 100(1)(1) or (2) of the Aviation Safety Act for remuneration, he or she must obtain permission from the MOLIT, as prescribed an ordinance of the MOLIT.32

**Prohibition of Air Transportation by Foreign Aircraft in Republic of Korea for Remuneration**

No aircraft that has obtained permission under Articles 54 and 55 of the Aviation Business Act or the proviso to Article 101 of the Aviation Safety Act, shall transport passengers or cargo between regions within Korea for remuneration.

**IV SAFETY**

**Certificate of Operation**

Before beginning flight operations, an air transportation operator must obtain from the MOLIT the Air Operator Certificate (AOC). As part of this process, the air transportation operator will be subject to document and on-site inspections including inspection of a safe navigation system, such as human resources, equipment, facilities, assistance in flight operations and assistance in maintenance management.33

The following documents and information are reviewed as part of the document inspection process: schedule for implementing the business plan, organisation, manpower, division of roles and responsibilities, regulations compliance statement, contracts or lease agreements relating to aircraft, facilities and equipment or the operation thereof, training programme and operation plan, policy and administration manual, aircraft operation manual, MEL/CDL, accident procedures manual, various manuals and passenger briefing cards, fuelling, refuelling, draining, emergency row seating procedures, drug and alcohol control procedures, emergency evacuation demonstration plan, flight operations inspection plan, environmental assessment, training plan and maintenance regulations.

The on-site inspection process comprises of the following: inspection of fixed and mobile facilities and equipment on the ground, operation of control centres, qualification tests of aviation workers, evaluation of training programs, emergency escape simulation, emergency landing simulation, maintenance of records, flight operations inspection, evaluation of cabin crew, aircraft conformity inspection and interviews with key executives.

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31 Aviation Business Act, Article 54(1).
32 Aviation Business Act, Article 55(1).
33 Aviation Safety Act, Article 90(1); Table 33 of its enforcement decree.
Mandatory reporting of aviation safety

A person engaged in aviation, who has caused or has become aware of any aircraft accident or serious incident or safety occurrence prescribed by the ordinance of the MOLIT must report the same to the MOLIT.34 A person who reports breakdowns, defects and malfunctions under Article 33 of the Aviation Safety Act is deemed to have satisfied the mandatory reporting obligation under Article 59.

V INSURANCE

‘Aviation insurance’ means passenger insurance, airframe insurance, cargo insurance, war risk insurance, third party insurance, aircrew insurance, and such other insurance prescribed by an ordinance of the MOLIT.

An air transport service provider, aircraft rental service provider, air charter operator must not operate an aircraft without purchasing aviation insurance (as prescribed by the ordinance of the MOLIT).35 Aircraft owners (other than those mentioned above) and aircraft operators must also have adequate insurance coverage.36 The limit of coverage shall be decided in accordance with the terms of international conventions of which Korea is a contracting state unless the application thereof is unreasonable, in which case the applicable limit of coverage shall be as prescribed by the MOLIT.37

i Light-weight aircraft, ultralight aircraft

In order to be able to provide compensation to parties injured (in the case of death, to parties entitled to damages) by the operation of lightweight aircraft, a lightweight aircraft owner referred to in Article 108 of the Aviation Safety Act must purchase insurance or join a mutual aid organisation prescribed by an ordinance of the MOLIT prior to obtaining a safety certification under Article 108(1) of the Aviation Safety Act.38 Anyone intending to use ultralight aircraft for ultralight aircraft rental service, air charter, and sport and leisure aviation service must also purchase insurance or join a mutual aid organisation prescribed by an ordinance of the MOLIT.39 Insurance or mutual aid agreements prescribed by an ordinance of the MOLIT are insurance or agreements that guarantee more than 150 million won for death and 30 million won for grade 1 injury,40 and includes insurance or agreements for co-travellers.41

34 Aviation Safety Act, Article 59(1).
35 Aviation Business Act, Article 70(1).
36 Aviation Business Act, Article 70(2).
37 Enforcement Decree to the Aviation Business Act, Article 70(2).
38 Aviation Business Act, Article 70(3).
39 Aviation Business Act, Article 70(4).
40 Article 3(1) of the Enforcement Decree to the Automobile Damages Compensation Act.
41 Enforcement Decree to the Aviation Business Act, Articles 70(3) and (4).
Third-party liability insurance

Third-party liability insurance is regulated under Articles 930 to 935 of the Commercial Act. As insurance that compensates for bodily harm to a third party or damage to a third party’s property caused by the aircraft itself, third-party liability insurance includes coverage for injury arising from mid-air collisions or air crashes, or by objects sprayed from aircraft, such as fuel, pesticides or chemicals.

Foreign international air transport operator

A foreign international air transport operator must include in its business plan submitted at the time of its permit application a certificate of insurance.

VI  COMPETITION

Where a market-dominant business entity engages in abusive practices, the Fair Trade Commission may impose upon the market-dominant business entity a penalty surcharge not exceeding three percent of the sales prescribed by Presidential Decree (or operating revenues in the case of a business entity prescribed by Presidential Decree (hereinafter the same applies)); provided that the Fair Trade Commission may impose a penalty surcharge not exceeding one billion won in cases prescribed by Presidential Decree where no sales have been made or where it is impracticable to calculate the sales.

Where a business entity engages in activities that unfairly restrict competition (as further prescribed under Article 19(1) of the Monopoly Regulation and Fair Trade Act), the Fair Trade Commission may order the business entity to stop such illegal cartel conduct, to publish the fact that it has been ordered to stop such conduct, or to implement other corrective measures, and may impose on the business entity a penalty surcharge not exceeding 10 per cent of the sales prescribed by Presidential Decree; provided that, the Fair Trade Commission may impose a penalty surcharge not exceeding 2 billion won in the event that no sales have been made.

A person who violates the provisions prohibiting abuse of market-dominant position, or illegal cartel conduct or facilitates the unfair restriction of competition may be subject to imprisonment for not more than three years or a fine not exceeding 200 million won.

VII  WRONGFUL DEATH

Overview

If a passenger dies, he or she (his or her estate) may claim damages for default or compensation for damages suffered as a result of unlawful acts of the carrier. The Supreme Court has held that there are three types of damages available for personal injury: passive damages, active damages and mental distress.
ii  Loss of earnings (passive damages)

Damages payments for loss of earnings (passive damages) seek to compensate the injured party for profit or income he or she would have earned in the future but for the injury suffered. In principle, loss of earnings for salary earners is calculated based on the amount of salary income that the injured party was earning at the time of injury; however, where the possibility of a future raise in the salary amount is abundantly clear and supported by objective data, that future raise amount must also be taken into account when calculating damages for loss of earnings.\(^{47}\) If the injured party was employed in a certain job but it is not possible to calculate his or her passive damages using his or her income, it may be possible to calculate the same based on income statistics that will highly likely apply in respect of his or her specific skills, qualifications or education.\(^{48}\) If the injured party dies as a result of an unlawful act, the costs of living must be deducted from lost profits for the applicable projected working years. In practice, it is commonly accepted that a third of income is used as costs for living.

iii  Active damages

Active damages include medical expenses, nursing expenses, and funeral expenses.

Medical expenses

Historical medical expenses refers to expenses expended prior to the closing of the hearing. Since treatment is aimed not only at improving or curing an illness but also at preventing the worsening thereof or prolonging life, the need for future treatments and related expenses may be recognised by the Court as long as a proximate causal relation can be shown between the unlawful act and the future medical expenses to be incurred. Future medical expenses for ongoing treatment are estimated at the time of medical examination.

Auxiliary tools refer to wheelchairs, special mattresses for preventing bedsores, dental prosthetics and limb prosthetics and their lifespan and price are usually determined based on the opinions of a medical appraiser.

Nursing expenses

Nursing refers to the act of helping an injured party who is so seriously injured that he or she requires the assistance of another person for a certain period of time or even for life after the end of medical treatment due to an incurable after-effect. Expenses related to such acts are nursing expenses and these are deemed active damages by the court. Where nursing is required due to physical disabilities, unless special circumstances exist, nursing expenses are calculated based on daily wages for ordinary urban workers or rural women workers for the whole period during which nursing is required.\(^{49}\)

Funeral expenses

In practice, compensable funeral expenses are fixed within a socially acceptable range to about 5 million won, regardless of actual costs expended.

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\(^{47}\) Supreme Court Decision 2004Da48829, 8 February 2007.
\(^{48}\) Supreme Court Decision 2003Da60365, 13 February 2004.
\(^{49}\) Supreme Court Decision 90DaKa 15171, 23 October 1990.
iv Compensation

Generally, compensation for death is usually 100 million won, but for aviation accidents the amount is usually higher, taking into account the special characteristics of aviation accidents.\(^{50}\) According to the guidelines published by the Supreme Court in 2016, in the case of aviation accidents, it is possible to award between 200 and 400 million won in compensation, depending on the nature of the accident.

VIII ESTABLISHING LIABILITY AND SETTLEMENT

i Procedure

Claims for liability against carriers are subject to civil proceedings. Civil proceedings are initiated in the first instance district court, appealed in the first district court of appeals, the high court and then the Supreme Court.

A carrier’s liability to its passengers, its shipper or consignee will expire within two years from the date the passenger or cargo arrived at the place of destination or the date the carrier was scheduled to arrive or the date on which transportation was suspended, whichever occurs last, if proceedings are not initiated within that time, regardless of who the claimant is.

In a damages claim, the defendant may be the carrier, the manufacturer, the seller of the aircraft or cabin crew. Where there are multiple defendants, they will be jointly liable. The court will not determine the ratio of liability between the defendants of an indemnity claim; but will determine the ratio as between the defendants where some of the defendants claim against other defendants.

ii Carriers’ liability towards passengers and third parties

A carrier will only be liable for damages resulting from the death or injury of its passengers if the accident that caused the death or injury took place on board the aircraft or in the course of embarking or disembarking operations. A carrier will be strictly liable within the scope of the Montreal Convention and the Commercial Act. Thus, intention or negligence is not required in order for such liability to be recognised. A carrier will not be liable for the portion of liability that exceeds the limitation of liability amount if it is able to prove that the damage (1) was not caused by the negligence or other unlawful act or omission of the carrier or its user or agent, or (2) was solely caused by the negligence or other unlawful act of omission of a third party. The liability of a carrier is strictly civil liability. Korea does not recognise punitive damages. Therefore, a ruling of a foreign court that recognises punitive damages will not be approved by\(^{51}\) or enforceable\(^{52}\) in the Korean courts.

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\(^{50}\) Supreme Court Decision 2008Da3527, 24 December 2009.

