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General Chapters:

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EDITORIAL

Welcome to the fifth edition of *The International Comparative Legal Guide to: Aviation Law.*

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of aviation laws and regulations.

It is divided into two main sections:

Four general chapters. These chapters are designed to provide readers with an overview of key issues affecting aviation law, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in aviation laws and regulations in 24 jurisdictions.

All chapters are written by leading aviation lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Alan D. Meneghetti of Locke Lord (UK) LLP and Philip Perrotta of Arnold & Porter Kaye Scholer LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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The Use of Personal Data in the Commercial Aviation Industry

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The aviation industry, much like any other industry sector, generates data. But in the aviation sector there is not only data, but vast amounts of just about every type of data – from engineering and scientific data, to flight data and weather data, through to consumer data, passenger data, security data, personal and in some cases (what we in the EU refer to as) sensitive personal data (that is, data regarding one's race and ethnic origins, physical health, religious beliefs and so on) [see Endnote 1].

The generation of data gives rise to many questions, the following being the ones which come immediately to mind:

- Where is this data collected?
- How is this data treated by the recipient or holder of that data?
- Where is the data stored?
- Does the data need to be stored securely and, if so, is it?
- What is the intended use of this data, and how is it used in practice?
- If the data relates to an individual (the individual to which the data relates is referred to in many jurisdictions as the "data subject"), did they supply their consent knowingly, willingly and whilst being fully informed of the uses to which that data will be put, where it will be stored and processed, and what security arrangements are in place with respect to that data (and – a corollary of sorts – may they withdraw their consent and "take their data back")?

Naturally, the answers to, and indeed the relevance of, these questions will depend on the type of data involved – flight, weather and engineering data (for example) is treated differently and by different people to personal data collected by shops and airport operators from the sale of duty-free merchandise or through customers logging on to the airport's website. Furthermore, not all types of data are protected by law – whilst certain types of data (most notably, personal data) will be legislatively protected in many jurisdictions, other types of data may be protected simply by the parties on the basis that it is confidential or business-sensitive.

In this short chapter we look at some instances where (that is, at which points) personal data is collected in the commercial aviation industry, how it is collected (for example, automatically or by a submission from the data subject) and what its potential uses are. This topic is large and one can write chapters and even books on the issues raised by, and the answers to, the questions above. This chapter will endeavour to provide the reader with a starting point for the issues which the questions raise, and some answers.

Collection Points

First then, where is personal data collected? One might, quite realistically, respond to that question with the answer that data collection takes place from the beginning to the end of the consumer (in most cases in the context of this chapter, this will be the passenger) experience. Take for example the following scenario, which is typical of a passenger travelling on an airline:

> A passenger wishing to travel from London Heathrow logs onto the Heathrow Airport website to find out the best way to travel to the airport. Cookies are collected which track her movements through the airport's website's pages. The passenger may even volunteer her email address and other personal information in order to be contacted by the airport in the event of delays (due, for example, to bad weather) or to receive regular updates and news from the airport. Before leaving her house or whilst on her mobile, the passenger checks in online, selects her seat on the aircraft and inputs her meal choice and any dietary requirements which she may have (at which point more cookies are collected, as well as personal data, this time by the airline on which the passenger is travelling. Potentially, sensitive personal data is also collected; for example, pointers to the passenger's physical health and religion may (although admittedly not necessarily) be indicated by meal choices and special requirements). Once at the airport, the passenger drops her bag at the airline's bag-drop counter (again, delivering personal data such as her name, address, flight details and so on), clears customs and immigration (at which point more personal data is submitted to the customs authorities) and proceeds to security, where she is scanned using a full body scanner (which collects personal data regarding the passenger, at least to the extent to which the scanners are able to identify any physical health issues such as implants, not to mention generating images of the passenger's body, which raises a number of privacy concerns for adults, let alone minors [see Endnote 2]). The passenger then buys some duty-free goods on her debit card, showing her boarding card (which is scanned – again, more personal data is collected, this time regarding the passenger's whereabouts and purchasing preferences), and boards the aircraft where, if she is travelling internationally, she may have to fill out an immigration form requesting further pieces of personal data. The passenger may also purchase more goods on board, on her debit card and after submitting her frequent flyer details.

There are, of course, other scenarios and related collection points which I have invariably missed out in the above scenario (for instance, the passenger may have a duty-free loyalty card [see Endnote 3] which the passenger scans when she purchases items, thereby allowing the duty-free rights holders the opportunity to collect further data on her shopping habits), but the scenario does illustrate the point that, whilst not quite limitless, the opportunities for various organisations and companies to collect data each and every time a passenger travels are multifarious.

Treatment of the Data by the Data Collector

As a rather generalised but relatively accurate observation, how the personal data which is collected is treated by the entity collecting it is, by and large, driven by the purpose for which that data is collected. Again, simply put, the first question which should be asked is whether the data collected was for the purposes of security and/or crime prevention, or whether it was collected in order to bolster the collecting entity's business intelligence and business requirements (for example, passenger manifests, passenger dietary requirements and so on).

In the case of the former, strict controls exist around exactly:

- what personal data may be harvested (usually the minimum which is necessary);
- how long it may be kept (this varies from jurisdiction to jurisdiction, but the usual rule of thumb is as long as may be required); and
- whether that data may be transferred out of the jurisdiction or to other crime prevention agencies (generally yes to prevent crimes).

Furthermore, in the case of personal data collected for security reasons, the issue of whether the data subjects concerned have consented to the collection of their data and its subsequent use does not usually arise as this data may be collected without the consent of the data subject, provided it is required for the purposes of the prevention of crime and is collected and held in accordance with the relevant legislation.

On 14 April 2016, the European Parliament approved the terms of the EU Passenger Name Record (PNR) Directive, obliging airlines flying into the EU to hand EU countries their passengers' data in order to help the authorities to fight terrorism and serious crime. Member States have until 25 May 2018 to implement the Directive into their national laws. The Directive will require Member States to set up "Passenger Information Units" (PIUs) to manage the data collected by airlines. The information will have to be retained for a period of five years, but after an initial six-month retention certain data will be removed such as the name, address and contact details of the passenger. While this Directive will only apply to flights from outside the EU into the EU, Member States may subsequently decide to extend this requirement to internal flights within the EU, as well as requiring tour operators and travel agencies to hand over their data to PIUs. In turn, the PIUs will ultimately be responsible for transferring the data (if required) to competent national authorities as well as liaising with other PIUs to improve European co-operation in tackling terrorism and trafficking [see Endnote 4]. It is fair to say that for all jurisdictions which have data protection laws of which this author is aware, personal data collected for the purposes of crime prevention may be collected without the consent of the data subject. Of course, this statement is subject to the proviso that all relevant legislative controls in relation to the collection and use of that data are adhered to and that the personal data is only used for the express purposes for which it is collected.

However, contrast this with the situation where the personal data of the passenger is collected for commercial reasons, for example when the passenger purchases an item at duty-free and swipes her loyalty card, when they submit their information (perhaps by dropping their business card into a box) for the chance to win a prize, or when the passenger checks in for a flight. In the EU, there is a general prohibition on data transfers to non-EU/EEA countries that are not officially recognised as having an adequate level of data protection (only a handful of countries – such as New Zealand, Israel, Australia and Switzerland – have been officially recognised by the EU as having an adequate level of protection). The sharing of personal data within the EU is also now subject to stricter laws on data processing and sharing. New data protection legislation was adopted by the European Parliament on 5 May 2016, further strengthening data protection rights for European citizens. The General Data Protection Regulation (GDPR) [see Endnote 5] will have to be transposed into the national laws of Member States by 25 May 2018. From a UK perspective, as a result of the referendum on 23 June 2016 to leave the European Union, the UK government will now need to reach a decision as to whether it will also introduce new national laws that mirror those of the Member States that are subject to this legislation after the UK leaves the EU. Logically speaking, if the UK does adopt new laws they will need to provide a level of protection commensurate with the GDPR if the UK wishes to be designated as a country which is regarded as providing an adequate level of protection.

The GDPR will apply to any entity that controls or processes personal data (regardless of whether that processing takes place outside of the EU). Taking our example scenario above, this would apply to a wide range of businesses, from loyalty card providers to airlines. The legislation will not, however, apply to authorities which process data for the purpose of public security, such as customs authorities (but these will be subject to other legislative requirements) [see Endnote 6]. The example of the prize draw is a more challenging one – section 352 of the Gambling Act 2005 (which is the main legal statute in the UK that governs prize draws) states that any disclosure of personal data must comply with the Data Protection Act 1998. Similarly, once the GDPR comes into force, the new regulations will apply equally to activities that fall within the scope of the Gambling Act. Currently, a major challenge for those operating prize draws, raffles and so on is that if a form is completed to enter into a prize draw, it may have terms and conditions regulating the collection of personal data, but it is arguable that if the form only refers to terms which cannot be read at the time of completion of the form, it may be difficult to enforce these terms against a consumer at a later point in time. Similarly, when a business card is dropped into a box for a prize draw, it is rare for the relevant terms and conditions to be shown (either in full or, for that matter, at all), with the subsequent challenge for the data collector (which is usually the data controller but may also be the data processor) of demonstrating that it has the requisite consents in place to use the data (for example, to contact the passenger regarding future promotions and so on). It is, of course and at least in the EU, incumbent upon the data controller to establish in the event of a challenge [see Endnote 7] that it has the required consents in place. This is the case to an even greater degree under the GDPR. In particular, there is a bolstered requirement under the GDPR for the data subject to give clear affirmative action (for example, by marking in a box) and this may well mean that operators of prize draws are required to clearly display the terms and conditions, and obtain the data subject's consent, before he or she is allowed to participate in the draw.

In the case of passengers travelling by air from the EU to the USA, personal passenger data (ranging from the passenger's name through to their frequent flier information, billing information and all available contact information) may be transferred from the EU to the USA in terms of an agreement between the United States of America and the European Union. [See Endnote 8.]

In addition, and of more general application, a new agreement was reached this year between the EU and USA allowing US companies to store, share and use the personal data of EU citizens, provided that the company is able to meet a number of criteria. Referred to as the "EU-US Privacy Shield", the legislation (which came into force on 1 August 2016) aims to re-establish a trans-Atlantic data framework after its predecessor (known as the "Safe Harbour") was struck out by the European Court of Justice in 2015 for failing to adequately protect the personal data of EU subjects.

There is a long list of criteria that a US company must satisfy in order to obtain this personal data, including:

1. providing the EU data subject with a right to limit how the company can use his or her data;
2. keeping the data subject informed of how the data is being used; and
3. storing the data only for the period required and, after that time, destroying the data safely and securely [see Endnote 9].

Other Concerns

Other concerns arise in relation to the collection, retention and use of personal data collected around the storage of the data, the location of that storage, and to whom the personal data may be transferred (whether as a result of the sale of a marketing list, an intra-group data-sharing arrangement or otherwise). The ability of a company to store and transfer a data subject's personal information has been further limited by new provisions in the GDPR (in particular, the prohibition on the company not to store data for any longer than required by the purpose for which the data was originally collected). In addition, the company must establish appropriate internal technical and organisational measures under Article 25 of the GDPR to ensure that it complies with this requirement.

Unfortunately, length constraints do not permit this short chapter to look into these issues in any depth; however, it is worth noting that data controllers need to be constantly mindful of the consents which they have in place with the relevant data subjects, as well as what they are permitted to do in the absence of those consents [see Endnote 10].

Breaches

Breaches of the relevant legislation invariably lead to administrative fines and penalties in the jurisdiction concerned; this is especially the case under the new GDPR Regulation. In addition, under the GDPR, "appropriate measures" may be taken by the supervisory authority: for minor infringements (dependent on the nature, gravity and duration of the incident) this may be in the form of a reprimand, while very serious infringements could carry criminal penalties under the laws of each Member State. The amount of the administrative fine and/or penalty shall be determined by the competent supervisory authority, which shall set upper-limit caps for each type of breach. In jurisdictions where data protection legislation is still relatively new [see Endnote 11], it is often a challenge to know what approach the relevant regulator will take to breaches, and what types of fine they are willing to mete out.

In Conclusion

The opportunities which data and, in particular, personal data provide to businesses operating in the commercial aviation sector are vast as much as they are valuable, both from a financial as well as a business intelligence perspective. However, the enthusiasm of the business community in this sector should be tempered by an awareness of the applicable legislation and the rights of the data subject.

It has been a busy year for data protection law and many of these changes will have a direct impact on the aviation industry in the months and years ahead. Member States across Europe will be required to transpose these changes into national law and it is probable that the United Kingdom, despite having voted in a referendum to leave the European Union, will either be forced to implement many of these changes (for the UK is not set to leave the EU until 2019) or will decide of its own accord to mirror the changes that are taking place in the remaining Member States. As regards the data protection laws that have been implemented at EU level, it seems that these are moving in many different directions. Firstly, the introduction of the PNR Directive shows that counter-terrorism and serious crime prevention are at the top of EU and national governments' priorities, to such an extent that the protection of personal data is willing to be sacrificed in the interests of national and global security.

The new EU-US Privacy Shield shows that the EU is determined to create a more globalised network of data sharing in an attempt to promote business and growth between the EU and other areas of the world, while the GDPR at the same time introduces stricter measures on how businesses use our personal data. It has been suggested that it may prove very challenging over time for the EU to both implement these stricter measures, as well as allow the personal data of data subjects to be shared over a wider geographic area.

Several leading data protection experts, including the European Data Protection Supervisor, have been quick to criticise the Privacy Shield for failing to safeguard the rights of the individual (as well as for ignoring fundamental EU data regulation principles that are reflected in the GDPR). It is for this reason that many are expecting the Privacy Shield to face intense legal challenges in the European Courts in the near future.

In any event, it is fair to say that operators in the aviation "space" will have their work cut out for them in the near future as they carry through the implementation of these new regulatory changes to the industry. Whilst the benefits of collecting and retaining personal data will continue to grow, the regime in which operators work is becoming stricter and requiring of more attention, not only to the manner in which personal data is collected and the consents which are required to be obtained, but also to the way in which that data is stored, processed, managed and safeguarded.

Endnotes

1. For a list of what constitutes sensitive personal data in the United Kingdom, the reader may refer to s.2 of the Data Protection Act 1998.
2. This is a concern which many privacy advocates argue is disproportionate to any gains in security which body scanners may offer.
3. Such as Heathrow Rewards.
4. The Passenger Name Record Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016.
5. The General Data Protection Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016.
6. Such as the PNR Directive.
7. Whether by a data subject challenging the legitimacy of the data controller's right to contact them, or the relevant data protection supervisory authority (usually investigating complaints from data subjects, around those data subjects being contacted by the data controller without their consent).
8. Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security (Interinstitutional File 2011/0382 (NLE)).
9. Commission implementing decision of 12 July 2016 pursuant to Directive 95/46 EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-US Privacy Shield.

10. For example, without the consent of the data subject, data may be transferred out of the EU to organisations in countries which have been endorsed by the EU as offering "an adequate level of protection".
11. For example, South Africa obtained its first data-protection-specific legislation, the Protection of Personal Information Act, in 2013 (the Act was passed into law on 26 November 2013), although at the time of writing this chapter (January 2017) the Act had yet to fully commence – certain sections of the Act became effective on 11 April 2014.

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The Aviation Industry – Constant Change Leading to Tales of the Unexpected

Arnold & Porter Kaye Scholer LLP

Philip Perrotta

Introduction

Having first contributed a co-editor's article by way of a general chapter to the *International Comparative Legal Guide to: Aviation Law* in 2013, it is relevant and timely to consider again the contents of that chapter, as well as to look in more detail at some of the trends and developments now affecting an aviation industry which inevitably places differing demands on the lawyers which service it.

Although that was little more than four years ago, it is clear that this represents a much longer period in relative terms for the aviation industry. The extent and profundity of developments in the aviation industry in the intervening period, while not being a surprise to anyone other than the most casual observer, should be worthy of reflection and verification as to the industry's capacity to evolve at speed in response to trends and demands, and of course to continue to raise issues across the board for which legal solutions must be found. Accordingly, this chapter will focus on a series of phenomena which have developed in the recent period and will explore some of the reasons for their emergence, and the nature of the matters to which they relate.

In no particular order, the trends identified include: the advent of airlines as competitive leasing companies, in a major shift from their traditional business model; the equity alliance programme of a major international carrier as an alternative to the traditional airline alliance model; the development of major aircraft leasing companies into providers of pre-delivery payment finance (as an alternative revenue stream to replace the business being lost to certain airlines); the sudden potential growth opportunities in markets hitherto blocked by political considerations; and, last but not least – and possibly flying in the face of macro-political and cultural evolution – the re-emergence and re-focusing of the capital markets available to aviation in the US as a primary chosen source of financing for new aircraft equipment.

A. The Airline Leasing Company

There has been plenty of coverage of some very large aircraft purchase orders which have been made in the intervening period, principally in the Asian markets, where market and passenger growth have not yet been affected by the same competitive pressures or the possibly more mature market dynamics which characterise, for example, Europe and North America. Investors and management are prepared, apparently, to assume that these phenomenal growth patterns are set to continue, and that a speculative volume order of new aircraft will be the product.

Examples of particular note in that regard include SriLankan Airlines' US$2.6 billion order for six Airbus A330-300 wide-body aircraft and four Airbus A350-900 wide-body aircraft, VietJet's amazing US$9.2 billion order for up to 100 Airbus A320/A321 CEO and NEO aircraft (subsequently supplemented by a further minimum of 30 A321 aircraft plus a Boeing 737-800 MAX commitment of a similar volume and deal value to their initial Airbus order) and, most recently (and in one of the most dramatic aviation turnarounds), SpiceJet's order for 113 Boeing 737-800 MAX, plus 50 options for additional aircraft worth a stunning aggregate US$22 billion.

The inevitable focus, following orders of this magnitude by operators who seem to be relying heavily on specific niche trends and who, in some cases, lack a long track record of successful operation, tends to be the amount of capital which is going to be required to support the order in individual terms, and the effect which the arrival of the new product is going to have on the business of the airline and its current operating models. However, one interesting and largely unexpected development in the market, to which this era of significant new aircraft orders has seemingly given rise, is the advent of the airline as a genuine threat and market competitor to the transactional powerhouse operating lessors such as GECAS and Aercap, who now find airlines making newly-delivered aircraft which might possibly have become surplus to requirements or not ready for immediate utilisation according to the relevant scheduling plans, available to other operators (and of course customers of the leasing companies) on a sub-lease or even primary lease basis.

It is, of course, well established that the prominent original equipment manufacturers of aircraft build them for their airline customers at a substantially deeper discount than for the traditional operating lessor companies. In the context of the current trend, this can mean that preferred aircraft types are made available to certain carriers in a timescale which can be much shorter than would otherwise be the case, and then at a significantly cheaper lease rate than a reputable operating lessor might require.

While the concept behind this method of making good business from (in these examples, deliberate) excess surplus aircraft and fleet capacity is relatively logical and straightforward, the mechanics involved are less so, and therefore require solid preparation and, in many cases, clear and relevant advice from acknowledged experts.

Firstly, an airline will not have the contracting infrastructure and the necessary orientation to act as an asset monitor and lease manager, with all that this entails as regards personnel and systems. Secondly, it will be critical that its lease, and indeed financing, agreements do not contain restrictions on sub-leasing or the ability to allocate aircraft to third parties in the event that they require this option.

Lastly, it will essentially need to create a new business based on its own delivery schedule from the original equipment manufacturer, which sees it having the flexibility to 'pull' aircraft at reasonably short notice to match its own programme delivery profile.

B. The Equity Alliance Programme (Etihad)

The concept of an airline alliance is, of course, nothing new. There are now three established global alliance networks of airlines who seek to create efficiencies from each other by way of co-ordination of ticketing, route operations, commercial sales and marketing, and other activities such as centralised procurement and aircraft fleet management.

The latest groupings of airlines which comprise each of these three alliances now demonstrate the extent and reach of the alliance concept among the world's carriers, as follows:

a) 'OneWorld' – comprising British Airways, SriLankan Airlines, Iberia, Cathay Pacific, S7 Airlines, Royal Jordanian, airberlin, Japan Airlines, Malaysia Airlines, American Airlines, Finnair, LAN, Qantas, TAM Airlines and Qatar Airways;

b) 'SkyTeam' – comprising Air France/KLM, Alitalia, Kenya Airways, Tarom, Aeroflot, Aerolineas Argentinas, AeroMexico, Air Europa, China Airlines, China Eastern, China Southern, Czech Airlines, Delta, Garuda Indonesia, Korean Air, MEA, Saudia, Vietnam Airlines and Xiamen Air; and

c) 'Star Alliance' – comprising Lufthansa, Air Canada, Avianca, Copa Airlines, United, Adria Airways, Aegean Airlines, Austrian, Brussels Airlines, Croatia Airlines, LOT Polish Airlines, Scandinavian Airlines, SWISS, TAP Portugal, Turkish Airlines – THY, EgyptAir, Ethiopian Airlines, South African Airways, Air China, Air India, ANA, Asiana Airlines, EVA Air, Shenzhen Airlines, THAI and Air New Zealand.

Etihad Airways have broken the mould of the traditional approach taken when looking to derive the benefits of an operator group alliance structure, by implementing its so-called 'Equity Alliance Programme'. While it has been presented as a strategic move which is not intended as a challenge to those other global alliances, indeed as the product of a strategy of not joining an airline alliance, the underlying principles behind it suggest that this is in fact not the case. It envelops Etihad and its partner airlines in a group which is intended to synchronise schedules and frequent-flyer benefits.

Any such agglomeration of operations and attempts to accelerate the gain of market share raises significant implications as regards antitrust and is bringing about a very lively discussion between the partners as regards the commercial basis for any relevant revenue-sharing and the necessary protection and licensing of an intellectual party (such as branding and processes which may be created by an alliance member and utilised by the alliance itself or created by and for the alliance itself).

What makes the Etihad Equity Alliance Programme so compelling, however, is the systemised acquisition of a series of the minority shareholdings involved, to create a series of bilateral partnerships which go beyond the traditional relationship between alliance partners and which are each tailored to meet the commercial leverage and business imperative for each party.

The Equity Alliance Programme produces different results depending on the legal and regulatory issues involved, and the fact that solutions need to be found guarantees a challenging time for aviation lawyers across the board, regardless of their particular specialism.

Example 1 – Jet Airways

The Jet Airways deal was speculated for months, with the two airlines seemingly coming close to realisation of the deal on several occasions, but careful regulatory investigation and bureaucratic hurdles slowed down the transaction. Finally, the Indian government allowed foreign direct investment (FDI) in Indian airlines of up to 49%, having previously been reluctant to do so, fearing that larger overseas carriers would convert domestic airlines into marginalised regional or feeder operations. Something of a watershed was reached, however, and with the domestic airlines (with one or two notable exceptions such as Indigo) continuing to falter in the face of competitive pressures, high taxation and subsequent events assisted Etihad in its final phase of due diligence and its acquisition for US$379 million of 24% of the company with the blessing of India's Foreign Investment Promotion Board.

The strategy of Etihad in the context of the resultant shareholders' agreement encompasses a number of activities and processes designed to integrate the operations of the acquired entity into the Etihad market model.

Firstly, the JetPrivilege frequent-flyer programme was acquired and re-shaped to align with Etihad's own customer products, and a number of slots at London's Heathrow airport which were the property of Jet Airways also became assimilated into Etihad's strategic growth plans for the world's busiest hub airports by way of a sale-leaseback transaction to the Indian carrier.

Example 2 – Alitalia

If there was any residual doubt about Etihad's conviction in their Equity Acquisition Programme, that was surely dispelled for all time in 2015 when €560 million purchased 49% of Alitalia.

The much-maligned (but ultimately extremely seductive) national flag carrier of Italy was careering once more towards another insolvency accompanied by its regular conversation with Brussels to re-define the principles of 'state aid' under EU law. In addition to the price paid for its acquisition, Etihad also committed to an equity-raising of €300 million, a restructuring of Alitalia's short- and medium-term debt in the amount of €598 million and new debt facilities for the airline of around €300 million.

As a strategic step, this was spectacular on the part of Etihad, and as a transaction, it rightly earned plaudits for what amounted to a US$1.9 billion restructuring plan of the perennial loss-making airline which had long come to be regarded as a political phenomenon rather than a business, best known for its huge losses caused by supersize-scale costs and inefficiency and a long outdated sense of its own worth. The industry itself labelled Alitalia as a dinosaur, a problem without a solution and on the verge of collapse, when James Hogan, Chief Executive Officer of Etihad, remarked that they had identified "a great brand, a great network, but a poor business in need of a new direction".

The immediate steps following the addition of Alitalia to the Etihad portfolio are being taken and, incredibly to many observers, there were, at least initially, signs that Alitalia may have a significant future after all. Losses fell for the first time in a long while (its 2015 first-half net loss of US$144 million was a 'slight improvement' on expectations), the combined complimentary route networks of around 200 destinations were presented in a more relevant way and passenger volumes were up across the whole business without the old practice of 'fare-dumping' to deal with competitive factors. By its connection with the Etihad hub in Abu Dhabi, Alitalia also immediately gained a new range of flight connectivity and extensive access (which did not exist before) to destinations across Asia, Australasia and Africa, apparently breathing life into its opportunities. A greater focus on long-haul operations and the elimination of loss-making short-haul flying resulted, and the fruits of that labour started to emerge almost immediately as the market responded in a positive way.

An indication of the genuinely strategic nature of the acquisition was the acquisition by Etihad of a majority stake in Alitalia Loyalty SPA, the company operating the airline's frequent-flyer programme 'Mille Miglia', and five pairs of highly-priced slots at London's Heathrow Airport. Integrating multi-faceted acquisitions of this nature is now something of a specialty for Etihad and, incredibly, the perceived restructuring and synergy benefits, including between Alitalia and the other Etihad equity partners on both a revenue and a cost level, gave rise to a business plan where Alitalia was looking to achieve profitability by 2017. Subsequent pressures and the challenges of dealing with legacy cost structures and burdensome supply arrangements accepted by Etihad as part of its acquisition have notably (and not at all unexpectedly to seasoned observers of the Alitalia story) started to impact on the impressive launch phase of this 'new' Alitalia, with some concerns being voiced as to the amount of investment which will ultimately be required if the latest incarnation of Italy's national flag carrier and one of its strongest international brands is not going to go the way of its predecessors. This might indeed turn out to be Abu Dhabi's greatest challenge yet.

Other

It is worth referencing from a legal as well as a business perspective, the fact that a major incentive behind another Equity Acquisition was to ensure that Etihad was able to proceed with the common branding of its passenger product as 'Pearl Class' for business class and 'Coral Class' for Economy Class. The intellectual property rights associated with these brand names and logos had for many years been owned by, and registered in the name of, a struggling Air Seychelles who were, somewhat surprisingly, added to the programme of acquisition targets. Etihad effected its acquisition model, acquiring a minority stake of 40% of the airline and, most critically, control of the intellectual property rights involved, in exchange for long-term obligations to turn around Air Seychelles, to provide centralised management services from Abu Dhabi, and to boost local and international marketing efforts as regards the airline and its products.

C. The Lessor Financier (PDP Financing)

One of the more fascinating market trends to have emerged since the time of the last contributing editor's piece, as aforesaid, is the expanded role of the established operating lessor, in the direction of a provider of financing to its prospective lessee for its pre-delivery payment obligations to the relevant original equipment manufacturer.

There has also been evidence of an appetite for providing similar finance on the part of an original engine manufacturer where it feels it might need a competitive edge in an engine selection programme, although this is still very unusual and will merit further observation in the near future before that phenomenon, and the issues associated with it, become worthy of detailed analysis.

In both cases, however, the primary driver appears to be oriented around a need to remain competitive in a market which is marked by a significant number of recent, extremely large new aircraft orders, referenced elsewhere in this chapter, by airlines which do not necessarily have the longest proven record of operation, particularly in the Asia-Pacific region.

The features and implications of these orders include the fact that a series of milestone payments for the aircraft in the build phase are required, often at short intervals depending on the delivery programme involved, and the carriers involved do not necessarily generate sufficient cash to service this, notwithstanding the success of their respective business models.

Furthermore, given the relative lack of strength of the airline balance sheets involved, and the evolving landscape in this phase of the industrial cycle as regards the reliability of traditional debt and equity providers, the phenomenon of sale-leaseback financing is set to lead the aviation finance market for the foreseeable future, which is giving rise to a hugely crowded market of lessors jostling for position, as each request for proposals to finance trusted aircraft types comes to the market.

This competition leads us to the sight of operating lessors being cut to the bone as regards their pricing and in terms of the returns they can expect to make on their sale-leaseback transactions, and leads to their fighting to maintain a market profile and presence by attempting to bundle products, including the provision of finance for pre-delivery payments, in exchange for commitments by the airline concerned to select their sale-leaseback financing on delivery of the aircraft from the factory.

So far so good, except that operating lessors are not generally financial institutions or even habitual lenders, and pre-delivery finance is by its nature one of the most complex forms of aircraft finance, not least because the aircraft have not been built at the time of providing the financing to pay for them.

Concerns around the nature of the security a lender can expect, and a series of step-in rights which have to be heavily negotiated between the airline, the lender and the original equipment manufacturer, tend to make this one of the less efficient transactions in terms of time and product (the capital amounts required and generated under pre-delivery payment (PDP) financing facilities are relatively modest given their milestone nature and the back-loading of payment profiles in commercial aircraft purchases). Added to that, the jurisdictions of some of the airlines involved in this phase of the industrial cycle tend not to be extensively tested from an enforcement perspective, with the consequence that a good deal of structuring around 'clawback' of PDP payments may be carried out by an insolvency representative of the airline if the worst happens.

It will be fascinating to see both how this phenomenon develops from this point onwards, given the long-term capital requirements of the airlines as aforesaid, and whether some of those lessors who have learnt the hard way will regard that hard-spent time and money as a useful investment and set up as regular providers of PDP financiers as part of their standard service to customers.

D. Iran and Myanmar – The Next Klondike?

One of the consequences (not always positive, it must be said) of the aviation industry's enduring appetite for innovation and willingness to explore unchartered territories in the name of growth, as well as pioneering attitudes to new or emerging markets globally, is an unbounded optimism when political developments on a global scale suggest that previously restricted access to markets is about to cease.

At the present time it is the turn of Iran and Myanmar to feature in relentless commentary and discussion within the industry when it comes to the possibility of large-scale FDI in countries whose infrastructure – in particular, air transport infrastructure – and equipment are perceived to lag behind their respective economic capabilities. These are now, in theory at least, becoming freed up from some of the severe and long-standing political and regulatory limitations imposed on them, not least by the United States Office of Foreign Assets Control (OFAC), that part of the Department of the Treasury which administers and enforces "economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related

to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States".

Of course, it will now be necessary to analyse these developments in the context of the new Trump Administration and its apparent interest in reviewing the foreign policy of the previous government of the United States, and the progress which has been made needs to be carefully considered by potential investors through that particular lens. However, there are certain elements of helpful certainty in each regard to encourage the industry to continue its excitement about those markets.

1. Myanmar

Myanmar, or Burma to those with a historical perspective on these things, has been on the radar of aircraft suppliers and aviation service providers in the international market very intensively over the recent period. With a burgeoning domestic economy and a population viewed as extremely upwardly mobile, Myanmar has in parallel seen many recent changes in its treatment for export purposes due to the international community's desire to reward Myanmar for its move toward democracy, especially following its last round of political elections which brought to power the party of Aung San Suu Kyi following years of her highly-publicised house arrest. That process took several years to come about, and sprang largely from the momentum created by a long series of international awards to create prestige for Ms. Suu Kyi, including a Rafto Prize, a Sakharov Prize, the Nobel Peace Prize, the Jawaharlal Nehru Award, the Order of Australia, a United States of America Congressional Gold Medal, and the Presidential Medal of Freedom. In the same period, Ms. Suu Kyi was made an honorary citizen of many countries, including Canada, and an honorary member of Nelson Mandela's Elders.

While limitations relating to the aviation industry's ability to supply Myanmar customers continue, the latest development in a positive direction was October 2016's issuance by the White House of a Termination of Emergency with respect to the Actions and Policies of the Government of Myanmar. Consequently, while it is something of a dynamic situation, in particular with the incoming Trump Administration set to take a stated narrower view of US foreign policy generally, there is much to be positive about and this has been reflected already in a number of published transactions.

Of note, and of encouragement to the market, have been deals such as Myanmar Airways' ATR72-600 and MRJ 90 orders in the regional aircraft space, a similar order for Embraer regional jet aircraft and a series of leasing transactions by the leading leasing companies including GECAS, with a series of B737-800 and ATR 72-600 transactions announced in-country.

The enthusiasm around these developments in aviation terms does still have to be balanced against the continuing application of the United States' restrictions on trade and investment as they relate to military use and application, in particular their International Traffic in Arms Regulations (ITAR), which will continue to make deals in the military arena problematic. However, there has also been evidence in that market of the regulators preparing to take a more constructive approach to applications for clearance by investors and suppliers. It should be an interesting next period in that regard.

2. Iran

Iran is a mature and capable historic aviation nation in its own right regardless of the years of sanctions which have impacted on its development, and OFAC has been in the process of lifting certain secondary sanctions through a series of international agreements mostly aimed at Iranian interests. Nevertheless, OFAC regulations and approvals will remain very much a feature of the country's aviation landscape for the foreseeable future.

In January 2016, the Joint Comprehensive Plan of Action (JCPOA) came into force, to much interest in the industry. This was followed by General Licence J in July 2016, which essentially allowed previously-restricted equipment including aircraft to operate into Iran, subject to certain conditions. Airlines in Iran can benefit from a certain relaxation of the rules but, in aviation terms, regulated activities still include the sale, supply, transfer or export of passenger aircraft, information-sharing and technical assistance in aircraft maintenance and assembly, transfer of funds, establishing a joint venture and opening a branch in Iran.

As regards US-origin aircraft (that is, typically those which include 10% or greater US-origin content by value), a licence from OFAC is definitely still required, and we have seen recent confirmation in December 2016 of the outgoing Administration's affirmation of its attitude in that regard with Boeing's confirmed order by Iran Air for 50 B737-800 MAX, 15 B777-300 ER and 15 B777-900X aircraft and Airbus' confirmation from the same carrier for 118 aircraft, including 21 A320-CEO, 24 A320-NEO, 27 A330-CEO, 18 A330-900 NEO, 16 A350-1000 and 12 A380 aircraft.

As regards non-US-origin aircraft, no licence from OFAC or indeed anywhere else is currently required and the regime has been liberated significantly, although other authorisations may, of course, still apply, depending on the nature of the proposed activity and utilisation of the equipment, and there remains a general exclusion of the US banking system in order to facilitate the relevant transaction.

It is, in summary, probably too early to evaluate reliably the opportunities for investors, but there is no doubting Iran's ability to join the international aviation market in terms of technical and commercial expertise if trust in its aspirations and in its ability to comply with its international commitments continues to develop at the current rate, with all the attendant benefits which that may bring. The recent massive Boeing and Airbus orders described above may be the proof of that particular pudding.

E. (Re-)Born In the USA (US Capital Demands)

Any intelligent and informed account of the history of finance and leasing in the aviation sector, particularly in relation to aircraft equipment itself, will necessarily refer to the US as the place where the concepts of assisting aircraft operators to access new equipment, including by way of leasing arrangements, were first offered and developed. Commonly accepted reasons for this include the historical activity and familiarity with aircraft and their potential as investment objects, as well as the volumes of funds available as debt, equities or a combination of both in the wider variety of capital markets in the US.

As the various embryonic structures and schemes became familiar, inevitable competition for such funding business also started to develop from a range of financial institutions overseas, which were themselves in the process of furthering international, cross-border business expansion objectives to which the aviation sector generally, and the aviation finance market in particular, was well-suited.

As competition grew and financing products became more sophisticated in these developing markets, the US and its tax regime displayed elements of a more mature activity by closing a number of revenue loopholes which had previously been available to help cheapen the cost of capital funding for airlines, driving them

further towards the overseas options of products such as the highly successful Japanese Leveraged Lease, and its hybrid successor the Japanese Operating Lease. These were not necessarily available to all carriers as an option to finance their fleet purchases; however, the amalgamation of genuine equity provided by Japanese doctors and opticians looking to improve their rate of return on pension investments, and corresponding loan funding against the backdrop of tax treatment which granted additional aircraft asset depreciation to the lessee of the aircraft as its 'economic owner', were a success for many carriers until those particular tax and accounting benefits were similarly closed.

It is now the case that the most varied, possibly most efficient and largely most available and certain sources of investment capital for aircraft, are once again to be found in the US. Huge volumes are being set aside for the investment into equipment in the aviation sector which is going to be required in the light of the extensive orders of new aircraft referred to elsewhere in this chapter, and the prevalence of transactions to fund new aircraft purchases in the last couple of years has been dominated by the likes of Turkish Airlines and Lufthansa looking at EETC (Enhanced Equipment Trust Certificate) structures, securitisation products being packaged by US investment banks before being sold on in the investor markets, and more simply a trend among equity funds and historical lenders stateside in showing once again an increased appetite for aviation risk more generally.

Conclusions

When the original contributing editors' general chapter was conceived and published four years ago, it was intended to provide a platform for reflection on some themes with reference to the well-known world view espoused by renowned Danish philosopher Søren Kierkegaard, as well as try to suggest what would likely be industry features and developments in the coming years: you only live life going forwards but understand it looking backwards.

If the last four years have proved anything, it is, firstly, that four years is a lifetime in terms of the aviation industry, and, secondly, that Kierkegaard continues to be correct. None of the examples analysed in this chapter would necessarily have been identified as key and embedded market trends even as recently as three years ago; however, we are now able to look back and understand their evolution.

In many respects, this ability of the aviation sector and the people who work in it to constantly innovate and develop solutions, often in advance of there being a problem to solve, is its defining characteristic and a source of enduring optimism about its condition and future relevance. Fasten those seatbelts.

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Digital Signatures, Subordinations and Drones

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What do digital signatures, subordinations and drones have in common? Nothing, except that all three issues are important to aviation lawyers; this chapter provides an overview regarding their impact on aviation practice.

Digital Signatures

On October 21, 1998, United States Public Law 105-277, the Government Paperwork Elimination Act, directed the Office of Management and Budget ("**OMB**") to develop procedures for the use and acceptance of electronic signatures by executive agencies of the United States. The Act states: "… The procedures developed … shall be compatible with standards and technology for electronic signatures that are generally used in commerce and industry and by State governments."

On June 30, 2000, the United States enacted the Electronic Signatures in Global and National Commerce Act (the "**E-SIGN Act**"). The E-SIGN Act promotes the use of electronic contract formation, signatures, and record-keeping in private commerce by establishing legal equivalence between:

- contracts written on paper and contracts in electronic form;
- pen-and-ink signatures and electronic signatures; and
- other legally-required written documents and the same information in electronic form.

On October 29, 2002, the Director of Flight Standards Service issued Advisory Circular No. 120-78 to provide guidance on the acceptance and use of electronic signatures to satisfy certain operational and maintenance requirements. The advisory circular states that an electronic signature may be in the following forms:

- A digital signature.
- A digitised image of a paper signature.
- A typed notation.
- An electronic code.
- Any other unique form of individual identification that can be used as a means of authenticating a record, record entry, or document.

On October 31, 2008, the U.S. Department of Transportation, Federal Aviation Administration ("**FAA**"), published FAA Order 1370.104, Digital Signature Policy (the "**FAA Policy**"), which established the FAA's policy for the use of digital signatures. The order states: "… Electronic signatures describe digital markings used to bind a party or to authenticate a record. It is considered the digital equivalent of the traditional handwritten signature used to sign a contract or document." The FAA Policy defines a digital signature as follows:

> "Digital signatures are a type of electronic signature that is legally acceptable and offers both signer and transaction authentication. The digital signature is the most secure and full-featured type of electronic signature. Digital signatures are federally acceptable types of electronic signatures for business transactions as specified in the National Institutes of Standards and Technology (NIST) guidelines."

14 CFR Part 47.13(a) states: "… Each person signing an Aircraft Registration Application, AC Form 8050-1, or a document submitted as supporting evidence under this part, must sign in ink **or by other means acceptable to the FAA** (emphasis added) …"

14 CFR Part 49.13(a) states: "… Each signature on a conveyance must be in ink."

Black's Law Dictionary, 7th Edition, defines a signature as: "A person's name or mark written by that person or at the person's direction and any name, mark or writing used with the intention of authenticating a document." Black's Law Dictionary, 7th Edition, defines a digital signature as: "A secure, digital code attached to an electronically transmitted message that uniquely identifies and authenticates the sender."

Based on the foregoing, the Civil Aviation Registry, Aircraft Registration Branch (under the FAA) concluded that printed duplicates of electronic documents that display legible digital signatures satisfy the signature requirements of Parts 47 and 49 and, **effective April 1, 2016** (over 15 years after the initial United States directive to employ the use of digital signatures), such documents are now accepted by the FAA. The documents include but are not limited to the following:

- Aircraft Registration Application, AC Form 8050-1.
- Aircraft Bill of Sale, AC Form 8050-2, or equivalent transfer documents.
- Security documents.
- Conditional sales contracts.
- Leases.
- Any supporting authorisation documents such as powers of attorney, trusts agreements, trust-related documents, limited liability company ("**LLC**") statements, etc.
- Releases.
- Lease terminations.

With regard to documents filed with the FAA, the FAA stipulates that an acceptable digital signature must:

1. show the name of the signer and is applied in a manner to execute or validate the document;
2. include the typed or printed name of the signer below or adjacent to the signature when the signature uses a digitised or scanned version of the signer's hand-scribed signature or the name is in a cursive font;

3. show the signer's corporate, managerial, or partnership title as a part of or adjacent to the digital signature when the signer is signing on behalf of an organisation or legal entity;
4. show evidence of authentication of the signer's identity such as the text "digitally signed by …" along with the software provider's seal/watermark, date and time of execution; or have an authentication code or key identifying the software provider; and
5. have a font, size and colour density that is clearly legible and reproducible when reviewed, copied and scanned into a black-on-white format.

[Jana L. Hammer, Fed. Aviation Admin. Aircraft Registration Branch, AFS-750 Change Bulletin 16-03; Acceptance of Documents with Legible Digital Signatures (March 28, 2016).] Further guidance from the FAA is not anticipated.

An important note is that a "digital signature" and an "electronic signature" are not necessarily the same thing. "Electronic signature" encompasses the broad category under which digital signatures fall. Electronic signatures, defined simply, are digital markings used to bind a party or to authenticate a record. An electronic signature is considered the digital equivalent of the traditional handwritten signature used to sign a contract or document. Electronic signatures can be either: (1) digital signatures, which are completed with specific software intended to create a secure, authenticated and federally acceptable signature; or (2) digitised signatures, which are merely electronic representations of an actual handwritten image of a signature. Therefore, it is important that any documents submitted to the FAA contain digital signatures that comply with the FAA's policy.

The FAA does not have an approved list of digital signature software; nor does the FAA define the technological distinction between an electronic signature and a digital signature. The FAA does confirm, however, that a digital signature should include Public Key Infrastructure[1] technology, utilising a Public Key,[2] Private Key[3] and Digital Certificates.[4] While the technology of digital signatures is beyond the scope of this article, most third-party vendors, such as DocuSign, have the appropriate technology for digital signatures that meet the FAA Policy.

How do digital signatures work?

The process of obtaining a digital signature using a third-party vendor is very simple: (i) the document or signature page to be signed is created as a PDF by the holder of the digital signature software (the Drafter); (ii) the Drafter will need the name of the person who will sign the document (the Signer), the Signer's managerial title and email address; (iii) the Drafter sends an email via the digital signature software to the Signer; (iv) the email will contain a link to the document(s) requiring digital signature; (v) the Signer opens the email, reviews the document contents and begins the signing process; (vi) the software leads the Signer through a few simple steps to adopt and sign the document(s); and (vii) after finishing, the Signer closes the link and the email, which will complete the digital execution process and automatically return the signed documents to the Drafter.

Some questions surrounding the FAA Policy on digital signatures

1. Will the FAA now accept documents submitted to the FAA electronically, since the FAA will now accept copies of documents with digital signatures? No, the FAA does not have the ability to electronically accept documents, nor is this contemplated in the near future.
2. Can signatures be obtained in advance and then attached to the execution text of a document once the parties have agreed on the final text? There is no authority directly addressing the question of whether a digital signature page may be obtained in advance and later attached to a final document, as opposed to obtaining the digital signature once the document is finalised. However, based on the E-SIGN Act and common practice with regard to handwritten signatures, an inference may be drawn to suggest that such practice with regard to digital signatures would likewise be acceptable. Digital signatures have the same legal effect as handwritten signatures. The E-SIGN Act explicitly states that "a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form" [15 U.S.C. § 7001(a)(1)]. While this language does not affirmatively state that a digital signature is considered to have the same legal effect as a handwritten signature, several states have interpreted the statute to convey that meaning.
3. Can notaries provide their notarisation via digital signature? There is no authority to suggest that notarisation methods or standards will be different depending on whether a signature is digital or handwritten. The National Notary Association has issued publications stating that digital signatures should be notarised under the same standards as handwritten signatures. The most recent publication of the Model Notary Act takes the position that: "the fundamental principles and processes of traditional notarisation must apply regardless of the technology used to create a signature. No principle is more critical to notarisation than that the signer must appear in person before a duly commissioned notary public to affix or acknowledge the signature and be screened for identity, volition, and basic awareness by the notary at the time of the notarial act." [Model Notary Act, Article III, The Electronic Notary (2010).] Hence, the notary should be present when the Signer digitally signs the relevant document.
4. What about the pink copy of the FAA 8050-1 Aircraft Registration Application form? In order to accommodate applicants for aircraft registration, the FAA has made available a downloadable Aircraft Registration Application, AC Form 8050-1, that applicants may sign using a legible digital signature. Applicants may also sign the downloadable application in ink. A printed duplicate of the digitally signed application may be submitted in support of aircraft registration. However, if the application is signed in ink, the ink-signed application must be submitted. A second duplicate copy, whether digitally signed or ink-signed, now serves as the old "pink copy" of the application and must be placed in the aircraft as temporary authority to operate the aircraft within the United States pending registration.
5. Can counterpart signatures be digital signatures, or a mix of ink and digital signatures? Yes, the FAA will accept counterpart digital signatures and a mix of ink and digital signatures on the same document.
6. Are any documents typically filed with the FAA excluded from the digital signature? It is contemplated that all documents or forms that would be acceptable under the signed-in-ink standard will be acceptable as printed duplicates of electronic documents that display legible digital signatures. Conversely, an application, bill of sale, security agreement, lease, release or similar document sent by facsimile (fax) is not considered the same as an original ink-signed document, and similarly would not be considered a printed duplicate of an electronic document.
7. Documents filed with the FAA often contain hand-written edits, changes or additions. Will documents with hand-written notations be accepted? In early discussions of digital signatures, the FAA suggested that the benefit of electronic documents is the ability to easily edit and sign documents during an online meeting, such as a closing. The FAA initially offered that, short of executing an amendment, a best

practice for hand-scribed corrections, edits and additions is that they be accompanied by the dated initials of the signing parties. However, upon consideration, the FAA determined that hand-scribed notations should be adjudicated for acceptability under local laws and it is the responsibility of the parties and their agents, not the FAA, to file documents for the public record that are true and complete. Hence, the FAA's long-standing policy of accepting documents at face value is still in force and will not change by the acceptance of digital signatures. The meaning or effect of these edits is left to the FAA examiner to determine whether the document meets the FAA's recording criteria.

Subordinating CTC Registrations

In order to understand the importance of "subordinations", it is necessary to understand the priority scheme established by the Convention on International Interests in Mobile Equipment (the "**Convention**"), as supplemented by the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the "**Protocol**") (collectively, the "**CTC**"). The priority rules are set out in Article 29 of the Convention. Generally speaking, priorities under the CTC are determined by a "first to register" principle such that a registered interest will take priority over (i) any other interest subsequently registered, or (ii) an unregistered interest. For example, Party "X" grants a security interest in its airframe to Party "Y" and Party "Z". Party "Y" thereafter goes out and registers its interest in the object on the International Registry prior to Party "Z" registering its interest. The interest of Party "Y" in the airframe is prior to that of Party "Z". This is true even if the interest granted to Party "Z" was created prior to the interest granted to Party "Y", and even if Party "Y" had actual notice of the prior interest granted to Party "Z".

The concept of subordinating priority interests often arises between two or more competing lenders, or when an owner of an airframe has executed a lease with a lessee, registered the lease interest with the International Registry, and then subsequently grants a security interest to a lender. In those instances, parties may elect to discharge the existing interest(s) and then re-register the interests in the priority desired by the parties. However, that practice is suspect because (i) it is not contemplated by the CTC, (ii) discharging existing interests will lose their priority position against third parties, and (iii) discharging and registering new interests is required to be in writing (per the CTC) and in most instances, there is no agreement among the parties to create a new international interest *vis-à-vis* the interest which was prematurely discharged for the sole purpose of re-ordering priority. The better practice is provided by Article 29 of the CTC, which establishes an exception to the basic priority rule and allows parties to vary their priority by mutual agreement. So, under Article 29, the parties may leave the current registrations in place, negotiate the order in which the new parties require their priorities to be, enter into a written agreement reflecting the new priorities, and then register agreed-upon subordinations with the International Registry.

Under Article 29 of the CTC, the holder of a registered interest may agree to subordinate its priority interest to a holder of a subsequently registered interest. When an agreement to subordinate an interest has been executed, parties should register the corresponding subordination with the International Registry to evidence the parties' agreement. The registration of the subordination not only alters the priority of the competing interest-holders, but further binds an assignee of the subordinated creditor (note: an assignee of a subordinated interest is not bound by an agreement to subordinate unless a subordination has been registered with the International Registry at the time the assignee takes the assigned interest).

With regard to lease registrations, the lease interest is registered with the International Registry prior in time to that of the security interest and the lessee would, absent an agreement to subordinate, have priority over the lender (in the form of a right to quiet possession and use). It therefore falls on the lender to negotiate a subordination agreement with the lessee in order to support the registration of a subordination of the lessee's interest with the International Registry. More often that not, the parties will have given little thought to the priority of an existing registered lease until late in negotiating a deal, when it may be difficult to obtain the necessary agreement to support the registration of a subordination, either by the lessor or the lessee under the prior registration. So it is important to pinpoint these issues early in transaction discussions.

Unmanned Aircraft Systems (aka Drones)[5]

The United States Transportation Code (the "**Code**") defines an "aircraft" as "any contrivance invented, used, or designed to navigate, or fly in, the air". Commonly known as "drones", the FAA has adopted the term "unmanned aircraft" or "unmanned aircraft system" ("**UAS**")[6] to describe aircraft that are "operated without the possibility of direct human intervention from within or on the aircraft". This includes what have traditionally been known as "model aircraft" which are capable of flying in the air.

In general, a person may not operate an aircraft (including UAS) in U.S. airspace if the aircraft is not registered.[7] As with manned aircraft, to be eligible for U.S. registration, **the owner of the UAS must qualify as a citizen of the United States under the Code**,[8] which carries all of the citizenship requirements of the Code which have always been applicable to manned aircraft. There are currently two methods available to register a UAS with the FAA: (1) the traditional "paper" registration process used for manned aircraft under Part 47 of the Federal Aviation Regulations ("**FARs**"); and (2) the newer online registration system created pursuant to FAR Part 48.

Online registration under FAR Part 48

When the FAA's online registration system was initially launched, it was available only for small UAS (i.e., UAS with a maximum takeoff weight of under 55 pounds) used solely for recreational purposes. The online system is now available for most small UAS, regardless of their use. However, online registration is not available:

- for "large UAS" (i.e., UAS with a maximum takeoff weight of 55 pounds or more);
- for UAS owned by a trustee under a trust agreement;
- for UAS whose owner uses a voting trust to meet U.S. citizenship requirements;
- for UAS that needs N-number registration to operate outside the United States; and
- when public recording is desired for a UAS's loan, lease, or ownership documents.

If one of the above applies, then the owner must register the UAS using the traditional "paper" registration and recordation system under Part 47, which is discussed in further detail below.

To register a UAS online, the owner will need:

1. an email address;
2. a credit or debit card; and
3. a physical address and mailing address (if different from the owner's physical address).

The registration fee is $5.00 and registration is valid for three years. The Certificate of Aircraft Registration must be on hand when

operating the UAS and can be available either in paper form or electronically. The online UAS registration system may be accessed at https://registermyuas.faa.gov/.

When registering a UAS online, the owner must indicate whether the UAS will be used for recreational purposes only or for commercial purposes. Registrants of UAS used for hobby or recreational purposes must be at least 13 years old, while registrants of UAS used for commercial purposes must be at least 16 years old. Registrants who use their UAS only for hobby or recreational purposes will be assigned one unique registration number to be used for as many UAS as the registrant desires. Registrants who use their UAS for commercial purposes must register each individual UAS. Registration numbers obtained through online registration begin with "FA".

Registration under FAR Part 47

If a UAS is not eligible for online registration, then the applicant must use the traditional "paper" registration process (which now includes digitally signed documents). The process to register a UAS under FAR Part 47 is similar to the process of registering a manned aircraft with the FAA. An applicant for registration must file certain documents with the FAA Civil Aircraft Registry in Oklahoma City, Oklahoma, and will receive a hard-copy Certificate of Aircraft Registration. As with manned aircraft, UAS registered under FAR Part 47 are assigned N-numbers.

To register a UAS with the FAA under FAR Part 47, the owner must provide the following to the FAA:

1. evidence of ownership (e.g., bill of sale) tracing the chain of title from the manufacturer or last registered owner to the applicant, including any intervening owners;
2. a notarised affidavit, as further described below;
3. an Aircraft Registration Application, AC Form 8050-1;
4. any necessary documentation to support the U.S. citizenship of the applicant (e.g., trust agreement, Statement in Support of Registration of a United States Civil Aircraft in the Name of a Limited Liability Company); and
5. the $5.00 filing/registration fee.

The FAA has provided a form of affidavit that applicants for registration of a UAS may use, but applicants are not required to use this form. The FAA's form of affidavit may be accessed at https://www.faa.gov/licenses_certificates/aircraft_certification/aircraft_registry/media/sUA_Affidavit.pdf. The affidavit filed with the FAA must include the following:

1. a detailed description of the UAS, including the full legal name of the manufacturer or builder, model designation, serial number, class (e.g., airplane, rotorcraft), maximum takeoff weight (including all items on board or attached), number of engines, and engine type;
2. a statement regarding the applicant's ownership of the UAS (e.g., referring to an attached bill of sale or explaining other evidence of the transaction);
3. a statement establishing that the UAS is not registered in another country; and
4. the following statement above the signature: "I affirm the information and statements provided herein are correct, the aircraft is not registered under the laws of any foreign country, and I am the owner."

If a bill of sale or an equivalent transfer of ownership document is not available, the affidavit should attach any other evidence of the transaction (e.g., sales receipt, invoice) and state the following: (1) how, from whom, and where the UAS was obtained, and (2) why a bill of sale or other equal transfer of ownership document is unavailable for filing.

If the UAS was purchased new and has not been registered anywhere, the affidavit must contain a statement such as: "I purchased this UAS as a new off-the-shelf item from [the manufacturer, a retail store, etc.] named [_], located in [City, State, Country] on [date]." Alternatively, if the UAS was registered or operated in another country or was purchased from a seller located in another country, the affidavit must be accompanied by a statement from the Civil Aviation Authority of the exporting country confirming that registration in that country has ended or that the UAS was never registered.

As noted above, if public recording is desired for a UAS's loan, lease, or ownership documents, the UAS must be registered with the FAA under FAR Part 47. Accordingly, a lender may perfect its security interest in a UAS by filing the instrument granting such interest with the FAA.

Endnotes

1. Public Key Infrastructure is a security management system including hardware, software, people, processes and policies (including certificate authorities and registration authorities) dedicated to the management of Digital Certificates for the purpose of achieving secure exchange of electronic information (adapted from the Federal Information Processing Standards ("**FIPS**") 186-3).
2. A Public Key is a cryptographic key that is used with an asymmetric (Public Key) cryptographic algorithm and is associated with a Private Key. The Public Key is associated with an owner and may be made public. In the case of digital signatures, the Public Key is used to verify a digital signature that was signed using the corresponding Private Key (adapted from FIPS 186-3).
3. A Private Key is a cryptographic key used with a Public Key. The Private Key is uniquely linked with the owner and not made public. The Private Key is used to calculate a digital signature that is verified when using the corresponding Public Key (adapted from FIPS 186-3).
4. A Digital Certificate is a set of data that uniquely identifies a Public and Private Key and an owner who is authorised to use the certificate. The certificate contains the owner's Public Key (and other information) and is digitally signed by the Certification Authority or Trusted Party; in doing so, it binds the Public Key to the owner. The most common use of a Digital Certificate is to verify that a user sending a message is who he or she claims to be, and to provide the receiver with the means to encode a reply (adapted from FIPS 186-3).
5. Note: The scope of this section is limited to registration of UAS with the FAA and perfection of certain interests in UAS. This article does not address issues related to the operation of UAS.
6. The term "unmanned aircraft system" ("UAS") has been adopted by the FAA and the international community in recognition of the fact that a UAS includes not only the airframe, but also associated elements necessary for the safe and efficient operation of the aircraft, such as the control station and communication links. *Id.*
7. Note: UAS with a maximum takeoff weight of less than 0.55 pounds and UAS operated solely indoors are not currently subject to the FAA's registration requirements.
8. UAS owners who are foreign nationals and are not eligible to register UAS with the FAA have two options. If the UAS is to be operated exclusively as a model aircraft (i.e.,

for recreational or hobby use), the owner may complete the online registration process and obtain a "recognition of ownership". This recognition of ownership is required by the U.S. Department of Transportation for a non-citizen owner to operate a model aircraft in the United States. If the UAS is to be operated for non-recreational purposes, the owner must register the UAS in the country in which the owner is eligible to register, and must obtain operating authority from the U.S. Department of Transportation.

Acknowledgment

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McAfee & Taft

Located just miles from the Federal Aviation Administration Aeronautical Center in Oklahoma City, the law firm of McAfee & Taft has distinguished itself as having one of the largest and most experienced FAA aviation groups in the United States.

McAfee & Taft actively represents local, national and international clients – from individuals to leaders in industry – on a wide spectrum of aviation matters, including aircraft title and registration, Cape Town Convention and International Registry matters, financing transactions, escrow closings, aircraft ownership issues, import/export matters, closing and post-recordation opinions, and unmanned aircraft systems. The firm also represents clients in the resolution of disputes involving the perfection of ownership rights, chain-of-title issues, slander-of-title claims, and the validity of liens placed on aircraft.

The firm is also a member of L2B Aviation, an international association of independent law firms that specialises in providing legal advice to the aviation industry.

The Need to Extend WALA's Presence in the Airport Industry

Alan D. Meneghetti

Worldwide Airports Lawyers Association (WALA)

Michael Siebold

About WALA

WALA was established in Prague, Czech Republic, in September 2007 at a seminar held at Prague Airport, where lawyers of airport operators gathered together from many countries in Europe (Belgium, Croatia, Cyprus, Lithuania, Malta, Poland and Russia) and South America (Argentina and Uruguay). The lawyers attending the seminar were all in agreement about one thing: the fact that air/aeronautical law in each of their countries was outdated and ill-equipped to face the new reality of airport service, which required specialised legal knowledge. Consequently, the attendees agreed on the need to create and promote a worldwide forum and meeting place where airport lawyers (as well as other interested parties) could develop, share and debate relevant issues in the field of air law (and particularly in the law relating to the functioning and operation of airports).

The Conferences

Seven months later, in 2008, the aim of the attendees at the Prague seminar became a reality. In Spain, at the 'airport' of Ciudad Real, the first Worldwide Airport Law Conference took place. The following annual conferences took place in:

- 2009 Ciudad Real, Spain, hosted by Aeropuerto de Ciudad Real;
- 2010 Lisbon, Portugal, hosted by ANA Aeroportos de Portugal S.A.;
- 2011 Dallas, USA, hosted by Dallas Fort Worth International Airport;
- 2012 Amsterdam, The Netherlands, hosted by the Schiphol Group;
- 2013 Montréal, Québec, Canada, hosted by Aéroports de Montréal;
- 2014 Buenos Aires, Argentina, hosted by AA2000; and
- 2015 Athens, Greece, hosted by Athens International Airport.

WALA and the Industry

WALA Board Members and industry delegates gather once a year at the AGM and annual conference, this being the main event in WALA's calendar. Some 1,200 delegates representing more than 400 different organisations from 70 countries across five continents have already attended WALA conferences, and this number is set to grow exponentially in the coming years as WALA formalises its structure and membership. In addition, WALA has created a community of like-minded individuals, regularly reaching more than 5,000 industry delegates in 90 countries through its database.

More than 130 topics with extreme relevance to the industry have been covered by more than 120 speakers. For a full list of organisations, topics and profiles, please visit our latest conference website, which contains details regarding the 2017 WALA conference, which will be held in Bologna on 18–19 January 2017: http://www.abiaxair.com/wala2017/.

It is fair to say that the high number of professional attendees, combined with a multitude of business and networking opportunities, have made the WALA conference currently the most important airport law event in the airport industry's calendar.

WALA 2017

The 2017 conference is likely to be the most varied and diverse WALA conference yet. The conference will be hosted by Aeroporto di Bologna in conjunction with Abiax, and follows 2015's successful conference in Athens. The 2017 WALA conference will bring together over 100 delegates from around the world. Statistically, 2017's conference is likely to be the most diverse in terms of attendees, with delegates from 35 countries attending, representing 63 organisations.

Some of the relevant issues to be covered will include:

- Competition between airports.
- The relationship between airports, innovation and governments.
- The role of the legal counsel to an airport.
- Responding to unforeseen events.
- Airports and the increasing security requirements placed upon them.
- Mobility rights.
- A look at the past and future of airport law and airport privatisation.
- Airport risk management and insurance.
- Transatlantic low-cost flights and the challenges faced by the limits of the EU-US Open Skies Agreement.

Since the 2015 conference, WALA's Board has continued to look at ways to further expand the scope of WALA and its involvement in the industry. The Board has a clear mandate to continue to grow WALA and to expand the conference in the future. In the immediate term, the WALA Board has incorporated WALA as a not-for-profit corporation, based in Montréal, and the aim is to continue to formalise WALA and to provide more facilities and services to members (such as a regular newsletter, discounted academic courses and so on).

WALA 2017: Growing WALA

In response to increasing demand, WALA's Board has initiated the following activities which will continue to be developed in 2017. WALA's aim is, in short, to become more involved and more embedded in the airport sector, and it believes that, by implementing the measures below, it will go a significant way towards achieving this aim:

1) Introduce membership (with different membership categories) for individuals and institutions wishing to have a more interactive role in WALA.
2) Provide training seminars based on the extensive and unique expertise of WALA's members, particularly those of its Board, in two formats:
   a. On site at the request of an airport operator, aviation authority, etc.
   b. Scheduled annual training lectures.
3) Designate Abiax Air as WALA's executive arm to assist WALA's Board in the development of the above initiatives.

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The authors would like thank Diego Gonzalez and Brian Day for their contribution to this chapter. Diego is President of the Worldwide Airports Lawyers Association; Brian is a Member of WALA's Executive Board, alongside Alan and Michael.

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Being strongly linked to North America's business community for many years, Michael Siebold is in charge of many national and especially international mandates and projects in all sectors, in particular the logistics sector as well as in sports, the innovative building of arenas and the international real property market. Furthermore, he specialises in legal project management and financing.

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The Worldwide Airports Lawyers Association is a non-profit partnership with the goal of promoting cooperation among airport legal affairs departments and legal advisors for airports worldwide, as well as other public and private sectors related to the aeronautical industry.

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1 General

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

Under Austrian Law, aviation is a federal matter governed by the Ministry of Transport, Innovation and Technology (*Bundesministerium für Verkehr, Innovation und Technologie* – BMVIT). The general Austrian act for aviation is the Austrian Aviation Act (*Luftfahrtgesetz*).

Any and all issues in relation to the operation of aircraft are handled by Austro Control GmbH, an entity owned by the Republic of Austria (www.austrocontrol.at).

Any matters in relation to air operator certificates are directly handled by the Ministry of Transport, Innovation and Technology (www.bmvit.gv.at/en/index.html).

In relation to passenger rights, airline liability and consumer matters, Austria is a party to the Montreal Convention and, as an EU Member State, is also bound to EU Regulation No. 261/2004 on airline passenger rights.

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

In order to obtain an operating licence, an air carrier needs to comply with EU Regulation No. 1008/2008.

1. Ownership requirement: in general, an operating licence will only be granted if the company is controlled and held by more than 50% of EU citizens; in addition, no managing director may have a criminal record.
2. Financial background: proof of sufficient funds of the company is required. A business plan, including a liquidity plan for the first two years and a cash deposit in order to cover a three-month period of operation and all expenses of the company, must be submitted.
3. Insurance: the company must obtain insurance according to EU Regulation No. 785/2004.
4. Air Operator Certificate: the company must provide an AOC issued by Austro Control GmbH according to the five-step plan of EU Regulation No. 965/2012; this includes the certification of a flight operation manual for the intended aircraft operation and the appointment of the required post-holders.
5. Aircraft: lastly, all required technical and operational documents and certificates of the aircraft being operated must be submitted.

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

Air safety is administered by the Ministry of Transport. Based on the Austrian Aviation Act, several regulations govern specific matters, such as the Air Operator Certificate Regulation (AOCV), the Rules of the Air (LVR), the Civil Aviation Personnel Licensing Regulation (ZLPV), the Civil Aircraft and Aeronautical Equipment Regulation (ZZLLV), and the Ordinance on Civil Airport Operations (ZFBO). All these matters are handled by Austro Control GmbH. Austro Control GmbH maintains a very well educated and trained team of specialists who are involved constantly in air operation matters, technical check-ups and licensing processes.

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

The Austrian air safety system is the same for commercial, cargo and private carriers.

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

No; however, different regulations apply for third-country operations pursuant to the Austrian Federal Act on International Air Services.

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

There are neither particular limitations for international operators nor any other additional tax or duty imposed on non-domestic carriers. The only difference between international and domestic routes concerns sale of tickets: domestic services are subject to VAT at 20%.

1.7 Are airports state or privately owned?

In Austria, both state-owned and privately owned airports exist. There is no legal requirement for the state to hold a minimum stake in airports. Vienna International Airport (VIE) is owned by a stock company listed on the Vienna Stock Exchange. Most regional airports are owned by the province or city in which they are located.

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

In general, airports do not impose specific requirements on carriers. Requirements for specific Austrian airports are imposed by federal law and concern the impact of noise emissions on the environment. In addition, some airports, such as Innsbruck (INN) in Tyrol, require special crew training of the pilots due to the location of the airport in the Alps and a difficult landing procedure.

Airports mostly grant a reduction of their fares and handling tariffs to new operators commencing operations at the airport. Such "welcome packages" depend on the type of aircraft and the frequency of the intended new service.

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

Austria has established the Federal Accident Investigation Agency, an agency reporting to the Ministry of Transport. Air accidents are handled pursuant to the Austrian Accident Investigation Act (*Unfalluntersuchungsgesetz* – UUG) and EU Regulations No. 56/9 and No. 996/2010. The duty of the Federal Accident Investigation Agency is to find out the cause of the accident and to publish such cause in its final investigation report. Such report shall be published no later than one year after the accident.

In addition, an accident causing personal damage or the death of a person will always be investigated by the Austrian prosecution department in accordance with the Austrian Criminal Act.

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

Yes, there have been two decisions by the Austrian High Court recently that will have an impact on air operators.

1. **Compensation for delays**: an Austrian court was the initiator of the decision of the European Court of Justice (04.09.2014 – C-452/13) regarding the decisive moment of a delayed flight in respect of the time of a delay. According to the court, a flight does not end on its "touch-down" or "block-on" time; the time when the doors are opened for de-boarding is the relevant moment. This decision will now bring quite a lot of confusion to airlines in respect of EC Regulation No. 261/2004, and in respect of compensation payments: pursuant the EC Regulation, passengers are entitled to cash compensation in the amount of €250.00 to €600.00 if a flight is delayed by more than two or three hours. This delay has always been based on the published "block-off" and "block-on" times; if the "block-on" time is 1:58 hours after "block-off", the determination of the time when the doors were opened will decide on the payment of compensation to passengers, but will be difficult to evidence.
2. **Sale of round-trip tickets**: in February 2013, the Austrian Supreme Court decided that both legs of a round-trip ticket can be used without any additional payments, even if one leg was not used. All round-trip tickets include the rule that the legs must be flown as shown and that the return leg will be cancelled if the outbound flight was not used. This clause was declared null and void by the Austrian Supreme Court. This will now have an impact on standard air carriers selling special round-trip fares much more cheaply than one-way tickets.

2 Aircraft Trading, Finance and Leasing

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

No, the Austrian aircraft register is only a federal register and does not constitute proof of ownership.

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

An aircraft mortgage register does not exist under Austrian law. The aircraft register is only a federal register where the operator and all relevant operational issues are registered. It is not possible to register mortgages, unpaid charges or other legal interest in respect of aircraft.

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

Lessors and financiers need to be aware that no mortgage register exists in Austria and that neither the lessor nor the owner or financier of an aircraft can be registered in the aircraft register.

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

The Montreal Convention was ratified by Austria in 2004. Austria has also ratified the Geneva Conventions. Austria has not yet ratified the Cape Town Convention or the Rome Convention.

2.5 How are the Conventions applied in your jurisdiction?

The Montreal Convention is directly applied without any additional national act. It has the same status as an Austrian act and priority over the Austrian Aviation Act.

3 Litigation and Dispute Resolution

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

Rights of detention in an aircraft may exist with respect to claims for compensation arising out of work carried out on, expenses made with respect to, or damages caused by, an aircraft (section 471 of the Civil Code (ABGB) or section 369 of the Commercial Code (UGB)). Such a right of detention only exists between the creditor and the debtor; however, generally not between the creditor and third parties. With respect to the aircraft, this means the following:

The aircraft is owned by the owner but operated by the airline. Therefore, the creditor will not acquire a right of detention against the owner or the lessor or a security agent, if the debt is incurred by the airline. In general, only the operator is party to the maintenance contract. However, the Austrian Supreme Court had stated in a decision in 1996 that a creditor may acquire a right of detention against the owner of a leased asset if he has agreed and the lessee has undertaken to carry out the respective repair work in the lease

contract. The Supreme Court stated that the lessee's responsibility to carry out the maintenance could be deemed as an authorisation to conclude such contracts on his behalf and that, therefore, the owner would become liable to pay the costs. The Austrian Supreme Court further stated that by repairing the aircraft, the owner is also released from a duty and the value of the aircraft increases. Therefore such claim against the owners may be justified. However, such claim is only possible if the main contract partner of the maintenance agreement is in default under the maintenance contract. A direct claim against the owner of an aircraft is not possible, since contractual agreements have priority.

In respect of fees in connection with the operation of the aircraft

Basically, the party liable to pay all relevant operational charges is the operator of the aircraft, therefore the airline. Only in the event where the identity of the aircraft's operator is unknown and the owner fails to prove that another party is the operator of the aircraft will the owner of the aircraft be deemed to be the operator and liable to pay these charges. In the case of non-payment, Austro Control or the Austrian airports would have to file an action against the operator with the competent courts. A judgment could be enforced against all properties of the operator and a lien will be attached to all assets. Please note that such lien may only be created with respect to assets owned by the debtor against whom the judgment has been rendered, and that any contractual lien which was created prior to such court order will rank ahead. Since a leased aircraft is not owned by the airline, it cannot be subjected to such liens deriving out of unpaid airport or air traffic charges. In any event, it is not possible to detain an aircraft for unpaid air navigation charges. The laws of Austria do not provide for any liability of the aircraft for the crew's wages or for salvage.

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

Under Austrian law, the owner of an aircraft can obtain access to his property in case of a default under the mutual agreements entered into.

Austro Control GmbH does not require the consent of the operator in order to deregister an aircraft from the aircraft register. Therefore, a deregistration is possible upon the owner's request, without the operator's consent.

In the case of the realisation of a pledge granted over an aircraft, the standard court proceedings need to be observed; it is possible to agree on a free sale in the pledge agreement under certain circumstances and provisions.

In the case of insolvency, special rules apply pursuant to which an airline being bankrupt may be granted a 90-day period in order to determine whether to return a leased aircraft or continue the lease. During these 90 days, return of the aircraft is blocked.

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

In Austria, civil matters and criminal matters are handled by different courts. For civil matters, the competent court for disputes depends on (i) the value of the claim, (ii) whether the content of the claim is "private" or "commercial", and (iii) the principal place of business of the defendant. In general, an aviation dispute is a commercial dispute and therefore the following courts would be competent:

- In 2015: a district court for claims of a value up to a total amount of €20,000.00; or the competent regional court for claims of a higher value.
- In 2016: a district court for claims of a value up to a total amount of €25,000.00; or the competent regional court for claims of a higher value.

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

Interim remedies: under Austrian law, the instrument of injunction exists for interim remedies. When filing an injunction, an immediate direct damage, and the fact that standard court procedures would fail to avoid such damage or its enforcement, must be proven in order to be successful. Injunctions are released for a specific period of time and must be followed by a standard claim where the entire matter will be looked at in detail. Injunctions have very short terms, both for the court to react and for the defendant to submit a reply (in general, 14 days). Injunctions do not comprise a detailed procedure of proof; this is based on the attestation of a possible damage that requires immediate action.

Standard legal proceedings require the filing of a claim, and the payment of an initial court fee which will depend on the value of the claim and will amount to around 1.5% of the claim. Before starting legal proceedings, the written claim is sent to the defendant, who is given a four-week period to file a statement of reply. After having received such statement, the court arranges a first hearing. In general, such first hearing takes place three to four months after the filing of the claim. The average time taken within legal proceedings to obtain the first judgment is 15 months.

Furthermore, the parties in a lawsuit are entitled to reimbursement of their legal fees by the defeated party. The legal fees that must be reimbursed are limited by the official tariffs of the Austrian Act on Lawyer's Fees (RATG), and also depend on the value of the claim.

For arbitral proceedings, Austrian law also provides for special interim remedies in order to secure the enforcement of a claim.

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

Under Austrian law, an appeal can be filed against any kind of judgment. For "small claims" (of a value lower than €2,700.00), certain restrictions apply.

The respective court of appeal will render its decision based on the facts determined by the court of first instance. Under Austrian law, the submission of additional evidence is prohibited.

A further appeal to the Austrian Supreme Court can be filed against the decision of the court of appeal, if the matter has not yet been decided by the Austrian Supreme Court or if the matter decided may have general legal consequences and contains legal matters going beyond the specific case being decided.

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

A standard appeal against arbitral awards is not possible under Austrian law. The only exceptions are if the matter decided was a matter which was not arbitrable, or if the arbitral award is against *ordre public*.

4 Commercial and Regulatory

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

In Austria, joint ventures between airline competitors are subject to the general principles and regulations in respect of unfair competition and merger control. Such joint ventures will therefore be qualified according to EU Regulation No. 411/2004 and the Austrian Act Against Unfair Competition (UWG).

Applications must be filed with the Austrian Independent Federal Competition Agency (*Bundeswettbewerbsbehörde* – "Antitrust Agency").

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

In respect of air carriers, the "relevant market" is determined by:

- the relevant routes flown;
- the type of aircraft used; and
- the frequency with which such routes are flown.

In addition, the geographical radius of the departure and landing airport is taken into consideration: for regional airports the radius is about 100 kilometres; for international airports, 300 kilometres.

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

Pursuant to the antitrust regulations under Austrian law, the parties to an agreement have to determine whether its content is subject to approval by the antitrust authorities. A specific system pursuant to which an agency decides or declares whether an agreement is subject to approval or not, does not exist.

However, the Austrian antitrust authorities offer to discuss merger projects prior to their implementation in order to share the view of the authority with the parties.

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

Under Austrian law, mergers, acquisition mergers and full function joint ventures are subject to Austrian antitrust law, specifically the Cartel Act 2013.

In general, an acquisition of more than 25% of a competitor, or the takeover of its control, is subject to the merger control provisions if the involved parties have more than a 10% market control of the relevant market. This means that the intended merger or acquisition must be registered with the Antitrust Agency.

In addition, certain key turnover figures must be met in order to fall under the Austrian antitrust regulations:

1. The worldwide turnover of all involved parties is higher than €300 million.
2. The combined Austrian turnover of all involved parties is higher than €30 million.
3. The worldwide turnover of at least two involved parties is higher than €5 million each.

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

The intended merger must be registered with the Antitrust Agency. Within four weeks of the date of registration, the Antitrust Agency itself or the federal antitrust prosecutor has the right to request a detailed audit of the merger. If no audit is requested, a clearance notification is rendered. This four-week period may be shortened if both the Antitrust Agency and the federal antitrust prosecutor waive their right to request an audit.

If an audit is requested, the merger will be published and every competitor may submit its concerns regarding the intended merger.

The Antitrust Agency must render a decision within five months of the date of registration. The decision of the Antitrust Agency can be appealed. The decision of the court of appeal is final.

For the filing of a merger registration, a lump sum in the amount of €1,500.00 must be paid. In case of an audit, the Antitrust Agency may impose a fee of up to €34,000.00 depending on the complexity and expenditure of each case.

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

Under Austrian law, no sector-specific rules for the aviation sector exist. Financial support by the state is, in general, not allowed and is subject to approval by the European Community.

In respect of start-up carriers and regional airports, specific exemptions apply.

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

In Austria, no specific route is under state subsidy. State subsidies would only be available if such route has a certain need for a public service obligation to be performed by the air service due to its geographical exposure.

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

Under Austrian law, any and all passenger data is protected by the Austrian Data Privacy Act of 2000. In addition, certain bilateral or EU agreements with the United States or Canada provide for the disclosure of certain information on the passengers and for such information to be kept by the airline.

Pursuant to the Austrian Data Privacy Act, an airline must not disclose any of the passenger's information or the fact of whether a passenger is on board a flight or not, to third parties.

The passengers themselves may request any information from the kept data at any time.

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

The Austrian Data Privacy Act does not provide for a particular sanction in case of data loss by an air carrier. The general Austrian

principles on indemnification of damages caused apply. Such damages could be the re-booking fees and hotel costs if, due to loss of data, the immigration authorities delay the immigration, resulting in the loss of a connecting flight.

Punitive damages in general, and in particular those imposed on air carriers for losing data, do not exist under Austrian law.

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

Trademarks can be registered in the Austrian trademark register. The competent authority is the Austrian Patent Agency, which is also competent for the registration of patents and designs. The registration can be filed online using a smartcard from the European Patent Office (www.epo.org). An Austrian registration can be used as the date for international intellectual property rights to be registered with the World Intellectual Property Organization (WIPO) (www.wipo.int).

The costs for the registration of a trademark in Austria are between €250.00 and €5,000.00 depending on the term of the requested protection.

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

In Austria, EU Regulation 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, is the relevant legislation for denial of boarding.

If boarding is denied to passengers against their will, the operating air carrier must compensate them as follows:

(a) €250.00 for all flights of 1,500 kilometres or less;

(b) €400.00 for all intra-Community flights of more than 1,500 kilometres, and for all other flights of between 1,500 and 3,500 kilometres; and

(c) €600.00 for all flights not falling under (a) or (b).

In addition, they are entitled to assistance and reimbursement of any and all expenses caused by the denied boarding, in accordance with Articles 8 and 9 of EU Regulation No. 261/2004.

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

In general, an authority has no direct power in relation to the late arrival and departure of flights. Austria is obligated to ensure general compliance with all applicable laws on the part of their air carriers, and this includes EU Regulation No. 261/2004 and the payment of the compensation referred to therein. Austria has therefore established an independent arbitration court at the Ministry of Transport in order to assist passengers claiming compensation under EU Regulation No. 261/2004.

If an air carrier constantly fails to comply with its obligation, a penalty pursuant to § 169 of the Austrian Aviation Act could be imposed. Such penalty could reach a maximum of €22,000.00.

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

Based on the Austrian Aviation Act, every airport is obliged to publish general conditions of use to guarantee that an operation is in line with all applicable laws, including airport charges according to EU Regulation No. 2009/12. Such general conditions of use must be approved by the Ministry of Transport.

For ground handling services, the Austrian Airport Ground Handling Act is applicable. This was implemented to ensure the liberalisation of ground handling services in Austria, and guarantees free access to this market for private ground handling companies.

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

The Austrian Consumer Protection Act does not deal directly with the relationship between the airport operator and the passenger. In general, the only contractual relationships protected are those between passengers and their direct contracting partners, namely:

1. the airline;
2. the travel agency; or
3. the agency where the respective service was bought.

Any claim based on a damage caused by the airport operator (loss of baggage, delays of flight due to lack of ground handling staff, etc.) must therefore be claimed with the passenger's contracting party and they, if applicable, may take recourse internally.

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

The three key players are Amadeus, Galileo and Sabre.

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

No, there are no specific ownership requirements pertaining to GDSs in Austria.

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

Vertical integration is permitted and subject to the general rules and regulations of any business that requires the disclosure of such structure.

5 In Future

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

Currently, there are no pending legislative or regulatory changes in Austria. A pledge register is discussed once every four to five years but has never been established. We do not expect any changes in the immediate future.

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Dr. David Kubes started specialising in aviation matters in 1995, directly after graduating from high school. During his university years, he was able to get to know the airline business from the ground up, establishing his passion for the field in his thesis on the Montreal Convention in 2001. The following years were dedicated to aircraft financing projects, major claim management for aviation insurance companies and leasing contracts for local airlines, lenders, financiers and banks. To date, the variety of clients has been as broad as the aviation business itself. In 2010, Dr. David Kubes was the leading lawyer in Austria's first *Shari'ah*-compliant financing project, advising an investor from the Middle East on establishing a private *ad hoc* charter airline with an A340-300 aircraft. Currently, Dr. Kubes is working for global acting leasing companies on aircraft and engines, as well as equipment leasing structures.

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KUBES PASSEYRER RECHTSANWÄLTE

Kubes Passeyrer Attorneys at Law focuses on aviation law and real estate transactions, as well as international tax law. Legal consultancy is offered in English, French, Spanish and Portuguese.

Due to this specialisation and more than 10 years of experience, we can guarantee the highest level of quality and relevance. Today's economy is changing faster than ever and therefore being up to date and specialised in certain special areas is our basis for meeting our clients' needs and expectations. Our ongoing national and international legal training and worldwide cooperation with experts in the same fields of specialisation are part of our philosophy. Our aim is to establish long-term client relationships and provide personal and individual solutions to our clients.

Bolivia

Sergio Salazar-Machicado

Ignacio Salazar-Machicado

Salazar & Asociados

1 General

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

The principal legislation is:

1.1.1 Law Nº 2902 of 29 October 2004, Civil Aviation Law.

1.1.2 Supreme Decree Nº 28478 of 2 December 2005, which establishes that the *Dirección General de Aeronáutica Civil* (DGAC) is the Civil Aviation Authority.

1.1.3 Bolivian Air Regulations (*Reglamentación Aeronáutica Boliviana*), the most relevant being the following:

1.1.3.1 Bolivian Air Regulation 119: Regulation relative to the certification of air operators and administration.

1.1.3.2 Bolivian Air Regulation 129: Regulation relative to commercial air transport for foreign transporters.

1.1.3.3 Bolivian Air Regulation 830: Regulation relative to the investigation of accidents and incidents.

1.1.3.4 Bolivia subscribes to the Latin American Aeronautical Regulations (LARs).

1.1.4 Law Nº 1600 of 28 October 1994, which establishes the Sectorial Regulation System.

1.1.5 Supreme Decree Nº 24718 of 22 July 1997, which establishes the norms that regulate aviation and airport services.

1.1.6 Law Nº 2341 of 23 April 2002, Administrative Procedures Law.

1.1.6.1 Supreme Decree Nº 27172 of 15 September 2004, Regulation to the Administrative Procedures Law for the Sectorial Regulation System.

1.1.7 Supreme Decree Nº 0071 of 9 April 2009, which created the Authorities of the Plurinational State of Bolivia in place of the Superintendencies.

1.1.8 Supreme Decree Nº 0285 of 9 September 2009, Regulation for the Protection of the Users' Rights in the Aviation and Airport Services.

1.1.9 Law Nº 165 of 16 August 2011, General Law of Transport.

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

1.2.1 For both national air carriers and international air carriers, the operating licence is divided into two stages: one before the Civil Aviation Authority (*Dirección General de Aeronáutica Civil* (DGAC)), which is the Technical Operation Permit; and the other before the Regulation Authority (*Autoridad de Regulación y Fiscalización de Telecomunicaciones y Transportes* (ATT)), which is the Commercial Operation Permit.

1.2.2 Before the DGAC, national and international air carriers must present legal documentation that demonstrates that they have been constituted and incorporated in the Plurinational State of Bolivia in accordance with the Commerce Code. They must provide technical information relating to operations, airworthiness and aviation security, commercial policies to be implemented, the structure of routes and itinerary to be used, pricing policy, the transport agreement for passengers, baggage, merchandise and postal cargo, the structure of the air carrier, the flight equipment to be used and the insurance certificate of the air carrier's fleet. Once approved, the DGAC will issue an Administrative Resolution authorising the provision of services for five (5) years.

1.2.3 Before the ATT, national and international air carriers must present legal documentation that demonstrates that they have been constituted and incorporated in the Plurinational State of Bolivia in accordance with the Commerce Code. They must provide: a legalised copy of the Administrative Resolution authorising the provision of services granted by the DGAC; identification of the market where the air carrier will operate and the existing competition in the same; the flight equipment to be used by the air carrier; the configuration and capacity; the projection of the participation of the air carrier in the market for one year, and expected occupation factors; initial assets for the operation in Bolivia; initial applicable prices and discounts; results of incomes and costs and their projections, for one year, as a result of the operation in the market (sustainability); the types of products to be offered, the installation of regional offices, if any; and information about the experience in providing the services. There must also be a public hearing. Once approved, the ATT will issue an Administrative Resolution authorising the provision of services for five (5) years.

1.2.4 Domestic flights are reserved for national air carriers with domicile in the Plurinational State of Bolivia.

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

1.3.1 The authority in charge of administering air safety is the *Dirección General de Aeronáutica Civil* (DGAC).

The principal pieces of legislation governing air safety are:

1.3.2 Convention on International Civil Aviation Chicago, which was elevated to Law through Supreme Decree Nº 722 of 13 February 1947 and ratified through Law 1759 of 26 February 1997.

1.3.3 Annex 13 and 17 of the Convention on International Civil Aviation Chicago.

1.3.4 Law Nº 2902 of 29 October 2004, Civil Aeronautic Law of the Republic of Bolivia.

1.3.5 Bolivian Air Regulation 108: Regulation of Air Operators' Security.

1.3.6 Bolivian Air Regulation 109: Regulation for Security for Accredited Agents for transport of cargo and mail.

1.3.7 Bolivian Air Regulation 830: Regulation relative to the investigation of accidents and incidents.

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

1.4.1 Yes, air safety is regulated separately for commercial, cargo and private carriers.

1.4.2 Bolivian Air Regulation 108: Regulation of Air Operators' Security: this Regulation applies to all air carriers that hold a Certificate of Air Operator under RAB 119 and RAB 129, from the charter flights and training aviation facility.

1.4.3 Bolivian Air Regulation 109: Regulation for Security for Accredited Agents for transport of cargo and mail; this Regulation applies to cargo carriers.

1.4.4 Bolivian Air Regulations 830: Regulation relative to the investigation of accidents and incidents.

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

No, air charters are not regulated separately for commercial, cargo and private carriers.

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

1.6.1 International air carriers pay a different price on jet fuel, landing fees and ground handling.

1.6.2 The operations of international carriers are based on international treaties and bilateral agreements.

1.7 Are airports state or privately owned?

1.7.1 Airports are state-owned.

1.7.2 On 18 February 2013, the three main airports, El Alto (La Paz), Viru Viru (Santa Cruz) and Jorge Wilsterman (Cochabamba) were nationalised and the administration and operation of *Servicios de Aeropuertos Bolivianos S.A.* (SABSA) is under the control of the Government.

1.7.3 The rest of the airports in the country are under the administration and operation of *Administración de Aeropuertos y Servicios Auxiliares a la Navegación Aérea* (AASANA).

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

Yes. Airports impose requirements and charges, not only to carriers but also to passengers; these are all related to airport security when checking/boarding passengers on local and international flights. Charges to carriers refer to landing, parking and/or taking off; and charges to passengers relate to an airport-use charge that applies differently to domestic and international flights. These charges are regulated by the Regulation Authority (*Autoridad de Regulación y Fiscalización de Telecomunicaciones y Transportes* (ATT)).

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

The legislation that applies to air accidents is as follows:

1.9.1 Law Nº 2902 (Civil Aeronautic Law of the Republic of Bolivia) of 29 October 2004.

1.9.2 Bolivian Air Regulation 830: Regulation relative to the investigation of accidents and incidents.

1.9.3 Bolivian Air Regulation 108: Regulation of Air Operators' Security.

1.9.4 Bolivian Air Regulation 109: Regulation on Security for Accredited Agents for transport of cargo and mail.

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

Yes, there have been air accidents involving Bolivian air operators and minor incidents with airport operators.

2 Aircraft Trading, Finance and Leasing

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

2.1.1 Yes, registration of ownership does constitute proof of ownership.

2.1.2 Registration of ownership is initiated by a written request to the Executive Director of the DGAC for the inscription of the lease agreement and granting of a temporary licence. The public testimony of the lease agreement is notarised locally and, if the lease agreement is in a language other than Spanish, a judicial translation must be attached. A temporary admission policy is then granted by National Customs of Bolivia and the licence of origin is cancelled. Afterwards, payment of inscription rights before the National Aircraft Registrar (*Registro Aeronáutico Nacional*) equivalent to Bs. 1,000.00 (one thousand Bolivianos) and Bs. 2.00 (two Bolivianos) per each Bs. 1,000.00 (one thousand Bolivianos), based on the value of the lease agreement, must be made, and form *Formulario Único Solicitud* RAN-01 must be used. The insurance policy taken before a local insurance company must also be presented.

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

2.2.1 Yes, there is a register of aircraft mortgages and charges.

2.2.2 Mortgages and charges can be registered before the National Aircraft Registrar (*Registro Aeronáutico Nacional*). The documents must be presented in Spanish through a judicial translation, and the owner of the aircraft or the lessee, through the lessor, may register the mortgages and charges. The cost for this registration is equivalent to Bs. 1,000.00 (one thousand Bolivianos) and Bs. 0.50 (50/100 Bolivianos) per each Bs. 1,000.00 (one thousand Bolivianos) based on the value of the document.

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

All lease agreements need to be registered before the National Aircraft Registrar (*Registro Aeronáutico Nacional*) in order to retake possession of the aircraft. As the Plurinational State of Bolivia is a signatory of the Geneva Convention of 1948, ratified on 9 July 1998, this is the legislation applied to retake possession of the aircraft.

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

Instrument	Date of Ratification or Accession
Convention on International Civil Aviation, Chicago, 7/12/44	4/4/47
International Air Services Transit Agreement, Chicago, 7/12/44	4/4/47
International Air Transport Agreement, Chicago, 7/12/44	4/4/47
Article 45 Montreal, 14/6/54	23/5/56
Articles 48(a), 49(e) and 61 Montreal, 14/6/54	23/5/56
Article 48(a) Rome, 15/9/62	9/7/98
Article 56 Vienna, 7/7/71	30/12/74
Article 83 *bis* Montreal, 6/10/80	3/9/02
Article 3 *bis* Montreal, 10/5/84	9/7/98
Article 50(a) Montreal, 26/10/90	9/7/98
Convention on the International Recognition of Rights in Aircraft, Geneva, 19/6/48	9/7/98
Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Rome, 7/10/52	9/7/98
Convention for the Unification of Certain Rules relating to International Carriage by Air, Warsaw, 12/10/29	9/12/98
Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 14/9/63	5/7/89
Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16/12/70	18/7/79
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23/9/71	18/7/79
Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23/9/71 Montreal, 24/2/88	1/2/02
Convention on the Marking of Plastic Explosives for the Purpose of Detection, Montreal, 1/3/91	1/2/02
Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 28/5/99	5/7/15

2.5 How are the Conventions applied in your jurisdiction?

Following the approval of the new Political Constitution of 2009, all Conventions had to be revised before 5 December 2013 in order for them to be concurrent with the new Political Constitution. Conventions are applied internally once Congress approves them and their application is done by the ordinary course. Any Conventions which were not revised before 5 December 2013 are considered to be concurrent with the new Political Constitution.

3 Litigation and Dispute Resolution

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

3.1.1 Lessors may request the *Dirección General de Aeronáutica Civil* (DGAC) to process the deregistration of an aircraft based on a breach or default of the lease agreement, on the understanding that the lease agreement allows this.

3.1.2 Also, the lessee must grant an irrevocable power of attorney, as stated in the lease agreement, to the lessor or its representatives in the Plurinational State of Bolivia to carry out the deregistration of the aircraft.

3.1.3 For this, the lessor or its representatives must present a letter to the *Dirección General de Aeronáutica Civil* (DGAC) requesting the deregistration of the aircraft due to a breach or default of the lease agreement, attaching the irrevocable power of attorney, as well as certifications of no-debt from the *Administración de Aeropuertos y Servicios Auxiliares a la Navegación Aérea* (AASANA) and *Servicios de Aeropuertos Bolivianos S.A.* (SABSA).

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

Please refer to our answer to question 3.1.

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

3.3.1 Due to the amounts that surround an aircraft lease agreement, the appropriate court will be a civil-commercial court (*Juzgado de Partido en lo Civil-Comercial*); however, international arbitration, if established in the lease agreement, can also be applied and the arbitral award can be enforced in the Plurinational State of Bolivia.

3.3.2 In cases related to major aviation accidents, unlawful acts on board an aircraft, or drug trafficking or smuggling of merchandise, jurisdiction is left with the criminal courts.

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

The parties must establish a domicile in Bolivia. If one of the parties is to be represented by a third person, this person must have a Power of Attorney granted, under the procedures of Bolivian civil law, by the pertaining party. All documents that are to be submitted to the courts need to be in Spanish language or translated judicially. There is no differentiation in the procedure for domestic or non-domestic airlines.

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

3.5.1 In 2015, Bolivia approved its new arbitration and conciliation law, Law Nº 708 of 25 June 2015, which allows the parties to submit their controversies to arbitration. This Law is based on the UNCITRAL Model Law and contemplates national and international arbitration; however, important modifications were introduced. Controversies that arise can be submitted to arbitration, as long as a written agreement exists. If the parties do not have this type of arbitration applied, it will be settled through law arbitration; also, if the parties have not agreed on the procedure, the arbitration will be conducted by three arbitrators. The new arbitration law introduced the role of emergency arbitrator for institutional arbitrations, who can decide whether to adopt precautionary measures prior to the confirmation of the arbitration tribunal dealing with the case. The final arbitration tribunal has the right to modify the precautionary measures.

3.5.2 Under the new law the terms may vary, based on the particular aspects of each case.

3.5.3 The arbitral award, under Bolivian legislation, is considered *res judicata* and it is equivalent to a final judgment; therefore the sanctions and compensations that are determined by the arbitrators can be enforced with the intervention of a judge by means of judicial assistance.

3.5.4 The arbitral award is not subject to an appeal; only an Annulment Recourse is permitted, as described in question 3.6 below.

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

3.6.1 The only means of impugnation of an arbitral award is the Annulment Recourse, which can only be filed for the following reasons:

3.6.1.1 It is a non-arbitral matter.

3.6.1.2 The arbitral award was contrary to the public order.

3.6.1.3 Existence of reasons of nullity or annulment of the arbitral agreement in accordance with the norms of the Civil Code.

3.6.1.4 Lack of notification in the designation of an arbitrator for the arbitration proceedings.

3.6.1.5 Impossibility to exercise the right of defence.

3.6.1.6 Reference in the arbitral award to a controversy not foreseen in the arbitral agreement, or the inclusion of decisions or material that extend beyond the arbitral agreement, or previous separation of the matters submitted to the arbitration and not sanctioned with annulment.

3.6.1.7 Irregular composition of the Arbitral Tribunal.

3.6.1.8 Corrupt development of the procedure, which infringes the arbitral agreement, or the adopted regulation as established in Law Nº 1770.

3.6.1.9 An arbitration award that exceeds 180 days, which can be extended by a further 60 days.

3.6.2 The Annulment Recourse is processed judicially and its resolution must legally be concluded within 30 days as of the day the docket enters the judge's chambers.

3.6.3 The Plurinational State of Bolivia has signed and ratified the New York Convention and is also a signatory to the Inter-American Convention on International Commercial Arbitration and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards.

4 Commercial and Regulatory

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

4.1.1 Local or international air carrier competitors that want to participate in a joint venture or a code share agreement, within Bolivia, must obtain approval from the Regulation Authority (*Autoridad de Regulación y Fiscalización de Telecomunicaciones y Transportes* (ATT)), which will consider the commercial factors and whether the joint venture will benefit the users.

4.1.2 The tariffs to be applied in a domestic code share agreement must be approved by the Civil Aviation Authority (*Dirección General de Aeronáutica Civil* (DGAC)) and, in an international code share, the approval of the foreign aeronautics advisory committee (ACC) on the tariffs must be considered.

4.1.3 For the local authorities, to date, in order to approve code shares both airlines must be authorised to operate in the route in which the code share would apply.

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

4.2.1 The competition authority, which in the case of the aviation sector in the Plurinational State of Bolivia is the Regulation Authority (*Autoridad de Regulación y Fiscalización de Telecomunicaciones y Transportes* (ATT)), will make sure that the merger or acquisition of competing companies does not establish, promote or consolidate a dominant position in a specific market. In this regard, it is understood that a company has a dominant position in a specific market when it is the only one in said market or, when it is not the only one, it is not exposed to substantial competition.

4.2.2 However, mergers and acquisitions that contribute to the improvement of the production or distribution of regulated services, or that promote technical and economic progress to the benefit of the user/consumer, and that do not entail the possibility of eliminating the competition with respect to an essential part of the affected production, could be excluded from the prohibition and be approved.

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

No, it does not.

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

Please refer to our answer to question 4.1.

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

4.5.1 The parties involved will request the pertaining authorisation from the Regulation Authority (*Autoridad de Regulación y Fiscalización de Telecomunicaciones y Transportes* (ATT)) to carry out the merger or acquisition, attaching all relevant documentation that will demonstrate that the request does not establish, promote or consolidate a dominant position in a specific market, that there will be a benefit for the

user/consumer, and that it does not entail the possibility of eliminating the competition.

4.5.2 The Regulation Authority (*Autoridad de Regulación y Fiscalización de Telecomunicaciones y Transportes* (ATT)) has six months to pronounce on the request; once this period has elapsed and no answer has been given, the parties should consider their request as dismissed.

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

No. As a matter of fact, the principal air operator is Government-controlled. In relation to the airport operators, the three main airports – La Paz, Cochabamba and Santa Cruz – were nationalised in 2013 and have since been under Government control.

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

No, they are not.

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

The authorities that require airlines to acquire, retain and use passenger data are:

4.8.1 Department of Immigration (*Dirección General de Migración*) based on Supreme Decree Nº 24423 of 29 November 1996 and related regulations.

4.8.2 Narcotics Police (*Fuerza Especial de Lucha Contra el Narcotráfico*) based on Law Nº 1008 of 19 July 1988 and related regulations.

4.8.3 National Customs of Bolivia (*Aduana Nacional de Bolivia*) based on Law Nº 1990 of 28 July 1999 and related regulations.

4.8.4 Air carriers, national or international, cannot give passenger data to third parties, be they Government agencies or private entities, without a valid judicial order or a summons from the public prosecutor's office and, in the case of the Department of Immigration and National Customs of Bolivia, the regulations that have effect on carriers apply.

4.8.5 Individuals can file a Constitutional Action of Protection of Privacy to obtain the elimination or rectification of data registered in public or private data banks that could affect their fundamental rights to confidentiality and privacy.

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

The carrier will have to mitigate any probable situation that could affect the rights of individuals to confidentiality and privacy. An individual affected by data loss by a carrier can initiate civil actions in order to obtain compensation for the damage that this loss might have caused to their reputation, image and honourability.

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

4.10.1 The National Intellectual Property Service (*Servicio Nacional de Propiedad Intelectual* (SENAPI)) is responsible for the registration of trademarks, patents and copyrights in the Plurinational State of Bolivia.

4.10.2 The legislation regarding Intellectual Property in the Plurinational State of Bolivia is based on the General Law on Trademarks and Industrial and Commercial Records (*Ley general sobre marcas y registros industriales y comerciales*) of 15 January 1918, Law Nº 1322 – Copyright Law (*Ley de Derecho de Autor*) of 13 April 1992, Decision Nº 486 of the Commission of the Andean Community – Common Industrial Property Regime (*Régimen Común sobre Propiedad Industrial*) of 14 September 2000 and Decision Nº 391 of the Commission of the Cartagena Agreement (Andean Community) – Regime for the Common Treatment of Foreign Capital and Trademarks, Patents, Licensing Agreements and Royalties (*Régimen Común sobre Acceso a los Recursos Genéticos*) of 2 July 1996.

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

4.11.1 The legislation governing the denial of boarding rights is Supreme Decree Nº 0285 (*Reglamento de Protección de los Derechos del Usuario de los Servicios Aéreo y Aeroportuario*) of 9 September 2009.

4.11.2 Air carriers cannot deny boarding rights, unless they can legally justify such denial, and denial cannot be based on racial, political, religious or nationality factors, or any type of discrimination; failure to comply can result in the initiation of an administrative process by the Regulation Authority (*Autoridad de Regulación y Fiscalización de Telecomunicaciones y Transportes* (ATT)).

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

Law Nº 2902 of 29 October 2004, the Civil Aviation Law, and Supreme Decree Nº 0285 (*Reglamento de Protección de los Derechos del Usuario de los Servicios Aéreo y Aeroportuario*) of 9 September 2009 establish sanctions against domestic and international air carriers for the delay, interruption, cancellation or over-booking of flights. These sanctions can go from seven per cent (7%) of the airfare to up to forty per cent (40%) of the airfare of the flight portion.

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

4.13.1 Yes, airport authorities are governed by particular legislation.

4.13.2 Supreme Decree Nº 08019 of 21 June 1967, later elevated to Law Nº 412 of 16 October 1968, created the *Administración de Aeropuertos y Servicios Auxiliares a la Navegación Aérea* (AASANA) as an entity of the Bolivian State that has technical operative autonomy with the objective to plan, direct and administer open airports of public service, to implement their organisation and to control air traffic.

4.13.3 Supreme Decree Nº 24315 of 14 June 1996 determined that the open airports of public service (El Alto (La Paz), Jorge Wilstermánn (Cochabamba) and Viru Viru (Santa Cruz de la Sierra)) be given in concession and on 28 February 1997 the Concession Agreement was signed with Airport Group International (AGI), and *Servicios Aeroportuarios Bolivianos S.A.* (SABSA) was created to provide services in these three main airports.

4.13.4 Law Nº 2902 (Civil Aeronautic Law of the Republic of Bolivia) of 29 October 2004, determined that AASANA is the entity responsible for providing auxiliary services to air navigation and that the Bolivian State must plan the construction, improvement and maintenance of airports designated for public service.

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

Supreme Decree Nº 0285 of 9 September 2009, Regulation for the Protection of the Users' Rights in the Aviation and Airport Services, is applied fully to the relationship between airport operators and passengers.

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

The GDSs that operate in Bolivia are:

4.15.1 Sabre.

4.15.2 Amadeus.

4.15.3 Travelport: Galileo; Worldspan; and Apollo.

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

There are no ownership requirements.

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

No, it is not allowed.

5 In Future

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

The changes to the current Aviation Law are in the process of being prepared by the Civil Aviation Authority.

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Salazar & Asociados (S&A), founded in 1982, is one of the leading Bolivian law firms and provides a full range of services to its clients.

Its major thrusts are in corporate civil, commercial, constitutional, private international law, aviation and intellectual property. It also manages all other legal specialties such as corporate and investment law, research, specific consultancies and others related to study and assessment in the juridical disciplines.

Furthermore, S&A has a specialised aviation department, providing expertise to cater for the specific requirements of individuals or businesses operating in the sector.

S&A has its headquarters in La Paz. It has offices in Santa Cruz de la Sierra, the main economic hub of Bolivia, branch offices in Cochabamba, Tarija, Sucre and Potosí and a network of carefully selected attorneys throughout the rest of the country.

S&A also has working relationships with the leading law firms in the USA, Europe and Asia.

Brazil

DDSA – De Luca, Derenusson, Schuttoff e Azevedo Advogados

Ana Luisa Castro Cunha Derenusson

1 General

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

The following is the main legislation applicable to aviation in Brazil:

- Federal Constitution (Article 178).
- Law n.º 7.565 of 19 December 1986, known as the Brazilian Aeronautical Code (CBAer).
- Law n.º 11.182 of 27 September 2005 created ANAC – *Agência Nacional de Aviação Civil* (the Brazilian Civil Aviation Agency) and further regulated the Brazilian Aeronautical Code.
- Law n.º 5.862 of 12 December 1972 created INFRAERO – *Empresa Brasileira de Infra-Estrutura Aeroportuária* (the Brazilian State-owned Airport Authority).
- Law n.º 12.462 of 5 August 2011 created SAC – *Secretaria de Aviação Civil da Presidência da República* (the Civil Aviation Secretariat).
- Law n.º 7.183 of 5 April 1984, on the profession of Airman.
- Law n.º 6.009 of 26 December 1973 on the exploitation and use of airports and other air navigation facilities.
- Decree n.º 89.121 of 6 December 1983, which regulates Law n.º 6.009.
- Decree n.º 21.713 of 27 August 1946 ratified the Convention on International Civil Aviation – Chicago Convention 1944.
- Decree n.º 5.910 of 27 September 2006 ratified the Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention 1999.
- Decree n.º 8.008 of 15 May 2013 ratified the Convention on International Interest in Mobile Equipment and its Protocol – Cape Town Convention.
- Decree n.º 7.554 of 15 August 2011 created the National Commission of Airport Authorities – CONAERO.
- Decree n.º 7.168 of 5 May 2010 regulates the National Programme of Civil Aviation Security against Acts of Illicit Interference – PNAVSEC.
- Decree n.º 6.780 of 18 February 2009 approved the Brazilian Civil Aviation National Policy – PNAC.
- Resolution n.º 309 of 18 March 2014 issued by ANAC ("Resolution n.º 309"), which regulates the Cape Town Convention and its Protocol.
- Resolution n.º 293 of 19 November 2013 issued by ANAC ("Resolution n.º 293"), which set forth the procedures to be complied with by the Brazilian Aeronautical Registry (RAB).
- Resolution n.º 25 of 25 April 2008 issued by ANAC ("Resolution n.º 25"), which provides for the administrative procedures and investigation of violations and application of fines.
- DECEA Order n.º 9 DGCA of 5 January 2011, which regulates the organisational competence of the Aeronautics Judgment Board.
- ANAC Normative Instructions n.º 08 of 6 June 2008, which provides for administrative procedures, investigation of violations and application of fines.
- Resolution n.º 377 of 15 March 2016 issued by ANAC ("Resolution n.º 377") which set forth the rules with respect to the granting ("*outorga*") of public air services for Brazilian companies.
- Ordinance ("*Portaria*") n.º 616/SAS of 16 March 2016 issued by ANAC ("Ordinance n.º 616/SAS") which rules Articles 7 and 16 of Resolution n.º 377.

The main regulatory bodies for aviation in Brazil are as follows:

- Brazilian Civil Aviation Agency – ANAC.
- Brazilian Aeronautical Command – COMAER.
- Aeronautical Accidents Investigation and Prevention Centre – CENIPA.
- Brazilian Air Space Control Department – DECEA.
- Civil Aviation Secretary from the Presidency of the Republic – SAC.
- National Commission of Airport Authorities – CONAERO (which regulates the powers of the Brazilian Airport Authorities).
- *Empresa Brasileira de Infra-Estrutura Aeroportuária* – INFRAERO.
- Ministry of Defence.

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

Article 181 of the CBAer provides that the right to operate air services in Brazil will only be granted to Brazilian entities meeting the following requisites:

- they must be headquartered in Brazil;
- at least 4/5 of the voting capital shall be held by Brazilians (such requirement shall survive capital increases); and
- the company's governance must be entrusted exclusively to Brazilians.

Authorisation or Concession for Operation of Air Public Services

To explore air public services, the applicant must: (i) obtain the approval of its constitutional documents before ANAC and provide evidence that the constitutional documents have been registered with the competent Board of Trade; (ii) finalise the homologation and certification procedures, when required, in accordance with the applicable Brazilian Civil Aviation Rules (RBAC) and the Brazilian Aeronautical Homologation Rules (RBHA); and (iii) obtain the granting ("*outorga*") of the concession or the authorisation, as applicable.

The exploration of air public services can only be initiated upon the conclusion of all of the above-referenced phases.

If the authorisation is granted, it will be be valid for a period of up to five (5) years, counting from the date of the publication of the act of the granting ("*outorga*") and it can be renewed, in whole or in part, based on the fulfilment of the corporate purpose and further applicable laws and regulations.

If the concession is granted, it will be valid for a period of up 10 (ten) years, become effective upon the publication of the extract of the agreement entered with the ANAC, and it can be renewed based on the fulfilment of the corporate purpose and further applicable laws and regulations.

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

Air safety in Brazil is governed mainly by: (i) the Chicago Convention (in particular, Annexes 2, 6, 13, 17, 18 and 19); (ii) the CBAer; (iii) Decree n.º 87.249 of 7 June 1982 (which modernised and recognised the Brazilian System of Investigation and Prevention of Aeronautical Accidents (SIPAER) and turned the Centre of Investigation and Prevention of Aeronautical Accidents (CENIPA) into a military organisation); and (iv) several other regulations, such as the Brazilian Regulation of Civil Aviation (RBAC) (formerly Brazilian Regulation of Aeronautical Certification), Rules of the Aeronautical Command (NSCA) and the Civil Aviation Instruction (IAC). Air safety in Brazil is administered by ANAC.

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

No. International general principles of air safety control and management are applicable to all carriers in Brazil; however, specific safety rules might apply to certain categories of aircraft and operations.

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

Yes. Domestic and international air charters, defined under Brazilian law as non-regular air transport services, are regulated separately in Brazil. International charter flights for the transport of passengers are regulated by Civil Aviation Instruction (IAC) n.º 1402 of 20 December 1993, and international cargo charter flights are regulated by IAC n.º 1401 of the same date. Domestic passenger charter flights are regulated by IAC n.º 1227 of 10 August 2001, and IAC n.º 1224 of 30 April 2000.

A particular set of requirements must be met by an air carrier in order to obtain a charter operation authorisation. Such requirements are provided for in the rules mentioned above.

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

Generally, international and domestic carriers have equal treatment under Brazilian law. However, pursuant to constitutional provisions, foreign air carriers' operations are subject to special requirements set forth by international treaties and/or agreements. Currently, in order to operate in Brazil, a foreign air carrier must comply with the Operative Specifications issued by ANAC in accordance with RBAC n.º 129.

1.7 Are airports state or privately owned?

Airports in Brazil are state-owned, privately owned and/or privately operated under a concession agreement.

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

Yes. There are certain requirements in connection with operational aspects, such as: measures to manage/balance the air traffic flux; rules for HOTRAN (the authority for operation of routes) and airport slots; security and safety programmes; and liaison with certain authorities (e.g. Customs, Federal Police, Sanitary and Environmental Authorities, among others). All international flights operated by foreign carriers shall initiate from and finish at international airports.

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

The Aeronautical Command is in charge of the investigation, through its Centre of Investigation and Prevention of Aeronautical Accidents (CENIPA), of any accidents which have taken place in Brazil.

The following legislative and/or regulatory regime applies to air accidents:

- Chicago Convention.
- CBAer.
- Federal Decree n.º 87.249 of 7 June 1982, which regulates the Brazilian System of Investigation and Prevention of Aeronautical Accidents (SIPAER).
- ANAC Resolution n.º 240 of 26 June 2012, which enacts the Aeronautical Accidents Prevention Programme.
- IAC n.º 200-1001 of 5 August 2005, which sets forth the Assistance Plan for Victims of Aeronautical Accidents and Support for their Relatives, and some internal rules of the former Aeronautical Ministry (recently merged into the Brazilian Defence Ministry) which also apply to aviation accident investigation.

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

The Brazilian Government is working on the concession of certain new airports for the next round of airport auctions. The first round

of relevant airport concessions was completed in 2012 (before that, São Gonçalo do Amarante in the city of Natal, State of Rio Grande do Norte was privatised), when ANAC concluded the concession auction for three major Brazilian airports: (i) Guarulhos; (ii) Viracopos; and (iii) Brasilia. 49% of the equity in each of the abovementioned airports was retained by INFRAERO. Another round of concessions was concluded in 2014 with Rio de Janeiro Galeão and Belo Horizonte Tancredo Neves. The next round of concessions encompasses the International Airport of Florianopolis – Hercilio Luz, the International Airport Pinto Martins − Fortaleza, the International Airport Salgado Filho – Porto Alegre and the International Airport of Salvador – Deputado Luis Eduardo Magalhaes. Another notable development is the authorisation for the private sector to build airports, such as Catalina airport, which is currently under construction. A specific proposal for an airline to build its own infrastructure at an airport in the north-west of Brazil is being discussed. An international cargo airport proposal is also being debated.

As for notable developments involving air operators, we note that there is a discussion about creating the concept of fractional ownership in Brazil, as per the proposed ANAC change to RBAC 91.

2 Aircraft Trading, Finance and Leasing

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

Yes, the registration of title before the RAB constitutes proof of ownership of the aircraft, as per Articles 72(II), 115(IV) and 116(V) of the CBAer. Transfer of an aircraft's ownership may be carried out through private or public deeds duly registered before the RAB. In order to be enforceable against third parties, it is advisable to register the transaction documents before the relevant Registry of Titles and Deeds (RTD).

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

Yes, the RAB is in charge of the registration of aircraft mortgages and charges in Brazil, which are ruled by Articles 73; 74, II and III; and 138-152 of the CBAer, as well as ANAC's Resolution n.º 293 of 19 November 2013. Only mortgages over registered aircraft may be registered with the RAB. There is no limitation, however, over who may be the mortgagee of an aircraft.

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

They should be aware of Article 124 of the CBAer, which provides that the owner of an aircraft shall be considered as its operator in the event that the owner's name is not registered before the RAB; thus being liable as the operator.

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

Brazil is a signatory to, has acceded to and has ratified the following relevant international Conventions related to the aviation sector:

- Warsaw 1929 with regard to the unification of certain rules relating to international carriage by air, enacted in Brazil through Federal Decree n.º 20.704 of 24 November 1931.
- Chicago 1944 with regard to international civil aviation, enacted in Brazil through Federal Decree n.º 21.713 of 27 August 1946.
- Geneva 1948 with regard to international recognition of rights in aircraft, enacted in Brazil through Federal Decree n.º 33.648 of 25 August 1953.
- Rome 1952 with regard to damage caused by foreign aircraft to third parties on the surface, enacted in Brazil through Federal Decree n.º 52.019 of 20 May 1963.
- Guadalajara 1961 with regard to the unification of certain rules relating to international carriage by air performed by a person other than the contracting carrier, enacted in Brazil through Federal Decree n.º 60.967 of 11 July 1967.
- Tokyo 1963 with regard to offences and certain other acts committed on board an aircraft, enacted in Brazil through Federal Decree n.º 66.520 of 4 May 1970.
- Montreal 1999 with regard to the unification of certain rules for international carriage by air, enacted in Brazil through Federal Decree n.º 5.910 of 27 September 2006.
- Cape Town Convention and its Protocol, enacted in Brazil through Federal Decree n.º 8.008 of 16 May 2013 and regulated by ANAC through Resolution n.º 309.

2.5 How are the Conventions applied in your jurisdiction?

In order to be enforceable in Brazil, an international convention to which Brazil is a signatory must be submitted for approval by the Congress, ratified by the President and enacted through a federal decree, after which its validity and enforceability might be compared to that of an ordinary law.

3 Litigation and Dispute Resolution

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

The following legal remedies are available by means of a court order: (i) seizure (*arresto*); and (ii) attachment (*penhora*).

Through the seizure (*arresto*) (Article 830 of the Brazilian Code of Civil Procedure), the creditor aims to block the debtor's asset to guarantee payment of a certain indisputable debt.

The attachment (Article 155 of the CBAer and Articles 831–869 of the Brazilian Code of Civil Procedure) is a judicial order to secure the asset in guarantee for the payment of a court award.

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

A judicial intervention will always be required to allow a lessor or financier to repossess the aircraft upon the occurrence of an event of default. A lessor and financier might bring a search and seizure action (*ação de busca e apreensão*) or a repossession action (*ação de reintegração de posse*), as the case may be, in accordance with the type of contract and/or guarantee available, in order to seek repossession of the aircraft or a collection action (*ação de cobrança, indenização e/ou declaratória*) in order to seek compensation or indemnity for a breach of contract.

Brazil has sanctioned the Cape Town Convention and its Protocol, which provides that a lessor or financier is entitled to request the aircraft's deregistration and promote its due exportation in case of a

breach of an agreement. Resolution n.º 309 provides for the filing of the irrevocable deregistration and export request authorisations (IDERAs) issued as of 15 May 2013 with RAB, which can only be cancelled by the debtor with the consent of the creditor after registration with the RAB. It should be noted, however, that application and enforcement of these proceedings have not been sought before Brazilian courts yet and therefore it is not possible to predict how the courts will rule in such regard, in view of a constitutional provision that determines that no one can be deprived of his or her assets without the due process of law.

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

Civil courts and arbitral tribunals are appropriate for aviation disputes, the latter depending on contractual provisions or the agreement of both parties.

A Brazilian court would have jurisdiction over an action brought by a lessor to obtain possession of the aircraft if:

(a) the lessee is domiciled in Brazil;

(b) the obligation must be fulfilled in Brazil; or

(c) enforcement arises from an act or fact occurring in Brazil.

The Brazilian judiciary system is composed of federal and state courts, as well as specialised courts.

Aviation matters related to operation, liability and contractual issues are subject to the jurisdiction of state courts. However, if the amount claimed does not exceed 40 (forty) Brazilian minimum wages (approximately the equivalent of US$ 11,000.00 converted by the exchange rate of US$ 1/R$ 3.20), the action may be filed with the state small claims court, where proceedings are expedited and less formal, hence reaching a final judgment in less time than a regular civil court.

If the dispute involves federal administration entities or state-owned companies, the claim must be filed with federal courts.

Criminal prosecutions resulting from air accidents, offences on board, unlawful interference, drug smuggling and other related crimes are within the jurisdiction of federal criminal courts.

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

Service of Process must be served on the lessee/debtor. If the lessee/debtor is being summoned in Brazil, the service of process would be made through an official clerk at the premises of the lessee/debtor. If the lawsuit is being undertaken in a jurisdiction other than Brazil, and assuming that the lessee/debtor has validly appointed a process agent in such foreign jurisdiction, such agent would receive service of process on behalf of the lessee/debtor, and that will be valid for legal purposes in Brazil.

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

Differently from the Common Law proceedings, there are several types of judicial order in the Brazilian legal system on an interim and final basis. An interim order may be obtained within the context of different proceedings by means of a preliminary injunction, "*Tutela Provisória*", or the "*Antecipação dos efeitos da Tutela Jurisdicional*". Essentially, any judge is vested with a general power to grant preliminary orders to prevent the damages that the elapsing of the procedural time may cause.

On the other hand, a final order may be obtained through different proceedings set forth by the Brazilian Procedural Code.

Arbitration in Brazil is ruled by Law n.º 9.307 of 23 September 1996, which provides that non-appealable decisions issued by arbitral tribunals are binding. Interim decisions (e.g. injunctions and urgent reliefs) can also be issued by arbitral tribunals, although their enforceability still requires the involvement of the judiciary.

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

Any court proceeding is subject to a double level of jurisdiction. Trial-level decisions can be reviewed by a court of appeal either in formal aspects or merits. Arbitration awards are not subject to appeal (only to a motion for clarification, to clarify or complete aspects of the decision). An arbitration award can be the subject of a claim for nullification in some specific cases, provided by the law and related to fraud.

4 Commercial and Regulatory

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

Pursuant to Law n.º 12.529 of 30 November 2011, any concentration act between competitors must be submitted to the Brazilian antitrust agency, *Conselho Administrativo de Defesa Econômica* (CADE), for approval prior to closing, provided that: (a) at least one of the groups of companies involved in the transaction has registered, in its last balance sheet, gross revenue in Brazil, in the year preceding the transaction, equivalent to or exceeding R$ 750,000,000.00; and (b) at least another group of companies involved in the transaction has registered, in its last balance sheet, gross revenue in Brazil, in the year preceding the transaction, equivalent to or exceeding R$ 75,000,000.00. An economic group for notification threshold purposes qualifies as: (i) companies which are under internal or external common control; and (ii) companies in which any of the companies under item (i) owns directly or indirectly at least 20% of equity interest. However, regardless of any revenue thresholds, ANAC shall approve in advance any consortiums, pooling, consolidation or merger of services, or interests between air carriers.

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

The definition of "relevant market" combines the product market and the geographic market, determined as follows:

(i) a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use; and

(ii) a relevant geographic market comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous.

There have been few decisions so far in this sector. Based on the analysis of the decisions issued so far, in case the transaction leads to

horizontal concentration, authorities will tend to define the relevant market as the air transport of passengers and cargoes separately. In relation to the geographic market, the authorities will tend to define the relevant market as each airline route in which there is an overlap between both companies.

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

As explained in question 4.1 above, every act of "concentration" shall be subject to mandatory notification and approval from CADE prior to closing when specific requirements are met.

Although competition agencies in Brazil do not grant antitrust immunity, they offer a very comprehensive leniency programme in order to encourage the reporting of cartels.

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

As explained in question 4.1 above, Law n.º 12.529 of 30 November 2011 provides for control of transactions constituting a concentration act.

As to air carriers, all companies resulting from mergers and joint ventures shall comply with the limitation of foreign-held ownership in the company's voting capital.

Mergers of foreign airlines are subject to CADE and ANAC's approval in order to operate in Brazil.

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

As mentioned in question 4.1 above, any concentration act that meets certain thresholds as defined by Law n.º 12.529 of 30 November 2011 shall be submitted to CADE for approval prior to closing. A fee of approximately US$ 26,500.00 is due at the time of filing. CADE has a term of 240 days, extendable for another 90 days, to issue a decision. The timeframe for such proceedings may vary according to the complexity of the transaction. Simple transactions fall into the fast-track proceedings created by CADE's Resolution n.º 2 of 31 May 2012, whilst more complex transactions might be approved by default, should CADE fail to issue a decision within the maximum period of 330 days.

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

There is a tax benefit programme in Brazil to foster the aviation industry by granting tax waivers, as per the following legislation:

a) Federal Law n.º 12.249 of 11 June 2010;
b) Federal Law n.º 12.462 of 4 August 2011;
c) Federal Law n.º 12.648 of 17 May 2012;
d) Federal Decree n.º 7.451 of 11 March 2011;
e) Federal Decree n.º 8.024 of 4 June 2013; and
f) Normative Ruling n.º 1.186 of 29 August 2011.

With regard to airports, the Brazilian government created the Airport Support Federal Programme (*Programa Federal de Auxílio a Aeroportos* – PROFAA) in 1992 to improve airports' facilities. The National Civil Aviation Fund (*Fundo Nacional de Aviação Civil* – FNAC) provides financing to the Airport Support Programme.

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

Although Federal Law n.º 13.097 of 19 January 2015 has been enacted, providing the regional aviation development programme (PDAR), a decree regulating such law is pending. In a nutshell, the granting of the following subsidies will be encompassed: (i) airport tax immunity for certain flights to or from small or medium-sized airports; (ii) reduction of/immunity from additional airport tax; and (iii) payment of part of certain domestic flights' costs according aircraft type, number passengers and flight distance, among other factors.

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

The main regulatory rule governing the acquisition, retention and use of passenger data is ANAC's Resolution n.º 255 of 13 November 2012, as amended by ANAC's Resolution n.º 328 of 25 June 2014, which refers to the obligation of air operators, excluding air taxi operators, to collect and transfer passenger data to the Brazilian authorities, using Advance Passenger Information (API) and the Passenger Name Record (PNR), which also includes crew data.

This regulation proposes to avoid and repress acts of illicit interference and expedite clearance of passengers before customs, immigration, sanitary and agriculture authorities. Consumer rights are covered under the Brazilian Consumer Code and Article 5, XII of the Brazilian Federal Constitution 1988, which provide the status of "fundamental guarantee" to the protection (against unauthorised transmission) of personal data. On 28 April 2014, Federal Law n.º 12.965, known as the "Internet Law", also provided regulation for protection of passenger information when airlines are selling tickets through the internet.

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

In the event of a data loss by a carrier, the airline is liable only for damages arising therefrom and upon final and non-appealable judgment. In addition to the obligations to indemnify eventual (material and/or moral) damages caused to passengers or authorities, they can also be sanctioned with fines or suspension of their activities, among others.

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

The mechanisms available for the protection are:

- Federal Law n.º 9.279 of 14 May 1996, which regulates the legal framework for trademarks, patents, utility models, industrial designs, and technology transfer.
- Federal Law n.º 9.610 of 19 February 1998, which regulates the protection accorded to copyrights and related rights.
- Federal Law n.º 12.965 of 28 April 2014, which regulates use of the internet.

The Brazilian legislation follows the intellectual property protection standards established in the international treaty of Trade Related Aspects of Intellectual Property Rights (TRIPS), incorporated into the Brazilian legal system through Federal Decree n.º 1.355 of 30 December 1994.

The Brazilian Industrial Property Institute (INPI) is the government agency in charge of issuing, reviewing and enforcing the industrial property rules.

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

Yes. Articles 730–756 of the Brazilian Civil Code and ANAC's Resolution n.º 141 of 9 March 2010 refer to the general conditions of air carriage applicable to flight delays/cancellation and boarding denial, which are:

- upon request by the passenger, the carrier must provide a written declaration explaining the reason for denying the passenger's boarding; and/or
- the carrier must provide alternatives to the passenger, such as relocation to another flight, carriage, or other means of transportation and reimbursement.

The carrier must also provide certain assistance to the passenger according to the length of the denied boarding: over one hour – communication (phone calls, internet, etc.); over two hours – an adequate meal; and over four hours – adequate accommodation and transfer.

Please note that the provision of such assistance does not prevent the passenger from claiming eventual material and moral damages against the carrier in respect of the denied boarding.

The state small claims court and civil court have jurisdiction over claims on this subject matter.

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

With regard to late arrivals and/or departures, ANAC may impose fines on the air carriers, which will also be liable towards the passenger pursuant to Article 302, III, "U" and "P" of the CBAer, as well as ANAC's Resolution n.º 141 of 9 March 2010.

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

ANAC and INFRAERO currently share the duties of airport authorities. Pursuant to Article 6 of Decree n.º 7.554 of 15 August 2011, among others, the main obligations of airport authorities are: (i) to coordinate and implement the integration and sharing of information; (ii) to implement a work routine in order to optimise the flow of people and goods; (iii) to ensure the use of adequate levels of security, excellence and celerity of the airport's daily activities; (iv) to coordinate emergency and exceptional solutions when demanded; (v) to register the performance of airport operation; and (vi) to follow the defined goals set by CONAERO.

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

The Brazilian Consumer Protection Code (CDC), enacted by Federal Law n.º 8.078 of 11 September 1990, applies to any consumer relationship and imposes a strict liability on the service or product provider, which might include the air carrier and/or airport operator, as the case may be. Air carriers may seek reimbursement for any amounts disbursed to the passenger due to damages caused by the airport operator.

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

The following global distribution suppliers currently operate in Brazil: (i) Amadeus; (ii) Sabre Travel Network; (iii) Travel Technology Interactive; (iv) MySky; (v) Travelport; and (vi) Navitaire.

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

There are no specific ownership requirements regarding the operation of GDS companies in Brazil.

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

Vertical integration between air operators and airports is not allowed in Brazil. However, airport administration can outsource services rendered at airports, which are supervised by INFRAERO.

5 In Future

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

There is a proposal under discussion in the Brazilian Senate to review the Brazilian Aeronautical Code. If approved, the proposed changes will highly enhance and modernise the aviation industry in Brazil. One of the expected changes is the transfer to foreign ownership of Brazilian airlines. Nowadays, foreign investors can only own 20% of the voting shares. The Brazilian government has been evaluating proposals to increase that percentage to 49%, and another proposal to completely eliminate all restrictions on foreign ownership in airlines.

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Ana Luisa Castro Cunha Derenusson is a partner at DDSA – De Luca, Derenusson, Schuttoff e Azevedo Advogados, with extensive knowledge of aircraft finance involving commercial aircraft, corporate aircraft, executive jets and helicopters, including leveraged lease transactions, loans, chattel mortgages, structured finance and operating leases (cross-border), new and used aircraft purchases, sales, sale and leasebacks, aircraft securitisation, debt restructuring, manufacturer support arrangements, cross-border financing transactions, engine leasing, repossessions and foreclosure, as well as regulatory, tax and labour aviation matters. In addition, Ms. Derenusson is well-versed in the negotiation of international agreements related to aerospace and defence. Furthermore, Ms. Derenusson is recognised by her peers and clients as a leading lawyer in her field for her knowledge and experience, and her capacity and effectiveness to lead on all of the aspects and details involved in aircraft transactions.

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Canada

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1 General

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

Canada is a federal system, comprised of 10 provinces and three territories. With the exception of Québec, all Canadian provincial jurisdictions are "common-law". Québec has a civil law system.

The responsibility for matters relating to aviation in Canada rests with the Federal Minister of Transport (the "Minister"). The Minister exercises his authority over aviation in Canada through two principal statutes:

The *Aeronautics Act* applies to all aeronautical products, facilities and services, including airports. The statute enables the Minister to enact the *Canadian Aviation Regulations* ("CARs"), which are overseen and enforced by Transport Canada, a department of the Federal Government. The CARs regulate:

- operational standards;
- the accreditation and licensing of aviation personnel;
- the oversight of design, manufacture and distribution of aviation products;
- the certification of air carriers;
- the certification of airports;
- the classification and use of airspace; and
- generally, the application in Canada of the *Convention on International Civil Aviation*.

Under the *Aeronautics Act*, the Minister has particular responsibility for aviation security, pursuant to which he has enacted the *Canadian Aviation Security Regulation, 2012* which governs passenger screening and airport and aircraft security measures.

The *Canada Transportation Act* provides the Canadian Transportation Agency ("CTA"), a quasi-judicial body, with primary jurisdiction over matters related to the economic regulation of air carriers. The statute enables the CTA to enact the Air Transportation Regulations ("ATRs").

The CTA administers a licensing regime designed to ensure that publicly available air services operating within Canada are Canadian-owned and have appropriate liability insurance.

The CTA has particular authority to:

- review mergers and acquisitions involving air transportation;
- oversee air carrier tariffs;
- respond to and resolve air travel complaints; and
- participate in the negotiation of bilateral agreements between Canada and other countries.

In Canada, no person can operate an air service without: (a) a licence issued by the CTA under the *Canada Transportation Act*; and (b) an operating certificate issued by Transport Canada under the *Aeronautics Act*.

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

Pursuant to Sections 61 to 75 of the *Canada Transportation Act* and the ATRs, the CTA may issue three categories of licences for:

- domestic service;
- scheduled international service; and
- non-scheduled international service.

In each case, the licensed service must be publicly available and may be for the transportation of passengers or goods, or both. An air carrier seeking a licence must apply in writing to the Secretary of the CTA with a supporting affidavit and the documentation necessary to establish that the applicant has met prescribed statutory requirements.

A carrier seeking a domestic licence is required to establish that it:

- is a Canadian:
  - Section 55 of the *Act* defines "Canadian" as a Canadian citizen or a permanent resident of Canada, or a corporation or other entity incorporated under the laws of Canada that is controlled in fact by Canadians and of which at least 75% of the voting interests are owned and controlled by Canadians;
- holds an air operator certificate issued by Transport Canada;
- has the following liability insurance coverage prescribed in ATR 7 with respect to the service to be provided:
  - passenger liability coverage in the amount of $300,000 per seat; and
  - public liability insurance of $1,000,000 (or greater depending on the take-off weight of the aircraft providing the service); and
- where necessary, meets prescribed financial requirements.

Applicants for either a scheduled or non-scheduled international service licence must meet the same requirements. However, a non-Canadian may be eligible to hold a scheduled or non-scheduled international service licence where that carrier has been designated by a foreign government to operate an air service under the terms of a bilateral agreement and the carrier already holds a licence from its own government equivalent to a Canadian scheduled or non-scheduled international service licence.

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

Under the *Aeronautics Act*, the Minister, through Transport Canada and the CARs, has the jurisdiction to introduce laws and regulations necessary to ensure the safe and proper operation of aircraft and aviation safety in general.

The Canadian Transportation Accident Investigation and Safety Board ("CTSB"), established under the *Canadian Transportation Accident Investigation and Safety Board Act*, is responsible for advancing transportation safety by identifying safety deficiencies through accident investigations and making recommendations designed to eliminate or reduce those deficiencies.

The CTSB is fully independent of Transport Canada. It may recommend safety measures, but has no authority to implement them.

The *Canadian Criminal Code* includes several offences in which penalties are prescribed for the unsafe operation of an aircraft.

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

No. In Canada, air safety for commercial, cargo and private carriers is regulated by Transport Canada under the *Aeronautics Act*. However, safety standards established by Transport Canada for commercial carriers are typically more stringent than standards applied to private aircraft.

The carriage of certain cargo by air is subject to the *Transportation of Dangerous Goods Act, 1992* and related regulations. The application and enforcement of this legislation is conducted by Transport Canada.

The safety requirements applicable to the carriage of dangerous goods by air for commercial purposes are significantly more stringent than the standards applicable to private aircraft.

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

Yes. A carrier wishing to offer international charter air service must hold a licence for a non-scheduled international service. All carriers offering charters must obtain a permit issued by the CTA. ATRs 21.1 to 103.5 set out terms and conditions for charter contracts for both international charters (non-U.S. and trans-border charters) between Canada and the United States and trans-border charters (Canada-U.S. charters).

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

The carriage of air traffic between two points within Canada is generally reserved for domestic carriers (cabotage) over international carriers. Routing, pricing, choice of destination and flight frequency may be governed by the bilateral agreement signed between Canada and the state in which the international air carrier resides.

Aviation fuel may be purchased free of the federal sales tax (Harmonized Sales Tax/Goods and Services Tax), provided the fuel is used for transportation to or from Canada or between points outside of Canada. Similarly, aircraft stores and other consumable technical supplies used in the provision of international air transportation services are mostly exempt from Canadian customs duties and excise taxes. Canada does not levy taxes on income derived by non-residents from the operation of aircraft in international traffic, provided that the state in which the international carrier resides grants substantially similar relief to Canadian residents. Generally, the liability of an international air carrier for withholding taxes and other tax provisions will be prescribed in the relevant bilateral agreement.

1.7 Are airports state or privately owned?

Prior to 1994, all airports in Canada were owned and operated by the Government of Canada. In 1994, the Government introduced the National Airports Policy ("NAP") with the intention of retaining ownership of airport lands while devolving management and upkeep responsibilities to local entities. The NAP is now almost fully implemented with all major airports in Canada operated by local authorities under lease to Transport Canada. The private authorities are typically non-share capital corporations operated by a Board, which includes representatives of Transport Canada. A number of smaller airports in northern Canada continue to be both owned and operated by Transport Canada.

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

The requirements imposed by airports in Canada on carriers may vary slightly depending on the airport. Principal requirements include:

- the provision of financial security by way of letter of credit, security deposit or pre-payment for aeronautical charges;
- the execution of an airport improvement fee agreement which requires the air carrier to collect from passengers and remit to the airport an improvement fee;
- the payment of landing fees and general terminal use fees (this requirement is imposed without a written agreement at the discretion of the airport); and
- the execution of agreements, leases and/or licences for the dedicated use of gates, counters, bridges and office space.

Generally, airports in Canada do not require an air carrier to execute an operating agreement with respect to their operations at the airport but all air carriers are required to comply with published airport policies.

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

The investigation of air accidents is governed by the *Canadian Transportation Accident Investigation and Safety Board Act*, which prescribes the obligations and responsibilities of the operator involved in the accident, as well as the handling and protection of cockpit voice and data recordings.

Regulation 6 to the *Canadian Transportation Accident Investigation and Safety Board Act* requires an air carrier to report to the Safety Board any accident in which a person sustains injury or death or the aircraft sustains significant damage or is missing.

Air carriers are also required to report to the Safety Board incidents involving certain major component failures.

CAR 705.07(2) requires a carrier to maintain an emergency response plan which addresses specific issues including:

- passenger and crew welfare;
- preservation of aircraft evidence; and
- wreckage removal.

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

There have been several recent cases in Canada involving the aviation industry, including:

- *Bier v. Continental Motors*, 2016 BCSC 1393 (British Columbia Supreme Court): an emergency landing was carried out because of aircraft engine failure. The defendant, Approved Maintenance Organization ("AMO"), and the aircraft operator issued claims against the engine manufacturer. The engine manufacturer (based in Alabama, USA) argued that the British Columbia court lacked jurisdiction over it. The court ruled that it had jurisdiction over the engine manufacturer. Despite having no actual physical presence in British Columbia, the engine manufacturer was found to have been carrying on business in British Columbia by selling engines to independent distributors in British Columbia and maintaining relationships with AMOs in British Columbia (via an online subscription service for technical manuals). In addition, the alleged failure to warn of a hazardous product would, if proven, constitute a tort committed in British Columbia.
- *Thorne v. Hudson*, 2016 ONSC 5507 (Ontario Superior Court of Justice): a Canadian-registered aircraft crashed in New York, USA. The engine manufacturer sought dismissal of the claims on the basis of the limitation period applicable under U.S. law. The engine manufacturer argued that since the place of the aircraft accident was New York and the place of manufacture of the engine was Pennsylvania, U.S. law applied to the tort. The aircraft was 39 years old at the time of the accident and a U.S. federal statute imposes an 18-year final limitation period on all civil actions against aviation manufacturers. The court ruled that since the allegations against the engine manufacturer were of negligent misrepresentations received in Ontario (faulty instructions in bulletins and manuals issued by the manufacturer), the law of Ontario (and its limitation period statute) applied. This decision has been appealed.

2 Aircraft Trading, Finance and Leasing

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

No. CARs 202.13(2) and 202.35 require that a Certificate of Registration be issued to the individual or entity that has legal custody and control of an aircraft. While the Canadian Civil Aircraft Register may constitute proof of legal custody and control of the aircraft, it does not constitute proof of legal ownership of the aircraft.

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

Canada has no national registry for recording security interests in aircraft or aircraft components. Each of Canada's provinces has enacted a *Personal Property Security Act* ("PPSA") which permits the registration of a security interest in personal property including aircraft. A security interest registered with respect to an aircraft in one province will not necessarily be recognised or enjoy priority over an interest registered at a later date in another province. In order to protect a security interest in an aircraft which moves inter-provincially, the security interest must be registered in each province in which the aircraft is likely to operate.

Those with a security interest in an "aircraft object" (airframes, aircraft engines, and helicopters) should also register with the International Registry pursuant to the Convention on International Interests in Mobile Equipment (*Cape Town Convention*). The *Cape Town Convention* supersedes the PPSA regime with respect to international interests over aircraft objects.

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

In the absence of a national registry, a security interest in an aircraft should be registered throughout Canada by registering it under the legislation of each province in which the aircraft may be present and an interest in aircraft objects should be registered in the International Registry.

In order to register, and to conduct effective searches, it is necessary to obtain the exact make, model, year and serial number of the aircraft's engines, propellers and other major components. A physical inspection of the aircraft and its records should be undertaken as early as possible in order to verify make, model and serial numbers and other relevant information.

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

The Convention for the Unification of Certain Rules for International Carriage by Air (*Montreal Convention 1999*) was ratified by Canada on November 19, 2002.

The *Cape Town Convention* was ratified by Canada on December 21, 2012. It was implemented as of April 1, 2013.

Canada has not ratified the Convention on the International Recognition of Rights in Aircraft (*Geneva Convention*).

2.5 How are the Conventions applied in your jurisdiction?

The *Montreal Convention 1999* has been implemented in Canada through the *Carriage by Air Act* (as amended). The Convention is applied in Canada as Canadian law subject to interpretation by the Canadian courts.

The Cape Town Convention is implemented in Canada pursuant to the *International Interests in Mobile Equipment (Aircraft Equipment) Act*. This Act introduces policy and regulatory changes necessary to support Canada's participation in the Convention. Corresponding legislation has been adopted in all provinces.

In the absence of a central registry, the Geneva Convention has no application in Canada.

3 Litigation and Dispute Resolution

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

In Canada, Nav Canada, the provider of air navigation services, and all airport authorities have a specific statutory remedy to seize and detain aircraft for unpaid landing fees and service charges.

Section 9(1) of the *Airport Transfer Act* and Section 56(1) of the *Civil Air Navigation Services Commercialization Act* permit the airport authorities and Nav Canada respectively to apply, before judgment to the Superior Court of the province in which any aircraft owned or operated by the person liable to pay the outstanding fees and charges is situated, to obtain an order authorising the seizure and detention of the aircraft.

Because these provisions specifically allow the airports and Nav Canada to "obtain an order against an owner or operator liable for the unpaid charges", the courts have held that where a lessor retakes possession of an aircraft operated under lease by the airline which has incurred the debt, the airports and Nav Canada shall no longer have any statutory right of seizure or detention.

Under Section 4.5 of the *Aeronautics Act*, Transport Canada has a corresponding priority for unpaid "aeronautical charges".

Most provinces have legislation giving priority to an engineer or other person who has worked on or installed components in an aircraft, for the costs of labour and materials.

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

Yes, although each province has separate legislation in this regard. In most provinces a lessor under a "true lease" may, upon default, retain the services of a bailiff and direct seizure of the aircraft in accordance with the terms of the lease.

In the case of a lease given in support of a financing in which the security interest is registered under the provincial *Personal Property Security Act*, the lessor is bound by the requirements of the PPSA to provide the lessee, together with all registered security interests, with notice prior to sale of the aircraft.

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

No particular court has been designated in Canada for aviation matters. In each province, the Superior Court of the province is the court of inherent jurisdiction. Each province also has a Provincial Small Claims Court where certain claims under a monetary limit may be brought. These monetary limitations vary from $8,000 to $50,000.

Most aviation disputes should be commenced in the Superior Court of the province having a real and substantial connection with the dispute. If the claim relates to aeronautics, or involves a Crown Corporation such as the Ministry of Transportation or the Canadian Air Transport Security Authority, it should be brought in the Federal Court of Canada.

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

Service requirements differ between the provinces, and also between the different levels of court (Provincial Small Claims, Provincial Superior, and Federal). Parties must refer to the rules and legislation governing the court in which the proceedings are commenced.

Small Claims Courts

In general, proceedings commenced in Small Claims Courts must be served on the opposing party within 6–12 months, though that time is shorter in some provinces. Extra-jurisdictional parties or airlines may be served in circumstances where, for example, the party is normally resident in the province; the airline has assets within the province, but is an extra-provincial corporation; or the event giving rise to the proceedings occurred within the province. Once served, the party must file and serve a response within a prescribed period of time, generally within 10–20 days. Parties served extra-provincially generally receive additional time to respond.

Superior Courts

Similarly, Superior Court proceedings must generally be served within 6–12 months. However, the rules governing service in Superior Court actions are more detailed, specifying how different classes of parties are to be served within the province, extra-provincially, and internationally.

In many circumstances, a party may serve initiating documents without a court order, provided the party can show that the facts of the case are substantially connected to the jurisdiction. Alternatively, the party may apply for leave of the court to serve an action extra-jurisdictionally. Initiating documents served extra-jurisdictionally should be accompanied by an endorsement specifying the circumstances under which service is permitted, though this is not required by courts in certain provinces.

Once served, the party must file and serve a response within a prescribed period of time, generally 20 days. If served extra-provincially, parties generally have 30–40 days to respond. Parties served internationally generally have 40–60 days to respond.

Federal Court

Federal Court claims must be filed within 60 days of issue. The responding party must serve and file a statement of defence within 30 days if served in Canada; within 40 days if served in the United States; and within 60 days if served outside Canada and the United States. The Federal Court Rules detail the manner in which different classes of parties may be served.

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

Most Superior Courts in Canada have jurisdiction to grant monetary damages expressed in Canadian dollars. The successful party may also recover "costs" from the unsuccessful party. These are intended to cover a portion of the expenses incurred for items such as lawyer's fees, expert fees, travel costs, etc. The court has broad discretion with respect to the award of costs. Further, an amount of interest payable on judgment debts will be determined by provincial judgment interest legislation or, in contract cases, by agreement between the parties.

The Superior Courts of all Canadian jurisdictions have inherent jurisdiction to grant injunctions to restrict the legal rights of a party. Injunctive relief may be granted only until a trial of the

action (interim), or may form a part of the final judgment binding the parties indefinitely (permanent). Often courts are empowered to make other interim judgments, such as orders seizing the property that is the subject matter of a proceeding. This is done where there is a risk that the property will be disposed of by the opposing party.

In Canada, aviation matters, including both commercial claims and personal injury claims, have been the subject of class action proceedings whereby a representative plaintiff is permitted to advance a case on behalf of a class of persons having claims with common issues. A judge may make an order for the distribution of monetary relief, including an undistributed portion of an award that is due to a class or subclass, or its members. Individual hearings or claims procedures may be established to determine each member's entitlement to the aggregate award.

Commercial disputes are frequently resolved by arbitration based upon a written agreement between the parties. All jurisdictions within Canada now have legislation governing arbitrations which may be adopted and incorporated into private arbitration agreements between the parties. Typically, those provisions will establish a forum for the arbitration and grant the arbitrator quasi-judicial powers so that he has authority to compel and swear witnesses, and make final and binding decisions. Arbitrators may also grant interim relief on any matter for which the arbitrator may make a final award. As with a court decision, arbitrators are commonly empowered to order monetary damages, costs and specific performance, requiring a party to fulfil an obligation laid out in an agreement.

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

In most cases, an appeal lies from a final decision of a Provincial Superior Court to the relevant Provincial Court of Appeal. A further appeal to the Supreme Court of Canada may only proceed where leave to appeal is granted. Generally, matters heard by the Supreme Court of Canada are only those which raise an issue of public importance.

Depending on the arbitration agreement in place, an arbitral award may be appealed or set aside by consent or if the court grants leave. These provisions vary between common-law provinces. Generally, the court will permit an appeal where the importance of the result to the parties justifies the court's intervention, and there is a determination of a question of law that will affect the rights of the parties or other classes of persons.

4 Commercial and Regulatory

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

The terms of a joint venture or indeed any agreement or arrangement among air carriers may be reviewed by the Commissioner of Competition established under the *Competition Act* (the "Commissioner"). Where the Commissioner believes that an agreement between competing airlines may prevent or lessen competition substantially in a market, he may apply to the Competition Tribunal (the "Tribunal"). If the Tribunal accepts the Commissioner's position, it may make an order prohibiting the agreement or directing the parties to the agreement to take steps to minimise its impact on the market.

In the case of airlines, a joint venture will typically relate to the cooperation or coordination of the airlines in the operation of designated routes. A joint venture will be struck down where it results in:

- a monopoly;
- substantially reduced competition; or
- significantly higher prices,

in relation to designated routes.

To the extent that the terms of the joint venture effectively constitute a merger between competing airlines, it may be a "notifiable transaction" (discussed below) requiring notice to the Commissioner. Joint ventures involving non-Canadian entities may also be subject to compliance with the *Investment Canada Act*.

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

In Canada, mergers and acquisitions within the airline industry are reviewed generally with respect to their impact on competition under the Competition Act and specifically by the CTA with respect to their effect upon the public interest as it relates specifically to national transportation.

The Competition Bureau (the "Bureau") will consider a transaction on a route-by-route basis and may disallow all or a portion of the transaction based upon the degree to which it creates a monopoly, reduces competition or results in substantially higher prices on any given route.

In Canada, the small number of major air carriers ensures that any merger will be carefully assessed by the CTA to ensure that the public interest is protected in any consolidation.

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

Yes. Pursuant to Section 102 of the *Competition Act*, the Commissioner may issue an advance ruling certificate ("ARC") with respect to a proposed transaction. Provided that the transaction is substantially completed within one year of the date of the certificate, the Competition Commissioner cannot apply to the Tribunal solely on the basis of information upon which issuance of the certificate was based.

In 2014, the Bureau altered its policy to require additional notification in cases where there has been a significant change to the original ARC request, such as adding a new party or new assets to the transaction.

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

Canada's approach to mergers, acquisitions and joint ventures is governed primarily by the *Competition Act*. Under the Act, mergers, acquisitions and joint ventures of all sizes may be reviewed by the Commissioner of Competition to determine whether they will likely result in a substantial lessening or prevention of competition.

Under Section 114 of the *Competition Act*, the parties to certain substantial transactions ("Notifiable Transactions") are required, prior to completion of the transaction, to notify the Commissioner of the transaction and supply prescribed information in accordance with the legislation. For 2016, the transaction-size threshold for Notifiable Transactions is reached when:

- the assets in Canada or revenues of the target firm generated in or from Canada exceed $87 million; and
- the combined Canadian assets or revenues of the parties and their respective affiliates in, from or into Canada exceed $400 million.

Where the Commissioner of Competition believes that a merger or joint venture may reduce competition, he may file an application for review to the Competition Tribunal, which may block any transaction found to be likely to reduce competition or through:

- a monopoly on routes;
- substantially reduced competition; or
- significantly higher prices.

Air carriers who are parties to a Notifiable Transaction under the *Competition Act* must also give notice of their transaction to the CTA. Pursuant to Section 53.1 of the *Canada Transportation Act*, the CTA has authority to review mergers and acquisitions in the airline industry to determine that the transaction does not raise issues with respect to the public interest as it relates to national transportation.

Where a merger involves the investment of an international air carrier into a Canadian domestic carrier, it may be blocked by the CTA if it results in a loss of control by Canadians as defined in the Act or a reduction in Canadian equity participation below 75%.

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

As discussed in question 4.4 above, a transaction which exceeds the Notifiable Transaction threshold under the *Competition Act* must notify both the Commissioner and the CTA. A period of review is granted to both the Commissioner (30 days) and the CTA (150 days). The notification fee is $50,000, along with costs for administrative items, such as photocopying. Parties may also obtain a written opinion from the Commissioner for $5,000. The opinion is binding on the Commissioner provided the facts underlying the opinion remain substantially unchanged and the transaction is carried out substantially as proposed.

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

In Canada, state aid is not generally available to an air carrier.

Domestic carriers providing services under a domestic licence have limited access to foreign investment. Presently, Canada limits foreign ownership of Canadian air carriers to 25% of voting equity. On November 3, 2016, the Minister announced that the Government of Canada will pursue legislation to change international ownership restrictions from 25% to 49% of voting interests for Canadian air carriers. He also conditionally approved requested exemptions for two discount airlines, Canada Jetlines and Enerjet, from the current international ownership restrictions.

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

The Federal Government offers no subsidies to air carriers for operating particular routes. However, provinces and municipalities seeking to attract air services may be willing to negotiate with an air carrier for a reduction in local fees and charges.

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

The collection, use and disclosure of personal information in Canada is governed by the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"). Under that legislation, passengers may file complaints to the Privacy Commissioner established under Section 53 of the Privacy Act. Following the Privacy Commissioner's investigation of the complaint, a report may be issued with recommendations to the subject airline to bring the airline into compliance with Canadian privacy requirements. In 2015, the *Digital Privacy Act* received Royal Assent, introducing amendments to PIPEDA. One goal of the *Digital Privacy Act* is to streamline rules for businesses in relation to the collection, use and sharing of information.

Notwithstanding PIPEDA, Section 4.83 of the *Aeronautics Act* permits Canadian carriers landing in a foreign state to disclose to authorities in that state information concerning persons on board or expected to be on board. Pursuant to the regulations concerning information required by foreign states, carriers must disclose certain passenger information to the United States Department of Homeland Security if the aircraft is scheduled to fly over the territory of the United States.

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

In addition to the complaint process pursuant to PIPEDA and the *Privacy Act*, a complainant may apply to a Provincial Superior Court for enforcement of the report of the Privacy Commissioner. The court may order compliance with the report and award damages to the complainant, including damages for humiliation.

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

The *Trade-marks Act*, *Copyright Act*, *Patent Act* and *Industrial Design Act* all cover certain intellectual property which may be associated with operations in the aviation industry. The Federal Court of Canada has concurrent jurisdiction with Provincial Superior Courts to hear most disputes involving these Acts. The nature of damages for specific types of violations varies dependent upon the individual Act and nature of the violation.

During the application process for a registered trade-mark, parties disputing the registration of a trade-mark are eligible to file an opposition which will be considered by the trade-mark office when determining whether the trade-mark is to be registered.

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

There is no legislation in Canada governing the denial of boarding rights. Section 107(1) of the ATRs passed under the *Canada Transportation Act* requires that an airline's tariffs shall contain provisions relating to the compensation allowed for denied boarding as a result of overbooking. Passenger complaints in this regard can be made to the CTA.

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

There is no legislation in Canada governing flight delays. Section 107(1) of the ATRs requires that an airline's tariffs shall contain provisions relating to the compensation allowed for flight delays. Passenger complaints in this regard can be made to the CTA.

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

Airports in Canada are governed by the *Aeronautics Act* and the related CARs which prescribe applicable operational standards. The Federal Government also manages airports by way of the National Airports Policy, a two-tiered policy that governs all airports in Canada.

All major airports in Canada are operated on land leased from the Federal Government. The managing airport authorities are incorporated pursuant to the *Canada Not-for-Profit Corporations Act*. They are governed by extensive provisions contained within their land leases which include enhanced accountability principles set out in the "Public Accountability Principles for Canadian Airport Authorities". These principles and other provisions in the lease require the authority to:

- be incorporated as a not-for-profit corporation;
- have a Board of Directors comprised of Canadian citizens who are nominated through a process acceptable to local and Federal Governments;
- have a Board of Directors with representatives of the local business community, organised labour and consumer interests; and
- at least once every five years, cause an independent organisation to conduct a review of the management, operation and financial performance of the airport.

The object of the authority as set out in the lease and accounting principles is not only to manage, operate and develop their respective airports but also to undertake and promote the development of related airport lands, to expand transportation facilities and generate economic activity in ways compatible with air transportation activities.

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

There is no general federal consumer protection legislation in Canada applicable to the services provided by an airport operator. However, each province has general consumer protection legislation with broad application and no exemption or exception for airport operators. This legislation prohibits unfair practices and sets out the requirements for certain consumer contracts.

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

The *Canadian Computer Reservation Systems (CRS) Regulations* ("CRS Regulations") regulate the operation of global distribution suppliers. The CRS Regulations do not regulate which suppliers may operate in Canada; however, they do require that those GDSs which operate in Canada comply with neutrality requirements and the production of information to the consumer when requested. The major GDS systems, Amadeus, Travelport GDS, and Sabre, all operate in Canada. In addition, Canadian airlines' flights are listed on most major international GDS systems.

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

There are no longer any ownership requirements pertaining to GDSs operating in Canada. Pursuant to the CRS Regulations, a GDS system vendor must allow any carrier an opportunity to participate in its distribution facilities, subject to any technical constraints that are outside of the control of the system vendor.

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

Vertical integration is permitted between air operators and airports, subject to the *Competition Act*. This can be seen in the utilisation of terminal space at major Canadian airports, as well as the operation of the Billy Bishop Toronto City Airport.

5 In Future

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

As mentioned above, the Government of Canada has announced its intention to increase the maximum voting interest that may be held by non-Canadians in airline companies from 25% to 49% while capping the interest of any single foreign investor at 25%.

On May 26, 2016 the CTA began an initiative to review and modernise the regulations that it administers. On December 19, 2016 the CTA launched the second phase of its regulatory review, which focuses on air transportation. The third phase will focus on consumer protection of air travellers. The CTA intends to draft updated regulations by the end of 2017. The regulations are to be implemented in 2018.

Regulation of unmanned aerial vehicles ("UAVs") or "drones" will increase in the coming years. Transport Canada has proposed amendments to the CARs that will clarify the categorisation of different types of UAVs based on size and use, and impose more rigorous certification requirements for UAV users based on those categories. The new regulations are currently being studied by the Standing Committee on Transport, Infrastructure and Communities. Transport Canada predicts that the new regulations will come into force in 2017.

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Michael regularly presents at aviation, insurance and legal industry conferences and seminars. He was recognised by *The Canadian Lexpert Directory* in 2015 and 2016 as a leading Canadian practitioner in the field of Aviation. He was also selected by his peers for inclusion in the *Guide to the World's Leading Aviation Lawyers* from 2013–2016.

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Darryl frequently writes and presents. He has been selected by peers for inclusion in *Best Lawyers in Canada* and was most recently recognised as a leading aviation lawyer in *The Canadian Lexpert Directory*. He is currently an Executive Member of the National Air Law Section of the Canadian Bar Association.

Alexander Holburn's Aviation Department is led by Michael Dery. The group's national and international client base includes prominent names in the aviation industry; amongst them international and domestic airlines, airports, fixed and rotary wing charter operators, flight schools and their insurers. We advise our clients on a full range of legal aviation matters, including accident litigation, product liability claims, commercial litigation, regulatory matters, corporate services, employment and environment law.

Supported by a firm of over 70 lawyers, our department is one of Canada's pre-eminent aviation practices.

France

Maylis Casati-Ollier

Clyde & Co

Benjamin Potier

1 General

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

Regulatory bodies

Aviation is regulated by the Ministry of Transport, which is the competent administrative body in the field of aviation and, as such, can issue regulations and measures in the field of aviation.

The Civil Aviation Authority, known as the DGAC (*Direction Générale de l'Aviation Civile*), advises the Ministry of Transport on aviation matters and makes administrative decisions regarding all aspects of aviation.

The European Aviation Safety Agency (EASA) has authority in respect of aviation safety regulation within EU Member States.

Legislation

As in other Member States of the European Union, aviation in France is increasingly regulated by EU legislation, most of which is of direct application in France.

Until 2010, the aviation sector was regulated by the French Code of Civil Aviation. It is now regulated by the sixth section of the Code of Transport, which covers all means of transport. It should be noted that certain provisions of the Code of Aviation remain applicable pending decrees to incorporate them into the new Code of Transport.

Finally, France is also a party to the 1999 Montreal Convention 1999 for the Unification of Certain Rules for International Carriage by Air, which sets out the liability regime of air carriers in the case of an accident; European regulation has extended this liability regime to domestic accidents.

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

Regulation (EC) 1008/2008 of 24 September 2008 sets out the conditions for granting an operating licence, which are that:

- the principal place of business is located in France;
- more than 50% of the company is owned by Member States and/or by nationals of Member States and effectively controlled by them, whether directly or indirectly through one or more intermediate companies;
- the persons who will continually and effectively manage the operations of the company are of good reputation and have never been bankrupt;
- the company holds a valid Air Operator's Certificate (AOC), issued by the local department of the civil aviation authority where the company will be established (*Direction de l'Aviation Civile* – DAC), which confirms that the company has the professional ability and standard of organisation to ensure the safety of the operations specified in the certificate;
- the company has one or more aircraft at its disposal through ownership or a dry lease agreement;
- the main business of the company will be to operate air services in isolation or combined with any other commercial operation of aircraft or the repair and maintenance of aircraft;
- the company submits a business plan for at least the first two years from the start of operations and in compliance with the financial requirements provided by Article 5 of Regulation (EC) 1008/2008; and
- the company complies with insurance requirements.

The *Direction de la Régulation Economique* (DRE), located at the DGAC in Paris, should issue the licence within three months; for small operators (non-scheduled services with aircraft of fewer than 20 seats and turnover not exceeding EUR 3 million per year), the licence will be delivered directly by the local DAC (i.e. the same department that delivered the AOC).

These authorities can withdraw the licence if it appears that the conditions are no longer met.

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

Firstly, air safety is regulated by the International Civil Aviation Organisation (ICAO), as France is a signatory to the Chicago Convention 1944 and must therefore ensure that air navigation equipment and operations comply with ICAO standards.

Air safety is also regulated by the European Aviation Safety Agency (EASA) and European legislation, for example:

- Regulation (EC) 1315/2007 of 8 November 2007, which establishes oversight of safety in air navigation services, air traffic flow management and airspace management.
- Regulation (EC) 300/2008 of 11 March 2008 on common rules in the field of civil aviation security.
- Regulation (EU) 340/2015 of 28 April 2015, which substitutes Regulation 805/2011 of 10 August 2011, which lays down detailed rules for air traffic controllers' licences and certain certificates. This Regulation applies as of 30 June 2015. By way of derogation from paragraph 1, Member States had the opportunity to decide not to apply Annexes I to IV, in whole or in part, before 31 December 2016.

In order to make use of this possibility, Member States needed to notify the Commission and the Agency by 1 July 2015 at the latest.

In France, different DGAC departments are responsible for enforcing air safety regulation, whether French or European; in particular, the OSAC (Organisation for Civil Aviation Security) and the DCS (Safety Oversight Directorate). The minister for transport also has powers in respect of safety inspections of aircraft, equipment and organisations and their employees. French safety rules are contained in Article L6341 and subsequent Articles of the Code of Transport.

Any aircraft, whether French or foreign, at a French airport, and any premises and facilities at which controlled activities are carried out, may be inspected to ensure compliance with French and European civil aviation regulations. In case of any breach of these regulations, the minister may prescribe any measure to correct and restrict operations, including the grounding of an aircraft.

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

The regulatory bodies are the same for commercial, cargo and private carriers; however, the rules and standards vary.

In particular, Article L6343 and the subsequent Articles of the French Code of Transport contain provisions for the security control of cargo and air mail carriage. Similarly, Regulation (EU) 859/2011 (amending Regulation (EU) 85/2010) provides for specific security measures on air cargo and mail coming from non-EU countries.

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

The rules and regulatory bodies are the same for these three cases.

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

There are no limitations, as France is a party to the 1944 Chicago Convention, which provides for availability, so far as practicable, of aerodromes in its territory and equality of conditions of use of aerodromes for international and domestic aircraft. Article 15 of the Chicago Convention further provides for equality for charges for the use of aerodromes.

As to authorisations, a distinction is to be made between community and extra-community carriers:

- Community carriers who have a valid licence can operate intra-community services in France without a permit or authorisation. A community carrier must only notify the DGAC of the intended operation in France (Article R330-8 of the Civil Aviation Code). Extra-community services are still subject to authorisation by the DGAC (Article R330-8 of the Civil Aviation Code).
- As to non-community air carriers, they must seek authorisation from the DGAC to operate into or out of France, whether they are carrying out intra-community air services or extra-community air services. Such authorisation will be granted only if the necessary traffic rights exist.

1.7 Are airports state or privately owned?

All French airports are directly owned by the State or public bodies, except for Paris-Charles de Gaulle, Paris-Orly, Paris-Le Bourget and other aerodromes in the Paris region (*région Ile de France*).

These are privately owned by the Aéroports de Paris company; however, the French State must own more than 50% (currently 52%) of the company's shares (Article L6323-1 of the Code of Transport).

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

Conditions of use are imposed, as well as charges. In particular, there are regulations on noise and curfews in some airports, especially in Roissy-Charles de Gaulle.

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

France is a party to the Chicago Convention 1944. Article 26 and Annex 13 of that Convention contain provisions for the investigation of air accidents.

Regulation (EU) 996/2010 also regulates the investigation and prevention of accidents and incidents in civil aviation.

The French Code of Transport (Article L.62231) obliges any regulated actor to report to the aviation authorities any event which has or is likely to have affected the safety of air operations.

The failure to report such events may result in penalties (Article 6232-10 of the French Code of Transport).

The *Bureau d'Enquêtes et d'Analyses* (BEA) is responsible for the investigation of civil aircraft accidents and serious incidents in France.

In addition to civil investigation, investigations into serious injuries or deaths are usually carried out by the French *Gendarmerie*, in addition to penal investigations which are undertaken by a judge of the local criminal court.

An airline's liability is generally governed by the Montreal Convention 1999, which provides a strict liability regime with the possibility to exclude liability for damages above 113,100 Special Drawing Rights (SDR) (approximately EUR 115,000) when the accident is a result solely of a third party's fault.

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

In 2015, the French Supreme Court (*Cour de cassation*) decided that a third party action by an aircraft manufacturer against an airline arising from the death of passengers in an air accident was not governed by the Warsaw Convention.

In this matter, the victims' families sued the manufacturer for alleged design defects on the aircraft. The families claimed compensation for damages arising from the death of the passengers. The manufacturer brought a third party action against the airline for indemnity. The airline raised a jurisdiction exception based on the applicable Warsaw Convention (the Montreal Convention was not applicable as it had not been ratified by one of the countries involved). The Court of Appeal granted the jurisdiction exception. The *Cour de cassation* quashed the Court of Appeal decision on the grounds that the Convention only governs actions brought against an airline directly by the passengers and not by the manufacturer.

This decision is a breach of the principle of exclusivity of the Convention (now the Montreal Convention).

2 Aircraft Trading, Finance and Leasing

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

France is a party to the Geneva Convention of 19 June 1948 and rights in relation to the ownership of aircraft are consistent with the rules set out therein.

Registration of ownership constitutes proof of ownership and is binding on third parties (Article L.6121-1 of the French Code of Transport). No transfer of title is binding on third parties until the owner is registered as the owner on the register which is kept by the DGAC. For the purpose of registering an aircraft or a change of ownership, the DGAC will require an original bill of sale and other such documentation necessary to verify the authenticity of the transfer.

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

Mortgages on aircraft registered in France must be registered on the French aircraft register in order to be binding on third parties (Article L.6122-8 of the French Code of Transport). Mortgages may only be taken on an entire aircraft (for example, one may not take a mortgage on an engine only).

Mortgages must be an instrument in writing signed by both parties (the owner as mortgagor, and the creditor of the owner as mortgagee). The amount secured must be indicated; the mortgage may secure the principal plus three years of past due interest, in addition to the interest accrued during the year of enforcement. The security consists of the aircraft, engines and all other parts; it may also be extended to spare parts provided that a list identifying each of them is included in the mortgage agreement. Mortgages may be obtained by contract only and not by Court Order.

A single mortgage may cover several aircraft or even an entire fleet (if the entire fleet is registered in France) as long as all aircraft included in the security are identified.

An original of the mortgage agreement must be sent to the DGAC for the purpose of filing a mortgage. In the same manner as for registration of ownership, the DGAC will require a number of documents in order to verify the authenticity of the mortgage; the mortgage agreement does not need to be notarised. The registration of the mortgage is valid for 10 years; if the mortgage agreement provides that the mortgage is granted for a period in excess of 10 years, a re-filing/re-recordation is required upon the expiry of the 10-year period.

The request for deregistration of a mortgage must be filed by the mortgagee. No deregistration of the aircraft from the French registry may be done unless the mortgage has been released or the mortgagee has agreed.

An aircraft mortgage does not give a right to possession, but only to cause the sale, and priority over the proceeds of sale. Several mortgages may be taken on a single aircraft and the mortgages registered first will have priority over the subsequent ones.

Consistent with the rules of the Geneva Convention, some rights have priority over the mortgagee's: (i) legal costs of public auction sale; (ii) costs incurred for salvage; (iii) costs that are indispensable for preserving the aircraft; and (iv) mechanics' liens if registered prior to the mortgage.

The registered mortgagee is entitled to receive insurance proceeds up to the secured amount in case of loss or damage to the aircraft, subject to alternative provisions agreed between the parties.

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

Leases (i.e. dry lease) are not required to be registered. However, they may be registered on the French aircraft registry. When a lease is recorded, the owner's liability to third parties is subject to proof of negligence of the owner. The registry only records the existence of the lease to the operator, and its duration.

Public transport aircraft may only be arrested in France in a very limited number of circumstances, for example in the event of sums due by the owner for acquiring the aircraft, or for training or maintenance, and also for airport or traffic dues and fines for curfew and similar violations.

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

France is a signatory of and has ratified most international aviation conventions including, *inter alia*:

- The 1929 Warsaw Convention, as amended by the Hague Protocol of 28 September 1955.
- The 1944 Chicago Convention.
- The 1963 Tokyo Convention on offences and certain acts committed on board aircraft.
- The 1952 Rome Convention on damage caused by foreign aircraft to third parties on the surface.
- The 1968 Geneva Convention on the international recognition of rights in aircraft.
- The 1999 Montreal Convention.

The Cape Town Convention on international interests in mobile equipment has been signed by France; however, to date it has not been ratified.

2.5 How are the Conventions applied in your jurisdiction?

Ratified conventions are recognised and enforced by the court and prevail over French domestic law.

3 Litigation and Dispute Resolution

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

Any person who has possession of an aircraft can retain it until payment of charges, fees or costs, which arose from the subject possession, such as repair and maintenance costs, hangar fees, etc., have been satisfied.

Aircraft that are dedicated to public transportation or to state services are protected, in the sense that they can be subject to freezing injunctions only for debts related to the sale or maintenance of the aircraft or training (Article L. 6123-1 of the French Code of Transport) and for unpaid airport or air service charges (Article L.6123-2 of the French Code of Transport).

In other circumstances, freezing injunctions can be sought pursuant to the common rules provided by the Law of 9 July 1991, before the *Juge de l'Exécution*. The conditions are:

- The debt must appear certain.
- Under certain circumstances, the creditor can assume that he will have difficulty in getting paid.

A freezing injunction is not necessary when the creditor already has a judgment which is not enforceable yet, or a similar document such as an unpaid cheque or a notarised agreement; in such circumstances, the freezing of an aircraft can be pursued directly by a bailiff.

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

There is no such self-help regime under French law. A lessor or a financier has no other choice than to seek an injunction to repossess an aircraft.

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

The French judicial system is not based on sector/industry, but on the nature of the dispute and the value of the dispute.

Commercial courts will have jurisdiction on all commercial claims or other disputes related to trade, finance and commerce. As such, commercial courts will have jurisdiction for claims between lessor and lessee, between airline and repair company, etc.

Criminal cases are heard by criminal courts. Prosecutions for manslaughter will be heard by the *Tribunal correctionnel*, which can also make decisions on a civil victim's compensation for harm arising from manslaughter.

Civil matters are heard by civil courts, mainly the *Tribunal de Grande Instance* for claims above EUR 10,000 (including claims arising from death or injury) and the *Tribunal d'instance* and *Juge de proximité* for small claims below EUR 10,000 (including baggage claims, claims for delayed flights, etc.).

Disputes with the French administration (for example, airport taxes and navigation service taxes) are heard by the *Tribunal administratif*.

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

The usual way for starting litigation in France is to serve a Writ in Summons on the Defendant. The service is done by a bailiff. Then the original of the Writ in Summons is filed with the relevant court which has jurisdiction over the matter.

Service on parties residing abroad varies according to whether the Defendant's state is a member of the European Union or has signed a bilateral or multilateral convention with France.

As to non-EU Member States, service is usually done via the diplomatic channel. The French court has no obligation to wait for evidence that the service on the foreign Defendant was actually completed; service is deemed completed; and it is sufficient to give evidence to the court that the Summons was sent to the public prosecutor who will take care of service abroad. If it transpires that service was not done, resulting in a Judgment by Default, this would be a specific cause for an appeal.

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

Remedies vary depending on the nature of the dispute.

On an interim basis, the Claimant can start a *procédure de référé* in order to obtain an *ordonnance de référé* for:

- a provisional Injunction Order to prevent the other party from doing something that clearly violates the law; or
- a provisional payment for damages.

On a final basis, the Claimant can start a *procédure au fonds* in order to obtain a decision on the merits of his claim. For example:

- damages;
- an injunction to do or not to do something;
- a decision on the ownership and repossession order; or
- other.

It should be noted that there is no definitive list of what a French court may order.

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

Except for small cases below EUR 4,000, there is a right of appeal to a Court of Appeal (*Cour d'appel*). The Court of Appeal has the power to make a new decision on all aspects of the matter, both on questions of fact and questions of law.

After a Court of Appeal decision, or if the appeal was not open, there is also an appeal before the French Supreme Court (*Cour de cassation* for civil matters or *Conseil d'Etat* for administrative matters). The Supreme Court only rules on matters of law: it merely ensures that the lower court has correctly applied the law to the facts, without contradicting the Court of Appeal as to what the facts are (with the exception of a clear misrepresentation or distortion of the facts).

Arbitral decisions cannot be subject to an appeal, except in very limited circumstances.

4 Commercial and Regulatory

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

There are no sector-specific competition law rules that apply to the aviation sector.

Joint ventures such as alliances or code shares can be considered to be agreements which are incompatible with the market (see point 4.1.1 below) or as a concentration (see 4.1.2).

4.1.1 Agreement incompatible with the market

Article 101§1 of the Treaty on the Functioning of the European Union (TFEU) prohibits all agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market (i.e. the European Single Market).

The European Commission will have jurisdiction if it finds that an agreement falls within the scope of this Article.

The European Commission may declare that Article 101§1 of the TFEU shall not apply to certain categories of agreements, decisions of associations, and concerted practices, in the air transport sector (see question 4.3).

In France, Article L420-1 of the Code of Commerce forbids joint actions, agreements, explicit or implicit collusions or alliances which have as their object, or can have as their effect, the prevention, restriction or distortion of competition within a market, directly or even indirectly through a foreign holding company.

If the scope of such an agreement affects only the French market, the French Authority in charge of competition (*Autorité de la Concurrence*) will have jurisdiction (Articles L420-1 and L420-2 of the Code of Commerce).

4.1.2 Concentrations

European Union law (Article 2 of Regulation (EC) 139/2004) and French law (Article L430-6 of the Code of Commerce) forbid concentrations which would significantly impede effective competition in the common market or in a substantial part of it.

The European Commission (see point 4.1.2.1) or the French authorities (4.1.2.2) will have jurisdiction over the concentration depending on the turnover of the undertakings involved. Concentrations which have very little impact on the market given the size of the undertakings, are not subject to any control (4.1.2.3).

4.1.2.1 European competence

The Regulation (EC) 139/2004 sets thresholds to define the Community dimension of the concentration, and therefore the competence of the European Commission.

A concentration has a Community dimension where:

- the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5,000 million; and
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

Alternatively, a concentration that does not meet the thresholds laid down previously has a Community dimension where:

- the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2,500 million;
- in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;
- in each of at least three Member States included for the purpose of the above point, the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

4.1.2.2 French competence

If the above-mentioned thresholds are not met, the French Authority in charge of competition will have jurisdiction.

4.1.2.3 Absence of control

Concentrations which will not have a substantial impact on the market are not controlled.

This is the case when the following thresholds are not met (Article L430-2 of Code of Commerce):

- the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 150 million; and
- the French aggregate turnover of each of at least two of the undertakings concerned is more than EUR 50 million,

or alternatively, if at least two of the undertakings concerned operate one or several retail store(s), or at least one undertaking operates all or any part of its activity in one or several French overseas departments or in the French overseas collectivities of Mayotte, Saint-Pierre-et-Miquelon, Saint-Martin and Saint-Barthélemy, and:

- the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 75 million; and
- the French aggregate turnover of each of at least two of the undertakings concerned is more than EUR 15 million.

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

The "relevant market" comprises all the goods and services which can be regarded as substitutable.

They are determined by analysing the relevant product market and the relevant geographic market. As regards the relevant product market, both supply and demand will be taken into account, which implies looking closely at the goods or services provided by competitors.

The French Authority defines the relevant market by reference to European case law, as the Minister of Economy did in a decision of 27 April 2000 concerning the merger between Air France and Brit Air.

The European Commission later defined several relevant markets between airline competitors in a decision of 27 February 2013 concerning the merger of Ryanair and Aer Lingus. Here, relevant markets included routes, types of flights, types of passengers and types of services. The European Commission considers that an Origin and Destination are not substitutable by another, but two airports serving the same city can be. The substitutability between direct and non-direct flights depends on the length of the flight. Different categories of passenger can constitute different relevant markets. The market packaging of the flight also has an influence on the definition of the relevant market because of the different services that can be linked to the flight.

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

4.3.1 In French law

Yes. The parties to a concentration can notify the project to the Authority in charge of competition (*Autorité de la Concurrence*), with commitments which aim to make the concentration compatible with the market. Under Article L430-5 II of the Code of Commerce, the Authority can then authorise the concentration, provided that the undertakings comply with their commitments.

Parties to an anticompetitive agreement may also obtain regulatory clearance. Under Article L420-4 of the Code of Commerce, they must prove that said agreement contributes to promoting economic progress, while allowing consumers a fair share of the resulting benefit, and does not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

4.3.2 In European Union law

Similar provisions apply in European Union law when the European Commission has jurisdiction (see question 4.1): the agreement must be notified to the relevant European authority.

Under Articles 6 and 8 of Regulation (EC) 139/2004, if the European Commission finds that the concentration raises serious doubts as to its compatibility with the common market, undertakings can offer commitments to make the concentration compatible with the common market. The European Commission will authorise it if it finds that the concentration, following the commitments, no longer raises serious doubts.

By a decision of 14 July 2010, the European Commission authorised an alliance between British Airways, American Airlines and Iberia, which was first seen as incompatible with the common market. But the undertakings committed to make landing and take-off slots available at London Heathrow, which were considered essential to facilitate the entry or expansion of competitors on routes between London and several airports. It was an important step because slots are seen as market barriers.

Regarding incompatible agreements with the market, under Regulation (EC) 487/2009, the European Commission may, by Regulation, declare that Article 101§3 TFEU shall not apply to certain categories of agreements and concerted practices in the air transport sector.

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

There is no control of foreign ownership.

Jurisdiction is distributed between French and European authorities depending on the combined aggregate turnover of all the undertakings (see question 4.1).

Under Articles L430-1 and subsequent of the Code of Commerce, concentrations shall be notified, and cannot be implemented before they are authorised (see question 4.5 for further details).

Under French law, joint ventures can only be considered concentrations if they "will be performing on a lasting basis all the functions of an autonomous economic entity" (Article L430-1 II of the Code of Commerce).

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

4.5.1 In French law

Concentrations shall be notified to the French Competition Authority prior to their implementation. The Authority must then respond within 25 working days.

It can then find that the agreement does not fall within the scope of Articles L430-1 and L430-2 of the Code of Commerce. It can also authorise the agreement, or order a further in-depth examination.

Within five working days from the day he/she is informed of the Authority's decision, the Minister of Economy can call for a further indepth examination of the agreement according to Article L430-7-1. In the absence of such a call, the agreement will be deemed authorised by the Authority.

4.5.2 In European Union law

Concentrations in the scope of the European Regulation (EC) 139/2004 (see question 4.1) have to be notified to the European Commission prior to their implementation.

Proceedings before the European Commission are set out in Articles 4 and subsequent of Regulation (EC) 139/2004. Its decision shall be taken within 25 working days starting from the receipt of the reasoned submission by the Commission.

It can then find that the agreement does not fall within the scope of the Regulation. It can also decide not to oppose the concentration, or declare the concentration incompatible with the common market.

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

This is a European Union law matter. Under Articles 107 to 109 of the TFEU, state aid that distorts or could distort competition is basically incompatible with the common market, although some aid might be exempted in consideration of its purpose.

Under Articles 87 and 88 of the EC Treaty and Article 61 of the EEA Agreement, the European Commission has set guidelines regarding State Aid in the Aviation Sector (94/ C 350/07 OJ C 950/1994; OJ C 312/2005).

Those guidelines concern the financing of airports and start-up aid for airlines.

The aim of the airport financing guidelines is to allow an airport under public ownership to behave as a private firm. Consequently, a reduction in airport fees is free of aid if the airport is guided by long-term profitability. In France, there are many examples of small airports conceding reductions in fees to Ryanair, which have allowed them to develop significantly.

Start-up aid for airlines has the main objective of maintaining certain routes (see question 4.7).

In France there are no sector-specific provisions that regulate direct or indirect financial support to companies or airports.

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

French law has not made available any specific national aid for airlines since 2005. Assistance must be sought at a European level.

Article 86 of the EC Treaty rules that state aid in the form of public service compensation may be granted to undertakings entrusted with the operation of services of general economic interest. Within this Article, Regulation (EEC) 2408/92 and a Decision from the European Commission of 28 November 2005 set the rules that Member States have to apply to provide public service compensation to airlines. The main goal followed by the regulation is to maintain routes considered vital for the economic development of certain regions.

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

The "*Informatique et Libertés*" Statute of 1978 created the CNIL (the French National Agency for Data Protection), which regulates the creation and use of consumer databases. This Statute was amended in 2004 by the implementation of the 95/46/EC Directive into French law.

The data subject may, on compelling legitimate grounds relating to the consumer's particular situation, object to the processing of data relating to him.

The consumer may also enquire with the data controller as to whether or not data relating to him is being processed, to what end, and what

category of data is concerned. He may obtain communication, in an intelligible form, of the data undergoing processing and of any available information as to its source. Finally, he may obtain communication about whether or not data is or will be transferred to another Member State of the EU.

In 2015, a new law was implemented in order to prevent terrorist attacks and serious cross-border crime, which allows API (Advance Passenger Information, which refers to a passenger's identity) and PNR (Passenger Name Records, containing booking information) data collection for flights entering or leaving France. According to this regulation, passengers' data must be transmitted to the intelligence services (Article L232-7 CSI of the Code of Homeland Security).

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

Under Article 34 of the 1978 Statute, the data controller must protect personal data against loss, alteration and unauthorised disclosure or access. In the event of such a breach, the airline shall notify forthwith the CNIL (if not, it may be fined EUR 300,000), pursuant to Article 226-17 of the French Penal Code.

The airline shall notify the consumer if either of the following applies:

- the violation is likely to breach personal data security or the privacy of a subscriber or any other individual; or
- the CNIL is convinced of the severity of the breach.

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

In French law, there are no specific provisions relating to intellectual property rights in relation to aircraft. All the mechanisms available are provided by the French Code of Intellectual Property.

As regards jurisdiction, special courts are established to deal with intellectual property issues.

Furthermore, the European Union joined the Cape Town Treaty in 2009. The accession covers those matters in respect of which legal competence has been transferred to the EU from the Member States. Ratification is therefore required by each Member State in order for the benefits to be realised.

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

Regulation (EC) 261/2004, directly applicable in France, provides for the rights of the passengers in case of denial of boarding (passengers may receive compensation up to EUR 600). In case of a dispute on the application of the Regulation's provisions, civil state courts will have jurisdiction.

Regarding Regulation (EC) 261/2004, the European Commission proposed the modification of the existing air passenger rights regulations, to address the court's decisions. The Parliament adopted its first-reading position on the proposal in February 2014. But the revised Regulation has not yet come into force: although the Council has made some progress on the file, it has not yet agreed on a general approach for negotiations with the Parliament.

In case of a dispute that is not covered by Regulation (EC) 261/2004, French law applies (no specific regulation).

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

Regulation (EC) 261/2004 also provides for the rights applicable in case of delay.

According to Article R160-1 of the French Civil Aviation Code, the French *Commission administrative de l'aviation civile* may impose a penalty of up to EUR 7,500 for non-compliance with Regulation (EC) 261/2004 (including late arrival of flights).

In order to contest such a penalty, an action may be brought before the Administrative Court (Article R160-14 of the French Civil Aviation Code).

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

Airports, and subsequently airport authorities, are governed by the Transport Code, Section 6, Book III, which provides for the legal status applicable to airports, for safety rules and for noise regulations.

In addition, airports are governed by European Regulations, such as (EC) 216/2008 implementing common rules in the field of civil aviation, and (EU) 219/2014, which deals with airport certification.

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

Most of the disputes that arise between airports and passengers relate to bodily injury. In case of such disputes, administrative liability applies.

The general consumer protection legislation in France mainly stems from EU legislation and is focused on safety, the protection of financial interests and the duty of information. Most of these general Regulations deal with the consumer's protection within the context of sale or use of goods, and are therefore not relevant to the relationship between airport operator and passengers.

However, the general consumer protection legislation applies to the relationship between the airport operator and the passenger using airport parking.

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

Amadeus, Sabre and Galileo are the most common GDSs used in France.

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

No, there are not.

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

Since most French airports are controlled by the State, such integration would presuppose political will.

In any case, there are no legal impediments to vertical integration between air operators and airports.

5 In Future

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

The most likely change in regulation is the amendment of Regulation (EC) 261/2004, which provides for the rights of passengers in the case of denial of boarding and cancelled flights. There has been a lot of criticism against the EU and French courts' interpretation of the Regulation, extending the right to compensation to delayed flights and dramatically restraining the possibilities for the airlines to avoid financial compensation (extraordinary circumstances). The burden of financial compensation paid by the airlines to the passengers is significant. An amendment has been sought for years but has not yet been achieved. Clarification as to whether the EU Commission will accept the courts' interpretation by implementing their decisions within the revised version of Regulation (EC) 261/2004, or counter the said interpretations, is expected.

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We appear in court frequently, whether representing clients in individual or in major accident cases.

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1 General

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

Aviation legislation in Germany is, to a high degree, characterised by international treaties and by European law. On a national level, aviation law is primarily based on the German Air Traffic Act (*Luftverkehrsgesetz*) of 1922, the Air Traffic Order (*Luftverkehrs-Ordnung*) of 1963 and the Aviation Security Act (*Luftsicherheitsgesetz*) of 2005.

The Federal Aviation Office (*Luftfahrt-Bundesamt* or "LBA") was established in 1954 in Braunschweig as the supreme authority in civil aviation and, as such, is directly subordinated to the Federal Ministry of Transport, Building and Urban Development (*Bundesministerium für Verkehr, Bau und Stadtentwicklung*). Amongst other tasks, the LBA is responsible for the supervision of the aviation industry and for the German Aircraft Register (*Luftfahrzeugrolle*).

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

The provisions 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 ("Regulation (EC) No. 1008/2008"), which were transposed into German law by sec. 20 para. 4 German Air Traffic Act (see question 1.1), set out the conditions for granting an operating licence. The Regulation consolidates and updates the set of liberalisation measures known as the 'Third Package', adopted by the European Commission in 1992. According to Art. 3 para. 1 Regulation (EC) No. 1008/2008, no undertaking established in the Community shall be permitted to carry air passengers, mail and/or cargo for remuneration and/or hire unless it has been granted the appropriate operating licence.

An undertaking shall be granted an operating licence by the Federal Aviation Office (*Luftfahrt-Bundesamt* or "LBA") provided that:

- its principal place of business is located in Germany;
- it holds a valid Air Operator Certificate;
- it has one or more aircraft at its disposal through ownership or a dry lease agreement;
- its main occupation is to operate air services in isolation or combined with any other commercial operation of aircraft or the repair and maintenance of aircraft;
- its company structure allows for the implementation of the provisions outlined in this chapter;
- Member States and/or nationals of Member States own more than 50% 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 Community is a party;
- it meets the financial conditions specified in Art. 5 of Regulation (EC) No. 1008/2008;
- it complies with the insurance requirements specified in Art. 11 of Regulation (EC) No. 1008/2008; and
- it complies with the provisions on good repute as specified in Art. 7 of Regulation (EC) No. 1008/2008.

Additional relevant information:

- The LBA is entitled to revoke or suspend an operating licence at any time if the above-mentioned requirements are not (all) met.
- Air carriers from Member States of the European Economic Area ("EEA") are allowed to operate intra-Community scheduled air services in the EEA. A separate application or notification is no longer necessary. Air carriers from EEA Member States must, however, apply for entry permissions with regard to commercial flights for other purposes (e.g. aerial work, flights with balloons or local flights).
- Air carriers from non-EEA Member States shall apply for operating permission prior to commencing scheduled air services to and from Germany. Prior to commencing charter flights to and from Germany, air carriers from non-EEA Member States, as well as air carriers from EEA Member States wanting to conduct flights to third countries, have to apply for an entry permit. Companies from non-EEA Member States shall apply for entry permits with regard to commercial flights for other purposes (e.g. aerial work, flights with balloons or local flights).

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

With the adoption of Regulation (EC) No. 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation, the establishment of a European Aviation Safety Agency ("Regulation (EC) No. 1592/2002") and the subsequent establishment of the European Aviation Safety Agency ("EASA"), a European Agency and Europe-wide regulatory authority was created. In this regard EASA absorbed most tasks from the Joint Aviation Authorities ("JAA"), as well as acquiring new responsibilities. Initially, EASA was responsible for: safety and environmental type certification of all aeronautical products; approval of organisations involved in the design of aeronautical products, as well as foreign production, maintenance and training

organisations; and coordination of the European Union programme, Safety Assessment of Foreign Aircraft ("SAFA").

Regulation (EC) No. 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation, establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No. 1592/2002 and Directive 2004/36/EC ("Regulation (EC) No. 216/2008" or the so-called "Basic Regulation"), entered into force on 8 April 2008 and extended the competencies of EASA to air operations, pilot licensing and authorisation of third-country operators (first extension). On 7 September 2009, the Council further extended EASA's competencies in order to cover the safety of aerodromes, air traffic management and air navigation services (second extension).

EASA works closely with the Federal Aviation Office (*Luftfahrt-Bundesamt* or "LBA"), but has taken over many of the LBA's functions in the interest of aviation standardisation across the European Union ("EU").

By performing ramp inspections on third-country aircraft landing at Community airports, the EU tries to meet the need for effective enforcement of international safety standards. In this regard, Directive 2004/36/EC of the European Parliament and of the Council of 21 April 2004 on the safety of third-country aircraft using Community airports (the so-called "SAFA Directive"), which came into effect on 30 April 2004, provides a legal obligation for EU Member States to perform ramp inspections upon third-country aircraft landing at their airports.

On 6 May 2014, Commission Regulation (EU) No. 452/2014 laying down technical requirements and administrative procedures related to air operations of third-country operators pursuant to Regulation (EC) No. 216/2008 of the European Parliament and of the Council, was published in the Official Journal of the European Union. As from 26 May 2014, EASA will issue safety authorisations to commercial air carriers from outside the EU upon earlier request, if all authorisation requirements are met. Third-country operators (TCO) flying to any of the 28 EU Member States and/or to the EFTA States (Iceland, Norway, Liechtenstein, Switzerland) must apply to EASA for a so-called TCO authorisation.

Furthermore, air carriers may be refused landing within the EU for safety reasons on the basis of Regulation (EC) No. 2111/2005 of the Parliament and of the Council of 14 December 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, and repealing Art. 9 of Directive 2004/36/EC. The lists, which distinguish between an operational ban and operation restrictions, are prepared by EASA and updated every four months.

The German Air Traffic Control (*Deutsche Flugsicherung GmbH*) is responsible for air traffic control in Germany. It is a company organised under private law and 100% owned by the Federal Republic of Germany. Under certain circumstances, flights might remain under the control of EUROCONTROL.

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

Not entirely. An operating licence is required for non-commercial air transport operations of passengers, mail or cargo if those operations are conducted for remuneration, pursuant to sec. 20 para. 1 German Air Traffic Act (*Luftverkehrsgesetz*). An exception is made whenever an operation is conducted with an aircraft with no more than four passenger seats. An operating licence is also not necessary for flights that are exclusively carried out to drop parachutists or which entail aerial sport devices.

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

In commercial air traffic, which does not qualify as scheduled transport operations (*Gelegenheitsverkehr* or "non-scheduled services"), the licensing authority can determine conditions and requirements or prohibit transportation, if such air traffic has a negative impact on the public interest. For special requirements relating to licensing of non-scheduled services, refer to question 1.2.

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

Yes. Concerning the German Air Travel Tax (*Luftverkehrsteuer*) for instance, carriers with a registered office outside Germany have to nominate a so-called licensed tax or fiscal representative, which can be considered discriminative at least under the European aviation law regimes if not also under the Chicago Convention.

Pursuant to sec. 3 of the German Air Traffic Act (*Luftverkehrsgesetz*), aircraft can, *inter alia*, only be registered in the German Aircraft Register (*Luftfahrzeugrolle*) if they are exclusively owned by German nationals or nationals of an EU Member State.

An undertaking shall only be granted an operating licence by the German Federal Aviation Office (*Luftfahrt-Bundesamt*) according to Art. 4 *lit.* f 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, if Member States and/or nationals of Member States own more than 50% 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 Community is a party. See also question 1.2.

1.7 Are airports state or privately owned?

German airports are mainly state-owned through operating companies organised under private law, i.e. there are no airport authorities, in the sense of a government agency, that operate an airport. Shareholders are mostly the Federal Republic of Germany ("FRG") and the federal state and/or city/county in which the airport is situated. Some operating companies also include private shareholders.

Out of the licensed German airports, of which there are currently 39, the five biggest (by passengers per year) are owned as follows: FRA – state of Hesse, Deutsche Lufthansa AG and two other private investors as well as free float; MUC – FRG, state of Bavaria, city of Munich; DUS – city of Dusseldorf, private investor; TXL – FRG, states of Berlin and Brandenburg; HAM – city of Hamburg, private investor; and CGN – FRG, cities of Cologne and Bonn, state of North Rhine-Westphalia, two counties.

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

Yes. The most notable requirement is the payment of airport charges as laid down in the Airport Charges Regulation (*Entgeltordnung*) drawn up by each airport and subject to prior authorisation by the supervising authority (sec. 19 *lit.* b German Air Traffic Act

(*Luftverkehrsgesetz* or "LuftVG")), i.e. the Ministry of Transport of the federal state where the airport is located. Operational limitations for carriers result e.g. from varying charges for aircraft in categories like noise and pollutant emissions, as well as maximum take-off weight ("MTOW") or time of operation. Sec. 19 *lit.* b LuftVG contains a non-discrimination clause, therefore in general there is no distinction e.g. between domestic and foreign carriers whereas the law expressly states that differentiations by noise categories or other material reasons are justified.

Technical requirements, such as specific approach or take-off procedures or specifications of aircraft allowed to use the airport, are frequently not imposed on carriers and other users by the airport itself; instead the competent authorities such as the Ministries of Transport or the Federal Aviation Agency act in these matters. Further requirements may also stem from the licence under which the airport in question operates, e.g. curfew hours, etc.

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

The German Federal Bureau of Aircraft Accident Investigation (*Bundesstelle für Flugunfalluntersuchung* or "BFU") is subordinated to the Federal Ministry of Transport and is responsible for the investigation of civil aircraft accidents and serious incidents in Germany. The purpose of the BFU is to improve aviation safety by determining the causes of accidents and serious incidents and making safety recommendations in order to prevent recurrence. The BFU is not, however, responsible for determining liability.

Regulation (EC) No. 996/2010 of the European Parliament and the Council of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation and repealing Directive 94/56/EC ("Regulation (EC) No. 996/2010") came into force on 2 December 2010. According to this regulation, each Member State has to set up a national safety investigation authority and information on safety investigation should be exchanged between Member States. Regulation (EC) No. 996/2010 supplements the provisions contained in Annex 13 to the Convention on International Civil Aviation ("ICAO Convention") dated 7 December 1944.

Germany ratified the ICAO Convention in 1956. Annex 13 of the ICAO Convention contains information regarding the process of investigation and analysis of aviation accidents and incidents regarding civil aviation, and stipulates the rights and responsibilities of signatory states in relation to their collaboration. Pursuant to Art. 37 and 38 of the ICAO Convention, signatory states are obliged to implement the rules and regulations and processes provided by the International Civil Aviation Organisation ("ICAO"), preferably unmodified.

On a national level, there is also the Law Relating to the Investigation into Accidents and Incidents Associated with the Operation of Civil Aircraft (*Gesetz über die Untersuchung von Unfällen und Störungen bei dem Betrieb ziviler Luftfahrzeuge*), which is in line with Regulation (EC) No. 996/2010 and the ICAO Convention, and which came into force on 1 September 1998. This law replaced existing general administrative regulations regarding the specialist investigation of aviation accidents in relation to the operation of aircraft. In the course of the new regulation, sec. 5 of the German Air Traffic Regulations (*Luftverkehrsordnung*) regarding the notification of aviation accidents and incidents was also adapted.

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

On 16 February 2016, the Federal Court of Justice (*Bundesgerichtshof* or "BGH") had to decide on three similar cases brought by a consumer association against two domestic carriers – Condor (X ZR 98/14) and Lufthansa (X ZR 97/14), and one web portal selling flights operated by a company-owned airline, TuiFly, and other airlines (X ZR 5/15). The Court held that an air carrier is legally allowed to claim full payment of the ticket price from a passenger as early as the time of the flight booking. Some legal experts had argued that an airline would be limited to request a percentage of the ticket price as down payment at the time of booking. However, the Court decided that a pre-payment clause would not present an unreasonable disadvantage to the passenger and would not be contrary to the fundamental principles of German law.

On 1 April 2016, the German Consumer Dispute Resolution Act (*Verbraucherstreitbeilegungsgesetz* or "VSBG") came into force. As of February 2017, all companies using websites or general terms and conditions have to comply with additional information duties, e.g. naming the conciliation body.