\(^{51}\) Supreme Court Decision 2015Da207747, 28 January 2016.

\(^{52}\) Seoul High Court Decision 2017Na2057753, 23 March 2018.
iii  Product liability

Product liability is imposed on the manufacturer if the product is found to be defective and unsafe such that it infringes on life, personal safety, health and damages property. The burden is on the injured party to prove that a product was defective. Furthermore, even if the injury or damage arose as a result of a defect in the product, any resultant damage to the product itself due to its own failings as a product cannot be the subject of a product liability claim.53

In the case involving the crash of the UH-60 ‘Blackhawk’ helicopter, the Supreme Court held as follows:

Even if a manufactural defect or design defect of a product is not recognised, if the damage or injury caused by the product could have been reduced or avoided had the manufacturer provided reasonable explanation, instructions, warnings and other indications, liability for the unlawful act of failing to properly indicate or to provide markings may be recognised and when deciding whether such defects in markings/indications exist, the Court will look to various factors such as the product's characteristics, its common use, user's expectations of the product, anticipated risks, the user's awareness and ability to avoid such risk, all in the context of social norm.54

iv  Compensation

Where the Montreal Convention applies, a carrier’s strict liability for death or bodily injury is 128,821 SDR per passenger, 5,346 SDR for delay, 1,288 SDR per passenger for loss or damage to baggage and 22 SDR per kilogram for the transportation of international goods.

Where the Commercial Act applies to domestic and international transportation, a carrier’s strict liability for death or bodily injury is 113,100 SDR per passenger, 4,694 SDR for delays in international flights, 1,000 SDR for delays in domestic flights, 1,131 SDR per passenger for loss or damage to baggage, 19 SDR per kilogram for international transportation of goods and 15 SDR per kilogram for domestic transportation of goods.

When the National Health Insurance Service (NHIS) has provided an insurance benefit to the insured or dependent because the grounds for the insurance benefit have arisen due to the act of a third party, the NHIS shall have the right to claim compensation from the third party up to the amount of the expenses incurred for the benefit concerned.55 The NHIS’ right of claim through subrogation is limited, out of the whole amount of damages receivable by the injured party (the insured), to the amount that equates to the health insurance amount.56

IX  DRONES

The general rules for aircraft (including drones) safety are stipulated by the Aviation Safety Law. According to the Act on Promotion of Drone Utilisation and Infrastructure Development, drones are classified as (1) ‘unmanned aerial vehicles’ under Article 2(3) of the Aviation Safety Act, (2) ‘unmanned aircraft’ under Article 2(6) of the Aviation Safety Act, and (c) vehicles that navigate remotely, automatically, autonomously and in such other ways as prescribed by the ordinance of the MOLIT under the Drone Act, Article 2(1).

55 National Health Insurance Act, Article 58(1).
56 Supreme Court Decision 2017Da233276, 25 April 2019.

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Drones for commercial use or drones weighing 12 kilograms or more, excluding fuel weight, must be reported to the MOLIT and must receive a pilot certificate. Businesses using drones must have insurance coverage or a mutual aid agreement in accordance with the ordinance of the MOLIT. A drone’s flight altitude is limited to 150 metres or less and, in principle, drones must not enter the airport airspace, restricted areas and state airspace; however, there is no limit to flight speed.

X VOLUNTARY REPORTING

A person who has caused or becomes aware of or expects the occurrence of a reportable event, situation, condition that jeopardises or is likely to jeopardise aviation safety may report the same to the MOLIT in accordance with the ordinance of the MOLIT. The MOLIT shall neither disclose the identity of the person who has voluntarily filed a report to third parties or to the general public against his or her will, nor use the voluntary report for purposes other than to prevent any accident and to ensure aviation safety. No person shall dismiss, transfer, reprimand, or unjustly treat the person who has made a voluntary report or impose measures unfavourable to him or her in relation to his or her status or treatment for voluntary reporting. Where the person who causes the relevant event, situation or condition, makes a voluntary report himself or herself within 10 days of the date on which the relevant event, situation or condition occurred, the MOLIT may not impose measures under the Aviation Safety Act and Airport Facilities Act if this person was not grossly negligent or intentionally reckless in causing the occurrence.

As Article 5.12 of Annex 13 Aircraft Accident Investigation (one of the annexes adopted by the International Civil Aviation Organisation pursuant to Article 54 of the International Civil Aviation Treaty) is a regulation that imposes certain obligations only on the country that conducts the investigation of aircraft accidents, other countries may use the accident investigation reports as evidence against the accused in criminal proceedings.

XI THE YEAR IN REVIEW

The details, type and scope of damages for delay are not covered by Article 19 of the Montreal Convention, and, therefore, it is up to the court to decide on what damages (in terms of detail, type and scope) are applicable to the delay events under Article 19 of the Montreal Convention. In other words, the lex fori will be relevant for determining what damages are applicable for delay under Article 19 of the Montreal Convention. In a case where a flight from Korea made an emergency landing in Japan due to engine failure, the court found that the details, type and scope of damages payable for delay under Article 19 of the Montreal Convention were subject to the law on compensation for damages in Korea, which provides for not only economic and property loss resulting from unlawful acts but also damages for

57 Aviation Safety Act, Article 61(1).
58 Aviation Safety Act, Article 61(2).
59 Aviation Safety Act, Article 61(3).
60 Aviation Safety Act, Article 61(4).
61 Supreme Court Decision 92Do373, 12 October 1993.
mental distress and in accordance with domestic law, the court held that the airline must compensate its passengers for damages for mental distress as well as for property loss resulting from the significant delays (19 hours) in transportation.62

A flight that was scheduled to depart from Incheon International Airport on 23 December 2017 at 11:30 and arrive at Okinawa International Airport on the same day at 14:00 was cancelled due to heavy fog. The cancellation was found to be a cancellation of operation or failure to provide freight transport as opposed to falling within the scope of ‘delay’ under Article 19 of the Montreal Convention. It was further held that the Montreal Convention was not applicable to the case because the Convention itself does not provide for ‘cancellation of flights’. Domestic law will apply in respect of international flight operations to the extent the Montreal Convention is not applicable and, in this case, the court, applying domestic law, decided that the defendant was not responsible for tort liability under the Montreal Convention.63

The claimant in the case was in the business of repairing mobile phones and the wholesale and retail of mobile phone parts, and the defendant was in the business of international transportation operations. On 4 June 2013, the claimant asked the defendant to transport (including customs clearance) liquid crystal displays to Shenzhen, China. On 9 June 2013, the defendant transported the LCDs by air from Korea to Qingdao, China, but the Chinese customs office at Qingdao, noting that the cargo appeared to be second-hand, suspended clearance and requested more information on the intended use. When that information was not forthcoming, the Chinese customs office notified the company responsible for clearing the Chinese customs and had the cargo destroyed in December 2013. Article 18(2)(d) of the Montreal Convention exempts the air carrier where cargo is destroyed, lost or damaged as a result of a public agency’s action during the entry or exit of the same or during customs clearance or where loss of or damage to cargo is caused by ‘action taken by a public organisation that is associated with the arrival and departure of cargo, quarantine or customs procedures’, respectively. In the case, the cargo was found to have been discarded after being held for customs clearance by the Qingdao Customs Office in China and so the carrier may be exempt from liability for loss or damage of the same.64

XII OUTLOOK

The courts continue to see an increase in claims for damages due to delays. In addition, research and legislation on drone industry activation and anti-drone regulations are continuing.

62 Seoul Central District Court Decision, 2018GaDan5222511, 11 October 2019.
63 Seoul Central District Court Decision, 2018GaDan5044186, 30 January 2019.
64 Supreme Court Decision, 2019Da14998, 17 October 2019.
I INTRODUCTION

The Kingdom of Spain is a member of the European Union. As such, the full regulatory body of EU law applies in the country as regards rules on access to, inter alia, market, slot regulation, competition law, state aid, passenger rights and accident investigation.

The main bodies that regulate aviation in Spain are the Directorate General of Civil Aviation (DGAC) and the State Agency for Aviation Safety (AESA), both under the umbrella of the Ministry for Development. The DGAC is responsible for the preparation of industrial and strategical policies and proposals for the aviation sector, the representation and coordination with other public administrations and with the European Union in matters of air transport policy, and the approval of aeronautical circulars. AESA has responsibility to exercise inspection and penalisation authorities in civil aviation matters and it takes the initiative to approve provisions in matters of aviation safety and passenger protection, among other topics.

Unlike other countries, Spain has a dual registration system for aircraft. The Aircraft Matriculation Registry (RMA) falls under the jurisdiction of AESA and is an administrative registry of aircraft, but not a registry of title or ownership. It is operator-based. The main effect of registration is that an aircraft is provided with a Spanish registration number (beginning with the letters EC, followed by a hyphen and a combination of three further letters, e.g., EC-XXX) and thus becomes a Spanish aircraft. The Central Moveable Assets Registry (RBM), under the jurisdiction of the Directorate General of Legal Safety and Public Faith, which in turn pertains to the Ministry of Justice, is a register of title, ownership and encumbrances over movable assets, including aircraft. The main effect of registration is that evidence is provided in respect of the status of ownership and liens over assets. With some exceptions, most transactions involving Spanish-registered aircraft must be recorded at both the RMA and the RBM.

II LEGAL FRAMEWORK FOR LIABILITY

i International carriage

The Kingdom of Spain is state party to the following air law treaties (all of them in effect), among others:

a the Warsaw Convention 1929 (as subsequently amended by the Montreal and Hague Protocols);

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1 Sergi Giménez Binder is a partner at Augusta Abogados.
b the Rome Convention 1933;
c the Chicago Convention 1944;
d the Rome Convention 1952;
e the Hague Convention 1970;
f the Montreal Convention 1971;
g the Montreal Convention 1999; and
h the Cape Town Convention 2001.

In accordance with Article 94 of the Spanish Constitution, once an international treaty has been approved by Parliament, ratified by the King and published in the State Official Gazette, it enjoys a higher hierarchical status than domestic legislation; consequently, its provisions prevail over any conflicting internal rules or provisions. Spanish judges regularly apply international treaties when those are applicable.

Of course, the full body of EU legislation on air carrier liability applies in Spain, such as Regulation (EC) 2027/97, as amended by Regulation (EC) 889/2002 and Council Decision 2001/539/EC.

In addition to international treaties to which Spain is a party and EU legislation, the main Spanish domestic provisions applicable to aviation are:
a the 1954 Act on Pledges over Movable Assets and Mortgage without Displacement;
b the 1960 Air Navigation Act;
c Act 28/1988 on Instalment Sales of Movable Assets;
d the Air Safety Act 21/2003; and
e Royal Decree 384/2015 – Regulations for the granting of registration marks.