On 22 June 2016, the Court of Justice of the European Union ("CJEU") ruled, at the request of the Local Court Dusseldorf, on the interpretation of Article 10(2) and Article 2(f) Regulation (EC) No. 261/2004 and the calculation of a reimbursement owed to the passenger following a downgrade. The CJEU held that the price to be taken into account in determining the reimbursement for the passenger affected is the price of the flight on which the passenger was downgraded, not including components of the price unrelated to that inconvenience (CJEU Case C-255/15).

On 26 July 2016, the Federal Labour Court confirmed its judgments of August 2015 denying compensation to a third party as a consequence of a strike. Two airlines claimed compensation for profit losses incurred by a strike. However, the direct opponent of the striking union, the employer and operator of Frankfurt Airport, successfully claimed compensation. The Federal Labour Court overruled the previous instances and granted the airport operator a right to compensation because the strike violated the industrial peace obligation and was therefore unlawful (BAG 1 AZR 160/14).

2 Aircraft Trading, Finance and Leasing

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

No. The registration in the Aircraft Register (*Luftfahrzeugrolle*) is only a declaratory one. It does not have any constitutive effect on the ownership of the aircraft under German law. Ownership can be proven by an effective transfer of ownership according to sec. 929 *et seqq.* of the German Civil Code (*Bürgerliches Gesetzbuch*) through mutual consent and delivery to the buyer on the basis of an effective contractual agreement under the law of obligations, e.g. a purchase and sale agreement. Good faith (*bona fide*) regarding the ownership of the registered party is not protected. This is a consequence of the fact that the German Aircraft Register mainly aims at securing registered data for purposes under public law, i.e. airworthiness and identification of the owner, nationality of the same, etc. Regardless of the public law nature and character of the Register, it is common practice to make use of the Aircraft Register for transactions under civil law.

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

Yes. Aircraft mortgages can be registered in the separate Register of Mortgages on Aircraft (*Pfandrechtsregister für Luftfahrzeuge*) in accordance with the 1948 Geneva Convention on the International Recognition of Rights in Aircraft. The conditions are set out in the German Aircraft Mortgage Act (*Gesetz über Rechte an Luftfahrzeugen*). The public register is maintained by the Local Court in Braunschweig. Upon request, a certified excerpt from the register may be issued.

A key precondition for the registration in the Register of Mortgages on Aircraft is that the aircraft is registered in the Aircraft Register. An effective mortgage requires mutual consent between the owner and the creditor and needs to be recorded in the Register of Mortgages on Aircraft. The declarations of the parties have to be certified before a notary public or the Register Court. As a consequence, recordings in the Register of Mortgages on Aircraft are not only declaratory but constitutive for the creation of the mortgage.

Upon its registration (*Eintragung*), the mortgage is a valid, enforceable and perfected security interest in the form of a first-ranking aircraft mortgage over the aircraft. The German aircraft mortgage generally covers the engines, provided such engines are installed at the airframe; title to the engines is and remains with the mortgagor as owner of the aircraft and they do not qualify as third-party accessories (*Zubehör*) of the airframe. Due to the flexible use of aircraft engines, it was in dispute in jurisprudence and amongst legal scholars in Germany in the past whether the ownership right of the aircraft owner and the rights of a mortgagee over the aircraft extend to the respective engine(s). It can now be considered a prevailing view for the time being under German law that aircraft engines do not form an integral part (*wesentlicher Bestandteil*) of an aircraft, and engines are therefore capable of being subject to independent rights. It is still controversial whether engines do qualify as accessories (*Zubehör*). Consequently, extra liens separate from the aircraft could rest on the engines without being registered in the Register of Mortgages on Aircraft. In Germany a separate register of mortgages on aircraft engines does not exist. However, so far the German Federal Court (*Bundesgerichtshof*) has not ruled on this qualification and therefore the questions have not been clarified yet.

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

The lessor/financier needs to be aware that the tax debtor in relation to the German Air Travel Tax (*Luftverkehrsteuer* or "ATT") is generally the carrier or the so-called licensed or fiscal representative, which carriers with a registered office outside Germany have to nominate. However, if an international carrier does not nominate a licensed or fiscal representative, then the owner (lessor) or keeper (operator) of the aircraft will be liable for ATT.

Regarding the restrictions of the lessor/financier on their right to retake possession of the aircraft, see question 3.2.

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

Germany is a signatory to the International Conventions of Montreal 1999 (effective date 28 June 2004), Warsaw 1929 (effective date 29 December 1933), the Hague Protocol for the amendment of the Warsaw Convention 1955 (effective date 1 August 1963), the Chicago Convention (effective date 8 June 1956), as well as the Geneva Convention on the International Recognition of Rights in Aircraft (effective date 5 October 1959). The Cape Town Convention has not been ratified by Germany.

2.5 How are the Conventions applied in your jurisdiction?

The ratification process renders the International Conventions into directly applicable national and EU law. The application is performed by the relevant German courts.

3 Litigation and Dispute Resolution

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

If a creditor has a claim regarding an outstanding debt against the owner of an aircraft, and if this creditor does not have a registered mortgage in relation to the relevant outstanding debt, then the creditor has to obtain an enforceable title (as recognised under German law) for the outstanding debt against the owner of the aircraft (e.g. by way of an enforceable court judgment or enforcement order) from the German civil courts. The enforceable title also needs to be issued with an enforcement clause by the competent German civil court and must be duly served on the debtor.

If the aircraft in question is registered in the German Aircraft Register, then the creditor needs to apply to the Local Court in Braunschweig (where the Register of Mortgages on Aircraft is kept) for the entry of a registered mortgage on the aircraft.

The enforcement of the mortgage is carried out by way of enforcement proceedings. In order to enforce the mortgage, the creditor has to apply to the relevant German civil court for compulsory auction of the aircraft.

If the outstanding debt is already secured by way of a registered mortgage and if the debtor has agreed to be subjected to immediate enforcement proceedings (which is common), then the creditor can (if all the necessary requirements are fulfilled) apply for compulsory auction of the aircraft with the relevant German civil court straight away.

Aircraft of foreign origin are not registered in the German Aircraft Register and no registered mortgage can be entered against such aircraft. Once the creditor has received an enforceable title with the relevant enforcement clause and has served this title on the debtor, the creditor will need to apply to the relevant bailiff to enforce title by way of seizure.

An aircraft can be released from a registered mortgage by cancellation of the registered mortgage by way of a transaction between the owner of the aircraft and the owner of the registered mortgage. Further, if the outstanding debt ceases to exist (e.g. by way of settlement) then the registered mortgage ceases to exist. Similarly, the registered mortgage ceases to exist if outstanding debt is settled as a result of enforcement proceedings.

If a foreign aircraft is seized, seizure can be released by way of a transaction between the owner of the aircraft and the creditor. Further, seizure can be released by way of settlement of the outstanding debt or return of the aircraft to the owner.

In order to secure the enforcement proceedings, the creditor can apply for an arrest of the aircraft with the relevant German civil court. The enforcement of the arrest regarding an aircraft, which is

registered in the German Aircraft Register or the German Register of Mortgages on Aircraft, is executed by the bailiff entering a registered mortgage against the aircraft and (if permissible) taking the aircraft into safe custody. In relation to aircraft of foreign origin, the bailiff will seize the aircraft instead of entering a registered mortgage.

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

No, the lessor/financier has to proceed in accordance with the German laws of enforcement and debt recovery in order to repossess the aircraft or enforce its rights under the lease/finance agreement.

If the lessor/financier has a claim for the return of the aircraft against the debtor which is not fulfilled, then the lessor/financier has to obtain an enforceable title (recognised under German law) for this claim from the relevant German civil court. The title has to contain the necessary enforcement clause and needs to be duly served on the debtor. The creditor can then apply for the enforcement of the enforceable title with a bailiff, who will procure the creditor possession of the aircraft. This process can be rather lengthy.

The parties can, however, agree in the lease/credit agreement/surety agreement that the lessee/borrower submits to subjecting the aircraft to immediate enforcement proceedings. In such cases the lessor/financier does not need to go through the first step of obtaining an enforceable title from the German civil courts. Instead, the creditor can (if all the requirements are fulfilled) apply for the enforcement of the enforceable title with a bailiff directly, who will procure the creditor possession of the aircraft.

If ownership of the aircraft has not been transferred to the financier as a security and the financier only has a registered mortgage, then the financier cannot claim the return of the aircraft, but has to apply for the compulsory auction of the aircraft according to the relevant rules (see question 3.1).

In order to secure the enforcement proceedings of the claim for the return of the aircraft, the owner can apply for an injunction with the relevant German civil court. The enforcement of an injunction in relation to an aircraft which is registered in the German Aircraft Register or the German Register of Mortgages on Aircraft, is executed by the bailiff entering a registered mortgage for the claim and (if permissible) taking the aircraft into safe custody. In relation to foreign aircraft, the bailiff will enforce the injunction by way of seizure of the aircraft instead of entering a registered mortgage.

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

There are no special courts (of any type) for aviation disputes.

Civil claims in relation to aviation disputes have to be brought before the German civil courts. For a more detailed description of the civil court system and the remedies available, see questions 3.4 and 3.5.

Administrative proceedings regarding aviation disputes have to the brought before the relevant German administrative courts.

Criminal proceedings in relation to aviation disputes have to be brought before the relevant German criminal courts.

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

Service of documents in court proceedings is effected according to the German rules of civil procedure. Generally speaking, and unless the recipient has appointed legal representation, the service is effected to the legal representative or the respective party. In this regard there is no differentiation between domestic and foreign parties. However, service of documents to foreign parties may often require service to be performed in foreign countries. Depending on applicable international conventions, the respective service can either be performed via mail or formal diplomatic service.

It should further be noted that foreign carriers from non-Member States of the EU need to legitimate an officially authorised recipient (according to the law on service in administrative procedure and the law on administrative procedure) for the entire correspondence with German administrative authorities and the law courts in the Federal Republic of Germany. The respective person has to be named before the German aviation authorities (*Luftfahrt-Bundesamt* – "LBA").

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

Entering into legal proceedings before a court of law is the standard remedy to be taken in Germany in order to enforce one's rights. Summary proceedings are available for monetary claims and can be initiated by filing a standard form with the local court. Lawsuits require the filing of a detailed statement of claim, in particular including proper documentation of all facts presented to the court. Depending on the content and volume of the claim, the case will be heard on different levels of the German court system, typically comprising first instance, appellate level and – under certain conditions – a further appeal on questions of law at the federal level and/or the European level. The likely time involved to obtain a court order is two to three months (summary proceedings), six to 18 months (judgment at first instance) or several years (appeal up to federal level). Obviously, exceptions may apply. Injunctive relief offers interim rulings in urgent matters to be obtained within days if not hours. Appeals are possible. Injunctive proceedings are often followed by regular court proceedings in which the subject matter of the injunctive proceedings will be reviewed in greater detail.

The parties are free to submit to arbitration proceedings rather than regular court proceedings. Arbitration proceedings can be rather time-consuming but are decided in one instance, usually without the right to appeal. Only in rare cases is an appeal to the public courts of law possible. Arbitration proceedings take between several months and up to several years, depending on the complexity of the subject matter, the experience of the arbitrators, etc. Depending on the arbitration rules established between the parties, the arbitral tribunal may also render injunctions for an interim solution.

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

In court cases an appeal to the respective higher instance is possible if either party faces negative effects with a value of more than EUR 600.00. A further appeal on a question of law requires an explicit admission, to be granted *inter alia* if the case involves legal questions of fundamental importance.

An appeal against an arbitration award is only possible in case of a grave violation of procedural principles. In order to be enforceable, arbitration rulings have to be declared enforceable by a court of law. Germany is a signatory to the New York Convention on the enforcement of arbitral awards.

4 Commercial and Regulatory

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

Joint ventures on the basis of a joint venture company are subject to German merger control if the turnover thresholds are met. Joint ventures based solely on a cooperation agreement may be subject to the rules on the prohibition of cartels, which are similar to EU antitrust law.

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

The essential authority with regard to mergers and acquisitions is the Federal Cartel Office (*Bundeskartellamt*). Its decision can be appealed before the Dusseldorf Higher Regional Court. As regards the determination of the relevant market, the specific type of aviation sector has to be considered. While in the context of passenger flights further distinction is made between the direct destinations served by the airlines at hand, cargo flights require a broader market definition.

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

Yes, parties can obtain regulatory clearance for mergers from the Federal Cartel Office (*Bundeskartellamt*) under the terms of sec. 35 *et seqq.* of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*). There is no system of clearances for cartels.

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

According to sec. 37 of the Act against Restraints in Competition (*Gesetz gegen Wettbewerbsbeschränkungen*), mergers are defined as a) acquisition of assets, b) acquisition of joint or sole control, c) acquisition of shares (at least 25%), or d) exercise of competitively significant influence (also in case of shares below 20%). However, no distinction is made between various forms of joint ventures.

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

A notification procedure before the Federal Cartel Office (*Bundeskartellamt*) begins with Phase I investigations, which take up to four weeks (no reaction = clearance). If the case at hand is rather complicated, Phase II investigations will be initiated (in few cases). Their duration is limited to another three months. Normally, costs for Phase I proceedings range between EUR 2,000.00 and 8,000.00, while Phase II proceedings are much more expensive.

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

There are no sector-specific rules, but there are various forms of support (tax relief regarding kerosene and VAT, state aid for airlines, flight control and infrastructure).

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

Yes, state subsidies may be granted in the context of so-called "public service obligations" according to Art. 16 *et seqq.* 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 ("Regulation (EC) No. 1008/2008"). The individual criteria are determined in the corresponding public tender procedure (*cf.* Art. 16 para. 10 and 17 Regulation (EC) No. 1008/2008).

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

The main regulatory instrument in Germany governing the acquisition, retention and use of passenger data is the Federal Data Protection Act (*Bundesdatenschutzgesetz* or "BDSG"), in which Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, was incorporated. According to the BDSG, the acquisition, retention and use of personal data is only lawful if permitted by the BDSG or other law or if the passenger has provided consent.

According to the BDSG, passengers have a right of information on recorded data relating to them, the recipients or categories of recipients to which the data are transferred and the purpose of the data recording. If data is collected without the passenger's knowledge, the passenger has to be notified of such collection. Furthermore, passengers have the right to request rectification of recorded personal data relating to them if such personal data is inaccurate. In addition, passengers may claim damages in case of unlawful acquisition, retention or use of personal data relating to them.

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

If an airline determines that in case:

- special categories of personal data (any information on racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, health or sex life);
- personal data subject to professional secrecy;
- personal data referring to criminal or administrative offences; or
- personal data concerning bank or credit card accounts,

which it has recorded have been unlawfully transferred or otherwise unlawfully disclosed to third parties, threatening serious harm to the rights and legitimate interests of passengers, the airline has to inform the supervisory authority and the passengers, without undue delay, describing the nature of the unlawful disclosure, and

recommend measures to minimise possible harm. The notification to the supervisory authority shall, in addition, describe possible harmful consequences and measures taken by the airline as a result.

Any breach of this obligation is deemed to be an administrative offence and may be punished by a fine of up to EUR 300,000.00, or more if the benefit derived from such offence is higher.

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

In the Federal Republic of Germany ("FRG"), intellectual property is protected by industrial property rights ("IPR"), which prevent the IPR from being copied or imitated. IPR include patents (protection of technical inventions), utility models (protection of technical innovations), designs (protection of designs and models) and trademarks. These IPR must be registered to obtain the respective protection. The administrative body dealing with industrial property rights is the German Patent and Trademark Office (*Deutsches Patent- und Markenamt*).

With regard to patents and utility models, the Employee Invention Act (*Gesetz über Arbeitnehmererfindungen* or "ArbNErfG") needs to be considered. The employee is entitled to any invention made in the course of employment if the employee makes use of the invention in accordance with the specifications of German law. The employee shall receive the statutory compensation. The ArbNErfG sets out how employee inventions and proposals for technical improvement should be dealt with.

As regards copyrights, in the FRG, copyright protection comes into effect when a work is created; official registration is not necessary. The German Copyright Act (*Urheberrechtsgesetz*) applies to works of literature, art and signs.

In relation to patents, utility models and trademarks, like in other European countries, protection at a European level with effect also in the FRG can be sought at the European Patent Office and/or the Office for Harmonization in the Internal Market. New designs are even protected without registration. The term of copyright expires, however, after three years.

An infringement of an IPR can be pursued in court proceedings or via interim injunctions, the latter of which may be obtained within hours. There are specialised civil divisions at the various German regional courts that deal with such cases.

The basic claims connected with any IPR proceeding are the cease and desist claim, the information claim, the damage claim, as well as the right to have the infringing products destroyed.

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

Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No. 295/91, grants passengers a right to fixed-rate compensation, a right to reimbursement or re-routing, as well as a right to care in case of denied boarding and cancellation. Passengers may also have contractual claims for damages under the contract of carriage pursuant to sec. 631 *et seqq.* of the German Civil Code (*Bürgerliches Gesetzbuch* or "BGB"). Passengers travelling on a package holiday may have claims for damages against the tour operator under sec. 651a *et seqq.* BGB. Furthermore, a conciliation body for air passenger rights was established in Germany as of 1 November 2013.

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

According to Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No. 295/91 ("Regulation (EC) No. 261/2004"), Member States should ensure and supervise general compliance by their air carriers with this Regulation and designate an appropriate body to carry out such enforcement tasks.

In Germany, the Federal Aviation Office (*Luftfahrt-Bundesamt* or "LBA") is the National Enforcement Body ("NEB") and, as such, is the competent authority for the implementation of Regulation (EC) No. 261/2004.

As a first step, the LBA investigates passenger complaints. If the LBA finds potential infringements based on a passenger's complaint, it will initiate administrative fine proceedings. The air carrier has the right to be heard and can submit a written statement regarding the accusations directed at it.

As a second step, the LBA may end the proceedings based on the air carrier's statement or may issue an administrative order imposing a fine. In this respect, the LBA can impose fines of up to EUR 25,000.00. The air carrier can file objections against this administrative order.

Finally, the LBA may end the proceedings or may dismiss the objection to the administrative order. In the latter case, the air carrier may file an application for a decision by a court of law, which then has to decide on the matter.

The LBA procedure is a purely administrative procedure. The LBA is not in a position to enforce possible civil claims for passengers legally. Passengers can only assert their claims according to the procedures provided for in German civil law.

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

Airport operators (see question 1.7) are subject to German and EU legislation, as well as international agreements to which Germany is a signatory. Specific rules on the construction and operation of airports are contained in sec. 6 *et seqq.* German Air Traffic Act (*Luftverkehrsgesetz*) and sec. 38 *et seqq.* German Air Traffic Licensing Regulation (*Luftverkehrszulassungsordnung*), stipulating a general licensing requirement and compliance, e.g., with zoning, construction and environmental compatibility laws. Also relevant are the German Aviation Security Act (*Luftsicherheitsgesetz*), imposing various obligations e.g. to secure and control the airport premises, and the German Ground Handling Services Regulation (*Bodenabfertigungsdienstverordnung*), the latter implementing Council Directive 96/67/EC of 15 October 1996 on access to the ground handling market at Community airports. Furthermore, all relevant EU legislation, such as Regulation (EC) No. 300/2008 of the European Parliament and of the Council of 11 March 2008 on common rules in the field of civil aviation security and repealing Regulation (EC) No. 2320/2002, applies, as well as related Regulations (EC) No. 272/2009, No. 18/2010 and No. 185/2010 and specific international treaty law such as Annex 14 (airports) of the Chicago Convention.

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

German consumer protection law is characterised by a rather high standard, but there is no specific and consolidated codified law in Germany. Instead, respective norms are placed in a number of codes. Based on these norms, prior to a purchase or the signing of a contract, consumers in Germany must be able to recognise the benefits and consequences of their decision. Transparency and information are important for the German market, including with regard to the airline industry. The Federal Office of Consumer Protection and Food Safety ("BVL") and other authorities are responsible for the enforcement of consumer protection in Germany.

According to sec. 13 German Civil Code and related norms, German consumers are better protected than non-consumers. The general German consumer protection legislation consists of norms in the German Civil Code and, *inter alia*, insolvency law, unfair competition law, law against unfair terms and conditions and many norms related to protection of consumer health. There have also been activities in German legislation against telephone marketing and other means of distribution practice.

However, there is typically no contractual relationship between passengers and airport operators, because passengers enter into air carriage agreements with airlines or travel companies whereas airlines enter into agreements with airport operators in order to provide services for passengers. Thus many norms regarding contracts with consumers are not directly applicable concerning the relationship between the airport operator and the passenger. Airport charges to be paid by passengers are a special scenario and transparency is important in this regard, because of general consumer protection law. Also, many general public law regulations relating to safety and security exist in Germany in order to protect consumers in airports. Furthermore, Regulation (EC) No. 1107/2006 is a specific consumer protection law which provides that passengers with a disability must be properly assisted by airport operators.

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

The key players are AMADEUS, Sabre, Galileo and Worldspan (Travelport).

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

No. However, it should be noted that a system vendor, pursuant to Regulation (EC) No. 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems and repealing Council Regulation (EEC) No. 2299/89 ("Regulation (EC) No. 80/2009"), shall publicly disclose, unless this is otherwise made public, the existence and extent of a direct or indirect capital holding of an air carrier or rail-transport operator in a system vendor, or of a system vendor in an air carrier or rail transport operator. A system vendor within the meaning of Regulation (EC) No. 80/2009 means any entity and its affiliates which is or are responsible for the operation or marketing of a computerised reservation system.

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

Yes. Although the shares in – especially the major – airports in Germany are usually not owned by private investors (see question 1.7), there is no general prohibition on air operators acquiring such shares, as illustrated by the fact that Deutsche Lufthansa AG owns 8.44% of Frankfurt airport operator Fraport AG (as of November 2016). Potential restrictions may arise under applicable national and/or EU competition law but would, depending on the case, not exist with the aim of preventing vertical integration.

5 In Future

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

The use of drones is developing at a fast pace on a global scale. This poses a challenge to the various legislators on a national, international and European level. The European Aviation Safety Agency ("EASA") seems to be at the forefront of such developments for the harmonisation of regulations for drones not only in Europe but worldwide. The industry has high hopes that the regulatory framework will make a good step forward during 2017. It is expected that the next legislative level will be reached in the not-too-distant future, and that stakeholder consultation will emerge into a concrete regulatory proposal.

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Ireland

Donna Ager

Mary Dunne

Maples and Calder

1 General

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

The Department of Transport, Tourism and Sport ("**DOTTS**"), is the Government department responsible for aviation policy in Ireland. It has established the following entities to assist it in carrying out its functions:

- The Commission for Aviation Regulation ("**CAR**").
- The Irish Aviation Authority ("**IAA**").
- The Air Accident Investigation Unit ("**AAIU**"), which is responsible for air accidents that take place in Ireland and air accidents that occur outside Ireland involving Irish registered aircraft.
- The Environmental Protection Agency ("**EPA**"), which is responsible for implementation of the EU emissions trading scheme.

CAR

The key functions performed by the CAR are:

1. regulation of airport charges at Dublin airport and air traffic control charges at airports with more than 1 million passengers per year;
2. licensing of air carriers under EU Regulations;
3. regulation of tour operators and travel agents;
4. approval of ground handlers;
5. overseeing slot allocation at Dublin airport; and
6. overseeing application of EU Air Passenger Rights and Reduced Mobility.

IAA

The key functions performed by the IAA are:

1. provision of air traffic management and related services in Irish controlled airspace and on the North Atlantic;
2. the safety regulation of the civil aviation industry in Ireland;
3. the oversight of civil aviation security in Ireland; and
4. the registration of aircraft in Ireland.

The principal aviation legislation applicable in Ireland is as follows:

1. the Air Navigation Transport Acts 1936–2005;
2. the Irish Aviation Authority Act 1993;
3. the Package Holidays and Travel Trade Act 1995;
4. the Aviation Regulation Act 2001;
5. the Air Navigation and Transport (International Conventions) Act 2004;
6. the International Interests in Mobile Equipment (Cape Town Convention) Act 2005;
7. the Aviation Act 2006;
8. the Air Navigation (Notification and Investigation of Accidents, Serious Incidents and Incidents) Regulations 2009;
9. the State Airports (Shannon Group) Act 2014;
10. EC (Access to the Ground Handling Market at Community Airports) Regulations 1998 (S.I.505/1998);
11. EC (Common Rules for the Operation of Air Services in the Community) Regulations (S.I.426/2008);
12. EC (Rights of Disabled Persons and Persons with Reduced Mobility when Travelling by Air) Regulations 2008 (S.I.299/2008);
13. Regulation EC/95/93 on common rules for the allocation of slots at community airports;
14. Regulation EC/261/2004 establishes common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights;
15. Regulation EC/1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air; and
16. Regulation EC/1008/2008 on common rules for the operation of air services in the community.

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

An aircraft operator involved in commercial air transport must be the holder of a valid Air Operator Certificate ("**AOC**") issued by the IAA and a valid Air Carrier Operating Licence ("**ACOL**") issued by CAR.

In order to qualify for an ACOL, an applicant must satisfy all of the conditions for granting an operating licence set out in Article 4 of Principal Regulation EC1008/2008.

ACOLs are divided into two categories related to capacity and maximum take-off weight being category A and category B licences.

Category A licence holders are permitted to carry passengers, cargo and/or mail on aircraft with 20 seats or more. Category B licence holders are permitted to take passengers, cargo and/or mail on aircraft with fewer than 20 seats and/or less than 10 tonnes of maximum take-off weight.

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

The IAA is responsible for administrating Ireland's international aviation safety obligations and agreements in accordance with standards set by the International Civil Aviation Organisation ("**ICAO**") and the European Aviation Safety Agency ("**EASA**").

The Safety Regulation Division of the IAA ensures specific compliance with safety objectives set down under section 14 of the Irish Aviation Authority Act 1993 and the annexes to the Chicago Convention which are implemented through a combination of EU and domestic Irish legislation.

The IAA's remit with respect to safety includes certification and registration of aircraft airworthiness, licensing personnel and organisations involved in aircraft maintenance, incident reporting and management, the protection, storage and collection of information, licensing pilots, air traffic controllers and aerodromes and approving and monitoring air carrier operating standards.

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

No, the IAA regulates commercial cargo and private carriers.

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

No, the IAA regulates air charters.

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

The creation of the EU single market for aviation in the 1990s removed all commercial restrictions on airlines flying within the EU. Under the single market, all EU carriers can operate services on any intra-EU route.

Outside the EU single market, access to the air transport market is still heavily regulated under the framework set down in the Chicago Convention. Under the Chicago Convention, Ireland has negotiated bilaterally with a wide range of States to agree market access rights for both passenger and cargo services. A list of States with which Ireland has a bilateral air transport agreement is available on DOTTS' website: www.dttas.ie. Following the "Open Skies" judgment in the European Court of Justice in 2002, all market access rights negotiated by each of the EU Member States in their bilateral agreements must be equally available to all EU carriers.

Furthermore, under the EU's external aviation policy, the European Commission has been mandated to negotiate air transport agreements on behalf of the EU and its Member States with certain third countries. Under this process, so called "Open Skies" agreements have been negotiated, removing restrictions on capacity, routing and other limits, creating a free market for services between the parties to that agreement.

Most bilateral air transport agreements require that substantial ownership and effective control be maintained by nationals of each party to the agreement. Within the EU, community airlines are required to be at least 50% owned by EU nationals. The EU has indicated its willingness to negotiate these current ownership and control limitations with States prepared to similarly waive the requirement on a reciprocal basis. However, progress on this matter has been slow.

1.7 Are airports state or privately owned?

The three main airports, Dublin, Cork and Shannon, are 100% State-owned. Dublin and Cork airports are owned by daa plc. Shannon Airport is owned by Shannon Airport Authority.

The regional airports, the largest of which are Donegal, Knock, Kerry and Waterford, are privately owned.

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

Dublin Airport is the only Irish airport currently subject to economic regulation of its charges. Economic regulation of charges at Dublin Airport is based on the Aviation Regulation Act 2001 and is implemented by CAR.

Terminal charges are levied by the IAA at Dublin, Cork and Shannon airports and until 2015 were regulated by CAR.

The regime for economic regulation of aviation terminal services charges is being replaced by an EU regulatory regime. Under the Single European Sky ("**SES**") initiative, economic regulation of en route over-flights was introduced in 2012. The extension of this EU regulatory regime to include aviation terminal services charges commenced in January 2015 and is planned to be fully implemented from 2017.

All airlines must comply with EU legislation on reduced mobility and consumer protection.

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

The AAIU is responsible for conducting technical investigations into air accidents in Ireland, as well as incidents outside of Ireland involving Irish-registered aircraft.

The Air Navigation (notification and investigation of accidents, serious incidents and incidents) Regulations 2009 ("**2009 Regulations**") give effect to the requirements of Annex 13 of the Chicago Convention and gives the AAIU the powers it needs to carry out full and detailed technical investigations.

EU Regulation 996/2010 on the Investigation and Prevention of Accidents and Incidents in Civil Aviation is directly applicable in Ireland.

Following an investigation, the AAIU will issue safety recommendations to the appropriate aviation authority. The AAIU does not purport to apportion blame or liability in respect of an accident.

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

Belair Holdings Limited -v- Etole Holdings limited & Anor [2015] IEHC 569 – the Irish High Court discharged a non-consensual interest registered on the International Register under the Cape Town Convention.

DOTTS published a Request for Tenders in November 2016 for a Review of Future Capacity Needs at Ireland's State Airports.

A key feature of this review will be the timing and financing of a third terminal at Dublin Airport as well as an analysis of future expansion requirements at the three airports.

2 Aircraft Trading, Finance and Leasing

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

The Irish aircraft register is operated and maintained by the IAA. It is a registry of nationality and not of title. Registration of an aircraft in the name of a person does not establish that person's title to the aircraft and it cannot be regarded as giving notice (whether actual or constructive) of a person's interest in an aircraft.

In order to register an aircraft in Ireland, the aircraft must have a connection to Ireland and, save in the rare case where the IAA grants a specific exemption, the applicant must demonstrate that the aircraft is either wholly owned by an Irish citizen or EU citizen having a place of residence or business in Ireland or owned by a company registered in and having its principal place of business in Ireland or the EU with not less than two thirds of the directors also being Irish or EU citizens. Notwithstanding the foregoing, an aircraft may also be registered in Ireland if it is 'chartered by demise, leased or on hire to, or is in the course of being acquired under a lease-purchase or hire-purchase agreement by, a citizen or company' where such charter, lease or hire is to an individual or corporate fulfilling the above criteria, but such registration may be subject to such conditions as the IAA may deem fit to impose.

The IAA has concluded a number of arrangements with foreign civil aviation authorities which serve to delegate the responsibility for regulation and safety oversight for Irish registered aircraft from the IAA to the operator's home State. These agreements are entered in to pursuant to Article 83*bis* of the Chicago Convention which permits bilateral agreements between two aviation authorities of Chicago Convention contracting States.

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

The IAA does not operate a register of aircraft mortgages or third party rights or interests in aircraft or engines and will not agree to requests to note a mortgage or third party interest on the aircraft register or related file. The IAA acknowledges Irrevocable De-Registration and Export Request Authorisation Register ("**IDERA**") pursuant to its obligations under the Cape Town Convention as enacted by the International Interests in Mobile Equipment (Cape Town Convention) Act 2005 (the "**CTC Act 2005**"), but this does not serve to notify third parties or perfect any security interest in an aircraft.

Aircraft mortgages and other "charges" (as defined in the Companies Act 2014 (the "**CA2014**") over aircraft granted by Irish companies and Irish registered branches of foreign companies) are registrable with the Companies Registration Office (the "**CRO**") in Ireland within 21 days of the creation of the charge. The register maintained by the CRO operates as a priority register with priority based on the time of filing, not the time of the interest being granted. Under the CA2014, priority interests can be filed up to 21 days prior to the date on which the charge is actually granted with a full filing being made upon the charge actually being granted. Parties may elect to make a single filing upon the charge actually being entered into. If the charge is not registered within 21 days of the date on which it is granted, the charge becomes void against a liquidator and any creditor of the party granting the charge.

The CTC Act 2005 provides for the registration of certain interests in airframes and engines with the International Registry of Mobile Assets to ensure priority. Aircraft mortgages are amongst the interests which constitute "International Interests" (as defined in the Cape Town Convention) to the extent the mortgage is granted by an owner in a contracting State or the aircraft is registered in a contracting State. The International Registry is an online register but, due to it being located in Dublin, disputes over registrations are heard or enforced in the Irish High Court regardless of the country in which the claim originates.

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

Strict liability is imposed on owners under section 21 of the Air Navigation and Transport Act 1936 (as amended) where material damage or loss is caused by any item falling from an aircraft inflight. Lessors and financiers, unless holding an interest akin to an owner, will be unlikely to be held to be liable under section 21 and in any event owners can be indemnified against the risks under section 21 by a third party. Section 21(2) of the Air Navigation and Transport Act 1936 (as amended) also provides that an owner will not be liable where the aircraft is subject to a charter or lease arrangement for 14 days or more and the pilot and crew are not in the employ of the owner.

Save as set out above, liability for financiers, owners and lessors is based in negligence and a failure on the part of the relevant party to discharge a duty of care. Thus lessors, owners and financiers are unlikely to be held to be responsible for losses resulting from the operation of an aircraft, unless they are actually aware of a defect or issue and failed to take reasonable action in respect of such defect or issue in order to prevent loss.

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

Ireland is a signatory to the following conventions (as amended and updated) in relation to international airline operations:

1. The 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, as amended by the Hague Protocol of 28 September 1955 – ratified 20 September 1935 and 12 October 1959.
2. The 1944 Chicago Convention on International Civil Aviation – ratified 31 October 1946.
3. The 1956 Geneva Agreements on the Joint Financing of Certain Air Navigation Services in Greenland/Iceland – ratified 3 June 1960.
4. The 1962 Rome Protocol Relating to an Amendment to the Convention on International Civil Aviation – ratified 14 February 1963.
5. The 1971 New York Protocol Relating to an Amendment to the Convention on International Civil Aviation – ratified 15 June 1971.
6. The 1971 Vienna Protocol relating to an amendment to the Convention on International Civil Aviation – ratified 11 July 1972.
7. The 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft – ratified 14 November 1975.

8. The 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft – ratified 24 November 1975.
9. The 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air – ratified 29 April 2004.
10. The 2001 Cape Town Convention on International Interests in Mobile Equipment – ratified 29 July 2005.
11. The 2001 Protocol to the Convention on International Interests in Mobile Equipment on matters specific to Aircraft Equipment – ratified 23 August 2005.

Ireland has also signed, but has not yet ratified, the 1948 Geneva Convention on the International Recognition of Rights in Aircraft.

2.5 How are the Conventions applied in your jurisdiction?

The Cape Town Convention became law in Ireland on 1 March 2006, following the passing of the CTC Act 2005. The court system, and in particular the Commercial Court in Ireland, is the appropriate means of enforcing the Cape Town Convention. The Commercial Court has exclusive jurisdiction to hear any proceedings in connection with any function of the International Registrar under the Cape Town Convention or the Aircraft Protocol as defined in the 2005 Act and the State Airport (Shannon Group) Act 2014 which at the time of writing was awaiting ministerial approval.

The Montreal Convention was implemented in Ireland by the Air Navigation and Transport (International Convention) Act 2004. The CAR has a significant consumer protection role. The court system in Ireland is the suitable forum for enforcement of the Montreal Convention. CAR is the national enforcement body tasked with the monitoring and regulation of EU legislation covering air passenger rights and the provision of assistance to passengers with reduced mobility.

3 Litigation and Dispute Resolution

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

Irish law recognises certain liens and rights of detention for unpaid debts or charges. The rights may arise in law, equity, under contract or statute.

At common law, the third party liens available are similar to other common law jurisdictions such as England and Wales. An unpaid seller may seek to exercise a seller's lien although typical aircraft finance structures mean that aircraft manufacturers are not in a position (and in most instances do not need) to exercise such rights. A possessory lien may be exercised, for example where aircraft are subject to a claim for unpaid repairs. In order to exercise such a lien, the aircraft must be, and remain, in the possession of the party who carried out the repairs, and the specific aircraft over which the lien is sought to be exercised, must have been improved through the labour of that party, with the knowledge and authorisation of the owner (note maintenance is probably insufficient) resulting in an unpaid debt. Such a lien would only extend to the cost of unpaid repairs to the specific aircraft in question, and would not allow for a right of sale without court intervention. Contractual liens can also be created, and if provided for in the agreement between the airport user and the owner or operator of an airport, aircraft can be detained, and sold, for non-payment of certain airport charges.

The Air Navigation and Transport (Amendment) Act 1998 (section 40) affords certain airports operated by specified Airport Authorities the right to detain and, if necessary, to sell aircraft in respect of certain unpaid airport charges. This power to detain extends beyond the particular aircraft in respect of which the charges were incurred to any other aircraft of the operator or registered owner. This can cause problems for new operators assuming liability for pre-existing debts. If the owner or operator disputes the charges and offers sufficient security pending determination of the dispute, the power to detain is limited. As regards the power of sale, it can only be exercised with leave of the Irish High Court.

Parties in possession of judgments may also be entitled to exercise certain rights against an aircraft or shares in an aircraft holding company, provided appropriate judgment enforcement procedures have been followed, but an Irish court will have regard to prior and superior interests in granting any such reliefs.

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

Ireland is generally seen as a creditor-friendly jurisdiction, allowing self-help repossession and interim relief and other self-help remedies provided the contractual arrangements between the parties provide for same. Standard default remedies under leasing and security agreements often include powers to take possession or control of the aircraft in order to: sell or grant a new lease of the aircraft; receive income or profits that result from the management or use of the aircraft; and/or procure the deregistration, export and physical transfer of the aircraft from the territory in which it is located. In Ireland, provided the requirements of the Convention are met, it is not necessary to make an application to the High Court for leave to exercise that remedy unless the terms agreed between the parties expressly require the creditor to make such an application.

While self-help remedies may be available, there are risks for the lessor associated with non-consensual repossession without ancillary judicial relief, such as a lessee claiming breach of lease terms for quiet enjoyment and use of the aircraft. It is often considered prudent for the lessor to institute recovery proceedings where the lessee is considered uncooperative, or where a liquidator or examiner has been appointed to the lessee.

As a member of the EU, the relevant Declaration pursuant to Article 55 of the Convention and the application of Council Regulation (EC) No. 1215/2012 on jurisdiction and enforcement of judgments applies to interim relief under the Convention.

Ireland is a signatory of and has ratified the Cape Town Convention and has given effect to the Aircraft Protocol. Legislation in 2014 has afforded the Irish Government the power to make an order to give effect to Article XI (Alternative A) of the Aircraft Protocol, which should further enhance Ireland's position as a leading jurisdiction for aircraft finance. The relevant ministerial order giving effect to Alternative A is expected in the near future.

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

Aviation disputes in Ireland will typically be dealt with in the civil courts, in particular the Commercial Court division of the High Court which deals with commercial disputes where, amongst other things, the quantum of the claim exceeds €1m, and enjoys enhanced case management procedures. This Court also deals exclusively with proceedings in connection with any function of the Registrar under the Cape Town Convention or the Aircraft Protocol.

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

As most disputes will invoke the High Court jurisdiction, the Rules of the Superior Courts prescribe the relevant methods of service. Personal service on individuals may be effected in the State. Service on a company in the State must be effected in accordance with section 51 of the Companies Act 2014, by leaving the proceedings at or sending it by prepaid post to the registered office of the Company. Where the company has not notified the Registrar of Companies of its registered office, the documents may be served on the Registrar.

For parties located outside the State but within the EU, Council Regulations (EC) 1215/2012 on jurisdiction and 1348/2000 on effecting service may apply. For parties outside the EU, leave of the Irish Court to issue and serve proceedings may be required, with service thereafter effected pursuant to the Hague Service Convention.

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

In general, the Irish courts have jurisdiction to order and direct the full range of common law and equitable remedies to include making orders providing for interim and interlocutory relief, together with final orders including declaratory orders, injunctions and associated damages and costs awards.

The Arbitration Act 2010, which adopted the UNCITRAL Model Law, as amended in 2006 (the "**Model Law**"), with some minimal amendments, applies to all arbitrations, both domestic and international, commenced in Ireland after 8 June 2010. Unlike England and Wales, Ireland deliberately avoided wholesale amendments and additions to the Model Law. Therefore, Articles 9 and 17 in respect of interim measures apply.

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

Appeals of High Court decisions as the court of first instance may be made to the Court of Appeal, and thereafter, on certain limited grounds, to the Irish Supreme Court.

Ireland ratified the New York Convention in 1981 and no reservations have been entered. The relevant legislation is now the Arbitration Act 2010, which does not provide for a right of appeal against an arbitral award.

The grounds for challenging an arbitral award before the High Court under the 2010 Act are limited to those expressly enumerated under Article 34(2) of the Model Law (which mirrors the grounds on which recognition and enforcement might be refused under the New York Convention as per Article 36 of the Model Law). Challenges must be brought within three months from the date of receipt of the award. Section 12 of the 2010 Act, however, requires that any challenge on the basis of public policy must be brought within 56 days of the date from which the circumstances giving rise to the application became known or ought reasonably to have become known. The jurisprudence suggests Irish courts will construe the ground of public policy as extending only to breaches of the most fundamental notions of morality and justice.

4 Commercial and Regulatory

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

Joint ventures between airlines are subject to Irish competition law which implements and is fully compliant with EU competition law. Therefore, joint ventures are subject to Sections 4 and 5 of the Irish Competition Act 2002 (as amended) which implement Articles 101 (anti-competitive agreements) and 102 (abuse of a dominant position) of the Treaty on the Functioning of the European Union.

There are no particular Irish rules on highly integrated airline alliances, codeshare agreements or similar arrangements. The Irish Competition and Consumer Protection Commission follow EU precedent in relation to such alliances and will not block them unless in the specific instance it will lead to a substantial lessening of competition in Ireland.

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

The relevant body is the Competition and Consumer Protection Authority ("**CCPC**").

There is no statutory definition and the market may be defined broadly or narrowly in the context of the particular case.

Market sectors used in EU case law such as origin and destination city pairs, premium and non-premium passengers, non-stop and one-stop flights and airport substitution will equally be considered by the CCPC in Ireland.

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

All mergers and acquisitions of legal entities, including airlines, that fall within the remit of the Competition Act 2002 and satisfy certain financial thresholds, require mandatory pre-clearance by submitting a notification to the CCPC.

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

Ireland's competition policy is closely aligned with EU principles of competition law. The test is whether the merger, acquisition or joint venture will substantially lessen competition in the market for consumers in Ireland.

The CCPC is responsible for enforcing Irish and European competition law in Ireland. They can enforce by way of criminal or civil proceedings with heavy fines and prison sentences available. However, the CCPC applies these sparingly.

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

A notification is lodged by the parties involved in the relevant transaction to the CCPC in relation to the merger, acquisition or joint venture. The CCPC then has 30 working days to give a Phase I clearance or to determine that the issues are sufficiently complex to require a Phase II clearance for which the CCPC has 120 working

days. These timelines can be extended by the CCPC by requesting further information. If it does this, the clock stops ticking until such time as the CCPC has received satisfactory replies to all questions, at which point time starts to run from the start again i.e. it has 30 working days.

In general, however, the CCPC deals with the majority of cases in Phase I without extending the timeline so the system works efficiently. The CCPC will try to agree conditions or changes with the proposed parties to the merger rather than refuse to clear it.

The fee charged by the CCPC for a Merger Notification is €8,000.00.

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

Ireland applies EU law on State Aid in general.

In the aviation sector in particular, it applies the EU Commission Guidelines on State Aid to airports and airlines (2014/C 99/03). These Aviation Guidelines set out the conditions under which Member States can grant State Aid to airports and airlines.

Key features are:

- State Aid for **investment in airport infrastructure** is allowed if there is a genuine transport need and the public support is necessary to ensure the accessibility of a region. The new guidelines define maximum permissible aid intensities depending on the size of an airport, in order to ensure the right mix between public and private investment. The possibilities to grant aid are therefore higher for smaller airports than for larger ones.
- **Operating aid to regional airports** (with fewer than 3 million passengers a year) will be allowed for a transitional period of 10 years under certain conditions, in order to give airports time to adjust their business model. To receive operating aid, airports need to work out a business plan paving the way towards full coverage of operating costs at the end of the transitional period. As under the current market conditions, airports with an annual passenger traffic of below 700,000 may face increased difficulties in achieving full cost coverage during the transitional period, the guidelines include a special regime for those airports, with higher aid intensities and a reassessment of the situation after five years.
- Start-up aid to airlines to launch a new air route is permitted provided it remains limited in time. The compatibility conditions for start-up aid to airlines have been streamlined and adapted to recent market developments.

The Irish Government supports Ireland's regional airports (Donegal, Ireland West Airport Knock ("**IWAK**"), Kerry and Waterford) through a Regional Airports Programme. That financial support is administered by DOTTS through three separate schemes:

- A Regional Airports Capital Expenditure Grant ("**CAPEX**") Scheme.
- A Core Airport Management Operational Expenditure Subvention ("**OPEX**") Scheme.
- A Public Service Obligation ("**PSO**") Air Services Scheme.

All funding of regional airports by the State must comply with the Aviation Guidelines on State Aid to airports and airlines referred to above.

Support under the CAPEX Scheme is only paid to the regional airports for essential safety and security work.

OPEX subvention is paid to compensate the regional airports for costs incurred in providing core airport services, insofar as these costs cannot be fully met by prudent commercial management and from any surpluses generated by non-core activities such as car parking and catering.

Two services operate from regional airports under the PSO Air Services Scheme – Kerry/Dublin and Donegal/Dublin.

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

As set out at question 4.6 above, two PSO services from two airports in Ireland are supported by the Irish Government on the basis that these services are considered necessary for the economic development of their regions and that they would not be provided on a commercial basis. Current contracts, which commenced on 1 February 2015, are in place for air services between Dublin and the regional airports in Kerry and Donegal.

These contracts will run for two years initially and, subject to a satisfactory review after 18 months, may be extended by a maximum of one year.

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

The Data Protection Acts (1988 and 2003) are the primary pieces of legislation giving effect to EU Directive 95/46/EC in Irish law. In keeping with the relevant EU principles, data collectors and processors in the airline industry must adhere to the core requirements of: fairly obtaining and fairly processing personal data; keeping collected data only for one or more specified lawful purposes; processing such data only in ways compatible with the purpose for which it was given; as well as keeping the data safe and secure; and ensuring that it is kept accurate and up to date.

Note that the EU General Data Protection Regulation (2016/679) ("**GDPR**"), and the extended obligations thereunder, will have direct effect from May 2018.

SI 336/2011 European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011, giving effect to Directive 2002/58 on Privacy and Electronic Communications (otherwise known as E-Privacy Directive), also apply to the airline industry, and in particular, communications with, and use of, passenger data in marketing.

In addition, all transfers of data beyond the EEA will have to meet specific adequacy protection levels, which will require assessment in light of the decision of the Court of Justice of the European Union of 6 October 2015 in *Schrems -v- Data Protection Commissioner* (Case C-362/14).

The EU-US Privacy Shield Framework, which was designed by the US Department of Commerce and the EU Commission to provide data controllers and processors with a mechanism to comply with EU data protection law, is presently the subject of a legal challenge (Case Number T. 670/16), and accordingly, airlines and other parties operating in the aviation sector may be forced to deal with this present uncertainty by taking a hybrid approach, adopting combinations of transfer solutions, such as both Model Clauses and a Privacy Shield Certification for all transfers beyond certain approved jurisdictions.

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

Irish data protection law includes obligations to notify affected data subjects in the event of a data breach and a requirement to report breaches to the Data Protection Commissioner. The notification and reporting requirements vary based upon the specific circumstances of the data loss/breach. The Irish Data Protection Commissioner has approved a personal data security breach Code of Practice as a guide to organisations dealing with breaches of security involving customer or employee personal information. The timeframes for reporting and notification are extremely limited (24 hours in certain instances), and a failure to adhere to the required reporting requirements can lead to regulatory sanction. Irish law also includes a requirement to notify the Irish police where the data breach potentially involves the commission of a crime, i.e. a cybersecurity attack or fraud.

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

Registration of intellectual property is carried out by the Irish Patents Office.

Registration of **trademarks** is governed by the Trade Marks Act 1996. A trademark is usually registered for an initial 10-year period but can be renewed indefinitely. Unregistered trademarks may also be protected by the common law tort of passing-off.

Patent registration is governed by the Patents Act 1992. Irish patents are protected for a maximum of 20 years. Short-term, 10-year patents, can also be obtained. Protection can be sought abroad by an application for a European Patent through the European Patent Office which includes 40 countries, or under the Patent Cooperation Treaty administered by WIPO which covers 145 countries.

Registration of **designs** is governed by the Industrial Designs Act 2001. Protection is granted initially for five years, which can be renewed four times, giving a maximum protection of 25 years. Protection abroad can be obtained by means of a Community Design in the EU, by application to the Office for Harmonisation in the Internal Market ("**OHIM**") in Alicante, Spain. Protection in additional countries can be obtained under the Hague Convention operated by WIPO. Protection is also available for unregistered designs for up to a maximum of three years.

Copyright protection in Ireland is governed by the Copyright and Related Rights Act 2000. There is no system of registration. It is a property right which can be transferred. The internationally recognised symbol © is normally used to denote copyright. Copyright protection for literary works lasts for 70 years after the death of the author. Copyright protection for computer-generated works lasts for 70 years after the date they are first made available to the public.

Other non-registerable Intellectual Property such as confidential information, trade secrets, knowhow and the like are normally protected by non-disclosure agreements or other forms of contract.

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

Ireland complies with Regulation (EC) No. 261/2004 in relation to denied boarding rights.

Where a flight is overbooked and an air carrier reasonably expects to deny boarding, it shall first call for volunteers in exchange for benefits to be agreed. If there is an insufficient number of volunteers, the airline may deny boarding to passengers against their will but must compensate them and offer the following assistance:

- Information: the air carrier shall provide a written notice setting out the rules for assistance in line with Regulation 261/2004. In addition, a sign must be displayed at the check-in area referring to air passenger rights under Regulation 261/2004.
- Passengers shall be offered the choice between reimbursement of the cost of their ticket if they decide not to travel; and rerouting to their final destination at the earliest opportunity. Passengers may choose to travel at a later date at their convenience, subject to the availability of seats.
- Meals and refreshments shall be offered free of charge and in reasonable relation to the waiting time.
- Hotel accommodation shall be provided where a stay of one or more nights becomes necessary, as well as transport between the hotel and the place of accommodation.
- Two free telephone calls, telex or fax messages, or emails shall be offered.
- Compensation as set out in the table (below). The amount of compensation payable may be reduced by 50% if the rerouting offered allows the passenger to arrive at his/her final destination close to the original planned arrival time.

Compensation amounts related to denied boarding

- For flights with a distance of 1,500km or less and where the delay is less than two hours past the original planned arrival time: €125.
- For flights with a distance of 1,500km or less and where the delay is more than two hours past the original planned arrival time: €250.
- For intra-Community flights of more than 1,500km and all other flights between 1,500km and 3,500km where the delay is less than three hours past the original planned arrival time: €200.
- For intra-Community flights of more than 1,500km and all other flights between 1,500km and 3,500km where the delay is more than three hours past the original planned arrival time: €400.
- For all other flights not falling within the categories mentioned above and where the delay is less than four hours past the original planned arrival time: €300.
- For all other flights not falling within the categories mentioned above and where the delay is more than four hours past the original planned arrival time: €600.

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

Ireland complies with Regulation (EC) No. 261/2004 in relation to late arrival and departure of flights.

Whether a delay comes within the terms of Regulation 261/2004 depends upon the distance of the route involved and the delay itself must be at least two hours. The Regulation shall apply to:

(a) delays of two hours or more in the case of flights of 1,500km or less;

(b) delays of three hours or more in the case of all Intra-Community flights of more than 1,500km, and of all other flights between 1,500km and 3,500km; and

(c) delays of four hours or more in the case of all other flights.

The operating air carrier must provide care and assistance in the event of such delays. This must consist of the following:

- Information: the air carrier shall provide a written notice setting out the rules for assistance in line with the Regulation. In addition, a sign must be displayed at the check-in area referring to air passenger rights under the Regulation.

- Meals and refreshments shall be offered free of charge and in reasonable relation to the waiting time.
- Hotel accommodation shall be provided where a stay of one or more nights becomes necessary, as well as transport between the hotel and the place of accommodation.
- Communications: passengers shall be offered free of charge two telephone calls, telex or fax messages, or emails.
- Reimbursement: where the flight delay is at least five hours, passengers shall be offered reimbursement within seven days of the full cost of the ticket at the price at which it was bought for the part or parts of the journey not completed. If, however, the purpose of the journey is no longer attainable, then reimbursement must be offered for the part of the journey already made, e.g. a flight from Cork to Dublin will be reimbursed if the purpose of the flight was to travel on a connecting flight to London for a function at which attendance is no longer possible due to the delay. In addition, there is a right to a return flight to the original point of departure where relevant. The right to reimbursement applies where the passenger decides not to travel as a result of the delay – it is not possible to travel and also claim reimbursement under the Regulation.

If the airline is unable to provide the above provisions free of charge, the airline should reimburse passengers for expenses incurred.

Compensation

Although the Regulation itself does not expressly state that compensation is payable in cases of delay, the ruling delivered by the European Court of Justice in the cases of *Sturgeon -v- Condor Flugdienst GmbH and Bock* and *Others -v- Air France SA* maintains that compensation may be payable to passengers who arrive at their destinations three hours or more after the scheduled arrival time.

The amount of compensation which may be payable in the aforementioned circumstances depends on the distance of the flight, the reason for the delay and, in the case of point (c) above, it may be reduced by 50% where the delay on arrival was less than four hours.

If an airline can prove that the delay was caused by an extraordinary circumstance which could not have been avoided even if all reasonable measures were taken, no compensation will be payable.

The amount of compensation payable depends on the distance of the flight. If the flight is classed as:

- short haul, the amount payable is €250 per person;
- medium haul, the amount payable is €400 per person; and
- long haul, the amount payable is €600 per person.

CAR is the designated enforcement body in Ireland. Section 45 of the Aviation Act 2001 (as amended) gives CAR the right to issue a direction to any airline in breach of Regulation 261/2004 requiring compliance. If the airline fails to comply it is guilty of an offence. Whilst an airline can make representations to CAR during the process, it can only challenge its decision by way of judicial review in the High Court.

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

The airport authority for Dublin and Cork Airports is the daa plc.

The airport authority for Shannon Airport is the Shannon Airport Authority Limited.

The relevant legislation is the State Airports Act 2004 and the State Airports (Shannon Group) Act 2014.

This legislation dictates that the airports are owned by the State and the policy position is that this will not change in the foreseeable future. Governance and structure of the airport authorities is set out in the legislation as well as detailed provision on operation of the airports.

Airport operators are subject to law such as consumer law, health and safety, employment, etc.

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

Ireland implements EU consumer law. The general legislation applicable in Ireland is the Sale of Goods and Supply of Services Act 1980. This applies to aviation-related matters also.

The CCPC is responsible for the enforcement of consumer protection laws.

The Package Holidays and Travel Trade Act 1995 also regulates the travel contract between travel operator and consumer.

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

Many of the major GDSs operate in Ireland, including Amadeus, Sabre, Travelport, etc.

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

No, there are no ownership requirements specific to GDSs operating in Ireland.

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

There is no particular prohibition on vertical integration between air operators and airports, though competition law will be relevant.

5 In Future

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

The Irish Government's expressed support for the wider aviation industry contained in its Policy Document will ensure that, when enacting new legislation in Ireland, aviation and the significance of the industry to the Irish economy will be at the forefront of the legislators' considerations, whilst the State Airport (Shannon Group) Act 2014 which, *inter alia*, serves to enact the "Alternative A" insolvency regime in Ireland, will strengthen the country's appeal as a hub for owning, leasing and financing aircraft, as well as its position as a global centre for aviation.

The multilateral instrument scheduled to be signed in June 2017 which serves to enact the recommendations of the OECD/G20 BEPS Project into the international tax treaties of the signature States (including Ireland) is expected to result in significant changes to international tax arrangements for base erosion and profit shifting; however, the impact on the Irish aviation industry is expected to be minimal due to the robust legislative framework already in place in Ireland and the substantial industry based in Ireland. In fact, the OECD's recommendation may well serve to enhance the appeal of

Ireland as an attractive jurisdiction for the owning, financing and leasing of aircraft as compared to competing jurisdictions.

On 15 November 2016, Ireland formerly enacted the European Union (Anti-Money Laundering Beneficial Ownership of Corporate Entities) Regulations 2016 by the introduction of SI/560/2016. The statutory instrument provides for every Irish-incorporated entity (other than those listed on regulated markets and subject to EU (or equivalent) disclosure requirements) to take steps to obtain and disclose information in respect of its beneficial interest holders. In terms of aviation, this may cause an issue where a company and its assets are held in trust structures and there is no discernible beneficiary; however, in these circumstances it may be possible to rely on an exemption to the requirement and to simply list the company directors and executive officer *in lieu* of the beneficiaries such that these structures can continue to be used.

This Irish Government is currently considering the impact of orphan structures and how they interrelate with taxation. No conclusion has been drawn in this regard and, given that these structures exist primarily to ensure that secured parties are protected in the case of bankruptcy, rather than to avail of any particular tax benefit, it is unlikely that any legislation will be implemented that will undermine the integrity of orphan trusts.

DOTTS is carrying out an extensive review of airport charges which may result in legislative change in this area in the next year or two. It is also carrying out a review of the role of CAR and IAA in light of SES regulation, which again may change the role of these two bodies and necessitate legislation.

Acknowledgment

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Italy

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1 General

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

Italy is a signatory of, and has ratified, the main international conventions and treaties concerning air transport (the 1933 Rome Convention; the 1944 Chicago Convention; the 1948 Geneva Convention; and the 1999 Montreal Convention). Italy has also signed, but not yet ratified, the 2001 Cape Town Convention.

The main set of internal rules governing the aviation sector is the Italian Navigation Code, approved by Royal Decree no. 327 dated 30 March 1942, as recently amended by Legislative Decree no. 96 dated 9 May 2005 and Legislative Decree no. 151 dated 15 March 2006.

Primary Italian laws in the aviation sector are:

- Legislative Decree no. 250/1997, which established the Italian Civil Aviation Authority (*Ente Nazionale per l'Aviazione Civile* – ENAC);
- Legislative Decree no. 185/2005, implementing Directive no. 2000/79/EC concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation;
- Legislative Decree no. 69/2006, implementing fines for breach of EC Regulation no. 261/2004 on compensation and assistance to passengers in the event of denied boarding, flight cancellations, or long delays of flights;
- Legislative Decree no. 197/2007, implementing fines for breach of EC Regulation no. 785/2004 on insurance requirements for air carriers and aircraft operators;
- Ministerial Decree dated 10 December 2008, providing guidelines in the matter of fares of airport services rendered on an exclusive basis; and
- Legislative Decree no. 24/2009, implementing fines for breach of EC Regulation no. 1107/2006 on the rights of disabled persons and persons with reduced mobility when travelling by air.

Further essential rules are regulations and circulars issued by ENAC, which is the main body regulating aviation in Italy, as provided under the above-mentioned Legislative Decree no. 250/1997 and article 687 of the Italian Navigation Code. The Ministry of Infrastructure and Transport, acting through its specific Department (*Dipartimento per i Trasporti, la Navigazione ed i Servizi Informatici e Statistici*), is the body which has general competence in the aviation sector, and which holds supervising authority over ENAC.

Other bodies are Assoclearance and the *Ente Nazionale per l'Assistenza al Volo* (ENAV), which are entities with delegated authority in the fields of slot allocation and air traffic control, respectively.

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

Operating licences are granted by ENAC (namely, by its dedicated Department, called *Direzione Licenze*) pursuant to relevant provisions under the Italian Navigation Code, EC Regulation no. 1008/2008 and ENAC Circular EAL-016.

In order to obtain an operating licence, air carriers must file an application with ENAC. Such application must include:

- A Certificate of Registration with the Companies Registry.
- A statement pursuant to article 46 of Presidential Decree no. 445/2000, under which the company declares itself not to be subject to liquidation or any insolvency or bankruptcy procedure.
- A certified copy of the Articles of Association.
- A certified copy of the By-Laws.
- An extract of the Register of the Shareholders.
- A Certificate of Citizenship, Residence and Criminal Records of the legal representative and any members of the Board of Directors.

The applicant air carrier must also submit a business plan relating to the initial three years of the prospective activity.

Pursuant to article 778 of the Italian Navigation Code, operating licences are granted by ENAC to companies:

- established in Italy and whose effective control is owned directly, or through majority ownership by Member States or citizens of Member States;
- having, as their main objective, air transport alone or combined with any other commercial activity involving the operation of aircraft or repair and maintenance of aircraft;
- owning a valid certificate of airworthiness issued by ENAC and holding one or more aircraft in property or leased (dry lease), as provided by article 2.2 of Circular EAL-16 issued by ENAC on 27 February 2008; and
- providing satisfactory evidence of administrative, financial and insurance requirements, as provided by EU Regulation no. 1008/2008 and EU Regulation no. 785/2004.

Moreover, the air carrier must hold a valid Air Operator Certificate, issued by ENAC as well, which certifies that the air carrier has the professional capabilities and necessary standard of organisation to ensure the operation of its aircraft under safety conditions.

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

Safety regulation falls within the institutional duties of ENAC. ENAC issues and renews airworthiness certificates and air operator certificates, as well as approving maintenance programmes. Furthermore, ENAC carries out inspections and controls on aircraft, operated for private and public use. Air traffic control is entrusted to ENAV.

Italy applies the international rules issued by the International Civil Aviation Organization (ICAO), the European Aviation Safety Agency (EASA), EU-OPS as provided by article 2 of EC Regulation no. 1899/2006 amending Council EC Regulation no. 3922/1991 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation, as well as all the European regulations.

ENAC issues its own circulars and regulations to implement and further clarify the international rules mentioned above. ENAC is also responsible for the regulation of crew skills assessments.

Italy has implemented all the EU rules related to air safety (in particular, EC Regulation no. 1702/2003, EC Regulation no. 2042/2003, EC Regulation no. 216/2008, EU Regulation no. 965/2012, EU Regulation no. 800/2013 and EU Regulation no. 1199/2016).

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

In general, safety requirements governing commercial and private flights are the same. They cover the technical requirements of aircraft, air traffic control and public safety requirements. The differences relate to administrative, organisational and financial regulations.

On 31 October 2011, ENAC issued Circular Nav. 70-C on the continuing airworthiness management organisation approval certificate (CAMO) for commercial air transport operations.

With respect to private operations, Circular Nav. 71-B provides that operators which do not perform commercial air transport must obtain the continuing CAMO when the aircraft operated have a weight of more than 5,700 kg or meet certain other specifications.

The criteria to determine whether the operations constitute commercial operations rather than private operations are outlined by the ENAC Regulation dated 21 October 2003 (and following amendments) and ENAC Regulation dated 30 June 2003. Such regulations provide, in relation to aircraft use, a general distinction between:

- commercial air transport operations, which include scheduled, charter and taxi flights, both passenger and cargo;
- aerial work operations, which include, among others, aerial photography, advertisement, surveillance, fire prevention and emergency services; and
- general aviation operations, which include private aircraft use and activities carried out by, among others, flying clubs and flying schools.

The private use of aircraft must correspond to the statement rendered by the aircraft's captain to ENAC on landing. Such statement is subject to control by ENAC. The private use of aircraft must be free of charge.

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

No. Charter services (including: non-scheduled services; taxi flights; own use charters; inclusive tour charters; advance booking charters; special event charters; student charters; affinity charters; migrant worker charters; and cargo charters) were formerly governed by the Decree of the Ministry of Transport dated 18 June 1981 (regulation of non-scheduled services). Most of those rules, especially the ones concerning charter flights within the EU, have been superseded by EU regulations, international conventions and treaties, as well as national laws (see below).

In particular, with regard to air charters within the EU, the same are operated in the "open skies" regime (i.e. relevant authorisation is granted to EU air carriers subject to slot availability).

According to article 787 of the Italian Navigation Code (headed "Non-scheduled air services ungoverned by international agreements"), extra-EU non-scheduled air services are authorised by ENAC, on a reciprocal basis, to carriers holding an EU air transport licence and to carriers of the country to/from which the flight operations are performed. Then the last paragraph of the subject article defers to ENAC the ruling of these air services, which are indeed governed by the ENAC Regulation named "Discipline of extra-EU non-scheduled air services" of 24 April 2007. Article 3 thereof specifies that "non-scheduled" flights include: ITC (i.e. inclusive tour charter flights); those related to special events; private use; transport of mail or freight; transport of dangerous goods; taxi services; and emergency and humanitarian aid.

A right of objection for charter flights operated in the so-called "fifth freedom regime" is granted to Italian air carriers.

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

No restrictions are provided for EU air carriers to operate to and from Italy, provided that they submit an application to the local coordinator in charge of the allocation of slots according to international rules provided by IATA conferences (clearance), EEC Regulation no. 95/93, as amended by EC Regulation no. 793/04, as well as Circular EAL-18 issued by ENAC on 24 August 2009.

Furthermore, domestic cabotage is allowed to EU carriers subject to slot availability and compliance with the requirements set out by EC Regulation no. 1008/2008 (Air Operator Certificate and Air Transport Licence), as well as with article 38 of Law Decree no. 179/2012 (converted into law by Law no. 221/2012). Licensed EU carriers are entitled to apply to ENAC for the designation on extra-EU routes to/from Italy provided that they hold a stable organisation within the Italian territory pursuant to article 7 of ENAC Circular EAL-14B (see question 1.10 below).

Extra-EU air carriers wishing to operate flights to and from Italy according to traffic rights set out in either bilateral or multilateral air services agreements, have to be designated by the state holding the traffic rights. If no air services agreement is in force, the schedule can be authorised only upon prior request submitted by the Civil Aviation Authority of the country of origin of the extra-EU air carrier.

International air carriers are authorised to operate to/from Italy – on a reciprocal basis – under certain "open skies" air transport agreements in place between the relevant countries, such as the agreements signed by the European Union with the United States (2007), Morocco (2006), Israel (effective from 2018) and Ukraine (effective from 2015).

Any change to existing authorisations (including but not limited to any change to the Air Operator Certificate) has to be notified to ENAC for assessment and consequent actions pursuant to ENAC rules (Circular EAL-15 dated 3 April 2007).

There are no taxes applied exclusively to international air carriers but not to domestic air carriers.

1.7 Are airports state or privately owned?

Most of the Italian commercial airports are state-owned and managed under concessions granted by the state to private companies, according to article 2 of Ministerial Decree no. 521 dated 12 November 1997.

Such airport managing companies can be public entities, such as regional, provincial, municipal or other local public entities (e.g. the chamber of commerce). A notable exception is Aeroporti di Roma S.p.A., the managing company of Rome Airports (FCO and CIA), which is entirely owned by private shareholders. There are many private airports devoted to activities such as general aviation, flying schools, parachuting, etc.

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

Air carriers, either EU or extra-EU, must comply with the specific rules (the so-called *Regolamento di Scalo*) provided by the airports to and from where they decide to operate. The airports set out such rules in accordance with the general guidelines provided by ENAC under Circular APT-19.

Moreover, air carriers must fulfil airport duties, as well as landing and take-off charges imposed by the relevant airport under ENAC surveillance. In that respect, according to article 802 of the Italian Navigation Code, ENAC is entitled, upon the request of the airport authorities and/or ENAV, to deny authorisation to aircraft taking off from Italian airports as long as airport taxes and duties, as well as air navigation charges, are outstanding.

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

Air accidents are regulated by articles 826 to 832 of the Italian Navigation Code. The airport manager and public security authorities have to immediately inform the judicial authority and the National Flight Safety Agency (*Agenzia Nazionale per la Sicurezza del Volo* – ANSV) of any accidents (Legislative Decree no. 66 dated 25 February 1999, which implemented Directive no. 94/56/EC containing the basic principles governing the investigations of civil aviation accidents and incidents). Directive no. 94/56 has been superseded by EU Regulation no. 996/2010 on the investigation and prevention of accidents and incidents in civil aviation and repealing Directive no. 94/56/EC.

Pursuant to article 826 of the Italian Navigation Code, the technical investigations of air accidents, if any, are conducted or supervised by the aforementioned ANSV, in cooperation with the judicial authorities responsible for the investigation of the events. Legislative Decree no. 213 dated 2 May 2006 implemented Directive no. 2003/42/EC on occurrence reporting in civil aviation.

Pursuant to article 727 of the Italian Navigation Code, as soon as ENAC is informed of aircraft in danger or air accidents, it is entrusted to immediately provide relevant rescue and assistance, whilst also requesting the cooperation of other authorities, if appropriate.

ENAC has also issued Circular APT-18A, regulating the airport emergency plan in case of air accidents.

ENAC is also responsible for verifying that any air carriers – either EU or extra-EU and providing either commercial or private services – operating to and from Italy comply with the EC Regulation no. 785/2004 on insurance requirements for air carriers and aircraft operators.

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

On 16 July 2015, ENAC issued a new Regulation on remotely piloted aerial vehicles (RPAVs, also called "drones"), which supersedes the previous Regulation of 2013 on the same matter.

The preliminary distinction made by ENAC is between "remotely piloted aircraft systems" (RPAS, highly regulated and subject to the applicable provisions of the Italian Navigation Code) and "model aircraft" (so-called *aeromodelli*, exclusively used for recreational and sport purposes and exempted from the Code provisions).

RPAS are classified on the basis of the maximum take-off weight (MTOW less than 25 kg / MTOW equal to, or more than 25 kg) and can be used for special operations or research and development activities.

Furthermore, flight operations are distinguished in VLOS ("visual line of sight", i.e. operations within vertical and horizontal distances which allow the remote pilot to keep a continuing view of the RPAS, without the assistance of visual instruments) and BLOS ("beyond line of sight", i.e. operations beyond certain distances which do not allow a continuing view of the RPAS by the remote pilot). All RPAS must have a flight manual (or equivalent) and their pilots must be certified by ENAC. The Regulation also establishes a mandatory third-party insurance for any kind of flight operations performed with RPAS (in compliance with EC Regulation no. 785/2004) and subordinates the treatment of personal data collected by means of RPAS to the Italian Data Protection Code (Legislative Decree no. 196/2003). Particular provisions are also established on the basis of the MTOW.

2 Aircraft Trading, Finance and Leasing

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

Yes, registration of ownership in the National Aircraft Registry constitutes proof of aircraft ownership.

Pursuant to the first paragraph of article 756 of the Italian Navigation Code, aircraft can be registered in the National Aircraft Registry in the name of the owner (when the EU nationality requirements pursuant to EC Regulation no. 1008/2008 are met), or, as per the second paragraph of article 756, in the name of the operator (holding an air operating licence and providing ENAC with relevant title to operate the registered aircraft).

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

Mortgages are registered in the National Aircraft Registry. Registration is made by filing the notarised mortgage deed with ENAC. The mortgage is then recorded by ENAC on both the National Aircraft Registry and the Certificate of Registration of the relevant aircraft.

There are no public registries of aircraft charges; neither are these recorded with the Italian Aircraft Registry.

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

Aircraft operation in Italy is subject to the surveillance of ENAC, regardless of where relevant aircraft are registered and whether or not they are owned by the operator. If an aircraft operated in Italy is registered with a foreign registry, the Civil Aviation Authority of the state of registration shall delegate surveillance of the aircraft to ENAC.

In compliance with article 83-*bis* of the ICAO Convention, ENAC grants Italian carriers authorisation to operate aircraft registered in a foreign registry, subject to the existence of an agreement between Italy and the state of registration, regulating the delegation of functions and duties of surveillance over the operations, crews and continuing airworthiness of such foreign aircraft. To date, ENAC has executed such agreements with the following states: Austria; Denmark; Germany; Ireland; Lithuania; Luxembourg; Malta; Poland; Portugal; Slovenia; Spain; Sweden; and Switzerland. In the absence of an agreement, the authorisation can be granted on a case-by-case basis.

Please refer to question 3.1 below with regard to rights of detention available under the Italian system in relation to aircraft.

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

Italy is party to the Montreal Convention dated 28 May 1999 (Convention for the Unification of Certain Rules for International Carriage by Air), which has been ratified by Italian Law no. 12 dated January 2004 and entered into force on the 60th day (28 June 2004) after the 30th ratification.

Italy is also party to the Geneva Convention of 19 June 1948 on the International Recognition of Rights in Aircraft and has signed, but not yet ratified, the Cape Town Convention on International Interests in Mobile Equipment together with the relevant Aircraft Equipment Protocol.

Due to the fact that the Cape Town Convention has not yet been enforced in Italy, the interests on aircraft are regulated by the Italian Civil Code, the Italian Navigation Code and the Geneva Convention.

2.5 How are the Conventions applied in your jurisdiction?

Conventions are applicable in Italy subject to ratification by way of a national law. Upon ratification, conventions are applied under Italian jurisdiction equally to national laws.

3 Litigation and Dispute Resolution

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

The Italian courts may order the detention of any Italian or foreign aircraft for unpaid charges provided under article 6 of Law no. 324 dated 5 May 1976, which states that the owner of the aircraft and its operator are jointly liable for the payment of rights, taxes and interests to airports.

An aircraft can also be detained pursuant to article 1023 of the Italian Navigation Code, which provides certain statutory preferred liens on aircraft by cause of their operation.

Moreover, according to article 802 of the Italian Navigation Code, ENAC is entitled, upon request of airport authorities and/or ENAV, to deny authorisation to aircraft taking off from Italian airports as long as airport taxes and duties, as well as air navigation charges, are outstanding.

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

Under the Italian system, self-help remedies are not enforceable to the extent that they would entitle the enforcing party to take enforcement measures with respect to the aircraft directly without seeking remedies through the judicial system, it being understood that any such self-help remedies would only be possible if taken with the express consent of the lessee given at the time when the relevant measures have to be taken.

In case of a lessee's non-cooperation, a judicial order of the competent court is necessary to take possession of the aircraft. The owner/lessor cannot enforce the lease agreement by taking physical possession of the aircraft. Therefore, the interested party may either act before the Italian competent court, or enforce a foreign judgment in the Republic of Italy (to the extent such judgment is recognised under the Italian system). Under the laws of Italy (article 633 of the Italian Civil Procedure Code), the owner/lessor can apply to the court for an injunction to return the aircraft, which can be granted *inaudita altera parte* and be either immediately enforceable or subject to a waiting period of 40 days for the possible opposition of the lessee. The achievement of an immediately enforceable order much depends on the actual event of default claimed and the evidence that the owner/lessor is able to provide to the court information about its right to repossess. In detail, the insolvency of the lessee and the absence of disputes about the lessee's default or the like would expedite the proceedings, while – on the contrary – disputes about amounts to be paid, and/or the owner/lessor's right to repossess and/or the existence of any default under the lease, would slow the proceedings.

Under article 1057 of the Italian Navigation Code, aircraft cannot be seized, confiscated, attached or be the target of precautionary measures to the extent that: (i) they are state-owned aircraft; (ii) they are operated for the transport of passengers and/or goods for profit and they are either ready to take off or are flying; or (iii) they are operated for scheduled services in Italy, unless the prior authorisation of the Italian Ministry of Infrastructure and Transport is obtained.

Please note that, recently, certain Italian Courts have granted precautionary attachments of aircraft operated for scheduled services without requiring the prior authorisation of the Ministry of Infrastructure and Transport.

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

Italian ordinary courts are competent for aviation disputes and yes, there are distinctions regarding the courts in which civil and criminal cases are brought. In detail, civil aviation disputes of a value up to EUR 5,000 fall into the competence of the Justices of the Peace. Civil aviation disputes of a value exceeding EUR 5,000 are instead brought before the Civil Courts.

With respect to criminal cases, the Criminal Justices of the Peace have jurisdiction over minor offences (e.g. negative and offensive remarks; threat; or omission to rescue) and the authority to apply money penalties to the guilty party. Any other offences are subject to the jurisdiction of the Criminal Courts, except for the most serious crimes (e.g. criminal conspiracy; trade in human beings; and other crimes whose penalty is imprisonment for life), which are brought before the so-called *Corte d'Assise*.

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

The standard procedure for informing a defendant that he is being sued consists of serving the writ of summons to them by means of the court clerks. The service is carried out by the court clerks upon instruction by the plaintiff as to the defendant's registered office (for entities) or residence (for individuals). Ministerial Decree no. 55 of 3 April 2013 also provided the facility for lawyers to serve writs of summons by certified email, as long as the defendant also holds a certified email address. Companies, public administrations and professionals are required to have a certified email address and to make the email address public through specific registers.

The mechanism for serving court proceedings outside of Italy is ruled by bilateral or international conventions ratified by Italy. Our country has entered into certain bilateral conventions (e.g. with San Marino, Argentina and Australia) which specifically regulate the instruments for servicing civil acts. In respect of Member States of the European Union, the service rules are established by Council Regulation no. 1393/2007 (on "the service in the Member States of judicial and extrajudicial documents in civil or commercial matters"). For other countries (i.e. extra-EU and with which Italy has not executed any bilateral convention) the service is governed under The Hague Convention of 1 March 1954 and 15 November 1965, provided that such countries are parties thereto. Otherwise, the service can be effected by the competent diplomatic office based in the country where the service has to be made.

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

Articles 669 to 705 of the Italian Civil Procedure Code provide for interim measures designed to protect the rights of the claimant outside proceedings, or to decide on the claim during proceedings. These are granted considering the preliminary evidence submitted by the claimant and the damage that might be suffered by the claimant's rights if a precautionary measure is not applied at short notice. In certain cases, such as restraining orders or urgent measures granted under article 700 of the Italian Civil Procedure Code, the interim measure is not necessarily followed by an ordinary action. In other cases, such as seizures, attachments, etc., after interim measures are granted, the parties have 60 days within which ordinary proceedings must be commenced.

Remedies available from the courts on a final basis are the so-called *sentenze*, being the ordinary decisions issued by the judges to resolve a judicial dispute between the parties. Such decisions can (either alternatively or jointly): (1) order the losing party to (i) pay a certain amount of money, (ii) comply with a certain duty, and/or (iii) refrain from continuing a certain activity (the so-called *sentenza di condanna*); (2) recognise a specific right of either party or otherwise deny such recognition (the so-called *sentenza dichiarativa*); and/or (3) establish/modify/revoke a specific right of either party (the so-called *sentenza costitutiva*).

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

Generally speaking, the decisions of a first instance court can be appealed to a higher court, to the Court of Appeal (second instance) and finally to the Supreme Court of Cassation (third and final instance).

The three levels of jurisdiction are:

First instance

Justice of the Peace, who is competent for civil disputes of a value below EUR 5,000, and *Tribunale*, where the deciding body is a single professional judge.

Appeal

Court of Appeal, where the deciding body is a panel of three judges: the Court of Appeal reviews the first instance decision by reference to points of fact and law.

Supreme Court

The *Corte Suprema di Cassazione* is based in Rome, with jurisdiction over the whole territory. This is the highest court of the judicial system and ensures the precise application and uniform interpretation of the law. It decides conflicts of competence between the lower courts, and conflicts of jurisdiction. It also has the power to re-examine decisions on appeal from the lower courts, but only on points of law. It is a collegial body and decides with a college of five judges. It has three civil divisions and hears cases of particular importance in joint session.

Under the Italian system a dispute can also be deferred by the relevant parties to an arbitration procedure (unless the arbitration is expressly excluded by law for the specific topic of the dispute), governed by articles 806 to 840 of the Italian Civil Procedure Code. The parties can either choose arbitration by a written agreement once the event giving rise to the dispute has already occurred (so-called *compromesso*) or, alternatively, provide a general arbitration clause under any agreement they enter into.

Pursuant to article 818 of the Code, arbitrators cannot grant interim and precautionary measures (e.g. seizures), which stay with the competence of the ordinary courts.

Final awards can be appealed before the ordinary judge (Court of Appeal), except when it is expressly excluded by the agreement between the parties.

4 Commercial and Regulatory

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

Joint ventures between airline competitors are subject to the general competition rules applied by the regular competition authority, namely the *Autorità Garante della Concorrenza e del Mercato*.

The regulatory framework is provided for by Italian Law no. 287 of 10 October 1990 (the Italian Competition Act), which is the main reference since it establishes the Italian Competition Authority. The Italian Competition Act specifies that its substantive provisions must be interpreted in accordance with the principles of the EU.

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

In the aviation sector, the Italian Competition Authority has distinguished between the charter and scheduled flight markets. For charter flights, the geographical market is divided into long-haul routes and medium- or short-haul routes that are then divided between European countries and the Mediterranean Sea. The relevant market for scheduled flights is defined on the basis of the single routes operated point-to-point or city-pair by air carriers involved in a competition assessment.

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

Article 16 of the Italian Competition Act provides for a mandatory pre-merger notification of concentrations meeting the turnover thresholds (see question 4.4 below).

The notification must be filed with the Italian Competition Authority before the transaction takes place (that is, before the acquiring entity can substantially influence the target entity's behaviour).

The notification must be submitted after the parties to the transaction have reached an agreement on the essential aspects of the transaction.

For acquisitions of control of an undertaking, the requirement to file before the transaction takes place is considered fulfilled if the implementation of the agreement is made conditionally on the Italian Competition Authority's approval.

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

Mergers, acquisition mergers and full-function joint ventures are subject to compulsory notification if the turnover thresholds – established by Law no. 287/1990 and subject to yearly indexation – are met. Generally speaking, a concentration that does not have a Community dimension under article 1 of the EU Merger Regulation must be filed with the Italian Competition Authority when one of the following alternative turnover thresholds is met: (i) the combined aggregate Italian turnover of all the undertakings concerned exceeds EUR 489 million; or (ii) the aggregate Italian turnover of the target(s) exceeds EUR 49 million (such thresholds are amended on a yearly basis by resolution of the Italian Competition Authority). Upon such filing, the Italian Competition Authority is called to grant clearance of the specific operation assessing whether or not it may cause potential detriment or a decrease in competition within the relevant business field.

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

The procedure which the Italian Competition Authority follows for evaluating concentrations consists of two separate phases.

First phase: under article 16(4) of the Italian Competition Act, within 30 days of receiving the notification (or of being informed of the concentration by any other means where the parties have failed to notify), the Italian Competition Authority must either: (i) clear the transaction if an investigation is not necessary, and immediately inform the notifying parties; or (ii) commence a second-phase investigation, if the transaction raises competition concerns.

The 30-day time limit is reduced to 15 days in the case of public takeover bids. If the information provided in the notification is inaccurate, incomplete or untrue, the Italian Competition Authority can request clarification of the information provided and suspend the 30-day time limit until the parties respond to that request.

Second phase: under articles 16(8) and 18 of the Italian Competition Act, if the Italian Competition Authority decides to open an investigation, it must notify the undertakings concerned, within 45 days of commencing that investigation, whether it has decided to: (i) prohibit the concentration; (ii) clear the concentration unconditionally; (iii) clear the concentration subject to commitments offered by the undertakings which remove any aspects of the concentration that were initially deemed likely to distort competition; or (iv) clear the concentration subject to measures prescribed by the Italian Competition Authority to prevent the creation or strengthening of a dominant position.

The 45-day period can be extended during the course of the investigation, for a further period of no more than 30 days, in cases where the undertakings concerned fail to provide information and data in their possession upon request.

As far as costs of notification are concerned, the amount of the notification depends on the total value of the transaction, which is adjusted to take into account the ratio between the Italian and the worldwide turnover of the target. At present, the notification fee has been set by the Italian Competition Authority at 1.2% of the transaction value, with a minimum limit of EUR 3,000 and a maximum of EUR 60,000.

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

General state aid rules provided by the EC Treaty are applied in Italy and in the aviation sector. No sector-specific provisions regulating direct or indirect financial support to individual companies by the government or government-controlled agencies or companies exist.

The main principles of the state aid rules are contained in article 107 of the Treaty on the Functioning of the European Union (TFEU). Pursuant to article 107, any aid granted by the state or through state resources in any form whatsoever is incompatible with the common market when it distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.

Most of Italy's local airports are controlled by public entities and, therefore, their management and financing is subject to EU state aid

rules as outlined under: (i) Communication 2005/C 312/01 of the Community (guidelines on financing of airports and start-up aid to airlines departing from regional airports) and subsequent European Commission Communication 2014/C 99/03; and (ii) the guidelines published by the Italian Ministry of Transport on 2 October 2014 in respect of support for air carriers in starting up and developing air routes.

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

According to article 782 of Italian Navigation Code, the Italian government may impose public service obligations to guarantee the right of mobility provided by article 16 of the Italian constitution. The Italian government may impose public service obligations in respect of domestic scheduled air services serving a peripheral or developing region or on a thin route to any regional airport, when such route is considered vital for the economic development of the region in which the airport is located. Such rules imposed by the Italian government are consistent with the European legal framework established by articles 16, 17 and 18 of EC Regulation no. 1008/2008 for public service obligations, the related public tender procedures and the examination by the authorities on how such obligations are performed by the awarded carriers.

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

The acquisition, retention and use of passenger data are governed by the provisions set forth by Legislative Decree No. 196/2003 (the so-called "Data Protection Code"). Pursuant to article 7, passengers have the right to: receive confirmation of filing; receive information on the purposes and use of their personal data; obtain details of recipients of personal data; update and amend their personal data held by airlines (as well as other providers); and deny the processing of their personal data.

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

Article 15 of the Data Protection Code – combined with article 2050 of the Italian Civil Code – provides a strict liability, and relevant indemnity obligation, for anyone (including air carriers) causing damages through the treatment of personal data (including the event of data loss), except if satisfactory evidence is given that all suitable measures to avoid such damages have been taken.

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

Intellectual property rights are protected under the Italian Intellectual Property Code (Legislative Decree no. 30/2005). The Public Body with authority over intellectual property rights is the Italian Patents and Trademarks Office (*Ufficio Italiano Brevetti e Marchi*), which holds public registries for – *inter alia* – trademarks, patents and utility models.

As far as the judicial protection of intellectual property rights is concerned, a specialised division of the Tribunal (the so-called *Sezione Specializzata Proprietà Industriale ed Intellettuale*) has been established by Legislative Decree no. 168/2003, as subsequently amended and updated.

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

The provisions set forth by EC Regulation no. 261/2004 are directly applicable and enforceable in the Italian jurisdiction.

The Italian Parliament has issued Legislative Decree no. 69/2006, implementing fines for breach of the mentioned EC Regulation no. 261/2004.

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

Italian Legislative Decree no. 69/2006 of 27 January 2006 empowers ENAC to issue fines towards national and European air carriers which are in breach of rules under EC Regulation no. 261/2004 rules relating to assistance to passengers in case of – *inter alia* – late arrival and departure of flights.

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

The airport authorities are governed by the provisions set forth in the Italian Administrative Procedure Act (Law no. 241 dated 7 August 1990), applicable to the Italian administration bodies. Consequently, the airport authorities are required to ensure that their actions conform to the principles of transparency and participation and to the equal protection opportunities provided for therein.

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

General consumer protection applies to the relationship between the airport operator and the passenger to the extent that the airport operator directly provides goods/services to the passenger against consideration. In that respect, each year the managing company of any Italian airport must issue an updated list of the services (so-called *carta dei servizi*) provided within the respective airport facilities, which sets out the mandatory quality standards to be complied with in rendering those services.

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

The following global distribution suppliers (GDSs) operate in Italy: Abacus; Amadeus; Galileo; KIU; Patheo; Sabre; and Worldspan by Travelport.

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

Ownership requirements pertaining to GDSs operating in Italy are governed by the provisions set forth in EC Regulation no. 2289/1989.

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

Generally speaking, vertical integration between air operators and airports is permitted under the Italian system, always provided that, when the airport is state-owned, the relevant purchase transaction shall be carried out via a public tender procedure (regulated by Legislative Decree no. 196/2006, which implemented European Directives no. 2004/17/CE and no. 2004/18/CE).

5 In Future

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

ENAC is working on the Italian implementation process of the new European rules on airports, which is due to be completed by 31 December 2017. This activity involves the provisions of EC Regulation no. 2016/2008 (the so-called "Basic Regulation"), EC Regulation no. 1108/2009 (enlarging the EASA's competences to include aerodromes, air traffic management and air navigation services within the EU safety system) and EU Regulation no. 139/2014 (laying down requirements and administrative procedures related to aerodromes), as well as the acceptable means of compliance (AMC), certification specifications (CS) and guidance material (GM) in the context of airport facilities issued by the EASA.

The road map prepared by ENAC for the said purpose identifies four macro-areas of intervention: regulatory and management; certifications and conversion of previous certifications; communication; and training/education. There are 38 airports throughout the Italian territory which are concerned by the required coordination actions. In particular, ENAC: (i) added a new section on its website entirely focused on EU Regulation no. 139/2014; (ii) prepared draft framework agreements between airport managing companies and the infrastructure safety and security entities to improve the coordination of surveillance and prevention services; (iii) issued guidelines with instructions and practical information for airport managing companies on how to handle the alternative means of compliance (AltMoC), which are used to prove the achievement of the targets identified by EU Regulation no. 139/2014 (as an alternative to the AMC published by the EASA); and (iv) will publish a regulation to develop risk management plans for the areas located near airports, in respect of prospective dangers and obstacles to air operations.

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Laura Pierallini, founder and named partner of the Firm, spent several years in the legal and tax department of the Arthur Andersen Worldwide Organisation and, from 2001 to 2005, was the managing partner of the international law firm Coudert Brothers in Rome.

She is a professor of Commercial Law and Air Law at the LUISS University of Rome.

Ms. Pierallini has practised aviation law since 1988, providing expert advice to clients across the whole of the international aviation sector, including aircraft finance and leasing, litigation and dispute resolution, employment and corporate issues. Her clientele include Italian and foreign airlines, manufacturers, lessors, financiers, airports, handlers and travel agents. She also assists her clients in regulatory matters, including advisory services and representation before governmental agencies, having continuous contact with the Civil Aviation Authorities, mainly in Italy and the European Union, but also abroad.

Ms. Pierallini also advises airlines and airport handlers in restructuring and insolvency procedures. She has advised on IPOs of Italian airlines at the Milan stock exchange and M&A of domestic airlines by foreign airlines. She is an adviser to the Italian Association of Air Carriers and has succeeded in challenging a resolution of the Italian CAA related to airports' charges before the Administrative Supreme Court (*Consiglio di Stato*).

Ms. Pierallini regularly attends and organises conferences on aviation, presenting speeches and moderating panels at various Italian and international symposia (in particular organised by the International Air Transport Association (IATA), the European Air Law Association (EALA), the European Aviation Club (EAC), the International Bar Association (IBA) and Assaereo). Ms. Pierallini is also a committee member of the European Air Law Association (EALA), and a member of the International Aviation Women's Association (IAWA) and the European Aviation Club (EAC).

She is named as a leading lawyer by several guides, including: *Expert Guides – Aviation Lawyers*; *Expert Guides – Women in Business Law*; *Who's Who Legal – Transport* (Aviation Finance; Aviation Regulatory; Aviation Contentious); and *The Legal 500 EMEA*.

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Francesco Grassetti has significant legal and regulatory experience in the aviation field.

He advises clients in purchase, sale, leasing and financing transactions of commercial aircraft (including single aircraft and multi-aircraft portfolios). He also focuses his practice on the business jet market, providing a full range of assistance to the industry (mainly to banks, lessors, manufacturers, owners and operators), such as filings with the aviation authorities, security matters, enforcement issues, aircraft operation and management, and local taxes.

In addition, Mr. Grassetti provides airlines and business aviation companies with a variety of support services, dealing on a regular basis with the negotiation and finalisation of sector contracts (transport, charter, dry-lease and wet-lease, maintenance, ground handling, supply, licensing and consulting) and providing regulatory advice on the Italian jurisdiction and the European Union (authorisations and licences, traffic rights, slots, competition, data privacy and consumer protection).

He is a regular attendee at aviation conferences worldwide and contributes to international publications on aviation law.

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Studio Pierallini is a multidisciplinary law firm based in Rome and Milan. The Firm has acquired a global and recognised reputation in aviation for over 20 years, providing expert advice to clients across the whole of the international aviation sector, including aircraft finance and leasing, litigation and dispute resolution, employment and corporate issues.

The Firm also assists clients in regulatory matters, including advisory services, assistance and planning in connection with representation before governmental agencies, having continuous contact with the Civil Aviation Authorities, mainly in Italy and the European Union, but also abroad. Our clientele include Italian and foreign airlines, manufacturers, lessors, financiers, airports, handlers and travel agents. In the context of the most important transactions involving airlines ever carried out in the Italian market, the Firm has recently advised lessors and lenders in connection with the transfer of Alitalia's fleet to a newly incorporated carrier participated in by Etihad.

Moreover, the Firm has extensive experience in corporate and commercial law. It offers integrated teams of professionals focused on drafting and negotiating across all areas of commercial contracts, as well as on structuring and completing joint ventures, strategic alliances, spin-offs and corporate restructuring. In M&A transactions, the Firm is competent to deal principally with the following issues: performing pre- and post-acquisition due diligence works; advising on corporate, employment, IP, tax and litigation issues; setting up the structure of companies; pre- and post-merger notification with the Italian Antitrust Authority; and all other legal and regulatory issues. Studio Pierallini has also advised Italian airlines and airport handlers in bankruptcy and insolvency procedures.

The Firm has been named for many years as Italian aviation law firm of the year by the most important publications focused on the aviation sector.

The Firm is also a member of the European Business Aviation Association (EBAA).

Japan

Mori Hamada & Matsumoto

Hiromi Hayashi

1 General

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

The principal regulator of aviation is the Ministry of Land, Infrastructure, Transport and Tourism (the "**MLIT**"). Separate MLIT bureaus regulate specific areas relating to transportation, such as by air, road, railway, and water. The MLIT bureau regulating aviation is the civil aviation bureau (*koukuu kyoku*).

The principal laws regulating aviation in Japan are described below.

A. The Civil Aeronautics Act (*Koukuu Hou*)

The purpose of the Civil Aeronautics Act is to ensure the safety of aircraft and develop aviation by establishing order in the aviation business. This law is based on the Convention on International Civil Aviation (Chicago Convention) and its Annexes.

The Civil Aeronautics Act comprises 11 chapters. Chapters 1 to 6, 9 to 11 apply to both commercial aviation and general aviation. Their provisions include: aircraft registration (Chapter 2); aviation safety such as airworthiness (Chapter 3); qualifications of airmen (Chapter 4); designation, permission and management of airways and establishment of airports and air navigation facilities (Chapter 5); requirements for operating aircraft (Chapter 6); requirements for operating unmanned aircraft vehicles (Chapter 9); and penalties for violations of this law (Chapter 11). Chapter 7 regulates commercial aviation such as the aviation transport business and businesses using aircraft (please see question 1.2 below). Chapter 8 regulates aircraft registered outside Japan and businesses conducted by foreign entities.

Certain provisions of the Civil Aeronautics Act do not apply to aircraft used by, airmen employed by, and airports and air navigation facilities established by the Japan Self Defence Forces (*Jieitai*) (Act on Self Defence Forces, Article 107). Similarly, there is an exception for US forces stationed in Japan (Agreement Under Article VI of the Treaty for Mutual Cooperation and Security between Japan and the United States of America, regarding Facilities and Areas and the Status of United States Armed Forces in Japan).

B. The Airport Act (*Kukouu Hou*)

Under the Airport Act, the MLIT is in charge of policy-making for establishing and managing airports in Japan. With a few exceptions, airports in Japan were built and are owned and managed directly by either the national government or the local governments. Airports mean basic aeronautical facilities such as runways, aprons and navigation facilities, and do not include airport terminals and car parks. A unique aspect in Japan is that, in many airports, airport terminals and car parks were constructed and are owned and managed by a private entity or a "third sector" entity, i.e., a company jointly owned by a local government and private entities. This is one reason for the enactment of the Airport Concession Act. Please also see question 1.10.

The airport operator (*kuukou kanrisha*) under the Airport Act is essentially the national government or local government which owns and manages airports. It must submit to the MLIT prior notification of the landing fees and other fees to use the runways or relevant facilities. If the MLIT determines that such fees are (i) discriminatory or (ii) extremely inappropriate, and the use of the airport is likely to be extremely limited, the MLIT may issue an order to the airport manager to change the fees (Airport Act, Article 13).

C. The Aircraft Mortgage Act (*Koukuki Tetitou Hou*)

Under the Aircraft Mortgage Act, certain aircraft registered pursuant to the Civil Aeronautics Act can be subject to security interests. Please see question 2.2.

D. The Aircraft Manufacturing Industry Act (*Koukuki Seizou Jigyou Hou*)

The Aircraft Manufacturing Industry Act provides that the manufacture and repair of certain aircraft and aircraft apparatuses requires a permit for each factory from the Ministry of Economy, Trade and Industry ("**METI**"), and must be carried out by methods approved by the METI.

E. Others

The Act for the Establishment of the Japan Transport Safety Board (*Unyu Anzen Iinkai Secchi Hou*) established the said board to investigate aircraft accidents, including their causes. The board also implements measures necessary to prevent such accidents. Please see question 1.9.

The Act on the Prevention of Damage caused by Aircraft Noise in Areas around Public Airports regulates noise problems caused by aircraft.

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

A. Aviation Transport Business (*Koukuu Unsou Jigyo*)

The aviation transport business is the business of transporting persons or cargo by aircraft for a fee (Civil Aeronautics Act, Article 2, Item 18).

A permit from the MLIT is required to start an aviation transport business (*Id.*, Article 100, Paragraph 1). The application for a permit must state the applicant's name and address, the name

of its representative director, items to be transported by aircraft, maintenance, and the total amount and details of funding and financing (*Id.*, Article 100, Paragraph 2). The MLIT will examine whether the business plan is suitable to ensure transport safety, whether the applicant is competent to conduct the aviation transport business, and whether the applicant is disqualified on grounds listed in the Civil Aeronautics Act (*Id.*, Article 101, Paragraph 1). This business is closed to foreign entities and persons. Please see question 1.6.

The application fee is JPY 150,000 and the standard processing period is two to four months after MLIT has received all necessary documents.

The holder of an aviation transport business permit is referred to as a domestic air carrier (*honpou koukuu unsou jigyosha*). It is subject to mandatory inspection by the MLIT in connection with its facilities to control, operate and maintain its aircraft and air transport business, and cannot operate or maintain the aircraft if it fails the inspection (*Id.*, Article 102, Paragraph 1).

As regards international carriers, please see question 1.6 below.

B. Business to Use Aircraft (*Koukuuki Shiyou Jigyo*)

A "business to use aircraft", to provide services other than transporting persons or cargo by aircraft for a fee, is also regulated (*Id.*, Article 2, Item 21). An example of this business is enabling the taking of photographs by using an aircraft.

A permit from the MLIT is necessary to start a business using aircraft (*Id.*, Article 123, Paragraph 1). The application for the permit must state the applicant's name and address, the name of its representative director, and the total amount and details of funding and financing (*Id.*, Article 123, Paragraph 2). The MLIT will examine whether the business plan is suitable to ensure safety, whether the applicant is competent to conduct the business, and whether the applicant is disqualified on grounds set forth in the Civil Aeronautics Act (*Id.*, Article 123, Paragraph 2).

The application fee is JPY 90,000 and the standard processing period is two months after the MLIT has received all necessary documents.

The business operator is subject to inspection by the MLIT in connection with its facilities to control, operate and maintain its aircraft, and operate or maintain the aircraft if it fails the inspection (*Id.*, Article 124).

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

A. Legislation

The principal legislation governing air safety is the Civil Aeronautics Act, which is primarily based on the Chicago Convention.

i. Requirements regarding aircraft and the operation of aircraft

The law imposes requirements to ensure the safety of aircraft and their operation. These include verification of airworthiness before an aircraft may be used, and restricting the use of aircraft to the purpose and scope stated in the verification of airworthiness. The task of verifying the airworthiness of aircraft registered in Japan falls on the MLIT (Civil Aeronautics Act, Articles 10 and 11). The MLIT also issues certificates of competency which are required by anyone to fly an aircraft. Only persons with such a certificate can operate an aircraft, and must do so within the scope of the certificate (*Id.*, Articles 22, 28, 65 and 67). Other requirements under the law cover restricted fly zones, minimum safety altitudes and speed limits.

ii. Requirements regarding the aviation business

In addition to permits to start an aviation transport business or a business using aircraft, the conduct of an aviation business is subject to requirements. Any domestic air carrier and any operator of a business using aircraft must pass the MLIT's inspections on facilities to ensure the safety of aircraft operation, including facilities to manage, operate, and maintain aircraft (*Id.*, Articles 102 and 124). Any domestic air carrier must have a manual regarding the operation and maintenance of its aircraft, which manual must stipulate the matters specified by applicable MLIT ordinances and be approved by the MLIT (*Id.*, Article 104).

iii. Enforcements

The MLIT may: (i) request persons engaging in the manufacture or maintenance of aircraft, airmen, domestic air carriers and operators of businesses using aircraft, to submit reports; and (ii) enter aircraft, airports, places where aircraft are located, and business offices when it deems it necessary for the enforcement of the Civil Aeronautics Act (*Id.*, Article 134).

Violation of the Civil Aeronautics Act is subject to criminal penalties. A person engaging in an aviation transport business without the MLIT's permission may be imprisoned for up to three years or fined up to JPY 3,000,000, or both.

Other than the Civil Aeronautics Act, there are other laws such as: (i) the Act on the Punishment of Acts that Cause Danger in the Air, which penalises any person who damages airports or air navigation facilities, destroys aircraft or causes aircraft to crash; and (ii) the Act on the Punishment of an Unlawful Seizure of Aircraft, which penalises any person who hijacks or plans to hijack any aircraft while in operation.

B. Administrator

The civil aviation bureau of the MLIT administers air safety. It established an aviation safety programme which became effective on April 1, 2014 pursuant to ICAO's policy to introduce State Safety Programmes. The programme applies to general aviation and commercial aviation by a person or a company. It has also started to operate VOICES (Voluntary Information Contributory to the Enhancement of Safety), through which any person may voluntarily report any incident which could have caused accidents by an aircraft, in order to prevent the occurrence of actual accidents.

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

Air safety is regulated by the Civil Aeronautics Act, which regulates aviation generally; however, Chapter 7 regulates only commercial aviation such as the aviation transport business and businesses using aircraft. Please see question 1.1.

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

Yes, as discussed in question 1.2 on aviation transport businesses. Regulations on aviation transport businesses do not distinguish between cargo and persons.

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

A foreign entity or person cannot be a domestic air carrier (*honpou koukuu unsou jigyosha*) (please see question 1.2). However, it may obtain the MLIT's permission to conduct an international aviation transport business (Civil Aeronautics Act, Articles 129 and 126).

A foreign entity or person who invests in Japan is subject to the Act of Foreign Exchange and Foreign Trade. Under that law, a foreign entity which wants to invest in the business of manufacturing aircraft, conducting air transport or using aircraft, must give prior notification, through the Bank of Japan, to the Ministry of Finance as well as the ministry with specific jurisdiction over the business (i.e. METI or MLIT). The foreign entity must wait for 30 days before making the investments; however, the period may generally be shortened to two weeks.

1.7 Are airports state or privately owned?

As described in question 1.1, with a few exceptions, airports in Japan were constructed and are owned and managed directly by either the national government or local governments. As of April 1, 2016, airports in Japan are classified as: (i) national airports established and managed by the national government (19 airports); (ii) special regional airports established by the national government but managed by local governments (5 airports); (iii) incorporated airports established and managed by corporations under special laws (Narita, Kansai, Itami, and Chubu airports) (4 airports); (iv) regional airports established and managed by local governments (54 airports); (v) airports for joint use managed by either the Japan Self Defence Forces or the US forces stationed in Japan jointly with the national government (8 airports); and (vi) other minor airports. Among those airports, Sendai Airport, Kansai International Airport and the Osaka (Itami) International Airport are currently being operated by private companies through the concession. Please see question 1.10.

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

An airport operator must establish rules for the operation of the airport and publish them through the internet or other appropriate methods (Airport Act, Article 12). The rules must cover the airport's operating hours, other services it is providing, landing and parking fees, and requirements for airport users, among other things.

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

The Act for the Establishment of the Japan Transport Safety Board created the Japan Transport Safety Board (*Unyu Anzen Iinkai*). The Board is one of the MLIT's administrative organs, although the National Government Organization Act gave it some independence from the MLIT.

The Board is responsible for investigating: accidents involving aircraft, railroads and vessels; any situation which is likely to cause those accidents; the causes and extent of damage surrounding those accidents; and for requesting the MLIT or relevant parties to implement necessary measures in response. This law is based on Annex 19 of the Chicago Convention. The Board's investigative powers must meet the standards, methods and procedures set by the Chicago Convention and Annex 19 (Act for the Establishment of the Japan Transport Safety Board, Article 18, Paragraph 1).

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

There are two notable developments in connection with regulations on flights by unmanned aircraft vehicles ("**UAVs**") and the privatisation of airports in Japan.

A. Regulations on flights by UAVs – Amendment of the Civil Aeronautics Act

The Japanese public and government turned their attention to drones after a drone landed on the roof of the Prime Minister's office on April 22, 2015. The Civil Aeronautics Act was amended to introduce safety rules for unmanned aircraft vehicles, and the amended Act took effect on December 10, 2015.

The amended Act introduces restrictions on (i) areas for flight, and (ii) operation. Violations will be penalised with a fine of up to JPY 500,000.

(i) Prohibited airspaces for flight

The amended Civil Aeronautics Act requires a person who intends to operate a UAV in the following airspaces to obtain the MLIT's permission:

(a) airspace which is likely to affect the safe operation of aircraft; and

(b) airspace which is above densely populated areas.

An "airspace which is likely to affect the safe operation of aircraft" refers to airspaces above airports and their vicinity, and airspaces 150 metres above ground level or water surface level. A "densely populated area" is defined as a densely inhabited district (*jinko shuchu chiku*) ("**DID**"), designated based on the results of the national census. A DID is, in principle, an area with a population density of 5,000 people or more per square kilometre.

(ii) Operational limitations

The amended Civil Aeronautics Act lists the following operational conditions.

Unless approved by the MLIT, an operator of UAVs must:

(a) operate UAVs only in the daytime;

(b) operate UAVs within the visual line of sight of the operator;

(c) maintain a certain operating distance (30 metres) between UAVs and persons or properties on the ground or water surface;

(d) not operate UAVs over event sites where many people gather;

(e) not transport hazardous materials specified in the Ordinance by UAVs; and

(f) not drop any object from UAVs except for the goods specified in the Ordinance.

With the MLIT's permission or approval, it is possible to operate UAVs in prohibited airspaces or without meeting operational conditions. An operator must submit the application for permission or approval, in general, 10 business days before the flight of a UAV.

UAV technology continues to advance rapidly. Hence, although the new regulations were created as an urgent response to the landing of a drone on the roof of the Prime Minister's office, government regulations will continue to evolve to ensure the sound development of the UAV business in Japan, as affirmed in a supplemental provision of the amended Civil Aeronautics Act.

B. Introduction of concessions for operating airports

The Act for the Operation of Government Controlled Airports by Private Sector Entities (the "**Airport Concession Act**"), which took effect on July 25, 2013, allows the private sector to operate airports through concessions under the Act on the Promotion of Private Finance Initiative (the "**PFI Act Concession**").

The need to reform airport management efficiently led to the PFI Act Concession. Under the current system, income from airport charges such as landing fees at all national airports is managed within a single national pool (i.e., the airport development sub-account under the social infrastructure development special account). In principle, airport charges are the same in all national airports in Japan, and each airport cannot set its own airport charges. Under the Airport

Concession Act, however, the airport concessionaire of a specific airport may set its own airport charges and collect them as income.

Further, the separation between aeronautical and non-aeronautical operations in terms of ownership and management has also been criticised as being inefficient. As mentioned above, in many airports in Japan, the government owns and operates basic aeronautical facilities, such as runways, aprons and navigation facilities, while private or third sector entities own and operate non-aeronautical facilities such as airport terminals and car parking facilities. Accordingly, the government cannot offer lower airport charges to airlines by generating income from non-aeronautical operations. By introducing the Airport Concession Act, the government aims to have one concessionaire manage both aeronautical and non-aeronautical operations under its concession.

A concession under the Airport Concession Act covers: (i) national airports; (ii) regional airports; (iii) civil aviation facilities at airports for joint use; and (iv) other minor airports established and managed by local governments. In 2014, the government started the bid process to select the concessionaire who will operate Sendai Airport, one of Japan's national airports. The operation of Sendai Airport by private companies through the concession started in July 2016.

Incorporated airports are not subject to the Airport Concession Act. However, the government has enacted another special law for the concession to operate Kansai International Airport and Osaka (Itami) International Airport. The operation of both airports by private companies, which include Vinci Airports and Orix Corporation, through the concession started in April 2016.

2 Aircraft Trading, Finance and Leasing

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

At the owner's application, the MLIT will register its ownership of an aircraft in the Aircraft Register (Civil Aeronautics Act, Article 3). The registration fee is JPY 30,000 multiplied by the weight (in tons) of the aircraft.

Any third party may request to see or have a copy of the Aircraft Register. Hence, the buyer of an aircraft can check whether the seller is registered as the aircraft's owner. Further, as for a registered aeroplane (*hikouki*) or rotorcraft (*kaitenyoku koukuuki*), the buyer or transferee of that aircraft may assert its ownership by registering the acquisition or transfer (*Id.*, Article 3-3). However, if the registration is false and there is a true owner who is not registered in the Aircraft Register, the buyer cannot acquire ownership. In this sense, the Aircraft Register is a very important piece of evidence to prove ownership, but it does not protect a third party who relies on a false registration.

As for other types of aircraft such as gliders or airships, even if they are registered, the mere delivery of the aircraft to the buyer or transferee enables the said buyer or transferee to assert ownership.

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

There is a register of aircraft mortgages under the Aircraft Mortgage Act (*Koukuuki Teitou Hou*).

Aircraft mortgages shall be made in the Aircraft Register in which the ownership is registered (please see question 2.1). To register an aircraft mortgage, the mortgagee and the mortgagor must jointly apply for registration and submit the document verifying the existence of the mortgage, such as the mortgage agreement, and other necessary documents. The aircraft mortgage registration fee is JPY 0.003 multiplied by the loan amount. It is customary to make a provisional registration of the mortgage and pay only JPY 2,000 as registration fee. As for the enforcement of the mortgage, please see question 3.1.

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

Please see question 2.4.

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

Japan is a signatory to (i) the Hague Convention, and (ii) the Montreal Convention, but is not a signatory to the ICAO Geneva Convention or the Convention on International Interest in Mobile Equipment, Cape Town, 2001.

2.5 How are the Conventions applied in your jurisdiction?

Japan essentially applied the Hague Convention through the Law on the Punishment of the Unlawful Seizure of an Aircraft. Japan essentially applied the Montreal Convention through the Law on the Punishment of Acts that Endanger Aviation.

3 Litigation and Dispute Resolution

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

Under the Civil Aeronautics Act, the compulsory execution and the execution of provisional seizure of registered aircraft, are governed by rules issued by the Supreme Court (Civil Aeronautics Act, Article 8-4, Paragraph 2), and the Civil Execution Rules (*Minji Shikkou Kisoku*) and Civil Provisional Remedies Rules (*Minji Hozen Kisoku*) apply to the compulsory execution, and the execution of provisional seizure, of registered aircraft (Civil Execution Rules, Article 84, and Civil Provisional Remedies Rules, Article 34).

If a court starts the procedures for a compulsory execution, it must order a public auction of the aircraft, get the documents which are necessary to fly the aircraft, including verification of the aircraft's nationality, and prohibit the aircraft's departure (Civil Execution Law, Article 114, and Civil Execution Rules, Article 84).

The execution of a provisional seizure is done by (i) making an entry of the provisional seizure in the registration, or (ii) getting what is necessary to fly the aircraft, including the verification of the aircraft's nationality (Civil Provisional Remedies Law, Article 48, and Civil Provisional Remedies Rules, Article 34).

Because aircraft without any registration certification cannot be used for aviation, they will be detained through the procedures for compulsory execution and execution of provisional seizure.

If it is likely that a compulsory execution will become significantly unfeasible unless the aircraft is in detention, a party may file an application with the district court with jurisdiction over the aircraft's homebase (*teichijyo*), before starting the compulsory execution procedures to request a court order for the delivery of the registration

certification. If there are pressing circumstances, a party may file the application with the district court with jurisdiction over where the aircraft is located (Civil Execution Law, Article 115, and Civil Execution Rules, Article 84). Even if the certification of registration is delivered, the possession of the aircraft is not deemed delivered to the party or the court. The party may file an application to appoint a custodian to maintain the aircraft until the compulsory execution starts (Civil Execution Law, Article 116).

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

A lessor or a financier of aircraft is basically required to do a compulsory execution, which needs to be filed with the court, to reacquire the possession of the aircraft or enforce any of its rights under the lease/finance agreement. If a lessor or financier has security interests on the aircraft or lease receivables, and the agreement has a provision that it may exercise the security interests against a debtor upon the occurrence of an event of default, it may enforce the rights without a court filing unless the provision is terminated upon the filing of bankruptcy.

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

A. Civil Cases

Applications for compulsory execution and the execution of provisional seizure of aircraft must be filed with the district court with jurisdiction over where the aircraft is located when the procedures of such executions start (Civil Aeronautics Act, Article 8-4, Paragraph 2). This district court is not necessarily the same as the district court with jurisdiction over the aircraft's homebase.

A contractually agreed court to settle disputes between an aircraft financier and the borrower is valid (Civil Procedure Law, Article 11) and the court will be determined pursuant to such provision. If no jurisdiction has been agreed, the competent court will be determined pursuant to the Civil Procedure Law. Depending on the kind of lawsuit, the competent court may be one with jurisdiction over the defendant's address, where the defendant should perform its obligation, or where the aircraft exists (*Id.*, Articles 4 and 5).

B. Criminal Cases

The jurisdiction over criminal cases is where the crime was committed or where the criminal resides (Criminal Procedure Law, Article 2, Paragraph 1). However, if the crime was committed in an aircraft registered in Japan at a time when it was outside Japan, the jurisdiction, in addition to the place where the crime was committed and the criminal's residence, could be the place where the aircraft lands (including on water) after the crime (*Id.*, Paragraph 3).

C. Summary Court

If (i) a plaintiff seeks damages of up to JPY 1,400,000 and (ii) the crime is punishable by fines or lighter penalties, the lawsuit can be filed with the Summary Court (*Kani Saibansho*) (Court Law, Article 33, Paragraph 1).

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

A. Civil Cases

Generally, the service of court proceedings should be made at the address or business office of the person being served. If a foreign company has a representative to do business in Japan or a branch in Japan, the service of court proceedings to a foreign company can be made at the representative's address or the branch's address (Civil Procedure Law, Article 103, Paragraph 1).

If the service needs to be made outside Japan, the presiding judge will delegate the service of court proceedings to the competent governmental agency of the foreign jurisdiction, or the ambassador, minister or council of Japan in such jurisdiction (*Id.*, Article 108). Japan is a signatory to the Convention Regarding Civil Procedures and the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

B. Criminal Cases

Service should be made in the way described in Article 108 of the Civil Procedure Law (Criminal Procedure Law, Article 54).

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

If an obligor does not perform its obligation, the obligee may file a lawsuit for performance. The obligee may also seek payments to force the obligor to perform the obligation, or may use a third party to perform the obligation and make the obligor pay the relevant costs. If the obligee obtains the court's final and binding decision, and that decision is given with a declaration of provisional execution, or an arbitration award to which the competent court has issued an execution order, it can start the compulsory execution against the obligor's properties (Civil Execution Law, Article 22).

The court can issue an interim decision with respect to specific or separate issues (Civil Procedure Law, Article 245) but the obligee cannot start the compulsory execution based on an interim decision.

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

A party who does not agree with the final decision of the district court at the first instance can appeal to the high court (Civil Procedure Law, Article 281, Paragraph 1). A party who does not agree with the final decision of the high court at the second or first instance can appeal to the Supreme Court. Further, a party who does not agree with the final decision of the district court at the second instance can appeal to the high court. An appeal to the Supreme Court requires specific grounds under the Civil Procedure Law; for example, if the high court's decision violates the Constitution or other laws (*Id.*, Articles 311 and 312).

As to the arbitration procedure, the award is binding on the parties and an appeal is basically unavailable.

4 Commercial and Regulatory

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

The Civil Aeronautics Act grants Antitrust Immunity ("**ATI**") if a domestic aviation carrier obtains the MLIT's approval of the following items (Articles 110 and 111):

(i) a joint management agreement between a domestic air carrier and another air carrier, in case two or more domestic air carriers operate air transport services to ensure passenger transport that is necessary for local residents' life, in a route inside Japan where continuing the service is expected to be difficult due to a decreased demand for air transport service; and

(ii) an agreement between a domestic air carrier and another air carrier on joint carriage, a fare agreement and other agreements relating to transportation to promote public convenience in a route between a point in Japan and a point in a foreign country or foreign countries.

The MLIT will not grant the approval unless the subject agreement conforms to the following standards:

(i) it does not unfairly impair the interests of users;

(ii) it is not discriminatory;

(iii) it does not unfairly restrict participation and withdrawal; and

(iv) the contents of the agreement are kept to the minimum necessary for the purpose of the agreement.

Before granting any approval, the MLIT will first discuss this with the Japan Fair Trade Commission ("**JFTC**").

Since 2010, the signing or amendment of a joint venture agreement needs the approval of the MLIT. As of July 2013, ATIs have been granted to four joint venture agreements between Japanese air carriers.

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

Under the Act on the Prohibition on Private Monopolization and on the Maintenance of Fair Trade (the "**Antitrust Law**"), consolidations of businesses such as mergers and business transfers are prohibited if (i) such consolidations will eventually restrict competition in any particular field of trade, or (ii) the consolidations involve unfair trade practices (Articles 14 to 17).

In 2004, the JFTC issued a guideline on how it assesses potential restriction on competition, and this guideline has been continually amended. The guideline provides that a particular field of trade (*ittei no torihiki bunya*) is determined from the perspective of whether users have alternative goods or services to the subject of the trade in terms of geographical area where such goods or services are traded. If necessary, the perspective of whether suppliers have an alternative is taken into account. The scope of goods or services is generally determined by examining whether goods or services, similar to those subject to the anti-competition assessment, are available to users. In evaluating similarity, the JFTC will consider, among other things, the uses and the cost of the goods or services.

The geographical area is also generally determined by whether users can have similar goods or services. In evaluating similarity, the JFTC will consider, among other things, where users can avail themselves of goods or services based on accessibility to users, distribution network, ability of suppliers to satisfy demand, whether the goods or services are easily deliverable, and delivery fees or costs.

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

A party planning a business consolidation can have a prior official consultation with the JFTC by providing the JFTC with concrete details of the proposed consolidation, the relevant parties consenting to the disclosure of the details of the consultation, and the JFTC's response.

The standard period for the JFTC to deal with any application for consultation is 30 days starting from the day after the JFTC has received the required documents. This period may be shortened pursuant to the acquirer's request and if the JFTC does not see any issue under the Antitrust Law.

It is customary to have an unofficial consultation with the JFTC, which is different from the official consultation mentioned above, before the party planning any business consolidation submits all necessary competition clearance documents to the JFTC.

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

Please see questions 4.1 and 4.2.

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

If a party plans a business consolidation which exceeds certain criteria, it must obtain the JFTC's clearance, which may take 30 days (which may be shortened) from the filing of the application for clearance and before any consolidation can proceed (please see question 4.3). The criteria depend on the type of acquisition. For example, in a share purchase, if: (i) the sales of the acquirer's group in Japan exceed JPY 20 billion; (ii) the sales of the target company and its subsidiaries in Japan exceed JPY 5 billion; and (iii) the resulting voting rights of the acquirer will exceed 20% or 50% after the acquisition, the acquirer must file for JFTC clearance and submit the acquisition agreement or its draft, the balance sheet, profit and loss statement and business report of the acquirer, a shareholders' resolution to approve the transaction (if any is required), and the financial condition of the acquirer's group.

It is customary to have an unofficial consultation prior to the application. The length of consultation depends on the transaction but, if necessary information such as sales and market shares of the consolidated businesses is submitted properly, the JFTC will receive the application for consultation promptly.

If the JFTC finds any material problem under the Antitrust Law, the examination process will start. The JFTC will consider whether a cease-and-desist order should be issued to solve the problem until the later of either the lapse of 120 days after the receipt of the application or the lapse of 90 days after the receipt of the documents that the JFTC additionally requested from the acquirer.

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

A. Air Operators

Air transportation to and from small local airports and isolated islands generally faces financial difficulties, but it is necessary

to enable residents to have an ordinary life. To keep such air transportation, air operators providing such transportation services are subsidised in relation to the purchase price of aircraft and equipment and landing charges, and may avail themselves of tax reductions in terms of fuel aviation tax and property tax.

B. Airports

Income from airport charges such as landing fees at all national airports is managed within a single national pool (i.e., the airport development sub-account under the social infrastructure development special account) (please see question 1.10). The pool provides airports with financial support for maintenance and operation.

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

Please see question 4.6.

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

The following laws and regulations are the basic legislation in Japan for the protection of personal information:

(i) Act on the Protection of Personal Information (Act No. 57 of May 30, 2003 as amended – the "**APPI**");

(ii) Act on the Protection of Personal Information Held by Administrative Organs (Act No. 95 of 1988 of May 30, 2003 as amended);

(iii) Act on the Protection of Personal Information Held by Independent Administrative Agencies; and

(iv) local regulations (*jyourei*) legislated by local governments.

The APPI is the principal data protection legislation which regulates the use of personal information by private businesses and sets forth the obligations of business operators handling personal information, which apply to all business operators using a personal information database for their businesses. Under the APPI, a passenger may request an airline to correct, add or delete his retained personal data and the airline must comply. The MLIT also issued a guideline regarding data protection to business operators conducting a business under the jurisdiction of the MLIT, including airlines.

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

Please see question 4.8.

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

The Basic Act on Intellectual Property provides the framework for promoting measures for the creation, protection and exploitation of intellectual property. This Act defines intellectual property as a patent right, a utility model right, a plant breeder's right, a design right, a copyright, a trademark right, a right that is stipulated by laws and regulations on other intellectual property, or a right pertaining to an interest that is protected by acts. Each of (i) a patent right, (ii) a utility model right, (iii) a plant breeder's right, (iv) a design right, (v) a copyright, and (vi) a trademark right, is protected under (i) the Patent Act, (ii) the Utility Model Act, (iii) the Plant Variety Protection and Seed Act, (iv) the Design Act, (v) the Copyright Act, and (vi) the Trademark Act. Each law has its own mechanism to protect intellectual property, although each basically protects registered intellectual property. For example, under the Trademark Act, a person holding a trademark may register it and such registration is effective for 10 years and is renewable. A trademark holder basically has an exclusive right to use the registered trademark in connection with the designated goods or services.

The unfair acquisition or use of know-how or trade secrets, and the unfair creation or use of trademarks or trade names which are similar or identical to others that are well-known by consumers, is prohibited by the Unfair Competition Prevention Act.

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

The MLIT issued a guideline on the necessary measures to prevent acts which may make passengers uncomfortable, embarrassed or unsafe, and in 2002 requested air operators to comply with the guideline. Under the guideline, air operators must not allow passengers who are very drunk to board.

Air operators generally lay down their terms and conditions which passengers of domestic and international flights are required to follow. Such terms and conditions typically provide that the operator may deny boarding if a passenger is late. Further, the operator may deny boarding to passengers or may make passengers disembark if the operator finds it necessary to ensure air safety, to comply with laws and requests from administrative bodies, to deal with any act which is making other passengers uncomfortable, embarrassed or unsafe, or to deal with any mental or physical conditions.

Further, a pilot of the aircraft may, during taxiing, order a passenger to disembark if he has reasonable grounds to believe that the passenger has committed or will commit an act that may impede safety, to the extent that it is necessary to ensure the safety of the aircraft, to protect other passengers and property, and to keep order and discipline inside the aircraft (Civil Aeronautics Act, Article 73-4, Paragraph 1).

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

The Civil Aeronautics Act does not explicitly impose sanctions directly due to the late arrival and departure of flights. However, the MLIT gathers and publishes information on the frequency of late arrivals and flight cancellations. Further, the MLIT may issue an order to improve the operation of aircraft or the business of air carriers if, for example, the technical ability of airmen or pilots does not meet the standards of the Civil Aeronautics Act (Articles 20, 29 and 72).

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

Please see questions 1.1 and 1.10.

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

The Consumer Contract Act provides for the protection of consumers who enter into contracts with business operators. For example, any

contractual provision which requires a consumer to pay a cancellation fee at an amount which exceeds the average amount of damages that a business operator would suffer in connection with the cancellation, is null and void (Consumer Contract Act, Article 9).

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

Japanese companies and foreign companies such as Fedex, DHL and UPS operate in Japan as global forwarders. Further, Japan has an association which includes international freight forwarders as members (Japan International Freight Forwarders Association Inc.).

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

As a general rule, a foreign person, a foreign entity (whether private or governmental), or an entity of which one-third or more of the directors are foreigners or one-third or more of the voting rights are held by foreign persons or entities, is prohibited from engaging in the freight forwarding business in Japan (Consigned Freight Forwarding Business Act, Articles 6 and 22), unless they are registered with or permitted by the MLIT (*Id.*, Articles 35 and 45).

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

The JFTC will consider whether vertical integration is an issue with regard to fair trade in the aviation business pursuant to the Antitrust Law. There is no precedent regarding such vertical integration. The government has set certain standards for airport concessionaires, such as the disqualification of an aviation transport business operator, and any of its parent companies, subsidiaries and other affiliates, from being an airport concessionaire.

5 In Future

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

Attention should be given to three possible changes or developments:

A. Development of a Business Using UAVs

According to the roadmap published in April 2016 at a conference on the UAV business attended by governmental authorities and private companies, the goal is to be able to deliver goods to scarcely populated areas (e.g., mountainous regions and isolated islands) around 2018, and to urban areas in the 2020s. To achieve this goal, discussions on better regulations, such as certification of UAVs and licences to operate UAVs, are going on.

B. Possible Expansion of Concession of Airports

In the wake of the privatisation of Sendai, Kansai and Itami airports, the privatisation of Takamatsu Airport by using the concession scheme is being considered. The MLIT released the draft of the concession scheme for Takamatsu Airport and Fukuoka Airport in 2016. Further, one national airport (Hiroshima) and six regional airports are being considered for privatisation using the concession scheme.

C. Increase of Flights to and from Haneda

The desirability of increasing flights to and from Haneda, which is closer to Tokyo than Narita, is under discussion. According to the MLIT's website, if the flights are increased as planned, the number of international flights will increase from 60,000 per year (2015) to 99,000 per year (2020). The increase will be accompanied by changes in flight routes. In any case, the MLIT plans to continue discussions with residents near Haneda airport and the flight routes, and other concerned people. It plans to implement suitable methods to properly deal with effects that the increase may have on the environment.

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Kazakhstan

Marina Kahiani

GRATA International

Kamila Suleimenova

1 General

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

In the Republic of Kazakhstan, the aviation industry is regulated by the following main legislative acts:

(1) the Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 28 May 1999 (ratified by the Law of the Republic of Kazakhstan No 297-V dated 19 March 2015) (the "**Montreal Convention**");

(2) the Convention on International Civil Aviation, Chicago, 7 December 1944 (ratified by the Decree of the Supreme Council of the Republic of Kazakhstan No 1503-XII dated 2 July 1992) (the "**Chicago Convention**");

(3) the Convention on International Guarantees in relation to Mobile Equipment (Cape Town, 16 November 2001) ratified by the Law on Ratification of the Convention on International Interests in Mobile Equipment and Aircraft Equipment Protocol to the Cape Town Convention No 29-V dated 5 July 2012 (the "**Ratification Law**") (the "**Cape Town Convention**");

(4) the Protocol on Aviation Equipment ratified by the Ratification Law (the "**Aviation Protocol**");

(5) the Constitution of the Republic of Kazakhstan dated 30 August 1995;

(6) the Civil Code of the Republic of Kazakhstan (General Part dated 27 December 1994; Special Part dated 1 July 1999) (the "**Civil Code**");

(7) the Commercial Code of the Republic of Kazakhstan No 375-V dated 29 October 2015 (the "**Commercial Code**");

(8) the Law of the Republic of Kazakhstan "On Transport" No 156-XIII dated 21 September 1994;

(9) the Law of the Republic of Kazakhstan "On Use of Airspace of the Republic of Kazakhstan and Aviation Activity" No 339-IV dated 15 July 2010 (the "**Aviation Law**");

(10) the Order of Acting Minister of Investments and Development of the Republic of Kazakhstan "On Approval of the Certification Requirements to Operators of Civil Aircraft" No 153 dated 24 February 2015 (the "**Order on Certification Requirements**");

(11) the Order of the Minister of Investments and Development of the Republic of Kazakhstan "On Approval of the Rules of Certification of Aircraft Operators" No 1061 dated 10 November 2015 (the "**Rules of Certification of Aircraft Operators**");

(12) the Order of the Minister of Investments and Development of the Republic of Kazakhstan "On Approval of the Rules for the Transportation of Passengers, Baggage and Cargo by Air Transport" No 540 dated 30 April 2015 (the "**Air Transportation Rules**");

(13) the Resolution of the Government of the Republic of Kazakhstan "On Approval of the Rules of Investigation of Air Accidents and Incidents" No 828 dated 18 July 2011 (the "**Air Accident Rules in Civil Aviation**");

(14) the Order of the Minister of Defence of the Republic of Kazakhstan "On Approval of the Rules for Investigation of Air Accidents and Incidents in State Aviation of the Republic of Kazakhstan" No 145 dated 18 March 2015 (the "**Air Accident Rules in State Aviation**");

(15) the Order of the Minister of Defence of the Republic of Kazakhstan "On Approval of the Rules for Registration of Aircraft of State Aviation of the Republic of Kazakhstan" No 220 dated 18 May 2011 (the "**State Aircraft Registration Rules**");

(16) the Order of the Minister of Transport and Communication of the Republic of Kazakhstan "On Approval of the Rules of State Registration of Civil Aviation Aircraft of the Republic of Kazakhstan" No 613 dated 18 September 2012 (the "**Civil Aircraft Registration Rules**"); and

(17) other legal acts mentioned in this chapter.

The Aviation Law is the main legislative act regulating aviation in Kazakhstan and it sets out the norms relating to: state regulation and state control of airspace management and aviation operations; the organisation of airspace management, international flights, aircraft, aviation personnel, operators, airports, air services and aviation work; and legal liability in the sphere of air services, actions and activities which affect flight operating services, air accidents and their investigation, rescue works in relation to aircraft, their passengers and crew members.

Aviation in the Republic of Kazakhstan is divided to civil aviation, state aviation and experimental aviation (article 6 of the Aviation Law).

State aviation is aviation used for the purpose of defence, security of the state, and protection of public order. **Experimental aviation** is aviation intended for use in conducting design, experimental work, scientific research work and tests in the field of aviation and other equipment. **Civil aviation** is aviation other than state aviation and experimental aviation, used for: (a) the transportation of passengers, luggage, cargo and postal matters (air transportation); (b) the performance of aviation works; (c) conducting educational, sport, social activities and developing technical creativity; (d) personal use by an aircraft operator; (e) conducting search and rescue and accident rescue operations and rendering assistance in

case of natural disasters; (f) the provision of aeronautical services; (g) the maintenance of operations and repair of aircraft; (h) carrying out airport activities and/or aerodrome (helicopter aerodrome) services; or (i) designing aerodromes and objects of civil aviation.

The main regulatory body in the sphere of **state aviation** in Kazakhstan is the Ministry of Defence of the Republic of Kazakhstan (article 15 of the Aviation Law).

The main aviation regulatory body in the sphere of **civil and experimental aviation** in Kazakhstan is the Committee of Civil Aviation of the Ministry of Investments and Development of the Republic of Kazakhstan (the "**CAC**") (articles 1.16 and 14 of the Aviation Law).

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

Under Kazakh law, only an air carrier holding the valid civil aircraft operator certificate (the "**Aircraft Operator Certificate**") issued by the CAC is authorised to carry out the air transportation of passengers, luggage, cargo and postal matters for payment or on hire (commercial air transportation) (article 74.1 of the Aviation Law). The Aircraft Operator Certificate is equivalent to the operating licence, i.e. it is a legal basis for the air operator to perform its activity and no additional operating licence is required.

In order to obtain the Aircraft Operator Certificate, the air operator shall satisfy mandatory certification requirements established by the Order on Certification Requirements (articles 17 and 2.4 of the Rules of Certification of Aircraft Operators). The minimum certification requirements are that the air operator be located in Kazakhstan and have financial resources (or access thereto) sufficient to perform its activities for three months without any profit (article 3 of the Rules on Certification of Aircraft Operators). Other requirements relate to the flight safety system, production facilities, and technical, organisational, ecological and personnel requirements.

The procedure for the issuance of the Aircraft Operator Certificate is regulated by the Rules of Certification of Aircraft Operators that have been developed based on the Chicago Convention.

Individuals or legal entities to which the Aircraft Operator Certificate has been issued for the first time, shall register with the International Civil Aviation Organisation ("**ICAO**") by sending the relevant request through the CAC (section 4 of the Rules of Certification of Aircraft Operators).

Article 6 of the Rules of Certification of Aircraft Operators outlines the following order of certification of air operators in Kazakhstan:

(i) Phase preceding the submission of the application to the CAC for issuance of the Aircraft Operator Certificate.

(ii) Submission of the application to the CAC for issuance of the Aircraft Operator Certificate, together with relevant documents, the list of which is established by the Rules of Certification of Aircraft Operators.

(iii) Assessment of the documents and making a decision as to whether the application is accepted for review by the CAC.

(iv) Certification examination of the air operator by the CAC.

(v) Making the decision and issuance/refusal of issuance of the Aircraft Operator Certificate.

The Aircraft Operator Certificate is issued by the CAC for a period of two years and cannot be transferred to a third party (section 3 of the Rules of Certification of Aircraft Operators). After each two-year period, the air operator shall renew the Aircraft Operator Certificate by the relevant application to the CAC (section 13 of the Rules of Certification of Aircraft Operators).

The overall period for certification and issuance of the Aircraft Operator Certificate shall not exceed 90 calendar days from the submission of the application (section 7 of the Rules of Certification of Aircraft Operators).

Phase preceding the submission of the application to the CAC for the issuance of the Aircraft Operator Certificate

This phase provides for a preliminary appeal to the CAC with the intention of obtaining the Aircraft Operator Certificate.

At this stage, the CAC will provide the applicant with information on the types of flights allowed, the procedures that the applicant would have to go through during the certification process and all documents which are required for it.

In turn, the applicant would need to go through a preliminary examination which comprises provision to the CAC of information on the applicant's financial capacity to provide security of flights, the types of aircraft it intends to use and structure of the air itineraries, planned profitability, qualified air crew and the level of service it intends to provide (article 9 of the Rules of Certification of Aircraft Operators).

The CAC should, within 10 working days from the date of the application for preliminary examination, provide the applicant with the results of such examination and the positive result serves as grounds for initiation of the applicant's certification (article 10 of the Rules of Certification of Aircraft Operators).

Submission of the application to the CAC for the issuance of the Aircraft Operator Certificate

The application should be submitted to the CAC 90 calendar days prior to the planned start date of the flights.

The application shall be in the form established by the Rules of Certification of Aircraft Operators and the applicant shall attach to the application certain documents, a list of which is established by the Rules of Certification of Aircraft Operators (articles 11 and 12 of the Rules of Certification of Aircraft Operators).

Assessment of the documents and making a decision as to whether the application is accepted for review by the CAC

The decision on acceptance/refusal of the application for review by the CAC should be made within 20 working days. In the case that the documents do not correspond to the requirements, the CAC grants the applicant a period of 10 working days for correction of the documents. If the application is accepted for review, it goes through the stage of certification examination (articles 14, 15 and 16 of the Rules of Certification of Aircraft Operators).

Certification examination of the aircraft operator by the CAC

The certification of the aircraft operator is conducted by the commission especially established by the CAC for this purpose (article 16 of the Rules of Certification of Aircraft Operators).

As a result of the certification examination, the CAC should issue the Act of Certification Examination, which is used as grounds for issuance/refusal to issue the Aircraft Operator Certificate. The Aircraft Operator Certificate is issued only if the aircraft operator meets the certification requirements as determined in the course of certification examination by the commission established by the CAC (articles 20 and 22 of the Rules of Certification of Aircraft Operators).

Making the decision and issuance/refusal in issuance of the Aircraft Operator Certificate

Based on the Act of Certification Examination and conclusion on the possibility to issue the Aircraft Operator Certificate issued by the commission established by the CAC for certification purposes, the CAC, within three working days from the moment of making the relevant decision, shall issue the Aircraft Operator Certificate in the

form established by the Rules of Certification of Aircraft Operators or provide the applicant with the decision on refusal to issue the Aircraft Operator Certificate (articles 23 and 26 of the Rules of Certification of Aircraft Operators).

In case of issuance of the Aircraft Operator Certificate, the air operator shall comply with the operating requirements and limitations established by the Aircraft Operator Certificate (article 27 of the Rules of Certification of Aircraft Operators).

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

Air safety in the sphere of civil aviation and experimental aviation is generally governed by:

- the Aviation Law;
- the Decree of the Government of the Republic of Kazakhstan "On Approval of Aviation Safety Rules" No 746 ДСП dated 25 July 2003 (the "**Aviation Safety Rules**");
- the Decree of the Government of the Republic of Kazakhstan "On Approval of the Program for the Safety of Flights in the Sphere of Civil Aviation" No 136 dated 11 March 2016; and
- the Order of the Minister of Transport and Communications of the Republic of Kazakhstan "On Approval of the Typical Instructions for the Management of Safety of the Flights of Civil Aircraft Operators, in the Airports, in Air Traffic Service, in Technical Service of the Aircraft" No 173 dated 28 March 2011.

Air safety in the sphere of civil aviation and experimental aviation is administered by the CAC.

Air safety in the sphere of state aviation is generally regulated by:

- the Aviation Law; and
- the Aviation Safety Rules.

Air safety in the sphere of state aviation is administered by the Ministry of Defence of the Republic of Kazakhstan.

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

No. Commercial, cargo and private carriers' air safety is jointly regulated by the legislative acts in the sphere of civil aviation mentioned in question 1.3.

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

No. Air charters for commercial, cargo and private carriers are jointly regulated by the provisions of the Civil Code and the Aviation Law.

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

Foreign air carriers willing to carry out their activity in the sphere of civil aviation (commercial, cargo and passenger carriers) should be registered by the CAC. From the moment of such registration, the capacity of the foreign air carrier is officially recognised in the territory of Kazakhstan. Foreign air carriers may operate in the territory of Kazakhstan through the establishment of either a representative office, a branch, or through the appointment of a general agent (a legal entity resident in Kazakhstan, authorised by the foreign carrier to sell the shipments in the territory of Kazakhstan, responsible to the foreign carrier for the services rendered by the foreign carrier by virtue of either agreement or a power of attorney ("**PoA**") on behalf of the foreign carrier). As a result of its registration with the CAC, the foreign air carrier obtains a certificate of registration of foreign air carrier and the information about the foreign air carrier is enrolled in the Register of Foreign Carriers kept by the CAC (article 81 of the Aviation Law). In addition, the CAC shall approve the schedule of regular international flights of the foreign air carrier (article 14.23 of the Aviation Law).

The following general restrictions apply to international air carriers as opposed to local operators:

- Domestic flights in the territory of the Republic of Kazakhstan can be performed only by domestic air carriers (i.e. air carriers registered in Kazakhstan and holding the Aircraft Operator Certificate issued by the CAC) (sections 7.1 and 7.2 of the Order of the Acting Minister for Investments and Development of the Republic of Kazakhstan "On Approval of the Rules for the Admission of Air Carriers for the Operation of Regular Internal Commercial Air Transportation" No 352 dated 27 March 2015 and section 8.3 of the Rules of Certification of Aircraft Operators).
- Foreign air carriers are, generally, prohibited from operating international irregular (charter) commercial flights to/from Kazakhstan, unless otherwise is (i) provided by international treaties, or (ii) permitted by the CAC (article 40.4-1 of the Aviation Law). This measure has been introduced in 2013 specifically for the purposes of protection of domestic air carriers. The CAC permission to foreign operators for international irregular (charter) commercial flights to/from Kazakhstan shall be issued in accordance with the Order of the Acting Minister of Transport and Communications of the Republic of Kazakhstan "On Approval of the Rules for Issuance and Grounds for Refusal in Issuance of Permissions for International Irregular Flights" No 359 dated 13 August 2010 (the "**International Irregular Commercial Flight Permission Rules**"). Under the International Irregular Commercial Flight Permission Rules, the CAC issues its permission to foreign operators in a limited number of cases, for example if the flight is not commercial or cannot be performed by a Kazakh airline (article 18 of the International Irregular Commercial Flight Permission Rules).
- It is prohibited to lease Kazakhstan-registered aircraft to the foreign lessee without the bilateral agreement between Kazakhstan and the country of registration of the foreign lessee, unless there is an agreement between the CAC and the relevant aviation authority of the country of the lessee providing for a transfer of duties and functions, and the corresponding responsibilities, from Kazakhstan to the state of the lessee (article 51.3 of the Aviation Law).
- The Government provides subsidies for the expenses of the domestic carriers related to unpopular routes, in order to support the domestic air carriers.

Generally, there are no tax advantages applicable to domestic air carriers as opposed to international air carriers.

1.7 Are airports state or privately owned?

Airports can be owned by the state and/or private legal entities, including foreign legal entities (articles 5 and 64 of the Aviation Law).

Currently, there are 20 airports in Kazakhstan. Generally, either the airports' assets or share ownership in the airports are considered

strategic objects (i.e. objects of socio-economic significance for the development of Kazakh society, ownership of which may affect national security), provided that the relevant airport is included in the list of strategic objects established by the Government of the Republic of Kazakhstan.

Transfer of ownership to airports that have been included in the strategic objects list is subject to the approval of the Government of the Republic of Kazakhstan.

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

In the Republic of Kazakhstan, carriers are subject to the Air Transportation Rules. We note, however, that such Air Transportation Rules are established by the Government rather than the airports themselves, and are generally applicable to domestic air carriers rather than foreign air carriers.

We are not aware of any specific requirements established by the airports themselves with regard to carriers flying to and from airports in Kazakhstan.

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

Air accidents in Kazakhstan are regulated by the Aviation Law, the Air Accident Rules in Civil Aviation and the Air Accident Rules in State Aviation.

The regulatory regime applicable to air accidents and incidents in civil aviation has been developed based on the Chicago Convention and ICAO standards.

Investigation of air accidents and air incidents is compulsory. The main purpose of such investigation is determination of the reasons of the accident/incident and drawing up recommendations for the prevention of air accidents/incidents in the future. The ascertainment of guilt and the punishment of liable persons for air accidents/incidents does not constitute the purpose of the investigation (article 93 of the Aviation Law).

For the purposes of investigation, special commissions in the sphere of state and civil/experimental aviation (depending on which sphere the accident/incident occurred in) are created.

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

Please see question 5.1 below.

2 Aircraft Trading, Finance and Leasing

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

In Kazakhstan, there are two aircraft registers – the register of aircraft of state aviation kept by the Administration of the Commander of Air Defence Force of the Republic of Kazakhstan Armed Forces (article 1 of the State Aircraft Registration Rules) (the "**Register of State Aircraft**") and the register of aircraft of civil aviation kept by the CAC (the "**Register of Civil Aircraft**"). Registration of aircraft in the Register of State Aircraft and in the Register of Civil Aircraft is regulated, respectively, by the State Aircraft Registration Rules and the Civil Aircraft Registration Rules.

Registration of ownership right to the aircraft in the relevant register constitutes proof of ownership over the aircraft (article 45.3 of the Aviation Law). Any transactions with the aircraft registered with the Register of Civil Aircraft shall also be registered with the Register of Civil Aircraft.

It is worth mentioning that an aircraft cannot be simultaneously registered with the Register of Civil Aircraft and the register of aircraft of a foreign state. Accordingly, before registration of the aircraft with the Register of Civil Aircraft, the owner needs to make sure the aircraft is not registered anywhere else (article 45.4 of the Aviation Law).

The following aircraft and transactions with aircraft are subject to registration with the Register of Civil Aircraft (article 45.2 of the Aviation Law, articles 29, 41 and 44 of the Civil Aircraft Registration Rules):

(i) aircraft owned by individuals and/or legal entities of the Republic of Kazakhstan;

(ii) aircraft in temporary possession and use by individuals and/or legal entities of the Republic of Kazakhstan, provided that the take-off weight of such aircraft does not exceed 45.5 tons;

(iii) change of ownership right to the aircraft indicated above;

(iv) change of purpose of the aircraft after its re-equipment;

(v) change of operator of the aircraft;

(vi) mortgage agreements in relation to the aircraft indicated in (i) and (ii) above; and

(vii) irrevocable deregistration and export authorisations ("**IDERA**").

For registration of ownership of aircraft in the Register of Civil Aircraft, the person who acquired rights of ownership of the aircraft should submit an application to the CAC in the form established by the Civil Aircraft Registration Rules and the list of documents stipulated by section 8 of the Civil Aircraft Registration Rules.

State registration of the aircraft is made only after payment of the fee for state registration of the aircraft. Upon registration of the aircraft in the Register of Civil Aircraft, the owner/temporary possessor of the aircraft is granted, by the CAC, the Certificate of State Registration of the Aircraft (articles 45.2 and 45.3 of the Aviation Law).

In practice, the requirement of article 45.2 of the Aviation Law creates a problem for the Kazakh companies – lessees of the aircraft registered abroad. As mentioned above, under article 45.2 of the Aviation Law, aircraft temporarily possessed or used by Kazakh individuals or legal entities and with a take-off weight of less than 45.5 tons "are subject to registration with the Kazakh state register of civil aircraft". It is not clear whether the wording "are subject to registration" means that such aircraft *shall be* mandatorily registered with the Register of Civil Aircraft or *may be* registered with the Register of Civil Aircraft at the option of the parties. Our interpretation of the law suggests that the wording "are subject to registration" means that aircraft with a take-off weight of less than 45.5 tons shall be mandatorily registered with the Kazakh Register of Civil Aircraft.

International lessors and financiers, however, prefer registration of aircraft located and operated in Kazakhstan with the state registers of foreign countries, due to the following reasons: (1) better technical oversight: the technical inspections of the aircraft are generally performed by the authorised body of the country of aircraft registration. Certain foreign countries such as, for example, Aruba, are often used in international practice for the registration of aircraft, since Aruban inspectors have developed experience

and high standards in the technical oversight of aircraft. The same practice applies in Kazakhstan. According to public sources, most of the air fleet of JSC Air Astana, the national air operator, is leased and registered with the Aruban air authority. Operation of such aircraft in Kazakhstan by Kazakh aircraft operators is performed based on bilateral agreements (under article 83 *bis* of the Chicago Convention) between the CAC and the aviation authority of Aruba; and (2) better protection of creditors' interests.

Kazakhstan has made a big step towards better protection of international creditors' interests by its ratification of the Cape Town Convention and the Aviation Protocol; however, there is still no precedent or established practice of implementation of these international treaties. In addition, it is international practice to register aircraft in an "independent" country different to the country of the lessee and the lessor.

As mentioned above, in the case of aircraft with a take-off weight of less than 45.5 tons, the lessees seem to be obliged to register such aircraft with the Kazakh Register of Civil Aircraft and will not be able to provide international lessors and financiers with the benefits indicated above. We believe this issue shall be removed by relevant amendments to the legislation or official clarification from the CAC.

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

There is no separate register of aircraft mortgages and charges. Information on mortgages (charges) over aircraft shall (and can) be reflected in the Register of Civil Aircraft only if the relevant aircraft is itself registered with the Register of Civil Aircraft. Under article 117.2 of the Civil Code, aircraft that are subject to state registration are treated in the same way as immovable property, i.e. the legal regime applicable to immovable property in Kazakhstan shall also apply to aircraft that are subject to state registration in Kazakhstan.

If the relevant aircraft itself is *not* registered with the Register of Civil Aircraft, it is not possible to register a mortgage (charge) over such aircraft in Kazakhstan, e.g. a foreign-leased aircraft with a weight of over 45.5 tons and mortgages thereof *cannot* be registered with the Kazakh Register of Civil Aircraft, even if it is operated by a local airline. Such mortgages are to be registered in the relevant foreign aircraft register.

In cases of Kazakhstan-registered aircraft, the registration of a mortgage (charge) over such aircraft is quite a straightforward procedure that requires the submission of a minimal package of documents (application, mortgage agreement, copy of the passport of the individual mortgagor/certificate of registration of the mortgagor – legal entity) and is subject to a state fee. The registration of a mortgage (charge) over the aircraft shall be performed within two business days from the moment of filing the application (articles 41 and 42 of the Civil Aircraft Registration Rules).

As mentioned above, under Kazakh law aircraft registered in Kazakhstan are treated in an equal way to immovable property. Any rights to immovable property (i.e. title, encumbrance, etc.) are, generally, subject to registration with the legal cadaster maintained by the Ministry of Justice. The law is not clear as to whether an aircraft (and rights thereto) should be registered with the Register of Civil Aircraft only, or if, in addition, they may be registered with the Ministry of Justice as immovable property. Though it seems that registration with the Register of Civil Aircraft only is possible and sufficient for aircraft, one may argue that, in theory, in addition to registration with the Register of Civil Aircraft, it is also possible to register title to aircraft and encumbrances on it with the legal cadaster of the Ministry of Justice. In the absence of official clarification and court practice on the issue, our interpretation of the law suggests that registration only with the Register of Civil Aircraft is feasible and sufficient (i.e. it seems that registration of aircraft with the Ministry of Justice is not required by law); however, we normally recommend our clients to at least try to register aircraft with the Ministry of Justice (in addition to the registration with the Register of Civil Aircraft), just to be on the safe side.

Since Kazakhstan is a party to, and has ratified, the Cape Town Convention, in order to protect the interests of foreign lessees and financiers in cross-border leasing of aircraft to Kazakh lessors, it is recommended to register a mortgage (charge) over relevant aircraft with the International Registry, pursuant to the Cape Town Convention. Apart from the mortgage (charge), registration with the International Registry is possible in relation to other creditors' rights, including lease and assignment of lease over aircraft.

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

The following points may be of interest for a foreign lessor or a financier in relation to aircraft operation under the lease agreement:

Financial Lease Considerations

Kazakh law generally provides for two types of lease agreement – "lease agreement" and "financial lease agreement". If a lease agreement is qualified as a "financial lease agreement" for the purposes of Kazakh law, certain tax exemptions and better protection of creditors upon the lessee's insolvency will apply as described below. In order to qualify as a "financial lease agreement", the lease agreement shall meet certain mandatory requirements of Kazakh law.

Under Kazakh law, "financial lease" means a type of investment activity in which the lessor transfers the acquired property to the lessee for a certain price and on certain terms and conditions for temporary possession and use for not less than three years for entrepreneurial purposes if such transfer complies with at least *one* of the following conditions:

(i) Transfer of the leased asset into the ownership of lessee and/or provision of the right to acquire the leased asset to the lessee for a fixed amount set out by the financial lease agreement.

(ii) The term of the financial lease exceeds 75% of the term of utility of the leased asset.

(iii) The current (discounted) price of lease payments for the whole duration of the financial lease exceeds 90% of the price of the leased asset transferred (article 2 of the Law of the Republic of Kazakhstan "On Financial Lease" No 78-II dated 5 July 2000 (the "**Financial Lease Law**")).

Please also note that one may argue that, in addition to above requirements, a lease agreement has to be governed by Kazakh law and provide for mandatory provisions stipulated in article 15 of the Finance Lease Law, in order to be recognised as a "financial lease" for the purposes of Kazakh law.

Currency Control Requirements

Depending on the terms of the relevant loan agreement and the aircraft lease, such agreements may need to be registered with the National Bank of Kazakhstan (the "**NBK**") for the purposes of currency control. Generally, under Kazakh law any financial loan (including financial lease) shall be registered with the NBK provided that it is executed (i) for an amount of more than 500,000 USD (or equivalent in other currency), and (ii) for a term exceeding 180 days.

If the relevant lease agreement contemplates provision of the security deposit by the lessee, such lease agreement shall also be

registered with the NBK provided that (i) the amount of the security deposit exceeds 100,000 USD (or equivalent in other currency), and (ii) the term of the security deposit exceeds 180 days.

Absence of registration may lead to refusal by the Kazakh bank to service the relevant transaction to transfer the money under the loan agreement/lease agreement. Registration with the NBK is quite a straightforward procedure and shall be completed by the NBK within 10 business days from the moment of application. Registration shall be performed by the Kazakh resident (the borrower or lessee) and no action from the foreign lessor or financier is required in relation to such registration.

In addition, any agreement that (i) provides for delivery of the goods to Kazakhstan, and (ii) exceeds 50,000 USD, is subject to the assignment of a so-called "record registration number" by the Kazakh bank servicing the relevant transaction.

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

Kazakhstan is a signatory to, and has ratified, the Chicago Convention, the Montreal Convention, the Cape Town Convention and the Aviation Protocol.

2.5 How are the Conventions applied in your jurisdiction?

In Kazakhstan, international treaties (including the Conventions mentioned above), once ratified by the Republic of Kazakhstan, should have prevailing force over domestic Kazakh legislation.

The provisions of international treaties shall be directly implemented, except in cases when the application of an international treaty requires the promulgation of the law (article 4.3 of the Kazakhstan Constitution, article 3.8 of the Civil Code and article 2 of the Aviation Law).

We believe that the most important international treaties in terms of cross-border aircraft finance transactions are the Cape Town Convention and the Aviation Protocol.

The Cape Town Convention and Aviation Protocol in Kazakhstan: Kazakhstan has acceded to and ratified the Cape Town Convention and Aviation Protocol pursuant to the Ratification Law, and has amended its legislation to bring it into line with these international treaties. In case of default under the lease agreement, the repossession and recovery of aircraft will take place in accordance with the Cape Town Convention/Aviation Protocol and relevant provisions of local Kazakh law that comply with the Cape Town Convention/Aviation Protocol as described below.

The Ratification Law contains a list of reservations of the Republic of Kazakhstan with respect to certain provisions of the Cape Town Convention and the Aviation Protocol (for instance, in accordance with the reservations of the Republic of Kazakhstan relating to clause 1(b) of article 39 of the Cape Town Convention, nothing in the Cape Town Convention may affect the right of the Republic of Kazakhstan or the Kazakhstan state organisation, the intergovernmental organisation or other private social services supplier to foreclose or hold the aircraft in accordance with the laws of Kazakhstan for payments due to such organisation or supplier, which payments shall relate directly to the servicing of this aircraft or any other aircraft).

In accordance with the reservations of the Republic of Kazakhstan relating to clause 1(a) of article 39 of the Cape Town Convention, the following non-contractual claims or warranties of creditors shall be prioritised by Kazakhstan:

(i) salary claims; and

(ii) repair work claims.

In particular, according to the Ratification Law the following rights shall have priority over the rights of creditors under the international interests registered with the International Register (as this term is defined in the Cape Town Convention):

(i) rights of employees for unpaid wages arising from the moment of default declared by an employer under the contract for finance or lease of the Object (as defined in the Cape Town Convention);

(ii) rights of persons performing the repair works during their possession of the Object, for the amounts due for such repair works and the amount by which the value of the Object increased; and

(iii) the right of the Republic of Kazakhstan, its state authority, an intergovernmental organisation or other private provider of public services to arrest or detain the Object under Kazakh law for the payment of amounts due to such entity, organisation or provider that are directly related to such public services for such Object or another Object.

3 Litigation and Dispute Resolution

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

Kazakhstan has declared that, pursuant to article 39(1)(b) of the Cape Town Convention: "Nothing in this Convention shall affect the right of the Republic of Kazakhstan or state entity, or intergovernmental organisation or other private provider of public services to arrest or detain an object under the laws of the Republic of Kazakhstan for payment of amounts owed to such entity, organisation or provider directly relating to those services in respect of that object or another object."

Accordingly, air navigation, airport organisations and tax authorities are entitled to retain any property held by the aircraft operator (including the aircraft operated by such aircraft operator) in case of its default on relevant payments.

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

A regime of self-help is generally available in Kazakhstan, pursuant to the Cape Town Convention and the Aviation Protocol.

Repossesion of Aircraft – IDERA

Under the Cape Town Convention/Aviation Protocol, the Kazakh Aviation Law and the Civil Aircraft Registration Rules, in order to repossess and recover an aircraft from Kazakhstan, the operator of such aircraft shall issue an Irrevocable Deregistration and Export Request Authorisation in the form provided by the Civil Aircraft Registration Rules ("**IDERA**") in advance, and register the IDERA with the CAC. The IDERA shall be issued in favour of the person who will be authorised, upon default of the lessee, to file a deregistration and export request with the CAC and repossess and export the aircraft from Kazakhstan (the "**Authorised Person**").

Registration of IDERA with the Civil Aircraft Register of Kazakhstan means that only the Authorised Party (or its attorney based on a PoA) is authorised to claim exclusion of the aircraft from the Civil Aircraft Register of Kazakhstan and export of aircraft from the territory of Kazakhstan. The IDERA cannot be withdrawn by

the debtor without the consent of the Authorised Person. The CAC can exclude the IDERA from the Civil Aircraft Register only upon written consent of the Authorised Party (articles 47 and 48 of the Civil Aircraft Registration Rules).

In case of default of the debtor, the Authorised Person shall file the following documents with the CAC for the purposes of deregistration and export of the aircraft from Kazakhstan (see article 49 of the Civil Aircraft Registration Rules):

(1) Application for deregistration in the form established by the Civil Aircraft Registration Rules.

(2) Original IDERA or its notarised copy.

(3) PoA (if another person (attorney) applies on behalf of the Authorised Person).

(4) Identification documents for the Authorised Person/its attorney individuals or certificate of registration if they are legal entities.

(5) Confirmation that all international interests (as provided by Cape Town Convention/Aviation Protocol) ranking first in the registered international interest (aircraft mortgage) in favour of the Authorised Person have been satisfied in the form of the relevant certificate issued by the International Registrar or written confirmation from each relevant secured person, or written consent of all prior ranking secured persons for the deregistration and export of the aircraft from Kazakhstan.

(6) Confirmation of written notification of the interested parties by the Authorised Person at least 10 business days prior to the filing of the IDERA with the CAC (if no court order has been issued for the deregistration and export of the aircraft from Kazakhstan).

(7) Confirmation of removal of identification signs from the aircraft, with photos to evidence this.

(8) Consent of the mortgagee for the deregistration of the aircraft.

Documents provided by foreign legal entities shall be notarised/legalised/apostilled, as appropriate.

The CAC considers the above documents and gives written notification to the owner/operator of the aircraft who issued the IDERA. The owner/operator, within 10 business days from the moment of such notification, shall provide to the CAC the following documents required for the deregistration and export of the aircraft:

(1) Certificate of state registration of the aircraft with the CAC.

(2) Certificate of airworthiness.

(3) Noise certificate.

(4) Radio station certificate.

The CAC, within 10 business days from the moment of filing for deregistration and export, issues the certificate on exclusion of the aircraft from the Register of Civil Aircraft in the form established by the Civil Aircraft Registration Rules (article 38 of the Civil Aircraft Registration Rules).

For the purposes of export of the aircraft from Kazakhstan, the Authorised Person will need the airworthiness export certificate issued by the CAC (article 47.12 of the Aviation Law).

In order to obtain the airworthiness export certificate, the Authorised Person or his/her attorney shall file the following documents with the CAC:

(1) Application in the form established by the Resolution of the Government of the Republic of Kazakhstan No 962 dated 25 August 2011 "On Approval of the Rules of Certification and Issuance of Airworthiness Certificates of Aircraft of the Republic of Kazakhstan".

(2) Copy of the certificate on exclusion of the aircraft from the Kazakh state register of civil aircraft issued by the CAC.

(3) Original of the certificate of airworthiness.

The CAC shall issue the airworthiness export certificate within 10 business days from the moment of filing the above documents. The airworthiness export certificate is valid for one month, i.e. the Authorised Person or his/her attorney has one month to export the aircraft from Kazakhstan.

During the process of export of the aircraft from Kazakhstan, the Authorised Person may be required to pay export duties and perform export filings.

We note that, to date, there has been no relevant practice in Kazakhstan of applying the Cape Town Convention/Aviation Protocol and Kazakh state bodies, including the CAC, are inexperienced in such matters. Notwithstanding that the Cape Town Convention/Aviation Protocol does prevail over any conflicting law or regulation of the Republic of Kazakhstan, may be applied directly and that, according to Kazakhstan's declaration under article 54 (2) of the Convention the Republic of Kazakhstan, any remedies available to the creditor under the Cape Town Convention which are not expressed under the relevant provision thereof to require application to the court may be exercised without court action and leave of the court or other court action, we believe it might be necessary to apply to a local court for a court decision outlining, among other things, the procedure for re-export customs clearance of an aircraft.

Repossesion of Aircraft – PoA

Issuance of IDERA and its registration with the CAC in order to facilitate repossession and export of the aircraft from Kazakhstan is only possible if the aircraft is registered with the Register of Civil Aircraft.

In cases where the aircraft is registered with the aircraft register of a foreign country, the parties use a PoA issued by the aircraft operator in advance and authorising the relevant person to repossess and export the aircraft outside Kazakhstan, by analogy to IDERA. Such PoA cannot, however, be registered with the Register of Civil Aircraft.

The issue with PoAs is that Kazakh law does not recognise irrevocable PoAs; a PoA can be revoked by the lessee at any time and cannot exceed three years. In addition, a PoA does not survive insolvency or liquidation of the lessee. It is recommended, accordingly, that such PoA is governed by the foreign law that does recognise the concept of irrevocable PoAs (e.g. UK law).

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

As mentioned above, aircraft registered in Kazakhstan are treated equally to immovable property (article 117.2 of the Civil Code), i.e. the legal regime applicable to immovable property shall apply to aircraft. Article 467.1.1 of the Civil Procedure Code provides that Kazakh state courts have exclusive jurisdiction over the disputes in relation to immovable property located in Kazakhstan. There is a minor and theoretical risk that disputes in relation to aircraft registered in Kazakhstan are subject to the exclusive jurisdiction of the Kazakh courts. We believe, however, that this shall not be the case, since:

(i) Kazakhstan ratified the Cape Town Convention and Aviation Protocol, which supersede the provisions of Kazakh law based on article 4.3 of the Constitution of the Republic of Kazakhstan. Under articles 42 and 43 of the Cape Town Convention and article XXI of the Aviation Protocol, the parties can choose any court as the competent court in relation to the disputes under the relevant agreement, and such court's jurisdiction will be

exclusive unless the parties agree otherwise; the requirement of exclusive jurisdiction of Kazakh courts over disputes related to aircraft seems not to be applicable.

(ii) Aircraft are treated equally to immovable property, but are not immovable property, whereas (a) article 177.2 of the Civil Code states that legal norms applicable to immovable property shall apply to the property equalled to immovable property *only if specifically provided by relevant legal acts*, and (b) the Civil Procedure Code specifically provides for the exclusive competence of the Kazakh courts *in relation to immovable property (and is silent about property equalled to immovable property)*.

Aviation disputes are generally business disputes, i.e. disputes between the individuals and/or legal entities involved in business activity. Under article 27 of the Civil Procedure Code of the Republic of Kazakhstan No 377-V dated 31 October 2015 (the "**Civil Procedure Code**"), civil disputes in relation to proprietary and non-proprietary disputes where the parties are individuals that conduct business activity and legal entities, are generally subject to consideration by so-called specialised inter-district economic courts (the "**Economic Courts**"). Accordingly, if the parties opted for the jurisdiction of the Kazakh state courts, the dispute shall be resolved by the Economic Court. The jurisdiction of the court does not depend on the value of the dispute.

There is no distinction in Kazakhstan between the courts in which civil and criminal cases are brought. In Kazakhstan, there is no criminal liability of legal entities. In case of any criminal offences (fraud, etc.), criminal liability will arise in relation to individuals involved in the offence (e.g. management or employees of the relevant legal entity).

Arbitration

Kazakhstan is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**"). Accordingly, a foreign arbitral award obtained in a state which is party to the New York Convention should be recognised and enforced by a court of Kazakhstan, subject to the terms of the New York Convention and compliance with the rules of civil procedure of Kazakhstan and the procedures established by the legislation of Kazakhstan on commercial arbitration for the enforcement of arbitration decisions.

Article 9.5 of the newly adopted Law of the Republic of Kazakhstan "On Arbitration" No 488-V dated 8 April 2016 (the "**Arbitration Law**") states that the parties have the right to unilaterally refuse an arbitration clause that has previously been agreed contractually based on the grounds listed in article 404 of the Civil Code. Namely, a party can unilaterally refuse arbitration if: (i) it is impossible to execute its contractual obligation to resolve the dispute in arbitration; (ii) the other party is recognised by the court as a bankrupt; and (iii) the state act that served as the basis for the contractual choice of arbitration is changed or terminated. Our interpretation of the law suggests that provisions of the Arbitration Law should apply only to Kazakhstan arbitration (as opposed to international commercial arbitration, for example through the London Court of International Arbitration); however, the provisions of the Arbitration Law are vague and can be interpreted to cover international commercial arbitration as well. In the absence of any court practice or official clarification issued by the authorised bodies on this matter, it is therefore difficult to predict with certainty how certain provisions of the Arbitration Law (article 9.5 in particular) would be interpreted by the relevant state authorities and courts in Kazakhstan.

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

Pursuant to article 127.4 of the Civil Procedure Code, service of process must be sent to: (a) the address, mobile number and email address of the individual who is a party to the proceedings, or his/her work address if the person is not found at the known address; and (b) the location of the legal entity which is a party to the proceedings (its address according to constitutional documents or the state database of legal entities (article 29.2 of the Civil Procedure Code).

There is no distinction between the service requirements in relation to court proceedings for domestic or non-domestic airlines/parties.

Appointment of an agent for service of process is not prohibited under Kazakh law. However, given the above service requirements of the Civil Procedure Code, it is not clear how the Kazakh courts may interpret provisions regarding the appointment of such process agent by a Kazakh counterparty. It should be noted, however, that the appointment of a process agent is common practice in Kazakhstan in cases where transaction documents include a foreign legal entity as a party.

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

Interim measures

The following interim provisional remedies are available from the Kazakh courts on an interim basis (article 156 of the Civil Procedure Code):

(i) arrest over the property owned by the defendant and held by the defendant or the third parties (except money in the corresponding bank account, property that is a base asset of repurchase transactions concluded in the trade systems of stock exchanges by the so-called "open trades" method, money placed in the bank accounts designated for salary accrual, mandatory pension contributions, pension assets and payments, social payments payable from the state budget or the state fund of social insurance, residential payments, notary deposits related to educational deposit agreements, and assets of the social medical insurance fund);

(ii) prohibition of the defendant from carrying out certain actions;

(iii) prohibition of third parties from transferring property to the defendant under due obligations, or otherwise performing their legal or contractual obligations to the defendant;

(iv) suspension of property sale in case of a claim on release of the property from arrest and/or a challenge to the defendant's property evaluation results;

(v) suspension of the effectiveness of the challenged legal act issue by the state body or local government (except certain acts of the National Bank of the Republic of Kazakhstan);

(vi) suspension of the execution under writ of execution that is being challenged by the debtor in the court;

(vii) suspension of the out-of-court sale of the pledged property;

(viii) suspension of the acts and actions of the marshal of the court which are being challenged, in relation to levying execution over the property, in the course of an execution proceeding; and

(ix) other interim measures where necessary and at the discretion of the court.

In the case of an arbitration proceeding, the parties are entitled to apply to the court for the introduction of the provisional remedies indicated above (article 39 of the Law of the Republic of Kazakhstan "On Arbitration" No 488-V dated 8 April 2016 (the "**Arbitration Law**"). In addition, the arbitral tribunal can issue the order on application of provisional measures itself unless the parties have agreed otherwise (article 20.6 of the Arbitration Law). However, the Arbitration Law does not specify what particular measures can be applied by the arbitral court. Our interpretation of the law suggests

that the arbitration court may issue the order for the application of any measure at its discretion.

In the cases covered by the Cape Town Convention (leasing, mortgage, preliminary purchase with reservation of the ownership right to the aircraft – article 2 of the Cape Town Convention), the claimant is specifically authorised to apply for a court order authorising or directing that it may:

(a) take possession or control of any object charged to it;

(b) sell or grant a lease of any such object; and/or

(c) collect or receive any income of profits from the management or use of any such object (article 8.2 of the Cape Town Convention).

Further, article 13 of the Cape Town Convention provides for the right of the creditor that has presented evidence of default by the debtor, to claim to the court and receive a court order for the following interim remedies:

(i) Safekeeping of the object and its value.

(ii) Transfer of the object into possession, control or storage.

(iii) Prohibition of change of location of the object.

(iv) Transfer of the object to leasing or, except in the cases indicated in points (i)–(iii) above, to the management with receipt of income.

These interim remedies are in addition to the interim remedies available to the creditor under Kazakh law (article 13.4 of the Cape Town Convention).

In taking any of the decisions indicated above, the court can establish such conditions as it deems fit to protect the interests of the third parties in the case that the creditor:

(a) upon execution of any of the decisions indicated above, commits non-performance of any of its obligations to the debtor under the Cape Town Convention; or

(b) does not, entirely or partially, form its position in the course of making the final decision on the case (article 13 of the Cape Town Convention).

Final measures

The decision issued by the relevant Kazakh state court on the arbitration award issued by the arbitral tribunal is considered as the remedy available to the parties on a final basis, subject to the right of the parties to appeal the court decision/arbitration award (please see question 3.6 below).

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

Appeal of court decision

Kazakh civil procedure includes three stages: first instance; appeal instance; and cassation instance.

Generally, court decisions on civil cases are issued by the courts of first instance – district courts (*raionnye sudy*) (article 8.1 of the law of the Republic of Kazakhstan "On Court System and Judges Status" No 132-II dated 25 December 2000 (the "**Court System Law**").

Any decision issued by the court of first instance can be appealed to the court of appeal (which is the court of higher level in the court system of Kazakhstan) without any particular ground. The applicant shall justify why the appealed court decision is illegal or incorrect and shall state what particular changes shall be made to the court decision by the court of appeal (article 404.1 of the Civil Procedure Code).

For district courts, the courts of appeal are the regional courts (*oblastnye sudy*), court of Almaty and court of Astana (article 402 of the Civil Procedure Code). An appeal can be filed before the relevant court decision enters into legal force, i.e. within one month from the moment of issuance of the relevant court decision or, if the applicant is not a party to the court proceedings, from the moment a copy of the court decision is sent to the applicant (article 403.3 of the Civil Procedure Code).

Cassation instance is executed by the Supreme Court of the Republic of Kazakhstan (the "**Supreme Court**"). Cassation claims can be submitted to the Supreme Court subject to prior consideration of the appeal claim on the same case by the court of appeal (article 434.1 of the Civil Procedure Code), i.e. it is not possible to apply directly to the cassation instance without using the appeal instance first.

A cassation appeal in relation to decisions of the court of appeal can be filed within six months from the moment such decisions of the court of appeal enter into legal force (article 436.1 of the Civil Procedure Code).

The following cases cannot be appealed in cassation instance (article 434.2 of the Civil Procedure Code):

(i) cases considered in a so-called "simplified proceeding" (generally, indisputable cases, e.g. cases of payment of an indisputable amount, etc.);

(ii) cases resolved by amicable agreement, settlement agreement or agreement on settlement of the dispute through the so-called "participative procedure";

(iii) cases connected with proprietary interests of individuals, provided that the amount of the case is less than 2,000 times the monthly calculation index* (approximately 14,000 USD); or legal entities, provided that the amount of the case is less than 30,000 times the monthly calculation index (approximately 210,000 USD);

(iv) cases resolved by refusal from the claim; and

(v) cases for settlement of indebtedness and in relation to disputes arising in the court of rehabilitation and insolvency proceedings, including on invalidation of the transaction concluded by the debtor, upon the return of the debtor's property, on execution of debtor indebtedness based on the demands of the insolvency and rehabilitation manager.

* The monthly calculation index is a special index established on an annual basis by the Law on Republican Budget, for the calculation of state fines, social benefits, taxes, etc. In 2017, the monthly calculation index is equal to 2,269 Kazakh Tenge or approximately 7 USD.

Appeal of arbitration award

The Republic of Kazakhstan is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**"). Therefore, foreign arbitral awards obtained in a state which is a party to the Convention will generally be recognised and enforceable in the Republic of Kazakhstan, provided that the conditions to enforcement set out in the Convention and procedures applicable under Kazakh law are observed.

Under the New York Convention and the Arbitration Law that has been brought into compliance with the New York Convention, an arbitral award is final and may not be reconsidered on its merits. The state court may set aside the award exclusively in the case of certain procedural violations (e.g. failure to notify the parties to the dispute, or where the dispute between the same parties on the same subject and under the same grounds has already been resolved by a court decision or another arbitration award that has entered into legal force, etc. – see article 5.1 of the New York Convention and

article 52.1 of the Arbitration Law). Also, the arbitration award can be set aside if the court holds that the arbitration award contradicts the public order of Kazakhstan or the dispute resolved by arbitration award cannot be resolved through arbitration under Kazakh law (article 5.2 of the New York Convention and article 52.2 of the Arbitration Law).

In addition, domestic arbitration awards can be reconsidered based on newly discovered evidence (article 51 of the Arbitration Law). The grounds for such reconsideration are:

a) A court decision based on evidence drawn from deliberately false witness statements or expert conclusions, deliberately incorrect translation, falsification of documents or other evidence that led to the issuance of an illegal or groundless arbitration award.

b) A court decision based on criminal actions of the parties to the dispute, third parties, their representatives or the arbiter which were committed in the course of the consideration of the case.

c) A decision by the Constitutional Council of the Republic of Kazakhstan on non-compliance with the Constitution or other normative legal act that serves as a basis for an arbitration award (article 51.1 of the Arbitration Law).

The application for reconsideration of an arbitration award based on newly discovered evidence shall be filed and considered by the arbitration court that issued the initial arbitration award within three months from the moment of establishment of the circumstances that are the grounds for reconsideration, unless a different term is established by the arbitration rules or by agreement between the parties. The case on reconsideration of the arbitration award based on newly discovered evidence shall be considered and resolved by arbitration court within one month (article 51.2 of the Arbitration Law).

4 Commercial and Regulatory

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

There is no industry-specific regulation which is applicable to joint ventures between airline competitors. Thus, general competition rules will apply to such joint ventures.

Under Kazakh law, competition is regulated by the Commercial Code and legal acts issued by the antitrust authority – the Committee for Regulation of Natural Monopolies and Protection of Competition of the Ministry of National Economy of the Republic of Kazakhstan (the "**CREMZK**").

In the sphere of joint ventures, the CREMZK regulates so-called "economic concentration", as discussed in question 4.4 below.

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

There is no specific definition of "relevant market" for the purposes of mergers and acquisitions. The general definition of a "goods market" is "the sphere of circulation of goods or interchangeable goods determined based on economical, territorial and technological possibility of a consumer to purchase the goods" (article 175.2 of the Commercial Code).

It is worth mentioning that the antitrust provisions of the Commercial Code have extraterritorial effect; namely, they can apply to actions made outside Kazakhstan if, as a result of such actions, one of the following conditions is met:

(1) The actions directly or indirectly concern fixed or intangible assets located in Kazakhstan, shares (participatory interests) in Market Participants, or proprietary and non-proprietary rights in relation to the legal entities of Kazakhstan.

(2) Competition in Kazakhstan is limited (article 161.2 of the Commercial Code).

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

Yes. The subjects of the market which intend to conclude an agreement and would like to make sure that such agreement would comply with antitrust provisions of Kazakh law can apply to the CREMZK with a request to consider the draft of such agreement and confirm that it is fine from antitrust law perspective. The CREMZK issues the decision as to whether the draft agreement complies with Kazakh antitrust law within 30 calendar days from the date of relevant application by the Market Participant (article 171 of the Commercial Code).

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

In the sphere of mergers, acquisitions and joint ventures, the CREMZK regulates so-called "economic concentration".

Economic concentration requires prior approval or a *post factum* notification (depending on the type of the transaction) from the CREMZK.

The following events are considered as "economic concentration" and are subject to regulation by the CREMZK:

(1) reorganisation of a market participant (the "**Market Participant**") via merger and acquisition transactions. The Market Participant is a legal entity incorporated under Kazakh law, as well as a foreign legal entity (its branch or representative office), performing entrepreneurial activity;

(2) acquisition by a person (or group of persons) of voting shares (participating interests) in the charter capital of a Market Participant when such person (or group of persons) obtains a right to dispose of more than 50% of the said shares (participating interests) if, prior to the acquisition, such person (or group of persons) has not disposed of shares (participating interests) of the given Market Participant or disposed of 50% or less of the voting shares (participating interests) in the share capital of the given Market Participant (except for acquisition at the stage of incorporation of a legal entity);

(3) acquisition by a Market Participant (group of persons) of the fixed production assets and/or intangible assets of another Market Participant into ownership, possession or use, if the book value of the assets constituting a subject of the transaction (or interrelated transactions) exceeds 10% of the balance value of the fixed production assets and intangible assets of the Market Participant disposing of or transferring its assets;

(4) acquisition by a Market Participant of rights (including on the basis of a trust management agreement, joint venture agreement or agency agreement) which allows it to give mandatory instructions to another Market Participant when carrying on business activity, or to perform functions of its executive authority; and

(5) participation of the same individuals in executive authorities, boards of directors, supervisory boards and other management authorities of two or more market entities, provided that these individuals direct the business of the said market entities (article 201 of the Commercial Code).

Certain transactions, including, *inter alia*, intra-group transactions in the same group of persons, do not constitute economic concentration and, therefore, are exempt from the requirement to obtain prior approval or a *post factum* notification from the CREMZK.

Prior approval of the CREMZK is required in cases (1), (2) and (3) above; notification is required in cases (4) and (5) above provided that the total book value of the assets *or* the total goods turnover (sales) of a target company *and* an acquirer (its group of persons) for the last financial year exceeds 10,000,000 times the monthly calculation index, which is equal to approximately 70,000,000 USD (article 201.3 of the Commercial Code).

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

In order to obtain the prior approval of the CREMZK for the transactions indicated in (1), (2) and (3) above, the person who made the relevant decision or the founders (participants) of the Market Participant (in the case of (1)) or the acquirer (in case of (2) and (3)) shall submit the application together with the documents and information, the list of which is established by the Commercial Code (articles 202 and 203 of the Commercial Code). Such documents and information are quite detailed and, in practice, it takes a while to prepare all the documents for the filing.

The CREMZK shall check the submitted filing documents and information on their completeness and either accept the filing for consideration or return the filing to the applicant if the filing provided is not complete.

The application must be reviewed by the CREMZK no later than 30 days after acceptance of the filing for consideration by the CREMZK, subject to suspension if the CREMZK requests additional documents or information from the applicant (article 205 of the Commercial Code).

The transactions indicated in (1), (2) and (3) above shall be concluded within one year from the moment of CREMZK approval, otherwise new CREMZK approval must be obtained (article 208.4 of the Commercial Code).

The notification of the CREMZK on the transactions indicated in (4) and (5) above shall be done no later than 45 days after execution of the transaction (article 201.8 of the Commercial Code).

Obtainment of the prior approval/*post factum* notification of the CREMZK is free of charge.

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

There are no sector-specific rules which govern the aviation sector in relation to financial support for air operators and airports, including state aid, other than those described below.

Local air companies can receive state subsidies in respect of particular routes as described in question 4.7.

The provision of such subsidies is governed by the following legal acts:

- the Aviation Law;
- the Resolution of the Government of the Republic of Kazakhstan "On Approval of Rules for Subsidising of Air Routes" No 1511 dated 31 December 2010 (the "**Air Subsidy Rules**");
- the Resolution of the Government of the Republic of Kazakhstan "On Approval of Rules for Conducting of the Tender for Subsidised Air Routes and Issuance of the Certificates for the Subsidised Air Routes for Provision of Services for the Transportation of Passengers, Luggage and Postage" No 69 dated 31 January 2013 (the "**Air Subsidy Tender Rules**").

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

As mentioned in question 4.6 above, local air companies can obtain subsidies in respect of particular routes.

The regular routes in relation to which state subsidies can be provided, are determined based on the resolutions of the Government, the CAC and the local governments of Kazakhstan's regions as well as Almaty and Astana, if performance of air services on such routes does not provide the air companies with the level of income necessary for the effective functioning of the air route (article 2 of the Air Subsidy Rules). The subsidies are provided from the Republic's budget or the local budgets of Kazakhstan's regions, as well as Almaty and Astana, depending on the route (article 3 of the Air Subsidy Rules). The subsidies are provided for the difference between the income received by the air company from the transportation of passengers, cargo, postage, luggage and the amount of expenses incurred in relation to such air transportation, within the annual amount of budget subsidies per air route (article 2 of the Air Subsidy Rules).

In order to receive the subsidy, the air company shall win the tender for the right to carry out cargo flights, passenger carriage, carriage of baggage, freight and postage on the air routes under the state subsidy. This tender is organised and conducted by the CAC.

In order to participate in the tender, the air company must comply with the following criteria:

(1) it must be registered in Kazakhstan and have the Aircraft Operator Certificate;

(2) it must have permission to carry out regular internal commercial carriage;

(3) it must not have any tax debts; and

(4) it must have a permanent reserve of financial assets, which is required for carrying out regular air carriage (article 9 of the Air Subsidy Tender Rules).

The air company that complies with the above requirements and that has been determined as the winner by the special tender commission established by the CAC receives the certificate for the subsidised air route (article 43 of the Air Subsidy Tender Rules).

The winner of the tender and the administrator of the relevant budget programme enter into the subsidy agreement in the form established by the Air Subsidy Rules (article 9 of the Air Subsidy Rules).

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

There is no specific legal act that regulates the acquisition, retention and use of passenger data.

The Law of the Republic of Kazakhstan "On Personal Data and its Protection" No 94-V dated 21 May 2013 (the "**Personal Data Law**") is the legislative act which generally regulates the collection, processing and protection of personal data and its distribution.

Under article 1.2 of the Personal Data Law, personal data means information related to a *definite subject* or to a *subject definable on the basis of such information*, recorded on an electronic, paper and/

or other tangible form (article 1.2 of the Personal Data Law). Name, passport details and other personal information on the passenger collected by the airline shall be considered as personal data and protected by the Personal Data Law.

Airlines shall use personal data of the passengers only for the particular purpose indicated by the airline (presumably, only for the purpose of air transportation of the passengers and related purposes) (article 14 of the Personal Data Law).

The airlines shall ensure the confidentiality of personal data collected from the passengers through compliance with the requirement not to disclose personal data without the consent of the passenger or based on legal requirements (article 11 of the Personal Data Law). Airlines are also obliged to protect the personal data held by them by taking the protective measures contemplated by the Personal Data Law, including prevention of unauthorised access to the personal data (article 22 of the Personal Data Law).

Collection and processing of personal passenger information can be done only with the consent of the passenger, subject to certain exceptions (e.g. if such collection and processing is required by state bodies of Kazakhstan) (article 7 of the Personal Data Law). Consent can be given or withdrawn in written or electronic form. Cross-border transfer of personal data is permitted only to the territory of a country that protects personal data, upon the consent of the passenger and if such transfer is performed under international treaties with Kazakhstan (article 16 of the Personal Data Law).

The main rights of subjects of personal data (including passengers) in relation to their personal data are (article 24 of the Personal Data Law):

(1) To be aware of the holding of his/her personal data by the airline, and to receive information confirming the fact, purposes, sources, ways of collection and processing of his/her personal data, as well as a list of the personal data held by the airline and the period during which the personal data is to be stored by the airline.

(2) To demand amendments to their personal data based on documents confirming such amendments.

(3) To demand that their personal data be blocked or deleted if its collection or processing was made in breach of the legislation on personal data.

(4) To withdraw his/her consent on the collection, processing or use of personal data.

(5) To give/withdraw his/her consent to distribute his/her personal data via public data sources.

(6) To protect his/her rights and interests, including compensation of damages including moral damages.

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

In the event of loss of personal data of passengers, the airlines may bear civil (be sued for damages including moral damages), administrative and criminal liability.

As mentioned above, the airlines shall protect the personal data held by them. Failure to comply with the obligation to protect personal data, if such failure led to the loss of personal data, may result in an administrative fine of up to 1,000 times the monthly calculation index (approximately 7,000 USD) (article 79.4 of the Code of the Republic of Kazakhstan "On Administrative Violations" No 235-V dated 5 July 2014) (the "**Administrative Code**").

If a loss of personal data results in substantial damage to the rights and interests of a passenger, it may result in criminal liability, which could be either a fee of up to 3,000 times the monthly calculation index (approximately 21,000 USD) or correctional works for the same amount, limitation of freedom for up to two years, or imprisonment for up to two years with or without deprivation of rights to perform certain activities for up to three years (article 147.1 of the Criminal Code of the Republic of Kazakhstan No 226-V dated 3 July 2014).

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

Kazakhstan is a party to, and has ratified, the following major international treaties in the sphere of intellectual property protection: (i) the Paris Convention for Protection of Industrial Property dated 20 March 1883; (ii) the Madrid Agreement Concerning International Registration of Marks dated 14 April 1891 and the Protocol to it (the "**Madrid Convention**"); (iii) the Nice Agreement on International Classification of Goods and Services for Registration of Marks dated 15 June 1997; (iv) the Eurasian Patent Convention dated 9 September 1994; and (v) the Patent Cooperation Treaty dated 19 June 1970 (the "**PTC**").

The main legislative acts in the sphere of intellectual property protection are: (i) the Civil Code of the Republic of Kazakhstan (Special Part dated 1 July 1999) (the "**Civil Code**"); (ii) the Law of the Republic of Kazakhstan on Patents No 427-I dated 16 July 1999 (the "**Law on Patents**"); (iii) the Law of the Republic of Kazakhstan on Copyright and Related Rights No 6-I dated 10 June 1996 (the "**Copyright Law**"); and (iv) the Law of the Republic of Kazakhstan on Trademarks, Service Marks and Names of Places of Origin of Commodities No 456-I dated 26 July 1999 (the "**Trademark Law**").

The authorised body in the sphere of protection of intellectual property is the Ministry of Justice of the Republic of Kazakhstan (the "**Ministry of Justice**").

Article 970 of the Civil Code provides the following general remedies for protection of intellectual property in Kazakhstan:

(1) through the courts and arbitration;

(2) withdrawal of material objects which were used for acts that led to infringement of exclusive rights and material objects created as a result of infringement of exclusive rights;

(3) compulsory publication about infringement of exclusive rights, with the inclusion of information on the holder of exclusive rights; and

(4) other remedies and measures stipulated by the legislation.

Such other remedies and measures are described below.

Trademark protection

The legal protection of trademarks in the territory of Kazakhstan is secured upon their registration in the State Register of Trademarks kept by the National Institute of Intellectual Property, which reports to the Committee on the Intellectual Property Rights of the Ministry of Justice (the "**NIIP**"). Registration of the trademark is evidenced by extracts from the State Register of Trademarks. Trademarks without registration can also be protected if provided by the international treaties to which Kazakhstan is a party. The owner of a registered trademark has an exclusive right to use and dispose of the registered trademark in the territory of Kazakhstan, and no other person can use the registered trademark without the consent of its owner (article 4 of the Trademark Law).

To ensure protection of trademarks in the territory of countries which are parties to the Madrid Convention, the trademark shall be registered with the International Bureau of the World Intellectual Property Organisation (the "**WIPO**"). International registration of a trademark with the WIPO in Kazakhstan is made through the NIIP. The NIIP is authorised to accept international applications

prepared in accordance with the Madrid Convention and to send them to the WIPO (article 1 of the Madrid Convention, article 3-1 of the Trademark Law).

Copyright protection

Copyright extends to scientific, literary and artistic works which are the results of artistic activity irrespective of their aim, content and value, as well as the ways and forms of their expression. Protection of copyright is ensured by the laws of Kazakhstan; mainly the Copyright Law. Article 49.1 of the Copyright Law stipulates that the protection of copyright and related rights is performed by the courts through:

(1) recognition of the rights;

(2) restoration of the situation that existed before the violation of rights;

(3) suppression of actions that lead to infringement of rights or pose a threat of infringement of rights;

(4) compensation of damages, including the loss of profits;

(5) recovery of income, received as a result of infringement of copyright and/or related rights;

(6) payment of compensation in the amount of between 100 and 15,000 times the monthly calculated index, as determined by the courts, or double the size of the cost of the right to the use of a work (creation), which is determined on the basis of costs normally applied to the legal use of a work (creation). The amount of compensation is determined by the court instead of recovery of losses or recovery of income; and

(7) other measures provided by the legislation.

The copyright to scientific, literary and artistic works is created due to the creation of the scientific, literary and artistic works and does not require their registration or any other formal steps (see article 9 of the Copyright Law). The copyright holder can register its rights to the scientific, literary and artistic works in the State Register of Copyrights at any time by evidencing such rights; the Register is kept by the Ministry of Justice (see article 9-1 of the Copyright Law).

Patent protection

In order to protect the rights of the author of an item of industrial property (invention, utility model or industrial prototype), the author can register the patent for such objects in the State Register of Inventions, the Register of Utility Models and the Register of Industrial Prototypes kept by the NIIP (see articles 16–26 of the Patent Law).

Kazakhstan is a party to the PTC, which ensures the protection of patent rights in the territory of countries which are parties to the PTC. In order to ensure such protection, one may register the patent with the WIPO through the NIIP by filing an international application in accordance with the PTC. The NIIP is authorised to send the international application to the WIPO (see article 3 of the PTC and article 4-1 of the Patent Law).

General protection

The customs authorities keep a special register of intellectual property rights. Owners of intellectual property objects (e.g. trademarks) can request that the customs authorities include such objects in this register. The customs authorities will be able to delay the import of any goods bearing such registered intellectual property objects for 10 business days. The customs authorities then notify the legal holder of the rights to intellectual property objects on the proposed import, to give it a chance to challenge it or request interim relief. If the holder of the rights does not take any actions within this 10-business-day period, the customs authorities no longer suspend the import (section 53 of the Code of the Republic of Kazakhstan "On Customs Activity in the Republic of Kazakhstan" No 296-IV dated 30 June 2010).

Disputes in the sphere of intellectual property protection are resolved at the civil courts of Kazakhstan. However, in certain cases provided by the Law on Trademarks, the Law on Patents and the Law on Selective Breeding Results, there is special pre-trial dispute resolution organised by the Appeal Counsel of the Ministry of Justice (see article 41 of the Trademark Law).

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

The Aviation Law and the Order of the Minister for Investment and Development of the Republic of Kazakhstan "On Approval of the Rules of Transportation of Passengers, Luggage and Cargo by Air Transport" No 540 dated 30 April 2015 (the "**Passenger Transportation Rules**") is the main legislative act that regulates the denial of boarding rights.

The airline is entitled to deny boarding of a passenger in the following circumstances:

(i) refusal of the passenger to undergo inspection prior to the flight;

(ii) breach by the passenger of the Passenger Transportation Rules and/or actions of the passenger that may influence the safety of the flight;

(iii) alcohol, narcotic or inhalant intoxication of the passenger, which creates a threat to the health of the passenger himself/herself, the safety of other passengers/property and which causes inconvenience to other passengers;

(iv) non-performance by the passenger of his/her on-board obligations established by the Aviation Law (e.g. to fasten the safety belt, to follow on-board procedure, etc.) (article 78.2 of the Aviation Law and article 22 of the Passenger Transportation Rules);

(v) if the transportation is technically impossible in the following cases (that shall be notified by the passenger to airline five calendar days prior to the flight): (a) limited excursion of the passenger; (b) accompaniment of a guide dog; (c) infectious disease; (d) transportation of animals/birds; (e) luggage with a weight above the established standard or oversized luggage; (f) luggage that may be transported only in the salon of aircraft; and (g) transportation of weapons and ammunition (article 15 of the Passenger Transportation Rules); or

(vi) the passenger is a pregnant woman and the birth is expected within seven calendar days (based on a medical certificate) (article 34 of the Passenger Transportation Rules).

In case of denial of boarding right by the airline, the cost of the ticket is returned to the passenger in accordance with the air transportation agreement concluded between the passenger and the airline (article 78.3 of the Aviation Law).

If passengers are denied boarding due to late arrival and departure of a flight, cancellation of a flight or a change to the airline, the airline should (depending on the length of the period for which the passengers are denied boarding) provide passengers with food, drinks, phone calls, accommodation, compensation, transportation by the next flight to the place of destination, etc. (article 86 of the Aviation Law).

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

The CAC is entitled to consider administrative cases against the airline for undue performance or non-performance of their obligations indicated in question 4.11 above in case of late arrival and departure of flights. Undue performance or non-performance of such obligations is subject to a fine of up to 1,000 times the monthly calculation index (approximately 7,000 USD) (articles 567 and 691.3 of the Administrative Code).

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

Under Kazakh law, airports are managed by so-called "airport operators" (*ekspluatant aeroporta*) that use airports based on an ownership right or other legal grounds. The following persons can act as airport operators: (i) legal entities of the Republic of Kazakhstan; and (ii) foreign legal entities based on an international treaty ratified by Kazakhstan (article 64.1 of the Aviation Law).

The airport operator shall:

(1) ensure and control the safety performance of flights and aviation security in the territory of the airport, including by individuals and legal entities carrying out activities in the territory of the airport;

(2) establish a committee on control of activities that may constitute a threat to flight operating safety in the vicinity of the aerodrome;

(3) keep a daily plan on the arrival and departure of aircraft, ensure their performance, keep records and analysis on the regularity of departures, take-offs and landings of aircraft;

(4) present reports on the safety performance of flights, aviation security, audits and accounting reports at the request of the CAC;

(5) have the right to close the airport for receipt and departure of civil aircraft due to technical and meteorological conditions which threaten the flight operating safety of aircraft; and

(6) have the right to carry out navigational activity; by this the expenses for carrying out such activity shall not have an impact directly or indirectly on tariffs on the regulated services (article 64.1 of the Aviation Law).

Any candidate for the position of chief executive officer of the airport operator shall conform to qualification requirements established by the CAC (article 64.2 of the Aviation Law).

The airport operator shall be obliged to implement the safety management system of flights, depending on the volume and difficulty of the flights performed (article 64.3 of the Aviation Law).

It is worth mentioning that under Kazakh law, certain services provided by airports (except services in the sphere of air transportation for transit through the territory of Kazakhstan with technical put-downs in Kazakh airports for non-commercial purposes) are regulated as services provided in the sphere of natural monopolies (article 4.1.9 of the Law of the Republic of Kazakhstan "On Natural Monopolies" No 272-I dated 9 July 1998).

The exhaustive list of particular services which are regulated is established by the Joint Order of the Minister of Transportation and Communication of the Republic of Kazakhstan No 119 dated 5 March 2011 and the Order of the Chairman of the Agency of the Republic of Kazakhstan on Regulation of Natural Monopolies No 81-ОД dated 3 March 2011 (the "**List of Regulated Airport Services**"). Such list includes services for take-off and put-down of aircraft, procurement of aviation safety and provision of parking places for aircraft in certain circumstances (article 11 of the List of Regulated Airport Services).

The services included the List of Regulated Airport Services are regulated by the state authority in the sphere of natural monopolies – the CREMZK. In particular, the CREMZK establishes tariffs for regulated airport services and prescribes the methodology as to the calculation of such tariffs, issues approvals in relation to certain transactions by airports or involving airports, receives various reports from the airports on their regulated activity, etc.

Services not included in the List of Regulated Airport Services are carried out on a competitive basis and are regulated by general civil law provisions.

In addition, certain services in relation to internal flights are referred by Kazakh law to the so-called "socially important market". Prices for such services are regulated by the CREMZK and the airports providing such services are subject to additional regulation by the CREMZK (article 124-5.1.4 of the Commercial Code). Such services include boarding/deplaning of passengers by telescopic passageway, lease of airport facilities used for the transportation process, processing of cargo, provision of the area for passenger check-in, and provision of aircraft with aviation fuel and lubricants.

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

Under Kazakh law, the following main legal acts regulate general consumer protection: the Civil Code; and the Law of the Republic of Kazakhstan "On Protection of Consumers' Rights" No 274-IV dated 4 May 2010. Both legal acts generally apply to the relationship between the airport operator and the passenger unless their provisions contradict specific legal acts in the aviation sphere.

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

Airlines and travel agents mainly use the following GDSs in Kazakhstan: Amadeus and Galileo.

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

There are no ownership requirements pertaining to GDSs in Kazakhstan.

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

There are no restrictions on vertical integration between airport operators and air operators, provided it does not violate antimonopoly legislation.

5 In Future

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

It seems that 2017 will be the year of development of the Kazakh aviation industry, and a few important trends have recently been observed.