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

Since EU Regulation 889/2002 extended the applicability of the Montreal Convention to all intra-European flights, the principles laid out in the Montreal Convention are also in force in respect of purely Spanish domestic flights.

Spain is a signatory state of the 1952 Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, and it came into force in 1958. The Convention’s aim is to ensure adequate compensation for persons who suffer damage caused on the surface by foreign aircraft, while limiting in a reasonable manner the extent of liabilities incurred for this damage in order not to hinder the development of international civil air transport. The 1952 Convention embraced the principles of the 1933 Convention, but raised the liability limits.

From a domestic perspective, the 1960 Air Navigation Act also includes provisions to regulate carriers’ liability for surface damage and basically follows the principles of the 1952 Rome Convention, although over the years the liability limits have been raised as well. Furthermore, in line with EU legislation, the Air Navigation Act expressly prevents carriers from using Spanish airspace if they cannot prove that they have insurance coverage for this specific type of damage.

**iii General aviation regulation**

The general provisions relating to the liability of air carriers in commercial operations apply to civil aviation aircraft as well. Given the very nature of civil aviation, the chances for purely domestic accidents – and, therefore, for the application of the 1960 Air Navigation Act – are higher, although the EU legal framework generally makes no distinction in this respect.
Passenger rights

As part of the European Union, Spain applies the entire set of European legislation, directives and guidelines relating to the protection of passengers, along with the provisions contained in international treaties such as the 1999 Montreal Convention where applicable. The provisions of Regulation 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, are fully applicable in Spain, and AESA and the Spanish courts regularly enforce this body of law.

From a purely domestic perspective, Spanish consumer protection laws are embodied mainly in Royal Legislative Decree 1/2007 on the Protection of Consumers and Users and apply to all transactions that are considered to be ‘consumer transactions’. Thus, to the extent that an airport operator engages in this kind of transaction, it will be caught by this legislation. Given the Spanish constitutional system, certain regions have issued their own consumer protection laws that prevail over the said Royal Legislative Decree in their respective geographical areas. Finally, the domestic consumer protection rules are generally applied and interpreted by the courts of justice so as to award the widest protection to air passengers.

Other legislation

As a civil law country, the general principles of liability in Spain are set out in the Civil Code, which is based on a fault-based system. However, like many other countries, and particularly since its accession to the European Community, Spain has implemented liability principles in areas such as liability for defective products or product liability, direct action in anticompetitive behaviours, quasi-objective liability in environmental matters, direct criminal liability of company directors or officers in corporate crimes, widened criminal action in private and public corruption cases. It should be highlighted that the 2015 Package Travel Directive has been implemented in Spain by adding a full chapter devoted to this type of agreements in the General Act on Protection of Consumers and Users.

III LICENSING OF OPERATIONS

Licensed activities

Intra-EU routes are, in general terms, automatically authorised pursuant to Regulation 1008/2008, so that no specific commercial licenses must be obtained. As an exception, certain routes which are classified as being of public interest, as well as operations between the Canary Islands and Gibraltar, are subject to certain restrictions.

To commercially operate extra-EU routes community carriers must ask AESA to issue the relevant air traffic license. Normally this will require the existence of an air transport agreement between Spain or the European Union and the country in question. Most of these agreements demand that the airlines chosen to operate the air services have been formally designated by the Spanish aeronautical authority. Airlines from third countries will also need to be designated by their respective aviation authority and, before performing any scheduled flights, become accredited by AESA in accordance with the requirements set forth in Royal Decree 1392/2007.

Non-scheduled commercial operations are subject to different rules under the Chicago Convention 1944. Generally speaking, the Spanish authorities allow such operations to air carriers belonging to signatory States of the Chicago Convention if the state concerned applies a reciprocal treatment to Spanish air carriers.
AESA has published the various procedures and forms of documents (in Spanish and English) on its website under https://www.seguridadaerea.gob.es/lang_castellano/cias_empresas/companias_aereas/permisos/default.aspx.

ii Ownership rules

Shortly after Spain’s entry into the European Community in 1986, nationality, ownership and control requirements were interpreted as referring to European citizens rather than only Spanish nationals, despite domestic legislation to the contrary. This topic is nowadays covered by the provisions of Regulation 1008/2008, on common rules for the operation of air services. Given the direct applicability of Regulation 1008/2008 in Spain, the requirements are identical to those of other EU Member States. Although the provisions of this Regulation are directly applicable, some follow-up and detailed provisions were approved in Spain, initially through the Ministerial Order of 12 March 1998, which was recently replaced by the Order TMA/105/2020. Thus, to the extent that interested parties comply with the requirements of Regulation 1008/2008 (as amended), access to the Spanish market – and thereby to the European Union market – will be granted.

Financial fitness is regulated under Article 5 of Regulation 1008/2008, and basically requires that applicants provide evidence that they can meet their financial obligations for a period of 24 months from the start of operations and their fixed and operational costs for a period of three months from the start of operations, without taking into account any income. Lower thresholds apply to operators with aircraft of less than 10 tonnes MTOW or less than 20 seats. AESA closely analyses and monitors the business plans submitted by interested parties to ensure that they are realistic and in line with the EU Regulation. AESA has particular regard to past experiences where financial troubles have led to the demise of a number of Spanish airlines.

The ownership provisions of Regulation 1008/2008 have become the subject of intense scrutiny within the context of the United Kingdom’s exit from the EU. In June 2016, AESA published certain interpretative criteria relating to the term ‘ownership and control’, which must, however, be read in connection with the Interpretative Guidelines published by the European Commission in June 2017 and the Notice to Stakeholders of January 2019.

iii Foreign carriers

Non-Community carriers must obtain accreditation from AESA before they are allowed to start commercial operations to/from Spanish airports. The main provisions to secure such accreditation are found in Royal Decree 1392/2007, and the procedure aims at ensuring the safety of operations, the protection of passenger rights and the protection of the environment. In general terms, applicants have to provide evidence of the following points:

- The airline must be under the supervision of an aeronautical authority which pertains to a State party to the 1944 Chicago Convention.
- The airline must hold an operator's license which proves its ability to carry out the intended operations.
- The fleet to be used for the Spanish operations must be registered at a state party to the Chicago Convention, comply with the requirements of the Chicago Convention in matters of airworthiness and noise, and also comply with Spanish and EU requirements concerning, inter alia, noise, navigation and communications equipment.
- The airline must have insurance coverage which complies with the terms of Regulation (EC) 785/2004 on insurance requirements for air carriers and aircraft operators.
The airline must have a security program against illicit interference actions which has been approved by its supervisory authority.

Compliance with any specific requirements contemplated in the applicable air services agreement.

Upon receipt of the application and all required documents, AESA must issue a decision within 40 days. If no decision is made within the said period, the application is deemed rejected. All decisions can be appealed with the Secretary General of Transportation and, as indicated above, with the contentious-administrative courts.

IV SAFETY

All security standards contained in European legislation and international treaties such as the Chicago Convention are applicable in Spain, chiefly under Regulation (EC) No 300/2008 on common rules in the field of civil aviation security. To take care of changing developments, the government publishes a National Programme for Aviation Security in Civil Aviation, which is updated on a regular basis, the last time being in February 2019.

From a domestic perspective, the main provisions are embodied in the Air Safety Act 21/2003 (LSA), although – as with EU legislation – there are detailed regulations in many specific aspects of aviation operations. Air safety is essentially under the control of AESA, although other governmental agencies (such as police bodies) cooperate with AESA as well.

The LSA imposes a number of rules that apply to all parties which somehow intervene in aviation: personnel, flight schools, aeroclubs, designers, manufacturers, maintenance and service providers, air operators, commercial airlines, aerial works, air navigation service providers, handling agents, airport and aerodrome managers, etc. – including passengers. In addition to those general provisions, the LSA then sets out rules that specifically apply to specific participants or categories of participants. The ICAO definition whereby general aviation is deemed to be ‘all civil aviation operations other than scheduled air services and non-scheduled air transport operations for remuneration or hire’ is also applicable in Spain and is used to distinguish general aviation from commercial and public transport.

In line with ICAO guidelines and EU legislation (mainly embodied in Regulation (EU) 996/2010 on the investigation and prevention of accidents and incidents in civil aviation, as amended), Spain has created the Commission for the Investigation of Accidents and Incidents in Civil Aviation (CIAIAC). Domestic legislation has developed in some detail the international provisions through Royal Decree 389/1998, the 2003 Air Safety Act, Royal Decree 1334/2005 and certain other Royal Decrees that periodically publish the State Programme of Operational Safety for Civil Aviation. In line with the legislative framework, the CIAIAC’s investigations are exclusively technical in nature, with the ultimate aim to prevent future accidents and incidents, and are not directed towards allocating any kind of liability.

Pursuant to the 2003 Air Safety Act and Royal Decree 389/1998, ‘any person’ who becomes aware of an accident or incident of civil aviation must ‘immediately’ report it to the closest authorities, who then must urgently contact the CIAIAC. Obviously, special reporting obligations are imposed upon pilots, operators, aircraft owners, aviation authorities, airport directors, ATCs and all other related services and bodies.
The detailed reporting system is set forth in Royal Decree 1334/2005, which applies to all events occurred in the Spanish territory or where Spanish-registered aircraft or operated by Spanish citizens are involved. All reports are directed to the DGAC, which then coordinates its activities with the CIAIAC and other relevant agencies.

V INSURANCE

The insurance set forth under Regulation (EC) No 785/2004 on insurance requirements for air carriers and aircraft operators are fully applicable in Spain. Insurance and reinsurance activities can be carried out in Spain by Spanish entities and also by EU insurance companies, subject to the provisions of Directive 2009/138/EC (as amended) and Spanish implementing legislation (basically, the Act 20/2015). Although the insurance market has been largely liberalised inside the European Union, certain types of risks still must be insured by national insurance companies. Aviation risks of Spanish airlines must still be subject to insurance made by Spanish insurance companies, who regularly reinsure the associated risks in the international markets. Article 78 of the Act 50/1980 on Insurance Contracts states that an insured cannot claim directly from the reinsurer any compensation or require any other duty to be performed by the reinsurer. Thus, in principle, cut-through clauses are not directly enforceable in Spain if the relevant insurance contracts are subject to Spanish law. However, Article 107 of the same Act expressly allows the submission to foreign laws for aircraft insurance. Therefore, the validity of a cut-through clause will depend on the choice of law clause in the lessee’s insurance contracts. Nevertheless, some legal scholars still consider that this type of clause is not enforceable in Spain based on a literal interpretation of the said provision.