Introduction of IOSA

As of 1 January 2016, all airlines are subject to the International Air Transport Association ("**IATA**") Operational Safety Audit ("**IOSA**") programme, which is the internationally recognised and accepted evaluation system designed to assess the operational management and control systems of an airline. Before 1 January 2016, IOSA audit was voluntary; now it is a mandatory requirement for all airlines. The introduction of the IOSA programme is supposed to induce the airlines to comply with the international standards of air safety.* Apart from the improvement of safety indicators, successful IOSA certification will allow airlines to conclude interline agreements

with other airlines, which will enable further development of the aviation industry in Kazakhstan. The introduction of the IOSA audit requirement has already assisted in removing Kazakh airlines from the EU blacklist (please see below).

Removal of Kazakh airlines from the EU blacklist

On 23 November 2016, the EU Committee on Air Safety made the decision to remove all Kazakh airlines from its so-called "EU blacklist". From 19 to 23 September 2016, the European Commission carried out a technical evaluation of the air safety of flights in Kazakhstan, the results of which showed that Kazakhstan is successfully implementing ICAO's standards. This happened as a result of work carried out since 2009 by the Kazakh Government, together with ICAO specialists, towards making Kazakhstan compliant with international aviation standards. The level of compliance with the standards of International Civil Aviation Organization has increased from 65 to 74%, the average European rate being 76%.* From now on, any Kazakh airline company will be able to fly to European countries, subject to certain requirements established by the European Commission. For instance, SCAT Airlines have already announced their plans to fly to Greece, Italy, Israel, the Czech Republic and Germany.*

Plans by the national carrier to extend its air fleet

Air Astana – the main Market Participant of the Kazakh airline industry – continues its growth and is planning to expand its aircraft fleet with 60 new aircraft by 2026. The main focus of Air Astana is to purchase cost-effective aircraft with fuel-efficient engines.* In 2015, Air Astana purchased seven new AirBus jets through operational leasing.*

Introduction of "open skies"

The Ministry of Investments and Development of the Republic of Kazakhstan stated that it intends to implement an "open skies" system in 2017, at least for the period of EXPO 2017, which should lead to more foreign airline companies gaining entry into the Kazakh market. It is already expected that at least five new airline companies will enter Kazakhstan's aviation market: Austrian Airlines; Czech Airlines; FinAir; as well as airlines from Poland and Hungary.*

**See public sources.*

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GRATA INTERNATIONAL

GRATA International ("GRATA") was founded on 22 April 1992. It is one of the leading Eurasian law firms, with more than 100 lawyers and a network of offices in Kazakhstan, Russia, Azerbaijan, Kyrgyzstan, Tajikistan, Uzbekistan, as well as representatives in China, the United Kingdom and the USA. GRATA also has associated offices in Belarus, the Czech Republic, Georgia, Switzerland and Turkey.

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GRATA's Banking & Finance Group is a leading legal counsel in the area of capital markets, project finance and infrastructure project development and financial transactions in Central Asia, and in Kazakhstan in particular.

Lithuania

PRIMUS attorneys at law

Paulius Docka

1 General

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

The main bodies regulating aviation matters in Lithuania are the Ministry of Transport and Communications of the Republic of Lithuania (hereinafter – Ministry of Transport) and the Civil Aviation Administration (hereinafter – CAA).

Specific regulatory functions are vested in other regulatory bodies, e.g. the state enterprise "Air Navigation" or the Ministry of Environment of the Republic of Lithuania.

The Law on Aviation of the Republic of Lithuania is the principal national legislation governing aviation matters. The said law sets the regulatory framework and the secondary legislation such as relevant decrees of the Government, Orders of the Minister of Transport and Orders of the Director of the CAA, while the Instructions of the Director General of the state enterprise "Air Navigation" set the whole regulatory environment.

European Union (EU) legal acts and international treaties also constitute an integral part of Lithuanian legal system.

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

Air carriers intending to obtain an operating licence have to ensure compliance with requirements stipulated under the EU Regulation No. 1008/2008 on common rules for the operation of air services in the EU. The aforementioned licence is issued by the CAA based on the air carrier's application accompanied by relevant documentation, including a three-year business plan.

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

Lithuania is a signatory to the Chicago Convention and must therefore ensure that air navigation equipment and operations comply with International Civil Aviation Organisation (ICAO) standards.

Lithuania implements regulations issued by the European Aviation Safety Agency (EASA), whose role has been substantially increased by Regulation No. 216/2008 dated 20 February 2008, as amended by Regulation No. 690/2009 and Regulation No. 1108/2009. Regulation No. 1315/2007, establishing the safety oversight function concerning air navigation services, air traffic flow management and air space management, is also applicable in Lithuania. The Aviation Security Division within the CAA is the main body administering air safety.

Resolution No. 1613-7 of 10 November 2010 of the Government of the Republic of Lithuania on verification of the national civil aviation security programmes and Order No. 4R-179 of 31 December 2014 of the Director of the CAA on establishment of the material aviation security quality programme, are the main national legal acts establishing requirements ensuring the quality of aviation security.

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

There are no separate regulations in force in Lithuania in respect of air safety matters concerning commercial, cargo and private air carriers. However, pursuant to the relevant EASA instructions, commercial air carriers shall also comply with and operate in accordance with Air Operations Regulation (EU) No. 965/2012 and requirements specified therein.

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

There are no separate regulations under the legislation in force. Commercial and cargo carriers must have a valid air operator's certificate and an operating licence in order to be eligible to conduct air charters.

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

There are no significant distinctions between operations of domestic and international carriers. The major difference is that the domestic carriers are supervised and controlled by the CAA.

1.7 Are airports state or privately owned?

Airports of Vilnius (VNO), Kaunas (KUN) and Palanga (PLQ) are operated by the state enterprise "Lithuanian Airports". Siauliai airport is operated by the municipal company "*Siauliu Oro Uostas*".

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

Airport authorities deal with carriers on a contractual basis and impose contractual service rates for the use of the airport infrastructure which must be equal and non-discriminatory to all carriers, regardless of whether they are local or international. In accordance with Order No. 3-96/D1-171 of 23 March 2007 of the Minister of Transport and the Minister of Environment, aircraft may arrive or leave the airports of the Republic of Lithuania provided that they conform with the environmental requirements and standards established in the Convention on International Civil Aviation.

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

The principal rules and procedures are established under Order No. 3-25 of 15 January 2002 of the Minister of Transport on establishment of the regulation concerning the classification, investigation and notification of accidents and incidents involving aircraft.

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

One more step was made towards entrusting the management of Lithuania's international airports to a private company. On 2 June 2016 the Parliament of Republic of Lithuania adopted the Law on the concession of the three international airports (Vilnius, Kaunas and Palanga). Currently, further concession consultations and documentation preparation are underway.

2 Aircraft Trading, Finance and Leasing

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

The registration of ownership of an aircraft does not constitute proof of ownership. The role of the public register is to disclose already existing rights. The rights are created by civil agreements and other legal grounds established under the law. A bill of sale is considered proof of ownership.

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

Any mortgages on the aircraft shall be registered under the Civil Aircraft Register of the Republic of Lithuania, administered by the CAA. Deeds and actions pertaining to any imposed restraints/encumbrances on the ownership title of the aircraft shall be reported to the CAA by the Central Mortgage Office of Lithuania. The register is open to the public and information on restraints/encumbrances shall be provided to any interested person upon request.

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

Lithuanian law does not provide for any specific requirements for operation of leased aircraft and the general aircraft operation rules shall apply. The lessor should be aware that, according to Lithuanian law, an aircraft is treated as real estate. Therefore, all transactions concerning the transfer of ownership and/or possession rights shall be endorsed by the notary public.

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

The Montreal Convention was ratified by Lithuania on 19 October 2004.

The Cape Town Convention on International Interests in Mobile Equipment was ratified by the EU on 28 April 2009 and is binding on the EU in its respective fields of exclusive competence. Considering that the said convention's subject matter falls almost entirely under the exclusive competence of the EU, Lithuania has not ratified this convention.

The Geneva Convention on the International Recognition of Rights in Aircraft is not ratified by Lithuania.

2.5 How are the Conventions applied in your jurisdiction?

Under Article 138 of the Constitution of the Republic of Lithuania, international treaties ratified by Parliament are a constituent part of the legal system of the Republic of Lithuania.

Under Article 11 of the Law on International Treaties, if a ratified treaty establishes regulations other than those established by the laws, the provisions of the treaty of the Republic of Lithuania shall prevail.

3 Litigation and Dispute Resolution

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

Article 4.229 of the Civil Code establishes general grounds for the detention of objects on the grounds of unpaid debts. It is stipulated that a lawful possessor, who has the right of claim in respect of the owner of an object belonging to the debtor, is entitled to detain the object until his claim is satisfied. In accordance with Order No. 4R-190 of 10 September 2010 of the Director of the CAA on the establishment of the rules on prohibition to leave and detention of aircraft, an aircraft may be subject to temporary detention if the charges stipulated by Article 72 of the Law on Aviation of the Republic of Lithuania, e.g. air navigation, airport charges, etc., are not paid.

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

Self-help instruments are not highly developed in Lithuania. Besides the detention right, according to Article 4.229 of the Civil

Code, the lessor might enjoy specific rights, if they are prescribed by the agreement with the defaulting party. If the agreement established lessor's rights on repossession of the aircraft without court interference, the lessor may rely on these rights. Therefore, it is highly recommended to discuss remedies within a lease contract as much as possible.

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

With the exception of administrative disputes with state authorities, including the CAA, all disputes fall under the competence of the general courts. If the value of the dispute exceeds €43,500 the respective county court shall have jurisdiction over the case, otherwise the district court shall be in charge of the case.

In the event that the parties have agreed to settle their disputes in arbitration, the respective arbitration shall be entitled to examine the case.

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

Articles 117, 118, 119 and 120 of the Code of Civil Procedure provide a significant variety of service methods, e.g. personal summons via registered mail or courier, service to the representative, exchange of documents between lawyers, and public announcement. The court, *ex officio* or upon the request of the party, chooses the most effective service method. It should be noted that public announcement, as a service method, is not applicable to foreign entities. Parties which are EU residents shall be served according to the rules prescribed by Regulation No. 1393/2007. Lithuania is also a party to a number of international instruments, e.g. the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, and a number of bilateral agreements with non-EU countries (Russian Federation, Republic of Kazakhstan, etc.). This enables Lithuanian courts to communicate effectively with foreign authorities and serve judicial documents for foreign-based airlines/parties.

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

Article 145 of the Code of Civil Procedure establishes the following principal interim measures: temporary seizure of the real property of the debtor; temporary seizure of the debtor's movable property, monetary funds and property rights; detention of the object owned by the debtor; and the creation of a record in the public register prohibiting transactions of property rights of the debtor's property, etc.

In accordance with Article 1.138 of the Civil Code of the Republic of Lithuania, the following final remedies could be applied in different cases: acknowledgment of rights; restoration of the situation that existed before the right was violated; prevention of unlawful actions; or prohibition from performing actions that pose a reasonable threat of the occurrence of damage (preventive action), etc.

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

If the parties opt for arbitration, there shall be no appeal procedure in relation to an award. However, in accordance with the exceptional and limited grounds established in Article 50 of the Law on Arbitration (i.e. infringement of public order, etc.) the Court of Appeal of Lithuania may set aside the arbitration award.

If the case is examined by the state court, each party has the right to appeal. If any party submits an appeal to the higher court, the decision does not come into force. Only once the ruling of the appeal court is adopted does the decision come into force.

The second appeal (cassation) to the Supreme Court is only possible in exceptional cases, e.g. serious breach of material or procedural rules, or deviation from case law of the Supreme Court. The submission of the cassation does not suspend the entry into force of the judgment, unless the Supreme Court rules otherwise.

4 Commercial and Regulatory

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

In each case, decisions shall be taken in accordance with the general competition rules and an individual decision shall be made. Depending on the market share and the turnover of the undertakings, competition-related issues are regulated by the Competition Council of the Republic of Lithuania and the European Commission.

All joint ventures meeting the turnover thresholds are subject to mandatory notification to the Competition Council. In all cases, the undertakings establishing the joint venture must provide the Competition Council with convincing evidence that the creation of the joint venture will not result in coordination of behaviour in relevant horizontally or vertically related markets.

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

The definition of the relevant market is established by the Law on Competition of the Republic of Lithuania and the relevant EU legislation (Regulation No. 1/2003 and Regulation No. 139/2004).

The criteria for defining the relevant market are reiterated in the Guidelines on Relevant Market of the Competition Council, which, to a large extent, corresponds to the Commission Notice on the Definition of the Relevant Market.

In general, the relevant market is defined in several steps. The first step is to define the relevant product by determining products that may be substituted in terms of their quality, price and use. The second step is to define the relevant geographical market, which is defined by determining the territory in which substitutability can take place. When defining the relevant product and geographical market, demand-side and supply-side substitutability are assessed.

In cases of mergers and acquisitions of air carriers, the relevant market shall mean a commercial flight from one specific departure place to a particular arrival place, i.e. a flight from one airport to another.

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

A notification concerning concentration shall be submitted to the Competition Council of the Republic of Lithuania or the European Commission, depending on the thresholds of turnover. Provided that the undertakings comply with the commitments raised by the Competition Council or European Commission, a concentration may be authorised.

Under Article 6 Clause 1 of the Law on Competition, an anti-competitive agreement may obtain regulatory clearance, provided that it contributes to improving the production or distribution of goods or improving technical or economic progress while allowing consumers a fair share of the resulting benefit. The list of agreements that can acquire clearance was established by the Resolution of the Competition Council of the Republic of Lithuania of 15 July 2010 No. 1S-140, regarding agreements fulfilling the conditions of Article 6 Clause 1 of the Law on Competition of the Republic of Lithuania.

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

Mergers, acquisition mergers and full function joint ventures shall be treated as a concentration. If turnover thresholds are met, the concentration is subject to mandatory notification to the Competition Council. Regulation No. 139/2004 also applies. Therefore, if the turnover thresholds listed in this Regulation are met, notification must be made to the European Commission.

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

Under Article 11 of the Law on Competition, the Competition Council shall examine the notifications of concentration submitted in accordance with the established requirements and adopt the resolutions no later than within a term of four months. The Competition Council shall, within one month from receipt of a notification of concentration meeting the established requirements, adopt a resolution to permit the implementation of concentration in accordance with the submitted notification or to permit the implementation of concentration in accordance with the conditions and obligations established by the Competition Council, or a resolution to proceed with further examination of the notification of concentration.

The entities who have submitted notifications of concentration shall be informed of the resolutions adopted by the Competition Council in writing. If the Competition Council does not adopt the resolutions within the four-month term, entities or controlling persons shall have the right to implement concentration in accordance with the conditions formulated in the notification of concentration.

Fees payable for the examination of the notifications of concentration start at €1,621 and may reach €3,243, depending on the turnover of the undertakings, legal fees excluded.

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

Under Articles 107 to 109 of the Treaty on the Functioning of the European Union, state aid that distorts or could distort competition is basically incompatible with the common market.

The rules of application of Articles 107 and 108 of the Treaty on the Functioning of the European Union with regard to the provision of *de minimis* aid are established by Regulation No. 1407/2013.

The conditions of the provision of financial support and state aid to airports and airlines are described in detail and regulated by the Commission Guidelines on state aid to airports and airlines (Communication from the Commission 2014/C 99/03).

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

On 1 June 2015, the Minister of Transport approved the rules on insignificant (*de minimis*) aid for air carriers seeking to start a new route (Order No. 3-227(1.5E)). The aid shall be granted to applicants who start a new regular route from/to Lithuanian airports or increase frequencies of existing routes from/to Lithuanian airports. The maximum aid amount shall be €200,000 in three years. The criteria for *de minimis* aid are further specified in the invitation to apply for *de minimis* aid for new routes from Lithuanian airports, approved by the state enterprise "Lithuanian Airports".

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

The Passenger Name Record (PNR) system is in the development stage at the moment. Lithuania is making preparations and all necessary amendments on a legal basis for the implementation of the Directive of the European Parliament and of the Council on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, which is intended to be adopted soon.

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

Under Article 30 of Law on Legal Protection of Personal Data of the Republic of Lithuania, the relevant data controller and the data processor must implement appropriate organisational and technical measures intended for the protection of personal data against accidental or unlawful destruction, alteration and disclosure, as well as against any other unlawful processing.

Passengers have the right to get acquainted with the information concerning them, request that their data is corrected and demand damages in case their personal data was used in an illegal way that caused harm to a passenger.

Notably, in cases where data is lost, an airline may be subject to a fine in accordance with Article 214, section 14 of the Code on Administrative Offences.

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

At the national level, national patents, trademarks and designs can be registered under the Law on Patents of the Republic of Lithuania, the Law on Trade Marks of the Republic of Lithuania and the

Law on Designs of the Republic of Lithuania. European patents can be registered under The European Patent Convention (1973). International patents can be registered under Patent Cooperation Treaty (1970). EU trademarks can be registered under Council Regulation No. 207/2009. International trademarks can be registered under the Madrid system for the international registration of marks. EU designs can be registered under Council Regulation No. 6/2002. International designs can be registered under the Geneva Act (1999) of the Hague Agreement Concerning the International Registration of Industrial Designs.

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

This matter is regulated under Regulation No. 261/2004 as of 11 February 2004, establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay to flights, and repealing Regulation (EEC) No. 295/91 are directly applicable in Lithuania and the local legal acts make direct reference to the said EU regulation.

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

Liability for cancellation and/or late arrival/departure of flights may be imposed on the air carriers pursuant to Regulation No. 261/2004 of 11 February 2004, establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay to flights.

The CAA is the designated authority to carry out and supervise the enforcement of the abovementioned Regulation and is authorised to review passengers' complaints and impose relevant penalties on the air carrier if it fails to respect the requirements imposed by the Regulation.

In the event that the entity disagrees with the decision adopted by the CAA and/or the imposed penalty amount, such air carrier is entitled to challenge the legitimacy thereof at the competent court pursuant to regular civil procedure.

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

The Law on Aviation of the Republic of Lithuania is the basic legal act governing airport authorities in Lithuania. Airport authorities shall comply with the requirements established by Order No. 4R-193 of Director of the CAA of 26 October 2004.

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

Provisions of general national legislation under the Law on Consumer Protection of the Republic of Lithuania regarding consumer protection are applicable to the full extent. Consumers are entitled to: the right to freely purchase and use goods and services; the right to purchase goods and services that meet recognised quality and safety standards; and the right to request relief for the infringement of consumer rights, including compensation for losses, etc.

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

The key global distribution suppliers (GDSs) in Lithuania are Amadeus and Galileo. Moreover, there are certain GDS suppliers attributed mainly to CIS countries and local air carriers/air operators operating in Lithuania, e.g. Sirena Travel.

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

Pursuant to Regulation No. 80/2009 of 14 January 2009 on a Code of Conduct for computerised reservation systems, any such existing ties (both, direct and indirect) between the GDS system vendors and air carrier/aircraft operators must be reported to the concerned authorities and/or otherwise disclosed. The said Regulation is directly applicable in Lithuania.

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

In accordance with the Law on Aviation and Order No. 4R-193 of the Director of the CAA of 26 October 2004 regarding requirements applicable to airports, an airport must and is entitled to perform a limited list of functions. Air operators' activities do not fall within the functions allowed to be performed by airports in Lithuania.

However, there are no other explicitly prescribed prohibitions for potential vertical integration, if this integration meets fair competition criteria.

5 In Future

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

No major changes are expected in the coming years. Lithuanian legal acts are generally in line with EU legislation, therefore any major changes might be stipulated only by changes to EU legislation.

However, in 2016, the CAA adopted an amended version of the unmanned aerial vehicle (UAV) regulation. Under the amended regulation, new limitations on the operation of UAVs were introduced (for example, above military zones and urbanised territories). All UAVs with a mass above 25 kilos should be licensed and registered, as should the pilots of such UAVs.

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Malaysia

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1 General

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

The principal legislation regulating civil aviation in Malaysia is as follows:

Acts

1. Civil Aviation Act 1969 ("CAA 1969");
2. Civil Aviation (Amendment) Act 2015;
3. Civil Aviation Offences Act 1984;
4. Carriage by Air Act 1974 ("CBAA 1974");
5. International Interests in Mobile Equipment (Aircraft) Act 2006;
6. Airport And Aviation Services (Operating Company) Act 1991;
7. Malaysian Aviation Commission Act 2015 ("MAVCOM Act 2015"); and
8. Malaysian Aviation Consumer Protection Code 2016.

Regulations

1. Civil Aviation Regulations 2016;
2. Civil Aviation (Amendment) Regulations 2016;
3. Civil Aviation (Aerodome Operations) Regulations 2016;
4. Civil Aviation (Fees And Charges) Regulations 2016;
5. Malaysian Aviation Commission (Aviation Service Charges) Regulations 2016; and
6. Minister of Transport Directives 2016.

The regulatory bodies which regulate civil aviation in Malaysia are as follows:

1. **Ministry of Transport**

   This is the principal policymaker for the aviation industry in Malaysia.

2. **Department of Civil Aviation ("DCA")**

   This is the technical regulator, overseeing safety, maintenance and security.

3. **Malaysian Aviation Commission ("MAVCOM")**

   This is the economic regulator, overseeing commercial and economic matters as well as being an independent adviser to the Ministry of Transport on economic matters pertaining to civil aviation.

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

(a) Any person intending to undertake carriage by air or use any aircraft for the carriage of passengers, mail or cargo for hire or reward for any journey between two or more places, of which at least one place is in Malaysia, is required to apply for an operating licence from MAVCOM.

(b) For scheduled flights, i.e. journeys with a fixed schedule, an air carrier is required to apply for an Air Service Licence ("ASL"). During the application process, a Provisional ASL may be given to the applicant prior to issuance of an ASL.

(c) For unscheduled flights, i.e. unscheduled journeys, an air carrier is required to apply for an Air Service Permit ("ASP"). Similarly, a Provisional ASP may be given to an applicant prior to issuance of an ASP.

(d) Flights across Malaysia by other operators from contracting states which have a Transit Agreement with Malaysia are exempted from having an ASP or an ASL.

(e) An air carrier who wishes to apply for an ASL or ASP may make an application to MAVCOM using appropriate forms which are publicly available.

(f) MAVCOM will conduct an evaluation of the applicant and upon satisfactory conclusion, issue a Conditional Approval.

(g) The applicant is then required to apply for an Air Operator Certificate ("AOC") to the DCA, together with the Conditional Approval issued by MAVCOM. AOC certifies that the holder is competent to operate flights, and that the aircraft operated by him on such flight is operated safely.

(h) An ASL or ASP will then be issued to the applicant, subject to the applicant having a valid AOC issued by the DCA.

(i) Documents to be submitted to MAVCOM on application for an ASL or ASP include details of the company, shareholding structure, organisational structure, financial status and projections, details of applicant's aircraft, aircraft certificate(s) of airworthiness, and aircraft maintenance programme.

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

The principal legislation in Malaysia governing air safety is as follows:

1. **Civil Aviation Act 1969**

   This Act prescribes or supplements requirements relating to, among others, maintenance of aircraft and components,

certification or airworthiness of types of aircraft and components, training organisations, and licences for maintenance engineers.

2. **Civil Aviation Regulation 1996**

   This Regulation sets out general rules relating to matters such as airworthiness of aircraft, maintenance of aircraft, aircraft crew and licensing, operation of aircraft, conduct of operations, air traffic control and investigation of accidents.

3. **Aviation Offences Act 1984**

   - Certain international conventions relating to safety of passengers have also been given force of law via the Aviation Offences Act 1984.
   - Part IV of the Aviation Offences Act 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.

The regulatory body that governs air safety is the DCA.

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

Air safety is not regulated separately for commercial, cargo and private carriers.

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

Air charters are not regulated separately for commercial, cargo and private carriers.

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

Under the Civil Aviation Regulations 1996, an aircraft registered in a Contracting State other than Malaysia or in a foreign state shall not take on board or discharge any passengers or cargo in Malaysia for valuable consideration without an operating permit granted by the Minister of Transport to the operator or charterer of the aircraft or to the government of the state in which the aircraft is registered.

1.7 Are airports state or privately owned?

Airports in Malaysia may be state-owned or privately owned depending on the airport.

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

Airports in Malaysia impose a Passenger Service Charge ("PSC") (formerly known as "Airport Tax"), paid by departing passengers. PSC is collected by airlines upon purchase of tickets and is only paid to Malaysia Airlines Holdings Berhad upon completion of flight. Passengers who do not travel on the flight for which they have purchased the tickets are eligible for full refund of the PSC.

PSC rates are as follows:

Departing	To	PSC
Rural Airports	All Destinations	RM 0
Kuala Lumpur International Airport – Main Terminal Building & Regional Airports	All International Destinations	RM 65
Kuala Lumpur International Airport – Main Terminal Building & Other Airports	All Domestic Destinations	RM 9

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

The following are applicable to air accidents:

Regulations

1. Part XXVI Investigation of Accidents, Civil Aviation Regulations 2016.
2. International Civil Aviation Organisation ("ICAO") Annex 13 Aircraft Accident and Incident Investigation.

Procedures

(a) All accidents involving aircraft issued with Certificates of Airworthiness will be investigated by Inspectors of Air Accidents, who are appointed by the Ministry of Transport to carry out investigations into the circumstances and causes of air accidents.

(b) When an accident or serious incident occurs where the aircraft involved carry or are loaded with dangerous goods, for the safety of rescuers and investigators, it is the duty of the commander or the operator or its representative to inform the Chief Inspector of Air Accidents and Director General of Civil Aviation ("DGCA") as soon as practicable of the presence of the dangerous goods on the affected aircraft.

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

As part of the government's efforts to streamline and strengthen the national aviation industry after the MH370 and MH17 tragedies, the independent regulator MAVCOM was established under the MAVCOM Act 2015.

MAVCOM's objectives include, amongst others, to regulate economic matters relating to the civil aviation industry, to strengthen the stability of the aviation industry, to provide just and fair treatment to all industry players, and to promote healthy, stable and sustainable competition in the aviation industry.

While MAVCOM is entrusted with the duty of overseeing the economic and commercial aspects of the aviation industry, the technical, safety and security aspects of the industry remain under the purview of the DCA. In this regard, the Act provides that MAVCOM shall consult the DCA on any technical, safety and security issues in performing its functions.

2 Aircraft Trading, Finance and Leasing

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

Registration of ownership of aircraft in the Aircraft Register constitutes proof of ownership of a particular aircraft. The DCA will issue a Certificate of Registration for aircraft registered in Malaysia.

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

Yes. Any mortgage of a Malaysian aircraft may be entered into the Aircraft Register. Once a mortgage is registered, ownership of the aircraft cannot be transferred until the mortgage is discharged with the consent of the mortgagee.

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

Aircraft may be registered and operated for commercial air transport or aerial work in Malaysia if the said aircraft is registered in the name of a qualified person, i.e. the Government of Malaysia, a citizen of Malaysia or a Malaysian company.

If a foreign company having a place of business in Malaysia holds a legal or beneficial interest by way of ownership or a share in an aircraft, the aircraft may be registered by the DGCA in that person's name. However, the said aircraft cannot be operated for commercial air transport or aerial work in Malaysia unless the aircraft is leased to and operated by a Malaysian entity.

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

Malaysia is a signatory to the following international Conventions:

(a) Chicago Convention 1944: Malaysia deposited its notification of adherence on 7 April 1958.

(b) Montreal Convention 1999: Malaysia ratified this Convention on 29 February 2008.

(c) Cape Town Convention 2001: Malaysia submitted its instrument of accession on 2 November 2005 and the Convention entered into force on 1 March 2006.

Other aviation-based conventions signed and/or ratified by Malaysia include:

(a) Warsaw-Hague Convention 1929, as amended at The Hague 1955 (Warsaw-Hague Convention);

(b) Convention on the Privileges and Immunities of the Specialized Agencies;

(c) Warsaw-Hague Convention further amended by Montreal Protocol No. 4; and

(d) Guadalajara Convention 1961.

2.5 How are the Conventions applied in your jurisdiction?

The Conventions referred to in question 2.4 above are given legal effect in Malaysia through the following statutes:

(a) Chicago Convention 1944 via the Civil Aviation Act 1969;

(b) Montreal Convention 1999 via the Sixth Schedule of the CBAA 1974;

(c) Cape Town Convention 2001 via the International Interests in Mobile Equipment (Aircraft) Act 2006;

(d) Warsaw-Hague Convention via the First Schedule to the CBAA 1974;

(e) Warsaw-Hague Convention further amended by Montreal Protocol No. 4 via the Fifth Schedule to the CAA 1974;

(f) Convention on the Privileges and Immunities of the Specialized Agencies via the International Organizations (Privileges and Immunities) Act 1992; and

(g) Guadalajara Convention 1961 via the Second Schedule to the CBAA 1974.

The DCA ensures compliance by the main players in the aviation industry with the above statutes.

3 Litigation and Dispute Resolution

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

The available rights of detention are as follows:

(a) DCA

Under Civil Aviation Regulations 2016, detention of aircraft may be made by the DGCA if a person defaults in payment of any fees or charges to the DCA.

Upon detention, details of detention such as amount due, date and time of detention, and date and time of the entry made, should be recorded in the Aircraft Register and an aircraft lien shall be vested in the DGCA upon such entry in the Aircraft Register. A notice of detention must be given to the owner, operator, lessee, hirer, charterer or pilot-in-command of the aircraft or the person who has security interest in the aircraft.

The DGCA may deregister the Malaysian aircraft if the outstanding amount is unpaid at the end of six months after the date of the aircraft lien, or may sell the aircraft with the leave of the High Court if the outstanding amount is unpaid at the end of one month after the date of the aircraft lien.

The DGCA shall also have right to recovery by civil action of any fees or charges.

(b) Unpaid seller

An unpaid seller in possession of the aircraft may retain possession of the aircraft until payment is received under the Sale of Goods Act 1957.

(c) Income tax authorities

Customs authorities may refuse clearance of any aircraft from any aerodrome or airports in Malaysia until the income tax is paid by the operator of the aircraft under section 105 of the Income Tax Act 1967.

(d) Creditor

A creditor may obtain an injunction restraining an aircraft pending judgment and execution of the judgment debt. This remedy is equitable and discretionary in nature.

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

Enforcement action to reacquire possession of the aircraft may be carried out without court action. This self-help remedy must

be exercised in a commercially reasonable manner pursuant to the provisions of the lease or financing documents. Further, it is advisable that an Irrevocable Deregistration and Export Request Authorization ("IDERA") is entered into by the Lessor/Financier to allow self-help proceedings. It is also advisable to enter into a Deregistration Power of Attorney with the IDERA, to allow the Lender/Financier to deregister the aircraft in the event that it is challenged in the Malaysian courts.

In addition, under the International Interests in Mobile Equipment (Aircraft) Act 2006, a chargee or lessor is allowed to take possession or control of the aircraft upon breach by the charger or lessee. A chargee may also sell or grant a lease, or collect or receive any income from the management or use of the aircraft, without a court order. Before the selling or grant of a lease on an object, a chargee is required to give prior notice of the proposed sale or lease to the interested person.

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

The relevant court for aviation disputes would depend on the subject matter of the dispute and its value. There is no specific court for aviation disputes.

Proceedings in relation to aviation disputes may be tried in the courts or referred to arbitration.

Courts

Civil disputes may be pursued in the following courts depending on the amount in dispute or the value of the claim.

Court	Amount in dispute or value of the claim
First Class Magistrates Court	RM 100,000
Session Court	RM 1 million
High Court	Unlimited

Disputes between air service providers

Disputes between air service providers may be referred to MAVCOM by virtue of section 75 of the MAVCOM Act 2015 upon fulfilling the following prerequisites:

(i) the dispute must be on any matter under the MAVCOM Act 2015; and

(ii) the parties must have first attempted to resolve their dispute via mediation and it failed to be resolved. Parties must notify MAVCOM on the commencement date of mediation and parties will be told to resolve their disputes within 30 days or within 60 days.

In the event that the parties fail to resolve their dispute through mediation within the stipulated period, MAVCOM will commence deciding on the matter. Decisions made by MAVCOM will be published and the parties will be provided with a copy of the decision. MAVCOM's decisions may be registered as judgments of the High Court and the High Court may make an order requiring the parties to comply with its decision if any party fails to do so.

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

Court proceedings in Malaysia may be initiated by a writ or originating summons. Under Order 10 of the Rules of Court 2012, a writ and originating summons must be served on each defendant to the proceeding personally or by pre-paid A.R. Registered Post.

For non-domestic parties which do not reside in Malaysia, the court may permit a writ or originating summons to be served on the defendant out of jurisdiction under Order 11 of the Rules of Court 2010.

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

Remedies available vary based on the nature of the dispute. Generally, the following remedies may be awarded by the Malaysian courts or arbitration:

On an interim basis:

(a) damages; and

(b) an injunction may be awarded to prevent a party from doing something for a specified period or until final judgment is reached.

On a final basis:

(a) damages;

(b) injunctions to require another party to do something or prevent the other side from doing something;

(c) orders to take possession of an aircraft and other aviation assets; and

(d) orders for the sale of an aircraft.

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

There are rights to appeal against the decision of a court or arbitral tribunal.

Courts

Cases heard in the lower courts may be appealed to a higher court. An appeal to the Court of Appeal or Federal Court requires the leave of the Court of Appeal and Federal Court respectively. Permission to appeal will be given where the court considers that the appeal would have a real prospect of success or there is some compelling reason why the appeal should be heard.

Arbitration

As a general rule, an arbitral award is binding. However, arbitration decisions may be set aside by the High Court under the following grounds in section 37 of the Arbitration Act 2005:

(a) incapacity of the party to the arbitration agreement;

(b) invalidity of the arbitration agreement;

(c) no proper notice was given of the appointment of an arbitrator or of the arbitral proceedings or the arbitrator was otherwise unable to present that party's case;

(d) the award deals with a dispute not contemplated or not falling within the terms of the submission to arbitration;

(e) the award contains decisions on matters beyond the scope of the submission to arbitration;

(f) the composition of the arbitral tribunal or procedure was not in compliance with the agreement of the parties; or

(g) the High Court finds that the dispute was not arbitrable or the award is in conflict with the public policy of Malaysia.

4 Commercial and Regulatory

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

Joint ventures between airline competitors are regulated under the MAVCOM Act 2015. In fact, the MAVCOM Act is the first act with a pre-merger notification and merger control element to regulate competition in the aviation industry.

Section 49 of the MAVCOM Act 2015 prohibits any agreement which has the object or effect of significantly preventing, restricting or distorting competition in any aviation service market. Such agreements are known as prohibited agreements and may include agreements involving: price-fixing; sharing of the aviation service market or sources of supply; limiting or controlling production; limiting or controlling market outlets or market access; limiting or controlling technical or technological development; limiting or controlling investment; and bid-rigging.

Thus, joint ventures between airline competitors will not infringe the anti-competition rule under the MAVCOM Act 2015 if the same do not come within the purview of prohibited agreements in section 49 of the MAVCOM Act 2015.

In addition, section 54 of the MAVCOM Act 2015 provides that mergers that have resulted, or may be expected to result, in a substantial lessening of competition in any aviation service market, are prohibited. The definition of merger under this section is inclusive of joint ventures. As such, a joint venture between airline competitors will be prohibited by MAVCOM if it results in or is expected to result in a substantial lessening of competition in the aviation service market. What amounts to "substantial lessening of competition" is yet to be defined by MAVCOM.

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

Currently, there is no provision or guideline in place for MAVCOM to determine "relevant markets" for the purposes of mergers and acquisitions. The Malaysian Competition Commission uses the Hypothetical Monopolist Test to define a relevant market for competition law purposes.

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

Yes; parties to the proposed merger may notify MAVCOM of the anticipated merger and apply to it for a decision on whether the anticipated merger may infringe section 54.

In addition, parties may apply to MAVCOM for exemption in relation to prohibited agreements under section 49 of the MAVCOM Act 2015 that have the object or effect of significantly preventing, restricting or distorting competition in any aviation service market.

An individual or block exemption (provided that parties fulfil section 50 of the MAVCOM Act 2015) may be applied by the parties to be exempted from the express prohibition under section 49 of MAVCOM Act 2015.

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

There is currently no merger control regime in Malaysia under the Competition Act 2010.

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

There is no fee charged by MAVCOM for notification of mergers or proposed mergers. Procedures for the notification are as follows:

(a) Parties shall inform MAVCOM regarding their merger or anticipated merger and apply to it for a decision.

(b) MAVCOM will provide a self-assessment checklist to the parties to assess whether the merger or the proposed merger will infringe the anti-competition rules.

(c) Upon self-assessment, should the parties require an assessment by MAVCOM, the parties shall inform MAVCOM and obtain the relevant notification form from MAVCOM.

(d) Upon submission of the relevant notification form, MAVCOM will commence an initial assessment and may require provision of further information and documents from the parties.

(e) MAVCOM will make a final assessment on the merger or proposed merger upon provision of documents and information, and will provide its decision on whether the prohibition in section 54 of the MAVCOM Act 2015 has been infringed.

(f) The duration of initial assessment and final assessment varies from case to case. The initial assessment may span one to two months.

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

There is no specific rule which governs financial support for the aviation sector.

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

Generally, the Malaysian Government does not provide subsidies in respect of particular routes. For non-economic aviation services conducted for rural communities in East Malaysia, the Malaysian Government has appointed and grants subsidies to MASwings to provide those aviation services as a national service.

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

The Personal Data Protection Act 2010 ("PDPA") is the main regulatory instrument governing the acquisition, retention and use of personal data in Malaysia for commercial purposes.

Passengers have the right, upon request, to obtain information on their personal data, limit the processing of personal data and also to update or make amendments to their personal data held by airlines.

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

Section 9 of the PDPA provides that when processing personal data, a data user shall take practical steps to protect the personal data, among others, from any loss. There is no specific obligation imposed on the airline with regard to the loss of data. However, the contravention of this Section 9 by a data user amounts to an offence which shall, on conviction, be liable to a fine not exceeding RM 300,000 or to imprisonment for a term not exceeding two years, or both.

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

The protection of intellectual property in Malaysia covers the protection of patents, trade marks, industrial design, geographical indication, copyright and layout design which are respectively governed by the Patents Act 1983, Trade Marks Act 1976, Industrial Designs Act 1996, Geographical Indications Act 2000, Copyright Act 1987, and Layout Designs of Integrated Circuits Act 2000.

Patents, trade marks, industrial design and geographical indication may be protected by filing an application with the Intellectual Property Corporation of Malaysia ("MyIPO"). There is, however, no system of registration for copyright and layout design in Malaysia. Protection of copyrightable works and layout design is provided automatically under the Copyright Act 1987 and the Layout Designs of Integrated Circuits Act 2000, respectively, based on certain criteria of eligibility. Nevertheless, copyright owners may be afforded more tangible protection by voluntarily notifying and depositing a copy of the work eligible for copyright with the MyIPO.

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

Denial of boarding rights is governed under the Malaysian Aviation Consumer Protection Code 2016 ("the Code"). According to Paragraph 11 of the Code, when an operating airline reasonably expects to deny boarding on a flight, it shall first contact passengers to give them the option to volunteer to surrender their reservations. Passengers who volunteer shall be offered compensation and care in accordance with the First Schedule of the Code. If the number of passengers who volunteer is insufficient, the operating airline may then deny boarding to any passenger and the airline shall immediately offer compensation in accordance with the First Schedule.

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

Late arrival and departure of flights is governed under the Code.

MAVCOM has the right to impose a financial penalty on any person for an amount not exceeding RM 200,000 for the first non-compliance with provisions of the Code governing late arrival and departure of flights. For subsequent non-compliance(s), MAVCOM may impose a fine of up to 10 times the amount of fine that was imposed for the first non-compliance.

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

The Civil Aviation (Aerodrome Operations) Regulations 2016 govern the establishment, maintenance and operation of aerodromes, including setting out the obligations of an aerodrome operator in relation to the operation of aerodromes.

Among the obligations of an aerodrome operator set out under the regulations are those in relation to: the maintenance and operation of an aerodrome; safety management systems; the storage of inflammable goods and dangerous goods; the removal of obstacles from aerodromes; environmental management programmes; lighting of obstacles; aerodrome operations and services; aerodromes' physical characteristics; and aerodrome emergency planning.

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

The general consumer protection legislation does not generally govern the relationship between the airport operator and the passenger. Consumer protection for passengers is specifically governed under part X of the MAVCOM Act 2015.

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

The principal GDSs in Malaysia are Amadeus, Mercator (Navitaire), Sabre (Abacus) and Travelport (Galileo).

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

No, there are no such requirements.

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

Please refer to question 4.1 above.

5 In Future

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

A bill has been tabled recently to upgrade the DCA into a statutory body known as the Civil Aviation Authority Malaysia. The formulation of this Civil Aviation Authority Bill 2016 is to meet the demand of the ICAO which proposes that all countries that have signed the Chicago Convention set up an autonomous civil aviation authority to ensure that aspects of civil aviation safety are efficiently managed.

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Malta

Dingli & Dingli Law Firm

Dr. Tonio Grech

1 General

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

There are several laws regulating civil aviation in Malta, each governing the different aspects of civil aviation. These are mainly the following:

- the Authority for Transport in Malta Act;
- the Civil Aviation Act;
- the Eurocontrol Act;
- the Civil Aviation (Air Operators' Certificates) Act;
- the Airports and Civil Aviation (Security) Act;
- the Civil Aviation (Security) Act;
- the Aircraft Registration Act;
- the Code of Conduct for Computerised Reservation Systems Act;
- subsidiary legislation promulgated on the basis of the powers given to the Minister for Transport in the several enabling acts; and
- EU Regulations on civil aviation.

The subsidiary legislation is vital in the regulation of civil aviation in Malta because it is enacted specifically with regard to that aspect of civil aviation which it purports to regulate. The following are a few examples: the Air Navigation Order governing, *inter alia*, aviation safety; the Civil Aviation Joint Aviation Requirements Order forming the JARs part of Maltese law; and the several regulations transposing EU directives into Maltese law.

In Malta, aviation is regulated by the Civil Aviation Directorate, which is a Directorate within the Authority for Transport in Malta. This Authority falls within the remit of the Ministry for Infrastructure, Transport and Communications.

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

On the basis of subsection 1 of article 6 of the Civil Aviation Act, no aircraft shall be used on any flight for reward or in connection with any trade or business except under and in accordance with the terms of a licence granted to the operator of the aircraft. Under the Civil Aviation Act, this is called an "operator licence", being a licence currently in force and authorising the operator to operate aircraft on such flights as are in question.

Moreover, pursuant to section 4 of the Civil Aviation (Air Operators' Certificates) Act, an aircraft registered in Malta shall not fly on any flight for the purpose of public transport, other than and in accordance with the terms of a certificate granted to the operator of the aircraft, certifying that the holder of the certificate is competent to secure that aircraft operated by him or her on such flights as are in question, are operated safely.

Furthermore, market access within the European Union is regulated by virtue of Regulation (EC) No. 1008/2008. The Civil Aviation (Air Transport Licensing) Regulations contain the rules emanating from Regulation (EC) No. 1008/2008 on common rules for the operation of air services in the Community, which also apply to Malta as a Member State of the European Union.

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

Under section 9 of the Authority for Transport in Malta Act, the Authority has, *inter alia*, the following powers:

- to ensure a safe operational environment in accordance with the Convention on International Civil Aviation created in Chicago on 7 December 1944;
- to regulate: transport by air; the registration, licensing and use of aircraft; the licensing of all commercial operations connected with air transport and service providers; the construction, maintenance, licensing and inspection of aerodromes and other facilities connected with air transport; and to make provision for any matter that is provided for under the Authority for Transport in Malta Act in connection with air transport;
- to regulate air traffic management and airspace design, including communications, navigation, surveillance, airspace and air traffic management systems and procedures, as well as aeronautical information services;
- generally to secure the safety, efficiency and regularity of air navigation and the safety of aircraft and of persons and property carried therein, to prevent aircraft endangering other persons and property and, in particular, to detain aircraft for any purposes; and
- to license flight crew, air traffic controllers and apron controllers and to monitor the conduct of their medical examination and to license aircraft maintenance engineers and other aviation personnel.

Furthermore, by section 3 of the Civil Aviation Act, the Authority has the power to appoint a person to act as director general for civil aviation in Malta to implement the strategies and objectives of the Authority and to act in accordance with the policies, strategies and directives of the Authority. In doing so, he uses the powers given

to him by the several laws and regulations on civil aviation, such as the Air Navigation Order and the Civil Aviation (Air Operators' Certificates) Act. Furthermore, the aviation requirements issued by the European Aviation Safety Agency (EASA) have also enhanced air transport safety in Malta.

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

Under the Air Navigation Order, the main distinction between public transport and private flights is the question of payment or reward. The ordinary rules of airworthiness, safety and private pilot licensing and crew are still applicable to private flights. Moreover, any rule of EASA affecting private flights is adopted in Malta.

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

No, air charters are not regulated separately for commercial, cargo and private carriers.

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

In Malta, market access is regulated by bilateral air service agreements. Furthermore, as a Member State of the European Union, air services between Malta and other Member States are liberalised. There are no particular limitations for international air carriers operating in Malta. According to article 9 of the Civil Aviation Act, an aircraft registered in any country or territory other than Malta shall not take on board or discharge any passengers or cargo in Malta, being passengers or cargo carried or to be carried for hire or reward or in connection with any trade or business, except with the permission of the Authority for Transport in Malta, granted under article 9, to the operator or the charterer of the aircraft or to the government of the country in which the aircraft is registered, and in accordance with any conditions to which such permission may be subject, unless such aircraft is being used in the exercise of traffic rights regarding access of European Union air transport undertakings on air routes in the territory of the European Union.

1.7 Are airports state or privately owned?

Malta International Airport, which is the only international airport in Malta, is privately owned. It is presently owned and operated by Malta International Airport plc.

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

Under the Allocation of Slots at Airport Regulations, a scheduling coordinator is appointed and is solely responsible for the scheduling of slots. He may consult the Airport Scheduling Committee on the scheduling of the slots, and, subject to the provisions of Regulation 6, his decision is final.

On the basis of Regulation 6, an air carrier may submit a complaint, to be made in writing to the Airport Scheduling Committee, which shall investigate that complaint and may make recommendations to the scheduling coordinator to review or alter his decision.

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

The procedure for the investigation of air accidents is regulated by the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations, which transposed into Maltese law Council Directive 94/56/EC. The sole objective of these Regulations is the prevention of accidents and incidents and not to apportion blame or liability.

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

To my knowledge there have been no recent cases of note in Malta involving air operators and/or airports.

2 Aircraft Trading, Finance and Leasing

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

An aircraft may be registered in the National Aircraft Register by any person referred to in article 6 and who may be:

(a) an owner of the aircraft who operates the said aircraft;

(b) an owner of an aircraft under construction or temporarily not being operated or managed;

(c) an operator of an aircraft under a temporary title which satisfies the conditions which may be prescribed; or

(d) a buyer of an aircraft under a conditional sale or title reservation or similar agreement which satisfies the conditions which may be prescribed and who is authorised thereunder to operate the aircraft.

Moreover, when an aircraft is registered by a registrant under points (c) or (d) above, every person who holds any interest by way of ownership or title in the aircraft or a share therein may make a request in writing to the director general to have his name, address and ownership interests or title noted in the certificate of registration.

Yes, before a court of law in Malta this would constitute a presumption of ownership.

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

The Aircraft Registration Act contains specific provisions with regard to mortgages and other charges. Mortgages are recorded by the director general of civil aviation in the National Aircraft Register in the order of time in which they are produced to him for that purpose.

Where it is stated in the instrument of the mortgage that it is prohibited to create further mortgages on an aircraft without the prior written consent of the mortgagee, the director general shall make a note in the National Aircraft Register to such effect, and the director general shall not record such further mortgage unless the consent in writing of the holder of a prior mortgage is produced to him, and any mortgage registered in violation of this provision shall be null and void.

Provided that where such further mortgage is executed in favour of an existing creditor, no such consent shall be required from such creditor.

This is provided, further, that the above does not hinder the registration of a special privilege where the Aircraft Registration Act requires registration for its continuing validity and effect.

When it is stated in the instrument of mortgage that it is prohibited to effect the transfer of the aircraft which is being mortgaged or charged, or of a share therein, without the previous written consent of the mortgagee, the director general shall make a note in the National Aircraft Register to such effect, and the director general, notwithstanding any other provision of the Aircraft Registration Act, shall not record any transfer of such aircraft or of a share therein, unless the consent in writing of such mortgagee is produced to him, except where the transfer is made pursuant to a court order in a sale by auction of such an aircraft or pursuant to any other court order; any transfer registered in violation of this provision shall be null and void.

Where a creditor has registered an international interest in the International Registry in accordance with the first schedule of the Aircraft Registration Act, it shall be lawful for the debtor (being the registrant or the owner of the aircraft, or both) to execute and file a prohibitory notice in favour of one or more creditors, in the form prescribed, which shall be entered into the National Aircraft Register by the director general.

When a prohibitory notice is entered in the National Aircraft Register, the director general shall not thereafter record any security interest in the National Aircraft Register in accordance with this part, until the prohibitory notice is withdrawn by the creditor.

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

An international interest registered in the International Registry shall not be subordinate to any mortgage registered in the National Aircraft Registry, even if the international interest is registered at a later date. Consequently, it is advisable for a mortgagee to have the mortgage registered also in the International Registry.

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

Yes, Malta is a signatory to the main international Conventions.

2.5 How are the Conventions applied in your jurisdiction?

The Conventions are applied by the courts of Malta.

3 Litigation and Dispute Resolution

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

The detention of aircraft in respect of unpaid charges may be achieved through a warrant of arrest of the aircraft, as a precautionary measure and/or as a means of enforcement. As a precautionary measure, the warrant of arrest may only be sued out by: (a) the holder of a mortgage or of an international interest, whatever the amount of the mortgage or the international interest; or (b) any other creditor in security of a claim of seven thousand euros (EUR 7,000) in the case of non-commercial aircraft or one million euros (EUR 1,000,000) in the case of an aircraft being used for public transport.

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

Under article 33 of the Aircraft Registration Act, without prejudice to any default remedies as may be applicable under the Cape Town Convention by virtue of the First Schedule to the Aircraft Registration Act, the mortgagee shall, in the event of default of any term or condition of a registered mortgage or of any document or agreement referred to therein, and upon giving notice in writing to the debtor:

(a) be entitled to take possession of the aircraft or share therein in respect of which he is registered; but, except so far as may be necessary for making a secured aircraft or share available as a security for the secured debt, the mortgagee shall not, by reason of the mortgage, be deemed to be the owner of the aircraft or share, nor shall the mortgagor be deemed to have ceased to be the owner thereof;

(b) have the absolute power to sell the aircraft or share in respect of which he is registered; but where there are more persons than one registered as mortgagees of the same aircraft or share, a subsequent mortgagee shall not, except under the order of a court of competent jurisdiction, sell the aircraft or share without the concurrence of every prior mortgagee; and if the proceeds of sale, after discharging the secured debt, show a surplus in his hands, the mortgagee shall hold under trust or deposit the same for the benefit of other creditors and of the mortgagor debtor;

(c) have the power to apply for any extensions, pay fees, receive certificates, and generally do all such things in the name of the owner or registrant as may be required in order to maintain the status and validity of the registration of the aircraft;

(d) have the power to lease the aircraft so as to generate income therefrom; and

(e) have the power to receive any payment of the price, lease payments, and any other income which may be generated from the management of the aircraft.

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

The Civil Courts are appropriate for aviation disputes. The Courts of Magistrates, in their civil jurisdiction, take cognisance of cases for an amount up to eleven thousand, six hundred and forty-six euros and eighty-seven cents (EUR 11,646.87) and the First Hall of the Civil Court takes cognisance of cases for a higher amount. In the event of cases before the Courts of Magistrates in their civil jurisdiction, appeals are heard by the Court of Appeal presided over by one judge; and in the case of the First Hall of the Civil Court, appeals are heard and decided by the Court of Appeal presided over by three judges. Criminal cases are heard and decided by the Criminal Courts, comprising the Courts of Magistrates in their criminal jurisdiction, the Criminal Court and the Criminal Court of Appeal, presided over by one judge or three judges depending on whether the appeal is made from a decision of the Courts of Magistrates in their criminal jurisdiction or the Criminal Court respectively.

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

The sworn application by which a lawsuit commences is served on the defendant by a court marshall; other judicial acts are sent by

registered mail by the court registry officers. This applies across the board, independently of who the parties are.

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

In respect of unpaid charges, an interim remedy may be achieved through a precautionary warrant. The process takes only a couple of days to obtain such a precautionary warrant. In such a case, the plaintiff has to institute court proceedings on the merits of the case within 20 days of the issuance of the precautionary warrant of arrest by the court. As a precautionary measure, the warrant of arrest may only be sued out by (a) the holder of a mortgage or of an international interest, whatever the amount of the mortgage or the international interest, or (b) any other creditor in security of a claim of seven thousand euros (EUR 7,000) in the case of non-commercial aircraft, or one million euros (EUR 1,000,000) in the case of an aircraft being used for public transport. After obtaining judgment in his favour, the plaintiff would then be able to request the court to issue an executive warrant of arrest of the aircraft, and if still not paid, the plaintiff could also institute proceedings for the judicial sale of the aircraft and the ranking of creditors in the case that there are two or more creditors. This process will normally be effected within a year.

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

There is a right of appeal from a decision of a court and there is also a right of appeal from an arbitration award, unless the parties had renounced such a right in the arbitration agreement. Malta is a signatory to the New York Convention on the enforcement of arbitral awards.

4 Commercial and Regulatory

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

There are no sector-specific competition rules which apply to aviation in Malta. The general competition rules found in the Competition Act apply. The responsibility for the application of competition rules in Malta lies principally with the Office for Competition, as established by article 13 of the Malta Competition and Consumer Affairs Authority Act.

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

So far, there has been no competition assessment by the Office for Competition regarding the aviation sector. It is therefore not certain that the SSNIP (Small but Significant and Non-transitory Increase in Price) test would be applied in Malta to define the relevant market for the purposes of a competition assessment in the aviation sector. What is certain is that the Office for Competition is bound to apply the decisions of the European Commission.

The criteria for assessing the competitive effect of a transaction are those that would be applied by the European Commission in assessing a similar transaction – that is: the welfare effects of the transaction on the consumer; whether the market entry by a new party is commercially viable; the market dominance by two or more carriers; and so on.

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

Traders can obtain advice from the Office for Consumer Affairs established under the Malta Competition and Consumer Affairs Authority Act, Chapter 510 of the Laws of Malta.

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

Mergers, acquisition mergers and joint ventures are governed by the Companies Act, Chapter 386 of the Laws of Malta. The amalgamation of two companies may be effected by (a) merger by acquisition, or (b) merger by formation of a new company. The companies may be owned by foreign shareholders.

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

No procedure or time frames for the obtaining of advice are outlined in the Malta Competition and Consumer Affairs Authority Act, Chapter 510 of the Laws of Malta.

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

In the case of state aid, which does not fall within the 26 categories of the General Block Exemption Regulation, clearance must be obtained from the European Commission.

The procedural steps are those that are applicable to Member States of the European Union. The Member State must notify the Commission of its intention to grant or alter its aid. The Commission will make a preliminary examination and decide whether the measure submitted by the Member State qualifies as state aid and whether it raises serious concerns as to its compatibility, in which case the Commission will proceed to the formal investigation procedure.

The Member State is allowed to submit its observations on a decision of incompatibility of the proposed measure, upon which the Commission will issue another decision.

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

No, they are not.

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

Regulation (EC) No. 80/2009, which repealed Regulation (EEC) No. 2299/89, protects passengers with regard to computerised

reservation systems. In 2007, the Maltese Parliament enacted the Code of Conduct for Computerised Reservation Systems Act (Chapter 434 of the Laws of Malta), which provides protection for passengers in relation to the data submitted by carriers.

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

The Computerised Reservation Systems Board, which is established under the Computerised Reservation Systems Act, may impose disciplinary penalties on system vendors, parent carriers, participating carriers and/or subscribers for infringements of the provisions of the Act up to a maximum of 10% of the annual turnover of the relevant activity of the undertaking concerned. In fixing the amount of the penalty, regard is had both to the seriousness and to the duration of the infringement.

Such decisions imposing disciplinary penalties are not of a penal nature, and any such penalties shall be recoverable as a civil debt by the Director of Civil Aviation by action before the competent court of civil jurisdiction.

Carriers, whether they are parent or participating carriers, subscribers, or system vendors, are subject to the jurisdiction and the procedures of, and the administrative penalties imposed by, the Computerised Reservation Systems Board.

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

There is a register for trademarks and patents at the department of the Comptroller of Industrial Property. Trademarks are filed in accordance with the provisions of the Trademarks Act, Chapter 416 of the Laws of Malta, and patents are filed in accordance with the provisions of the Patents and Designs Act, Chapter 417 of the Laws of Malta. Copyright is protected by the Copyright Act. It enjoys civil protection, as well as a criminal sanction in the case of any dealing with infringed articles, such as the distribution of pirated goods. The courts which take cognisance of these matters are the ordinary courts and there are no special courts established to deal with these issues.

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

The Denied Boarding (Compensation and Assistance Air Passengers) Regulations, 2011, implement Regulation (EC) No. 261/2004 of the European Parliament and the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No. 295/91 (Text with EEA relevance).

The Civil Aviation (Rights of Disabled and Persons with Reduced Mobility) Regulation implements Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities for the enforcement of consumer protection laws of the Regulation on Consumer Protection Cooperation.

The Package Travel, Package Holidays and Package Tours Regulation, which transposed into Maltese law Council Directive 90/314/EEC, grants protection to consumers of package holidays and tours.

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

Under Regulation 5 of the Denied Boarding (Compensation and Assistance Air Passengers) Regulations, 2011, the operating air carrier is guilty of an infringement punishable by an administrative fine of not less than four hundred and seventy euros (EUR 470) and not exceeding five thousand euros (EUR 5,000). In the case of non-compliance with a compliance order, the director general (Consumer Affairs) may impose a daily fine of not less than one hundred and twenty euros (EUR 120) and not more than two hundred and thirty euros (EUR 230) for each day of non-compliance.

Any person who feels aggrieved by a decision, order, administrative fine or measure imposed or taken by the director general (Consumer Affairs), may file an appeal before the Competition and Consumer Appeals Tribunal in terms of the Act.

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

The licensing of airports is regulated by the Civil Aviation (Aerodrome Licensing) Regulations. The applicant for an aerodrome licence has to submit for acceptance to the director general of civil aviation an aerodrome manual, and amendments thereto as may be required from time to time. The manual shall consist of five parts which shall contain the information specified in appendix 1 to ICAO Document 9774.

The aerodrome manual shall:

- be typewritten or printed, and signed by the aerodrome operator;
- be in a format that is easy to revise;
- have a system for recording the currency of pages and amendments thereto, including a page for logging revisions; and
- be organised in a manner that will facilitate the preparation, review and acceptance and/or approval process.

Furthermore, the operator of an aerodrome used for public transport purposes shall comply with the Standards and Recommended Practices of Volume 1 and Volume 2, Annex 14 to the Convention on International Civil Aviation, except for differences filed by Malta, and with national regulations, as well as with any conditions that are specified in the aerodrome licence.

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

By the Civil Aviation (Rights of Disabled Persons and Persons with Reduced Mobility) Regulations, the airport operator must comply with the obligations pertaining to it as specified in Regulation (EC) No. 1107/2006. Moreover, the airport operator can impose airport charges only within the parameters of the Airport Economic Regulations. Furthermore, by the Civil Aviation Security Regulations, the airport operator must implement and maintain such airport security programmes as are appropriate to meet the requirements of the national civil aviation security programme.

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

In relation to global distribution suppliers, the applicable law is Chapter 434 of the Laws of Malta, namely the Code of Conduct for

Computerised Reservation Systems Act. There is no restriction as to the number of computerised reservation systems to be used.

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

There are no ownership requirements.

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

In the granting of an aerodrome licence, our law does not prohibit vertical integration; however, the need has never arisen to legislate on vertical integration insofar as air operators and airports are concerned. The only international airport in Malta was, until 2002, owned and operated by the government and, although privatised now, it is not owned or operated by any air operator.

5 In Future

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

In my opinion it is likely that more powers will be given to the mortgagee.

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1979–1984: Read law at the University of Malta and graduated as a lawyer.

1984–1989: Practised as an advocate at the Attorney General's Office dealing with, *inter alia*, transport matters as counsel to the Ports Department and the Department of Civil Aviation. Attended international conferences on civil aviation and drafted laws to update civil aviation legislation in Malta. Drafted the Eurocontrol Act which was enacted by Parliament in February 1989.

1989 to date: Practising as a private litigation lawyer, dealing mainly with civil, commercial and maritime court cases, in particular where protection and indemnity matters are involved.

2001: Joined Dingli & Dingli Law Firm as a partner.

2004: Successfully completed a course on the Law and Administration of Trusts organised by the Malta Financial Services Authority; became a member of the Institute of Financial Services Practitioners.

Dingli & Dingli Law Firm is a Maltese firm established in 1982 with offices at 18/2, South Street, Valletta 1102. Although by Malta's standards it is a medium-sized firm, it enjoys a solid reputation for efficiency and effectiveness, leading to results. The firm handles all types of legal work and in completely new areas of practice it is ready to learn quickly. The firm is fluent in Maltese, English, Italian, French and Spanish, having also a basic understanding of German and Russian. Malta's recent entry as a Member of the European Union has opened a window of opportunity, and the firm leaves no stone unturned to face the future with confidence and expectation.

The firm is particularly active in the area of maritime law, corporate law, taxation and international tax planning, financial services, aviation law, intellectual property law, investment, residency, real estate, succession and trusts. The firm is often involved in the major maritime cases brought before the Courts of Malta or the Malta Arbitration Centre. These include, to name a couple of these cases, the Normand Carrier case, which involved a collision in the Grand Harbour in Malta, and the Nuria Tapias case, relating to a collision between the Nuria Tapias and the Junior M in the Black Sea, where the limitation fund was set up in Malta.

Mexico

Luis A. Cervantes Muñiz

Cervantes Sainz, S.C.

Alejandro Zendejas Vázquez

1 General

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

Civil aviation law in Mexico is governed and regulated at a federal level. The legislative bodies applicable to aviation at the first and second tiers are:

1. The Federal Constitution, which provides the legal framework from which the regulation of air transport derives.
2. The Civil Aviation Law and the Regulations to the Civil Aviation Law, which regulate air transport, safety, security and air traffic rights.
3. The Airports Law and the Regulations to the Airports Law, which regulate airport construction, operation, administration and the relationship amongst airports, users and service providers. These deal with specific matters such as the slot allocation procedures in congested airports.
4. The General Law of Communication Means: this was the prior governing law of air transport before the Civil Aviation and the Airports Law were issued. It covers those aspects not included in the Civil Aviation Law.
5. The National Security Law, which regulates the interaction of air transport in national security matters.
6. The Federal Rights Law, which establishes the amounts to be paid for each administrative procedure filed before the Ministry of Communication and Transport.
7. The Federal Law of Administrative Procedure, which regulates the interaction between users and the aeronautical authority.
8. The Federal Law of Metrology and Standardisation: this law provides the general legal framework from which Mexican Official Standards derive.

In addition, there are specific Regulations which are also applicable:

1. The Technical Aeronautical Schools Regulations, which regulate aviation schools.
2. The Civil Aircraft Operations Regulations, which deal with specific matters applicable to sundry air transport services.
3. The Aeronautical Workshops Regulations, which apply to all activities, creation, certification and activities of the aeronautical workshops – including maintenance, repair and overhaul (MRO).
4. The Mexican Aeronautical Registry Regulations, which organise and regulate the activities of the Mexican Aeronautical Registry, as well as setting forth the faculties of the Director thereof.
5. The Transport Medicine Service Regulations, which deal with the medical examination of aeronautical personnel.
6. The Ministry of Communications and Transport Interior Regulations, which set forth the faculties and general activities of the General Bureau of Civil Aeronautics (*Dirección General de Aeronáutica Civil* – DGAC).
7. The Search, Rescue and Accident Investigation Regulations, which deal with all steps of the procedure to be performed upon the occurrence of an air transport accident.

Various other regulations also apply to civil aviation, such as the Mexican Official Standards and the circulars issued and enforced by the Aviation Authority.

The principal regulatory body is the Ministry of Communication and Transport, through a dependent organism of the Undersecretary of Transport: the DGAC; in addition, certain general regulatory faculties fall within the legal scope of other administrative bodies dependent on the Undersecretary of Transport through different agencies: the Mexican Airspace Navigation Services (*Servicios a la Navegación en el Espacio Aéreo Mexicano* – SENEAM) with respect to air navigation; the Airports and Auxiliary Services (*Aeropuertos y Servicios Auxiliares* – ASA) with regard to jet fuel; and specific airports which are dependent on these services. As a corollary, the Federal Antitrust and Competence Commission has general faculties – not specific to aviation – to regulate competence in given markets, including that of civil aviation.

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

There are various categories of air transport service. In general terms, for a carrier to obtain the necessary authorisations to operate into and out of Mexico, evidence of compliance with four capacities must be filed before the authority. Such capacities are: (i) legal capacity, in order to evidence the legal existence and full capacity of the carrier; (ii) administrative capacity, which refers to the capacity of the carrier to have the necessary administrative resources to render the desired service; (iii) technical capacity, to evidence the technical, safety, operational and performance elements which will allow the safe and uninterrupted rendering of a service; and (iv) financial capacity, which is almost self-explanatory and is used to assert the financial viability of the service to be rendered.

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

Air safety in Mexico is administered and enforced by the DGAC.

Within the DGAC, a specific Deputy Directorate General for Air Safety and Security (DGASA) oversees this matter. This administrative body regulates and governs the revision faculties and enforces air safety and security provisions; in addition, the DGASA is the responsible entity for controlling Airport Commanders who, amongst others, are in charge of performing the daily and routine checks for air safety and security. All safety and security activities are governed by the Civil Aviation Law, the Regulations to the Civil Aviation Law, the Technical Air Personnel Licensing Law and sundry Mexican Official Standards.

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

Air safety and security in Mexico is enforced through the same legislative bodies for commercial, cargo and private carriers. Notwithstanding the foregoing, the Civil Aviation law sets forth a specific set of rules regarding air charter operation, particularly in the exercise of available air traffic rights.

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

Air charters receive specific treatment under the Civil Aviation Law. This has no bearing on air safety and security, nor on compliance with operational standards when flying into and out of Mexico. Notwithstanding, there are differences in the services which can be performed with charter operations, the type of traffic rights available to be exercised and certain administrative procedures for requesting authorisation for such operations.

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

No major differences between domestic and foreign carriers may be observed in Mexico. The main difference to be highlighted on the operational side is that no foreign carrier – whether private, scheduled, non-scheduled or from general aviation – is allowed to perform cabotage operations, in either of their varieties: stand-alone or continuous cabotage.

A consequence of this is that there is a limitation on the percentage of the capital stock of an air transport company in which foreign entities – whether individuals or companies – can participate. The limit is 25% in domestic air transport, air taxi transport, and specialised air transport. In addition, there is a limit of 49% for a foreign company to participate in a concession or permit for airfields. This limit can be exceeded upon authorisation from the Ministry of Economy with the prior approval of the Ministry of Communication and Transport.

1.7 Are airports state or privately owned?

Mexico has 76 airports, not taking into consideration non-controlled airstrips. After a reform in the 1990s, four major airport groups were created: *Grupo Aeroportuario del Pacífico* (GAP), *Grupo Aeroportuario Centro Norte* (holder of OMA – *Operadora Mexicana de Aeropuertos*), *Aeropuertos del Sureste* (ASUR) and *Grupo Aeroportuario de la Ciudad de México* (GACM – the current holding company of Mexico's City New Airport, NAICM – *Nuevo Aeropuerto Internacional de la Ciudad de México*). Such groups comprise private investment groups, public investment achieved through IPO processes and, in some cases, they can also be operated through public-private partnerships. Additionally, a large number of airports are owned by state governments.

As a global consideration, all airports in Mexico are constructed, maintained, operated and administered through a concession title granted by the Ministry of Communication and Transport.

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

Disregarding operational requirements, such as fees for the utilisation of airport facilities, there are no specific requirements imposed by airports, other than those set forth in the Civil Aviation Law, the Airports Law and the regulations thereto.

It should be noted that there are certain limitations for congested airports. In Mexico, only Mexico City International Airport has been declared as a congested airport. Among the limitations, it is important to emphasise that the most important of these refer to slot use, allocation and, in the case of Mexico City, limitations also apply to the use of the airport's terminal infrastructure capacity.

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

The DGAC has a specific Directorate for investigation, follow-up and ruling on air accidents. Each investigation deriving from an air accident will follow the protocol set forth by the Directorate of Accidents. There are other federal and state agencies which can assist in the investigation, such as the Republic Attorney General (*Procuraduría General de la República* – PGR), state-level attorney generals' offices and civil protection agencies. All accident investigations, search and rescue activities must be performed in accordance with the Search, Rescue and Accident Investigation Regulations.

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

Several developments have taken place in the aviation sector very recently. It is worth mentioning the initiatives deriving from the authorisation for the construction of the new airport for Mexico City. With regard to the bilateral structure of air transport, Mexico entered into negotiations with the government of the United States of America, from which a new bilateral air services agreement resulted. The new bilateral agreement was steered towards liberalising certain rights and encouraging each of the parties to open new commercial opportunities for air carriers. In addition to the air service agreement with the United States of America, Mexico updated or renegotiated agreements with: Belize; Canada; Colombia; Kuwait; the Philippines; Qatar; Saudi Arabia; the United Arab Emirates; and the United Kingdom. Furthermore, the Civil Aviation Law underwent a major amendment to incorporate the safety management system standards in regard to air safety.

2 Aircraft Trading, Finance and Leasing

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

Registration of ownership in Mexico constitutes a declaration of the ownership of an aircraft – to the extent attached to an aircraft, to any given component thereto such as the engines. Registration in Mexico also has the effects set forth by the Chicago Convention 1944. Registration is declaratory and has no constitutive effects. It is used to publicise and have *erga omnes* effects over the ownership.

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

The Mexican Aeronautic Registry (*Registro Aeronáutico Mexicano* – RAM) is organised in Register Sections. Amongst such Register Sections, mortgages and liens in general can be annotated. Registration in the RAM can be performed by the Aviation Authority upon the request of a party evidencing legal right and interest in doing so, or through judicial mandate.

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

There are no specific regulatory requirements to be met. Upon execution of a purchase, sale, or sale and leaseback agreement, such agreement must be duly translated into the Spanish language, ratified before a Notary Public and registered before the Mexican Aeronautical Registry.

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

Mexico has signed and ratified the following international Conventions:

1. Convention on International Civil Aviation (also known as the Chicago Convention).
2. Convention for the Unification of Certain Rules for International Carriage by Air (also known as the Montreal Convention 1999).
3. Convention on the International Recognition of Rights in Aircraft (also known as the Geneva Convention).
4. Convention for the Unification of Certain Rules relating to International Carriage by Air (commonly referred to as the Warsaw Convention 1929).
5. Convention on Offences and Certain other Acts Committed on Board Aircraft (referred to as the Tokyo Convention 1963).
6. Convention on International Interests in Mobile Equipment and its protocol regarding aviation equipment (known as the Cape Town Convention).

2.5 How are the Conventions applied in your jurisdiction?

The Mexican Constitution sets forth the hierarchy of laws, and thus the applicability thereof. International treaties – used in a broad sense without distinction of treaty or convention, nor entering into the discussion of those treaties related to human rights – are immediately below the Constitution and above federal laws. Thereafter, applicability of the conventions should be pre-emptive to the provision of federal laws, and in the event of a conflict, the latter should be adjusted in accordance to the conventions.

3 Litigation and Dispute Resolution

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

Article 1168 of the Commercial Code sets forth injunctive relief provisions, including for the detention of any type of property or goods. This injunctive relief measure is granted by the judge in the absence of the defendant upon the filing of the lawsuit in the case that the requirements established in article 1175 are duly complied with. Evidence must be filed before the court that a liquidated debt exists and that there is a founded suspicion that the property can be subtracted to avoid the payment of the debt. Finally, the potential damages that may be caused by the measure must be warranted.

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

There is no regime of "self-help" available in Mexico. It is important to note that Mexico adopted Option B of the Declarations to the Cape Town Convention.

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

The Federal Courts are competent in aviation disputes as stated by the Civil Aviation Law. In the case that the dispute is commercial, the value of the dispute may determine which court is competent. Finally, different courts rule on civil and criminal cases.

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

The service of process by Mexican courts is always specific to the address of the defendant and is carried out by judicial clerks exclusively. There are no differences concerning the domestic or foreign nature of an airline for the purposes of service of process. In any case, if a foreign airline does not have the permanent address of a legal representative in Mexico, the notification would have to be carried out by diplomatic means.

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

A ruling that has been rendered by a first instance court may be appealed and subsequently a direct *amparo* lawsuit may be filed against the appeal ruling. Arbitral awards are final, as recognised by the Commercial Code. Consequently, they can only be nullified based on very specific causes of action set forth in article 1457 of the Commercial Code.

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

Yes; in general terms, any party in a litigation may appeal the first instance ruling. That would not be the case in an arbitration, since the awards granted by an arbitration panel are final and can only be nullified for the reasons established in article 1457 of the Commercial Code.

4 Commercial and Regulatory

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

There are no specific provisions regulating joint ventures. Civil and commercial general legislation may be applicable to a joint venture. Notwithstanding the foregoing, the validity of a joint venture between competing airlines is subject to authorisation from both the Ministry of Communications and Transport and the Federal Competition Authority.

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

On a general basis, and disregarding the specifics of a given case – i.e. the filing of prior authorisation for a concentration – the "relevant market" for an airline concentration (the Federal Competition Law does not use the term "joint venture") would be analysed under: (i) the possibility of replacing the good or service on which the concentration would have a direct effect; (ii) the distribution costs of the specific service and financial thresholds thereto; (iii) the viability of the market access of other competitors; and (iv) the opinion of the sectorial authorities governing the good or service over which the concentration would have a major impact.

Additionally, for a joint venture to go into the review and consequently be subject to the authorisation of the Federal Commission of Economic Competence (COFECE – the Mexican authority on antitrust and competition matters), it needs to exceed certain limits set forth by the Federal Competition Law (FCL). A joint venture will require COFECE clearance when: (i) it implies a concentration equal to or above 18,000,000 (eighteen million) times the daily minimum wage valid in Mexico City (DMWVFD – a reference value determined by the Minimum Wage Commission which can be consulted on their website or in the Daily Official Gazette of the Federation); (ii) it implies the accumulation of 35% or more of the shares or assets of an economic agent – as defined by the COFECE – whose annual sales in the territory of Mexico exceed 18,000,000 (eighteen million) times the DMWVFD; and (iii) the transaction implies the accumulation of assets or corporate capital exceeding 8,400,000 (eight million four hundred thousand) times the DMWVFD and the annual sales of the economic agents involved, jointly or separately, exceed 48,000,000 (forty-eight million) times the DMWVFD.

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

Yes, the procedure needs to undergo a parallel and simultaneous review. Such review is performed by internal areas of the DGAC and the COFECE. The DGAC review is governed by the Federal Administrative Procedure Law (*Ley Federal del Procedimiento Administrativo*). Revision by the COFECE is regulated by the Federal Competition Law (*Ley Federal de Competencia*).

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

If a transaction of the sort described in the above questions is to be carried out, two types of requirements should be met: antitrust and corporate. As regards antitrust requirements, in the case that the operation is significant in terms of volume of operations, income or consideration involved, then a formal notice must be filed before the COFECE which is the Mexican authority on antitrust and competition matters. On the corporate side, certain corporate acts must be executed in order for the merger, for example, to be valid: a merger agreement; shareholders' meetings; and registration with the Public Registry. Finally, it is worth noting that in the case that the parties involved in a merger hold permits or concessions granted by the Mexican authorities, then prior to the execution of the merger the authorisation of those authorities may be needed in order to prevent forfeiture of the rights concerning the permits or concessions.

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

If certain thresholds are met, the merger or full-function joint venture would be subject to the COFECE's approval, which would analyse whether the operation will have negative economic effects on the relevant market. If so, this authority may reject the operation or establish certain conditions that the parties must comply with in order for the operation to materialise. On the contrary, if the analysis leads the authority to consider that no harm would be caused to the relevant market, the authorisation would be issued and the parties would be free to formally execute all the corporate documents needed for such purposes. The COFECE has 60 days to issue its ruling once the notice has been filed or the additional information requests made by the authority have been complied with by the interested parties. The parties must pay a fee of around $8,000 USD for the COFECE to analyse the concentration notification.

Regarding corporate acts, the parties in the merger must first execute a merger agreement where they set forth the terms and conditions in which the merger would be carried out. Subsequently, a shareholders' meeting should be held by each party involved to approve the merger on the agreed terms, along with the financial statements that will be used for the merger. Finally, the parties must register the corporate resolutions before the Public Registry, considering that the merger will be effective only after three months of its registration. In the case that all the debts owed by the parties are covered at the time of the registration, the merger will have full effect without a need for the aforementioned waiting period. The estimated cost of the entire corporate process, including notary expenses and registration fees, would be of around $4,500 USD, depending on the characteristics of the operation.

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

There are no specific rules regarding the aviation sector.

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

No state subsidies are available; nor are these permitted by law.

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

Passenger acquisition, maintenance and handling is governed and regulated by the Federal Personal Data Protection Law (*Ley Federal de Protección de Datos en Posesión de Particulares*). Passengers have a right, and carriers a corresponding obligation, to determine how their personal information is to be treated. With a detailed scope, passengers can determine how their information is maintained and for what purposes it is authorised to be used, and may limit the transfer of such information or request its deletion or destruction.

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

Passenger data must be treated in accordance with the Federal Law of Personal Data Protection. It is important to emphasise that compliance with the law is mandatory for the acquisition, maintenance, use, distribution and destruction of data. Data loss is pursued and sanctioned in accordance with this law and the sanction will vary depending on the specific violation.

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

Industrial property – used as a general term – and intellectual property – broadly used – are protected by the Mexican Institute of Industrial Property (IMPI) and the Mexican Institute for Authorial Rights (INDAUTOR). IMPI protects trademarks, patents, trade secrets, industrial designs, trade names and any right related to industrial property. IMPI is the competent authority to file, pursue and solve any claim related thereto. INDAUTOR mainly deals with intellectual creations requiring copyright.

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

Yes, the Civil Aviation Law and the Regulations to the Civil Aviation Law directly regulate passenger rights amongst which denial of boarding is comprised. As a complement, the Federal Consumer Protection Law is applicable, as the relationship between an airline and a passenger is considered a commercial consumer affair.

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

The Civil Aviation Law and its regulations provide specific enforcing faculties for an air carrier to properly use and adhere to its arrival/departure schedules. Should a violation be detected and enforcement pursued, this would be done through the enactment of an administrative sanctioning procedure, performed and enforced by the DGAC. Parallel to the procedure which can be started by the DGAC, the Consumer Protection Agency (*Procuraduría Federal del Consumidor* – PROFECO) has legal authority to initiate a procedure on violations of the Federal Consumer Protection Law due to late arrivals and departures under the parameters set forth by the Civil Aviation Law.

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

Airport and airport authorities are governed by the Civil Aviation Law and the Airports Law and its regulations.

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

The relationship between an airport operator and a passenger would fall into the scope of the Consumer Protection Law (LFPC) so long as the passenger is considered a user of the services of the airport. In spite of this, an airline would be jointly liable as the relationship between a passenger and an airport is created because of the passenger using an airline.

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

The major computer reservation systems (CRSs), fixed-based operators (FBOs), ground handling and ancillary GDS service providers operate in Mexico.

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

GDSs, as long as they do not fall into the "investment – limited activity" areas of the Foreign Investment Law, have no specific regulations. Their relationship is commercially considered and general laws are thus applicable.

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

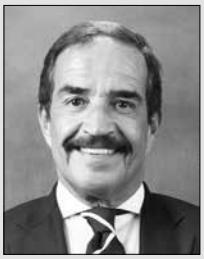
No vertical integration is permitted. Additionally, there is a direct prohibition against air service operating companies, their holdings or subsidiaries, owning or acquiring, directly or indirectly, the control of airports or airfields. In this regard, there is also a maximum allowed threshold of 5% of the stock capital of an airport concessionaire or permit-holder to own, hold or acquire stock capital in an air transport company.

5 In Future

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

There is an urgent need to broaden and reinforce the regulatory capacity of the General Bureau of Civil Aeronautics. The first step towards this goal is the creation of an autonomous regulatory civil

aviation authority and to date there is a project to create the Federal Civil Aviation Agency. In addition, it is necessary to perform a complete overhaul of the legislation directly regulating air transport to accommodate specialty activities and new technologies such as hot air ballooning and unmanned aircraft systems. These general amendments should also take into consideration the approach to passenger rights, in order to facilitate low-cost carrier models and bring them more into line with international practice and standards.



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Alejandro Zendejas Vázquez holds a Master's degree in advanced studies of International Air and Space Law from Universiteit Leiden, the Netherlands. He was admitted to practise law in 2001 and holds a B.A.-equivalent degree from Universidad Iberoamericana, Mexico City. His professional experience in the private sector has been focused primarily in the aviation industry. He worked for Interjet Airlines as a junior in-house attorney; later to be appointed Legal VP in Grupo Hawk Mexico, a private air transport company. Mr. Zendejas was later appointed as General Counsel for Vivaaerobus. In the public sector, Mr. Zendejas served as General Deputy Technical Director and General Counsel in the Civil Aviation Authority of Mexico (DGAC); he continued his public service career thereafter, being appointed as General Deputy Director for Air Transport and Aeronautical Control at the DGAC, where he was able to execute sundry bilateral air services agreements – amongst others, the Mexico-USA agreement – and key amendments to the Civil Aviation Law in relation to air safety and security, as well as the foreign investment law regarding the maximum allowable percentage of foreign investment capital. As of February 2016, Mr. Zendejas has been in private practice with Cervantes Sainz, S.C.

CERVANTES SAINZ

Cervantes Sainz is a full-service law firm with an extensive array of creative problem-solving techniques for optimum, lasting outcomes.

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Poland

Krystyna Marut

MMMLegal Legal Counsels

Anna Burchacińska-Mańko

1 General

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

Poland, as a European Union (EU) Member State, applies EU regulations. It is also a signatory to most international conventions in the field of aviation, including the Chicago Convention. The main piece of national law governing all issues regarding aviation is the Aviation Act (consolidated text Journal of Laws 2016.605, as amended). There are numerous implementing regulations issued by competent ministers, particularly by the Minister competent for transport. The President of the Civil Aviation Authority issues guidelines and instructions. Furthermore, the Polish Civil Code applies to matters of a civil nature not regulated in the Aviation Law, and the Polish Administrative Procedure Code applies to proceedings before the Civil Aviation Authority. The Polish Criminal Code as well as the Code of Petty Offences would apply.

The main regulatory bodies are the Minister competent for transport and the President of the Civil Aviation Authority (CAA). Both bodies constitute air authorities in the fields of European and international aviation. In practice, the President of the CAA would be addressed in all civil aviation issues. The President of the Office of Competition and Consumer Protection would be competent for fair competition and consumer protection issues, including those related to state aid, mergers and general conditions of carriage.

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

To obtain an operating licence, an air carrier should in particular:

1. comply with the requirements provided by EU Regulation of the European Parliament and of the Council No 1008/2008, including:
   a. obtain an Air Operator Certificate from the President of the CAA; and
   b. possess insurance required by law; and
2. file an application to the President of the CAA, together with the documents required by the Aviation Act and the implementing Regulation of the Minister of Infrastructure (Journal of Laws 2015.1398).

The motion for certification should be filed with the President of the CAA at least 90 days before the planned start of operations and, in the case of certificate extension, at least 30 days before the end of the certificate's validity. The proceedings concerning the operating licence can last up to three months after all documents required by law are delivered (as provided for under EU Regulation No 1008/2008).

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

In Poland, ICAO and EU legislation regarding air safety applies. In addition, air safety is regulated by the Aviation Act and the implementing regulations. The most important of these are related to the safety of aircraft and airport exploitation, construction requirements, certification, airworthiness, air accidents and air search and rescue (ASAR).

Airport authorities must have a Safety Management System manual. The European Aviation Safety Plan has not been implemented yet. The State Safety Programme compliant with ICAO Doc 9859 – Safety Management Manual (SMM) was approved by the CAA and the Minister competent for transport in October 2016.

In the scope not restricted to the European Air Safety Agency, air safety is primarily administered and supervised by the President of the CAA and the Minister competent for transport.

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

No, it is not.

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

In general, no. However, there are some differences relating to:

- requirements for obtaining carriage permissions; and
- the applicable air charges.

There is also a specific regulation regarding air carriage in package tour holiday and charter flights, which mainly focuses on charter agreements.

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

In general, there are no significant distinctions between operations

of domestic and international carriers. The major difference is regarding the supervision by the President of the CAA in the case of domestic carriers. The Aviation Act, however, distinguishes between carriers established within the EU, Switzerland and European Free Trade Association (EFTA) and European Economic Area (EEA) Member States, and those established in a third country, especially regarding carriage permissions and licensing (as provided for under EU Regulation No 1008/2008).

Airlines operating for reward chiefly on international routes can benefit from 0% VAT for the services and deliveries defined under the Polish VAT Act.

1.7 Are airports state or privately owned?

Airports in Poland can be state-owned and privately owned. The major public airports are:

- Warsaw Chopin (WAW, EPWA) – operated and owned by the Polish Airports State Enterprise;
- Kraków-Balice (KRK, EPKK) – operated by Międzynarodowy Port Lotniczy im. Jana Pawła II Kraków-Balice Sp. z o.o., owned by Polish Airports State Enterprise, Małopolskie Voivodship and several municipal self-government units;
- Gdańsk im. Lecha Wałęsy (GDN, EPGD) – operated by Port Lotniczy Gdańsk Sp. z o.o., owned by Pomorskie Voivodship, Polish Airports State Enterprise, and several municipal self-government units;
- Katowice-Pyrzowice Airport (KTW, EPKT) – operated by Górnośląskie Towarzystwo Lotnicze S.A. w Katowicach, owned by Węglokoks SA, Śląskie Voivodship, Polish Airports State Enterprise, ATENDE S.A. (ATM Systemy Informatyczne S.A.) and several municipal self-government units;
- Modlin (WMI, EPMO) – operated by Mazowiecki Port Lotniczy Warszawa-Modlin Sp. z o.o., owned by Polish Airports State Enterprise, Mazovia Voivodship, Military Property Agency and the City of Nowy Dwór Mazowiecki;
- Wrocław-Strachowice (WRO, EPWR) – operated by Port Lotniczy Wrocław S.A., owned by Polish Airports State Enterprise, the City of Wrocław, Dolnośląskie Voivodship; and
- Poznań-Ławica (POZ, EPPO) – operated by Port Lotniczy Poznań-Ławica Sp. z o.o., owned by Polish Airports State Enterprise, the City of Poznań and Wielkopolskie Voivodship.

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

No, they do not. However, aircraft operators have to comply with the airport data published in Aeronautical Information Publication (AIP Poland).

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

The Aviation Act contains the rules applicable to air accidents and air incidents compatible with international rules, including the Chicago Convention. EU regulations, particularly Regulations of the European Parliament and of the Council No 996/2010 and No 376/2014, apply.

Aviation accidents and incidents are dealt with by the State Commission for Aircraft Accident Investigation, which is an independent body established by the Minister competent for transport. The Commission investigates the circumstances and causes of accidents and incidents; it does not make judgments regarding guilt and liability.

The following entities are required to notify the Commission of an interruption in operation, a defect, damage to aircraft or components, or other circumstances that would or could affect the safety of a flight:

1) the operator or commander of the aircraft;
2) the entrepreneur engaged in the design, manufacture, maintenance or modification of the aircraft;
3) the person signing the certificate of airworthiness and documents related to inspections of the aircraft;
4) a provider of air navigation services;
5) the airport authority;
6) the ground handler;
7) a person exercising a function connected with the installation, modification, maintenance, repair, overhaul, flight-checking or inspection of air navigation installations, the safety of which the air supervision authorities are responsible for; and/or
8) Polish Armed Forces exploiting military airports, if used by a civil aircraft.

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

There has been a thorough discussion of the rules to govern seeking compensation under Regulation No 261/2004 and the issue of the limitation period for passengers' claims under Regulation 261/2004, as well as on proper usage of unmanned air vehicles (UAVs).

LOT Polish Airlines entered into strategic cooperation with Nordica Airlines.

Plans to establish a new central airport for Poland have been subject to discussion in the public domain. Polish Airport State Enterprise, the operator of the major airport (Chopin Airport) in Warsaw, is progressing its idea to create a duoport with Warsaw Modlin Airport.

2 Aircraft Trading, Finance and Leasing

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

Yes, it does. The aircraft register is an owner-type register, which means that the ownership is reflected in the registry documents. The registration certificate constitutes proof of ownership unless and until proved otherwise. In order to register the aircraft in the Polish aircraft register, a proof of ownership (e.g. a bill of sale) must be lodged.

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

There is no specific register for aircraft mortgages and charges. The mortgages over aircraft can be registered in a general mortgages register. Such registers are kept by 11 courts in Poland. The registers, together with the documents lodged in the register, are open and can be reviewed by anyone. However, it is impossible to view the register electronically (via the internet) at the present time. The mortgages are listed in the registers by one of the 11 courts, depending on the seat of the mortgager, following a short court proceeding.

The mortgages over aircraft are reflected in the Polish aircraft register.

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

The Polish aircraft register is an owner-type register. Any records (including deregistration of aircraft) can be made upon an owner's motion or by an attorney appointed by the owner.

No self-help remedies are permitted under Polish law – for more details please refer to question 3.2.

Certain limitations of the bankruptcy law need to be considered as well:

- it is presumed that items (e.g. aircraft) in a bankrupt's possession, at the date of declaration of bankruptcy, are the assets of the bankrupt; exemption from the bankruptcy estate requires a motion to/action of the court; and
- contractual provisions defining the declaration of bankruptcy as an Event of Default entitling the other party to immediate termination/change of a contract are not permitted.

As regards situations where aircraft could be subject to temporary retention/detention/seizure, please refer to question 3.1.

In certain circumstances, an aircraft owner may also be held liable for unpaid airport charges.

In case an owner or financier retains a right to decide on the issues of a flight's performance, he may be held liable for damages caused by the aircraft to third parties on the ground.

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

Poland is a signatory to the Montreal Convention. It is not a signatory to the Geneva Convention. In the case of the Cape Town Convention, Poland is not a signatory. However, the Cape Town Convention applies in the scope where the EU has exclusive competence such as: choice of law; recognition of judgments; and insolvency, etc.

2.5 How are the Conventions applied in your jurisdiction?

Conventions, being international agreements, constitute a source of law in Poland if they are ratified upon a previous statutory consent and published in the Journal of Laws. Once ratified and published, conventions overrule domestic law and are applied directly. The Warsaw and Montreal Conventions have been ratified and published and are therefore binding sources of law in Poland. They should be applied by natural and legal persons as well as state or administrative organs and courts. EU Regulation of the European Parliament and of the Council No 889/2002, adopting the provisions of the Montreal Convention within the EU, is also applicable.

3 Litigation and Dispute Resolution

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

An aircraft may be subject to temporary detention/retention/seizure, *inter alia*:

- aircraft may be detained by the President of the CAA in case of breach of safety regulations;
- aircraft may be detained by an airport authority for securing claims for airport charges or damages caused at the airport;
- aircraft may be retained by a person who is obliged to hand it over once such person's claims for reimbursement of outlays, and for remedy of damages caused by the aircraft, are satisfied or secured. This, however, does not apply if the obligation to hand over the aircraft results from tort or when the aircraft to be returned has been rented, leased or lent for use;
- aircraft may be retained by a lessee, in case the lease is rescinded, to secure claims for monies payable by the lessor (e.g. the return of a security deposit);
- aircraft may be seized upon a court decision (e.g. in an interim order procedure) or by a court bailiff in enforcement proceedings;
- it is problematic under Polish law whether an aircraft can be detained by Eurocontrol for non-payment of navigation charges; and
- in some emergency cases, including natural disasters, a possessor of an aircraft may be required to render it for military purposes (actions concerning the security or defence capability of Poland) – adequate compensation is available in the case of such requisition.

The Rome Convention of 1933 is also applicable.

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

There are no self-help remedies available to lessors or financiers to reacquire possession of an aircraft. Polish law protects the rights of the possessor (e.g. lessee). The lessee may revert to necessary defence in order to repeal a lawless infringement of his possession and, if threatened by a danger of irreparable damage, may, immediately after having been deprived of possession, revert to necessary "self-help" regimes in order to restore the previous state. The lessee may also file a claim to court requesting the restoration of his possession and withholding from infringements.

In case of involuntary repossession, a court order with an enforcement clause is required for aircraft repossession. Such order can be obtained in a regular court suit, which is a rather lengthy process. Previous submission of the lessee to enforcement regarding return of the aircraft can be used in order to facilitate the process. Such submission to enforcement is done in a notary deed which can be granted with the enforcement clause without lengthy regular proceedings. The enforcement clause is granted upon a motion, which should be recognised within three days.

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

In general, commercial suits (i.e. suits where plaintiffs and defendants carry out a business activity) in Poland should be filed to commercial divisions of courts having territorial competence. Consumer suits will be recognised by civil divisions of such courts. Depending on the value of a claim, a suit shall be directed to:

- the district court – where the value of the claim does not exceed PLN 75,000 (approximately EUR 17,500); and
- the regional court – where the value of claim is higher.

Criminal cases can, in general, be instituted by public prosecutors or the Police. Criminal cases are decided by criminal divisions of courts having territorial competence.

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

Generally, documentation in court proceedings is served to the address provided by the parties and if such address is not given – to the official company's address. Following appointment of an attorney (if such is appointed) – documentation is served to the attorney's address.

However, a party seated outside the European Union is obliged to either appoint an attorney seated in Poland or indicate an agent for process in Poland. Otherwise, court's summons, documents, letters and/or other communications shall be left in court files with the effect of being served.

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

Civil judgments are rendered upon a suit or motion. In general, it is necessary to file the following with the court:

- the claim, containing legal justification;
- evidence; and
- evidence of the court fee payment.

In some cases (e.g. money claims), simplified, summary or order procedures are available.

Interim measures are available in order to secure the plaintiff's claims. The plaintiff should specify a manner of securing the claim (e.g. arrest of accounts, or seizure of movables). The final decision with regard to security is made by the court. Under Polish law, no interim order can lead to the satisfaction of the claim. The security cannot overburden the defendant.

A valid and absolute court judgment needs to be granted an enforcement clause in order to be enforced by the Court Bailiff.

Usually, court proceedings in Poland are lengthy. The order procedures for money claims tend to be the shortest, as there are no hearings prior to issuing the order. However, in the case that a defendant files an objection, regular proceedings would commence.

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

Polish court proceedings are conducted in two instances. Judgments and some decisions of the first instance court can be appealed to the second instance court. In addition, in certain cases, a cassation claim to the Supreme Court is available.

Pursuant to the Polish Civil Procedure Code, foreign judgments are recognised and enforced by Polish courts following an application. The court would dismiss such application if, for instance: (i) the judgment is not absolute and enforceable; or (ii) recognition or enforcement would be manifestly contrary to public policy in Poland. Poland, as a Member State of the EU, applies Council Regulation No 1215/2012, and is also a party to the Lugano Convention.

Generally, arbitration awards are final. In order to be enforced, they are subject to recognition or certification of enforcement by a Polish court. Awards of Polish arbitration tribunals can be reversed by a Polish court on the complaint lodged by a party to the arbitration proceedings. The New York and Geneva arbitration conventions would also apply to such proceedings.

4 Commercial and Regulatory

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

The primary source of legislation is the Act on Protection of Competition and Consumers (consolidated text − Journal of Laws 2015.184 as amended). Poland also applies EU Council Regulation No 1/2003. These legal acts are applied in parallel.

Under the Act, any agreements which aim at or result in the elimination, limitation or other infringement of competition on a relevant market are prohibited (i.e. anti-competition agreements). Similarly, any abuse of a dominant position in the relevant market is prohibited. In cases where the practices may affect trade between Member States, Polish authorities must also apply Articles 101 (ex 81) and 102 (ex 82) of the Treaty.

The President of the Competition and Consumer Protection Office is a competent authority and can issue a decision ascertaining that certain practices restrict competition and ordering them to be stopped. On the basis of Council Regulation No 1/2003, the European Commission also exercises significant powers.

Polish law allows agreements, decisions and such other practices regarding air carriage freedoms as are provided in international agreements, as a condition for those freedoms. EU Council Regulation No 487/2009 also applies.

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

Under the Act on Protection of Competition and Consumers, in determining the relevant market, two criteria are applied: assortment market – the market of goods which, with regard to their destination, price and features, including quality, are considered as substitutes by the purchasers; and geographical market, which is offered in an area, where, due to its type and features, barriers in accessing the market, consumers' preferences, significant price differences and transport costs, a similar competition environment exists.

Each case is examined individually by the President of the Competition and Consumers Protection Office on the basis of gathered evidence. The "relevant markets" have a dynamic character – the decision of the President of the Competition and Consumers Protection Office defining the "relevant market" in one case cannot be treated as a precedent for future proceedings; it may merely be treated as a guideline.

There is not much Polish case law regarding mergers and acquisitions within the aviation industry.

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

The Polish Act on Protection of Competition and Consumers does not envisage such a possibility. The control of the President of the Polish Competition and Consumer Protection Office is exercised *ex post*.

The European Union Regulations, including Council Regulation No 1/2003 and Council Regulation No 487/2009, may be applicable.

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

The Polish Act on Protection of Competition and Consumers imposes an obligation to notify an intended concentration, i.e.:

1) the merger of two or more independent undertakings;
2) the acquisition – through the purchase of securities, shares or by any other means, of direct or indirect control – of one or more undertakings by one or more undertakings;
3) the establishment of a joint undertaking by the undertakings; or
4) the acquisition of assets, provided the minimum turnover threshold (calculated in respect of the territory of Poland or worldwide) is exceeded.

Poland, as a Member State of the European Union, also applies Council Regulation (EC) No 139/2004. If the turnover thresholds envisaged by this Regulation are met (Community-wide and worldwide), notification must be made to the European Commission (i.e., for concentrations with a Community dimension).

There are no general national limitations on foreign ownership in Poland. However, such limitations may be applicable in specified situations/sectors of economy, e.g. in the case of a public airport's owner or authority, where the Minister competent for transport can prohibit the acquisition of shares. For airlines, the requirements of Regulation (EC) of the European Parliament and Council No 1008/2008 shall apply.

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

The relevant authority to grant concentration clearance is the President of the Polish Competition and Consumer Protection Office. The procedure is instituted upon a motion. The fee is PLN 5,000 (approximately EUR 1,250). In theory, the procedure shall be finalised and a decision issued within two months. In practice, the procedure takes longer.

A decision of the President of the Polish Competition and Consumer Protection Office refusing clearance can be appealed to the competition and consumer protection court within two weeks of delivery.

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

The aviation act allows financial support for airlines and airports or other undertakings in the field of aviation safety, i.e. the purchase of equipment necessary to ensure safety in aviation. Airport developments can also be subsidised. There is also a possibility to impose a public service obligation on airports and airlines. The support to air operators and airports is governed by the EU rules (principally, the Communication from the Commission, Guidelines on State aid to airports and airlines).

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

Public service obligations can be imposed over regular air carriage between two airports in Poland or between an airport in Poland and an airport within the EU, and can be subsidised. The criteria are governed by the EU rules, especially Regulation of the European Parliament and of the Council No 1008/2008. Airport authorities can apply discounts on particular routes, in compliance with European rules.

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

The Act on Personal Data Protection (consolidated text Journal of Laws 2016.922) is a primary regulation in this respect. It specifies in detail the requirements for personal data processing which must be met by data administrators (e.g. airlines), and defines situations where personal data processing is permitted, which include, *inter alia*, processing upon consent or in performance of the agreement.

The passengers are, *inter alia*, entitled to:

- receive information on the data files and the administrator (name and address);
- receive information on the purpose (including anticipated recipients), scope and method of data processing;
- receive information on the data content and the date when processing was started;
- receive information on whether giving personal data is obligatory or voluntary (if obligatory, the legal basis must be stated);
- receive information on the source of data;
- access and correct data; and
- request to stay the processing of data or to remove data.

Personal data files must be registered in a public register maintained by the General Inspector for Personal Data Protection.

Data processing by computerised reservation systems (CRSs) is also regulated by specific law provisions from European Parliament and Council Regulation No 80/2009. Information concerning identifiable individual bookings shall be stored offline within 72 hours of the completion of the last element in the individual booking, and destroyed within three years.

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

Administrators who, intentionally or unintentionally, breach the duty to protect data from being taken by an unauthorised person, damaged or destroyed, can be subject to a fine, restriction of freedom or imprisonment for up to two years.

Passengers whose data is lost can also institute civil claims for compensation against the administrators.

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

Patents for inventions and protective rights for trademarks are covered by the provisions of the Industrial Property Law (consolidated text Journal of Laws 2013.1410 as amended). Patents are granted for inventions which are new, inventive and have an industrial application. In order to receive patent protection, an invention shall be notified to the Patent Office. The holder of a patent has a right to exclusive commercial or professional use of the invention within the territory of Poland. The duration of a patent is 20 years.

A trademark is a graphical identification allowing for the distinction between products. In order to receive a protective right, a trademark shall be notified to the Patent Office. The holder of a registered trademark has a right to exclusive commercial or professional use of the trademark within the territory of Poland. The duration of a protective right is 10 years, but this can be prolonged.

The Polish Patent Office carries out proceedings regarding the protection of international trademarks in the scope envisaged by the Madrid Agreement (1891) and Protocol (1989) concerning the International Registration of Marks.

In the course of the proceedings before the Patent Office, the applicant can be represented exclusively by a patent agent (*rzecznik patentowy*). Final decisions of the Patent Office can be appealed to administrative courts.

Creative works are also protected by the Copyright Act.

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

The Aviation Act, for matters connected with the denial of boarding rights, refers to EU Regulation of the European Parliament and of the Council No 261/2004.

Passengers to whom boarding is denied have a right to reimbursement of the cost of the ticket and the re-routing. Passengers to whom boarding is denied against their will are also entitled to:

1. lump-sum compensation; and
2. care (e.g. meals and refreshments, hotel accommodation, communication means).

The claims of passengers are individually decided by the CAA (Commission on Passengers' Rights). In order to file a complaint to the CAA, a passenger must first file a claim to the airline. The CAA issues first- and second- (upon motion for reconsideration) instance decisions. The final decisions of the CAA can be further appealed against to the administrative courts, which again can issue verdicts in first and second (upon appeal) instance.

Following the Supreme Court verdict, passengers can also file claims for compensation under Regulation No 261/2004 to the civil courts (bypassing the CAA). This impairs business as the claims are sometimes filed to the CAA, sometimes to civil courts and sometimes to both. It should be noted that the courts are not obliged to honour the CAA verdict, also with regard to qualification of extraordinary circumstances. The airlines incur the significant financial and organisational burdens of this situation. There is a legal dispute about whether passenger claims are subject to an expiry period or not and if so, what the expiry period is.

The CAA imposes fines on air carriers for breach of the Resolution. The fines amount to between PLN 200 and PLN 4,800. As the fines are imposed separately for the breach of each duty (e.g. duty to pay compensation, duty to provide care) and separately in respect of each individual passenger, their cumulated amount can be very significant.

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

Similar to denied boarding rights, cancellation and long delays are regulated by the Regulation of the European Parliament and of the Council No 261/2004. The practice is also significantly influenced by the verdicts of the European Court of Justice, which have largely extended the Regulation's applicability.

The Regulation provides for a number of entitlements to passengers whose flights were delayed or cancelled, for example:

1. reimbursement of ticket cost and re-routing;
2. care (e.g. meals and refreshments, hotel accommodation); and
3. lump-sum compensation (whereas the Regulation provided for a right to compensation only to passengers of cancelled flights, the Court of Justice of the European Union (ECJ) ruled that passengers of flights delayed by more than three hours in arriving at their final destination shall be entitled to compensation on the same terms and conditions as passengers of cancelled flights).

Claims by passengers are individually decided by the CAA (Commission on Passengers' Rights) or by the civil courts – for more detail, please refer to question 4.11 above. Fines are also applicable – please refer to question 4.11.

The CAA and the courts apply a pro-consumer approach in interpreting the "extraordinary circumstances" which could exempt a carrier from the obligation to pay lump-sum compensation. Following recent judgments from the Court of Justice of the European Union (such as van der Lans C-257/14 and Siewert C-394/14), the jurisprudence became even stricter.

Passengers of delayed flights may also request compensation under the Montreal Convention.

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

Airport authorities are governed by the Aviation Act and by implementing regulations issued by the competent minister. In general, the airport authority is responsible for assuring safe air operations for the airport, including in the required scope of airport infrastructure, the fire brigade, medical protection, safety and security, and environmental requirements (including noise restrictions).

The Aviation Act also regulates constitutional requirements regarding the airports, both in relation to establishing the airport and to operating the airport. The requirements depend on the airport's type, i.e. whether it is an exclusive usage airport (open to those registered in the airport register) or a public airport (open to all air operators within the airport limits, relevant for commercial flights).

In general, state, municipal or private undertakings, with their seat/domicile in Poland or another EU country or the Swiss Confederation or a Member State of the EFTA (a signatory of the EEA Agreement), can establish and manage public airports in Poland. However, some foreign ownership limitations apply in the case of airport owners and airport authorities. The Minister competent for transport has some important powers regarding the acquisition of shares in a public airport authority, as well as the undertaking establishing or owning such an airport. The same applies to disposing of an asset which is important for the functioning of the airport. Actions taken against the ministerial decisions are void. The next limitation concerns the ownership of real estate of international airports with a continuous state border. Such a piece of land can be owned only by the State Treasury or other state units, municipal units or commercial companies where such undertakings own at least 51% of shares.

In order to commence operating the airport, an entity has to obtain:

1. a certificate confirming the safe operation of the airport, mainly in accordance with Annex 14 to the Chicago Convention and Regulation of the European Parliament and of the Council No 216/2008 WE, granted by the President of the CAA;
2. an operating permit granted by the President of the CAA;
3. an airport charges scheme, consulted on with airport users and approved (or not contested) by the President of the CAA; and

4. operational contracts with providers of air traffic control services, ground handlers and border guard services.

The application for the certificate should be lodged no less than 90 days before the planned commencement of operations. The procedure to obtain a permit to operate the airport should last no longer than 30 days, but this term can be prolonged by the CAA. The procedure to consult airport users about airport charges should last at least 30 days, and the scheme should be presented to the President of the CAA 40 days in advance.

Following the entering into force of the EU Regulation No 139/2014, airports have to prepare for certification in terms of their organisation and functioning, under the rules established by the European Air Safety Agency (EASA). Under the new rules, certification has to be completed by all airports by the end of 2017.

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

Provisions of general legislation regarding consumer protection are applicable.

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

The major GDSs operating in Poland are: Amadeus (Amadeus Polska Sp. z o.o.); Galileo and Worldspan (operated by Travelport); IBE; Navitaire; and Sabre (Sabre Polska Sp. z o.o.).

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

Under the Polish Aviation Act, CRSs shall be used in such a manner that:

- they meet the requirements of transparency, equality and fair competition among the carriers and CRS operators; and
- they ensure the widest choice to users.

Entities enjoying access to a CRS are bound to protect personal data and cannot process such data without a user's consent.

CRS activities are supervised by the President of the CAA.

EU Regulation of the European Parliament and of the Council No 80/2009 also applies. Under the Regulation, every CRS operator shall, every four years and, in addition, upon request from the Commission, submit an independently audited report detailing the ownership structure and governance model.

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

Generally, under the Polish Aviation Act a public airport operator may not conduct air carriage activities. The purchase of shares in an entity owning and/or managing an airport falls under the supervision of the Minister competent for transport, and may require notification to the Minister under pain of nullity (for details please refer to question 4.13).

Regarding vertical integration and/or cooperation, general provisions of competition and consumer protection law shall apply; for example, vertical agreements impairing competition are prohibited. However, vertical agreements may be admitted provided they meet criteria detailed in the Regulation of the Council of Ministers on exclusion of certain types of vertical agreements from the prohibition of agreements limiting competition.

The Council Regulation No 487/2009 shall also apply.

5 In Future

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

We expect an amendment to Regulation No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and cancellation or long delay of flights, to be implemented within the EU. We also expect an amendment to the Polish legislation addressing local issues connected with the practical application of Regulation No 261/2004, particularly regarding a clear manner in which to seek compensation, and regarding the relevant limitation period.

Due to huge interest in unmanned air vehicles (UAVs) both in Poland and within the EU, more specific legislation regulating usage of UAVs can be expected.

We also expect exclusive-usage airports to open for certain commercial operations.

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MMM LEGAL
Legal Counsels

MMMLegal was founded in 2008 by three practising aviation lawyers – Edyta Michalak, Krystyna Marut and Anna Burchacińska-Mańko. The idea was to provide highly specialised legal expertise to the business entities acting in the rapidly developing Polish aviation market, including, in particular, airlines and airports. MMMLegal provides clients with a wide range of legal assistance in the domain of aviation, encompassing, *inter alia*, regulatory, commercial, operational, financing, liability and safety issues. They also offer professional assistance in many legal aspects related to the aviation business, such as labour law, data protection regulations, intellectual property, etc. Their expertise covers Polish, EU and international regulations. MMMLegal are also actively engaged in popularising aviation law in Poland through publications and lecturing.

Portugal

GDP Advogados

Francisco de Sousa Alves Dias

1 General

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

The main regulatory body for aviation in Portugal is the *Autoridade Nacional de Aviação Civil* ("ANAC"), which is the Portuguese Civil Aviation Authority. Notwithstanding, specific matters may be dealt by other authorities, such as competition, under the *Autoridade da Concorrência*, or tour operators acting under the supervision of *Turismo de Portugal, I.P.* Specifically, ANAC has the following functions:

- All licensing and supervision of an airline's activity.
- All licensing and supervision of activities related to aviation.
- The promotion of safety and security.
- Representation of the Portuguese state at the European Union and other international organisations.

Other activities carried out by ANAC are performed in cooperation with the above-mentioned bodies.

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

Operating licences for carriers have to be requested to ANAC and the request should follow the procedures established in EC Regulation n.º 1008/2008. The process should be performed equally for the obtainment of the carrier's air operator certificate ("AOC"), which should be a more lengthy process than the licensing itself.

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

Since Portugal was part of the Joint Aviation Authorities ("JAA") and is a member of the European Union, the principal pieces of legislation are now found under European Aviation Safety Agency ("EASA") regulations that, due to their extent, will be not fully described here. The main body responsible for overseeing air safety is ANAC: it is responsible for inspecting and approving all aircraft use, personnel licensing, maintenance procedures and operational facilities, as well as insurance.

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

The European Regulations apply in the same sense to all air operations despite different regulatory requirements as set out in the mentioned regulations for each type of aircraft operation. All operations are under ANAC supervision and airworthiness certification is required irrespective of the activity pursued.

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

In regard to market access exclusively, different legislation applies for commercial permits to operate commercial, private and cargo air transport. Also, within commercial operations, different procedural regulations apply to scheduled and non-scheduled flight permissions, notwithstanding the licensing process for the carrier being the same.

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

No; however, each international operator is advised to confirm the applicable bilateral agreement for specific limitations that might have been agreed upon and may be subject to safety inspections based on the Portuguese application of Directive 2004/36/CE. It should also be mentioned that all European carriers licensed under EC Regulation n.º 1008/2008 have the same treatment as nationals.

1.7 Are airports state or privately owned?

Airports are state-owned; however, they have been privately managed by Vinci Airports since 2013.

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

No special requirements apply. General noise abatement procedures and slot allocation procedures should be confirmed in advance. Also, in the past, during the summer season, Notices to Airmen ("NOTAMs") have been issued with regard to parking restrictions at Lisbon airport.

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

ANAC is the main responsible entity concerning safety and rescue operations. A specific body exists for the prevention and investigation of accidents ("GPIAA"). Both ANAC and GPIAA should be notified within six hours of accidents or incidents. Decree-Law n.º 318/99 and EU Regulation n.º 996/2010 apply.

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

Yes. In the past four years, all airport management has been delivered by Vinci Airports and the national flag carrier has been through a privatisation process, with a change in government policy during the process. This highlights the fact that air transport regulation is still, notwithstanding the EU free market, subject to a high degree of political interference. In addition, the Civil Aviation Authority has changed in terms of its duties and responsibilities, as it is now considered an administrative authority. Soon a new regime is expected to be approved, which will entail an increase in the service fees charged by ANAC.

2 Aircraft Trading, Finance and Leasing

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

Yes. Ownership should be registered in the *Registo Aeronáutico Nacional* managed by ANAC and the following documents must be presented:

- aircraft bill of sale;
- customs release certificate for non-EU registered aircraft;
- cancellation of previous registration;
- photos of the aircraft; and
- registration application form.

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

Although a specific registry for mortgages and charges does not exist, the registry mentioned in question 2.1 expressly includes the indication of mortgages and charges on the aircraft and engines, and they can be registered; Portugal is a single registry state, therefore no further registrations are needed. A document duly notarised, providing proof of the mortgage, is required.

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

There are no particular regulatory requirements; general requirements for the leasing of aircraft by Portuguese operators are detailed in National Regulation n.º 832/2010. The applicable tax regime should, however, be taken into consideration.

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

Portugal is a signatory to the Montreal and Geneva Conventions. Portugal is not a party to the Cape Town Convention.

2.5 How are the Conventions applied in your jurisdiction?

In procedural terms, the Conventions function through the civil or criminal courts, as they materially apply in the Portuguese jurisdiction.

3 Litigation and Dispute Resolution

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

The creditor will have to apply to court. Forms of ancillary relief, which allow for the seizure of the assets, are available to the lessor pending the outcome of the proceedings.

A specific regime is available to the airport authority for detaining the asset in case of unpaid airport liens and, as Portugal is a party to the Geneva Convention on the International Recognition of Rights in Aircraft, a creditor can opt for foreclosure under the provisions of the Convention, and such credit takes priority over all rights in the aircraft.

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

No self-help remedies are available under Portuguese law; lessors or financiers should apply to court.

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

In Portugal, there is a distinction between civil and criminal courts and they have different rules, although a civil demand can be presented together with criminal cases under certain conditions. Civil action is available, with courts varying according to the value of the dispute. There is no minimum value for a court case. Specific commerce matters may be referred to a specific court.

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

As Portugal has a civil law system, service of process is performed by the court directly after a legal action is started. These apply to all parties independently of whether they are domestic or foreign.

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

Interim relief measures may be obtained from civil courts, such as a right to hold the aircraft ("*arresto*") or generic measures to protect

the claimant's right, if such right is endangered, until the final court decision is made. On a final basis, any general right can be declared by the court, from the repossession of the asset to a decision on an agreement default.

In respect of arbitral tribunals there is a broader basis for interim relief compared to civil courts, since these legal grounds justify any measure necessary to preserve the rights in dispute. However, unless voluntarily complied with by the counter-party, only a civil court can enforce them. In regards to a final decision by an arbitral tribunal, it can decide on the substantive matter presented to it as long as part of the original claim is presented. To enforce the arbitral tribunal decision, however, recourse to the civil courts is needed.

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

Decisions from the civil court are always allowed at least one possibility of appeal. If the second decision does not confirm the first court decision or, when confirming it, it does so on different legal grounds than the first decision, a second appeal is allowed by the law. It should be noted that the possibility of appeal exists in both the final as well as the interim decision of the court, and its effects may suspend, or not, the previous decision based on the effects of the decision in question and the grounds of appeal.

In respect of an arbitral tribunal the decisions are final; a party may, however, claim the decision to be null at a civil court. Such claim is limited to the cases previously determined by law and can either be based on the form or merit of the decision. If the claim is based on form, the civil court may decide on it; however, if it is a matter of merit, a new arbitral tribunal has to be formed to decide on the case's merit.

4 Commercial and Regulatory

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

Most joint venture agreements in Portugal are non-equity and non-corporate, usually referred to as "*consórcios*", and they are considered under the same conditions as company concentration in accordance with the national applicable legislation. They have to be previously notified to the competition authority if they obtain a market share greater than 30% and/or have a total business volume above or equal to 150 million euros, and/or at least two companies have a business volume above 2 million euros. Considering the airline sector, these thresholds are easy to reach.

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

For the determination of the "relevant market", the decision of the Portuguese competition authority regarding the purchase of PGA by TAP sheds some light on the issue. According to that decision, for scheduled commercial flights, the relevant market includes all routes operated by the air carrier, and each route or destination is treated as a separate market. The decision of the Commission on the Air France-KLM merger should also be used for reference in future mergers and acquisitions.

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

Previous clearance from the Portuguese Competition Authority does not need to be obtained; however, prior to any operation, a preliminary recommendation by the Authority can be requested.

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

Mergers, acquisition mergers and full-function joint ventures are closely monitored by the competition authority in order to maintain proper functioning of the market. Mergers of 50% or more, or mergers between 30% and 50% where the total business volume of one of the two companies is greater than 5 million euros, have to be notified to the Authority. Approval is generally granted, except when the Authority considers that dominant positions may arise. General remedies applied by the Authority are either interim remedies, suspending the operation, or coercive measures, which can go as far as prohibiting the operation or ordering the demerging of the undertaking. Charges and fines have also been applied.

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

Notification is presented in accordance with the specific form approved by National Regulation n.º 60/2013. In cases of full acquisition, the burden of notification rests on the purchasing company, whereas in partial mergers both companies have the burden of notification; however, they must use a single notification representative.

The notification should be made after agreement has been reached but before the merger or acquisition takes place. Where applicable, it should be made after the publication of the mandatory notice of public offer on the company or, when the company shares are admitted for negotiation on the regulated market, after the announcement of the purchase intention.

Simpler notifications and/or those without an interested third party may be decided under a simplified procedure, and a final decision should be published within 30 business days of the notification. For more detailed investigations, final decisions should take 90 business days. If the Authority requests additional information, deadlines are suspended until a reply is delivered to the Authority.

Notifications have a specific cost which is calculated in accordance with National Regulation n.º 1/E/2003.

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

All limitations on state aid, and competition rules, that derive from the European legislation, apply to their full extent in Portugal. Portugal does not have a sector-specific procedure and general competition rules apply.

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

Yes, routes between the Portuguese mainland and the islands of Madeira and the Azores are Public Service Obligation ("PSO")

routes. There are also state subsidies for airlines flying to specific aerodromes in the territory of the Portuguese mainland. These have specific rules for application and any Community carrier is allowed to apply. In the case of mainland routes, the Portuguese government provides compensation to the air carriers operating the route through a percentage of the ticket price. In respect of Madeira and the Azores, the government subsidises a percentage of the airfare directly to the passengers.

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

Until the approval of the EU Directive for PNR data and its applicability in Portugal, passenger name record ("PNR") data is currently governed by the *Comissão Nacional de Protecção de Dados* ("CNPD") and Law n.º 67/98. Data is transferred by airlines to third states when required by these third states; its use and regulation will depend on the existence of an agreement for such use and retention.

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

Airlines which collect data are required by law to protect the data, once collected, from loss or theft. In case of loss, sanctions may be applied by the CNPD.

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

Registration of intellectual property in Portugal is valid only for the Portuguese territory. However, Portugal is a party to the Paris Convention for the Protection of Industrial Property ("CUP") and a member of the World Trade Organization, and a request presented in Portugal can be presented in other party/member states with the respective priority claim.

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

For cases of denied boarding, EC Regulation n.º 261/2004 will apply.

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

The Civil Aviation Authority has the power to verify if airlines comply with the Regulation; passenger claims are dealt under the civil courts.

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

With regard to an airport concession, the concession agreement dated 14 December 2012 is a useful document for consultation as well as the general basis for its concession set in Decree-Law n.º 254/2012. All remaining rules pertaining to passenger security, charges, air traffic and environmental protection are now ruled by European law. Besides investment requirements usual to concession agreements, it should be also noted that the increase in charges is limited to the criteria previously defined by ANAC. Finally, International Civil Aviation Organization ("ICAO") obligations imposed regarding non-discrimination of users of airports must also be fully complied with.

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

Such legislation applies to its full extent. Specific aviation legislation, such as EC Regulation n.º 261/2004, will apply primarily due to the principle of *lex specialis*.

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

Several suppliers operate, namely:

- Amadeus.
- Galileo.
- Sabre.
- Worldspan.
- Travelport.

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

No, there are no such requirements.

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

Considering that airports have always been directly managed by the state, as has the main national airline, the question has never been fully discussed in Portugal. However, we do not see, on initial reflection, that it would not be allowed. Certain remedies applied by the European or national competition authority could, however, arise to assure equal treatment between all operators.

5 In Future

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

We would call all interested parties' attention to the consequences of the national airline's privatisation, which has demonstrated a governmental policy towards aviation where interference in the functioning of the market is still done with a certain ease. Also, considering the traffic data for Portugal, we continue to see a steady growth in low-cost carriers, particularly in Lisbon where the tourist sector has had a tremendous increase in the past two years. This trend is definitely worth a closer look. Talks about opening a second airport in the vicinity of Lisbon are far from new, but despite all projects being suspended after the 2013 crisis, with the current easing of the economic situation and the increase in traffic into Lisbon, the topic seems to be returning to the public agenda. Finally, the increase in charges applied by ANAC may increase the cost of certifying an operator in Portugal which, at the present time, is extremely low and appealing to foreign companies interested in being certified under an EU registry.

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GDP Advogados aims to offer a wide range of quality legal services in a professional way, having a special focus on the expansion of the European Internal Market and the consequent evolution of commercial relationships, as well as on the new international challenges resulting from the growing complexity of commercial and personal relationships worldwide.

We have an innovative vision in this respect, regarding the creation and the expansion of contacts and international networks, whether through participation in various European and international associations, or through membership of Libralex EEIG – a network of law firms from several European jurisdictions, the USA, Brazil, Lebanon and China. Our presence in Libralex also enables clients to have access to fast legal services, in an effective manner and with a guarantee of high quality in any of those jurisdictions.

Currently, GDP Advogados is mostly focused on Commercial and Corporate Law, Transport Law, Trade Law, Dispute Resolution, Intellectual Property, Real Estate and Private Client assistance.

Romania

Mihai Furtună

ONV LAW

Ioana Anghel

1 General

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

In Romania, the general legal framework regulating aviation law is structured on three levels: national, European and international.

Romanian aviation law is in compliance with EU/EUROCONTROL/EASA Regulation.

The Romanian Civil Air Code (GO no. 27/1997, as further amended) represents the main regulation at the national level, setting forth general rules which are applicable in the field of civil aviation.

The state authority in the aviation field is the Ministry of Transportation, which has delegated some of its duties to the Romanian Civil Aviation Authority. The Romanian Civil Aviation Authority (RCAA)'s main duties include the application of national aviation regulations and monitoring compliance therewith by aeronautical operators, as well as the implementation of international covenants and agreements to which Romania must adhere.

The RCAA, together with the Defence Ministry, coordinates the use of Romanian air space by civil and military aviation.

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

At the European level, the required conditions for obtaining an operating licence are provided under (EC) Regulation no. 1008/2008 governing mutual rules for the operation of community air services. Order no. 808/2011, issued by the Ministry of Transportation, sets forth the procedures to award, discontinue or withdraw the operating licence at the national level. The application to obtain an operating licence shall be submitted to the Ministry of Transportation and Infrastructure – General Directorate of Civil Aviation, and the conditions that shall be met by the company with a view to obtaining such a licence are enumerated hereunder:

- its main headquarters are located in Romania;
- it owns an available air operator certificate (AOC);
- it owns one or several aircraft, either in virtue of a property title or under a dry lease agreement;
- its main object of activity is either the exclusive operation of air services or it may be combined with any other commercial use of the aircraft or aircraft repair and maintenance activities;
- the structure of the company shall allow the state authority to enforce the provisions of (EC) Regulation no. 1008/2008 in respect of the operating licence;
- EU Member States and/or residents thereof shall own over 50% of the share capital in the company and shall exercise direct or indirect control thereon, except in the case of the existence of an agreement entered into with a third country to which the EU is a party;
- compliance with the financial conditions as set forth in Article 5 of the Regulation;
- compliance with the requirements provided in Article 11 of (EC) Regulation no. 785/2004; and
- compliance with the requirements on goodwill as set forth in Article 7 of the Regulation.

An operating licence is available as long as the air carrier meets all of the above-mentioned conditions.

The General Directorate of Civil Aviation is entitled at all times to assess the financial outcomes of an air carrier to whom it granted the licence, under which the authority may discontinue or cancel the operating licence in the event that it is doubtful whether such an air carrier may comply with its existing or prospective obligations over a 12-month term. Nevertheless, the competent authority may issue a temporary licence for a maximum of 12 months until the financial restructuring of the community air carrier has been completed.

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

Air safety is governed by the European regulation related to air safety ((EC) Regulation no. 216/2008, (EU) Regulation no. 965/2012, etc.) and also by the national legislation, namely the Romanian Civil Air Code and secondary legislation implementing the European rules.

According to (EC) Regulation no. 216/2008, the European Aviation Safety Agency (EASA), founded in 2002 by the EU, is responsible for the proper functioning and development of civil aviation safety and cooperates with the national authorities in air safety matters.

In Romania, the body responsible for flight safety oversight is the Romanian Civil Aviation Authority, having the following main duties:

- drafting air safety regulations and overseeing the implementation of such regulations;
- air operator certification, aviation personnel licensing and aeronautical product, part and appliance certification;
- aerodrome certification;
- flight safety inspection; and
- civil aircraft registration.

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

No. Our domestic law does not distinguish between commercial, cargo and private flights when it comes to flight safety; therefore, all air transport operators are subject to ongoing certification and supervision by the Romanian Civil Aviation Authority, pursuant to the provisions of the Civil Air Code.

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

No, they are not.

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

According to the Romanian Civil Air Code, all aircraft operating in the national air space are obliged to pay a fee in order to use air navigation services. All such fees are non-discriminatory for the same categories of civil flight, irrespective of the nationality of the air operators or of the state where the aircraft was registered. The Ministry of Transportation has the right to temporarily deny access to the national air space for aircraft operators who have failed to pay the fees to use air navigation services.

1.7 Are airports state or privately owned?

Airports are both state- and privately owned. Most airports in Romania operate under the authority of the Ministry of Transportation or local county councils. Bucharest Banaesa International Airport – "Aurel Vlaicu" and Bucharest "Henri Coanda" International Airport are administered by the Bucharest National Airport Company, in which the Romanian state owns 80% of the shares. Other airports are administered by state-owned companies, for example Sibiu International Airport or Cluj "Avram Iancu" International Airport.

Tuzla Airport is the only private airport in the country.

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

Yes, they do. In Romania, according to the Civil Air Code, airport administrators set certain charges for the use of facilities and services provided by airports. Nevertheless, there are certain aircraft which are exempt from the payment of such fees, for example: Romanian military aircraft; foreign military aircraft which operate under bilateral agreements (exemptions are applicable only to airports where the Romanian state is the controlling shareholder); and aircraft that carry out humanitarian and emergency aid operations.

In the event that a civil aircraft fails to comply with these pecuniary obligations, airfield administrators have the right to confine such an aircraft to the ground until the debts are written off or until a satisfying security interest is given.

Moreover, the Ministry of Transportation has the right to restrict the operation of civil aircraft on Romanian airports or in the Romanian air space, with a view to protecting the environment. Following an application by the administrator of the airfield, the Ministry of Transportation is entitled to approve temporary measures and waivers, thus allowing the operation of civil aircraft despite a significant impact on the environment.

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

The national legislation regulates air accidents under different acts, among which the most relevant are the Romanian Civil Air Code and G.D. no. 741/2008 for the approval of the Regulation of 9 July 2008 on emergency management generated by civil aviation accidents.

The Romanian Civil Air Code states that the Investigation and Examination Centre for Civil Aviation Safety is the authority in charge of managing, coordinating and performing technical investigations as a result of civil aviation events with a view to determining the facts, the causes and the circumstances that led to the accident, as well as identifying prevention measures. It should be noted that this technical investigation is independent from criminal or disciplinary investigation.

The Regulation of 9 July 2008 on the management of emergency situations caused by the occurrence of a civil aviation accident is a special regulation setting forth the procedure that must be complied with, as well as the main institutions with duties in the management of air accidents, namely:

- The structures that provide alerting services (Romanian Administration of Air Traffic Services – ROMATSA, the National Company of Maritime Radio communications, RADIONAV S.A., and the Special Communications Service).
- The units responsible for coordinating rescue operations depending on the place where the accident occurred.

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

Yes, there have been – especially over the past year, during which the number of international routes departing from the regional airports has increased; for example, LOT Polish Airlines have started operating from Cluj "Avram Iancu" International Airport.

Also worth mentioning is the Competition Council, which started two investigations this year in the aviation industry: one on a possible abuse of dominant position by "Regie Autonoma" at Cluj "Avram Iancu" International Airport, consisting in a possible refusal by "Regie Autonoma" to grant the access to airport infrastructure which is necessary for providing ground handling services; and the other having as its subject the alleged anticompetitive agreement between three companies that have restricted competition on the commercial services market of Bucharest "Henri Coanda" International Airport by concluding long-term joint venture contracts containing clauses that may have had an anticompetitive effect.

Finally, the most recent notable development took place in September 2016, when the Romanian Government adopted the General Transport Master Plan of Romania, which sets out the strategy for investment in airport infrastructure; namely, which airports will benefit from public funds for investment, and what kinds of investment will be carried out.

2 Aircraft Trading, Finance and Leasing

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

No, it does not. According to the national legislation, civil aircraft registration does not entail the emergence of rights, and its sole effect lies in the fact that the registered rights may be opposed to third parties.

Furthermore, Civil Romanian Air Regulation no. RACR-47, "Registering civil aircraft", edition 3/2007, sets forth that the civil aircraft registration and the registration certificate do not constitute proof of legal title or ownership of a civil aircraft in the case of litigation whose cause-at-issue is ownership of title in that particular aircraft.

Proof of ownership of the aircraft may only be made by the actual or legal owner thereof, and it may range from a title of property, a sales agreement, a final court decision or any other legal document whereby ownership is transferred, or a title of ownership – whereby possession and a usage right in the aircraft are transferred.

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

There is no separate register of mortgages and charges attached to aircraft. According to the Air Code and subsequent legislation, and Civil Romanian Air Regulation no. RACR-47, "Registering civil aircraft", edition 3/2007, mortgages or charges that are attached to aircraft are registered in the Civil Aircraft Register.

The Civil Aircraft Register includes a "mortgages and charges" section, based on the notices received from the agent at the Charges Registry, according to the procedures imposed by the Romanian Civil Aviation Authority as regards application and notice registration in the charges document of the aircraft.

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

There are no special requirements, as civil common law provisions and clauses specific to lease agreements are applied as prescribed under the Romanian Civil Code and special laws regulating financial lease agreements under GO no. 51/1997.

As regards lessors, the lease agreements entitle them to a writ of execution, provided that the lease agreement is concluded in an authenticated form. Consequently, in the event that the lessee is in default under the lease agreement, he/she may be executed against rent payment without the interference of the court.

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

Romania is a signatory to:

- The Geneva Convention of 19 July 1948, to which it adhered following the enactment of Act no. 64 of 13 July 1994.
- The Montreal Convention of 28 May 1999, ratified by GO no. 107/2000, which was approved by Act no. 14/2000.
- The Convention on International Civil Aviation Organisation (ICAO), to which Romania adhered in 1965.
- The International EUROCONTROL Convention on air safety cooperation and the "Multilateral agreement regarding air fees" (concluded in Brussels on 12 February 1981), to which Romania adhered in 1995.

Romania is not a party to the Cape Town Convention. Nevertheless, there is a bill on the adherence of Romania to the Cape Town Convention which is currently under consideration and will probably be passed this year.

2.5 How are the Conventions applied in your jurisdiction?

Acceding to the Romanian Constitution, the treaties ratified by the Parliament become part of the domestic legislation. Therefore, the provisions of the conventions to which Romania is a party are directly applicable in the Romanian legislation on condition of being ratified by the Parliament. Compliance with and enforcement of the treaties and conventions are provided through the court of jurisdiction.

3 Litigation and Dispute Resolution

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

A creditor is entitled to commence the detention proceeding against an aircraft. Romanian legislation provides several types of detention depending on the nature of the title on whose grounds such detention relies:

- Seizing the assets, as part of the enforcement proceeding, entails the existence of an execution writ (court decision, arbitration decision or an agreement). The seizure is commenced by the bailiff in the absence of a court order. When under seizure, the aircraft is grounded and it is temporarily taken out of the civil circuit. In the event that the aircraft is mortgaged in favour of a third party, it may still be put under seizure as long as the rights of the mortgagor are complied with.
- Attachment is a proceeding which entails freezing the moveable assets of the debtor with a view to realising them once the creditor obtains an execution writ. Depending on the nature of the debt, a bail may be needed whose value is consistent with the reason for which a writ of attachment is sought.
- A writ of judgment may be ordered against an aircraft in the event that the cause-at-issue of the litigation between the parties is represented by an alleged claim thereupon. In certain situations, a writ of judgment may be sought in the absence of litigation, provided that an application to court is filed in less than 20 days. Finally, in the event that the court admits the issuance of a judgment writ, the beneficiary may be obliged to set a bail.

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

No, there is not. The Romanian legislation does not provide any specific security interests for lessors or aircraft financiers.

As regards the repossession of a leased asset, the lease agreement grants an execution writ over the asset in the event that such an obligation arises out of the termination of the agreement and not out of rescission. In the latter case, the action is brought in court.

In respect of the financiers, according to GO no. 51/1997, lease agreements, as well as personal and real securities agreements entered into in order to pledge the assumed obligations, are considered writs of execution. As a result, unless otherwise provided for under the agreement, in the event that the lessee/user does not comply with the obligation to pay in full the rent for two consecutive months, the lessor/financier is entitled to rescind the lease agreement while the lessee/user is obliged to return the asset and pay the due amounts. In the event that the lessee fails to return the aircraft, the financier is entitled to commence the enforcement proceeding against the lessee without resorting to court.

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

Pursuant to the enforceable legislation, there are no specialised courts to deal with civil aviation disputes. National courts have the competence to adjudicate both civil and criminal cases in accordance with rules of general, material and territorial competence as provided by the Civil and Criminal Proceedings Codes.

In civil matters regarding pecuniary claims, the district courts have the competence to settle litigation claims that include a maximum value of 200,000 RON inclusive, whereas claims over a higher amount are adjudicated in first instance by tribunals.

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

As regards natural or legal entities residing in Romania, the summons and further procedural documents are served *ex officio* through procedural court agents. Parties who are abroad, but whose domicile or residence is known, are summoned, or procedural documents are served upon by means of a recommended letter with declared contents and receipt confirmation. In the event that the domicile or the residence of the persons living abroad is not known, these are served by means of advertisement (the summons is displayed on the door of the court, on the court's portal or at the last known domicile of the summoned person). Also, a curator is appointed by the court so as to act as a lawyer who will represent the interests of the summoned person.

The above-mentioned service is identical to that used for both companies registered in the UK and those registered in other states.

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

In Romania, both courts and arbitration tribunals pass provisional and final decisions.

The decisions held by the courts entail the examination on the merits of the alleged right, and they become final following the adjudication of incidental challenges (appeal and, in some cases, second appeal) or as a result of failure by the interested party to challenge such decisions.

Litigation commences once the complaint is filed with the court, on the condition that it complies with the admissibility conditions. In the event that such conditions are met, the defendant is served with the complaint in order to file a statement of defence. In cases where the complaint has certain flaws, these are communicated to the plaintiff who has the obligation to remedy them; otherwise, the complaint is annulled. Provided that the defendant submits a statement of defence (which is compulsory; non-compliance with this obligation shall lead to an interdiction on the part of the defendant to submit evidence and raise exceptions), this is served upon the plaintiff so that he/she could file an answer to the statement of defence. This proceeding is solely carried out in writing and, subsequent to the setting up of the first hearing and the summoning of the parties, the lawsuit itself is initiated and becomes final once the court passes a ruling. Challenges to court rulings are subject to the same proceedings as the complaint. The duration for a final settlement of litigation differs depending on its complexity and may range from one-and-a-half years to several years.

The provisional decisions passed by the court are mainly aimed at ordering preservation measures. As a rule, these are ordered as a result of a motion and they are enforceable until the merits of the case are settled.

In the event that the parties choose arbitration, the arbitration award is passed after the parties have exposed their claims and namely their defences. The award is final and it has the same applicability with a view to enforcement proceedings as the decision passed by the court. Dispute resolution before an arbitration tribunal is a flexible proceeding and the parties have the possibility to choose the procedural rules by means of an arbitration convention. The claims are settled faster, usually within six months.

The arbitration court may also order provisional or attachment measures before or during arbitration and may ascertain certain factual circumstances.

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

In respect of decisions of the court of jurisdiction, according to the procedural Romanian rules, the decisions passed by the court are subject to different challenges. Depending on the nature of the litigation, the appeal may be the only challenge or an appeal may be followed by a second appeal which exclusively envisages reasons related to the illegality of the appealed decision.

Regarding arbitration, the Romanian lawmaker has excluded both ordinary and extraordinary challenges in cases of arbitration. Nevertheless, the Civil Procedure Code stipulates the procedure according to which an arbitral award may be annulled. The action in annulment may constitute files only on certain limited grounds, and the competence to rule on such grounds is vested in the Appeals Court located where the arbitration took place.

As regards the New York Convention of 10 June 1958, Romania adhered thereto under Decree no. 186 of 10 July 1961.

4 Commercial and Regulatory

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

Our national legislation does not set forth special regulations for joint ventures between air operators. Joint ventures are regulated by the national and European provisions, namely the Romanian Competition Act no. 21/1996, the Treaty on the Operation of the European Union and Council Regulation (EC) no. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 101 (*ex.* Article 81 TEC) and Article 102 (*ex.* Article 82 TEC) of the Treaty.

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

The competent authority to receive a merger notification is the Competition Council. In order to determine the relevant market, both the Competition Council and the courts of jurisdiction take into account the market of the product or service on the one hand and the geographical location on the other. The determination criteria are specific to the aviation industry and are applied depending on each particular situation. For example, in the case of airports, the service market is represented by the main operations performed in an airport, namely those connected to its exploitation, and they comprise both infrastructure services (runway facilities, runways, etc.) and services envisaging passenger and merchandise management.

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

Yes, it does. Takeovers performed through the merger of two or several undertakings must be notified by each of the involved parties. In all the other cases, the notification must be submitted by the party who gains the control over the undertaking. The transaction must be notified before it takes effect and after the conclusion of the agreement.

Following the examination of the transaction, the Competition Council may render one of the following decisions:

- a resolution of non-objection when it is found that the merger does not fall under the scope of the Competition Law; or
- a resolution to start an investigation because of doubts concerning compatibility with a normal competitive environment, in which case the authority can: (i) declare the merger incompatible with a normal competitive environment; (ii) render an authorisation decision if the merger does not raise significant obstacles for effective competition on the Romanian market; or (iii) render a conditional authorisation decision establishing the obligations and/or conditions which must be fulfilled so that the merger can be compatible with a normal competitive environment.

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

There is no distinction in our domestic legislation between takeovers (mergers, acquisition mergers or full-function joint ventures).

A merger takes effect when the long-term change of control results from the merging of two or more previously independent undertakings or parts of undertakings, or one or more persons, who, already holding control over at least one undertaking, or one or more undertakings directly or indirectly, or by purchase of securities or assets, either by contract or other means, acquire control directly or indirectly over one or several undertakings or parts thereof. The setting up of a joint venture company which operates like an autonomous economic entity also represents a merger.

The obligation to notify the Competition Council applies to mergers where the aggregate turnover of the undertakings concerned exceeds the equivalent in RON of 10,000,000 EUR and at least two undertakings involved in the merger have an individual turnover of the equivalent in RON of more than 4,000,000 EUR.

For the analysis of any other kind of merger, the Competition Council decides, based upon the following criteria: a) if two or more holding companies keep running (to a significant degree more than 20% or 30%, as applicable), their operations on the same market as the joint venture, or on a market upstream or downstream from the market of the joint venture, or on a market in close relation with this market; or b) if, by setting up the joint venture, the undertakings in question can eliminate competition for a significant part of the products or services in question.

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

The notification procedure starts with Phase I and lasts: (i) 30 days from receiving a complete notification of a merger case, if the Competition Council concludes that the merger does not fall under the scope of the Competition Law; or (ii) 45 days from receiving a complete notification of a merger case, if the Competition Council will issue a decision of non-objection when it is found that the merger does fall under the scope of the Competition Law; and: a) there are no serious doubts concerning compatibility with a normal competitive environment; or b) serious doubts concerning compatibility with a normal competitive environment have been removed through the commitments proposed by the undertakings and accepted by the Competition Council.

Phase II has a maximum time schedule of five months from receiving a complete notification of a merger case, for which the Competition Council subsequently decides to start an investigation because of doubts concerning compatibility with a normal competitive environment.

The notification fee is 1,061 EUR for each notification.

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

Although there are no national provisions in respect of financial support for airports and air companies, the European regulations are applied, namely the European Commission Guidelines on State aid to airports and airlines. The guidelines establish rules for state aid to airports and airlines, for three categories of state aid: investment in airport infrastructure; operating aid to regional airports; and start-up aid to airlines to launch new air routes.

For investment in airport infrastructure, the Guidelines set percentages for the maximum amount of state aid going into airport infrastructure. The percentages depend on the size of an airport (for an airport with passenger traffic of 3–5 million, up to 25% of the investment costs; for an airport with passenger traffic of 1–3 million, up to 50%; and for an airport with passenger traffic of less than 1 million, up to 75%), in order to ensure the right balance between public and private investment.

Operating aid to regional airports (with fewer than 3 million passengers a year) is allowed only for 50% of the initial average operating funding gap calculated as an average of five years preceding the transitional period of 10 years (2009–2013). To receive operating aid, airports need to work out a business plan paving the way towards full coverage of operating costs at the end of the transitional period.

Basically, the new guidelines are intended to initially reduce, and then eliminate, as soon and as much as possible, the public funding of airports and airlines.

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

State subsidies may be granted for services of general economic interest (SGEI), but also in the case contemplated by Article 16 of (EC) Regulation no. 1008/2008 regarding common norms for the operation of air services in the community.

As a result, the public authorities may consider in some cases that certain economic activities performed by airports or air operators fall in the category of services of general economic interest and thus grant compensation for their performance. The subsidies are under the form of compensation for public service obligation and will be assessed in accordance with Decision 2012/21/EU of the Commission. Additionally, state subsidies for certain routes may be granted under the provisions of Article 16 of (EC) Regulation no. 1008/2008 in the case of air routes between a community airport and an airport situated on a peripheral or under-development area on its territory, or for low-traffic routes to any airport on its territory, if such a route is of the essence to the social and economic development of the area where such an airport is located.

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

In Romania, the legal framework for data processing is mainly provided by Act no. 667/2001 which basically transposes Directive no. 95/46/CE, and by Act no. 506/2004 on electronic communication which implements Directive no. 2002/58/CE (the Directive will be repealed starting from 25 May 2018, when Regulation no. 679/27 of May 2016 will be effective; the new regulation stipulates a two-year transitional period, during which the states must comply with the new requirements).

The national authority which deals with personal data protection is the National Authority for the Surveillance of Personal Data Processing.

Any processing of personal data may be performed only upon the express and univocal consent of the person at issue. The legislation prescribes certain rights of the person at issue, namely the right to be informed, free access to such data, the right to interfere with these data and the right not to be subject to an individual decision. Any person who incurred a loss as a result of illegal data processing has the right to obtain remedy in court.

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

The air company, as well as any other personal data operator, is compelled to apply adequate technical and organisational measures in order to prevent personal data from accidental or illegal destruction, modification, unauthorised access or disclosure, as well as from any form of unlawful processing.

Non-compliance with the obligations to apply security measures shall result in contravention liability of the personal data operator or, as the case may be, in its criminal liability which is punishable by a fine in the amount set forth by legislation.

The application of contravention penalties does not exclude the civil liability of the personal data operator; therefore, any injured person may seek the repair of his/her loss as a result of the illegal processing of personal data.

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

The institutional and legal framework which acts as a safeguard is mainly provided by two specialised institutions: the State Office for Patents and Trademarks, which is the authority that grants protection for industrial property; and the Romanian Copyright Office, which is the authority with duties in respect of tracking, observance and investigation into the application of legislation on copyright and affiliated rights.

The protection of industrial property rights is mainly regulated by Act no. 64/1991 regarding patents, Act no. 84/1998 regarding trademarks and geographical indications and Act no. 129/1992 regarding the protection of industrial design and models. Moreover, Romania transposed an important part of the community legislation in respect of intellectual property – Directive no. 2008/95/CE to approximate the laws of the Member States relating to trade marks, Directive no. 98/71 CE regarding the legal protection of design, and Directive no. 92/100/CEE regarding the lease and rent of certain rights affiliated to copyright in the area of intellectual property. Finally, in respect of legal remedies awarded by courts, there are specialised panels adjudicating intellectual property cases, thus ensuring qualified platforms in protecting such rights.

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

The applicable legislation consists of the Convention to unify provisions regulating international air transportation, signed in Montreal in 1999, and (EC) Regulation no. 261/2004, which set out joint provisions as regards compensation and passenger assistance in the event of boarding denial, cancellation or prolonged delays.

In the event that the air operator denies the boarding of a passenger due to reasons other than poor health, safety and security requirements or inappropriate travel documents, the passenger is entitled to damages of a fixed amount (consistent with the flight distance), assistance (refunding the cost of the ticket, transportation to his/her final destination by another airplane or means of transportation) and accommodating services (meals, accommodation, transfer, two free-of-charge phone calls and fax or e-mail messages). In respect of the court which applies the legislation, please see the answer to question 4.12 below.

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

In Romania, the National Authority for Consumer Protection is responsible for monitoring compliance with passengers' rights as these are set out in (EC) Regulation no. 261/2004.

In the event that the parties fail to settle amicably, the passenger is entitled to seek redress from the National Authority for Consumer Protection (if the incident occurred on the territory of Romania) or from the competent national authority in the country where the incident took place. The complaint shall be made according to the standard form issued by the European Commission and it must be solved within the 30-day legal term. The National Authority for Consumer Protection shall impose a fine on the air operator, provided that it finds, upon investigation, that it failed to inform passengers or did not grant the due compensation/damages.

In the event that the above-mentioned endeavours do not result in a solution to the problem, the passenger may start legal proceedings

against the air operator within two years as of the date of arrival to the destination, or as of the date on which the aircraft was to have arrived, or as of the date on which the transportation terminated.

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

The obligations of airport administrators are provided both under national and European legislation. Hence, at the national level, such obligations are regulated by the Order of the Ministry of Transportation no. 161/2016 which approved the Romanian Civil Aviation Regulation with reference to the authorisation of civil airdromes, RACR-AD-AADC. The airport administrator, namely the natural or legal person who runs and manages an airport in public or private property, has the following main duties:

- to obtain and maintain proper conditions in terms of safety, regularity and efficiency of the air operations performed on the airdrome under the provisions of air legislation;
- to maintain the organisational structure, the facilities and airdrome equipment, the operational framework and safety management systems at the minimum level initially declared, acknowledged and approved by the Romanian Civil Aviation Authority; and
- to perform only the activities/services which have received authorisation, and only under the specified conditions, abiding by the restrictions set forth in the Annex attached to the authorisation certificate.

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

The relationship between the passenger and the airport operator is governed by (EC) Regulation no. 261/2004 and by common law regarding consumer protection, Act no. 296/2004 on Consumer Protection, Ordinance no. 21/1992 regarding consumer protection – in case they do not contain provisions contrary to the Regulation. In this respect, please see also the answer to question 4.12 above.

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

Amadeus, Sabre, and Travelport operate in Romania.

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

There are no express provisions in the national legislation with reference to ownership rights pertaining to GDSs. Nonetheless, we apply the provisions of (EC) Regulation no. 80/2009 regarding a behaviour code for IT systems to reserve and abolish (EEC) Regulation no. 2298/89 of the Council. We must emphasise the fact that this Regulation sets forth specific guidelines to ensure real competition between the participating carriers and the associated carriers, as well as ensuring compliance with non-discriminatory principles among air carriers, irrespective of whether these are or are not party to a computerised reservation system.

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

Vertical integration is not expressly forbidden. Nevertheless, it must abide by the conditions imposed by legislation in order to ensure legal competition dynamics.

5 In Future

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

Our focus is mainly on the following:

- The New Air Code, which is to be adopted with the following main changes: the applicability of the Air Code to military air activities as well as to entities without legal entity; articulating provisions concerning the competence of the airdrome administrator to set airport fees as well as concerning the principles to impose such fees, namely transparency and non-discrimination; withdrawing the competence of the Ministry of Transportation to grant exemption from payment of airport fees and granting such power to the airdrome administrator; provisions regarding the right of the civil aerodrome administrator air navigation service provider to retain to ground aircraft whose operator failed to pay the fees entitling him/her to use the aerodrome infrastructure or the fees for air navigation services, as well as the modality that such retention right operates.
- At this moment, there are several regulatory initiatives on drone operation, including the new Air Code, that sets out different drone categories (depending on the drone weight) and specific operation rules in relation to these categories.
- In the near future some of the regional airports will exceed annual traffic of 2 million passenger movements (at this moment, the only airport that overcomes this threshold is Bucharest "Henri Coandă" International Airport), the Directive 96/67/EC on access to the ground handling market at Community airports is soon to be applicable for the regional airports.
- The ratification of the Cape Town Convention on international interests in mobile equipment.

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Mihai Furtună is a seasoned lawyer in domestic and international assignments. He is also the founder of the Aviation practice at ONV LAW, a practice that covers work ranging from regulatory issues to the procurement of suppliers, to the drafting and negotiating of various commercial agreements, to advising clients on all related aspects of financing, leasing, selling and buying of aircraft, as well as litigation following aircraft accidents. He and the members of the firm's Aviation practice currently provide counselling to public authorities, aviation technology manufacturers, private airports, associations of private aircraft operators, labour unions, airport service providers, as well as private individuals.

Mihai Furtună is a sought-after speaker at industry-specific events organised by public authorities, chambers of commerce and professional associations in Romania.

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Ioana Anghel started specialising in aviation matters as soon as the firm established this practice in 2011. Her experience includes drafting regulatory input for aviation legislation (e.g. updating the Romanian Air Code), advising technology manufacturers on regulatory compliance, litigation following aircraft accidents, advisory services on buying, selling and registration of aircraft for tax purposes, legal assistance and consulting for the procurement and building of airport and related facilities, as well as for the organisation of air shows. She is a member of the Bucharest Bar and speaks Romanian, English and Italian.

ONV LAW has been at the forefront of the legal profession in Romania for almost 15 years, providing services in the areas of Aviation and Airport Infrastructure, Public Procurement and Concessions, Litigation, Corporate, Labour, Competition as well as Digital Law. In 2015, *Bizlawyer*, the highest-ranked journal for Romanian lawyers, acknowledged ONV LAW as a trend-setter in the aviation law market. The Aviation practice is best known for two things: a) the scope of aviation projects covered, i.e. investigation of aviation accidents (assistance and representation in civil and criminal proceedings), assistance with the financing, construction and authorisation of international airports, assistance on matters related to the manufacturing of aviation equipment, such as flight simulators, advisory services on buying, selling and registration of aircraft, legal clearance for aviation shows, as well as regulatory drafting; and b) the ability of the lead Partner Mihai Furtună to assemble and coordinate multidisciplinary teams of lawyers and technical experts (in metallurgy, aviation, physics, etc.) in order to successfully handle highly complex cases in civil and criminal proceedings.

ONV LAW is the only Romanian law firm that has been granted member status in Interlaw – a law firm network ranked by *Chambers & Partners* as Elite (Band 1), as well as in *LNA (Legal Netlink Alliance)* – a global alliance of carefully selected independent law firms.

The firm has been growing steadily since 2000, currently providing a wide range of legal services to a portfolio of over 300 clients in Romania and abroad. The firm is committed to competence, creativity and trustworthiness; values that guide its team, activities and strategy.

Chapter 22

South Africa

Chris Christodoulou

Antonia Harrison

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1 General

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

1.1.1 Principal legislation

The Carriage by Air Act No. 17 of 1946 (as amended) gives effect to the Convention for the Unification of Certain Rules for International Carriage by Air, signed in Montreal on 28 May 1999, and for the unification of certain rules relating to international carriage by air.

The Air Services Licensing Act No. 115 of 1990 and the International Air Services Act No. 60 of 1993 provide for the establishment of Air Service Licensing Councils for the licensing and control of domestic and international air services. The Air Services Regulations provide for certain classes and types of air services, categories of aircraft, insurance levels and third-party and cargo liability.

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

The Convention on International Interests in Mobile Equipment Act No. 4 of 2007 enacts the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment into law, and provides for matters connected therewith.

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

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

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

1.1.2 Regulatory bodies

These are as follows:

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

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

The operation of domestic and international air services in South Africa is governed by the Air Services Licensing Act No. 115 of 1995 and the International Air Services Act No. 60 of 1993, respectively.

1.2.1 International air service licence

An application for an international air service licence is made on a prescribed form set out in Annexure A of the International Air Services Act (obtainable at the Department of Transport: www.transport.gov.za) and accompanied by:

(a) documents to the satisfaction of the Council that the applicant will be actively and effectively in control of the international air service;

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

(ii) proof that he/it is financially capable of operating such international air service; and

(c) a certified true copy of:

(i) the existing licence held by the applicant, (where applicable); and

(ii) in the case of a company: a) its memorandum and articles of association; and b) the authorising resolution concerned.

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

An applicant who wishes to use an aircraft other than a South African aircraft in providing an international air service must satisfy the council that:

(a) an appropriate certificate of airworthiness has been issued in respect of the aircraft concerned in the country in which that aircraft is registered;

(b) the aircraft complies with the registration and identification requirements of the country in which it is registered; and

(c) a Type Certificate has been issued by the Commissioner for Civil Aviation or an appropriate authority in the country in which the aircraft was manufactured.

A licence is not required if an aircraft is visiting the Republic from time to time and registered in another State and is used to operate an international air service, provided that such air service is operated under and in accordance with: the provisions, and subject to the conditions, of the International Air Services Transit Agreement, signed at Chicago on 7 December 1944; an air transport service agreement; or a foreign licence. However, it will be subject to the conditions of a foreign operator's permit issued in terms of the Act.

1.2.2 Domestic air service licence

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

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

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

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

An application for a domestic licence must be accompanied by:

(a) documents to establish, to the satisfaction of the Council, the manner in which the applicant will be actively and effectively in control of the air service;

(b) (i) a plan setting out in detail the manner in which the applicant will ensure that a safe and reliable air service is operated, and must contain full particulars and information on the following aspects in respect of the air service to be provided:

(1) the description and objectives of the air service to be provided;

(2) the full name and surname, qualifications and experience of each of the following officials:

(I) the Chief Executive Officer;

(II) the Responsible Person: Flight Operation;

(III) the Responsible Person: Aircraft; and

(IV) the Air Safety Officer;

(3) a statement of the responsibility and accountability for the duties of each official mentioned in paragraph (2) above and a written acceptance thereof by such official;

(4) a line management diagram indicating to whom each official mentioned in paragraph (2) above reports and the subordinate managerial positions;

(5) an outline of the engineering, maintenance and flight operation management practices; and

(6) the management practices indicating the manner in which procedures will be updated; and

(ii) proof that the applicant is financially capable of operating an air service;

(c) in the case of a company, a certified true copy of its memorandum of incorporation and certificate to commence business and the authorising resolution concerned; and

(d) in the case where the applicant will use an aircraft which is not registered in his name in the operation of his air service, a certified true copy of the agreement concerned under which the applicant is entitled to use the aircraft.

For the purposes of satisfying the Council that the applicant is financially capable of operating the air service concerned, an applicant must submit to the council a set of audited accounts of the most recently completed financial year.

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

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

(i) projections of the income statement, including the: proposed tariffs; forecast revenue; forecast yields, passenger numbers and cargo volumes, if applicable; and flying hours;

(ii) a cash flow statement including: revenue; trading costs by main category and receipts by operation; fixed assets expenditure; debtor, creditor and stock assumptions; finance raised and repaid; financing costs and taxation; and opening and closing balances;

(iii) a balance sheet in respect of the air service to be provided and the assumptions on which the projections are based, for a period of 12 months following the date of application, including in relation to sources of finance: equity; short, medium and long-term loan facilities; securities for finance; and encumbered assets;

(iv) in relation to the company's shares: details as to shareholders and proposed shareholders; the nationality of shareholders and

proposed shareholders; types of shares; and the number and value of issued shares;

(v) in relation to its assets, including aircraft, engines and spares: the capital costs; financing arrangements, including deposit, amount of finance and repayments; and leasing arrangements; and finally

(vi) a sensitivity analysis of the assumptions used with regard to possible adjustments and the consequences that such adjustments may have on the projections referred to in that subparagraph.

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

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

(a) submit, to the satisfaction of the Council, a consumer guarantee for the total sum of cash receipts as envisaged in the plan referred to in (b)(i)(2) above for services in respect of the transport of passengers or cargo, where such services have already been sold but not yet rendered by the applicant and which the Council deems to be a fair representation of that component of the applicant's projected cash flow; and

(b) at all times make his/its financial accounting system available to the Council, or to a person designated by the Council for inspection, provided that the details concerning such financial accounting system shall not be made public without the consent of the applicant.

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

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

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

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

The Civil Aviation Act further provided for the establishment of an independent Aviation Safety Investigation Board (the "ASIB") in compliance with Annexure 13 of the Chicago Convention. The ASIB investigates the causes of, and factors contributing to, aircraft accidents, in conjunction with certain other bodies authorised to conduct investigations, issues a report on its findings without apportioning blame or liability, and makes safety recommendations based on its findings. (*See detailed notes under question 1.9 below.*)

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

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

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

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

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

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

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

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

Slot availability – the Airport Slot Coordination Regulations of 2012 came into operation on 22 February 2013, which make provision for the appointment of a Coordinator (the ATNS) allocating, monitoring and enforcing the use of slots at airports and ensuring that the capacities of coordinated airports are not exceeded. In addition, a Slots Coordinating Committee has been established under the Regulations to promote the optimisation of the utilisation of slots in the national interest and the interests of all stakeholders, and to advise the Coordinator. The Regulations further provide guidelines for the allocation of slots and to deal with problems encountered by new entrants in accessing coordinated airports.

Airport charges – the Airports Company South Africa Limited ("ACSA") levies airport charges that comprise landing, parking and passenger service charges, which are regulated by the Regulating Committee. There is a differentiation in airport charges for flights landing at an ACSA airport where the airport of departure of that aircraft was outside of South Africa, but those charges apply equally to both foreign and locally owned carriers.

Air traffic service charges – the Air Traffic and Navigation Services Company Limited levies air traffic service charges that are regulated by the Regulating Committee established by Section 11 of the Airports Company Act. Differentiation in charges applies in respect of flights undertaken by an aircraft (regardless of whether the carrier is foreign or locally owned) where either the airport of departure or the airport of arrival of the aircraft is within any State other than South Africa, and the other airport is within South Africa or elsewhere. The differentiation in charges will be phased out by 2015.

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

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

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

1.7 Are airports state or privately owned?

Airports in South Africa are both State and privately owned.

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

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

Other airports include Kruger Mpumalanga International Airport and Richards Bay.

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

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

- the International Air Services Transit Agreement, signed in Chicago on 7 December 1944;
- a bilateral air transport service agreement;
- a foreign licence; or
- a foreign operator's permit.

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

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

(a) conduct independent investigations, including, when necessary, public inquiries into selected aircraft accidents and aircraft incidents in order to make findings as to their causes and contributing factors;

(b) identify safety deficiencies as evidenced by aircraft accidents and aircraft incidents;

(c) make recommendations designed to eliminate or reduce any such safety deficiencies;

(d) report publicly on its investigations and on the findings in relation thereto;

(e) promote compliance with the provisions and procedures of Annexure 13 to the Convention;

(f) investigate aircraft accidents and aircraft incidents in compliance with the provisions and procedures of Annexure 13 to the Convention; and

(g) discharge all other functions and obligations in compliance with the provisions and procedures of Annexure 13 to the Convention.

(2) The Director of Investigations has exclusive authority to direct the conduct of investigations on behalf of the Aviation Safety Investigation Board under this Act in relation to aircraft accidents and aircraft incidents, reports to the Aviation Safety Investigation Board with regard to investigations and conducts such further investigation as the Aviation Safety Investigation Board requires.

(3) The Aviation Safety Investigation Board does not apportion blame or liability in any report following the investigation of any aircraft accident or aircraft incident, and the sole objective of the investigation is accident prevention.

(4) In delivering its findings as to the causes and contributing factors of an aircraft accident and an aircraft incident, it is not the function of the Aviation Safety Investigation Board to assign fault or determine civil or criminal liability, and the Board must not refrain from fully reporting on the causes and contributing factors merely because fault or liability might be inferred from the Aviation Safety Investigation Board's findings.

(5) No finding of the Aviation Safety Investigation Board should be construed as assigning fault or determining civil or criminal liability.

(6) The findings of or the evidence before the Aviation Safety Investigation Board are not binding on the parties to any legal, disciplinary or any other proceedings and may not be used in any civil, criminal or disciplinary proceedings against persons giving such evidence.

(7) Where the causes and contributing factors of any aircraft accident or aircraft incident are known to the Aviation Safety Investigation Board, it may refuse to investigate such aircraft accident or aircraft incident.

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

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

Two cases were particularly noteworthy in 2016:

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

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

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

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

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

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

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

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

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

2 Aircraft Trading, Finance and Leasing

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

Registration of an aircraft and the issuing of a certificate of registration under the Regulations does *not* confer or imply true ownership over an aircraft. However, in terms of Section 8 of the Civil Aviation Act of 2009, the registered owner of an aircraft is deemed to be the owner for purposes of liability for damages caused by the aircraft in certain circumstances.

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

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

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

2.2.1 The mortgage register under the Geneva Convention

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

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

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

2.2.2 Registration procedure

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

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

2.2.3 Registration under the Cape Town Convention

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

2.2.3.1 Fees payable (in South African rands)

(a) The recording of a mortgage in the register of aircraft mortgages: R1,100.00.

(b) A notification of the discharge of a mortgage: R1,100.00.

(c) A transfer of mortgage by deed of cession: R1,100.00.

(d) A declaration of transmission of rights in a mortgage: R1,100.00.

(e) A certificate of mortgage: R820.00.

(f) Access to the register of aircraft mortgages: R140.00.

(g) The furnishing of information from the register of aircraft mortgages (R1.00 per page up to a maximum of R200.00).

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

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

(1) Where a dry lease involving a foreign operator is approved by the Director, a copy of the duly completed form must be forwarded to the International Air Services Council or the Domestic Air Services Council, as applicable, for record-keeping purposes.

(2) The oversight responsibilities in respect of a dry lease-in of a foreign-registered aircraft may be fully or partially transferred in terms of an Article 83*bis* Agreement from the appropriate authority of the State of Registry to the appropriate authority of the State of the Operator.

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

(a) the aircraft shall be subject to the airworthiness certification, maintenance, and inspection procedures prescribed by the regulations in respect of South African-registered aircraft;

(b) the responsibility or custody of the aircraft and control of all operations shall be vested in the lessee operator;

(c) the responsibility for the airworthiness and maintenance of the aircraft shall be vested in the lessee operator; and

(d) the registration of the aircraft shall be valid only for the duration of the lease agreement, and for as long as the aircraft is operated in accordance with the regulations, the terms or conditions specified in the lessee operator's operating certificate, the related operations specifications, and the lessee operator's operations and maintenance control manuals.

(4) The conditions of approval referred to in sub-regulation (3) must be made part of the lease agreement, and in particular must specify the responsibilities of the parties involved in respect of:

(a) airworthiness of the aircraft and performance of maintenance;

(b) signing the maintenance release;

(c) flight and cabin crew member certification;

(d) crew member training, competency and currency;

(e) scheduling of crew members;

(f) dispatch or flight-following; and

(g) insurance arrangements.

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

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

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

2.4.1 The Geneva Convention

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

2.4.2 The Cape Town Convention

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

2.4.3 The Montreal Convention

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

2.5 How are the Conventions applied in your jurisdiction?

2.5.1 The Geneva Convention

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

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

(a) An aircraft or share therein may be mortgaged as security for a loan or other debt, and the instrument creating the mortgage is called a deed of mortgage.

(b) On the production of such instrument and payment of the prescribed fee, the Director of Civil Aviation records the mortgage in the register in the prescribed manner and containing the prescribed particulars.

(c) Mortgages are recorded by the Director in the order in which the deeds creating them are produced and endorsed on each deed that has been so recorded, stating the date and time of that record.

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

(e) A certificate of mortgage shall not authorise any mortgage to be made in the Republic or by any person not named in the certificate.

(f) A certificate of mortgage shall contain the prescribed particulars and also a statement of any registered mortgages or certificates of mortgage affecting the aircraft or share in respect of which the certificate is given.

2.5.2 The Cape Town Convention

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

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

3 Litigation and Dispute Resolution

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

3.1.1 In terms of the common law, a creditor may seize an aircraft for debts owing to the creditor by the debtor. In addition, the holder of a lien over a debtor's property is regarded as a secured creditor on insolvency of the debtor.

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

(i) **Debtor/creditor liens** – in respect of debts relating to the aircraft over which a creditor has a lien *vis-à-vis* the creditor and the debtor, though not between a creditor and third parties.

(ii) **Salvage and improvement liens** – which arise in respect of salvage services and/or improvements by the creditor to aircraft belonging to the debtor.

3.1.2 Other than the form of self-help contained in the Cape Town Convention (*see notes under question 3.2 below*), the creditor will in the normal course have to approach the Court for an order to seize and detain the aircraft.

3.1.3 Steps to be taken to obtain an Order:

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

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

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

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

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

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

3.2.2 South Africa has made the necessary Declaration under the Cape Town Convention to include the availability of non-judicial remedies for a lessor seeking to re-acquire possession of the aircraft either at the end of the contract or upon the breach thereof under the Convention, i.e. a lessor may take possession of an aircraft without the Court's permission.

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

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

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

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

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

Service of court proceedings is obligatory and is effected by the Sheriff of the Court, and must be effected between the hours of 07:00 and 19:00, excluding Sundays unless so directed by the Court.

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

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

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

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

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

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

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

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

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

3.5.1 Interim orders – South African common law allows lessors to apply to the courts for an interim (and urgent) interdict preventing an aircraft from being removed pending the final determination of a court. Such interim orders can extend to a preservation order, custody and control of the aircraft, and even to an income stream.

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

3.5.3 Final orders are made in the normal course of events once a matter has been decided upon by the arbitral tribunal or the Court, and are executable by means of a writ served by the Sheriff of the Court.

Steps to be taken to obtain an order

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

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

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

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

In addition, a person aggrieved by an authority's decision (such as the Civil Aviation Authority) may, under the Promotion of Administrative Justice Act, 2000 ("PAJA"), seek a judicial review of the decision in a court or tribunal. Furthermore, in terms of PAJA, a person who has been aggrieved by an authority's decision has a right to be given reasons for the decision.

3.6.2 South Africa is a signatory to the New York Convention on the enforcement of arbitral awards, given effect through the Recognition and Enforcement of Foreign Arbitral Awards Act, No. 40 of 1977.

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

4 Commercial and Regulatory

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

All joint ventures, in whatever form, that take place in the Republic, or outside the Republic with an effect in the Republic, fall within the ambit of the Competition Act 89 of 1998 (the "Competition Act").

Competitors are normally regarded as being in a horizontal relationship. In terms of Section 4(1) of the Act, an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if:

(a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or

(b) it involves any of the following restrictive horizontal practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or

(iii) collusive tendering.

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

Global airline alliances

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

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

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

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

Code-share agreements

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

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

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

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

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

(i) the Competition Commission (the "Commission"), which is responsible for investigating and evaluating mergers and prohibited practices;

(ii) the Tribunal, which is essentially the court of first instance in adjudicating competition law matters; and

(iii) the Competition Appeal Court ("CAC"), which is the designated appellate authority for competition law matters.

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

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

Code-shares would probably be dealt with under the provisions of the Competition Act, dealing with restrictive practices – horizontal and vertical (Sections 4 and 5) – rather than a merger, which relates to the direct or indirect acquisition or establishment of control over the whole or part of the business of another firm (Section 12). The test of co-operative agreements is whether they have the effect of substantially preventing or lessening competition in a market, mitigated by technological or other pro-competitive gain (Sections 4 and 5). Interlining agreements would probably be regarded as positive.

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

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

The Commission has the power to disallow small and intermediate mergers, and makes recommendations on large mergers to the Tribunal.

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

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

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

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

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

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

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

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

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

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

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

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

A merger relates to the direct or indirect acquisition or establishment of control over the whole or part of the business of another firm (Section 12 of the Competition Act). Joint ventures will probably be dealt with under the provisions of the Competition Act dealing with restrictive practices – horizontal and vertical (Sections 4 and 5) rather than a merger, unless they are constructed in a special purpose vehicle (company), in which case the merger provisions would apply.

What does the Competition Commission consider in analysing a merger?

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

(i) Is the merger likely to substantially prevent or lessen competition in the relevant markets?

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

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

(i) the actual and potential level of import competition in the market;

(ii) the ease of entry into the market, including tariff and regulatory barriers (a merger is unlikely to create or enhance market power or to facilitate its exercise if entry into the market is timely, that is within a period of two years in most markets, likely to be profitable for new entrants and sufficient to return market prices to their pre-merger levels);

(iii) the levels and trends of concentration (this is usually undertaken in the assessment of market shares and the calculation of the Herfindahl-Hirschman Index or HHI, which is basically the sum of the squared market shares of merging parties and their competitors in the relevant market/s) and history of collusion in the market;

(iv) the degree of countervailing power in the market (that is, the bargaining strength that the buyer has *vis-à-vis* the seller in commercial negotiations due to its size, commercial significance to the seller and its ability to switch to alternative suppliers);

(v) the dynamic characteristics of the market, including growth, innovation and product differentiation;

(vi) the nature and extent of vertical integration in the market;

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

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

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

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

(a) a particular industrial sector or region;

(b) employment;

(c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and

(d) the ability of national industries to compete in international markets.

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

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

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

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

4.5.1 Procedure

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

(i) A Merger Notice in Form CC 4 (1), which must declare the names of the primary acquiring and target firm and

whether, in the opinion of the filing firm, the merger is small, intermediate or large.

(ii) For each of the Primary Acquiring Firm and the Primary Target Firm, a Statement of Merger Information in Form CC 4 (2).

(iii) All documents required, as stipulated on each form, including:

(a) a complete list of shareholders and their respective shareholding, including minority shareholders, for the primary acquiring firm and for any firm that directly or indirectly controls the primary acquiring firm; and

(b) strategic documents of the merging parties in relation to the affected markets including, but not limited to, the following: business plans; marketing documents; high-level strategic presentations; and board minutes.

(iv) A non-confidential version of Form CC 4 (1), and the report on competition if submitted.

(v) In an attempt to move to a paperless filing system, the Commission also encourages the merging parties to file electronically and include a CD of the merger filing.

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

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

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

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

4.5.2 Timing

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

How long does it take to process a merger?

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

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

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

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

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

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

Phase 2 cases (complex) – 45 business days

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

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

Phase 3 cases (very complex) – 60 business days

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

4.5.3 Fees

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

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

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

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

Government domestic air transport policy includes undertakings to create a competitive domestic air transport market to level the playing field, and equal treatment of State-owned airlines in a competitive market, as opposed to a market that is reserved for a State-owned and controlled monopoly. The undertakings included that:

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

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

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

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

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

- Consistent with the spirit of sound commercial operations, air carriers should have no obligation to provide services below cost to any institutions whether Government or otherwise, unless such intervention is required based on national interest considerations and subject to appropriate financial compensation.
- In terms of the Government's public service obligations, air transport services on routes that are not economically viable should be invited through a transparent public tender process.
- This strategic approach offers the Government much more than it had before, which focused on SAA to the exclusion of other airlines to achieve its strategic objectives. In this context, the Government will be able to focus on both SAA and other airlines to play a role in achieving the economic growth and developmental objectives.

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

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

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

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

- A business that collects, holds, uses, disseminates or otherwise processes individuals' personal information will have to do so under certain conditions.
- A business cannot collect more personal information than is necessary to fulfil the purpose for which the information was collected.
- Businesses will have to allow customers or prospective customers to specifically opt in to receive direct marketing communications. Until now, businesses have only been required to allow consumers to opt out. There are some exceptions to this general rule in respect of direct marketing to existing customers.
- Steps must be taken to secure the integrity and confidentiality of personal information in the possession of a business, or under its control, by taking appropriate, reasonable technical and organisational measures to prevent loss of, damage to or unauthorised destruction of personal information.
- Cross-border transfers of personal information will have to meet certain requirements.
- A data protection authority, the Information Regulator, is in the process of being established and is tasked with monitoring and enforcing compliance with the law, receiving and handling complaints about alleged violations, serving information notices, enforcement notices and infringement notices, and obtaining a warrant for search and seizure.

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

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

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

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

4.9 In the event of a data loss by a carrier, what obligations are there on the airline which has lost the data and are there any applicable sanctions?

No mandatory breach notification procedure exists. Individuals' rights are enforced and damages claimed through the common law and the Constitution and enforced by the courts. Normal appeal procedures are available to a carrier against whom damages are granted, as set out in question 3.5 above.

4.10 What are the mechanisms available for the protection of intellectual property (e.g. trademarks) and other assets and data of a proprietary nature?

The Companies and Intellectual Property Commission ("CIPC") oversees the Register of Trade Marks, which records all the trademarks that have been formally applied for and registered in the Republic of South Africa.

4.10.1 A **trademark** can only be protected as such and defended under the Trade Marks Act No. 194 of 1993 if it is registered; however, unregistered trademarks may be defended in terms of common law. South Africa is also a signatory to the Paris Convention, and therefore protection is afforded to trademarks that are well known, even if they are not registered in South Africa.

The registration procedure results in a registration certificate which has legal status, allowing the owner of the registered trademark the exclusive right to use that mark.

4.10.2 **Patents** are filed with the Patents Office in the CIPC and are regulated by the South African Patents Act 57 of 1978. Patent protection may be obtained for inventions which are new and unobvious, and which are capable of use in the fields of trade, industry or agriculture.

South Africa is a member of the Patent Co-operation Treaty ("PCT"), which allows an individual to file an international application, as well as a national application. The international application will designate countries in which the applicant seeks protection.

Acceptance of the application takes place six to eight months after filing and must be advertised in the Patent Journal. The certificate of registration will be issued thereafter but the publication date is regarded as the grant date of the patent.

4.10.3 **Copyright** is protected under The Copyright Act 98 of 1978, which provides for the statutory protection of copyright of literary musical and artistic works; however, there is no provision for the registration of copyright, except for cinematographic films.

4.10.4 **Special Courts** – an action for infringement may be brought by way of application or summons and is heard in the Court of the Commissioner of Patents (an *ad hoc* court set up under the High Courts of South Africa).

4.11 Is there any legislation governing the denial of boarding rights?

The Consumer Protection Act 68 of 2009 ("CPA") and the Regulations thereto apply to the promotion and supply of goods and services within South Africa concluded in the ordinary course of business between suppliers and consumers, and provides significant protections to passengers in the event of a denial of boarding under certain circumstances.

The Act provides for the reasonableness test for overselling and overbooking. In terms of this test, a supplier may not accept payment for goods or services where it has no reasonable intention to supply the goods or services.

With regard to damages suffered as a result of a supplier's inability to supply goods or services due to overbooking or overselling, the CPA provides for a refund of the amount paid plus interest (usually, this would be the deposit plus interest), as well as any consequential damages that directly resulted from the breach of contract.

4.12 What powers do the relevant authorities have in relation to the late arrival and departure of flights?

There is no applicable legislation or sanctions available to authorities at this time. It is, however, worth noting that Article 19 of the Warsaw Convention as incorporated in terms of the Carriage by Air Act is applicable to carriers.

4.13 Are the airport authorities governed by particular legislation? If so, what obligations, broadly speaking, are imposed on the airport authorities?

State Airports, which were transferred to the Airports Company of South Africa under the Airports Company Act No. 44 of 1993, are governed by the said Act and may only impose levies and airport charges with the permission of the Regulating Committee established by Section 11 of the Airports Company Act.

The Airports Company is restricted from having any financial interest, either directly or indirectly, in the provision of any air service and may not unduly discriminate against or among various users or categories of users of any company airport.

It is obliged to conduct its business in such a manner as to ensure that the company: does not engage in any restrictive practice as defined in Section 1 of the Maintenance and Promotion of Competition Act No. 96 of 1979; may not change the level or modify the structure of any airport charge more than twice within a financial year; must publish any airport charge by notice in the Gazette at least three months prior to the coming into operation of such charge; and ensures that relevant activities are performed subject to any relevant activity service standards which shall conform to internationally accepted and recommended practices.

The Air Traffic and Navigation Services Company Act No. 45 of 1993 provided for the transfer of certain assets and functions of the State to a public company responsible for the provision and control or operation of air navigation infrastructures, air traffic services and air navigation services. The ATNS Company is entitled to levy air traffic service charges by virtue of a permission issued by the Regulating Committee.

Refer also to question 1.6 regarding slot allocations and the introduction of the Airport Slot Coordination Regulations of 2012.

4.14 To what extent does general consumer protection legislation apply to the relationship between the airport operator and the passenger?

The CPA, as stated in question 4.11 above, applies to the promotion and supply of goods and services to consumers within South Africa and thus generally applies to the relationship between the airport operator and the passenger.

It is submitted that if a passenger were to cancel a flight, he/she would be entitled to a refund of the airport taxes included in the air fare under the provisions of the CPA.

4.15 What global distribution suppliers (GDSs) operate in your jurisdiction?

The major global distribution suppliers operating in South Africa are: Amadeus; Galileo (Travelport); Sabre; and Worldspan.

4.16 Are there any ownership requirements pertaining to GDSs operating in your jurisdiction?

There are no ownership requirements placed upon GDSs operating in South Africa.

4.17 Is vertical integration permitted between air operators and airports (and, if so, under what conditions)?

In terms of Section 5 of the Competition Act, an agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighs that effect.

5 In Future

5.1 In your opinion, which pending legislative or regulatory changes (if any) or potential developments affecting the aviation industry more generally in your jurisdiction are likely to feature or be worthy of attention in the next two years or so?

5.1.1 Proposed amendments to the Civil Aviation Regulations of 2011

The Minister of Transport gave notice on 23 September 2016 of its intention to amend the Civil Aviation Regulations of 2011 and the Director of Civil Aviation also intends to amend the Technical Standards; however, the amendments are scheduled for discussion at Parliament only in 2017. At this stage, Cabinet approval has not been obtained and the Office of the Chief State Law Advisor has not yet perused the Bill concerned. Furthermore the Bill, after the above-mentioned steps have been finalised, has to be published for public comment.

5.1.2 Remotely piloted aircraft systems ("RPAS")

Regulations under Part 101 governing the licensing and operation of RPAS came into effect on 1 July 2015, making South Africa one of the first countries to make comprehensive headway in terms of developing regulations for the operation of drones.

The new regulations will affect drones used for private and commercial use. Private use regulation is limited and necessitates that the drone may not have any commercial interest and is solely operated on the property owned by the operator, and requires that distance thresholds are maintained. However, despite universal standards of use, drones do not have to be approved and licensing requirements do not exist.

Should one wish to operate a drone commercially, this must be approved by the South African Civil Aviation Authority and the operator will need to obtain an RPAS pilot's licence. Such licences are issued in three specific categories: aeroplane; helicopter; and multi-rotor. Logbooks detailing each flight also have to be recorded by pilots.

An issue that will no doubt be debated, and answers thereto found, is what regime will regulate cross-border operation of drones, and whether the bilateral system will need to be addressed to recognition of foreign operator permits, etc., as well as whether the International Air Services Council has the jurisdiction to deal with the issue or operators will simply have to apply for permission to operate in each specific country from which they wish to launch their operation.

5.1.3 Slot availability

The Airport Slot Coordination Regulations 2012 were published in the *Government Gazette* on 22 February 2013, in terms of which the Air Traffic Navigation Services has been appointed as the Coordinator, whose function is to facilitate the process of voluntary schedule adjustments by aircraft operators so as to avoid exceeding the coordination parameters of schedules-facilitated airports.

In addition, the Slot Coordination Committee was established and made up of representatives of a number of aviation industry and State bodies whose function is to advise on the coordination parameters contemplated in Regulation 18 and make proposals to, or advise, the Coordinator, the Director-General or the Minister on:

(i) possibilities for increasing the capacities of coordinated airports or for improving their usage by aircraft operators;

(ii) improvements to aircraft traffic conditions prevailing at coordinated airports, including environmental issues relating to aircraft traffic;

(iii) local rules and local guidelines for the allocation of slots, which rules or guidelines are specific to a particular airport;

(iv) methods of monitoring the use of slots;

(v) serious problems encountered by new entrants in accessing coordinated airports;

(vi) any other issues relating to capacity, slot allocation and monitoring of the use of slots at coordinated airports; and

(vii) the designation of coordinated airports and schedules-facilitated airports, the withdrawal of designations, the relaxation of designations and the designation of special event airports in terms of Regulations 2 to 7.

In addition, the Committee is tasked with promoting the optimisation of the utilisation of slots in the interests of all stakeholders and in the national interest.

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Christodoulou & Mavrikis Inc. is a full-service South African corporate and commercial law firm established in Johannesburg in 1991. The firm specialises in aviation law with solid commercial law capabilities, and is ideally placed to deal with both local and international mergers & acquisitions, commercial litigation and dispute resolution. Aviation law services include liability and contentious issues, drafting and negotiating aviation leasing contracts and other commercial aspects of aviation, including aircraft repossessions, acquisitions and registrations. We have acted for commercial airliners, charter operators, regulators, recreational aviation associations, insurers and brokers, maintenance organisations and private owners, as well as local correspondents for international law firms.

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Spain

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1 General

1.1 Please list and briefly describe the principal legislation and regulatory bodies which apply to and/or regulate aviation in your jurisdiction.

The civil aviation regulatory bodies in Spain are the Directorate General of Civil Aviation, an agency of the Ministry of Development, and the Spanish Air Safety Agency ("*Agencia Estatal de Seguridad Aérea* – AESA"), created by Royal Decree No. 184/2008, of 8 February 2008, which also depends on the Ministry of Development. The Directorate General of Civil Aviation deals with strategic and political issues related to aviation, and AESA is in charge of licensing, operations, airworthiness and operator certificates, and it is the entity in which sanctioning powers are vested.

Article 149.20 of the Spanish Constitution states that all matters relating to airports, general interest, control of, and circulation through, the airspace, air transportation, meteorological services and aircraft registration are reserved to the central state (Spain being organised as follows: central state; autonomous communities; provinces; and municipalities). Apart from the constitutional rules, the basic civil aviation rules are:

- the Air Navigation Act 1960 (Act No. 48/1960 of 21 July 1960);
- the Aviation Safety Act 2003 (Act No. 21/2003 of 7 July 2003);
- the Air Navigation Penal and Procedural Act 1964 (Act No. 209/1964 of 24 December 1964);
- the Chicago Convention 1944 (ratified in 1969);
- the Warsaw Convention 1929 (ratified in 1930);
- the Geneva Convention 1949 (ratified in 1952);
- the Hague Protocol 1955 (ratified in 1965);
- the Montreal Protocol Nos. 1, 2 and 4 (all three ratified in 1984);
- the Rome Convention 1952 (ratified in 1957);
- the Tokyo Convention 1963 (ratified in 1969);
- the Hague Convention 1970 (ratified in 1972);
- the Montreal Convention and Protocol 1971 (ratified in 1974 and in 1992 respectively);
- the Montreal Convention 1999 (ratified in 2004);
- the Cape Town Convention 2001 (ratified in 2013);
- the Aircraft Protocol (ratified in 2016);
- European Union regulations; and
- several domestic rulings.

1.2 What are the steps which air carriers need to take in order to obtain an operating licence?

An application, accompanied by the necessary documents, has to be filed with the Directorate General of Civil Aviation, under the Ministry of Development, pursuant to the Ministerial Order of 12 March 1998 on the granting and maintenance of operating licences to carriers. The Directorate analyses and evaluates the application and its attachments. It is required to make a decision within three months of the date of the application. This decision is a formal administrative decision.

If there is no decision from the Directorate within three months from the date of application, this will mean that the application has been denied. The applicant can then apply for remedies as provided by the law, namely to take the matter to the administrative courts that are part of the Spanish judiciary. In the event that the application is expressly denied, the same remedies are available for the reversal of the decision, including the possibility of asking the European Commission to review the case.

1.3 What are the principal pieces of legislation in your jurisdiction which govern air safety, and who administers air safety?

Air transport is regulated by several rules. These include European Union and domestic rules. The key EU rules include:

- Regulation (EEC) No. 3922/1991 of 16 December 1991;
- Regulation (EC) No. 216/2008 of 20 February 2008;
- Regulation (EC) No. 69/2014 of 27 January 2014;
- Regulation (EC) No. 748/2012 of 3 August 2012;
- Regulation (EC) No. 965/2012 of 5 October 2012;
- Regulation (EC) No. 2015/640 of 23 April 2015;
- Regulation (EC) No. 1321/2014 of 26 November 2014;
- Regulation (EC) No. 1178/2011 of 3 November 2011;
- Regulation (EC) No. 70/2014 of 27 January 2014;
- Regulation (EU) No. 2015/640 of 23 April 2015;
- Regulation (EU) No. 452/2014 of 29 April 2014;
- Regulation (EU) No. 391/2013 of 3 May 2013;
- Regulation (EU) No. 2016/1377 of 4 August 2016;
- Regulation (EC) No. 1033/2006 of 4 July 2006;
- Regulation (EU) No. 2015/340 of 20 February 2015;
- Regulation (EU) No. 1332/2011 of 16 December 2011;
- Regulation (EU) No. 923/2012 of 26 September 2012;

- Regulation (EC) No. 300/2008 of 11 March 2008;
- Regulation (EC) No. 272/2009 of 2 April 2009;
- Regulation (EU) No. 2015/1998 of 5 November 2015; and
- Regulation (EC) No. 1079/2012 of 16 November 2012.

The domestic rules include:

- Air Navigation Act No. 48 of 21 July 1960;
- Royal Decree No. 57/2002 of 18 January 2002, which enforced the Rules on Air Navigation and the Air Safety Act No. 21 of 7 July 2003;
- Royal Decree No. 547/2006 of 5 May 2006, concerning third-country aircraft utilising Spanish airports;
- Royal Decree No. 550/2006 of 5 May 2006, regarding the National Programme for the Safety of Civil Aviation and the National Committee of Civil Aviation Safety;
- Royal Decree No. 184/2008 of 8 October 2008, approving the legal statute of the Spanish Air Safety Agency (AESA);
- Royal Decree-Law No. 13/2010 of 3 December 2010, approving performances in tax, labour and liberalisation matters in order to promote investment and job creation;
- Spanish Law No. 1/2011 of 4 March 2011, which established the State Safety Operational Programme for Civil Aviation and amended Spanish Law No. 21/2003 of 7 July 2003, on Aviation Safety;
- Royal Decree-Law No. 11/2011 of 26 August 2011, which created the Airport Economic Regulation Commission ("*Comisión de Regulación Económica Aeroportuaria*");
- Spanish Law No. 2/2012 of 29 June 2012, approving the State Budget Law, which established an increase in Spanish airport charges (in force until 1 January 2016);
- Resolution of 16 July 2012 of the General Secretariat of Transport, which approved the National Safety Programme for Civil Aviation ("*Programa Nacional de Seguridad para la Aviación Civil* – (PNS)"); and
- Ministerial Order of 12 March 1998 on the granting and maintenance of operating licences to carriers.

The Ministry of Development, through the Spanish Air Safety Agency ("*Agencia Estatal de Seguridad Aérea* – (AESA)"), is the Government department which governs air safety.

1.4 Is air safety regulated separately for commercial, cargo and private carriers?

No, the same domestic rules as mentioned above regulate all air operations, irrespective of their nature, with the exception of military carriers.

1.5 Are air charters regulated separately for commercial, cargo and private carriers?

No, they are not.

1.6 As regards international air carriers operating in your jurisdiction, are there any particular limitations to be aware of, in particular when compared with 'domestic' or local operators? By way of example only, restrictions and taxes which apply to international but not domestic carriers.

A distinction is made between air transport services within the European Union and those covering the rest of the world.

Air transport services within the European Union are regulated in accordance with the packages of 1987, 1989 and 1992, complemented by the rules regarding the allocation of slots. As far as domestic legislation is concerned, air transport services are regulated in accordance with the Ministerial Orders of 27 November 1997 and 12 March 1998.

Air transport services covering the rest of the world are subject to bilateral agreements. Spain has recently ratified the open skies treaty with the US.

In relation to airport charges such as landing fees, parking fees, handling fees, etc., they have suffered an increase set forth in the Spanish State Budget Act for 2012, and they apply to all carriers using Spanish airports.

1.7 Are airports state or privately owned?

Almost all 54 Spanish airports are State-owned and operated by a State-owned corporation named "Aena, S.A.", formerly named "Aena Aeropuertos, S.A.", except the airport of Murcia-Corvera (under construction), the airport of Ciudad Real, the airport of Castellón, the airport of Lérida-Alguaire, the airport of Teruel and the airport of Andorra-La Seu.

There are many private aerodromes. They are mainly devoted to activities such as general aviation, firefighting, flying schools, etc.

The following airports are operated by Aena, S.A.: A Coruña; Adolfo Suárez Madrid-Barajas; Albacete; Algecira; Alicante-Elche; Almería; Asturias; Badajoz; Barcelona-El Prat; Bilbao; Burgos; Ceuta; Córdoba; El Hierro; Fuerteventura; Girona-Costa Brava; Gran Canaria; Granada-Jaén F.G.L.; Huesca-Pirineos; Ibiza; Jerez; La Gomera; La Palma; Lanzarote; León; Logroño-Agoncillo; Madrid-Cuatro Vientos; Málaga-Costa del Sol; Melilla; Menorca; Murcia-San Javier; Palma de Mallorca; Pamplona; Reus; Sabadell; Salamanca; San Sebastián; Santiago; Seve Ballesteros-Santander; Sevilla; Son Bonet; Tenerife Norte; Tenerife Sur; Valencia; Valladolid; Vigo; Vitoria; and Zaragoza.

Royal Decree-Law No. 13/2010, of 3 December 2010, created the company "Aena Aeropuertos, S.A." (today, "Aena, S.A.") which took over the management of airports which were previously managed by the Public Entity AENA. The intention of this is the gradual privatisation of Aena Aeropuertos, S.A.

Royal Decree-Law No. 8/2014, of 8 July 2014, started the privatisation process of Aena Aeropuertos, S.A., which went into the stock market in February 2015. Among the performed changes, the company "Aena Aeropuertos, S.A." changed its name to "Aena, S.A."; the name of the public entity "*Entidad Pública Empresarial Aeropuertos Españoles y Navegación Aérea* (AENA)" changed its name to "ENAIRE"; both shall maintain their legal nature and functions.

1.8 Do the airports impose requirements on carriers flying to and from the airports in your jurisdiction?

Yes. Spanish carriers need to have an operating licence in Spain and a valid air operator certificate (AOC). Foreign carriers need to have the same documents issued by their state of origin. Carriers which are included in the list of airlines banned within the EU ("blacklist" of dangerous airlines of the European Commission) are not allowed to operate in Spain.

1.9 What legislative and/or regulatory regime applies to air accidents? For example, are there any particular rules, regulations, systems and procedures in place which need to be adhered to?

The Air Navigation Act 1960 refers briefly to aviation accidents in article 134 where it is stated that the investigation of accidents shall

be dealt with by the civil aviation authorities. Following ICAO's annex XIII, and the incorporation into domestic law of Directive 94/56/EC of 21 November 1994 and Royal Decree No. 389/1998 of 13 March 1998, the investigation procedures were updated and the duties and responsibilities of the Spanish Aviation Accident Investigation Bureau ("*Comisión de Investigación de Accidentes e Incidentes de Aviación Civil*") defined. Later on, articles 11 *et seq.* of the Aviation Security Act No. 21/2003 of 7 July 2003 set up more appropriate rules, maintaining the bureau as a body independent from the Directorate General of Civil Aviation (although under the jurisdiction of the Ministry of Development) and emphasising that the only purpose of the investigation of accidents and incidents is to prevent future accidents and incidents, and not to apportion blame or liability.

Article 9 of the Regulation (EU) No. 996/2010 of the European Parliament and of the Council of 20 October 2010 on the investigation and prevention of accidents and incidents in Civil Aviation and repealing Directive 94/56/EC, states that aviation authorities, persons responsible for facilities and services relating to air navigation, owners, operators and crew members of aircraft, and any person, or entity involved with, or related to, an aviation incident or accident, must report the event to the Aviation Accident Investigation Authority of the Member State involved in the accident, which in Spain is the Spanish Aviation Accident Investigation Bureau ("*Comisión de Investigación de Accidentes e Incidentes de Aviación Civil*"), as soon as it becomes known to them. Such report is to be made using the fastest and most efficient means available.

Spain has introduced the aforesaid EU Regulation No. 996/2010 into domestic legislation by means of Royal Decree No. 632/2013 of 2 August, which regulates assistance to victims of civil aviation accidents and their relatives and amends the previous regulations on investigation of air accidents.

1.10 Have there been any recent cases of note or other notable developments in your jurisdiction involving air operators and/or airports?

- Ciudad Real Airport: in April 2016, Ciudad Real Airport was sold to Ciudad Real International Airport, S.L. (CRIA) for a total of EUR 56.2 million as the result of the tendering process with creditors initiated in 2009. CRIA is currently waiting on the decision of the Spanish Air Safety Agency (AESA) for the granting of the requisite authorisations and licences. Meanwhile, the negotiations with the institutions and companies of both private and public sectors are underway for the provision of the airport facilities.
- New Spanish Aircraft Registry Regulations since 1 December 2015: on 1 December 2015, the new Regulations which regulate the procedures for the recordation of aircraft in the Spanish Aircraft Registry entered into force. These new regulations abolished the previous regulations, which had been in force since 1969.

2 Aircraft Trading, Finance and Leasing

2.1 Does registration of ownership in the aircraft register constitute proof of ownership?

No. In Spain, there are two registries: the Spanish Aircraft Registry; and the Register of Goods and Chattels.

The Spanish Aircraft Registry will register a foreign-owned aircraft leased by a Spanish operator. However, the Spanish Aircraft Registry has no jurisdiction over the recognition of ownership rights and priority interests. It may note the name of the party that is the owner of the aircraft. This notation is purely informative, that is, it does not create a right that is opposable (effective) *vis-à-vis* third parties. In order to register the aircraft, a form needs to be completed, which can be obtained from the Spanish Aircraft Registry ("*Registro de Aeronaves*").

As a result of Royal Decree No. 1709/1996 of 12 July 1996, an aircraft owner having the nationality of a Member State of the European Union may also register its title in the Spanish Aircraft Registry, but he/she has to appoint a representative in Spain for this purpose.

The Register of Goods and Chattels only records ownership titles and mortgages. Said Register requires prior recording of title before recording a mortgage over the aircraft. Recording a title by a non-EU party is only possible on the basis of a reciprocity test; namely, it is granted only if the aircraft registry of the relevant country admits the recording of title by a Spanish aircraft owner.

2.2 Is there a register of aircraft mortgages and charges? Broadly speaking, what are the rules around the operation of this register?

Yes. See question 2.1 above (final paragraph).

In addition, the recordation of ownership title or a mortgage in the Register of Goods and Chattels may take around two to four weeks; the creation of a Spanish mortgage would require the payment of Spanish stamp duty at the rate of 0.5% (in certain regions this rate may be higher) over the amount of the secured obligation (the principal of the loan plus an amount of interest which cannot exceed the interest accruing during a period of five years).

2.3 Are there any particular regulatory requirements which a lessor or a financier needs to be aware of as regards aircraft operation?

Yes. Under Spanish law, unpaid airport landing and parking charges would not create a lien over the aircraft. However, the owner of an aircraft leased to a Spanish operator may be prevented by local airports from flying the aircraft away if there are outstanding airport fees and if there has been a change in the operator.

In this respect, the applicable regulations would be the statute whereby AENA, the Spanish airport authority, was created and is regulated, as described under question 4.13.

Furthermore, any commercial transaction and operation executed in Spain requires the involved individual of non-Spanish nationality to obtain a N.I.E. (Foreign Identity Number), for the consideration of security and registration.