VI COMPETITION

There is no specific regulation or policy in Spain concerning airline access or competition, since all these matters are to be handled in line with EU policies and rules. No domestic sector-specific competition rules have been published, but given Spain’s membership of the European Union, Spanish competition authorities are bound by and follow the legislation and guidelines that emanate from the EU. These are abundant as far as the aviation industry is concerned and focus mostly on state subsidies, concentrations of undertakings and fostering free competition.

The main body in charge of supervising competition rules in Spain is the National Commission for Markets and Competition (CNMC), which has jurisdiction over all economic areas. However, the CNMC is organised internally into various directorates, one of which is specifically in charge of transportation matters.

The CNMC follows in general terms the definitions, methods and criteria established by the European competition authorities, including the European Court of Justice, to define the relevant market. Since most of the transactions of the aviation industry have a EU dimension, they are ordinarily assessed by the European Commission rather than the Spanish authority.

It is difficult to provide a general rule in this connection, because the criteria depend on the type of transaction under analysis. When it comes to the review of potential state subsidies or actions against free competition the criteria are fixed and assessed on a case-by-case basis, taking of course into account existing precedents and guidelines.
When it comes to concentrations of undertakings, such as mergers between enterprises and company acquisitions, Spanish domestic competition legislation provides more detailed thresholds. Economic concentrations are governed by the 2007 Competition Defence Act when they fall outside the thresholds of the EU Merger Control Regulation 139/2004. Mergers are defined broadly and include the actual merger of two or more previously independent companies, the acquisition of control over an undertaking by another, the creation of a joint venture or the acquisition of joint control over an undertaking. As a general rule, concentrations of undertakings must be notified to the CNMC, in order to obtain approval when, as a consequence of the transaction, a share of 30 per cent or more is acquired in the ‘relevant market’. Such market can be either the entire territory of Spain or a smaller, geographically defined market (e.g., a certain region). The communication is also mandatory when the turnover of the participants in Spain exceeds €240 million and at least one of them has a turnover of more than €60 million. However, no notification is needed if the turnover of the acquired company is less than €10 million, unless a market share of 50 per cent or more is achieved (de minimis exception).

In merger transactions, the CNMC has a period of one month from receipt of the notice to decide whether or not it wishes to pursue the investigations any further (the ‘first phase’). If no decision is made within this time period, the transaction is deemed to be approved. If the CNMC decides to deepen the analysis, it opens the ‘second phase’ and then has an additional period of two months to issue a decision. This timing is often extended to take into account delays arising from the receipt of any information requested additionally. A final decision is then taken by the Council of Ministers within one more month.

Spanish domestic legislation essentially mirrors EU legislation as regards the remedies that the CNMC or the Courts can impose upon participants in transactions which are perceived to be in breach of competition rules.

VII WRO ngful Death

Spain is a state party to the Warsaw System, the 1999 Montreal Convention and, as a Member State of the European Union, the provisions of Regulation (EC) 2027/97 on air carrier liability are directly applicable by the Spanish courts. Specifically, the EU provisions also apply to domestic air transport when it is performed by Community carriers. Therefore, the domestic regulation contemplated under Articles 92-125 of the 1960 Air Navigation Act only come into play on a residual basis.

The damages awarded by Spanish courts aim at reinstating the injured party in the position it would have been in the event that no damage had been caused. Thus, direct damages for bodily injury and mental distress or moral damages are generally awarded, as well as indirect damages such as loss of income and similar concepts. Institutions of certain common law countries such as punitive damages are not part of the Spanish system, and sometimes difficult to enforce even if awarded by foreign courts. Also, the amounts awarded by Spanish courts are often more modest than those that can be obtained in other jurisdictions.
VIII  ESTABLISHING LIABILITY AND SETTLEMENT

i  Procedure

Liability claims fall, generally speaking, under the jurisdiction of the civil courts in Spain. In this respect, the commercial courts have exclusive jurisdiction in transportation disputes, which causes that most actions about passenger claims are discussed in these courts. However, where liability is claimed on the basis of body injuries or wrongful death, then usually the criminal courts will be involved, who also have authority to decide on the civil law aspects of such claims such as liable persons, amounts payable as damages, beneficiaries.

There is no fixed rule that can be given as regards the timelines for court actions in Spain. Since Spanish courts are chronically overloaded with work, the duration of claims often takes a long time, particularly in criminal cases. Where only civil matters are being disputed, the parties can spend about 12 months in the first instance, and if appeals are made then another six to 18 months should be accounted for. However, this very much depends on the specific court involved, although given the exclusive jurisdiction of the commercial courts to deal with transportation disputes there is a tendency that such matters are concentrated in a limited number of courts.

In principle, all parties potentially involved as causing the damage or having contributed to the damage can be asked to join a proceeding. Subject to the principles laid down in the Montreal Convention, liability is generally allocated on the basis of the fault or participation of each of the parties involved.

ii  Carriers’ liability towards passengers and third parties

Spain is a state party to the Warsaw System, the 1999 Montreal Convention and, as a Member State of the European Union, the provisions of Regulation (EC) 2027/97 (as amended) on air carrier liability are directly applicable by the Spanish courts. Specifically, the EU provisions also apply to domestic air transport when it is performed by Community carriers. Therefore, the domestic regulation contemplated under Articles 92–125 of the 1960 Air Navigation Act only come into play on a residual basis. The liability system and limits of air operators are thus based on the mechanisms established by the said international treaties.

Additionally, certain actions or omissions of carriers could be considered as criminal offences under Spanish law. In fact, whenever an accident causes fatalities, a criminal investigation will be opened under the control of the courts to assess whether any such liability may exist.

iii  Product liability

Manufacturer’s liability is governed in detail under Royal Legislative Decree 1/2007 on the Protection of Consumers and Users, and implements the terms of Directive 85/374/EEC. In general terms, manufacturers are liable for non-conforming products, and the law lists a detailed number of requirements for products to be found conforming. It is also established that, without prejudice to other contractual claims, all damaged persons have a right to be indemnified for the damage caused by goods or services. For the purposes of the Consumer Protection Act, the term damage encompasses personal damage, including death and moral damage, and material damages relating to private goods or services. This liability extends to the manufacturers of products and to their importers in the EU, who are jointly and severally liable.
Compensation

As discussed under Section VII, Spanish courts award direct and indirect damages, but not punitive damages. In accordance with European regulations, air carriers and their insurers are obliged to provide mandatory financial support to the victims of air accidents.

Spanish courts calculate the damages taking into account the specific circumstances of the victims, such as their age, level of income, dependency of family members, etc. The courts often resort to the objective criteria and amounts set out in the 2004 Act on civil liability and insurance for road transport, which, although not directly applicable to air accidents, are often used as basis for discussion. Recent experience with accidents in commercial flights indicates that compensations ranging between €30,000 and €200,000 are granted.

IX DRONES

Until the entry into force of Regulation (EU) 2019/947, on the rules and procedures for the operation of unmanned aircraft (expected to happen by the end of 2020 after a recent extension), the legal framework applicable to drone operations in Spain is composed of international conventions and accords, European regulations and directives and domestic legislation.

At an international level, international conventions such as the Chicago Convention 1944 and the ICAO Circulars set forth the main rules of how drones must be treated by states.

From the perspective of European Union legislation, the main applicable pieces of legislation are, for the time being and until the entry into force of the said Regulation 2019/947:


b) Regulation (EU) 2018/1139, of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency amending among others the former one;

c) Regulation (EU) 2019/945, of 12 March 2019 on unmanned aircraft systems and on third country operators of unmanned aircraft systems; and


Additionally, a large number of Acceptable Means of Compliance and Guidance Material has been published to accommodate the high number of varieties in the use of drones and safety and security measures under cover of the EASA jurisdiction.

Spain also has its own domestic legislation for drones. The core legal provision regulating the use of drones is Royal Decree 1036/2017, of 15 December, pursuant to which the use of civil remotely piloted aircraft is regulated. This Royal Decree contains the main terms and obligations that an operator must comply with to lawfully use drones. AESA is the main governmental entity in charge of the control, surveillance and enforcement of Royal Decree 1036/2017, although the Ministry of Internal Affairs also has jurisdiction for authorisations of certain specific operations where public security issues arise. In addition to this core provision, the legal framework governing drones is scattered across different other regulations and acts which are also applicable to the operation developed by these aircrafts, such as Royal Decree 384/2015 of, on Regulations of the Spanish Civil Aircraft Registry, the 1960 Air Navigation Act, the 2003 Air Safety Act and others.
X VOLUNTARY REPORTING

As indicated under Section IV, under the 2003 Air Safety Act ‘any person’ who becomes aware of an accident or incident of civil aviation must ‘report it to the closest authorities. Special reporting obligations are imposed upon pilots, operators, aircraft owners, aviation authorities, airport directors, ATCs and all other related services and bodies. The system ensures the confidentiality of the reports and the reporters and no cases have been published where someone might have been blamed or punished for complying with his or her legal duty.

XI THE YEAR IN REVIEW

Over the past year, the main topics of concern have been those related with the exit of the United Kingdom from the European Union, which directly affects some major Spanish carriers (Iberia, Vueling, Level) due to their being part of the IAG Group. In accordance with the EU Commission’s guidelines, both companies have submitted plans to show that they will continue being owned and controlled by EU citizens after Brexit.

In this context, in December 2019 a merger between Iberia and Air Europa was announced, with the aim of strengthening their position in the routes to Latin America and South America. This transaction is under review by the merger control authorities, and it is expected that both airlines will have to release a number of the slots which they presently hold.

Carriers operating in Spain have also been devoting a great deal of attention to the challenges arising from the increasing number of passenger claims under Regulation 261/2004 and the implementation of the GDPR.

XII OUTLOOK

At the time of writing these lines the uncertainties arising from the economic crisis created by covid-19 are in everybody’s mind. The aviation industry has been among those most severely hit by the events, and it is difficult to predict when the situation will revert to something resembling normality. Tourism being one of Spain’s largest industries, the country is highly dependent on air traffic. While the government has published temporary legislation imposing restrictions on movement, mandatory quarantine for travellers from abroad and other measures to control the virus’s spread, it is also acknowledged that these measures need to be lifted sooner rather than later.

To assist the Spanish carriers with their cash flow impasse, the government has granted some state-backed loans to Iberia, Vueling, Air Europa and Air Nostrum for a total amount of more than €1 billion. It remains to be seen if this financial support will be enough to save the airlines from failure, because in addition to the operational issues and substantial loss of income, carriers all over Europe are facing massive claims for refund of the tickets paid by their customers.