2.4 Is your jurisdiction a signatory to the main international Conventions (Montreal, Geneva and Cape Town)?

Please see question 1.1 where the main international conventions signed by Spain are listed. Spain is a member country of the Convention on Interests in Mobile Equipment made in Cape Town on 16 November 2001, by way of the accession instrument dated 20 June 2013 and published in the State Gazette on 4 October 2013. Spain's accession to the Aircraft Protocol of the Cape Town Convention was published in the State Gazette on 1 February 2016 and the Aircraft Protocol came into force on 1 March 2016.

2.5 How are the Conventions applied in your jurisdiction?

They are directly applied by the Spanish courts in case of any dispute.

3 Litigation and Dispute Resolution

3.1 What rights of detention are available in relation to aircraft and unpaid debts?

A creditor of the owner of the aircraft may seize the aircraft for unpaid debts except if the route operated by the aircraft is considered to be the provision of a public service. The creditor needs to apply to court, who will issue a court order seizing the aircraft. In order to release the detention, evidence of payment of the debt needs to be provided to the court, which will, in said case, issue an order to annul the seizure.

Under Spanish law, unpaid airport landing and parking charges would not create a lien over the aircraft. However, it has to be taken into account that the owner of the aircraft might be prevented by local airports from flying the aircraft away if there are outstanding airport fees and if there has been a change in the operator.

Strictly speaking, air navigation, landing and parking charges are Spanish taxes ("*tasas*" – users' fees) so that their collection can be enforced through tax procedures, which include seizure of the aircraft and its sale through a public auction, but the aircraft owner may obtain the repossession of the aircraft through court action, taking into account that liability for landing and parking fees generally lies with the operator.

3.2 Is there a regime of self-help available to a lessor or a financier of aircraft if it needs to reacquire possession of the aircraft or enforce any of its rights under the lease/finance agreement?

Under Spanish law, the legal rights of a party can only be enforced through court action, because Spanish courts have the monopoly of coercive power. Self-help measures are less developed than would be the case under English or New York law. Moreover, Spanish law would not treat the obligations of the Lessor/Lender as absolute and unconditional, since rights and obligations must be exercised reasonably, and abuse of law is not permitted (article 7 of the Civil Code).

If the Lessor is seeking to repossess the aircraft following the occurrence of an event of default, it is required to pursue its claim through judicial proceedings. In such a case, the Lessor would have to formally declare an event of default by serving an official notice to the Lessee, and if the Lessee fails to redeliver the aircraft, the Lessor would have to start a declaratory action and at the same time apply for interim relief: the Lessor would be required to post a substantial bank guarantee with the Spanish court to indemnify any damage caused to the Lessee. In our experience, it may take three months to obtain an injunction from a Spanish court, although there is no definitive time period.

A Spanish court would base an injunction or an interim order regarding the repossession of the aircraft on two requirements: (a) the Lessor must submit to the Court a document evidencing the existence of its claim against the Lessee. In other words, it must show that it has good legal right to take action against the Lessee ("*fumus boni iuris*"); (b) there is a risk of considerable court delay ("*periculum in mora*"): for instance, the Lessee may have dissipated all or a large part of its assets before the Lessor is able to obtain a final judgment on its claim. This risk is difficult to prove and it depends very much on the subjective criteria of the relevant court. An *ex parte* order would be granted by a Spanish court only in exceptional situations. In most cases, the Spanish court will hold a hearing to which the defendant will have the possibility to attend before granting an injunction.

3.3 Which courts are appropriate for aviation disputes? Does this depend on the value of the dispute? For example, is there a distinction in your country regarding the courts in which civil and criminal cases are brought?

The courts where a dispute is held depend on the matter, and not on the value of the dispute.

Consequently, for cases of insolvency and passenger rights, the competent courts are the Commercial Courts ("*Juzgados de lo Mercantil*").

In relation to any civil claim (claims for owed amounts, damages, etc.), the Civil Courts of First Instance ("*Juzgados de Primera Instancia*") are competent.

Criminal cases are brought in front of the Criminal Courts of Examination ("*Juzgados de Instrucción*"), and civil responsibility arising from criminal offences can also be claimed together with the criminal complaint.

Finally, resolutions of the Governmental or Regulatory Bodies can be challenged in front of the Administrative Courts of Justice ("*Juzgados de lo contencioso-administrativo*").

3.4 What service requirements apply for the service of court proceedings, and do these differ for domestic airlines/parties and non-domestic airlines/parties?

For the purposes of proceedings before a Spanish Court, a notarised and apostilled power for litigation needs to be granted by the Plaintiff to a Spanish court agent ("*Procurador de los Tribunales*"), any document in English or in another foreign language must be filed with a Spanish translation and Plaintiffs are subject to an *ad valorem* user's fee ("*Tasa por el ejercicio de la potestad jurisdiccional*").

These service requirements do not differ for domestic airlines/parties and non-domestic airlines/parties, i.e. the same requirements are applicable for everybody.

3.5 What type of remedies are available from the courts or arbitral tribunals in your jurisdiction, both on an i) interim and a ii) final basis?

(i) Interim remedies: a plaintiff is entitled to ask for an injunction ("*medida cautelar*") from the courts within a court proceeding and an arbitral proceeding. The party requesting the injunction needs to justify (a) that there is an appearance, an indication or a token that he has a good legal right in relation to the claim ("*fumus boni iuris*"), and (b) that there is a great risk of loss of the object of the claim in case the injunction is not granted ("*periculum in mora*"). The injunction can consist in the attachment of goods or monies, the recordation of the claim with a public registry, a court order to cease an activity, the deposit of goods, the suspension of shareholder agreements or any other measure to protect the rights of the party requesting the injunction. The party asking for the injunction has to post a bond as guarantee to protect the rights of the defendant.

To obtain a resolution granting an interim measure may take around three months.

(ii) Remedies on a final basis from a court are essentially judgments which can be enforced in front of the courts of justice. The likely time it will take to obtain a judgment in the first instance depends on the relevant backlog of work of the court and may be between six months and one-and-a-half years. The further enforcement of the judgment depends also on the court and may take between one and three months.

Remedies on a final basis from an arbitral tribunal are essentially awards which can be enforced in front of the courts of justice. The likely time it will take to obtain an arbitral award depends on the arbitrators and may take between three months and one year. The further enforcement of the award depends on the court where it is enforced and may take between one and three months.

3.6 Are there any rights of appeal to the courts from the decision of a court or arbitral tribunal, and, if so, in what circumstances do these rights arise?

(a) Right of appeal to the courts from the decision of a court

The judgments issued by a Court of First Instance can be challenged in front of the Court of Appeals ("*Audiencia Provincial*"), except in case of judgments issued in a verbal proceeding ("*juicio verbal*") where the claimed amount is EUR 3,000, or lower.

The judgments issued by the Court of Appeals can only be challenged in front of the Supreme Court ("*Tribunal Supremo*") under very restricted circumstances.

(b) Right of appeal to the courts from the decision of an arbitral tribunal

The reasons for annulment of an award are very restricted under Spanish law. The applicant must argue and prove that: a) the arbitration clause does not exist or is invalid; b) the appointment of an arbitrator and/or the arbitration proceedings have not been properly notified or a party has been unable for any reason to exercise its right of defence; c) the appointment of the arbitrators or the arbitration proceedings have not been carried out in accordance with the agreement between the parties (unless such agreement was contrary to mandatory law) or, in the absence of such an agreement, in accordance with the arbitration law; d) the arbitrator has decided about matters which cannot be arbitrated; or e) the award is contrary to Spanish public policy. The motion of annulment has to be filed not later than two months from the date of the award in the High Court of Justice ("*Tribunal Superior de Justicia*") of the relevant Spanish region. Its decision is final.

Spain has ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

4 Commercial and Regulatory

4.1 How does your jurisdiction approach and regulate joint ventures between airline competitors?

There is no specific law on joint ventures between airline competitors. The applicable law is the Spanish Act No. 15/2007 of 3 July 2007, on Defence of Competition, further developed by Royal Decree No. 261/2008 dated 22 February, in order to adapt it to EU Competition regulations.

In terms of concentration, the Law focuses its definition on the existence of a stable change in the control structure, ***de iure* or *de facto***, of all or part of one or more undertakings as a result of: (i) the merger of two or more previously independent undertakings; (ii) the acquisition by a company of control over all or part of one or more companies; or (iii) the creation of a joint venture and, in general, the acquisition of control over one or more companies, when they permanently perform functions of an autonomous economic entity.

The Law establishes the market share threshold restriction in 30% of the relevant market, and foresees a mechanism for the update of turnover (if the overall turnover in Spain of all the undertakings involved in the concentration in the last financial year exceeds the amount of EUR 240 million, provided that at least two of the undertakings reached a turnover exceeding EUR 60 million individually in Spain).

4.2 How do the competition authorities in your jurisdiction determine the "relevant market" for the purposes of mergers and acquisitions?

As a general rule, the relevant market must be defined according to the specific circumstances of the relevant situation.

In the context of "concentration" control, for scheduled flights, the definition of the relevant market in air transport is generally made on the basis of a route or a bundle of routes. More specifically, in the *KLM/Alitalia* decision (see case *M/JV-19-KLM/Alitalia*), the European Commission concluded that each point-of-origin/point-of-destination pair constitutes a relevant market, and that such market includes a route or a bundle of routes.

In Spain, the competition authority is the National Competition and Markets Commission ("*Comisión Nacional de los Mercados y de la Competencia* – (CNMC)") and the competent courts of justice for competition matters are the Administrative Courts of Justice ("*Juzgados de lo contencioso-administrativo*").

4.3 Does your jurisdiction have a notification system whereby parties to an agreement can obtain regulatory clearance/anti-trust immunity from regulatory agencies?

The Spanish Act No. 15/2007 of 3 July 2007, on Defence of Competition, sets forth a leniency procedure, similar to the one in effect in the EU, whereby undertakings that, having been part of a cartel, report the existence of the cartel and provide substantial evidence for the investigation, shall be exonerated from payment of the fine, provided they cease their conduct of infringement and have not been the instigators of the prohibited agreement. Likewise, the amount of the fine may be reduced for undertakings that collaborate but do not meet the requirements for complete exemption.

The leniency procedure in Spain has been developed from European Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings and by all related Commission decisions finally granting immunity or reduction of fines or rejecting immunity and leniency applications (1996, 2002 and 2007 Leniency Notices), which state the confidentiality of the procedure and the obligation of the requestor of leniency to cooperate with the Antitrust Authorities throughout the procedure. According to the Regulation, only the first requestor of leniency will be given full immunity, provided that it supplies the Antitrust Authorities with information allowing them to carry out an investigation that it would not have been able to start by itself, and which proves the existence of a cartel.

Companies that have already received the statement of objections from the European Commission and ring-leaders cannot claim immunity. They can, however, request a reduced fine if they provide evidence that significantly helps the investigation.

4.4 How does your jurisdiction approach mergers, acquisition mergers and full-function joint ventures?

Please see question 4.1.

4.5 Details of the procedure, including time frames for clearance and any costs of notifications.

The Spanish Act No. 15/2007 of 13 July, on Defence of Competition, foresees a system of mandatory notification of concentrations. With regards to merger control procedure, the Law establishes two phases of the procedure and allocates the competence for its handling and resolution to the National Competition and Markets Commission. In the first phase, which shall have a maximum duration of one month, operations that do not raise competition problems will be analysed and approved. In the second phase, which has a maximum duration of two months, a more detailed analysis of the operation will be made, with the participation of interested third parties, in order for the National Competition Commission's Council to adopt a final resolution.

The procedure before the National Competition and Markets Commission foresees the imposition of conditions, the presentation of commitments by the notifying parties to solve the possible problems of competition derived from the concentration, and the possible consultation of interested third parties.

In the case that the Council issues a resolution prohibiting or subordinating the authorisation to commitments or conditions, the Minister of Economy, Industry and Competitivity will have a 15-day period to raise the matter of the concentration with the Council of Ministers for its intervention. The final decision of the Council of Ministers, duly justified, that may authorise the concentration with or without conditions, must be adopted within one month from the moment that the proceedings were raised to the Council of Ministers, and a report may be requested from the National Competition and Markets Commission.

The Regulation develops the merger notification procedure, including two notification forms: one regular and the other one abridged.

The new regular notification is closer to the European Commission's form used for concentrations with EU dimensions. The abridged form relieves the parties of the need to submit a substantial amount of information, thus considerably simplifying the notification process for operations that do not contain elements capable of affecting competition, which is understood to occur in the following scenarios: (i) when none of the parties to the concentration operates in the same geographic and product market, or in related upstream, downstream or neighbouring markets in which any of the other parties to the operation is active; or (ii) when the presence of the parties in the market, due to its reduced importance, is not capable of significantly affecting competition.

4.6 Are there any sector-specific rules which govern the aviation sector in relation to financial support for air operators and airports, including (without limitation) state aid?

The EU-specific competition rules regarding state aid applying to the aviation sector include:

- Communication from the Commission 94/C350/07 regarding the application of articles 92 and 93 (not 87 and 88) of the EC Treaty and article 61 of the EEA Agreement to State Aid in the aviation sector;
- Council Regulation (EEC) No. 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes; and
- Communication from the Commission C 2005 (312). Community guidelines on financing of airports and start-up aid to airlines departing from regional airports.

The general Spanish provisions on state aid are contained in Act No. 38/2003 of 17 November 2003 on subsidies.

4.7 Are state subsidies available in respect of particular routes? What criteria apply to obtaining these subsidies?

Yes. The criteria which apply are the ones contained in the Communication from the Commission C 2005 (312). The essential criteria contained in said guidelines is the "principle of the private investor" in a market economy, following which it has to be examined if, under normal conditions, a private partner would have invested capital, based only on the foreseeable possibilities of profit, regardless of any consideration of a social, regional policy or sectorial nature.

In addition, in particular, in Spain, residents of the Canary Islands and Balearic Islands, and the towns of Ceuta and Melilla benefit from lower airfares subsided by the central and the relevant regional government. Spanish law also provides for an obligation of public services in respect of routes to certain cities and islands establishing frequencies of flights and maximum price levels.

4.8 What are the main regulatory instruments governing the acquisition, retention and use of passenger data, and what rights do passengers have in respect of their data which is held by airlines?

The EC Directive 1995/46 of 24 October 1995, on Personal Data Protection, was implemented in Spain by the Spanish Data Protection Act No. 15/1999 of 13 December 1999 (LOPD). In addition, in April 2008 an enabling regulation of the LOPD (Royal Decree No. 1720/2007) has developed this legislation. Therefore, the LOPD and Royal Decree No. 1720/2007 constitute the legal framework for the privacy rights of individuals in connection with the processing of their personal data, and they apply to both private and public entities. The processing of personal data is, in general terms, subject to the prior consent of the data subject, which may be provided expressly or tacitly (with 30 days' prior notice). Notwithstanding this general rule, tacit consent may be deemed to have been given in situations where the processing of personal data takes place and relates to the parties to a commercial agreement (such as the agreement which would exist between airlines and its passengers).

In general terms, the information that must be provided to individuals when collecting personal data from the data subject is the following:

- Existence of a database, its purpose and end-users, including any assignees, where applicable.
- Voluntary or mandatory nature of the information requested.
- Consequences of the provision of, or refusal to provide, personal information.
- The data subjects' right to have access to, correct and cancel any personal data relating to them, as well as their right to oppose themselves to the processing activities performed by the data controller.
- Name and address of the data controller and name and address of those responsible for the database in Spain, if the data controller is located outside the EU.

4.9 In the event of a data loss by a carrier, what obligations are there on the airline which has lost the data and are there any applicable sanctions?

Following the infringement of any provision of the Spanish Data Protection Act No. 15/1999 of 13 December 13, 1999 (LOPD) or of Royal Decree No. 1720/2007, investigation proceedings may be

opened, whether by a claim filed by the data subjects or a legitimate third party (e.g. a consumer association or other organisation representing the interests of affected individuals), or *ex officio* by the Spanish Data Protection Agency. The LOPD determines 19 potential violations. They are divided into three categories: minor; serious; and very serious. These violations are subject to penalties depending on the nature of the personal rights affected, the volume of data concerned, the profits obtained, the intent, the continued nature of the infringement, etc., ranging from:

- Minor infringements: fine from EUR 900 to EUR 40,000.
- Serious infringements: fine from EUR 40,001 to EUR 300,000.
- Very serious infringements: fine from EUR 300,001 to EUR 600,000.

Airlines can challenge the imposition of fines by the Spanish Data Protection Agency in front of the Administrative Courts of Justice ("*Juzgados de lo contencioso-administrativo*"). Passengers in respect to whom data has been lost, are able to seek damages against the airline through court action.

4.10 What are the mechanisms available for the protection of intellectual property (e.g. trademarks) and other assets and data of a proprietary nature?

In Spain, there is an intellectual property office which depends on the Ministry of Culture ("*Registro General de la Propiedad Intelectual*").

There is also a Register of Patents and Trademarks which depends on the Ministry of Industry ("*Oficina Española de Patentes y Marcas*").

Requests for patents are filed with the Register of Patents and Trademarks and, following an internal review eighteen (18) months after the filing, the register publishes in its official gazette ("*Boletín Oficial de la Propiedad Industrial*") a proposal for a patent, which is subject to challenges from third parties. Thereafter, the register grants the requested patent and this decision is again published in the register's official gazette. Any third party is entitled to challenge the decision of the register in front of the Administrative Courts of Justice ("*Juzgados de lo contencioso-administrativo*"). The patent is granted for a non-extendable period of twenty (20) years. The person whose patent right is violated is entitled to seek protection of his rights from the courts of justice. The person whose patent right is violated is also entitled to seek from the courts of justice an interim remedy (injunction), in order to protect his patent rights.

Trademarks are protected by means of their registration in the aforementioned Register of Patents and Trademarks, and the claimant can file civil and criminal actions to protect its rights, including claiming for damages.

The courts which deal with issues relating to intellectual and industrial property are the Commercial Courts ("*Juzgados de lo Mercantil*"). With respect to the resolutions issued by the Register of Patents and Trademarks in relation to the registration of trademarks and patents with said register, the Administrative Courts of Justice are the competent courts. Criminal courts deal with criminal offences.

4.11 Is there any legislation governing the denial of boarding rights?

The applicable legislation is Regulation (EC) No. 261/2004 of 11 February 2004, establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. The competent courts where passengers are entitled to file their claims in relation to denial of boarding rights are the Commercial Courts ("*Juzgados de lo Mercantil*").

The Ministry of Transport can impose sanctions foreseen in the Aviation Security Act 2003 (Act No. 21/2003 of 7 July 2003) which can be challenged in front of the Administrative Courts of Justice.

There are many judgments and case law whereby Spanish courts of justice have ruled in favour of consumers (passengers).

4.12 What powers do the relevant authorities have in relation to the late arrival and departure of flights?

Following the provisions of the Aviation Security Act 2003 (Act No. 21/2003 of 7 July 2003), the Ministry of Transport through the Spanish Air Safety Agency ("*Agencia Española de Seguridad Aérea* – (AESA)"), is entitled to impose sanctions against carriers as a consequence of these infringements of up to EUR 250,000, which can be challenged in front of the Administrative Courts of Justice.

4.13 Are the airport authorities governed by particular legislation? If so, what obligations, broadly speaking, are imposed on the airport authorities?

The State-owned corporation AENA (currently named "ENAIRE") is the Spanish airport authority in respect of air navigation and air traffic control, which was incorporated by article 82 of Law No. 4/1990 of the State Budget for 1990 and is regulated by Royal Decree No. 905/91 of 14 June, as amended by Royal Decree No. 1993/1996 of 6 September, by Royal Decree No. 1711/1997 of 14 November, by Royal Decree No. 2825/1998 of 23 December, and by Royal Decree No. 8/2014 of 8 July 2014, whereby it changed its name to ENAIRE. It performs its duties as if it were a private company with respect to its contracting and ownership relationships. With respect to its public decisions, these are subject to the public law regulations.

As a consequence of the privatisation process of AENA (now "ENAIRE"), Royal Decree-Law No. 13/2010 of 3 December has incorporated the State-owned company Aena Aeropuertos, S.A. (currently named Aena, S.A.), which is currently in charge of the management of the 48 State-owned airports, while ENAIRE remains in charge of the supervision and management of the air navigation and air traffic control. The Government has authorised the sale of a stake of up to 49% of Aena, S.A., which went into the stock market in February 2015. The shares were issued at EUR 58 per share and traded at EUR 129,650 as of the end of the year 2016. Currently ENAIRE owns 51% of the capital of Aena, S.A. Royal Decree-Law No. 13/2010 of 3 December also foresees the incorporation of subsidiaries of Aena, S.A. for the management of one or more particular airports.

Besides the Aena, S.A. airports network (48 airports), there are also the listed airports under question 1.7 above (first paragraph). While the air navigation and air traffic control duties remain with ENAIRE, the management of privately owned airports is carried out by its owners subject to an operating licence granted by the Ministry of Transport. Before a licence is approved, several requirements have to be fulfilled (environmental impact, structure of the air space, terminal facilities, airport operations handbook, etc.). A building permit granted by the local municipality is also necessary except for ENAIRE.

4.14 To what extent does general consumer protection legislation apply to the relationship between the airport operator and the passenger?

In Spain, consumer protection is mainly regulated by the General Law for the Protection of Consumers and Users approved by Royal Legislative Decree No. 1/2007 of 16 November, but there are two other pieces of legislation that refer to the protection of passengers in air navigation:

- Law No. 48/1960 of 21 July, on Air Navigation: articles 92 to 101 refer to the transport of passengers and their protection in different situations that may arise as a result of, for example, flight delays or loss of luggage, and the corresponding obligations of the carrier.
- Regulation (EC) No. 261/2004 of 11 February 2004, establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

Consumer protection legislation focuses more on the prevention of abusive practices and the provision of information to consumers, while the two latter pieces of legislation described above focus more on the rights of passengers in case of denied boarding, cancellations, long delay of flights and compensation for lost luggage.

4.15 What global distribution suppliers (GDSs) operate in your jurisdiction?

The GDSs that operate in Spain are: Amadeus (which is the most important one in Spain and Europe); Sabre; and Galileo.

4.16 Are there any ownership requirements pertaining to GDSs operating in your jurisdiction?

No; in Spain there are not any ownership requirements for GDSs to operate in Spain, but there are some restrictions at European level.

Article 8 of the Regulation (EEC) No. 2299/89 of 24 July 1989 establishes that: (i) a parent or participating carrier shall not link the use of any specific Central Reservation System (CRS) by a subscriber with the receipt of any commission or other incentive for the sale or issue of tickets for any of its air transport products; and (ii) a parent or participating carrier shall not require use of any specific CRS by a subscriber for any sale or issue of tickets for any air transport products provided either directly or indirectly by itself. The European Commission may, by decision, impose fines on system vendors, parent carriers, participating carriers and/or subscribers for infringements of this Regulation, up to a maximum of 10% of the annual turnover for the relevant activity of the undertaking concerned.

In fixing the amount of the fine, regard shall be had to both the seriousness and the duration of the infringement.

4.17 Is vertical integration permitted between air operators and airports (and, if so, under what conditions)?

Yes, so long as the threshold foreseen in the Spanish Act 15/2007 on Defence of Competition ("*Ley de Defensa de la Competencia*") of 30% of the relevant market is not exceeded. Air operators and airports, like any other player, are subject to the general provisions which apply to competition matters. Please see questions 4.1 to 4.5.

5 In Future

5.1 In your opinion, which pending legislative or regulatory changes (if any) or potential developments affecting the aviation industry more generally in your jurisdiction are likely to feature or be worthy of attention in the next two years or so?

The Spanish Government has approved, through Royal Decree No. 384/2015 of 22 May 2015, the new Spanish Aircraft Registry Regulations which came into force on 1 December 2015, which include light-structure aircraft and private aircraft for commercial use, which previously had a specific system. These new regulations substitute the former registration system. The regulations determine which aircraft are excluded from registration and incorporate an adjustment on the list of checks for new aircraft that need to carry out test flights.

The new regulations introduce a "register reserve" for those who intend to register an aircraft in Spain, while carrying out the registration procedure. It also regulates the possibility of temporarily cancelling the registration of an aircraft (for a time period of less than five years) when said aircraft is expected to be temporarily recorded abroad.

The purpose of the new regulations is to modernise the Spanish Aircraft Registry, through a more agile, effective and efficient recordation system, adapting it to the present requirements, permitting the application of the Cape Town Convention and the Aircraft Protocol in Spain and guaranteeing an adequate complementarity between the Spanish Aircraft Registry and the Register of Goods and Chattels ("*Registro de Bienes Muebles*"). As a consequence of these new regulations, documents to be filed in the Spanish Aircraft Registry need to have been filed previously with the Registry of Goods and Chattels, and there is an electronic communication system between both registries.

Furthermore, it is worth noting that Spain became a member of the Aircraft Protocol to the Cape Town Convention on 1 March 2016. Under the new rules, in order to deregister an aircraft, the consent of the lessee is required, except when an Irrevocable Deregistration and Export Request Authorisation (IDERA) is put in place and annotated in the Spanish Registry of Goods and Chattels and, thereafter, recorded in the Spanish Aircraft Registry. There is a risk that the IDERA may be recharacterised in an insolvency proceeding as a power of attorney, in which case it will lapse by operation of general law. However, no precedent has been set by the Spanish courts to clarify their understanding on the nature of IDERA; nor is there, for the time being, any precedent of the enforcement of an IDERA before the Spanish Aircraft Registry in order to deregister an aircraft and export it unilaterally from Spain.

Finally, the regulation of drones (pilotless aircraft) will probably be modified and developed in the following years as a consequence of the growth of this industry.

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1 General

1.1 Please list and briefly describe the principal legislation and regulatory bodies which apply to and/or regulate aviation in your jurisdiction.

The Swedish Transport Agency has authority in areas of transport by air, sea, rail and road. The authority is a matter of The Ministry of Enterprise and Innovation, which is a part of the Government Offices of Sweden.

The Civil Aviation and Maritime Department is the part of The Swedish Transport Agency that monitors and regulates civil aviation in Sweden. Within the scope of its assignment, the authority *inter alia* issues regulations pertaining to aviation, examines and issues permits relating to aviation, administers aircraft registrations and supervises aviation rules. The authority also assesses civil aviation, focusing primarily on safety and security.

The Swedish Aviation Act and the Swedish Aviation Ordinance are important pieces of legislation for granting The Swedish Transport Agency authority in civil aviation.

As Sweden is a member of the European Union (EU), The Swedish Transport Agency only has authority to certify aircraft and aircraft materials pertaining to aircraft listed in Annex II to EC Regulation No 216/2008 on common rules in the field of civil aviation. The European Aviation Safety Agency (EASA) is otherwise the regulating body, whose authority has been established in the aforementioned EC regulation including amendments. The European Aviation Safety Agency also conducts oversight of The Swedish Transport Agency in several aspects pertaining to civil aviation.

There is no sector-specific competition regulator in Sweden. The main competent authority for all competition matters is The Swedish Competition Authority. The European Commission also has competence in competition matters, although it usually only investigates if several Member States are involved.

1.2 What are the steps which air carriers need to take in order to obtain an operating licence?

The conditions of obtaining an operating licence are stipulated in EC Regulation No 1008/2008, specifically in Article 4.

There are two types of operating licence:

- Category A – pertaining to aircraft with a maximum certificated take off mass of 10 metric tonnes or more and/or has 20 or more seats.
- Category B – pertaining to aircraft with a maximum certificated take off mass of less than 10 metric tonnes and/or has less than 20 seats.

The Swedish Transport Agency has a form BSL14005, stipulating all documents needed for the application of an operating licence. Less documentation is needed for category B compared to category A.

1.3 What are the principal pieces of legislation in your jurisdiction which govern air safety, and who administers air safety?

As a member of the European Union (EU), air transport safety in Sweden is governed by the implementation of the general provisions of EC Regulation No 216/2008, including amendments, on common rules in the field of civil aviation. The EC Regulation is referred to as "Basic Regulation". The provisions apply to several aspects of civil aviation with some exceptions that may be regulated nationally, such as search and rescue (SAR). There are several implementing rules issued under the aforementioned EC Regulation.

The European Aviation Safety Agency (EASA) issues soft law in the form of certification specifications (CS), acceptable means of compliance (AMC) and Guidance Material (GM), and advises, among others, The Swedish Transport Agency on the application pertaining to the aforementioned EC Regulation.

The Swedish Aviation Act and the Swedish Aviation Ordinance are the main Swedish national legislations.

Furthermore, The Swedish Transport Agency issues regulations (TSFS).

See also question 1.1 above.

1.4 Is air safety regulated separately for commercial, cargo and private carriers?

The Swedish Transport Agency provides detailed safety regulations which apply to non-commercial and non-public transport operations. Holders of relevant documentation (e.g. pilot licence, aircraft registration, certificate of airworthiness, etcetera) are normally not obliged to retain additional permits to carry out such operations. Certain non-commercial aerial operations do require specific permits, such as for flight training or surveillance purposes, the latter of which should be referred to as aerial work.

For helicopter operations, aerial work has been highly regulated in Sweden in a European context. This will change with the introduction of common EU regulations, with the introduction of Part-SPO (Specialised Operations), which is a part of the EU Regulation No

965/2012 as amended by EU Regulation No 800/2013. These are applicable not only for helicopters.

As for private flights, the regulations also contain Part-NCC and Part-NCO, which will regulate non-commercial flights.

As for commercial flights, including cargo, Part-CAT is applicable. The standards for commercial operations are higher than those for private operations.

A private flight, as opposed to a commercial flight, can be characterised that there is not any remuneration made for the flight. "Cost-sharing" is usually accepted on private flights.

1.5 Are air charters regulated separately for commercial, cargo and private carriers?

Charter operators need a specific operating permit. The Swedish Transport Agency has also issued Regulation TSFS 2011:104 applicable to charter flights.

1.6 As regards international air carriers operating in your jurisdiction, are there any particular limitations to be aware of, in particular when compared with 'domestic' or local operators? By way of example only, restrictions and taxes which apply to international but not domestic carriers.

As an EU Member State, the EC Regulation No 1008/2008 on common rules for the operation of air services in the Community regulates access to the Swedish market. Accordingly, any operator who has been granted an operating licence which has been issued in any EU or EEA Member State is granted access to most routes in Sweden (as in the rest of the EEA area). In order to gain access to the market with regard to routes between Sweden and states outside of the EEA, the operator must apply for The Swedish Transport Agency's permission. The same applies for operators holding operating licences issued in a state outside of the EEA.

1.7 Are airports state or privately owned?

The Swedish Government indirectly owns ten major Swedish airports through the corporate group Swedavia. There are several smaller airports which are owned by local/regional municipalities, by local private enterprises or as joint ventures by both public and private interests and investors.

1.8 Do the airports impose requirements on carriers flying to and from the airports in your jurisdiction?

Access to airports in Sweden is primarily governed by the licence that The Swedish Transport Agency has issued for the relevant airport. Other operational limits could apply and there might have to be, depending on the type of operation, an allocation of slots. EC Regulation No 1008/2008 stipulates that EU air carriers generally have access to all routes within the community.

An airport may impose further requirements on carriers operating to and from the airport.

1.9 What legislative and/or regulatory regime applies to air accidents? For example, are there any particular rules, regulations, systems and procedures in place which need to be adhered to?

The investigation of most air accidents and some serious incidents in Sweden is conducted by The Swedish Accident Investigation Authority. If an investigation is conducted, three questions are to be answered: what happened; why did it happen; and what can be done to prevent similar occurrences in the future, or to mitigate the consequences should it happen again? If rescue services have been used, an assessment of those will follow that also has the purpose of making future improvements.

The investigation should not apportion blame as this could be counterproductive to answering the abovementioned questions. In practice, the result of the investigation is often used by the police and public prosecutor. The Swedish Accident Investigation Authority does not normally investigate accidents of ultralight aircraft. Those accidents could be investigated by the police and could also be reviewed by private organisations.

EU Regulation No 996/2010 stipulates that all involved persons who have knowledge of an accident or serious incident must without undue delay report the occurrence to the authority that is responsible for the territory where the accident or serious incident occurred. For Sweden, the responsible authority is The Swedish Transport Agency.

In accordance with the Swedish Aviation Act, the pilot in command is responsible for reporting an accident or a serious incident. If the pilot in command cannot fulfil his or her duties, the owner, or if the aircraft is not used by the owner, the user, of the aircraft is responsible for reporting an accident or serious incident or report if the aircraft is missing and cannot be found.

An incident may also have to be reported even if the incident did not pose any immediate danger for the operation or aviation safety. An incident is to be reported to The Swedish Transport Agency. The same principles apply if other circumstances could have led to a situation posing an immediate risk, or if there would be a risk factor if no correction is made. The authority which is the predecessor of The Swedish Transport Agency issued regulation LFS 2007:68 on incident reporting.

1.10 Have there been any recent cases of note or other notable developments in your jurisdiction involving air operators and/or airports?

The Swedish Consumer Agency supervises airlines' provision of adequate information about passenger rights in accordance with EC Regulation No 261/2004. Due to non-compliance by ten airlines, the Agency has imposed decisions under penalty of a fine, should the airlines continue to give inadequate information about passenger rights in accordance with the Regulation. In July 2015, the Agency has pursued the decision to the Stockholm district court against at least one airline due to non-compliance with the decision.

See also question 4.12 below.

2 Aircraft Trading, Finance and Leasing

2.1 Does registration of ownership in the aircraft register constitute proof of ownership?

A registration of ownership could be used for the presumption that the registered owner is the owner of the aircraft.

See also question 2.2 below.

2.2 Is there a register of aircraft mortgages and charges? Broadly speaking, what are the rules around the operation of this register?

The Swedish Transport Agency administers a register over acquisitions, leasing rights and mortgages in which the owners of

aircraft may choose to register relevant information about their aircraft, provided that the aircraft is registered in the Swedish Civil Aircraft Register, resulting in a perfected interest which is thereby better protected against other, unregistered corresponding interests by third parties.

2.3 Are there any particular regulatory requirements which a lessor or a financier needs to be aware of as regards aircraft operation?

An aircraft may be registered in the Swedish Civil Aircraft Register if the owner of the aircraft is an EU or EEA national or entity. Further, aircraft owned by foreigners from outside the EU or the EEA, and where the aircraft is operated within or from Sweden, may apply for registration in the Swedish Civil Aircraft Register. The register is administered by The Swedish Transport Agency.

2.4 Is your jurisdiction a signatory to the main international Conventions (Montreal, Geneva and Cape Town)?

Sweden is a signatory to, among others, the following Conventions:

- The 1999 International Conventions of Montreal, ratified 29 April 2004.
- The 1929 Warsaw Convention, ratified 3 July 1937.
- The Hague Protocol for the amendment of the Warsaw Convention 1955, ratified 3 May 1963.
- The 1944 Chicago Convention, ratified 7 November 1946.
- The 1948 Geneva Convention on the International Recognition of Rights in Aircraft, ratified 16 November 1955.

The Cape Town Convention has not been ratified by Sweden.

2.5 How are the Conventions applied in your jurisdiction?

The Conventions can either be transformed into Swedish law, or there could be a specific law that incorporates a convention into Swedish law.

A convention, just by its mere ratification, should not have the effect that it becomes applicable law in Sweden. The European Union can, alongside Sweden, ratify a convention and make it into EU legislation which could, depending on the type of EU legislation, become applicable in Sweden without any further implementation.

3 Litigation and Dispute Resolution

3.1 What rights of detention are available in relation to aircraft and unpaid debts?

The operator of an airport has a right of detention of an aircraft if the fees for the aircraft's most recent landing are unpaid. The right of detention allows the operator of the airport to hinder the take-off of the aircraft. Further, aircraft located in Sweden may be detained within the scope of the enforcement procedure for unpaid debts. Such detention requires a court order and the applicant may be ordered to post a bond covering any damages the detention may cause if the application is successfully disputed.

Aircraft may under certain circumstances be detained in accordance with Swedish civil law, for instance in the event of unpaid maintenance services.

3.2 Is there a regime of self-help available to a lessor or a financier of aircraft if it needs to reacquire possession of the aircraft or enforce any of its rights under the lease/finance agreement?

No; in order to reacquire possessions of the aircraft or enforce any of its rights under the lease/finance agreement, the Swedish laws on enforcement and debt recovery apply. The Swedish Enforcement Authority is the competent authority.

3.3 Which courts are appropriate for aviation disputes? Does this depend on the value of the dispute? For example, is there a distinction in your country regarding the courts in which civil and criminal cases are brought?

Any negative decision by The Swedish Transport Agency in respect of traffic licences may be brought before the Swedish Government.

Decisions by The Swedish Transport Agency with regards to licences, authorisations or other decisions which are negative to an applicant may be appealed by the applicant to the Swedish administrative court in Linköping. If the applied law is or is based on EU law, the administrative court may refer the question to the Court of Justice of the European Union (CJEU) in Luxembourg. The Court of Justice of the European Union will try the case and refer back with its decision to the Swedish administrative court, which will then give its decision based on the decision by the Court of Justice of the European Union. This is a practice that is seldom used in aviation matters in Sweden; it would also considerably delay the proceeding.

Civil and penal cases normally have jurisdiction in the local district court as the court of first instance. It is the same legal court (*tingsrätt*) that handles both civil and penal cases. It is also the same legal court notwithstanding the claimed amount, while the process could differ.

3.4 What service requirements apply for the service of court proceedings, and do these differ for domestic airlines/parties and non-domestic airlines/parties?

Normally, a Swedish court would informally use the same procedure for service abroad as within Sweden, and send out court documentation with a request for the receiving party to sign and return an evidence of service. If that would not work, EC Regulation No 1393/2007 can be applied on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents).

3.5 What type of remedies are available from the courts or arbitral tribunals in your jurisdiction, both on an i) interim and a ii) final basis?

The two standard remedies that can be used are the following:

- A physical or judicial person must make what is established; *inter alia*, make a payment (*fullgörelsetalan*).
- A physical or judicial person has something established; *inter alia*, the establishment that the person has entered into a specific agreement or has had something delivered (*fastställelsetalan*).

The latter can be used on an interim basis (*mellandom*), while the former is seldom used on an interim basis.

3.6 Are there any rights of appeal to the courts from the decision of a court or arbitral tribunal, and, if so, in what circumstances do these rights arise?

There are three national instances for courts having jurisdiction of civil and penal cases, and three national instances for administrative courts. There are also special courts where the amount of instances could differ.

A litigant can always appeal a case, but whether the case will be tried in a higher court depends on the individual case and if a leave of appeal is required.

4 Commercial and Regulatory

4.1 How does your jurisdiction approach and regulate joint ventures between airline competitors?

There are several options for the competition authorities to remedy concerns, *inter alia*: surrender of slots to a new competitor; pricing constraints; access to a frequent flyer programme; an agreement to enter into interline; special prorate agreements with new competitors; agreements to enter into intermodal agreements; a frequency freeze; pricing constraints; and sale of certain assets.

4.2 How do the competition authorities in your jurisdiction determine the "relevant market" for the purposes of mergers and acquisitions?

The general principles that define the relevant market are also applicable for the aviation sector. The point of origin and the point of destination, in practice a specific route, could specify a relevant market. An airport in the vicinity could also be part of the same area, if that airport is a viable alternative option to be used for passengers or goods. This would not be applicable for the purpose of ground handling where one airport constitutes the relevant market. Other means of transport could also be included in the relevant market, which in such case would most often be railway travel. There could also be a distinction between time sensitive and non-time sensitive passengers or goods.

4.3 Does your jurisdiction have a notification system whereby parties to an agreement can obtain regulatory clearance/anti-trust immunity from regulatory agencies?

The EC legislation on competition law abolished the system of giving a clearance for a hypothetical case.

For mergers, an application to The Swedish Competition Authority is needed if at least two of the companies individually have an annual turnover in Sweden of at least 200 million SEK and the companies together have an annual turnover in Sweden of at least 1 billion SEK. There could be an obligation for the application even if one of the companies does not have an annual turnover in Sweden of at least 200 million SEK. If competition could affect several EU countries and the companies' turnover exceed 5 or in some cases €2.5 billion, an application is to be made to the EU Commission.

4.4 How does your jurisdiction approach mergers, acquisition mergers and full-function joint ventures?

The main concern is to determine that a transaction would not substantially lessen the competition within the relevant market.

For the competition assessment, non-stop/non-stop, non-stop/indirect and indirect/indirect routes that overlap should be taken into consideration when assessing the competition. Hub-to-hub routes get a higher level of scrutiny. Several factors are considered; *inter alia*, restriction of market power, market entry conditions and regulations. The dominance of two or more operators and the possible positive effect of increased efficiency following a merger are also considered.

4.5 Details of the procedure, including time frames for clearance and any costs of notifications.

As for mergers, the decision needs to be made by The Swedish Competition Authority within 25 days. If a party suggests an obligation, the timeframe is extended to 35 days. If The Swedish Competition Authority decides to start a special investigation, the authority shall within three months bring the case before the Stockholm district court. That time frame can be extended if any of the parties agree or if there are extraordinary reasons.

4.6 Are there any sector-specific rules which govern the aviation sector in relation to financial support for air operators and airports, including (without limitation) state aid?

There is no sector-specific competition regulation for aviation in Sweden. Instead, general competition regulations apply. The main regulation is the Swedish Competition Act which implements EU legislation.

4.7 Are state subsidies available in respect of particular routes? What criteria apply to obtaining these subsidies?

Effective as of March 2014, the European Commission has changed its guidelines on state aid to airports. State aid for investments and operation of an airport is allowed if it is necessary to ensure transportation to and from a region. The possibilities for state aid are better for smaller airports and airports in rural or non-densely populated areas.

Aid to air carriers for new routes is allowed provided that the aid is limited in time. In Sweden, there are procured routes as well as state aid and municipal allowances to some non-state-owned airports.

Air carriers starting a new route are permitted to have state aid only if they can show prospects of being profitable within three years or make an irrevocable commitment to operate the route for a period not less than the period that state aid is given for.

The Swedish Transport Administration procures air transportation and, in the procurement, stipulates how those airfares are to be regulated. The procurement is only done for routes where towns or villages otherwise cannot get satisfactory transportation. Usually the authority sets forth in the procurement certain requirements that shall or should be fulfilled. The airline must meet all "shall requirements", while meeting "should requirements" will give extra points. The price offered by the airline is viewed as a combination of fulfilled points given, when the winning bidder is chosen. Airlines are not able to view others' offers before the deadline of the procurement.

4.8 What are the main regulatory instruments governing the acquisition, retention and use of passenger data, and what rights do passengers have in respect of their data which is held by airlines?

The main regulation is The Personal Data Act (*personuppgiftslagen*) which implements EC Directive 95/46 on the protection of personal data.

The legislation gives passengers several rights; *inter alia*, to have the information deleted after a certain time and, upon request, to have access to the data.

Sensitive personal information should not normally be stored about a passenger, especially if no consent from the passenger has been given.

4.9 In the event of a data loss by a carrier, what obligations are there on the airline which has lost the data and are there any applicable sanctions?

The responsible person for The Personal Data Act could have penal sanctions against him, but also civil compensation against him can be applicable. The employer of the responsible person normally has economic responsibility for its employees such as the responsible person.

If an error has been made or if there has been a security breach, those are naturally to be addressed.

4.10 What are the mechanisms available for the protection of intellectual property (e.g. trademarks) and other assets and data of a proprietary nature?

There are no aviation-specific mechanisms available for the protection of intellectual property. General copyright, patents, trademarks and design rights can be used for aviation.

The Swedish Patent and Registration Office is an appointed authority for the protection of patents, design and trademarks. The Office for Harmonization in the Internal Market (OHIM) registers the Community Trade Mark in the European Union.

4.11 Is there any legislation governing the denial of boarding rights?

EC Regulation No 261/2004 entitles air carrier passengers subjected to denied boarding, cancellation or long delay of flights to compensation. This could be in the form of reimbursement of the cost of the ticket, rerouting, assistance and monetary compensation in the range of €250 to €600.

A claim for compensation, if to be legally tried, can be brought before a district court (*tingsrätt*), which is the court of first instance. Applicable courts have jurisdiction of the place of departure, arrival or where the airline is domiciled. If the claimant is a consumer, the case could be brought before the court in Sweden where the claimant is domiciled.

Alternatively, a case, if the claimant is a consumer, can be tried for free at The National Board for Consumer Disputes (ARN). Decisions by the ARN are only recommendations and thus not legally binding.

4.12 What powers do the relevant authorities have in relation to the late arrival and departure of flights?

The Swedish Consumer Agency supervises airlines' provision of adequate information about passenger rights in accordance with EC Regulation No 261/2004. The Swedish Act of Air Transports (*lag (2010:510) om lufttransporter*) gives the Agency its authority.

In terms of non-compliance by an airline, the Agency can impose a decision under penalty of a fine. The fine can formally be decided by the Stockholm district court on application by the Agency.

4.13 Are the airport authorities governed by particular legislation? If so, what obligations, broadly speaking, are imposed on the airport authorities?

In order to establish and to operate a public airport, the permission of, and a licence from, the Swedish Government or The Swedish Transport Agency is required. When deciding whether or not to grant the licence of an airport, an overall assessment is made which includes the public interest in the establishment, as well as considerations with regard to air safety, the environment, etcetera. The Swedish Transport Agency provides detailed rules and requirements for the licensing of airports. For civil airports that have a paved runway of 800 metres or more, or exclusively cater for helicopters, are open to the public and have some kind of instrument landing procedure, EU Regulation No 139/2014 is applicable.

By implementation of EC Directive 2009/12 on airport charges, the two major Swedish airports, Stockholm-Arlanda and Gothenburg-Landvetter, are economically regulated by the Swedish Act on Airport Charges. There is no legislation governing the levying of fees, etcetera for smaller airports. However, airports owned by the Swedish Government through the Swedavia group are bound to set the airport fees in accordance with the principles set forth in ICAO Doc 9082 on Charges for Airports and Air Navigation Services, which includes the principles of transparency, relation between fees and costs and non-discrimination.

4.14 To what extent does general consumer protection legislation apply to the relationship between the airport operator and the passenger?

The principal aviation-specific passenger protection legislations are provided by the EU.

EC Regulation No 1107/2006 protects disabled passengers and passengers with reduced mobility when travelling by air. Refusal of carriage on those grounds might not be allowed. The regulation requires air carriers to inform, assist and provide training to their personnel and to grant compensation in case of non-compliance.

The EC Regulation No 80/2009 sets out a code of conduct for computerised reservation systems.

The EC Regulation No 2111/2005 requires passengers to be informed of the identity of the operating air carrier.

4.15 What global distribution suppliers (GDSs) operate in your jurisdiction?

The main GDSs are Amadeus, Galileo, Sabre and Worldspan by Travelport.

4.16 Are there any ownership requirements pertaining to GDSs operating in your jurisdiction?

There are not any ownership requirements pertaining to GDSs.

4.17 Is vertical integration permitted between air operators and airports (and, if so, under what conditions)?

In principle, vertical integration between air operators and airports is permitted. Conditions for that integration are adherence to applicable competition laws, and that all regulations and requirements are fulfilled individually for both the airport and the air operator.

5 In Future

5.1 In your opinion, which pending legislative or regulatory changes (if any) or potential developments affecting the aviation industry more generally in your jurisdiction are likely to feature or be worthy of attention in the next two years or so?

Drones are becoming increasingly popular in Sweden, as in most of the world. There has been a steady increase in the number of incidents where a drone, without permission, has flown into controlled airspace. Fifteen incidents were reported in the first half of 2015, compared to eight in the whole of 2014. On at least four occasions, airports have had to temporarily close for air traffic, at least once affecting Sweden's largest airport, Stockholm-Arlanda.

In October 2016, the Supreme Administrative Court decided that operators of drones need a permit for camera surveillance (CCTV) if the drone is operated in Sweden and has a camera that is directed towards where the public has access. The reasoning behind the differences for cameras on drones, compared to conventional photography, is that the camera on drones is not located in close proximity to the operator.

As very few, if any, operators of drones had such a permit when the decision was made, effectively all drones with cameras were grounded in Sweden. Camera surveillance is only granted restrictively in Sweden.

If operators of drones will have a difficulty in gaining such a permit, drones with cameras will also be heavily restricted in Sweden for the future, unless a change of the regulations take place.

From what we know, in November 2016 only a few such permits have been approved by the relevant authority and those approvals have been for rescue training and for coverage of a specific sport competition.

It will be interesting to follow how the administrative courts will decide upon applications for camera surveillance from drones.

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Who's Who Legal, *Global Law Experts* and Legal Media Group's *Expert Guides* have ranked him as one of the world's leading aviation lawyers.

Stephan Eriksson has an education in Aviation Law from the Institute of Air and Space Law, McGill University, Montreal, Canada, http://www.mcgill.ca/iasl/, where he is also appointed adjunct member and regularly lectures. The IASL has offered education in Aviation and Space Law for more than 50 years. In its field, the IASL Air Law education is possibly the best in the world.

As chair of the PEOPIL Aviation EEG, Stephan regularly organises aviation seminars together with McGill University.

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Martin Thysell is a keen aviation enthusiast and holds a commercial helicopter licence. He graduated from the University of Lund with a Master of Laws degree in 2011. Among his advanced courses he studied aviation law, which is in the same field as his Master's thesis. During his studies, he worked as ground crew for, among others, the largest hot air balloon company operating in the south of Sweden and in Denmark.

Martin Thysell's knowledge of both practical flying and aviation law is helpful when working with aviation law, as it is often important to understand how aviation is conducted practically when practising aviation law.

ERIKSSON PARTNERS

Advokatfirman Eriksson & Partners is one of Sweden's foremost aviation law firms, where we represent airlines, helicopter operators, aviation brokers, travel agencies, insurance companies and pilots. We practise public, private and commercial air law, and also offer assistance in business law and dispute resolution. We are admitted to all courts, including The Swedish Supreme Court.

Switzerland

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1 General

1.1 Please list and briefly describe the principal legislation and regulatory bodies which apply to and/or regulate aviation in your jurisdiction.

The Swiss Federal Office of Civil Aviation (FOCA) is the supervision authority responsible for safety (aircraft, flight operations, and infrastructure) and for aviation policy and strategy issues.

Civil Aviation is regulated by two sources: domestic law; and international treaties.

Domestic law

The main enactments are:

- **The Federal Civil Aviation Act (FCAA)**

  The FCAA is the "basic law" concerning civil aviation in Switzerland. Based on the FCAA, many Ordinances have been enacted by the Government, i.e., the Swiss Federal Council, and the Department of the Environment, Transport, Energy and Communication (DETEC).

- **The Federal Act on the Aircraft Records Register**

  See question 2.2 below.

International law

There are about 180 bilateral and multilateral treaties. The main sources are:

- The Convention on International Civil Aviation (Chicago Convention).
- The Agreement between the European Community and the Swiss Confederation on Air Transport ("EU-CH Agreement"), entered into force on 1 June 2002.

Based on the EU-CH Agreement, Switzerland has adopted the relevant civil aviation regulation in the European Union.

Federal legislative texts are freely available in German, French, and Italian under www.admin.ch (Federal law/Classified compilation).

1.2 What are the steps which air carriers need to take in order to obtain an operating licence?

For an operating licence for a commercial operator to transport passengers and/or cargo with an aircraft, air carriers are required to:

1. Hold an AOC from the competent national Civil Aviation Authority (Regulation (EC) No 1008/2008).
2. File with FOCA the Application Form for an Operating Licence (Form 49.05; at least 30 days prior to the intended launch date of commercial operation and before the expiry date of the existing operation licence, respectively), including appendices:
   a. certificate on the Swiss or the European character of the company (Form 54.045 including appendices);
   b. leasing or management agreements for the respective aircraft;
   c. aircraft list (registration marks, type of aircraft, seating capacity);
   d. evidence of own flight crews;
   e. tenancy agreement for the office of the operation department (Post Holder Flight Operations);
   f. business plan for two operational years;
   g. certified balance sheet, income statement, auditor's report; and
   h. opening balance sheet and financial plan (budget).
3. File with FOCA certain corporate documents (articles of association, extract from the commercial register, certified copy of the shareholders' register, organisational chart with information on Board and management).
4. File with FOCA an extract from the debt collection and bankruptcy register (*Betreibungsregisterauszug*) regarding the CEO, the CFO, and the accountable manager.

Carriers with an EU/EFTA operating licence do not need a separate Swiss operating licence in addition (see Form 49.10). Apart from the AOC and the EU/EFTA operating licence, they have to file the following documentation:

1. liability insurance for passengers, baggage, and cargo;
2. security programme;
3. list of aircraft used on routes from and to Switzerland (Form 49.06; if required by FOCA);
4. schedule (Form 49.01);
5. contact information (e.g., handling agent in Switzerland);
6. contact person within the airline concerning Regulation (EC) No 261/2004 issues, i.e., compensation and assistance to passengers (Form 49.03; for FOCA use only);
7. tariffs for the scheduled flights (Form 49.02);
8. declaration of reciprocity for services in the fifth or seventh freedom to destinations outside the EU/EFTA issued by the competent national Civil Aviation Authority; and
9. request for a Route Licence (Form 49.04).

Non-EU/EFTA carriers (see Form 49.07) are subject to further disclosure duties as set out in Form 49.12 (Operating Permit Questionnaire).

1.3 What are the principal pieces of legislation in your jurisdiction which govern air safety, and who administers air safety?

Switzerland has adopted the Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency. It is the main source of Swiss aviation safety legislation. EASA Rules on Air Operations (OPS) and Implementing Rules (IR) will be applicable in Switzerland. Furthermore, Switzerland has implemented safety management systems as provided for in ICAO Annexes 6, 11 and 14.

The FOCA administers air safety in Switzerland.

1.4 Is air safety regulated separately for commercial, cargo and private carriers?

No, it is not.

1.5 Are air charters regulated separately for commercial, cargo and private carriers?

No. The Swiss Federal Administrative Court has, however, accepted that the operational regulation of Zurich Airport stipulates a departure prohibition after 10 p.m. solely applicable to air charters (DFAC 2011/19).

1.6 As regards international air carriers operating in your jurisdiction, are there any particular limitations to be aware of, in particular when compared with 'domestic' or local operators? By way of example only, restrictions and taxes which apply to international but not domestic carriers.

No. Airport concession holders are obliged to grant access to all national and international airlines entitled to fly to Switzerland (Art. 36a of the Federal Civil Aviation Act). Any restrictions must be detailed in the operational regulation of the airport and must not be discriminatory. The operational regulation is subject to FOCA approval.

1.7 Are airports state or privately owned?

Both models exist. Zurich Airport is owned by a publicly traded company (at least ⅓ of the shares of which the canton of Zurich is legally bound to hold), whereas EuroAirport Basel-Mulhouse-Freiburg and Geneva Airport are owned by public corporations.

1.8 Do the airports impose requirements on carriers flying to and from the airports in your jurisdiction?

Yes. The most notable requirement is the payment of airport charges (Art. 39 of the Federal Civil Aviation Act). In addition, every airport has its own operational regulation which can contain certain requirements regarding safety, environmental issues, noise protection, slots, etc.

1.9 What legislative and/or regulatory regime applies to air accidents? For example, are there any particular rules, regulations, systems and procedures in place which need to be adhered to?

The Swiss Transportation Safety Investigation Board (STSB) is the state authority of the Swiss Confederation having a mandate to investigate accidents and dangerous incidents involving, *inter alia*, aircraft.

The principal legislation relating to investigation of air accidents includes:

- Art. 26 and Annex 13 of the Chicago Convention;
- Regulation (EU) No 996/2010 of the European Parliament and of the Council of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation;
- Regulation (EU) No 376/2014 of the European Parliament and of the Council of 3 April 2014 on the reporting, analysis and follow-up of occurrences in civil aviation;
- Art. 22 *et seq*. of the Federal Civil Aviation Act; and
- Ordinance on Aviation Accidents and Severe Incidents.

Any accident or severe incident must be reported to the STSB immediately.

1.10 Have there been any recent cases of note or other notable developments in your jurisdiction involving air operators and/or airports?

In 2016, the Chinese state-owned aviation conglomerate HNA Group entered the Swiss market by way of acquisitions of three former Swissair group companies: (i) Swissport; (ii) Gategroup; and (iii) SR Technics.

With the decision of 2 December 2013, the Swiss Competition Commission (COMCO) imposed aggregate fines of approximately CHF 11m on various companies in the air freight sector. The decision has been challenged before the Swiss Federal Administrative Court and the proceedings are still pending.

2 Aircraft Trading, Finance and Leasing

2.1 Does registration of ownership in the aircraft register constitute proof of ownership?

No. The Swiss Aircraft Register (*Luftfahrzeugregister*) relates to the administrative registration of the aircraft (permit to fly, airworthiness certificate, noise type certificate, nationality of ownership, call sign, etc.). Although the owner is registered in the Aircraft Register, the certificate of registration does not constitute proof of ownership. In addition, aircraft can be registered in the Swiss Aircraft Record (*Luftfahrzeugbuch*), which registration constitutes proof of ownership.

2.2 Is there a register of aircraft mortgages and charges? Broadly speaking, what are the rules around the operation of this register?

Yes; ownership and mortgages can be registered in the Aircraft Record (*Luftfahrzeugbuch*). In respect of ownership, the registration is voluntary.

Registration of any right will only be made upon application by the owner and is only permissible for aircraft already registered in the Aircraft Register. Mortgages can only be set up, and will only become effective, upon registration in the Aircraft Record. Any entry will first be published in the Swiss Official Gazette of Commerce (SOGC) and is subject to an objection period of 30 days. This 30-day period has to be borne in mind in any aircraft financing project. The Swiss FOCA, which runs the Aircraft Record, is rather swift in handling the applications. Requests are usually handled within a few days.

Once a right is registered in the Aircraft Record, it can only be altered or deleted by amending the respective registration. In other words, once registered in the Aircraft Record, any transfer of ownership by necessity requires an amendment of the registration.

2.3 Are there any particular regulatory requirements which a lessor or a financier needs to be aware of as regards aircraft operation?

Mortgages

Certain claims are granted priority over a registered mortgage, although Swiss legislation is more restrictive than foreign law when it comes to accepting preferred security rights (see Art. 47 of the Federal Act on the Aircraft Records Register). There are no maintenance or mechanic's priority rights.

Leases

The lessee of an aircraft can be registered in the Aircraft Register, assuming that all the other requirements for a registration in the Aircraft Register (apart from legal ownership) are fulfilled. In the case of long-term lease agreements under which a Swiss lessee operates the aircraft, a non-Swiss owner may also be registered in the Aircraft Register. Furthermore, lease agreements with a period of validity of more than six months can be registered in the Aircraft Record (*Luftfahrzeugbuch*). Such registration gives the lessor and the lessee priority over all rights and agreements recorded subsequently (except for statutory liens). However, the lessor may unilaterally allow the registration of a mortgage, unless this is explicitly excluded in the lease agreement.

2.4 Is your jurisdiction a signatory to the main international Conventions (Montreal, Geneva and Cape Town)?

Chicago Convention 1944

Switzerland ratified the Convention on 6 February 1947, prior to its effective date of 4 April 1947.

Geneva Convention 1948

Switzerland ratified the Convention on 3 October 1960, prior to its effective date of 1 January 1961.

Montreal Convention 1999

Switzerland ratified the Convention on 7 July 2005, prior to its effective date of 5 September 2005.

Cape Town Convention 2001

The Convention has so far not been ratified by Switzerland.

2.5 How are the Conventions applied in your jurisdiction?

As Switzerland follows the so-called monistic system, international treaties are incorporated into the Swiss legal order without further legislation. A treaty can be directly applicable ("self-executing") provided that its provisions are litigable, i.e., its content must be sufficiently precise and clear to constitute the basis for a decision in a specific case.

3 Litigation and Dispute Resolution

3.1 What rights of detention are available in relation to aircraft and unpaid debts?

Pursuant to Art. 80 *et seq*. of the Federal Civil Aviation Act, a creditor, a mortgagee, or the owner (e.g., the lessor) of an aircraft can apply for seizure of the aircraft even if the claimant cannot produce an enforceable title. However, the following aircraft shall not be subject to seizure:

1. governmental aircraft (which are designated or actually used by public authorities on an exclusive basis);
2. aircraft actually in service on scheduled flights of a public carrier (and its reserve aircraft); and
3. any other passenger or cargo aircraft ready to depart in such transportation, unless the debt for which the seizure is requested was incurred for, or has become due in the course of, that specific leg.

3.2 Is there a regime of self-help available to a lessor or a financier of aircraft if it needs to reacquire possession of the aircraft or enforce any of its rights under the lease/finance agreement?

No, this is not admissible under Swiss law (other than under the Cape Town Convention).

3.3 Which courts are appropriate for aviation disputes? Does this depend on the value of the dispute? For example, is there a distinction in your country regarding the courts in which civil and criminal cases are brought?

There are no special courts (of any type) for aviation disputes.

Civil proceedings

Civil claims in relation to aviation disputes must be brought before the ordinary civil courts. Four cantons (Aargau, Bern, St. Gallen, and Zurich) have specialised commercial courts competent if (i) the dispute is to be considered a commercial dispute, and (ii) the value threshold of CHF 30,000 is exceeded, which will, in aviation disputes, almost invariably be the case.

Debt enforcement

Enforcement of mortgages is carried out by the competent Debt Enforcement and Bankruptcy Office (*Betreibungsamt*). The same applies to the enforcement of financial claims, if the creditor is in possession of an enforceable title. If he does not hold such title, he may still initiate the enforcement procedure; however, in such cases the debtor may raise objection against the enforcement, and the creditor will then have to obtain a court order before being able to proceed with the enforcement procedure.

Criminal proceedings

Criminal charges are handled by the competent public prosecutors and criminal courts, respectively.

Administrative proceedings

Rulings (*Verfügungen*) by a federal authority (e.g., FOCA) can be challenged in administrative proceedings before the Swiss Federal Administrative Court.

3.4 What service requirements apply for the service of court proceedings, and do these differ for domestic airlines/parties and non-domestic airlines/parties?

Service on domestic (Swiss) defendants is made via post (registered mail) or in person by court bailiffs. Defendants in jurisdictions with which Switzerland has concluded a Treaty dealing with service of documents (in particular, the Hague Conventions) are served according to the standards provided for in the respective Treaty. Defendants in all other jurisdictions will be served with documents via consular or diplomatic channels.

However, only the document instituting the proceedings (or its equivalent) must be served upon foreign defendants via these channels (and, thus, usually in a translated version). Foreign defendants are invited, according to Art. 140 of the Civil Procedure Rules, to appoint a Swiss domiciled recipient – usually a law firm – for all future communications. Defendants who fail to do so are served via publication in newspapers or the Swiss Official Gazette of Commerce (SOGC), which often results in default judgments. Communications from courts must therefore invariably be taken seriously.

3.5 What type of remedies are available from the courts or arbitral tribunals in your jurisdiction, both on an i) interim and a ii) final basis?

Interim basis

Seizure of aircraft pursuant to Art. 80 *et seq*. of the Civil Aviation Act (see question 3.1): even if the court is *ex officio* held to take all the necessary precautions to make sure that the seizure will have effect, it may still be advisable to explicitly request the court to deliver a notice of seizure to the Aircraft Register (FOCA), to Skyguide, to the airport where the aircraft is currently positioned, and to the owner of the aircraft (if the seizure was not directed against him, but, e.g., against a lessee). On the rare occasion that the rules on the seizure of aircraft are not applicable, a freezing injunction (*Arrest*), as provided for in the Debt Enforcement and Bankruptcy Act, may be obtainable.

Arbitral tribunals: if a dispute is subject to arbitration, the creditor may choose to apply for seizure at the state court or at the arbitral tribunal. The arbitral tribunal is only competent to grant injunctions such as a seizure once it has been constituted; the Swiss Rules on International Arbitration therefore provide for the appointment of an Emergency Arbitrator.

Final basis

A court judgment or arbitral award can order specific performance of contractual or other duties, award compensation for damages, or can be a declaratory judgment.

3.6 Are there any rights of appeal to the courts from the decision of a court or arbitral tribunal, and, if so, in what circumstances do these rights arise?

Yes, decisions from a court of first instance can be appealed.

A brief overview (exceptions are not mentioned):

Civil proceedings

Decisions of state courts in civil proceedings can be challenged. The appeal has to be filed with the upper cantonal court, whose decision can then be appealed before the Swiss Federal Supreme Court. However, decisions of commercial courts (see above, question 3.3) are not subject to appeal before an upper cantonal court; they can only be appealed before the Swiss Federal Supreme Court.

Criminal proceedings

Decisions of state courts in criminal proceedings can be challenged. The appeal has to be filed with the upper cantonal court, whose decision can then be appealed before the Swiss Federal Supreme Court.

Administrative proceedings

Decisions rendered by the Federal Administrative Court can be appealed before the Swiss Federal Supreme Court.

Arbitral proceedings

Arbitral awards can only be appealed on the basis of very limited grounds, e.g., if certain procedural rights such as the right to equal treatment, the right to be heard, or the Swiss *ordre public* have been violated.

Switzerland is a Member State of the New York Convention on the enforcement of arbitral awards.

4 Commercial and Regulatory

4.1 How does your jurisdiction approach and regulate joint ventures between airline competitors?

All agreements between undertakings, decisions by associations of undertakings, and concerted practices, including joint-ventures, which may affect trade between Switzerland and the EC and which are aimed at, or result in, the prevention, restriction or distortion of competition within the territory covered by the Agreement between the European Community and the Swiss Confederation on Air Transport ("EU-CH Agreement"), are prohibited. Contravening decisions or agreements are null and void. Exemptions are possible under the conditions foreseen by the EU-CH Agreement.

This wording, as provided for in Article 8 of the EU-CH Agreement, corresponds to the applicable EU competition law (Art. 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)). Switzerland has therefore, in fact, adopted the EU competition law.

On 1 December 2014, the Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws came into force. It facilitates and strengthens the cooperation between European and Swiss authorities.

4.2 How do the competition authorities in your jurisdiction determine the "relevant market" for the purposes of mergers and acquisitions?

According to the EU-CH-Agreement, the European Union institutions and not the Swiss competition authorities are competent to control concentration between undertakings (the "one-stop-shop principle"). The Swiss authorities only remain competent if the thresholds, as defined in the EC Merger Regulation, are not reached (i.e., generally, a combined aggregate worldwide turnover of EUR 5bn and an aggregate EU-wide turnover of each of at least two of the undertakings concerned of more than EUR 250m).

Therefore, in most cases, the relevant market is not to be determined by Swiss authorities but by the EU institutions.

In the rare cases that remain within the Swiss competence, the relevant market is determined based upon the "O&D" approach ("point of origin/point of destination") as applied by the EU Commission. This approach is applied both to charter and scheduled airlines (see LPC 2008/4, p. 677).

4.3 Does your jurisdiction have a notification system whereby parties to an agreement can obtain regulatory clearance/anti-trust immunity from regulatory agencies?

Again, in most cases the EC Merger Regulation will apply (see above, question 4.2). However, if Swiss law applies, the answer is yes, the Swiss Cartel Act provides for a notification system.

4.4 How does your jurisdiction approach mergers, acquisition mergers and full-function joint ventures?

See above, question 4.1.

4.5 Details of the procedure, including time frames for clearance and any costs of notifications.

Notification of a planned concentration of undertakings must be made to the Swiss Competition Commission (COMCO). The commission then has to decide within one month whether an examination is to be initiated. During that month, the concentration must not be implemented. After expiration of the one-month period, the applicant will receive either a clearance or the information that an investigation will be initiated. If no such notice is given within that time period, the concentration may be implemented without reservation.

In the event of an investigation being initiated, the Competition Commission must decide within a four-month period whether the concentration will be cleared.

The legal effect of a concentration that has to be notified is suspended.

For the preliminary investigation of one month, the Secretariat of the COMCO charges a flat fee of CHF 5,000. For the in-depth investigation, filing fees are charged on a time spent basis. The hourly rates are between CHF 100 and CHF 400, depending on the urgency of the case and the level of seniority of the case-handlers.

4.6 Are there any sector-specific rules which govern the aviation sector in relation to financial support for air operators and airports, including (without limitation) state aid?

Yes. The EU-CH Agreement stipulates an aviation-specific aid scheme (Art. 13). This scheme corresponds almost literally to the regulation in the EU (Art. 107 TFEU).

As a general rule, the EU-CH Agreement prohibits state aid which distorts or threatens to distort competition. Exceptions are provided for in the EU-CH Agreement.

The decision as to whether state aid is permissible under the aforementioned regulations lies with the Swiss authorities, who are obliged to inform the EU authorities on such aid. Although not expressly provided for in the Agreement, the Swiss authorities are likely to follow the recent practice of the European Union (see the 2014 Aviation Guidelines of the EU Commission, OJ C 99, 4 April 2014, pp. 3 to 34).

4.7 Are state subsidies available in respect of particular routes? What criteria apply to obtaining these subsidies?

The criteria are set out in 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, which is also applicable in Switzerland.

Subsidies for particular routes may be granted to an undertaking carrier operating a particular route under a public service obligation, as provided for in Art. 16 *et seq*. of the Regulation. Before deciding on such a public service obligation, the other Member States, the EU Commission, the airports concerned, and other air carriers operating on that particular route must be consulted.

4.8 What are the main regulatory instruments governing the acquisition, retention and use of passenger data, and what rights do passengers have in respect of their data which is held by airlines?

General rules

The main regulatory instrument in Switzerland governing the acquisition, retention and use of (passenger and other) data is the Federal Act on Data Protection (FADP). The FADP embodies fundamental rules concerning the processing of personal data by both the public and the private sector.

The data subject generally has the right to inspect and to correct false, incomplete, or erroneous data. The collection of the data and the purpose for which it is processed must be readily identifiable by the person concerned. There exists a duty to actively inform the person concerned if particularly sensitive personal data is involved.

Violations of the FADP can lead to criminal proceedings. Furthermore, the data subject enjoys all remedies generally available under civil procedure rules (i.e., injunctions, right to restitution, or right to claim damages).

Aviation-specific rules

Aviation-specific rules are incorporated in the Federal Act on Foreign Nationals (FNA).

According to the Schengen and Dublin Association Agreements, the Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data is applicable in Switzerland. The Directive was implemented in the FNA, which was significantly revised in 2014. The Federal Office of Migration (FOM) determines the flights for which air carriers are required to transmit the personal data of the passengers (see Art. 104 FNA). The affected carriers are obliged to transmit the Advance Passenger Information (API) of all passengers to the Swiss authorities.

Details on how and where the data is to be delivered can be found under www.bfm.admin.ch/dam/data/bfm/eu/schengen-dublin/api-schnittstellenspezi-e.pdf.

4.9 In the event of a data loss by a carrier, what obligations are there on the airline which has lost the data and are there any applicable sanctions?

The FADP (see question 4.8 above) imposes the obligation on any entity which collects data to put in place adequate security measures against data loss. If the loss of data is caused by insufficient security measures, the carrier may become liable for damages.

Unauthorised access to sensitive data can be prosecuted.

4.10 What are the mechanisms available for the protection of intellectual property (e.g. trademarks) and other assets and data of a proprietary nature?

Intellectual property rights are enforced by court action. Each of the 26 cantons of Switzerland has a single cantonal instance with overall jurisdiction for intellectual property and related disputes. In the cantons of Aargau, Bern, St. Gallen, and Zurich, competence lies with the commercial court.

A separate, exclusive jurisdiction has been granted to the newly created (2012) Federal Patent Court, as the first instance for patent disputes, including action for infringement and claims concerning the existence or validity of a patent. For other civil actions related to patents, the cantonal courts have concurrent jurisdiction.

An important and effective tool to efficiently prevent acts of infringement under intellectual property law is injunctive relief. If certain conditions can be demonstrated, a court injunction can be obtained relatively quickly. The claimant must demonstrate a valid cause of action, an infringement, a resulting disadvantage that cannot be readily remedied, and urgency. Injunctive relief must be confirmed in the framework of subsequent ordinary court proceedings unless the parties settle.

Furthermore, intellectual property infringements may constitute a criminal offence.

4.11 Is there any legislation governing the denial of boarding rights?

Switzerland has adopted Regulation (EC) No 261/2004 regarding passenger rights in the event of denied boarding and of cancellation or long delay of flights.

In the event of overbooking, the carrier may first determine whether passengers are willing to offer their seat against an indemnification to be agreed upon. If no such volunteers can be found, the carrier must compensate those passengers denied boarding with a payment of up to EUR 600, depending on the distance of the flight. The Regulation requires airlines to offer the relevant passenger meals, refreshments, and hotel accommodation as appropriate whilst waiting for a rearranged flight. They must also cover any costs of transport between the hotel and the airport.

The passenger rights under Regulation (EC) No 261/2004 must be enforced before the ordinary civil courts.

In 2012, a civil court of first instance ruled that Regulation (EC) No 261/2004 does not apply to a flight from Zurich to a non-EU country.

4.12 What powers do the relevant authorities have in relation to the late arrival and departure of flights?

It is possible to file a passenger report with the FOCA, which can initiate administrative fine proceedings and impose fines of up to CHF 20,000 (Art. 91 para. 4 of the Federal Civil Aviation Act).

The passenger report form is available under www.bazl.admin.ch (Air Passenger Rights).

4.13 Are the airport authorities governed by particular legislation? If so, what obligations, broadly speaking, are imposed on the airport authorities?

Airports can only be run based on a concession by the federal government. Such concessions are based on the Federal Civil Aviation Act and the Ordinance on the Aviation Infrastructure. The airport operators are licensed either for 50 years in the case of national airports, or 30 years in the case of regional airports.

The concession entails the right to run an airport commercially and to raise fees. On the other hand, the airport operator is obliged to open the airport to all aircraft, as provided for in the operational regulation of the airport (see question 1.6 above), and to maintain an infrastructure guaranteeing safe operations.

The operation of the airport must be in line with the Sectoral Aviation Infrastructure Plan (SAIP), and the applicant must have the management skills, technical knowledge, and funds necessary for the operation of the airport, as provided for in the operational regulation.

All details regarding the operation of the airport are then to be specified in the operational regulation, which is subject to FOCA approval. Typical contents of the operational regulation are the organisation of the airport, operational hours, departure/arrival procedures, ground handling, slots coordination, further commercial and non-commercial use of the airport, environmental issues, an aerodrome design and operational manual according to ICAO standards, and a Safety Management System.

4.14 To what extent does general consumer protection legislation apply to the relationship between the airport operator and the passenger?

There is no consumer protection legislation specifically governing the relationship between airport operators and passengers.

As regards the general consumer protection legislation (e.g., the Unfair Competition Act), it must be noted that there is typically no contractual relationship between passengers and airport operators.

4.15 What global distribution suppliers (GDSs) operate in your jurisdiction?

All the major GDSs operate in Switzerland, e.g., Travelport, Amadeus, Sabre, etc. (not taking into account the many suppliers of Front-End Tools).

4.16 Are there any ownership requirements pertaining to GDSs operating in your jurisdiction?

No. However, Switzerland has adopted Regulation (EC) No 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems. According to this Regulation, a system vendor shall publicly disclose, unless this is otherwise made public, the existence and extent of a direct or indirect capital holding of an air carrier or rail-transport operator in a system vendor, or of a system vendor in an air carrier or rail-transport operator.

4.17 Is vertical integration permitted between air operators and airports (and, if so, under what conditions)?

This is not specifically regulated in Switzerland. As long as the competition rules are respected and all the conditions for the approval of the airport operational regulation are fulfilled (especially, in this constellation, non-discrimination), an integration between air operators and airports should be permissible.

5 In Future

5.1 In your opinion, which pending legislative or regulatory changes (if any) or potential developments affecting the aviation industry more generally in your jurisdiction are likely to feature or be worthy of attention in the next two years or so?

Along the lines of the Aeropolitical Report 2015 ("LUPO 2015") that was passed on 24 February 2016, the Swiss Federal Council (i.e., the government of the Swiss Confederation) intends, in particular, to exert a more substantial influence on the three national airports in Zurich, Geneva and Basel-Mulhouse, given the national (and not just cantonal) interests associated with these crucial infrastructures in an ever-more competitive international environment. In particular, Zurich airport is currently operating at the limits of its capacity, facing growing demand. Further, in line with European legal developments, we anticipate the implementation of more comprehensive legislation on unmanned aerial vehicles in Switzerland. Drones have been becoming increasingly popular, thereby constituting various challenges particularly in terms of safety, insurance, liability/damages, privacy/data protection, and environment.

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VISCHER advises and represents airline companies in their core business and also in associated fields such as catering. We regularly advise on questions at a cantonal and federal level, handle damage and insurance cases of all types, and assist in contract negotiations with travel offices, air-traffic authorities, and airport operators. In addition, we advise on leasing, buying and selling aircraft and also have a wealth of experience in aircraft completion and all types of aviation-related dispute resolution.

VISCHER received the Finance Monthly 2016 award "Aviation Law Firm of the Year – Switzerland".

Our offices are located in Zurich and Basel, the two largest business centres in Switzerland.

Ukraine

Andrei Liakhov

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1 General

1.1 Please list and briefly describe the principal legislation and regulatory bodies which apply to and/or regulate aviation in your jurisdiction.

The air transportation sector in Ukraine is subject to an extensive and detailed regulatory regime based on the international conventions duly ratified by the Ukrainian Parliament (*Verhovna Rada*).

The principal regulatory instruments are:

(a) Convention on International Civil Aviation (the "**Chicago Convention**") together with 18 Annexes thereto;

(b) International Convention Relating to Cooperation for the Safety of Air Navigation, 1960;

(c) Convention on Offences and Certain Other Acts Committed on Board Aircraft (the "**1963 Tokyo Convention**");

(d) Convention for the Suppression of Unlawful Seizure of Aircraft (the "**1970 Hague Convention**");

(e) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (the "**1971 Montreal Convention**");

(f) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (the "**1988 Montreal Protocol**");

(g) Convention for the Unification of Certain Rules for International Carriage by Air (the "**1999 Montreal Convention**");

(h) Convention on International Interests in Mobile Equipment and the Aircraft Equipment Protocol (the "**2001 Cape Town Convention**");

(i) Air Code of Ukraine, 2011 (as amended) (the "**Air Code**");

(j) Law of Ukraine "On Transport", 1994 (as amended);

(k) Law of Ukraine "On Transit of Cargo", 1999 (as amended) (the "**Cargo Transit Law**");

(l) Law of Ukraine "On Liability of Air Carriers in International Carriage of Passengers", 2002 (as amended) (the "**Air Carriers Liability Law**");

(m) Law of Ukraine "On State Programme of Civil Aviation Air Safety", 2003 (as amended) (the "**State Programme of Air Safety**");

(n) Law of Ukraine "On Licensing Types of Business Activities", 2015 (as amended) (the "**Licensing Law**");

(o) Rules of Procedure for Granting and Revocation of Authority to Provide Air Services, 2014 (as amended) (the "**Air Services Rules**");

(p) Rules of Aircraft Certification, 2014;

(q) Rules of Civil Aircraft Registration in Ukraine, 2012;

(r) Rules of Carriage of Passengers and Baggage by Air, 2012 (the "**Passenger and Baggage Carriage Rules**");

(s) Rules of Carriage of Cargo by Air, 2006 (as amended) (the "**Cargo Carriage Rules**");

(t) Rules of Civil Aircraft Operators Certification, 2010 (as amended) (the "**Civil Aircraft Operators Certification Rules**");

(u) Air Operators Certification Rules, 2005 (as amended);

(v) Rules of Certification of Aviation Personnel in Ukraine, 1998 (as amended); and

(w) Procedure for and Rules of Mandatory Aviation Insurance of Civil Aviation, 2002 (as amended).

There are two principal aviation regulatory bodies in Ukraine:

(a) the Ministry of Infrastructure of Ukraine (the "**Ministry of Infrastructure**") – the main governing body responsible for promotion and implementation of state aviation sector policies; and

(b) the State Aviation Service of Ukraine (the "**State Aviation Service**") – the principal regulator and supervisor which directly controls all aspects of the air transportation sector in Ukraine by, in particular, approving the specific aviation by-laws, issuing operating licences and air operator certificates to air carriers, and controlling air carriers' compliance with the rules of air operations.

1.2 What are the steps which air carriers need to take in order to obtain an operating licence?

Air carriers may carry passengers and/or cargo only on the basis of an operating licence issued by the State Aviation Service for an unlimited period. The procedure for the issue of the operating licence is currently governed by the Licensing Law and may be summarised as follows:

(a) filing of an application for grant of an operating licence together with supporting documents of the applicant, including its constitutional documents confirming that at least 50 per cent of the share capital of the applicant is held by a Ukrainian body corporate or individual;

(b) the State Aviation Service has 10 business days to consider such application together with all the supporting documents;

(c) a decision on a licensing application must be notified to the applicant within three business days of issue; and

(d) within 10 days of the receipt of the notification from the State Aviation Service, the air carrier must pay the fee for the licence in the amount of one minimum salary (UAH 1,450 (approx. EUR 50)) and file the confirmation of such payment with the State Aviation Service.

The new draft Licensing Terms for Carriage of Passengers, Hazardous Cargo and Hazardous Waste by Air have been prepared by the State Aviation Service in accordance with the Licensing Law. It is expected that the Licensing Terms may be adopted by the end of 2016.

1.3 What are the principal pieces of legislation in your jurisdiction which govern air safety, and who administers air safety?

An extensive body of laws and regulations governs air safety in Ukraine. The principal pieces of Ukrainian legislation on air safety consist of the Air Code, the State Programme of Air Safety, the Air Carriers Liability Law, the Cargo Transit Law, and the Decree of the President of Ukraine "On Emergency Measures Regarding Promotion of Air Safety in Ukraine". In addition, Annex 17 to the Chicago Convention, and the 1963 Tokyo Convention, 1970 Hague Convention, 1971 Montreal Convention and 1988 Montreal Protocol are all directly applicable in Ukraine as well.

General responsibility for ensuring compliance with air safety rules and regulations lies with the State Aviation Service. In 2012 the Cabinet of Ministers of Ukraine established the Interagency Commission on Air Safety of Civil Aviation, an advisory body the main function of which is to coordinate the work of various executive bodies related to civil aviation safety.

On 20 July 2015, the National Security and Defence Council of Ukraine adopted the Decision "On Measures for Protection of National Interests in Aviation" which, *inter alia*, provides for preparation of a draft law on the new state programme of air safety in civil aviation. The respective draft law was prepared by the Cabinet of Ministers of Ukraine but it has not been submitted to the Ukrainian Parliament yet.

1.4 Is air safety regulated separately for commercial, cargo and private carriers?

The Ukrainian air safety legislation does not establish sectoral differences for different types of transportation by air. However, there are specific rules for carriage of military and hazardous cargo.

1.5 Are air charters regulated separately for commercial, cargo and private carriers?

Not entirely. A general legal framework sets out uniform regulation for commercial and cargo air charters. However, some instruments, in particular the Cargo Transit Law and the Cargo Carriage Rules, set out specific requirements for carriage of cargo by air.

1.6 As regards international air carriers operating in your jurisdiction, are there any particular limitations to be aware of, in particular when compared with 'domestic' or local operators? By way of example only, restrictions and taxes which apply to international but not domestic carriers.

The Air Code provides that international air carriers operating in Ukraine must have a licence and a certificate granted by the relevant government body of their state. Scheduled air services are provided by international air carriers in accordance with the International Civil Aviation Organization ("**ICAO**") Rules, Standards and Recommendations, the international treaties to which Ukraine is a party, the aviation regulations of Ukraine and agreements between the aviation authorities. However, charter air services are carried out by international air carriers in accordance with the aviation regulations of Ukraine only.

Ukraine is not a party to the majority of international instruments in relation to the sixth freedom of the air. All routes are granted by the State Aviation Service on a reciprocal basis. It is the preferred practice of the State Aviation Service to incorporate into bilateral air service agreements provisions about codes of sharing and/or pooling provisions which are aimed at ensuring that Ukraine's airlines have a share of revenues on these routes.

On 4 April 2016, the State Aviation Service adopted a regulation which abolished a number of controversial provisions of the Air Services Rules that had restricted the Ukrainian air services market for international airlines. In particular, an international airline willing to allocate either a scheduled or charter international air route is no longer required to carry out scheduled air transportation within Ukraine for at least 12 months and comply with the applicable maximum flight frequency for scheduled international flights from/to Ukraine.

1.7 Are airports state or privately owned?

Pursuant to the Air Code, airports may be both state and privately owned. As a matter of practice, most Ukrainian airports are state or municipally owned.

1.8 Do the airports impose requirements on carriers flying to and from the airports in your jurisdiction?

Ukrainian airports may determine the charges for ground handling operations. The charges for take-off and landing of aircraft, passenger handling and air safety support are determined by the by-laws of the Ministry of Infrastructure.

1.9 What legislative and/or regulatory regime applies to air accidents? For example, are there any particular rules, regulations, systems and procedures in place which need to be adhered to?

Investigation of air accidents in Ukraine is regulated by Annex 13 to the Chicago Convention, the Air Code, the State Programme of Air Safety, the Regulation on Investigation of Aviation Accidents and Incidents, 2010 and the Rules of Investigation of Aviation Accidents and Incidents with Civil Aircraft in Ukraine, 2005 (as amended).

The principal regulatory authorities in this area are the State Aviation Service, which supervises and controls the air safety and air navigation service in Ukraine, and the National Bureau of Investigation of Aviation Incidents and Accidents with Civil Aircraft, which conducts technical investigation of air accidents and incidents that occur involving civil aircraft in Ukraine.

1.10 Have there been any recent cases of note or other notable developments in your jurisdiction involving air operators and/or airports?

The USA-Ukraine Open Skies Agreement came into effect in 2016, introducing the fifth freedom of the air into national legislation. According to the Agreement, there is no limitation on the flights which the parties may carry out.

Following the annexation of Crimea by the Russian Federation and the imposition of international and internal Russia-related sanctions, Ukraine banned Russian airlines from flying to and from Ukraine as part of the state sanction policy. Since September 2015, there has not been a direct air communication between the two states. Transit flights and flights operated by Russian airlines with their

final destination in Crimea have been restricted as well. Certain Russian airlines have been fined an aggregate amount of approx. USD 27.9 million for breaching these restrictions.

Ukraine has postponed an ICAO aviation sector audit planned for 2016. It is expected that ICAO will carry out required procedures at the beginning of 2017.

In July 2016, the Ukrainian Parliament adopted the Law of Ukraine "On Creation of Conditions for International Cooperation of Entities of Aircraft Production". The Law allows Ukrainian aircraft production enterprises to expand cooperation with foreign investors and is aimed at the creation of favourable conditions for the development of the national aircraft production industry and the attraction of new technologies and investments to the projects of Ukrainian enterprises.

The State Aviation Service has adopted Regulation No. 222, which liberalises access to the domestic market for international airlines by abolishing a number of controversial legislative provisions.

2 Aircraft Trading, Finance and Leasing

2.1 Does registration of ownership in the aircraft register constitute proof of ownership?

Registration of an aircraft with the State Register of Civil Aircraft of Ukraine does not constitute proof of ownership. Such registration means that the aircraft is under Ukrainian jurisdiction and the State Aviation Service is entitled to control its flights and operation. Proof of ownership in the aircraft consists of a sale and purchase agreement or another document on the basis of which the aircraft has been acquired.

2.2 Is there a register of aircraft mortgages and charges? Broadly speaking, what are the rules around the operation of this register?

There is no special register of aircraft mortgages and charges in Ukraine, therefore encumbrances over the aircraft are registered with the State Register of Encumbrances over Movable Property. This Register is up to date, maintained by the Ministry of Justice of Ukraine and information contained therein has a probative value of the encumbrance over a certain object of movable property. Encumbrances over the aircraft should be registered with the State Register of Encumbrances over Movable Property based on the encumbrancer's application on the day of its submission, provided that the nominal fee in the amount of UAH 34 (approx. EUR 2) has been paid.

2.3 Are there any particular regulatory requirements which a lessor or a financier needs to be aware of as regards aircraft operation?

The Rules of Civil Aircraft Registration provide that an aircraft may be registered in the State Register of Civil Aircraft of Ukraine only if it is (i) owned by a legal entity incorporated in Ukraine or a natural person resident in Ukraine, or (ii) rented or leased by a Ukrainian operator from the non-resident owner.

Due to the volatile economic environment in Ukraine, the National Bank of Ukraine has imposed several currency restrictions of which a lessor or a financier needs to be aware, should it decide to transfer funds from Ukraine under a cross-border lease agreement.

2.4 Is your jurisdiction a signatory to the main international Conventions (Montreal, Geneva and Cape Town)?

Ukraine has ratified the 1999 Montreal Convention (effective as of 6 May 2009) and the 2001 Cape Town Convention (effective as of 1 November 2012). The Geneva Convention on the International Recognition of Rights in Aircraft has not been ratified by Ukraine.

2.5 How are the Conventions applied in your jurisdiction?

International conventions ratified by the Parliament of Ukraine constitute a part of Ukrainian legislation and are applied in the ordinary course by Ukrainian courts. ICAO Standards also form part of Ukrainian legislation as these are an integral part of the Chicago Convention.

3 Litigation and Dispute Resolution

3.1 What rights of detention are available in relation to aircraft and unpaid debts?

In general, the right of detention may be used by creditors under the Civil Code of Ukraine as a measure to enforce debtors' obligations. In particular, a creditor who legitimately possesses an item (e.g. an aircraft or its spare parts) to be transferred to a debtor, is entitled to detain such item, should the debtor fail to perform its obligations in time or to indemnify the creditor against any losses related to such item, until the debtor properly performs its obligations.

Such right may be granted to a creditor in accordance with a contract or directly under the law. However, the right of detention may be used by a creditor providing that the following terms are observed: (*i*) the item is owned by the debtor or person other than the creditor; (*ii*) the creditor legitimately possesses the item; and (*iii*) the debtor has breached its obligations to the creditor. Moreover, the Air Code and other statutory instruments regulating civil aviation stipulate that the respective Ukrainian authority is empowered to take measures for the recovery of debts for air navigation services, including detention of the debtor's aircraft as well as suspension of its operation.

3.2 Is there a regime of self-help available to a lessor or a financier of aircraft if it needs to reacquire possession of the aircraft or enforce any of its rights under the lease/finance agreement?

In terms of Ukrainian laws, the opportunity of an aircraft lessor to repossess its aircraft depends on the terms of the lease. In particular, the lease agreement may set out a lessor's right to terminate the agreement beforehand should a lessee breach its obligations under this agreement. In this case the lessor may demand that the lessee return the aircraft without filing a claim. In the case that the lessee refuses to return the aircraft, the lessor may apply to court. If this right is not provided in the lease agreement, the lessor may terminate the lease agreement before the expiry of its term and repossess the aircraft only with the lessee's consent or upon the decision of a court.

An aircraft financier could protect its rights under a finance agreement by entering into a mortgage agreement which contains provisions regarding satisfaction of creditor's claims.

Ukraine, being a signatory to the 2001 Cape Town Convention, made a declaration under Article 54(2) thereof, allowing the repossessing creditor or lessor to proceed against an aircraft or its engine without the permission of a court.

3.3 Which courts are appropriate for aviation disputes? Does this depend on the value of the dispute? For example, is there a distinction in your country regarding the courts in which civil and criminal cases are brought?

Aviation disputes are generally considered by commercial and administrative courts and, more rarely, by courts of general jurisdiction which consider civil and criminal cases. The particular type of court jurisdiction depends on the subject matter of, and party to, the dispute. For example, administrative courts consider disputes to which any state authority is a party. Commercial courts usually consider cases involving business entities in connection with the breach of contractual provisions, compensation of damage or debt recovery, etc. Courts of general jurisdiction consider cases to which individuals are parties and which relate to damage to passengers' baggage, its delay or loss, etc.

3.4 What service requirements apply for the service of court proceedings, and do these differ for domestic airlines/parties and non-domestic airlines/parties?

Requirements for the service of court proceedings vary depending on the jurisdiction of courts (i.e administrative, commercial courts or courts of general jurisdiction).

In general, the parties in legal proceeding shall be notified as to the particular date and place of the court session by summons. For instance, under the Civil Procedure Code of Ukraine, a summons shall be sent to a disputing party not later than three days before a court session by registered mail or via courier to the address of the relevant party. There are also certain additional options for the sending of a summons in cases where a party to a dispute does not provide the court with its address, or does not reside at the provided address.

Generally, the rules for service of court proceedings to non-domestic parties/airlines are set by the relevant bilateral and multilateral international treaties of Ukraine.

3.5 What type of remedies are available from the courts or arbitral tribunals in your jurisdiction, both on an i) interim and a ii) final basis?

The particular type of interim and final remedies depends on the following:

(a) the nature of the dispute;
(b) the parties in the dispute;
(c) the type of judicial procedure;
(d) the legal relationships involved; and
(e) the rights violated, etc.

For example, the Civil Code of Ukraine envisages the following remedies: recognition of the claimant's right; termination of an action which violates the claimant's right; compensation of losses; and other means for compensation of material damage, etc. In addition, the parties may agree in a contract any specific forms of remedy.

3.6 Are there any rights of appeal to the courts from the decision of a court or arbitral tribunal, and, if so, in what circumstances do these rights arise?

Ukrainian court procedure rules define several stages for appeal against a court decision, in particular: appeal; cassation; and, in exceptional cases, revision of a court decision by the Supreme Court of Ukraine. In addition, a court decision may be reconsidered by the same court on the basis of newly discovered circumstances. Ukraine is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

4 Commercial and Regulatory

4.1 How does your jurisdiction approach and regulate joint ventures between airline competitors?

There are no specific laws that regulate joint ventures between competing airlines.

Pursuant to the Ukrainian antitrust legislation, establishment of joint ventures may be defined as either a concentration or concerted practices.

Establishment of joint venture is deemed to be a concentration if its establishment does not entail coordination of behaviour between joint venture partners, or between the joint venture itself and the joint venture partners. Due to this concept, a joint venture can conduct business activity independently for a long period of time.

Establishment of joint venture is deemed to be concerted practices if such establishment results in coordination of behaviour between the joint venture partners, or between the joint venture itself and the joint venture partners.

Both approaches require the prior clearance of the Antimonopoly Committee of Ukraine (the "**AMC**"), if the financial thresholds stipulated by the effective competition laws are met by the parties.

4.2 How do the competition authorities in your jurisdiction determine the "relevant market" for the purposes of mergers and acquisitions?

Pursuant to the Ukrainian antitrust legislation, "relevant market" is a product market with certain product and geographical boundaries, which is affected or may be affected by a concentration.

Geographical boundaries of the market mean the territory of trade relationships arising around certain products, within which, under normal conditions, the consumers can easily meet their demand for a certain product, and which normally coincide with the territory of the state, region, district, city, or parts thereof.

Product market boundaries mean a product and/or an assembly of similar, homogeneous objects of economic exchange, within the boundaries of which the consumer can, under normal conditions, transfer between the consumption of certain objects of economic exchange to the consumption of other such objects.

In its practice, the AMC defines the airline services market as individual routes between cities, including international routes.

4.3 Does your jurisdiction have a notification system whereby parties to an agreement can obtain regulatory clearance/anti-trust immunity from regulatory agencies?

In the case that an agreement is qualified as potentially anti-competitive, it requires prior clearance of the AMC.

If a concentration/concerted practices is/are prohibited by the AMC, the Cabinet of Ministers of Ukraine may authorise a concentration/concerted practices if a positive effect produced by the concentration/concerted practices in the public interest outweighs any negative consequences of the restriction of competition.

4.4 How does your jurisdiction approach mergers, acquisition mergers and full function joint ventures?

In accordance with the effective Ukrainian antitrust legislation, mergers and acquisitions relate to concentrations and accordingly require clearance by the AMC.

Merger approvals are required whenever an economic concentration is consummated, provided that the parties exceed the relevant financial thresholds. In particular, for the purposes of the Ukrainian merger control rules, a concentration is deemed to occur, *inter alia*, in cases of:

(a) mergers between undertakings (i.e. when two or more independent undertakings amalgamate into a new undertaking and cease to exist as separate legal entities);

(b) absorption of one undertaking by another (with one retaining its legal identity and the other ceasing to exist as a legal entity);

(c) acquisition of control directly or through other persons or entities by one or more undertakings over one or more undertakings, including by way of:

- direct or indirect acquisition (gaining control over or acquiring a lease) of assets that amount to a going concern or a structural subdivision of an undertaking;
- appointment to the post of a chair or deputy chair in the supervisory council, the executive (management) board or any other supervising or executive body of an individual who already occupies one or more such positions in another undertaking; or
- composition of the supervisory council, the executive (management) board, or any other supervising or executive body of an undertaking, in such a manner as to enable the same individuals to represent more than 50 per cent of the members of such bodies in two or more undertakings;

(d) establishment by two or more undertakings of a joint venture, which in turn is intended to perform on a continuing basis all the functions of an autonomous economic entity; and

(e) direct or indirect acquisition of assets or participation interests (including shares) in an undertaking that allows the acquirer to reach or exceed 25 or 50 per cent of votes in the target undertaking's highest management body.

The establishment of joint ventures may be considered as either a concentration or concerted practices (as described under question 4.1 above).

4.5 Details of the procedure, including time frames for clearance and any costs of notifications.

The effective Ukrainian merger control regulations provide two options for review of concentration notifications: fast-track and regular procedures.

According to the fast-track review procedure, the AMC reviews a merger filing and grants approval for concentration within 25 calendar days in either of the following cases:

- only one party is active in Ukraine; or
- combined market share of the parties does not exceed 15 per cent on an overlapping Ukrainian market or 20 per cent on a vertically related Ukrainian market.

Should the parties not meet the requirements for the fast-track review procedure, the application for the approval of a concentration is supposed to be considered by AMC within the regular procedure, i.e. within 45 calendar days starting from the date of its submission.

The application for the approval of concerted practices is considered by the AMC within three months and 15 days starting from the date of its submission.

During the first 15 calendar days following the filing – the so-called "waiting period" – the AMC conducts an initial review of completeness of the applications and may return them without review due to their incompleteness. Within the subsequent period, the AMC analyses the submitted information *per se* and decides whether to grant the approval.

The filing fee for a concentration is UAH 20,400 (approx. EUR 730), while the filing fee for concerted practices is UAH 10,200 (approx. EUR 365).

4.6 Are there any sector-specific rules which govern the aviation sector in relation to financial support for air operators and airports, including (without limitation) state aid?

There are several initiatives currently provided for by Ukrainian law. In accordance with Order No. 433 of the Ministry of Transport and Communication (currently the Ministry of Infrastructure) dated 14 April 2008, an airport's administration may by its own decision reduce airport fees and charges due, by as much as 80 per cent. Such reduction shall give an impetus to exploit new routes. However, such reduction should not violate anti-competition rules.