The government has also announced that in the coming months it will impose a mandatory system of consumer arbitration, whereby all passenger claims will have to be settled by arbitration under the control of AESA. The system is currently being set up, and airlines have voiced their concerns about a mechanism that might take their right – and the consumer’s right – of access to justice.
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 cover various areas, including air transport.2

Aviation plays an important role in Switzerland. Zurich Airport (2019: 31.5 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 (2019: 17.9 million passengers) and Basel-Mulhouse-Freiburg, the tri-national EuroAirport on French territory (2019: 9.1 million passengers). However, air traffic has drastically fallen since March 2020 due to the measures and travel restrictions imposed by governments worldwide to combat the covid-19 (coronavirus) pandemic. In April 2020, flight movements at Zurich Airport have dropped to levels as of the early days of civil aviation in the 1950s. At the time of writing (June 2020), the long-term impact of the covid-19 pandemic on the aviation industry cannot be finally assessed.

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.

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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).
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 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.

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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.
that is found in the Code of Obligations.\(^5\) If the flight is a mere courtesy to the passenger, there may be no contract and liability may have to be based on tort.\(^6\) A reduced standard of care applies, but there is no limitation of the liability amount in statutory provisions. 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 et 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 an act of terrorism by a person who is not on board the aircraft, it is arguable that, by analogy, the same liability limitation applies.

### iv 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


\(^6\) BGE 137 III 539.

\(^7\) AS 2006 5987.
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 from third countries. The German Federal Court of Justice, in its decision of 9 April 2013, 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, where the CJEU applied a restrictive interpretation of ‘extraordinary circumstances’ of Article 5(3) of the Regulation; and Sturgeon 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 the event 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). 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. All flights of licensed operators are considered commercial.

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):

\(a\) the undertaking meets the ownership requirements described in Section III.ii;

\(b\) 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;

\(c\) 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;

\(d\) the undertaking has the right to use the airport at the place of operation to the extent required to provide the services;

\(e\) the undertaking has sufficient insurance cover;

\(f\) the aircraft meet the actual technical standards, at least the internationally agreed minimal standards, regarding noise and pollution; and

\(g\) 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.

\(^{14}\) 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. 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.

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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:

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.

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 et 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 the event 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.\textsuperscript{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

\textsuperscript{17} Swiss Civil Procedure Code of 19 December 2008 (SR 272).
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 et 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 the event 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.

iii Product liability


18 Swiss Civil Code of 10 December 1907 (SR 210).
19 Federal Act on Product Liability of 18 June 1993 (SR 221.112.944; the Product Liability Act).
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).

iv 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 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 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.\textsuperscript{21} 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.

\section*{XII OUTLOOK}

The most important issue for the aviation sector worldwide as well as in Switzerland is and will remain to overcome the consequences of the covid-19 pandemic. The current crisis will have an impact on aviation not only in 2020, but likely also in the next few years. The Swiss government grants financial aid to the aviation industry to secure its survival.

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 and provides that the existing traffic rights survive 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 16 June 2017 will presumably be taken into consideration by Swiss authorities, even if not yet formally applicable.

\textsuperscript{21} BGE 144 III 209.
Chapter 30

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 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; 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.

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.
7 In relation to the CAA generally, see www.caa.co.uk/home.
8 See, in particular, CA Act 1982, Section 3.
9 Principally, as set out in and under the CA Acts 1982 and 2012.
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 ceased to be a Member State of the European Union on 31 January 2020. However, it will continue to apply EU law as if it was a Member State until the end a transitional ‘implementation period’ which is currently due to end on 31 December 2020. It is thereby currently still subject to EU law. In particular, EU regulations continue to have direct application in the UK for the time being.

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 transitional implementation period ends, 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 (as amended) 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 end of the implementation period, including many related to aviation.

The UK remains part of the ‘single aviation market’ for Community air carriers within the EU, as provided for by Regulation (EC) No. 1008/2008, until the end of its exit implementation period. Outside of this area, route access to and from the UK is via either a horizontal agreement made between the EU and the non-Member State or a bilateral air services agreement made between the UK and the state concerned. As and when the UK’s

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10 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).
11 So far as British airlines may reasonably be expected to provide such services.
12 CA Act 1982, Section 4 and CA Act 2012, Section 1.
13 The Chicago Convention is given domestic effect in the UK largely by and under the CA Act 1982.
14 As to which, see Sections XI and XII.
15 As to which, see Sections XI and XII.
16 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.
exit from the EU is completed, 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.17

The UK is also currently subject to EU law on such matters as state aid and slots.18 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 Montreal Convention 1999 currently has force of law in the UK in respect of the liability of a ‘Community air carrier’19 concerning passengers and their baggage by reason of Regulation (EC) No. 2027/97 (as amended),20 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.21 The revised liability limits of the Montreal Convention set by ICAO, with effect from 30 December 2009, have been implemented in the UK.22 But the further revisions set with effect from 28 December 201923 are yet to be implemented.

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 As to which, see the Civil Aviation (Allocation of Scarce Capacity) Regulations 2007. As from the expiry of the UK's EU exit implementation period, these will apply as amended by the Operation of Air Services (Amendments etc.)(EU Exit) Regulations 2018.
18 As from the expiry of the UK's EU exit implementation period, 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.
19 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.
21 By reason of amendment made by the Air Passenger Rights and Air Travel Organisers’ Licensing (Amendment)(EU Exit) Regulations 2019, upon completion of the UK's EU exit the former route will only apply in relation to UK air carriers.
22 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 completion of 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).

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25 See, for example, Barclay v. British Airways Plc [2010] QB 187 at [6].
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 expiry of the UK’s EU exit implementation period 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)\textsuperscript{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.\textsuperscript{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 \textit{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.\textsuperscript{32}

As to surface damage, see Section II.i.

\textbf{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\textsuperscript{33} and hot-air balloons,\textsuperscript{34} but not to a tandem heavier than air non-powered paraglider.\textsuperscript{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.

\textbf{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).\textsuperscript{36} Non-compliance with certain provisions of this regulation is a criminal offence.\textsuperscript{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 addressed in the ‘European Union’ chapter of this publication.\textsuperscript{38} Although a claim by

\begin{thebibliography}{9}
\bibitem{30} The Carriage by Air Acts (Application of Provision) Order 1967.
\bibitem{31} \textit{Holmes v. Bangladesh Biman Corp}n [1989] AC 1112.
\bibitem{32} \textit{George v. Eagle Air Services Ltd} [2009] 1 WLR 2133 at [12]–[13].
\bibitem{33} See, for example, \textit{Fellowes (or Herd) v. Clyde Helicopters Ltd} [1997] AC 534.
\bibitem{34} \textit{Laroche v. Spirit of Adventure (UK) Ltd} [2009] QB 778.
\bibitem{35} \textit{Disley v. Levine} [2002] 1 WLR 785.
\bibitem{36} Upon the expiry of the UK’s EU exit implementation period, it will continue to apply as amended by the Air Passenger Rights and Air Travel Organisers’ Licensing (Amendment)(EU Exit) Regulations 2019.
\bibitem{37} The Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005. Upon the completion of the UK’s EU exit, this will apply as amended by the Air Passenger Rights and Air Travel Organisers’ Licensing (Amendment)(EU Exit) Regulations 2019.
\bibitem{38} Upon the completion of 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.
\end{thebibliography}
a qualifying person may be made for any infringement of this 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.

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.

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41 Upon the completion of 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.
42 For the meaning of these terms see Regulation 2(5) and 2(3) of the Package Travel and Linked Travel Arrangements Regulations 2018.
43 Civil Aviation (Air Travel Organisers’ Licensing) Regulations 2012 as amended (2012 Regulations), Regulation 9. Upon the completion of 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.
44 2012 Regulations, Regulation 69.
45 CA Act 1982, Section 76(1).
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) granted to that person by the CAA.47

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. 1008/2008.49 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.50

Although such a (UK) Community air carrier51 is currently entitled to operate intra-Community air services as of right as part of the single EU aviation market,52 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 (and subject to the availability of traffic rights under any relevant air services 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.

47 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.

48 Upon the completion of 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).

49 Certain related provisions are contained in the Operation of Air Services in the Community Regulations 2009.

50 Upon the completion of 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 as amended.

51 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.

52 See Regulation (EC) No. 1008/2008, Chapter III.

53 As to which, see CA Act 1982, Section 69A, and Civil Aviation Regulations 1991, Part III. Upon the completion of the UK's EU exit and subject to any agreement with the EU, including in relation to any further 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 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.
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.

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54 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 (upon completion of the UK's EU exit, as amended by the Aviation Safety (Amendment etc.) (EU Exit) Regulations 2019). 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.

55 ANO, Article 101(1). 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 completion of the UK's EU exit, Article 101 will apply as amended by Aviation Safety (Amendment etc.) (EU Exit) Regulations 2019.

56 CA Act 1982, Section 64. As to the grant of such a licence see Section 65 and the Civil Aviation Regulations 1991, Part III. Upon completion of 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 53.


58 Upon the completion of 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'.

59 For the position after the completion of the UK's EU exit see the preceding footnote.

60 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 2013.61

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 SST62 (including as to circumstances in which the SST expects to determine an application for permission).63

IV SAFETY

Regulation (EU) No. 2018/1139 on common rules in the field of civil aviation (the Basic EASA Regulation) and its implementing regulations64 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).67 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 currently 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) currently 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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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. 139/2004.76 The UK’s national competition authority for these purposes is the Competition and Markets Authority (CMA).77 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.78 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.79

Regulation (EU) No. 2019/712 on safeguarding competition in air transport currently has direct effect in the UK80 and is addressed in the ‘European Union’ chapter of this publication.

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)

76 For the position upon the completion of the UK’s EU exit, see the Competition (Amendment etc.) (EU Exit) Regulations 2019 as amended.
77 In relation to the CMA generally see www.gov.uk/government/organisations/competition-and-markets-authority.
78 As to this concurrent relationship, see: the Competition Act 1998 (Concurrency) Regulations 2014 (upon completion of the UK’s EU exit, as amended by the Competition (Amendment etc.) (EU Exit) Regulations 2019); and the Memorandum of Understanding between the Competition and Markets Authority and Civil Aviation Authority – concurrent powers (9 February 2016).
80 Upon completion of the UK’s EU exit, it will continue to apply as amended by the Air Services (Competition) (Amendment and Revocation) (EU Exit) Regulations 2019.
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.
that was or would have been provided by the deceased, as well as for funeral expenses.\footnote{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.} Any benefits that have accrued or will or may accrue to any person from the deceased's estate or otherwise as a result of his or her death are to be disregarded.\footnote{FAA 1976, Section 4.} Damages for bereavement are also recoverable, but only for the benefit of a limited class of persons\footnote{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.} and in a prescribed amount – currently £15,120.\footnote{FAA 1976, Section 1A.} See Section VIII.i.