The Tax Code of Ukraine imposes 0 per cent VAT on international air carriage of passengers, baggage and cargo. Resolution No. 944 of the Cabinet of Ministers of Ukraine dated 30 October 2013 sets out a governmental programme of airport development in 2013–2023 (the "**Programme**"). The Programme states that major airports should remain state-owned and that an immediate reconstruction of certain facilities is required. It is planned to engage UAH 15.3 billion (approx. EUR 510 million) in investments into the development of airport infrastructure and facilities under state guarantee.

4.7 Are state subsidies available in respect of particular routes? What criteria apply to obtaining these subsidies?

There are no state subsidies available.

4.8 What are the main regulatory instruments governing the acquisition, retention and use of passenger data, and what rights do passengers have in respect of their data which is held by airlines?

The Passenger and Baggage Carriage Rules stipulate that airlines should keep the data they hold on passengers confidential. However, passengers are deemed to authorise carriers to submit such data to (*i*) governmental authorities, (*ii*) officials and agents of the carrier, (*iii*) other carriers, or (*iv*) providers of additional services.

Apart from provisions of the Passenger and Baggage Carriage Rules, the Law of Ukraine "On Personal Data Protection", 2010 (as amended) (the "**Data Protection Law**") sets out the following rights of persons providing their personal data:

(a) to know the place of personal data storage and its designation;

(b) to request information of third parties to whom such data was provided and the purposes of such provision;

(c) to revoke consent to retention or usage of personal data; and

(d) to use remedies and apply to the respective authorities in case of a breach of his/her personal data protection regime, etc.

4.9 In the event of a data loss by a carrier, what obligations are there on the airline which has lost the data and are there any applicable sanctions?

Neither the Passenger and Baggage Carriage Rules nor the Data Protection Law impose direct obligations on carriers in case of loss of data. However, carriers are obliged to prevent such loss by establishing personal data protection systems.

In case of violation of passengers' personal data regime by courier, passengers may have recourse to certain remedies, such as filing a claim before the court or applying to a designated authority (the Commissioner of the Parliament of Ukraine on Human Rights (the "**Commissioner**").

The Commissioner's powers and authorities include, among others, rights to:

(a) conduct scheduled or unscheduled inspections of personal data holders, with unrestricted access to data storage facilities;

(b) request and have access to any information and/or documents of data holders in order to control the proper level of data protection; and

(c) issue obligatory instructions regarding the removal of inconsistencies and breaches of the data protection regime, etc.

A breach of the personal data protection regime by the carrier may lead to administrative responsibility if it resulted in illegal access by third parties to such information or other violation of the data provider's rights. Section 188[39] of the Code of Administrative Breaches prescribes a fine of between UAH 1,700 (approx. EUR 56) and UAH 34,000 (approx. EUR 1,130) for such a breach.

A passenger may also use a civil litigation procedure in order to pursue compensation for damages.

4.10 What are the mechanisms available for the protection of intellectual property (e.g. trademarks) and other assets and data of a proprietary nature?

Trademarks are subject to registration with the Ukrainian Patent and Trademark Office, which is authorised to issue a certificate confirming rights to the trademark (the "**Certificate**"). The Certificate is valid for 10 years and may be renewed for the same period. Being a party to the Madrid system, Ukraine protects international trademark registrations designated to its territory.

Patents are granted for inventions, utility models and designs. To meet patent eligibility requirements, the inventions and utility models should be new, non-obvious and industrially applicable. The designs need only meet the criterion of novelty. The terms of patent validity depend on the registered object. The principle of universal novelty is applied in Ukraine when registering patentable objects.

The rights holder enjoys an intellectual property right in copyright objects from the moment of its creation/assignment and no formal registration of rights and/or intellectual property right assignment transaction is required in Ukraine. Published and unpublished works enjoy legal protection. The copyright is valid for the whole life of the author and 70 years after his/her death.

Valuable information may be protected as a commercial secret, which is a kind of confidential information. Ukrainian law defines a commercial secret as information, which is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question, as well as having commercial value because it is secret and has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret. A person may decide at his/her discretion, which information should be treated as commercial secret, provided that all requirements described in definition above are complied with. Commercial secrets are protected for an indefinite time as long as the above-mentioned requirements are met.

To secure rights in certain IP objects, the rights holder may register them with the Customs Register of Intellectual Property Objects. The information is recorded in the aforementioned register upon filing an application together with the documents, which confirms the rights to such object.

4.11 Is there any legislation governing the denial of boarding rights?

Denial of boarding rights by carriers is regulated by the Passenger and Baggage Carriage Rules and the Air Code, which comply with standards incorporated in EC Regulation No. 261/2004 and EC Regulation No. 1107/2006.

The carrier may deny boarding when: (*i*) it is necessary in order to comply with regulatory provisions of the country of departure; or (*ii*) such denial is requested by the relevant Ukrainian governmental authorities. The Passenger and Baggage Carriage Rules also set out circumstances under which a carrier may deny boarding rights at its discretion; namely, if a passenger:

(a) refuses to go through a security check;

(b) has not paid, or has paid only part of, the ticket price or other charges due;

(c) does not provide the required documents;

(d) behaves aggressively towards other passengers or members of the aircraft crew; or

(e) is intoxicated by alcohol or narcotics.

The list of circumstances includes rather vague wording (e.g. "*passengers may pose a danger to other passengers (baggage, cargo) or aircraft*"), leaving a certain level of discretion to air operators.

In case of denial of boarding under circumstances (a) and (b) above, the carrier is obliged to reimburse the full value of the ticket, or propose reasonable re-routing under comparable transport conditions. This rule also applies to other cases of boarding denial, when such denial is due to the fault of the carrier (e.g. overbooking).

Moreover, in accordance with the Air Code, the carrier should also provide compensation in the range of EUR 250 to EUR 600 (the amount depends on the length of the flight). Such compensation may be decreased by 50 per cent when a passenger rejects reasonable rerouting proposals. In all other cases of denial, depending on the circumstances of such denial, the carrier may be entitled to claim costs and any damages caused by the actions of the passenger, deducting them from the ticket price.

4.12 What powers do the relevant authorities have in relation to the late arrival and departure of flights?

In accordance with the Air Code, in case of late arrival a carrier shall provide to passengers:

(a) meals and refreshments in reasonable relation to the waiting time;

(b) accommodation (in case the delay requires a stay of one or more nights);

(c) transport between the airport and place of accommodation; and

(d) two telephone calls, telex or fax messages, or e-mails, free of charge.

If the delay exceeds five hours, the carrier should propose to the passengers a ticket price reimbursement or re-routing.

According to the Air Code, breaches of passenger carriage rules and failure to provide the requisite level of treatment are sanctioned with a fine of between UAH 8,500 (approx. EUR 300) and UAH 17,000 (approx. EUR 600). Persons authorised by the State Aviation Service and chief airport officers are entitled to file protocols fixing such breaches. During 15 days following the filing of a protocol, the State Aviation Service will consider it and impose the fine, to be discharged within a term of 15 days.

4.13 Are the airport authorities governed by particular legislation? If so, what obligations, broadly speaking, are imposed on the airport authorities?

Airport operators shall obtain a certificate in accordance with the Rules of Certification of Airports, 2006 (as amended). An aerodrome, attached to the airport, is subject to certification and registration with the State Register of Civil Aerodromes as well. The procedure for obtaining the certificate and registration is set out in the Rules of Registration of Civil Aerodromes, 2005 (as amended), which also set out applicable technical standards and requirements.

In accordance with the Air Code, airport operators have the following obligations:

a) to ensure the orderly arrival and departure of aircraft;

b) to provide for on-land handling of aircraft, passengers, crew, baggage, cargo and post;

c) to maintain in operational conditions aerodromes and necessary constructions, facilities and personnel devices (such conditions corresponding to the relevant technical requirements);

d) to provide for border, customs, sanitary and other types of controls (for international airports);

e) to secure an efficient client-administration communication system;

f) to provide meteorological information to aircraft; and

g) to ensure the efficient provision of services to airport visitors, etc.

4.14 To what extent does general consumer protection legislation apply to the relationship between the airport operator and the passenger?

The relationship between the airport operator and the passenger falls under the scope of the Law of Ukraine "On the Protection of Consumers' Rights", 1991 (as amended).

4.15 What global distribution suppliers (GDSs) operate in your jurisdiction?

The following GDSs operate in Ukraine: Amadeus, Sabre Travel Network and Travelport.

4.16 Are there any ownership requirements pertaining to GDSs operating in your jurisdiction?

There are no ownership requirements pertaining to GDSs operating in Ukraine.

4.17 Is vertical integration permitted between air operators and airports (and, if so, under what conditions)?

The applicable laws remain silent on this matter.

5 In Future

5.1 In your opinion, which pending legislative or regulatory changes (if any) or potential developments affecting the aviation industry more generally in your jurisdiction are likely to feature or be worthy of attention in the next two years or so?

In 2015, the Ministry of Infrastructure adopted the Strategic Plan for Development of Air Transport by 2020. It is expected that by 2020 the regulatory authorities of Ukraine will improve the air transport infrastructure of Ukraine, introduce tariff regulation in relation to air navigation services and airport charges, and create conditions for the promotion of competition in the aviation market. In that regard the State Aviation Service has already initiated work on the simplification of different aspects of aviation regulation of Ukraine (in particular, the Draft Aviation Rules on Access to the Ground Handling Services Market has been prepared by the State Aviation Service and is currently pending its final approval).

It is expected that the legislation of Ukraine in the fields of certification of aerodromes/airports and airworthiness will be harmonised with the relevant EU norms and standards.

Experts also expect the signing of the EU-Ukraine Common Aviation Area Agreement in the near future. The main obstacle for signing of the Agreement by EU Member States is the dispute between the United Kingdom and Spain on Gibraltar.

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Sayenko Kharenko enjoys a global reputation as a leading Ukrainian law firm with an internationally oriented full-service practice.

The firm has a highly specialised aviation team boasting years of experience in advising on aviation law matters involving Ukraine and the CEE countries.

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1 General

1.1 Please list and briefly describe the principal legislation and regulatory bodies which apply to and/or regulate aviation in your jurisdiction.

Regulatory Bodies

There are a number of bodies which have the authority to regulate, administer and control civil aviation. The UK bodies are chiefly: the Secretary of State for Transport; and the Civil Aviation Authority ("CAA"). The European Aviation Safety Agency ("EASA") has authority in respect of aviation safety regulation within EU Member States pursuant to Regulations having direct application (see Regulation 216/2008).

The Secretary of State for Transport

The Department for Transport (in exercising the authority of the Secretary of State for Transport) is the governmental body responsible for civil aviation. The Secretary of State has a general responsibility for organising, carrying out and encouraging measures for the development of civil aviation and the related aviation industry, for the promotion of its safety and efficiency, for research into questions relating to air navigation, and for the safeguarding of the health of persons on board aircraft.

The Secretary of State has statutory powers relating to aviation security (see, for example, the Aviation and Maritime Security Act 1990).

Furthermore, the Secretary of State has responsibility for advising on, and where appropriate, implementing Orders of Council (made by the Crown) to effect international obligations and standards in UK domestic legislation.

The Civil Aviation Authority ("CAA")

The CAA is an independent body responsible for economic, safety and consumer protection regulation, and airspace policy. In addition, the CAA advises the UK Government on aviation issues, represents consumer interests, conducts economic and scientific research and produces statistical data. The CAA acts in the regulation of aviation without detailed supervision by the Government. Under current legislation, policy formation in route and air transport licensing is the responsibility of the CAA, although the Secretary of State retains specified powers both of direction and of guidance. The CAA exercises certain licensing and other powers under European Regulations, notably in connection with operational safety and airworthiness. In certain respects the CAA acts for EASA in the UK. It also has concurrent powers with the Competition and Markets Authority ("CMA") to enforce competition law in relation to air traffic services and airport operation services.

Legislation

As with its European Union ("EU") neighbours, legislation is a mix of local law, international treaties and EU regulations and directives. Some of the principal pieces of domestic UK legislation are:

- Civil Aviation Act 1982 (as amended).
- Operation of Air Services in the Community Regulations 2009 – Statutory Instrument No 41 2009.
- Air Carrier Liability (No 2) Regulations 2004 – Statutory Instrument No 1974 2004.
- Community Air Carrier Liability Order 2004 – Statutory Instrument No 1418 2004.
- Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005 – Statutory Instrument No 975 2005.
- Civil Aviation (Insurance) Regulations 2005 – Statutory Instrument No 1089 2005.
- Civil Aviation Act 2006.
- Civil Aviation (Provision of Information to Passengers) Regulations 2006 – Statutory Instrument No 3303 2006.
- Civil Aviation (Access to Air Travel for Disabled Persons and Persons of Reduced Mobility) Regulations 2007 – Statutory Instrument No 1895 2007.
- Civil Aviation (Allocation of Scarce Capacity) Regulations 2007 – Statutory Instrument No 3556 2007.

Lastly, Her Majesty's ("HM") Government, from time to time, appoints commissions to investigate certain aspects of the aviation industry, the most recent and highly publicised being the Airports Commission into the expansion of London's airport capacity, which was chaired by Sir Howard Davies and issued its final report in July 2015.

1.2 What are the steps which air carriers need to take in order to obtain an operating licence?

The CAA is the competent licensing authority in the UK in almost all matters relating to the granting of operating licences. There are two types of operating licence: Type A; and Type B. Type B operating licences are for operators of aircraft with 19 or fewer seats; Type A operating licences are for operators of aircraft with 20 or more seats. A Type B operating licence may also be granted to operators of larger aircraft with a limited scope of activity.

In order for the licence to be granted, the CAA must be satisfied that the applicant fulfils the conditions set down in European Regulation 1008/2008, including that:

- its principal place of business is located in the Member State whose competent licensing authority is to grant the operating

licence; for an operator having its principal place of business in the UK, the CAA is the competent authority;

- it holds a valid air operator certificate issued by a national authority of the same Member State;
- it has one or more aircraft at its disposal through ownership or a dry lease agreement;
- its main occupation is to operate air services in isolation or combined with any other commercial operational of aircraft or the repair and maintenance of aircraft;
- its company structure allows the competent licensing authority to implement the relevant provisions of the Regulations;
- Member States and/or nationals of Member States own more than 50% of the undertaking and effectively control it directly or indirectly through one or more intermediate undertakings, except as provided for in an agreement with a third country to which the European Community is a party;
- it meets the financial conditions specified in Article 5 of the Regulation;
- it complies with the insurance requirements specified in Article 11 of the Regulation and in European Regulation 785/2004; and
- it complies with the provisions on good repute as specified in Article 7 of the Regulation.

1.3 What are the principal pieces of legislation in your jurisdiction which govern air safety, and who administers air safety?

UK legislation is contained in the Civil Aviation Act 1982 and the Air Navigation Order 2009 (as amended). Another important source of law is European legislation, which has direct application in the UK concerning safety aspects of aircraft, operators, maintenance and design organisations, and personnel in commercial transport. See, for example, the European Regulations: 216/2008 (as amended; "Basic Regulation"); 7/2013 (rules for airworthiness of aircraft and products and certification of design and production organisations); 1321/2014 (continuing airworthiness and approval of involved organisations and personnel); 2015/445 (aircrew); and 859/2009 ("EU-OPS" – operating safety requirements and standards). The CAA is responsible for administering air safety on a day-to-day basis, in its own capacity and for EASA.

1.4 Is air safety regulated separately for commercial, cargo and private carriers?

The CAA regulates all aspects of the aviation industry. Whilst the regulator is the same in all three cases, there are different regulations and standards which have to be adhered to.

1.5 Are air charters regulated separately for commercial, cargo and private carriers?

The CAA regulates all aviation activity (apart from military).

1.6 As regards international air carriers operating in your jurisdiction, are there any particular limitations to be aware of, in particular when compared with 'domestic' or local operators? By way of example only, restrictions and taxes which apply to international but not domestic carriers.

The UK is a party to the Chicago Convention 1944, which provides for availability, so far as practicable, of aerodromes in its territory (Article 28) and equality of conditions for use of aerodromes for international and domestic aircraft (Article 15). Article 15 of the Convention further provides for equality of charges for use of aerodromes.

Under the Air Navigation Order 2009, an aircraft registered in a state other than the UK must not take on board or discharge any passengers or cargo in the UK for valuable consideration without an operating permit granted by the Secretary of State. Such permit will only be granted if the necessary traffic rights exist (under bilateral international agreement or otherwise), and is also subject to satisfying the Department for Transport of compliance by the operator with administrative requirements relating to the carrier's aircraft and its insurance arrangements.

1.7 Are airports state or privately owned?

They are privately owned. For example, London Heathrow is owned by Heathrow Airport Holdings Limited; Aberdeen, Glasgow and Southampton airports are owned by AGS Airports; and Manchester Airport is owned by Manchester Airports Group plc. They are licensed and regulated by the CAA.

1.8 Do the airports impose requirements on carriers flying to and from the airports in your jurisdiction?

Conditions of use are imposed, as well as charges. Users of airports are subject to airport charges, which are regulated by the CAA under the Civil Aviation Act 2012 and Airport Charges Regulation 2011. 'Airport charges' means (a) charges levied on operators of aircraft in connection with the landing, parking or taking-off of aircraft at the airport (but excluding charges for air navigation services and certain penalties in connection with aircraft noise and vibration caused by aircraft), and (b) charges levied on aircraft passengers in connection with their arrival at, or departure from, the airport by air.

1.9 What legislative and/or regulatory regime applies to air accidents? For example, are there any particular rules, regulations, systems and procedures in place which need to be adhered to?

The UK is a party to the Chicago Convention 1944. Article 26 and Annex 13 to that convention make provisions for the investigation of air accidents. The UK implements the relevant requirements by way of the legislation discussed below.

The Air Accidents Investigations Branch ("AAIB") is responsible for the investigation of civil aircraft accidents and serious incidents in the UK. The AAIB is an independent part of the Department for Transport.

The principal legislation relating to investigation of air accidents includes:

- European Regulation No 376/2014 on the investigation and prevention of accidents and incidents in civil aviation.
- UK Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996.
- UK Civil Aviation (Investigation of Military Air Accidents at Civil Aerodromes) Regulations 2005.

The AAIB has the power to require the detention and preservation of evidence, and has powers of enquiry. Assistance of the local police is routinely available to AAIB investigators to secure an accident site. The AAIB reports to the CAA and other civil aviation authorities having responsibility for oversight of any aspect of the accident. Reports into civil air accidents are published.

1.10 Have there been any recent cases of note or other notable developments in your jurisdiction involving air operators and/or airports?

In July 2012, the Court of Appeal upheld a decision by the Competition Commission for the compulsory sale of Stansted Airport by BAA (now called Heathrow Airport Holdings Limited). This was one of three airport disposals (the other two being of Gatwick and Edinburgh airports) ordered by the Commission in order to reduce BAA's hold on the market and improve competition (*BAA Ltd v Competition Commission* [2012] EWCA Civ 1077).

The UK Competition Commission ordered Ryanair to reduce its shareholding in Aer Lingus in August 2013 as it concluded that Ryanair's stake in Aer Lingus had led, or may be expected to lead, to a 'substantial lessening of competition between the airlines on routes between Great Britain and Ireland'. Despite Ryanair appealing the decision, the UK Competition Appeal Tribunal dismissed the appeal in March 2014 on the basis that the proposed shareholding of Ryanair in Aer Lingus gave Ryanair material influence over Aer Lingus and resulted in a substantial lessening of competition. In February 2015, the Court of Appeal also dismissed Ryanair's further appeal in its entirety, on the basis that the Competition Commission's divestment order is not *ultra vires* and already meets the aim of the Enterprise Act 2002. Ryanair has also applied to the Competition Appeal Tribunal to suspend the Competition and Markets Authority's (formerly Competition Commission) final order pending determination, arguing that if the final order were implemented it would bring about the divestment of substantially all of Ryanair's shareholding in Aer Lingus. To date, notwithstanding, the judgment on this application is still underway.

The Court of Appeal ruled in September 2013 that a passenger consenting to an injection from a doctor on board an international flight does not constitute an "accident" for the purposes of Article 17.1 of the Montreal Convention 1999 (*Ford v Malaysian Airline Systems Berhad* [2013] EWCA Civ 1163).

In April 2013, the Court of Appeal ruled that when a lessee signs a certificate of acceptance acknowledging that the aircraft is in the required condition, it is bound by that acceptance and cannot subsequently allege that the aircraft is not satisfactory to it (*Olympic Airlines v ACG* [2013] EWCA Civ 369).

In June 2014, the Court of Appeal held that a technical problem is not considered to be an extraordinary circumstance under Regulation EU 261/2004 and accordingly cannot be used as a basis for an airline to escape from its obligation to compensate passengers for long delays, cancellations, rerouting and/or denied boarding (*Jet2.com v Huzar* [2014] EWCA Civ 791).

A long-running commission of enquiry, chaired by Sir Howard Davies, gave its recommendation in July 2015 that a third runway be built at London Heathrow. In October 2016, HM Government approved a third runway at Heathrow to expand the UK's airport capacity. A public consultation on the effects of the expansion of Heathrow follows this decision, after which HM Government will make a final decision as part of its national policy statement on aviation. Parliament is expected to vote on the decision during the latter part of 2017 or early 2018, with the intention of commencing construction in 2020, and the runway being completed in 2025.

2 Aircraft Trading, Finance and Leasing

2.1 Does registration of ownership in the aircraft register constitute proof of ownership?

The United Kingdom Register of Civil Aircraft, maintained by the United Kingdom CAA, is not a register of legal ownership, and therefore registration of ownership does not constitute proof of ownership of a particular aircraft. However, it often provides non-conclusive *prima facie* evidence.

To register aircraft on the United Kingdom Register of Civil Aircraft, a Form CA1 (see www.caa.co.uk) is submitted either by the owner or by the so-called 'charterer by demise' (by virtue of a relevant loan, lease, hire or hire purchase) eligible to register in accordance with the Air Navigation Order 2009 [see Endnote 1].

As part of the application procedure, the CAA may request additional information in order to process an application for registration (for example, a certified copy of a bill of sale evidencing the ownership of the aircraft to be registered).

Further guidance on the requirements for registration of aircraft on the United Kingdom Register of Civil Aircraft is available at www.caa.co.uk.

2.2 Is there a register of aircraft mortgages and charges? Broadly speaking, what are the rules around the operation of this register?

The CAA maintains the United Kingdom Aircraft Mortgage Register (pursuant to the Mortgaging of Aircraft Order 1972). There are no restrictions as to who can be registered as a mortgagee, and any mortgage charging a UK-registered aircraft by way of security may be registered (and indeed, from a mortgagee's perspective, should be, so as to confirm the security priority referred to in the section headed "Priority" below). Leases and other charges not constituting *in rem* rights in a 'G'-registered aircraft (such as mortgages) cannot be registered, and there is no separate register maintained by the CAA for the registration of ownership rights in engines or parts.

Mortgage Registration

Applicants for registration of a mortgage must complete and provide to the CAA a Form CA1577 (see www.caa.co.uk), together with a complete copy of the related aircraft mortgage deed (provided it has been certified as a true copy by the applicant). The CAA will then confirm, in writing, to the applicant once an aircraft mortgage registration application is successful.

The registration fees for an aircraft mortgage by the CAA vary according to the maximum take-off weight ("MTOW") of the subject aircraft. They are currently as follows (and are subject to revision annually):

Maximum Take-off Weight	CAA Charge
5,700 kg and under	£172
5,701 kg to 15,000 kg	£342
15,001 kg to 50,000 kg	£569
Over 50,000 kg	£1,025

For aircraft mortgages which attach to a number of aircraft, the CAA registration fee is levied on the heaviest aircraft by MTOW, plus £172 for each additional aircraft attached.

Priority

An aircraft mortgage registered on the United Kingdom Aircraft Mortgage Register will take priority over all other non-registered or subsequently registered mortgages. It constitutes notice of the relevant mortgage being given to all relevant third parties, and all persons are thereby deemed to have express notice of all of the details appearing in the United Kingdom Aircraft Mortgage Register.

If the relevant mortgagor is a company registered in England and Wales, in order to obtain all the protections conventionally afforded to a mortgagee, it will be necessary to also register the relevant mortgage at Companies House pursuant to the provisions of the

Companies Act 2006 as it will become void against an appointed insolvency agent of the mortgagor (whether an administrator, a liquidator or a secured creditor).

It should be noted, however, that this priority position of an aircraft mortgage is nevertheless subject to certain other *in rem* rights ("liens") of third parties to retain or detain the relevant aircraft until a claim for payment (e.g. in respect of maintenance or repair of the aircraft or in respect of an unpaid purchase price for the aircraft) has been satisfied. These liens are created both by statute and under common law, and they are also capable of creation by contract between parties. In addition, certain specific rights are created by statute for relevant regulatory authorities to detain the aircraft (e.g. the CAA for unpaid airport and air navigation charges, the UK Environment Agency for unpaid penalties under the European Emissions Trading Scheme, and HM Revenue & Customs in respect of unpaid taxes). In certain circumstances, these rights of detention will also include a power of sale of the relevant aircraft, or attach to the rest of the operating fleet of which the aircraft is a part despite different ownership.

The limited case law in English law which applies as precedent to the matter of the priority of aircraft liens and statutory detention rights, suggests strongly that an aircraft lien or statutory detention right will take priority over a registered aircraft mortgage.

Liens are not registrable. However, in dealing with the concerns of mortgagees, it is possible to seek to manage the risks of detention and sale of a registered aircraft by way of contractual obligations of owners and operators limiting the creation of liens to 'permitted liens'. These obligations are generally complemented by contractual monitoring rights, established in the relevant loan or lease agreements, which include requirements to provide 'statement of account' letters, authorising information regarding relevant payments giving rise to liens, to be provided directly to the mortgagee by the relevant regulatory authority. This is generally effective in providing an early warning of any potential detention or retention of a relevant aircraft, and in ensuring the timely termination of the relevant operating agreement before liens are enforced.

Priority Notices

A potential mortgagee of a registered aircraft can 'pre-register' a mortgage with the CAA by entering a priority notice, utilising CAA Form CA1330 (obtained from www.caa.co.uk). The priority notice remains valid for 14 working days from and including the date of entry, and during this period either the relevant aircraft mortgage must be registered or a further priority notice entered. The relevant aircraft mortgage, once registered with the CAA, will then take its priority from the date of registration of the original priority notice. The registration fees for such priority notices vary according to the maximum take-off weight of the subject aircraft, and are currently as follows (subject to revision annually):

Maximum Take-off Weight	CAA Charge
15,000 kg and under	£51
Over 15,000 kg	£102

The relevant registration fee is applied by the CAA on a 'per aircraft' basis.

Mortgage Searches

A search of the United Kingdom Aircraft Mortgage Register for entries registered against relevant aircraft can be made by submitting a CAA Form CA350 (obtained from www.caa.co.uk) to the CAA. Search fees are currently £29 per aircraft and are revised on an annual basis. Certified copies of the entries on the Mortgage Register are available at £29 per aircraft.

2.3 Are there any particular regulatory requirements which a lessor or a financier needs to be aware of as regards aircraft operation?

As regards the lessor of an aircraft registered with the CAA, theoretically it is permitted to take enforcement action to repossess the aircraft following a default by the lessee concerned on the relevant lease terms, without enforcing through the courts, i.e. as a 'self-help' remedy. To that end, lease terms and conditions conventionally contain an indemnification of the owner/lessor of a relevant aircraft against losses and/or claims it incurs as a result of a repossession action. Similarly, the mortgagee of an aircraft registered with the CAA may take peaceful possession of an aircraft following a similar default and it will then, in addition, have the power to sell the relevant aircraft if such power is properly and expressly described in the relevant mortgage agreement.

Nevertheless, in practice it is generally advisable for the lessor or the mortgagee of a relevant aircraft registered with the CAA to pursue an application for repossession of the aircraft in court, particularly if there is any question as to whether a default has actually occurred and/or the relevant mortgagor or lessee of the aircraft concerned resists or is likely to resist repossession. A court order obtained in this way reduces any risk of liability of the lessor or the mortgagee (as the case may be) of the relevant aircraft to third-party claims for compensation for losses due to a repossession (in the case of aircraft in scheduled operation in particular, such losses can be substantial), assists with ensuring the cooperation of the CAA with their issuing necessary permissions for the continued flight of the aircraft affected, and is also presentable to any prospective third-party purchaser of the aircraft as proof of the right of the mortgagee, or indeed the owner, to sell the aircraft with good title, free of any trailing interests of the relevant mortgagor or lessee (subject to any other third-party rights over the relevant aircraft).

In addition, and by way of further potential protections, if it can be demonstrated to the court that a risk exists or that the relevant aircraft is treated in a way which frustrates the rights of a mortgagee or lessor (for example, removal by an operator of the aircraft from the jurisdiction or by a clear and material degradation of the condition of the aircraft in the circumstances), it is possible to apply to the court, on an expedited basis, for an interim injunction ordering detention of the aircraft by the mortgagor/lessee until judgment regarding repossession of the aircraft has been given by the court. This type of application may be made without notice to the operator of the relevant aircraft if the mortgagee or the lessor (as the case may be) can demonstrate the urgency of the matter to the court in accordance with the applicable Civil Procedure Rules. In these circumstances, the mortgagee or the lessor (as the case may be) will be required to provide a cross-indemnity for any third-party claims arising from a sudden detention of the aircraft (not, however, in favour of the relevant mortgagor, lessee or operator of the relevant aircraft, on the basis that it is assumed that an appropriate indemnity from such party has already been given in respect of, among other things, losses arising from the repossession of the relevant aircraft following a default).

It should nevertheless be noted that a right to repossess the relevant aircraft would always be subject to any liens and other statutory detention or retention rights of third parties (as described more fully in "Priority" under question 2.2 above).

2.4 Is your jurisdiction a signatory to the main international conventions (Montreal, Geneva and Cape Town)?

Chicago Convention 1944

The United Kingdom was a signatory to the Chicago Convention in 1944 and it was ratified on 1 March 1947 prior to its effective date of 4 April 1947.

Geneva Convention 1948

The United Kingdom was a signatory to the Geneva Convention in 1948, but has not ratified it.

Montreal Convention 1999

The Montreal Convention has legal effect in the United Kingdom through the Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002/263. The limits of liability for air carriers pursuant to the Montreal Convention have been subsequently amended by way of the Carriage by Air (Revision of Limits of Liability under the Montreal Convention) Order 2009.

Cape Town Convention ("CTC")

The CTC entered into force in the United Kingdom and thereby became effective as United Kingdom national law on 1 November 2015 following its ratification on 27 July 2015, as implemented by the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 and several declarations.

2.5 How are the Conventions applied in your jurisdiction?

The Chicago Convention is integrated into English law and applicable in the jurisdiction as a matter of international law. Any dispute as to its implementation by the United Kingdom would be heard through the International Court of Justice. As a practical matter, the principles of the Chicago Convention are implemented at the national level in the United Kingdom by the CAA.

As detailed above, the Montreal Convention became effective in the United Kingdom pursuant to the Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2009 and it can be applied in the UK courts, without particular limitation, on that basis.

The CTC is effective in the United Kingdom but will not be applied retrospectively, i.e. any rights and interests existing prior to ratification of the CTC will retain their priority without the need for registration. This avoids additional administrative hurdles resulting from the ratification of the CTC, but at the same time means that it is not possible to register such pre-existing interests.

It is worth noting that, although it does not change any relevant provisions of English law as regards the creation of *in rem* security interests generally, that law will not apply to determine whether an international interest under the CTC is validly created. This will depend entirely on the CTC and its requirements in the case of an aircraft, debtor location or aircraft registration in a "CTC country" (and compliance with the formalities set out in Article 7 of the CTC), and an aircraft mortgagee may be able to rely on the rights and remedies available under the CTC for such international interest in the relevant aircraft.

It is also worth noting that by adopting the Alternative A insolvency regime (with a 60-day waiting period for the asset to be returned to the creditor), the UK has furthermore decided to grant additional protection to financiers and lessors in a debtor insolvency scenario.

3 Litigation and Dispute Resolution

3.1 What rights of detention are available in relation to aircraft and unpaid debts?

An unpaid seller in possession of the aircraft may retain possession of the aircraft until payment is received (Sale of Goods Act 1979).

The Civil Aviation Act 1982 provides for a salvage lien on an aircraft where "any services are rendered in assisting, or in saving life from, or in saving the cargo or apparel of, an aircraft in or over the sea or any tidal water, or on or over the shores or any tidal waters", according to the national and international regulatory framework of the law of maritime salvage.

In common law, under specific conditions, a possessory lien arises in favour of a person who has expended labour and skills on the improvement of a chattel. The requirement for 'improvement' is now uncertain under English law. Liens in favour of maintenance organisations are widely considered to arise in common law; however, in the majority of cases the right of lien is expressed contractually and there is no requirement for 'improvement'.

Under the Civil Aviation Act 1982, the person managing or owning an aerodrome may detain an aircraft where its operator has not paid the applicable airport charges in respect of that aircraft, or of any other aircraft, which that operator operates. Customs and excise authorities may detain an aircraft to enforce their charges against an operator.

The Transport Act 2000 provides that an aircraft may be detained and sold where its operator has not paid charges relating to air navigation services provided by the CAA, the Secretary of State or Eurocontrol.

Of less frequent application, a creditor may obtain a freezing injunction, restraining an aircraft pending judgment and execution of the judgment debt. The creditor will have to demonstrate *inter alia* that there is a real risk of 'dissipation' of the debtors' assets other than in the debtor's usual course of business, and that the value of the debt is commensurate with that of the aircraft. The remedy is equitable and discretionary; a court will exercise considerable caution before granting it.

There is no domestic legislation prohibiting the detention of commercial transport aircraft.

3.2 Is there a regime of self-help available to a lessor or a financier of aircraft if it needs to reacquire possession of the aircraft or enforce any of its rights under the lease/finance agreement?

There is no relevant statutory regime of 'self-help' rights (subject to the limited exceptions mentioned below). English law allows the exercise of extant rights to repossess chattels, including aircraft, without the need for a court order. A person seeking to exercise rights on this basis can only do so peaceably and lawfully. There are no collateral rights of enforcement as a matter of law, without a court order. Accordingly, the exercise of such rights on a self-help basis usually requires the person in possession or control of the aircraft to accede to that exercise. The rights must be extant (under the finance instruments or lease) and clearly demonstrable to third parties. The more usual course of action will be to obtain a court order.

The Bills of Sale Acts 1878 and 1882 allow seizure in the event of certain events of default (specified in the Acts) relating to a security bill of sale. Those acts do not apply to a registered mortgage of an aircraft.

3.3 Which courts are appropriate for aviation disputes? Does this depend on the value of the dispute? For example, is there a distinction in your jurisdiction regarding the courts in which civil and criminal cases are brought?

Civil disputes concerning personal injury or property damage may be pursued in the Queen's Bench Division of the High Court or in the County Court in accordance with the criteria summarised below. 'Commercial claims' (see below) should be pursued in the Commercial Court of the Queen's Bench Division of the High Court, or in the County Court.

Civil proceedings for damages or a specified sum may not be started in the High Court unless the value of the claim exceeds £25,000; if not, proceedings should be started in the County Court.

Civil proceedings which include a claim for damages in respect of personal injuries must not be started in the High Court unless the value of the claim is £50,000 or more.

Subject to the above, pursuit of a claim in the High Court is appropriate where:

- there is a degree of complexity of the facts, legal issues, remedies or procedures involved; and/or
- the outcome of the claim is of importance to the public in general.

A case may be started in the Commercial Court only if it fulfils the characteristics of a 'commercial claim'; namely any claim arising out of the transaction of trade and commerce, including any claim relating to a business document or contract, the export or import of goods or the carriage of goods by land, sea, air or pipeline.

Although there is no rigid financial limit, a claim for less than £200,000 is likely to be transferred out of the Commercial Court unless it involves a point of special commercial interest. The majority of cases arising out of the finance or lease of aircraft will be heard by the Commercial Court. The majority of cases concerning death, serious injury or serious property damage claims arising out of air accidents will be heard by a Court of the Queen's Bench Division of the High Court.

Civil and criminal cases will be heard in separate courts.

3.4 What service requirements apply for the service of court proceedings, and do these differ for domestic airlines/parties and non-domestic airlines/parties?

Pursuant to Part 6 (*Service of Documents*) of the Civil Procedure Rules, where the claim form is being served in the 'jurisdiction' (defined as England and Wales and any part of the territorial waters of the United Kingdom adjoining England and Wales), a claim may be served by a number of methods including (without limitation) by personal service, first class post, or by service on the defendant's solicitors, fax or other means of electronic communication.

The court will serve the claim form (subject to certain exceptions, for example where the claimant has notified the court that the claimant wishes to serve it).

In the event that the defendant is established out of the jurisdiction, the court may permit a claim form to be served on the defendant's agent provided that an agent for service of process has been appointed and the agent's authority has not been terminated.

It may be necessary for the claimant to obtain the court's permission, in certain circumstances e.g. where no agent for service of process is appointed, to serve a claim form on a defendant outside the jurisdiction. The claimant must file at court a notice with the claim form containing a statement of the grounds on which it is entitled to serve the claim form out of the jurisdiction.

3.5 What type of remedies are available from the courts or arbitral tribunals in your jurisdiction, both on an i) interim and a ii) final basis?

Remedies vary depending on the nature of the dispute. In general terms, there are both (for historical reasons) legal and 'equitable' remedies and the following may be available:

- On an interim basis:
  - an injunction order to prevent the other party from doing something until final judgment is reached; and
  - damages.
- On a final basis:
  - damages;
  - injunctions to prevent the other side from doing something or requiring the other party to do something;
  - possession orders to take control of an aircraft and other aviation assets; and
  - orders for the sale of an aircraft.

3.6 Are there any rights of appeal to the courts from the decision of a court or arbitral tribunal, and, if so, in what circumstances do these rights arise?

From a Court Decision

A party requires permission to appeal from a County Court or High Court decision.

A request for permission to appeal can (and if appeal is to be sought, should) be made to the lower court at the hearing at which the decision to be appealed is made. Thereafter, permission may be sought directly from the appeal court.

Permission to appeal will only be given where the court considers that the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard. In most instances, the trial judge will be considered best placed to judge the facts of the case. An appeal from factual findings is usually difficult to pursue. The category and level of court to which an appeal is to be made depends on the level of the court making the decision which is being appealed. There is no automatic stay of execution of a judgment or order while appeal is pursued.

A route of appeal lies from the Court of Appeal to the Supreme Court. Again, permission to appeal is required.

From an Arbitral Tribunal

As a general rule, an arbitrator has the same powers as any court, and an arbitral tribunal's decision is binding. There is no right of appeal to the courts on a question of fact. There are narrow exceptions to this general rule.

A party may challenge an arbitral award for lack of jurisdiction (Section 67 of the Arbitration Act 1996). It is also possible to challenge the arbitrator's award on the basis of a serious irregularity (Section 67 of the Arbitration Act 1996). The definition of a 'serious irregularity' includes exceeding the arbitrator's powers, failure to comply with the general duties imposed on the arbitrator or failure to deal with all the issues.

A party may appeal to the High Court on a question of law arising out of the arbitral award. The court will only intervene if the arbitrator's decision is obviously wrong or 'the question is one of general public importance and the decision of the tribunal is at least open to serious doubt'.

4 Commercial and Regulatory

4.1 How does your jurisdiction approach and regulate joint ventures between airline competitors?

UK competition law reproduces in virtually identical form EU competition law, sections 2 and 9 of the UK Competition Act 1998 ("CA 1998") setting out provisions similar to the prohibition of anticompetitive agreements and the exemption criteria (Article 101(1) and 101(3) of the Treaty on the Functioning of the European Union ("TFEU")). A joint venture between airline competitors would, therefore, have to satisfy the four exemption criteria of section 9 CA 1998 and/or Article 101(3) TFEU. In summary:

(a) the agreement should generate efficiency gains for the parties or promote economic progress (e.g. costs savings through joint operations or improved services);

(b) consumers should receive a fair share of those benefits (e.g. including the passing on of savings through lower prices);

(c) the agreement should not impose on the undertakings concerned, restrictions which are not indispensable to the attainment of these objectives. Restrictions should be proportionate; and

(d) the agreement should not eliminate effective competition. This is a market power test, requiring that there should be effective competition outside of the joint venture.

The European Commission (the "Commission") and the European National Competition authorities (hereinafter referred to as "EU regulators") have not yet blocked airline alliances, which are usually considered to produce substantial efficiencies and consumer benefits, but have, often following lengthy investigations and negotiations with the parties, required commitments from the parties, to be satisfied that the alliance qualifies for exemption, in particular that competition is not eliminated.

In relation to highly integrated airline alliances, the so-called "metal neutral alliances", the European Commission closed an investigation on 14 July 2010 into the British Airways, American Airlines and Iberia (members of the Oneworld alliance) highly integrated transatlantic alliance, covering all routes between North America and Europe (see case No 39596 *BA/AA/IB*). This alliance involved revenue-sharing and joint management of schedules, pricing and capacity. The Commission closed its investigation after the parties offered extensive commitments to make landing and take-off slots available at London Heathrow, which were considered essential to facilitate the entry or expansion of competitors on routes between London and New York, Boston, Dallas and Miami (London-New York: 21 slots weekly (3 daily); London-Boston: 14 slots weekly (2 daily); London-Miami: 7 slots weekly (1 daily); London-Dallas: 7 slots weekly (1 daily)). The parties also offered to conclude with competitors fare combinability and special pro-rate agreements, as well as to provide access to the parties' frequent-flyer programmes.

In May 2013, the Commission cleared a revenue-sharing joint venture focusing on transatlantic passenger routes (in particular, Frankfurt-New York), accepting binding commitments from Star Alliance members Air Canada, United and Lufthansa (COMP/39595 *Continental/United/Lufthansa/Air Canada*).

Similarly, in May 2015, the Commission decided to make binding commitments offered by Air France/KLM, Alitalia and Delta – all members of the SkyTeam airline alliance – to address concerns over their transatlantic joint ventures with respect to capacity, schedules, pricing and revenue management and sharing of profit and losses, which has the object and effect of restricting competition on three routes, namely: (i) Amsterdam-New York; (ii) Rome-New York; and (iii) Paris-New York (COMP/39964 *AF-KL/DL/AZ*).

In relation to codeshare agreements, neither national nor European competition laws provide specific rules; the legal test applied being based on the exemption criteria of Article 101(3) TFEU and/or the corresponding provisions of the competition laws of the EU Member States.

The current EU case law is limited. In the *SAS/Maersk Air* case, in which the parties notified a codeshare agreement to the Commission for clearance, with an underlying cartel agreement in the form of a broad market-sharing agreement between the parties, the Commission concluded that this agreement was a serious infringement of competition and fined the parties a total of €52.5m, which was confirmed by the EU Court of First Instance (see COMP/37.444 – *SAS/Maersk Air* and COMP/37.386 – *SUN Air/SAS and Maersk Air*, 18.7.2001 (2001/716 EG) confirmed by CFI decision T-241/01, 18.07.05). At the national level, codeshare cases were investigated by the Italian National Competition Authority (see the *Alitalia/Volare* case and the *Alitalia/Meridiana* case). In the *Alitalia/Volare* case the Italian Competition Authority considered the codeshare agreement restrictive but the decision was reversed by the court (both first instance and second instance), and in the *Alitalia/Minerva* case, the Authority considered the codeshare agreement not to be restrictive.

In addition, on 11 February 2011 the Commission opened an investigation on free-flow parallel hub-to-hub codeshare arrangements between Lufthansa and Turkish Airlines and between Brussels Airlines and TAP Air Portugal. These investigations are ongoing.

With regard to non-overlapping block space and interlining agreements, these are viewed by EU regulators as pro-competitive and have been accepted subject to commitments by the Commission in several merger clearance decisions pursuant to Regulation 139/2004 (please see: *Air France/KLM*, case COMP/M. 3280, paragraph 158 (j); *Lufthansa/SNAirholdings*, Case COMP/M. 5335, paragraph 441; and *Lufthansa/Swiss*, Case COMP/M. 3770, paragraph 196).

4.2 How do the competition authorities in your jurisdiction determine the "relevant market" for the purposes of mergers and acquisitions?

The UK competition authorities will follow an analysis similar to that of the Court of Justice of the European Union ("CJEU") and the Commission. These have defined the relevant market in decisions regarding the aviation sectors as follows:

Origin and Destination ("O&D") City Pairs

This evaluation considers a demand-side perspective, whereby customers consider all possible alternatives of travelling from a city of origin to a city of destination, i.e. an O&D city pair (which generally are considered unsubstitutable by a different city pair).

Premium and Non-Premium Passengers

The different services appeal to different passenger groups with varying travel needs and price sensitivities. First and Business Class ticket passengers are less price-sensitive than Economy ticket users. The Commission considers that Business and First Class tickets on one hand, and Economy on the other, are two different product markets.

Non-Stop and One-Stop Flights

EU regulators consider that the degree of competitive constraint imposed by one-stop services varies according to the route and assesses the precise impact of competing one-stop flights on the parties' joint venture on a route-by-route basis.

Airport Substitution

Where more than one airport in a city at one end of the route offers passenger air transport services, this must be assessed for market definition purposes. The market definition for airports is based on a catchment area of airports considered substitutable by passengers. The relevant market may vary according to the type of passengers: premium and non-premium passengers; or time-sensitive and non-time-sensitive passengers.

4.3 Does your jurisdiction have a notification system whereby parties to an agreement can obtain regulatory clearance/anti-trust immunity from regulatory agencies?

No. The notification system was abolished by Regulation 1/2003, which entered into force on 1 May 2004, and since then it has no longer been possible to notify agreements to the CMA (or indeed the European Commission) for clearance. Parties now also need to ensure that their agreement satisfies the exemption criteria of section 9 CA 1998 and/or Article 101(3) TFEU, on which section 9 is closely based.

4.4 How does your jurisdiction approach mergers, acquisition mergers and full-function joint ventures?

The legislation applicable to UK merger control is the Enterprise Act 2002 (the "Act"). Mergers (including, acquisitions and full-function joint ventures) are not subject to a system of mandatory notification in the UK. However, where a merger falls outside the turnover thresholds of the EU Merger Control Regulation 139/2004, but falls within the definition of "relevant merger situation" within the Act (see below), the CMA will have jurisdiction to investigate it within four months of completion or the date it was made public, whichever is later (discussed below).

EU Merger Control

A merger will have an EU dimension and will have to be notified to the Commission if either:

- the combined aggregate worldwide turnover of all the companies concerned is more than €5 billion (this threshold is intended to exclude mergers between small and medium-sized companies); and
- the aggregate Community-wide turnover of each of at least two of the companies concerned is more than €250 million (this threshold is intended to exclude relatively minor acquisitions by large companies or acquisitions with only a minor European dimension); or
- unless each of the companies concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State (this threshold – the so-called "two-thirds rule" – is intended to exclude cases where the effects of the merger are felt primarily in a single Member State, when it is more appropriate for the national competition authorities to deal with it) (Article 1(2), Merger Regulation).

Alternatively:

- the combined aggregate worldwide turnover of all undertakings concerned is more than €2.5 billion (instead of €5 billion);
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than €100 million (instead of €250 million);
- the combined aggregate turnover of all undertakings concerned is more than €100 million in each of at least three Member States;
- in each of at least three of these Member States, the aggregate turnover of each of at least two of the undertakings concerned is more than €25 million; and
- unless each of the companies concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State (Article 1(3), Merger Regulation).

The relevant legislation applicable to EU merger control is Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.01.2004).

UK Merger Control

"Relevant Merger Situation"

A relevant merger situation under the UK merger rules arises where:

- two or more enterprises "cease to be distinct" – in essence, the transfer from one party to another of an "enterprise", which is broadly defined to include business activities of any kind; and either: as a result of the merger, the combined enterprises will supply or acquire 25% or more of any goods or services in the UK or a substantial part of the UK; or an existing share of supply of 25% or more will be enlarged (Section 23, Enterprise Act 2002) (it should be noted that the "share of supply" test is not a market share test but, rather, focuses on the share of supply of the most narrow reasonable description of goods or services); or
- where the value of the turnover in the UK of the enterprise being taken over exceeds £70 million.

Obligation to Notify

With the exception of special cases of mergers involving newspapers, broadcasters or water companies, there is no obligation to notify proposed or completed mergers. However, it is possible, and will in many cases be advisable, to notify the CMA, since if a merger may result in a "substantial lessening of competition" in the UK market, failure to obtain prior clearance risks a reference to a more in-depth investigation and analysis by the CMA (known as a "Phase 2 investigation"), with the possible consequences described below, which may include a requirement that the purchaser divest.

4.5 Details of the procedure, including time frames for clearance and any costs of notifications.

UK Merger Control Timing and Fees

The CMA has an administrative (non-binding) timetable, to which it usually adheres, to take a decision on a notified merger within 40 working days of receiving a complete notification. The waiting time for a decision will be greater if the CMA has serious concerns or if undertakings by the parties to address competition difficulties have to be explored.

A fee is payable to the CMA in respect of relevant merger situations. The fees payable are, since August 2012:

- £40,000, where the UK turnover is less than £20 million;
- £80,000, where the UK turnover is between £20 million and £70 million;
- £120,000, where the UK turnover is between £70 million and £120 million; and
- £160,000, where the UK turnover is over £120 million.

A merger fee is not payable if the merger involves the acquisition of an interest that is less than a controlling interest and the CMA has investigated the acquisition on its own initiative. This exception does not apply if the merger parties notified the acquisition by submitting a merger notice.

Furthermore, a person or corporate body acquiring an interest is exempt from paying a merger fee if, in its most recent financial year

before the time the fee would become payable, it meets the criteria for small or medium-sized enterprises, as defined by reference to certain provisions in the Companies Act 2006. For financial years beginning on or after 1 January 2016 and, if the directors of the acquirer so decided, financial years beginning on or after 1 January 2015, the acquirer qualifies as small or medium-sized if it, or the group of which it is a member (as defined in section 474 of the Companies Act 2006), has satisfied certain criteria laid down by the CMA (which is more fully detailed in the relevant section of the government website: www.gov.uk).

If the CMA believes that a merger has resulted or may be expected to result in a substantial lessening of competition, and satisfactory undertakings cannot be agreed with the parties, the CMA will evaluate the competitive effects of the merger and may, where it believes the merger has or may result in a substantial lessening of competition in the UK market, refer the merger for an in-depth ("Phase 2") investigation. The CMA has a wide range of powers, including to prevent the merger proceeding or divestment if the proceeding has already taken place.

4.6 Are there any sector-specific rules which govern the aviation sector in relation to financial support for air operators and airports, including (without limitation) state aid?

At UK level, no. At EU level, yes. The specific rules on state aid for the aviation sector are set out in the Guidelines on State Aid to Airports and Airlines (Communication from the Commission, 2014/C 99/03). The Guidelines cover the presence of state aid within the meaning of Article 107 (1) of TFEU, investment aid, public service compensation for airlines and airports and so forth.

Public Funding of Airports

In order to assess whether an undertaking has benefited from an economic advantage, the Guidelines set out that the Market Economy Operator ("MEO") test will be applied. The test will be based on available information and foreseeable developments at the time at which the public funding was granted. When an airport benefits from public funding, the Commission will assess whether such funding constitutes aid by considering whether, in similar circumstances, a private-sector funder would have granted the same funding. Should such funding have been regarded as being granted in circumstances which correspond to "normal" market conditions, then it is not regarded as state aid.

Start-up Aid for Airlines

The Guidelines acknowledge that state aid granted to airlines for the launching of a new route with the aim of increasing the connectivity of a region will be considered compatible with the internal market pursuant to Article 107(3)(c) of TFEU, if the cumulative conditions in the Guidelines are satisfied. The conditions that will be considered (in relation to start-ups) as contributing to the achievement of an objective of common interest are: (i) if the airline increases the mobility of EU citizens and connectivity as well as the connectivity of the regions by opening new routes; or (ii) if the airline facilitates the development of remote regions.

The Guidelines also acknowledge that airlines are not always prepared to run the risk of opening new routes from unknown and untested airports, and may not have appropriate incentives to do so. Consequently, start-up aid will only be considered compatible for routes linking an airport with less than 3 million passengers *per annum* to another EU airport. Additionally, start-up aid for routes linking an airport with more than 3 million passengers *per annum* and less than 5 million passengers *per annum* and which are not located in remote areas are only likely to be considered compatible with the internal market in duly substantiated (and indeed exceptional) cases. Linking an airport with more than 5 million passengers *per annum* not located in remote regions, however, cannot be considered compatible with the internal market.

4.7 Are state subsidies available in respect of particular routes? What criteria apply to obtaining these subsidies?

Yes. There are specific EU state aid rules as regards public service compensation granted to undertakings entrusted with the operation of services of general economic interest ("SGEI"), which also cover the aviation sector. These rules are set out in Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ No L312/67, 29.11.05). The Commission's decision covers compensation for SGEI generally, but contains the following provisions specifically relating to air transport:

- public service compensation for air links to islands on which average annual traffic during the two financial years preceding that in which the SGEI was assigned does not exceed 300,000 passengers, will be considered compatible with the common market and not requiring notification; and
- the same rule applies to public service compensation for airports, if average annual traffic during the two financial years preceding that in which the SGEI was assigned does not exceed 1 million passengers.

4.8 What are the main regulatory instruments governing the acquisition, retention and use of passenger data, and what rights do passengers have in respect of their data which is held by airlines?

The Data Protection Act 1998 ("DPA") governs the collection and use of personal data in the UK. The DPA implemented EU Directive 95/46/EC.

Broadly, the DPA applies to the processing (such as obtaining, recording, holding, using, disclosing or erasing) of personal data. The obligations under the DPA are on the "data controller", who is the person that determines how personal information can be processed. A "data processor" is a person who processes data on behalf of the data controller. The data controller remains legally responsible for the processing of personal data by the data processor.

The DPA's jurisdictional scope includes persons who:

(a) are incorporated in the UK;

(b) have an office, branch or agency in the UK; or

(c) have a regular practice in the UK.

Data controllers must ensure that data is processed in accordance with eight data protection principles; namely that personal data is:

(a) fairly and lawfully processed;

(b) obtained only for specified lawful purposes;

(c) adequate, relevant and not excessive for the purposes;

(d) accurate and up to date;

(e) not kept for longer than is necessary;

(f) processed in accordance with the rights of data subjects;

(g) protected by ensuring that appropriate technical and organisational measures are taken against the unauthorised or unlawful processing of the personal data, as well as against accidental loss or destruction of, or damage to, personal data; and

(h) not transferred outside of the European Economic Area (subject to specified exemptions).

All data subjects, such as individual passengers, have the right to:

(a) access a copy of the information comprising their personal data;

(b) object to processing that is likely to cause them damage or distress;

(c) prevent processing for direct marketing;

(d) object to decisions being taken by automated means;

(e) have inaccurate personal data rectified, blocked, released or destroyed; and

(f) claim compensation for damage caused by a breach of the DPA.

There is no minimum period for which controllers must hold personal information; rather, they must securely delete personal data when that personal data is no longer necessary for the purposes for which it was collected. Individuals may only request that personal data be deleted by the data controller where it is inaccurate.

It is worth noting that, in May 2016, a new General Data Protection Regulation (Regulation 2016/679) came into effect across the EU, and this will come into force in each Member State on 25 May 2018. As this is a Regulation, it will have direct effect in each EU Member State from 25 May 2018, as well as the Member States of the European Economic Area ("EEA"), and so will go a long way towards harmonising the EU data protection regime (which has been notoriously fragmented to date).

On 2 December 2015, a provisional deal was reached by the European Parliament and Council on an EU directive regulating the use of Passenger Name Record ("PNR") data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, and was endorsed by the Civil Liberties, Justice and Home Affairs Committee on 10 December 2015. The Directive was approved by Parliament as a whole on 14 April and by the Council of the EU on 21 April 2016.

The PNR Directive obliges airlines to hand EU countries their passengers' data in order to help the authorities fight terrorism and serious crime. It requires more systematic collection, use and retention of PNR data on air passengers, and therefore has an impact on the rights to privacy and data protection.

It is also worth noting that EU countries have bilateral PNR agreements with third countries in the wake of terrorist attacks across the EU and in the USA. Each of the agreements sets out the use of PNR data collected by airlines for law enforcement purposes.

4.9 In the event of a data loss by a carrier, what obligations are there on the airline which has lost the data and are there any applicable sanctions?

Under the current legislative regime, there is no mandatory obligation for an airline to notify the Information Commissioner's Office ("ICO" – the regulatory body in charge of the DPA) of a data breach.

Where an individual has suffered damage due to a data controller's breach of the DPA, that individual is entitled to claim compensation from the data controller.

The ICO has the power to fine data controllers up to £500,000 for serious breaches of the DPA. The data controller may appeal the imposition of a fine to the Information Rights Tribunal.

The DPA creates several criminal offences, including (amongst others) unlawfully obtaining personal data, selling personal data obtained unlawfully and failing to comply with an enforcement notice.

The ICO's other coercive powers include issuing information notices requiring organisations to provide it with information and issuing binding undertakings to organisations with which they must comply.

It is worth noting here that the new General Data Protection Regulation (see question 4.8 above) has enhanced notification provisions around data losses, as well as allowing the relevant data protection regulators the authority to levy significantly increased fines for non-compliance with the provisions of the Regulation.

4.10 What are the mechanisms available for the protection of intellectual property (e.g. trademarks) and other assets and data of a proprietary nature?

The UK has an Intellectual Property Office ("IPO"). Trademarks, patents and designs are registrable with the IPO.

Copyright protection applies to original works upon creation of the work, without the need for registration (copyright is not registrable in the UK). The UK has a relatively low threshold of originality for a work to be considered an original work which is protected by copyright. Databases may be protected by copyright and/or database rights.

A patent may be filed online or in hard copy. A patent application should include a full description (including drawings) of the invention, the claims defining the invention, an abstract summarising the invention's technical features and the relevant IPO forms.

Some intellectual property disputes may be heard initially by the IPO. The Intellectual Property Enterprise Court ("IPEC") is a specialist court that deals with lower-value or lower-complexity intellectual property disputes. There is a £500,000 cap on the amount of damages that can be claimed (although this can be waived if agreed by the parties). There is a small claims track within the IPEC which is appropriate if the claim has a value of £10,000 or less. More complex or valuable cases will be heard in the Chancery Division of the High Court.

4.11 Is there any legislation governing the denial of boarding rights?

European Regulation 261/2004 provides rules concerning compensation for denied boarding. Airlines must ensure that a clearly legible and visible notice containing prescribed wording is displayed to passengers at check-in, and must provide passengers affected by denied boarding with a notice setting out the rules for compensation. Planned revisions to this Regulation may be adopted during 2017, with the new rules entering into force later in the year. However, much work is still required to be done on the proposed revisions to Regulation 261 and it is difficult to anticipate when the European authorities will be in a position to adopt the revised Regulation.

Under the Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005, the CAA is responsible for enforcement of the operators' compliance with these rules; the Air Transport Users Council is the body to receive complaints. It is an offence, subject to a defence of due diligence, for an operating air carrier to fail to comply with the obligations imposed under the above.

4.12 What powers do the relevant authorities have in relation to the late arrival and departure of flights?

European Regulation 261/2004 establishes common rules on compensation and assistance to be given to passengers in the event of cancellation or long delay. Pursuant to the UK domestic legislation – the Civil Aviation (Denied Boarding, Compensation

and Assistance) Regulations 2005 – the CAA is empowered to pursue enforcement proceedings against an airline for non-compliance with the European rules. If proved, an airline will be liable to a fine not exceeding £5,000 for each offence.

4.13 Are the airport authorities governed by particular legislation? If so, what obligations, broadly speaking, are imposed on the airport authorities?

The Civil Aviation Act 1982 and the Air Navigation Order 2009 stipulate that where an aerodrome is open for public use, the aerodrome must be available to all, on equal terms, whether they are foreign or domestic carriers. There are numerous other obligations imposed upon an airport operator by law of application not limited to aviation; for example, concerning employment, health and safety and disability discrimination.

The Civil Aviation Act 2012 has introduced a new system of economic regulation of airport operators. Certain airports will require a licence to levy airport charges, and the CAA can impose such conditions on that licence as it deems necessary to promote competition (e.g. capping the percentage by which charges at a particular airport may be increased, by a certain percentage or by reference to a particular index (such as the Retail Price Index)).

The Transport Act 2000 requires airport operators to keep records of aircraft movements in order to facilitate the assessment and calculation of charges. The Civil Aviation (Chargeable Air Services) (Records) Regulations 2001 govern the format and content of the aircraft movement log, which must be kept at any airport pursuant to Section 88 of the Civil Aviation Act 1982. Pursuant to the Air Navigation Order 2009, the aerodrome licence-holder must ensure that the messages and signals between an aircraft and the air traffic control unit at the aerodrome are recorded, complete and preserved.

The airport operator is responsible for ensuring that the landing ground and runway remain clear of unmarked and unlit obstructions pursuant to the Air Navigation (Consolidation) Order 1923.

There is also a statutory duty for an airport operator to take care, as in all reasonable circumstances, to see that a visitor shall be safe in using the premises for the purposes for which he is invited, or permitted, by the operator, to be there. Failure to install, maintain and use the proper equipment to enable aircraft to take off and land safely will attract liability, and there may be liability to passengers of aircraft which crash if there is a failure to have or to use adequate rescue equipment.

Airport operators have also been held liable where there was a known hazard and no effective system to discover and disperse birds, leading to bird strikes.

4.14 To what extent does general consumer protection legislation apply to the relationship between the airport operator and the passenger?

The Consumer Protection Act 1987 and the Consumer Rights Act 2015 apply to aviation-related matters, providing a cause of action to a passenger against a manufacturer. The Enterprise Act 2002 is also applicable to aviation: it gives the CMA powers of enforcement in relation to consumer legislation.

4.15 What global distribution suppliers (GDSs) operate in your jurisdiction?

All the major GDSs operate in the UK, i.e. Travelport, Amadeus, Sabre, etc.

4.16 Are there any ownership requirements pertaining to GDSs operating in your jurisdiction?

No, there are no ownership requirements specific to GDSs operating in the UK, beyond the general UK company law applicable to all companies. Foreign-domiciled companies may operate in the UK without registering a UK company or branch. UK-registered companies are not required to have a local shareholder or director; they just need to have a registered address in the UK.

4.17 Is vertical integration permitted between air operators and airports (and, if so, under what conditions)?

There is not a prohibition of vertical integration between air operators and airports. In such a case, however, competition rules particularly prohibiting abuse of a dominant position (section 18 CA 1998 and/or Article 102 TFEU) will prohibit any discriminatory charges for access to airport infrastructure, or denial of access where this affects trade and is not objectively justified.

5 In Future

5.1 In your opinion, which pending legislative or regulatory changes (if any) or potential developments affecting the aviation industry more generally in your jurisdiction are likely to feature or be worthy of attention in the next two years or so?

It is clear that developments in the data protection space involving the collection, retention, processing and use of personal – specifically, PNR data – are going to feature as a major area of concern and focus for airlines and airports in the future, let alone the next two years. The advent of the new General Data Protection Regulation in the EEA as well as the introduction of the PNR Directive (and the national variations that are likely to arise in relation to that Directive) will require operators in this industry not only to ensure compliance, but also to implement mechanisms, processes and procedures in the run up to implementation, to ensure they are not found wanting when it comes not only to the legislative requirements around the collection and provision of that data but also the secure handling, retention and use of it.

The new Package Travel Directive (2015/2302/EU), which entered into force on 31 December 2015, has a deadline for transposition into the national laws of the EU Member States of 1 January 2018 and an effective date of 1 July 2018. This too will have an impact on carriers, as it has a scope which extends beyond the traditional holiday package booked through a tour operator and covers many other forms of combined travel (for example, fly-drive holidays and flight-hotel bookings). These forms of combined travel will be protected as a package under the Directive, in particular where the travel services are booked at the same time and as part of the same booking process or where they are offered for an inclusive price.

Consumer rights legislation will continue to strengthen in the UK as a result of the Consumer Rights Act 2015 and the ever-present bolstering of Regulation 261/2004, primarily by the CJEU's interpretation of the Regulation (which has caused a plethora of headaches for lawyers, airlines and consumers alike over the years) but also in relation to a revision to the Regulation (which was first published in March 2013 but has yet to be agreed).

Endnote

1. Under Part 1 Article 4(3) of the Air Navigation Order 2009, an aircraft must not be registered or continue to be registered in the United Kingdom if it appears to the CAA that:
   (a) the aircraft is registered outside the United Kingdom and that such registration does not cease by operation of law when the aircraft is registered in the United Kingdom;
   (b) an unqualified person holds any legal or beneficial interest by way of ownership in the aircraft or any share in the aircraft;
   (c) the aircraft could more suitably be registered in some other part of the Commonwealth; or
   (d) it would not be in the public interest for the aircraft to be, or to continue to be, registered in the United Kingdom.

   Pursuant to Part 1 Article 5(1), only the following persons are qualified to hold a legal or beneficial interest by way of ownership in an aircraft registered in the United Kingdom or a share in such an aircraft:
   (a) the Crown in right of HM Government in the United Kingdom and the Crown in right of the Scottish Administration;
   (b) Commonwealth citizens;
   (c) nationals of any EEA state;
   (d) British protected persons;
   (e) bodies incorporated in some part of the Commonwealth and having their principal place of business in any part of the Commonwealth;
   (f) undertakings formed in accordance with the law of an EEA state which have their registered office, central administration or principal place of business within the EEA; or
   (g) firms carrying on business in Scotland; in this sub-paragraph 'firm' has the same meaning as in the Partnership Act 1890 (c39).

   Under Part 1 Article 5(4) of the Air Navigation Order 2009, if an aircraft is chartered by demise to a person qualified under paragraph (1), the CAA may, whether or not an unqualified person is entitled as owner to a legal or beneficial interest in the aircraft, register the aircraft in the United Kingdom in the name of the charterer by demise if it is satisfied that the aircraft may otherwise be properly registered. There is also a discretion for the CAA to register an aircraft which is owned by a person not qualified under Part 1 Article 5(1) where the owner resides or has a place of business in the United Kingdom, but such aircraft must not be used for commercial air transport, public transport or aerial work (Part 1 Articles 5(2) and (3)).

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Chapter 28

USA


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1 General

1.1 Please list and briefly describe the principal legislation and regulatory bodies which apply to and/or regulate aviation in your jurisdiction.

Aviation in the U.S. is primarily regulated by:

- the Department of Transportation ("DOT");
- the Federal Aviation Administration ("FAA"), which is an agency of the DOT;
- the Department of Homeland Security's Transportation Security Administration ("TSA") and Customs and Border Protection ("CBP"); and
- the National Transportation Safety Board ("NTSB").

The DOT regulates economic authority approval and consumer protection, and negotiates and implements international transportation agreements. The FAA regulates aviation safety, including but not limited to: minimum standards for manufacturing, operating and maintaining aircraft; air traffic control, and certification and registration of airports; and aircraft and their parts. The FAA also funds and regulates airport development. The TSA assists the FAA with aviation safety by screening airline passengers, baggage and cargo. The CBP works to secure U.S. borders. The NTSB is an independent agency charged by Congress with investigating civil aviation accidents and accidents involving other modes of transportation in the U.S.

The primary aviation laws are organised under title 49 of the U.S. Code ("USC"), section 40.101 *et seq.* (the Transportation Code), and the primary aviation regulations are organised under title 14 of the Code of Federal Regulations ("CFR").

Each state within the U.S. also has aviation laws and regulations that may apply to the extent that such regulations and laws are not pre-empted by federal laws.

1.2 What are the steps which air carriers need to take in order to obtain an operating licence?

In order to obtain an operating licence, an air carrier needs to obtain two separate authorisations: safety authority and economic authority.

Air carriers must obtain safety authority from the FAA. Both U.S. and foreign air carriers must file an application with the FAA, whereby the FAA determines if the air carrier meets certain safety regulations and standards. If the FAA is satisfied, it will issue a U.S. air carrier an Air Carrier Certificate and Operations Specifications (14 CFR Parts 121 and 135), and a foreign air carrier Operation Specifications only (14 CFR Part 129).

Air carriers also need to obtain economic authority from the DOT. Pursuant to 49 USC 41101, all air carriers must file an application to receive either a "certificate of public convenience and necessity" or an exemption from the certification requirement. Air taxis and commuter air carriers are typically exempt from the certification requirement and are, instead, regulated under 14 CFR 209.

U.S. air carrier applications are analysed by the DOT and the prospective air carrier must be:

- owned and controlled by citizens of the U.S. (49 USC 40102);
- run by individuals with sufficient managerial competence and experience to conduct operations;
- run by individuals with a keen understanding of the financial requirements involved, who have access to the necessary capital to conduct operations; and
- likely to comply with the applicable laws, rules and regulations.

Foreign air carrier applications are also analysed by the DOT and the prospective air carrier must be:

- substantially owned and controlled by citizens of its claimed homeland;
- operationally and financially fit to conduct services; and
- covered by a bilateral aviation agreement with the applicant's claimed homeland, or authorisation would be in the public interest.

Upon receipt of an application, the DOT publishes a notice of the application for comment. If all of the criteria are met and there is no opposition, an application by a U.S. air carrier could be granted in four months, and an application by a foreign air carrier could be granted within 30–60 days.

Both U.S. and foreign air carriers may also seek an exemption allowing them to begin operations while awaiting the DOT's decision.

1.3 What are the principal pieces of legislation in your jurisdiction which govern air safety, and who administers air safety?

The safety of air transport is primarily regulated by the FAA and the DOT.

The FAA sets minimum standards and other requirements for aircraft operation (14 CFR Parts 91, 121, 125, and 135), aircraft maintenance and repair (14 CFR Parts 43 and 145), aircraft design and manufacturing (14 CFR Parts 21, 25, and 33), and the operation and certification of airports (14 CFR 139).

The NTSB also investigates aviation accidents to determine the probable cause of the accident and issue a safety recommendation to prevent similar accidents from occurring in the future, as well as to provide assistance to accident victims and their families.

1.4 Is air safety regulated separately for commercial, cargo and private carriers?

For the most part, aviation regulations are based upon aircraft size and type, specifically, the number of passenger seats on the aircraft and the payload capacity, as well as whether the operation involves common carriage of passengers and/or cargo.

The principal provisions regulating air safety for common carriers are 14 CFR 121 and 135 (for U.S. air carriers) and 14 CFR 129 (for foreign air carriers). Common carriers are those who hold themselves out to the public as willing to transport passengers or property for compensation.

Air safety for private carriers of larger aircraft is regulated by 14 CFR 125. Private carriers are carriers both "for hire" and "not for hire" that do not hold themselves out to the public.

Additionally, 14 CFR 135 regulates safety for commuter and on-demand operations of air carriers of smaller aircraft.

1.5 Are air charters regulated separately for commercial, cargo and private carriers?

Depending on the size and type of the air charter, 14 CFR Parts 135, 212, 298, and 380 may apply. 14 CFR Parts 135 and 298 regulate on-demand air charters, for both passenger and cargo, with smaller aircraft. 14 CFR Part 212 regulates large aircraft charters. 14 CFR Part 380 regulates passenger public charters for both small and large aircraft.

1.6 As regards international air carriers operating in your jurisdiction, are there any particular limitations to be aware of, in particular when compared with 'domestic' or local operators? By way of example only, restrictions and taxes which apply to international but not domestic carriers.

Typically, bilateral aviation agreements prevent the U.S. from discriminating against foreign air carriers seeking to operate in the U.S. and, as a result, foreign air carriers are treated the same as domestic air carriers and are subject to similar regulations.

To ensure safety, foreign air carriers must meet the requirements set out in 14 CFR 129 and certain additional requirements set out in 49 CFR Part 1546, the International Aviation Safety Assessment Program, and the Foreign Air Carrier Family Support Act of 1997. In determining whether to grant a foreign air carrier an operating licence, the FAA will consider the existence of an effective aviation security agreement between the U.S. and the applicant's homeland.

1.7 Are airports state or privately owned?

Airports in the U.S. are both privately and publicly owned. Almost all airports servicing commercial operations are owned by public entities. However, there are small, private general aviation airports in the U.S. that are privately owned.

1.8 Do the airports impose requirements on carriers flying to and from the airports in your jurisdiction?

Airports have leeway in managing their operations as long as they provide access to all authorised carriers on reasonable terms and without discrimination. Accordingly, most airports maintain minimum standards of safety and efficiency. Enforcement of these standards is typically undertaken by the FAA.

Airports enter into lease agreements with air carriers, granting access to gates, facilities, and amenities in exchange for reasonable and non-discriminatory charges. Airports also often establish their own rules and regulations, including hours of operation, noise restrictions, baggage handling requirements, ground transportation, and fuelling requirements.

Additionally, airports may collect passenger facility charges of up to $4.50 for every boarded passenger at commercial airports controlled by public agencies.

1.9 What legislative and/or regulatory regime applies to air accidents? For example, are there any particular rules, regulations, systems and procedures in place which need to be adhered to?

The NTSB conducts independent investigations into all major transportation accidents in the U.S., including civil aviation accidents, that do not involve criminal conduct. Investigations into transportation accidents involving criminal conduct are passed to the Federal Bureau of Investigation and the Department of Justice.

The purpose of an NTSB investigation is to determine the probable cause of the accident and to issue safety recommendations to prevent similar accidents in the future, not for the purpose of determining liability.

Immediately after a civil aviation accident, the notification requirements set out in 49 CFR Part 830 must be followed and the airline must preserve wreckage as well as records, reports, and internal documents relating to the accident or incident. The NTSB then investigates the accident and prepares a final report for the public in accordance with the procedures and responsibilities noted in 49 CFR Parts 831 and 845, often with the help of the FAA and, if foreign individuals were on board, the Department of State. Additionally, both U.S. and foreign air carriers are required to have in place a Family Assistance Plan, which identifies how the air carrier will address the needs of families and passengers involved in any accident resulting in a major loss of life. (49 USC 41113 and 41313.)

1.10 Have there been any recent cases of note or other notable developments in your jurisdiction involving air operators and/or airports?

In *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016), the plaintiff filed suit for the death of her husband against Lycoming Engines Division of AVCO Corporation ("AVCO"), the manufacturer of the aircraft engine installed on the aircraft that her husband was piloting when it crashed immediately after take-off. The plaintiff asserted various state law claims, alleging that the aircraft lost power as a result of a malfunction/defect with the engine carburettor, causing the aircraft and its pilot to lose control and crash. (AVCO did not manufacture the carburettor, but is the engine type certificate holder and the carburettor was compliant with AVCO's engine specifications.) AVCO moved for summary judgment on the grounds that the FAA type certificate issued to AVCO established

that it had complied with applicable FAA regulations and did not deviate from federal standards of care for aircraft engine design. The District Court granted summary judgment on all but one of plaintiff's product defect claims, holding that it was bound to find that the state law based standards of care were pre-empted by the federal standards of care and the FAA's issuance of a type certificate to AVCO satisfied the federal standards of care. The District Court relied on *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 199), wherein the Third Circuit held that the Federal Aviation Act (the "Act") pre-empted the entire field of aviation safety.

The plaintiff appealed and the Third Circuit reversed the District Court decision, holding that aviation product liability claims are governed by state tort law standards of care. The Third Circuit reasoned that while it held in *Abdullah* that the Federal Aviation Act pre-empted the field of aviation safety, that was with respect to in-air operations, not designing or manufacturing an aircraft. Further, the Third Circuit held that there was no evidence that Congress intended to pre-empt state law product liability standards of care in the Act and its attendant regulations. AVCO filed a Petition for a Writ of Certiorari seeking a determination by the U.S. Supreme Court that the Act pre-empts all state-law standards of care related to aviation safety claims. The U.S. Supreme denied AVCO's petition, so the Third Circuit's decision stands.

In *U.S. Airways, Inc. v. Sabre Holdings Corp. et al.*, No. 1:11-cv-02725, U.S. Airways filed suit against Sabre, a global distribution supplier and airline booking service, for violations of antitrust laws, including the Sherman Antitrust Act, arguing that the provisions of a 2011 contract between U.S. Airways and Sabre unreasonably restrained trade, reduced competition, and harmed the airline and consumers. Specifically, the provisions required U.S. Airways to give Sabre access to all of its flights and fares, in order to allegedly accommodate the large number of travel agencies that use Sabre's booking reservation system, and prohibited U.S. Airways from offering lower fares for the same flights through other booking systems, including U.S. Airways' own website. U.S. Airways also argued that it was at a disadvantage because 38% of its revenues come from Sabre, while only a small fraction of Sabre's revenue comes from U.S. Airways. Further, U.S. Airways argued that Sabre conspired with its competitors to not compete with each other for airline content like flight and fare information. Sabre denied conspiring with competitors, and stated that its contract with U.S. Airways benefitted competition. The case went before a jury in the Southern District of New York and the jury awarded U.S. Airways $15 million. The jury found that Sabre unreasonably restrained trade by forcing unfavourable contract terms on U.S. Airways. However, the jury held that Sabre did not conspire with its competitors to not compete with each other.

2 Aircraft Trading, Finance and Leasing

2.1 Does registration of ownership in the aircraft register constitute proof of ownership?

No. A certificate of registration does not constitute proof of ownership. 49 USC Chapter 44103 notes that a certificate is not evidence of ownership in a proceeding in which ownership is in issue, and it is not conclusive evidence of the nationality of an aircraft in a proceeding under the laws of the U.S.

The FAA issues a certificate to the person who appears to be the owner on the basis of the evidence submitted. An owner may include a buyer in possession, a bailee or lessee of an aircraft, and the assignee of that person. However, a bill of sale serves as proof of ownership.

2.2 Is there a register of aircraft mortgages and charges? Broadly speaking, what are the rules around the operation of this register?

Yes. The FAA Aircraft Registry is a public registry for recording conveyances that affect title to, or interest in, an aircraft and specific types of engines, propellers, and spare parts. The rules for the registry are set forth in 14 CFR 47 and 49 and 49 USC Chapter 441. Relevant documents must include the make, model, serial number, registration number, and necessary signatures, and the documents must be mailed to or filed in person with the FAA Aircraft Registry office.

Additionally, the FAA Aircraft Registry serves as the entry point for registering "international interests" with the International Registry of Mobile Assets pursuant to the Cape Town Convention and related Protocol on Aircraft Equipment.

2.3 Are there any particular regulatory requirements which a lessor or a financier needs to be aware of as regards aircraft operation?

Aircraft operations are regulated by the FAA and the DOT. Accordingly, a lessor or financier needs to ensure that any lessee/operator complies with applicable regulatory requirements. To that end, the lease or other agreement must be in accordance with U.S. restrictions regarding who can operate an aircraft and what type of operation the aircraft can be used for. The agreement should be clear on who has operational control, as this can differ among true, operational, and financing leases, as well as wet and dry leases. In some instances, a lease agreement must contain a truth-in-leasing clause. (14 CFR Part 91.)

2.4 Is your jurisdiction a signatory to the main international Conventions (Montreal, Geneva and Cape Town)?

Yes. The U.S. is a signatory to the main international conventions. The following Conventions were entered into force in the U.S. on the following dates:

- The Convention on International Civil Aviation (the "Chicago Convention") – 4 April 1947;
- The Geneva Convention – 17 September 1953;
- The Warsaw Convention – 29 October 1934;
- The 1955 Hague Protocol to the Warsaw Convention, and Montreal Protocol No. 4 – 14 December 2003;
- The Montreal Convention – 4 November 2003; and
- The Cape Town Convention, and the Protocol to the Convention on Matters Specific to Aircraft Equipment – 1 March 2006.

2.5 How are the Conventions applied in your jurisdiction?

The Conventions are applied in the U.S. pursuant to the procedures that govern the implementation of treaties, requiring ratification and in some instances, legislative implementation. If a treaty is self-executing, it becomes judicially enforceable upon ratification. If a treaty is not self-executing, it requires legislative implementation, which authorises judicial enforcement. With the exception of the Chicago and Cape Town Conventions, international conventions have been self-executing and therefore did not require legislative implementation.

As treaties of the U.S., the Conventions supersede individual state laws and policy and are the supreme law of the land. Cases are

decided and enforced in U.S. courts pursuant to the terms of the Conventions and precedential case law interpreting them.

3 Litigation and Dispute Resolution

3.1 What rights of detention are available in relation to aircraft and unpaid debts?

Rights of detention are primarily governed by state law and depend upon the type of debt, the priority of any lien, and whether the lien has been perfected. Generally, when an aircraft owner or operator has unpaid debts, a creditor may seek to obtain an enforceable court judgment and to foreclose upon a lien and seize the aircraft. However, if the aircraft is already subject to a lien as a result of a civil penalty, or if the debtor has already filed for bankruptcy, the rights of a creditor are limited by applicable federal laws.

Additionally, where an aircraft is subject to a lien as a result of unpaid civil penalties, the aircraft may be seized by the federal government pursuant to 49 USC 46304.

3.2 Is there a regime of self-help available to a lessor or a financier of aircraft if it needs to reacquire possession of the aircraft or enforce any of its rights under the lease/finance agreement?

The Uniform Commercial Code, which has been adopted in some form by all fifty states, allows a lessor or financier, in the event of a default, to take possession of the aircraft and without removal, render it unusable as long as there is no breach of the peace. Whether there is a breach of the peace depends upon the definition of "breach of the peace" in the state where the repossession occurs. Upon seizure, the lessor or financier may retain, sell, or otherwise dispose of the aircraft and apply the proceeds to satisfy the debt. However, the rights of a lessor or financier may be limited by the terms of the underlying loan documents.

The Cape Town Convention also may affect the remedies available to the lessor or financier of an aircraft in the U.S.

3.3 Which courts are appropriate for aviation disputes? Does this depend on the value of the dispute? For example, is there a distinction in your country regarding the courts in which civil and criminal cases are brought?

Most civil matters, including civil aviation disputes, can be heard in state or federal court, depending on the circumstances.

Civil claims may be filed in federal court under limited circumstances, including if there is an issue of federal question (i.e. under a treaty or federal regulation), or if the case is between citizens of different states and the amount in controversy exceeds $75,000. Federal courts may also hear cases involving foreign sovereign entities.

State courts have broader jurisdiction and can hear almost any case, as long as it is not pre-empted by federal law. The only civil cases state courts are not allowed to hear are lawsuits against the U.S. and those involving antitrust, bankruptcy, copyright and patent law. Many states also have small claims courts to resolve actions involving smaller amounts.

Criminal cases involving federal laws can be tried only in federal court, but most criminal cases involve violations of state law and are tried in state court.

3.4 What service requirements apply for the service of court proceedings, and do these differ for domestic airlines/parties and non-domestic airlines/parties?

Requirements for service of process vary from state to state in the U.S. In general, service of process is proper when a summons and complaint are served on a defendant or an agent of the defendant. Service may be completed by: (1) personal delivery; (2) substituted service on a person of suitable age who is willing to accept the papers at the actual place of business or dwelling place of the defendant, followed by mailing the papers to the defendant's actual place of business or last known residence; and (3) affixing the papers to the door of the defendant's actual place of business or dwelling, followed by mailing the papers to the defendant's actual place of business or last known residence. In addition, in some situations, service may be completed by publication.

For proceedings in federal court, service of process is completed in accordance with the Federal Rules of Civil Procedure and the method of service is largely dependent on the type of defendant. For example, a corporation may be served at its principal place of business, or in accordance with the laws of its state of incorporation, and any officer or agent authorised to receive process may accept service.

The U.S. also is a party to the Hague Service Convention, which allows for service of process from one party of the Convention to another to assure that defendants sued in foreign jurisdictions receive actual and timely notice of suit.

3.5 What type of remedies are available from the courts or arbitral tribunals in your jurisdiction, both on an i) interim and a ii) final basis?

Depending on the circumstances surrounding the case, civil courts in the U.S. may order legal remedies (i.e. monetary damages) or equitable remedies (i.e. specific performance or injunctive relief). On an interim basis, civil courts may order provisional remedies (i.e. temporary injunctions).

The Federal Arbitration Act and various state laws afford arbitrators wide latitude with regard to granting remedies. Typically, however, arbitration is agreed to by parties during the formation of a contract and arbitration cannot be unilaterally imposed by a party.

The U.S. is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, which requires courts of contracting states in the U.S. to give effect to private agreements to arbitrate and to recognise and enforce arbitration awards made in other contracting states.

3.6 Are there any rights of appeal to the courts from the decision of a court or arbitral tribunal, and, if so, in what circumstances do these rights arise?

In federal court, once a case is decided by a U.S. District Court, it may be appealed as a matter of right to the applicable Court of Appeals. Thereafter, a party may request the Supreme Court of the United States hear the case, but the Court is not required to hear the case.

In state court, rights of appeal vary from state to state. Generally, once a case is decided by a trial court, a party may appeal as a matter of right to the next level appellate court for review (either an intermediate court of appeal or the supreme court of that state). A party may appeal to the U.S. Supreme Court if the case dealt with a federal question or a state law that violates the U.S. Constitution, treaties, or laws of the U.S.

The right to appeal a decision of an arbitral tribunal varies with regard to federal and state laws, but is typically allowed. On appeal, however, the grounds to vacate an arbitration decision are severely limited by the Federal Arbitration Act, and courts tend to grant deference to rulings of arbitrators in mutually agreed-upon arbitration.

4 Commercial and Regulatory

4.1 How does your jurisdiction approach and regulate joint ventures between airline competitors?

The DOT primarily regulates of joint ventures. Air carriers are exempt from the jurisdiction of the Federal Trade Commission ("FTC") (15 USC Sections 45–46) and from the enforcement of state antitrust laws (49 USC 41713).

The DOT is responsible for:

- determining whether a U.S. or foreign air carrier has engaged in an unfair or deceptive practice or an unfair method of competition under 49 USC 41712;
- reviewing joint venture agreements within the meaning of 49 USC 41720, including code sharing and joint frequent flyer programmes; and
- approving cooperative agreements and antitrust immunity under 49 USC 41308–41309, often sought by U.S. and foreign air carriers considering an alliance.

Ultimately, the DOT does not approve or disapprove of a joint venture; rather, the DOT evaluates the potential arrangement to ensure it does not lessen competition or harm the public.

4.2 How do the competition authorities in your jurisdiction determine the "relevant market" for the purposes of mergers and acquisitions?

The "relevant market" is determined by looking at the relevant product and geographic markets to assess whether the desired merger or acquisition will reduce competition and whether consumers in the relevant market can readily find a suitable alternative.

The relevant product market is typically defined by the line of commerce being offered, such as scheduled passenger or cargo flights. The relevant geographic market is typically defined by where the companies involved compete, often based on routes or city-pairs.

4.3 Does your jurisdiction have a notification system whereby parties to an agreement can obtain regulatory clearance/anti-trust immunity from regulatory agencies?

Yes. Depending upon the size of the parties involved and the value of the proposed agreement, parties seeking to merge or acquire another carrier must provide the FTC and the DOJ with notice of the proposed transaction. Section 7a of the Clayton Act, otherwise known as the Hart-Scott-Rodino Antitrust Improvement Acts ("HSR") (15 USC 18a), outlines the procedure for notifying the regulatory agencies. The notice is then used by the DOJ to determine whether a more extensive review is necessary.

Parties seeking to form a cooperative agreement, or joint venture within the meaning of 49 USC 41720, or to obtain an exemption from antitrust laws for a proposed alliance, must submit an application to the DOT for clearance. (49 USC 41308-41309.) The DOT then follows specified guidelines to determine whether approval and/or exemption is warranted.

4.4 How does your jurisdiction approach mergers, acquisition mergers and full function joint ventures?

Depending upon the size of the parties involved and the value of the proposed agreement, parties seeking to merge or acquire another carrier must notify the FTC and DOJ prior to closing (see question 4.3). Parties seeking to form a cooperative agreement or joint venture under 49 USC 41720, or to obtain an exemption from antitrust laws for a proposed alliance, must apply for clearance from the DOT.

By agreement with the FTC, the DOJ is responsible for enforcing federal antitrust laws, including the Sherman Act and the Clayton Act, and reviewing mergers, acquisitions, joint ventures, and other agreements to determine whether they negatively impact the relevant market by reducing competition. Horizontal Merger Guidelines provide insight into how the DOJ determines whether to challenge the transaction.

The DOT may evaluate a proposed agreement and submit its findings to the DOJ for consideration during the DOJ's decision-making process.

Additionally, if a U.S. air carrier is formed as a result of the merger, acquisition, or full-function joint venture, the owner must be a citizen of the U.S. as defined under 49 USC 40102.

4.5 Details of the procedure, including time frames for clearance and any costs of notifications.

Section 7a of the Clayton Act requires parties to an agreement involving voting securities and non-corporate interests and/or assets of a significant value to notify the FTC and the DOJ at least 30 days prior to closing of the terms of the transaction and information about each party's business.

The parties must also submit a filing fee based on the value of the voting securities and non-corporate interests and/or assets. The agencies then review the information and determine whether additional information is needed or whether they want to challenge the transaction or to permit the transaction to close. (16 CFR Parts 801, 802, and 803.)

Parties seeking approval of a joint venture within the meaning of 49 USC 41720, or a cooperative agreement, and/or antitrust immunity for a proposed alliance, must submit an application to the DOT. The DOT shall grant approval and/or a request for an exemption where:

- it is not in violation of the laws of 49 USC 413;
- it is not adverse to the public interest; and
- it does not substantially reduce or eliminate competition, unless it is necessary to meet a serious transportation need or to achieve important public benefits.

The DOT must give the Attorney General and the Secretary of State notice and an opportunity to comment, and a hearing if required. The DOT must make a final decision within six months of receipt if there is no hearing, or twelve months if there is a hearing.

4.6 Are there any sector-specific rules which govern the aviation sector in relation to financial support for air operators and airports, including (without limitation) state aid?

While the federal government does not provide direct financial support to air carriers, it is permitted to provide subsidies under certain circumstances. For example, the federal government subsidies air carriers under the Essential Air Service ("EAS") programme to ensure

that smaller communities continue to be served (see question 4.7). In addition, the DOT has the authority to exempt air carriers from certain economic regulations when the exemption is consistent with public interest and to provide air carriers with insurance. Further, the federal government provides financial support to airports (see question 4.13).

4.7 Are state subsidies available in respect of particular routes? What criteria apply to obtaining these subsidies?

Under the Airline Deregulation Act, the government is not permitted to enforce a law, regulation or other provision related to a price, route or service of an air carrier providing transportation. This allows U.S. air carriers to choose which domestic markets to serve and what fares to charge. To ensure that air carriers continue to serve less-profitable, smaller markets, the federal government has enacted the Essential Air Service ("EAS") programme. The EAS is currently run by the DOT, who determines the minimum level of service required for eligible communities and subsidies air carriers service to those communities under two-year contracts. Eligibility for these subsidies is outlined in 49 USC 41731-41732.

Additionally, the Small Community Air Service Development Program is a grant programme designed to help small communities address air service and airfare issues (49 USC 41743), and the Alternative Essential Air Program allows communities to take the EAS money and spend it in ways that better suit the particular needs of the community.

4.8 What are the main regulatory instruments governing the acquisition, retention and use of passenger data, and what rights do passengers have in respect of their data which is held by airlines?

The Intelligence Reform and Terrorism Prevention Act ("IRTPA") requires all airlines who operate flights to and from the U.S. to collect passenger name records ("PNR data") and transmit them to the CBP or TSA. To assist in complying with the IRTPA, the TSA developed the Secure Flight Program. (49 USC 114, 49 CFR Parts 1544, 1546 and 1560.)

PNR data includes a passenger's full name, date of birth and gender. Upon collection and comparison with watch lists, the TSA instructs the air carrier to proceed with the passenger as normal, perform enhanced screening, or deny transport. The records of individuals who are not potential or confirmed matches are destroyed within seven days of completion of travel. If the individual is a potential or confirmed match, the TSA will keep his or her record for at least seven years after the completion of travel.

Under the Privacy Act of 1974, passengers may request a copy of or make a correction to their own PNR data. In addition, air carriers typically have their own privacy policy and are subject to state privacy laws. Further, the EU-U.S. PNR Agreement identifies privacy rights for EU citizens.

The DOT protects the privacy of consumers under 49 USC 41712, which prohibits unfair or deceptive trade practices. The DOT has determined that a violation of the privacy of an airline passenger occurs where the airline or ticket agent: (1) violates the terms of applicable privacy policies; (2) gathers or discloses private information in a way that violates public policy, is immoral, or causes substantial consumer injury; (3) violates a rule issued by the DOT identifying specific privacy practices to be unfair or deceptive; or (4) violates the Children's Online Privacy Protection Act or FTC rules implementing the same.

4.9 In the event of a data loss by a carrier, what obligations are there on the airline which has lost the data and are there any applicable sanctions?

While the DOT permits individuals to file a privacy-related complaint under 49 USC 41712, there are no federal laws regarding the loss of private consumer data within the aviation industry. Air carriers that lose private consumer data are subject to their own privacy policies and state privacy laws. State privacy laws often require, among other things, reasonable security procedures, data disposal procedures, and notification of security breach. States typically allow for private rights of action by individuals, and enforcement actions by state Attorneys General, for civil penalties, damages, and/or injunctive relief, in the event of a data loss or breach. Notably, Congress recently passed the Cybersecurity Act, which permits companies to share limited information on cyberattacks.

EU citizens may be able to seek recourse through the EU-U.S. PNR Agreement.

4.10 What are the mechanisms available for the protection of intellectual property (e.g. trademarks) and other assets and data of a proprietary nature?

To protect intellectual property and other assets and data of a proprietary nature, an air carrier may file a patent or register a trademark (or service mark) with the United States Patent and Trademark Office, or register a copyright with the United States Copyright office.

4.11 Is there any legislation governing the denial of boarding rights?

14 CFR Part 250 governs the denial of boarding rights in the event of an oversold flight. If a flight is oversold, the air carrier must first request volunteers to give up their seats, in exchange for compensation from the carrier in an amount of the carrier's choosing. The carrier must inform volunteers if their ticket is one that may be denied boarding, and of the amount the carrier is obligated to pay should they be denied boarding involuntarily. Additionally, the carrier must inform volunteers of any material restrictions affecting the compensation. If there are not enough volunteers, the carrier may then deny boarding in accordance with its boarding priority rules. Boarding priority factors include, but are not limited to, when the passenger checked-in, the fare the passenger paid, the passenger's frequent-flyer status, whether the passenger has a seat assignment, and a passenger's disability.

The carrier must notify the DOT of all passengers involuntarily denied boarding. The DOT may enforce civil penalties against air carriers who improperly deny passengers boarding. (49 USC Chapters 461 and 463.)

4.12 What powers do the relevant authorities have in relation to the late arrival and departure of flights?

The rights of passengers with respect to late arrivals and departure flights is established by 14 CFR 259. Air carriers must establish a Customer Service Plan, which includes notifying passengers of known delays, cancellations, and diversions. Air carriers also must have contingency plan for lengthy tarmac delays and may not remain on the tarmac without disembarking passengers for more than three hours for domestic flights and four hours for international flights, with the exception of certain safety concerns and air traffic control

requests. An air carrier that fails to comply with the aforementioned rules may be subject to monetary penalties levied by the DOT. (49 USC 46301.)

In addition, continuously making unrealistic flight schedules resulting in chronically delayed flights is considered a deceptive business practice and could result in civil penalties under 49 USC 41712.

4.13 Are the airport authorities governed by particular legislation? If so, what obligations, broadly speaking, are imposed on the airport authorities?

Airport operators are primarily governed by the FAA. (14 CFR 139 and 49 USC 44706.) 14 CFR 139 requires airport operators to obtain an airport operating certificate if the airport serves scheduled passenger aircraft with more than nine passenger seats and unscheduled passenger aircraft with more than thirty passenger seats. The airport operator also must maintain an Airport Certification Manual, which ensures that safety and maintenance requirements are met.

Additionally, a majority of commercial airports in the U.S. seek development grants from the federal government. By accepting federal funding, airport operators agree to obligations of the applicable airport development programme, including the Airport Improvement Program (49 USC 47101-47142) and the Surplus Property Act of 1944 (49 USC 47151-47153).

Operators also must comply with security requirements imposed by the TSA and CBP, as well as certain state or other local municipal regulations.

4.14 To what extent does general consumer protection legislation apply to the relationship between the airport operator and the passenger?

As discussed in question 4.13, a majority of commercial airports in the U.S. seek grants from the federal government. In order to obtain approval for a grant, the airport operator must assure the DOT that the airport will be available for public use on reasonable conditions and without unjust discrimination. Airports also must provide accessibility to passengers with disabilities pursuant to the Americans with Disabilities Act of 1990.

By preserving competition among the air carriers in this fashion, the airport operators are protecting consumer rights. (49 USC 47107.)

4.15 What global distribution suppliers (GDSs) operate in your jurisdiction?

Amadeus, Sabre and Travelport operate in the U.S.

4.16 Are there any ownership requirements pertaining to GDSs operating in your jurisdiction?

No. There are no ownership requirements pertaining to GDSs operating in the U.S.

4.17 Is vertical integration permitted between air operators and airports (and, if so, under what conditions)?

A certain level of vertical integration is permitted. Air operators do not own equity in airports, but air operators and airports enter into long-term use and lease agreement, whereby the air operator agrees to financial obligations, terms of use, and other regulatory responsibilities in return for use of gates, ticket counters, and terminals, decision-making rights and control, and sometimes the creation of a "hub airport".

These agreements have raised competition concerns with the FAA, causing it to closely monitor the transactions and require airports with dominant air operators to submit an outline for how the airport will promote airport access, entry and competition.

5 In Future

5.1 In your opinion, which pending legislative or regulatory changes (if any) or potential developments affecting the aviation industry more generally in your jurisdiction are likely to feature or be worthy of attention in the next two years or so?

The FAA and the federal government have been working to create 14 CFR 107, the first set of operational rules for routine commercial use of Unmanned Aircraft Systems ("UAS") in the U.S. airspace system.

Prior to 14 CFR 107, the FAA permitted non-recreational use of UAS through limited mechanisms, including exemptions, special airworthiness certificates, and certificates of waiver or authorisation. For example, under Section 333 of the FAA Modernization and Reform Act of 2012 (Public Law No. 112/95), exemptions could be obtained to operate UAS for non-recreational purposes where the operation posed the least amount of public risk and no threat to national security.

In August 2016, 14 CFR 107 took effect. While the ability to operate UAS for non-recreational purposes is now more accessible, operation is nevertheless subject to certain requirements, including, but not limited to, the following: (1) the UAS must weigh less than 55 lbs.; (2) the UAS must adhere to confined areas of operation and visual line-of-sight operations; (3) the operator of the UAS must hold a "remote pilot" airman certificate; (4) the UAS must fly under 400 feet, during the day, at or below 100 mph, and not fly over people or from a moving vehicle; (5) the UAS must yield to manned aircraft; and (6) the operator of the UAS must report any accidents resulting in serious injury or damage to property within 10 days.

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