**VIII  ESTABLISHING LIABILITY AND SETTLEMENT**

### i  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.\footnote{i.e., per Article 29 of the Warsaw Convention and Article 35 of the Montreal Convention.}

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,\footnote{See its Sections 2, 5 and 9 respectively.} 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.\footnote{See its Sections 11 and 12 respectively.} A claim for fixed compensation under Regulation (EC) No. 261/2004 is subject to a six-year limitation period.\footnote{Dawson v. Thomson Airways Ltd [2015] 1 WLR 883.}
Subject to the court having jurisdiction to entertain an action made against the
defendant concerned,\(^{91}\) there is no artificial restriction upon who may be added as a defendant
to any action (whether carrier, owner, pilot, manufacturer or otherwise).

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,\(^{92}\) where the relevant conditions of liability contained in
the convention are met, and for surface damage.\(^{93}\) 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.\(^{94}\) 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.\(^{95}\) 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]’.\(^{96}\) For these purposes, a ‘product’ means ‘any goods’,
including aircraft, and a product that is comprised in another product;\(^{97}\) there is a ‘defect’

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\(^{91}\) 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

\(^{92}\) See Section II.i and ii.

\(^{93}\) As discussed in Section II.i.

\(^{94}\) See, for example, Articles 21 and 22 of the Montreal Convention, as incorporated into English law as
Schedule 1B to the 1961 Act and revised by the Carriage by Air (Revision of Limits of Liability under the

\(^{95}\) Upon the completion of the UK’s EU exit, the Act will continue to apply as amended by the Product
Safety and Metrology etc. (Amendment etc.)(EU Exit) Regulations 2019.

\(^{96}\) CPA, Section 2.

\(^{97}\) CPA, Sections 1(2) and 45(1).
if 'the safety of the product is not such as persons generally are entitled to expect';\textsuperscript{98} and 'damage' means 'death or personal injury or any loss of or damage to any property (including land)'.\textsuperscript{99} However, the CPA does not apply to:
\begin{itemize}
  \item[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';
  \item[b] loss of or any damage to the product itself; or
  \item[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.\textsuperscript{100}
\end{itemize}

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.\textsuperscript{101}

Liability under the CPA is joint and several, and without prejudice to liability on any other basis.\textsuperscript{102} It cannot be limited or excluded by any contract term, notice or other provision.\textsuperscript{103}

Aside from the CPA, there is no specific statutory scheme for product liability of relevance to the aviation sector.\textsuperscript{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).\textsuperscript{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

\textsuperscript{98} CPA, Section 3.
\textsuperscript{99} CPA, Section 5.
\textsuperscript{100} CPA, Section 5.
\textsuperscript{101} CPA, Section 4.
\textsuperscript{102} CPA, Section 2(5) and (6).
\textsuperscript{103} CPA, Section 7.
\textsuperscript{104} Save with reference to employees, as to which see the Employer's Liability (Defective Equipment) Act 1969.
\textsuperscript{105} See its Article 29.
for the recovery from a tortfeasor of certain benefits and NHS charges by the Compensation Recovery Unit of the Department for Work and Pensions. Benefits paid by an agency of another EU Member State may also be recoverable.107

IX DRONES

The CAA has regulatory responsibility for drones weighing less than 150kg.108 The safety regulations for these drones (referred to as ‘unmanned aircraft’ in the UK regulations) are set out within the Air Navigation Order.

On 11 June 2019, the European Commission introduced a package of regulations specific to the use of Unmanned Aircraft Systems (the European UAS Regulations) consisting of Commission Implementing Regulation 2019/947 of 24 May 2019 on the procedures and rules for the operation of unmanned aircraft (the Implementing Regulation) and Commission Delegated Regulation 2019/945 of 12 March 2019 on unmanned aircraft and on third country operators of unmanned aircraft systems (the Delegated Regulation). Both regulations entered into force on 1 July 2019, however, only the Delegated Regulation is applicable in the UK at the time of writing. The Implementing Regulation will not become applicable in the UK until 1 November 2020.109 The European UAS Regulations cover a broad scope, including provisions that address ‘non-aviation safety’ issues related to drones such as privacy and security, as well as aviation safety regulations for drones.110

Until the European Implementing Regulation is applicable, the national regulations of the UK must be followed. The current UK regulations for drones are set out below.

Drone operations in the UK must be approved by way of a special permission from the CAA, except where a ‘small unmanned aircraft’111 is operated for recreational purposes and in accordance with particular operating conditions.112 Those operating conditions include:

1. that a person does not cause any article or animal to be dropped from the drone so as to

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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.

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. Regulation (EC) No. 216/2008 will remain in force until the European Commission package of regulations relating to the use of Unmanned Aircraft Systems comes into force in the UK on 1 November 2020. At that time, the Basic EASA Regulation will also apply to all unmanned aircraft irrespective of weight. Upon the completion of the UK’s EU exit, the Basic EASA Regulation will continue to apply with the modifications made by the Aviation Safety (Amendment etc.)(EU Exit) Regulations 2019 as amended by the Aviation Safety (Amendment etc.)(EU Exit) (No.2) Regulations 2019.

109 The UK has elected that it will not apply the Implementing Regulation before 1 November 2020 due to the disruption caused by the covid-19 pandemic. The UK’s position upon completion of EU Exit is not yet clear. However indications of the potential position are set out in CAP 1789, as to which see the next footnote.

110 Further guidance on these regulations can be found in the CAP 1789, dated 29 April 2020: https://publicapps.caa.co.uk/docs/33/CAP1789%20April%202020.pdf.

111 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.

112 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/.
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.\footnote{ANO, Articles 94 and 94A as amended by Air Navigation (Amendment) Order 2019.}

Additional operating requirements apply to drones fitted with surveillance equipment.\footnote{ANO, Article 95.}

In 2019, the CAA 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.\footnote{ANO, Article 94A. These rules came into force under the Air Navigation (Amendment) Order 2019 on 13 March 2019.}

The regulations place responsibility on both the drone operator and the remote pilot to ensure that a drone is not operated within a flight restriction zone.\footnote{ANO, Article 94A.}

Anyone responsible for a drone weighing between 250 grams and 20 kilograms must register as an operator with the CAA, upon which they will be issued with an operator’s registration number which must be displayed on the drone. Operators of drones that fall within this weight category must also pass an online test prior to commencing operations.\footnote{ANO, Articles 94C–94F.}

Remote pilots flying a drone who hold a current CAA permission or exemption from drone operations, such as a permission related to commercial operations, are exempt from having to undertake the online test. This registration system was introduced in November 2019 and was developed to align with the requirements set out by EASA for the proposed future EU drone registration system.

**X VOLUNTARY REPORTING**

The UK has a Confidential Human Factors Incident Reporting Programme (CHIRP), which is run by a charitable trust.\footnote{See www.chirp.co.uk.}

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),\footnote{See www.airproxboard.org.uk/home. The UKAB is sponsored and funded by the CAA and its military equivalent, the Military Aviation Authority.} 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.

\footnote{ANO, Articles 94 and 94A as amended by Air Navigation (Amendment) Order 2019.}
\footnote{ANO, Article 95.}
\footnote{ANO, Article 94A. These rules came into force under the Air Navigation (Amendment) Order 2019 on 13 March 2019.}
\footnote{ANO, Article 94A.}
\footnote{ANO, Articles 94C–94F.}
\footnote{See www.chirp.co.uk.}
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{120}

As to mandatory reporting, see Section IV.

XI THE YEAR IN REVIEW

Over the past year, aviation in the UK has continued to be 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{121} 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 was then extended until 31 January 2020, whereupon it formally left the EU. However, it will continue to apply EU law as if it was a Member State until the end a transitional ‘implementation period’ which is currently due to end on 31 December 2020.\textsuperscript{122} Negotiations as to the UK’s relationship with the EU and EU law thereafter are in progress. As to the consequences of Brexit, see Section XII.

As with the rest of the world, 2020 has also seen the unprecedented effects on the UK as a result of covid-19, which was declared a global pandemic on 11 March 2020. Although this has not caused the UK to formally close its borders, the severe drop in passenger numbers travelling into, out of and within the UK due to the restrictions imposed by the UK government on movement of UK persons, as well as similar restrictions on travel and movement applied in other countries, has led to a very significant reduction in all aviation activities in the UK. At the time of writing, the effects of this are ongoing and predicted to continue to be felt for a prolonged period. It is reasonable to anticipate that the consequences of covid-19 will have a profound effect on the size and shape of the UK aviation industry for some time to come.

The saga of the development of new runway capacity in the South East of England has taken another twist during the course of the last year, with the Court of Appeal holding that the government’s designation in favour of the development of a third runway at Heathrow

\textsuperscript{120} 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 occurring or is likely to occur.


\textsuperscript{122} See the European Union (Withdrawal) Act 2018 (as amended).
airport in its ‘Airports National Policy Statement’ was unlawful because it failed to take into account the 2015 Paris Agreement.\(^{123}\) On 7 May 2020, the Supreme Court gave permission for this decision to be appealed to it.

In October 2019, the UK government published its ‘Consultation Response on Legislation for Enforcing the Development of Airspace Change Proposals’ in follow-up to its consultation on the future of UK aviation to 2050.\(^{124}\) Legislation is apparently to follow.

### 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 once the UK completes its current transition period from EU membership, or what the wider economic implications of Brexit will be. For these reasons alone the UK aviation market and aviation law are likely to endure a considerable period of uncertainty over the next few years. However, that uncertainty is now compounded considerably by the impact of the covid-19 pandemic and the recession it is precipitating. There can be little doubt that we are in for evolutionary times.

\(^{123}\) R. (on the application of Friends of the Earth Ltd and others.) v. Secretary of State for Transport v. Heathrow Airport Ltd and others [2020] EWCA Civ 214.

Appendix 1

ABOUT THE AUTHORS

DIETER ALTENBURGER
Jarolim Partner Rechtsanwälte GmbH

Dr Dieter Altenburger, MSc is a partner at 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.

ANGELA ATHERDEN
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. She was recognised as a Rising Star by Airfinance Journal, a market leading financial publication of the global aircraft and aviation business. She is one of only seven lawyers worldwide to be given this recognition in the publication’s 2019 awards issue.
TAREK BADAWY

Shahid Law Firm

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 2020) among other things. He has degrees from the American University in Cairo (BA), Cairo University (LLB), Essex University (LLM), and McGill University (BCL/LLB).

MARC KYUHA BAEK

Jipyong LLC

Mr Marc Kyuha Baek joined Jipyong LLC’s litigation practice group (labour) after graduating from Korea University School of Law in 2019. Mr Baek is a member of the Korean Bar and has a BSc in industrial and labour relations from Cornell University.

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).
NICOLAS BOUCKAERT
Kennedys

Nicolas Bouckaert is a partner at Kennedys, whose Paris office he co-founded in October 2017. He is qualified as a French Avocat à la Cour and a solicitor in England and Wales, having studied in England (University of Oxford and University of York) and trained at a Magic Circle firm in the City, before relocating to Paris and joining one of France’s leading (re)insurance practices, at litigation boutique firm BOPS.

Nicolas is regularly instructed in complex and international disputes, both before French courts and arbitration tribunals, where he acts for leading (re)insurers, manufacturers and service providers. His practice, which has a particular focus on product and professional liability, includes the entire range of (re)insurance disputes (i.e., coverage, defence and subrogation), as well as general commercial disputes and court-appointed technical investigations (specifically those relating to industrial risks). It spans several key industry sectors, such as real estate, construction, manufacturing, finance and aerospace (Nicolas leads the aerospace product liability practice of Kennedys’ Paris office). Nicolas is also very active in (re)insurance matters relating to political risks and trade credit insurance.

Nicolas is recommended for insurance and aviation by leading legal directories (including The Legal 500 and Chambers) and has been identified as a ‘Rising Star’ for insurance in France by Expert Guides in 2019, a ‘Europe Rising Star’ for insurance by the Legal Media Group in 2019 and a ‘Next Generation Partner’ for insurance in France by The Legal 500 in 2020.

He publishes regularly and is one of the co-authors of, inter alia, The Insurance and Reinsurance Law Review, The Class Action Law Review, the Insurance Litigation by Lexology GTDT, the FARAD Private Life Insurance Handbook and The In-House Lawyer’s Country Comparative Guide on Insurance and Reinsurance.

Nicolas is a member of the Franco–British Lawyers Society (FBLS), the British Insurance Law Association (BILA), the Insurance and Reinsurance Legacy Association (IRLA), the Association Internationale du Droit des Assurances (AIDA) and the Association du Management des Risques et Assurances de l’Enterprise (AMRAE).

Nicolas is bilingual in English and French and also speaks Italian.

AURÉLIA CADAIN
Kennedys

Aurélia Cadain is a partner at Kennedys, whose Paris office she co-founded in October 2017. She is an insurance specialist with extensive expertise in complex litigation matters of transport law, industrial risk, insurance and product liability, including health products.

She acts for global insurers and assists well-known airline companies both in their day-to-day operations and in important litigation. Aurélia also acts for pharmaceutical companies. Her practice includes coverage disputes, defence work, subrogation claims. It spans several key industry sectors (aerospace, transport, tourism, manufacturing, health industry and medical malpractice) with a particular focus on product liability. Aurélia has developed particular experience in complex expert-appraisal proceedings including in aviation and marine matters, and industrial risk.

Aurélia also has a daily practice in advising and litigating complex transport claims (in aviation, marine, road and rail) involving individuals and carried goods.
She holds a master’s degree in business law from the University of Paris X – Nanterre as well as a master of international law and management from HEC Business School, Paris. Aurélia also holds an LLM in European law from the University of Canterbury University.

Aurélia is a member of AIDA (Association Internationale de Droit des Assurances), IAWA (International Aviation Womens Association), SFDAS and ISC France.

Aurélia speaks French, and she is also fluent in English and Spanish.

**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*.

**RALUCA DANCIU**

*Iordache Partners*

Raluca Danciu is a senior lawyer specialising in commercial law, with a focus on international contracts and international arbitration.

**ANA LUISA CASTRO CUNHA DERENUSSON**

*De Luca, Derenusson, Schuttoff Advogados*

Ana Luisa Castro Cunha Derenusson is the head of the aviation practice and is recognised by *Chambers Latin America* and *The Legal 500 Latin America*. Ana Luisa is recognised by her peers and clients as a leading player in the aviation finance arena. She is also a member of the American Bar Association (ABA) and the International Bar Association (IBA), and was co-chair for the International Transportation Committee of the American Bar Association (ABA), Section of International Law, from 2014–2015, and president of the Legal Committee of ABAG – Brazilian General Association for Civil Aviation in 2013. She was a member of the Steering Group of Transportation Committee and of the Aerospace & Defense Committee of the American Bar Association (ABA), former president of the Legal and Tax Committee of the Brazilian British Chamber in Sao Paulo (BRITCHAM) and country coordinator of the Inter-American Law Committee of the American Bar Association (ABA) in 2000.

**AZRA DIZDAREVIC**

*Jarolim Partner Rechtsanwälte GmbH*

Azra Dizdarevic LLM is an attorney 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 and transport law, especially air passenger rights, and public law. Moreover, she is an experienced litigation lawyer.

**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 the finance team at Maples and Calder, the Maples Group’s law firm, 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.

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 Shangdong 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 the 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.
MARÍA PÍA GARCÍA HENRÍQUEZ
Squire Patton Boggs Peña Prieto Gamundi

María Pía García focuses her practice on corporate law, mergers and acquisitions, intellectual property, contracts, regulatory matters and civil aviation. María Pía 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. María Pía also assists clients in creating and implementing corporate structures.

María Pía obtained her LLM in civil law (Panthéon-Assas, Paris II) and a master’s degree in administrative law and economic regulation (Mother and Teacher Pontifical Catholic University, Santo Domingo). María Pía 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 until he merged the firm with Kennedys.

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 has recently been sole arbitrator under ICC rules in respect of a lease dispute, and adviser in relation to a European aviation manufacturers product liability and insurance disputes. He is currently advising, inter alia, in a coverage and liability dispute in relation to a space products liability policy and in respect of a coverage dispute in a multi-death helicopter accident. He is also acting as part time general counsel for a European airline.

Mr Gates is CEO of Gates Aviation. He is also senior vice president of legal affairs at Kenyon International Emergency Services, director and 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 an enthusiastic amateur oenophile.

SERGI GIMÉNEZ BINDER
Augusta Abogados

Sergi Giménez is a partner at Augusta Abogados, a mid-sized, full-service Spanish law firm known for its expertise in aviation law, among other practice areas. Sergi’s career spans more than 30 years in the field of international business law. His professional career has always been closely linked to international law, due to his recurring work with multinational companies with business dealings in Spain and vice versa. In particular, Sergi has spent more than
20 years advising both national and international companies linked to the aviation industry, working on transactions of all kinds. In addition to airlines, his clients include the owners of aircraft and engines, lessors and financial companies. He also has lengthy experience in the tourism industry, providing advice to tour operators, hotel companies, cruise operators and companies of all types in the leisure sector.

**RITA DE CASSIA FERNANDES DE GODOY**
*De Luca, Derenusson, Schuttoff Advogados*

Rita Godoy graduated at the Faculty of Law of São Bernardo Campo. Rita has extensive practice in aircraft financing transactions. She has worked for leading law firms in Brazil. Rita is a member of the Aeronautical Committee of the Sao Paulo Bar Association.

**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.

**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 practises 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.

CLAUDIA HESS
Urwantschky Dangel Borst and Partners

Claudia Hess joined Urwantschky Dangel Borst in April 2007 and became a partner in 2012. She graduated from the law school of the University of Passau and completed a law and language education in English, French and Chinese law. She completed her legal traineeship at the Higher Regional Court Nuremberg. Moreover, she has studied at Sichuan University in Chengdu, China, and has worked in Beijing for a German–Chinese law firm and a German automobile manufacturer as well as for the Sichuan–American Chamber of Commerce in Chengdu, China.

In the firm, Claudia handles cases for airlines and their insurers worldwide related to German and EU law. She provides advice and assistance out of court and she represents her clients in court proceedings and in proceedings initiated by administrative bodies.

Claudia deals with cases and queries involving liability and regulatory issues, compliance, commercial, contractual and data protection matters as well as claims concerning EU regulations and international treaties. She represents airlines in cases initiated by consumer protection agencies. Claudia drafts and reviews terms and conditions as well as data protection policies and assists airlines in complying with the requirements of ETS. She also provides advice on the legal landscape concerning drones.

Claudia Hess is fluent in German, English, French and Chinese (Mandarin).

Claudia is regularly invited as a speaker and panellist to international air law conferences. She is recommended as an aviation lawyer in various legal publications such as Who's Who Legal and The Legal 500. In 2015 and 2016, she was nominated a ‘Rising Star’ by Expert Guides – Aviation and in 2019 and 2020, she was nominated a ‘Thought Leader’ by Who’s Who Legal.

She regularly writes articles in air law publications and contributes to legal guides on aviation law.

SHARI HOWELL
Maples Group

Shari Howell is of counsel with the finance team at Maples and Calder, the Maples Group’s law firm. 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.

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).

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 KOWARSKY
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 by 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.
CHANG YOUNG KWON

Jipyong LLC

Mr Chang Young Kwon is a partner in Jipyong LLC’s labour & employment practice group and represents clients in diverse areas of general corporate, labour relations, shipping and aviation, construction and real estate, civil and criminal law, public administration, trade disputes and medial disputes.

Before joining Jipyong LLC in March 2017, Mr Kwon served as a judge in numerous courts. When he resigned, he was the Chief Justice of Uijeongbu District Court. During his 18-year service as a judge, Mr Kwon handled many complex cases in various fields of law including civil, commercial, criminal and administrative, preservation, tax, medical, religion, family and insolvency cases.

Based on his many years of trial experience regarding civil execution and applications (provisional seizures and injunctions), Mr Kwon has published a book entitled Civil Preservation Law, which is regarded as the best academic book on the subject, and the Commentary to the Civil Execution Act Vol. 7.

In the field of aviation, Mr Kwon is an adjunct professor at the Korea Aerospace University, president of the Society of Aviation Law Cases, vice president of the Air Noise Policy Form and executive director of the Korea Society for Air & Space Law and Policy. Mr Kwon has also authored Aviation Law Case Commentaries, which has been published in three volumes, each regarding Aviation Civil Law, Aviation Labour Law and the Law of Carriage by Air, respectively.

Mr Kwon is a member of the Korean Bar and has a PhD in law from Seoul National University.

JOANNA LANGLADE

Kennedys Brussels LLP

Joanna Langlade is an associate at the Brussels office of Kennedys.

She completed her bachelor’s diploma at the University of Paris 1 Pantheon-Sorbonne, after which she went to Leiden University to specialise in public international law (LLM 2016) and air and space law (Advanced LLM 2017, cum laude). She gained experience in the aviation and space industry and joined the Brussels office of Kennedys, led by Dimitri de Bouronville, in 2019. She focuses on international and European aviation law as well as regulatory affairs and did a secondment in an insurance company during her time at Kennedys.

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.
RHINA MARIELLE MARTÍNEZ BREÁ
*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 19 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.

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.

ANNA MASUTTI
*R&P Legal*

Anna Masutti is a tenured professor of air law at Bologna University and a partner at R&P Legal Law Firm. She represents clients in court, both ordinary and administrative, as well as in arbitration and mediation forums with regard to legal issues arising from airlines’ liability, aircraft finance and leasing, employment and corporate issues. She advises her clients in relation to a wide variety of regulatory matters including representation before governmental agencies, such as antitrust authorities and civil aviation authorities.

She provides assistance and advice in the drafting of aviation contracts, in particular for the purchase, sale and lease of aircraft and related financial and guarantee transactions. She also assists air carriers in obtaining the air operator’s certificate (AOC) and related licences.
Anna advises public bodies in relation to financing procedures for air services in accordance with the Community guidelines on state aid and in relation to the preparation of calls for tender for the allocation of routes subject to public service obligations.

Anna regularly works with the European Commission in European programmes concerning the regulation of UAVs (drones) and the development of new aerospace technologies (EGNOS and Galileo GNSS programmes).

Anna Masutti is member of the Board Committee of the European Air Law Association (EALA), an officer in the Aviation Committee of the IBA (International Bar Association) and member of AIDINAT – the Italian Association of Navigation and Transport Law – and of the Scientific Technical Committee of Insurance SkillJam.

She is the author of several monographs in the field of aviation law, transport and public services. She is the editor of The Aviation and Space Journal of the University of Bologna, a member of the Scientific Committee of the journal Transport Law and of the journal Marine Aviation & Transport published by ANIA (Associazione Nazionale Imprese Assicurative).

**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).

**JAKOB DAHL MIKKELEN**

*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, and in 2020 he became a director 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.

**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**  
*Supreme Court of Cyprus*

Andrea Nicolaou is a registrar at the Supreme Court of Cyprus. 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 worked as an advocate, 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.

**GORAN PETROVIĆ**  
*SMATSA ANS Personnel Training Centre and SMATSA Aviation Academy*

Goran Petrović is a lawyer and instructor for complex theoretical training – aviation law specialist at SMATSA ANS Personnel Training Centre and SMATSA Aviation Academy. The primary fields of practice that Goran covers are aviation law, telecommunications 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, the 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 he is the author of books and articles on product liability, the law of damages and procedural subjects.

INGRID SANTOS ALVES ROSA
*De Luca, Derenusson, Schuttoff Advogados*

Ingrid Rosa graduated at the United Metropolitan College, postgraduate student in extrajudicial law. She has practiced in civil and criminal areas, and is currently working in the area of aeronautical law.

JULIA GAZINEU MACHADO SANCHES
*De Luca, Derenusson, Schuttoff Advogados*

Julia has extensive practice in aircraft financing transactions and insurance matters. She has worked for a large airline in Brazil and for an American reinsurance company.
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.

ISABEL SEVZATIAN SILVEIRA  
*De Luca, Derenusson, Schuttoff Advogados*

Isabel has practised extensively in aircraft financing transactions. She has worked for a large airline in Brazil and for a Brazilian trading company.

JANE YOUNG SOHN  
*Jipyong LLC*

Ms Jane Young Sohn is a foreign attorney in Jipyong LLC’s M&A/corporate practice group and energy, resources and infrastructure practice group.

Trained and qualified in the United Kingdom, Ms Sohn has diverse international experience across many jurisdictions, including the United Kingdom, the Middle East, Europe and North America. Representing clients from a variety of industries including, oil and gas, energy, aviation, healthcare, media and technology, construction, infrastructure, retail, and financial service sectors, Ms Sohn advises on private equity and venture capital matters, complex cross-border mergers and acquisitions, takeovers, divestitures, joint ventures, corporate/project finance transactions and international dispute resolution.

Prior to joining Jipyong LLC, Ms Sohn was an associate in the corporate and finance practice at Morgan Lewis & Bockius LLP’s Dubai office.

Ms Sohn is qualified as a solicitor of England and Wales and has a BA in archaeology & anthropology from the University of Cambridge, UK.
ANDREW TULLOCH

*Colin Biggers & Paisley*

Andrew Tulloch is a partner in 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.

PETER URWANTSCHKY

*Urwantschky Dangel Borst and Partners*

Peter Urwantschky received his law degree from the University of Munich in 1977 and his PhD in 1985 with a dissertation on conflicts of laws arising in aviation disasters. Mr Urwantschky earned an LLM from the Boalt Hall School of Law, Berkeley in 1981. He has also studied at the Universities of Berlin and Paris.

Mr Urwantschky joined Urwantschky Dangel Borst in 1981 and has been a partner since 1985. The firm has specialised in aviation law since 1955. Mr Urwantschky is active in the areas of German and international aviation law. He deals with legal problems and commercial transactions for a wide range of clients in the aerospace and insurance industries.

Peter Urwantschky advises airlines and their insurers on all aviation matters. He deals with liability and regulatory issues. He also handles cases involving EU legislation. Moreover, he and his firm advise on antitrust and competition law matters.

Mr Urwantschky is a member of the Aviation Insurance Association, the Association Suisse de Droit Aérien et Spatial, the European Air Law Association and the Transportation Lawyers Association, and is a fellow to the International Academy of Trial Lawyers. He has spoken on aviation conferences in Europe and overseas. His clients profit from his links with aviation law experts throughout the world.

Peter Urwantschky was elected as Transport Lawyer of the Year 2015 by *Who’s Who Legal*.

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 Bouronville, in 2019.
CONTRIBUTORS’ CONTACT DETAILS

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

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

AUGUSTA ABOGADOS
Vía Augusta 252-260
08017 Barcelona
Spain
Tel: +34 93 3621620
Fax: +34 93 2009843

Paseo de la Castellana 135
28046 Madrid
Spain
Tel: +34 91 7906844
Fax: +34 91 2975497
s.gimenez@augustaabogados.com
www.augustaabogados.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

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
18 Londra St, ground floor, ap. 6
Bucharest 011763
Romania
Tel: +40 374 616 161
Fax: +40 374 676 767
adrian@iordache.partners
raluca@iordache.partners
iordachepartners.com

GATES AVIATION LTD
24 Paultons Square
London
SW3 5AP
United Kingdom
Tel: +44 20 7469 6437
Mob: +44 7768 930441
sgates@gatesaviation.com
www.gatesaviation.com

JAROLIM PARTNER RECHTSANWÄLTE GMBH
Volksgartenstraße 3/2nd floor
1010 Vienna
Austria
Tel: +43 1 253 7000
Fax: +43 1 253 7000 43
dieteraltenburger@jarolim.at
azra.dizdarevic@jarolim.at
www.jarolim.at
Contributors' Contact Details

JIPYONG LLC
10F, KT&G Seodaemun Tower, 60 Chungjeong-ro, Seodaemun-gu Seoul 03740 Korea
Tel: +82 2 6200 1600
Fax: +82 2 6200 0800
icarus@jipyong.com
khbaek@jipyong.com
jysohn@jipyong.com
www.jipyong.com

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
kim.verhaeghe@kennedyslaw.com
joanna.langlade@kennedyslaw.com
31 Rue de Lisbonne
75008 Paris France
Tel: +33 184 793 780
Fax: +33 145 636 172
aurelia.cadain@kennedyslaw.com
nicolas.bouckaert@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
www.kennedyslaw.com

KROMANN REUMERT
Sundkrogsgade 5
2100 Copenhagen East Denmark
Tel: +45 70 12 13 11
Fax: +45 70 12 14 11
jrj@kromannreumert.com
jdm@kromannreumert.com
www.kromannreumert.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.howell@maples.com
www.maples.com

PHOEBUS, CHRISTOS CLERIDES & ASSOCIATES LLC
Agias Elenis 2
Stasinos Court
Nicosia, 1514
Cyprus
Tel: +357 22753015
Fax: +357 22752085
c.clerides@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
kokseng@rdl.com.my
chewphyekeat@rdl.com.my
www.rajadarrylloh.com

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Contributors’ Contact Details

R&P LEGAL
Piazzale Luigi Cadorna, 4
20121 Milan
Italy
anna.masutti@replegal.it
Tel: +39 051 232495
Mobile: +39 335 5971572
Fax: +39 051 230407
www.replegal.it

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

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

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

SCHILLER RECHTSANWÄLTE AG
Kasinostrasse 2
PO Box 1507
8401 Winterthur
Switzerland
Tel: +41 52 269 16 16
Fax: +41 52 269 16 00
hempel@schillerlegal.ch
maritz@schillerlegal.ch
www.schillerlegal.ch

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
www.squirepattonboggs.com

SHAHID LAW FIRM
20B Adly Street
Cairo 11511
Egypt
Tel: +20 22393 5557
Fax: +20 22393 5447
tarek.badawy@shahidlaw.com
www.shahidlaw.com

© 2020 Law Business Research Ltd
URWANTSCHKY DANGEL BORST
AND PARTNERS
Insel 1
89231 Neu-Ulm
Germany
Tel: +49 731 70 70 941
Fax: +49 731 70 70 999
urwantschky@udabo.de
claudia.hess@udabo.de
www.udabo.de
THE SPORTS LAW REVIEW
András Gurovits
Niederer Kraft Frey

THE STRUCTURED PRODUCTS LAW REVIEW
Christopher S Schell, Yan Zhang and Derek Walters
Davis Polk & Wardwell LLP

THE TAX DISPUTES AND LITIGATION REVIEW
Simon Whitehead
Joseph Hage Aaronson LLP

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW
John P Janka
Latham & Watkins

THE THIRD PARTY LITIGATION FUNDING LAW REVIEW
Leslie Perrin
Calunius Capital LLP

THE TRADEMARKS LAW REVIEW
Jonathan Clegg
Cleveland Scott York

THE TRANSFER PRICING LAW REVIEW
Steve Edge and Dominic Robertson
Slaughter and May

THE TRANSPORT FINANCE LAW REVIEW
Harry Theochari
Norton Rose Fulbright

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Michael S Sackheim and Nathan A Howell
Sidley Austin LLP

www.TheLawReviews.co.uk

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