



ICLG

The International Comparative Legal Guide to:

Aviation Law 2017

5th Edition

A practical cross-border insight into aviation law

Published by Global Legal Group, with contributions from:

Advokatfirman Eriksson & Partners AB
Alexander Holburn Beaudin + Lang LLP
ARNECKE SIBETH
Arnold & Porter Kaye Scholer LLP
Azmi & Associates
Cervantes Sainz, S.C.
Christodoulou & Mavrikis Inc.
Clyde & Co
Condon & Forsyth LLP
DDSA – De Luca, Derenusson,
Schuttoff e Azevedo Advogados
Dingli & Dingli Law Firm
GDP Advogados
GRATA International

Kubes Passeyrer Attorneys at Law
Locke Lord (UK) LLP
Maples and Calder
McAfee & Taft, A P.C.
MMMLegal Legal Counsels
Mori Hamada & Matsumoto
ONV LAW
PRIMUS attorneys at law
Salazar & Asociados
Sayenko Kharenko
Studio Pierallini
Ventura Garcés & López-Ibor Abogados
VISCHER AG





global legal group

Contributing Editors

Alan D. Meneghetti, Locke Lord (UK) LLP and Philip Perrotta, Arnold & Porter Kaye Scholer LLP

Sales Director

Florjan Osmani

Account Directors

Oliver Smith, Rory Smith

Sales Support Manager

Paul Mochalski

Sub Editor

Nicholas Catlin

Senior Editor

Rachel Williams

Chief Operating Officer

Dror Levy

Group Consulting Editor

Alan Falach

Group Publisher

Richard Firth

Published by

Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design

F&F Studio Design

GLG Cover Image Source

iStockphoto

Printed by

Ashford Colour Press Ltd
February 2017

Copyright © 2017

Global Legal Group Ltd.

All rights reserved

No photocopying

ISBN 978-1-911367-35-2

ISSN 2050-9839

Strategic Partners



General Chapters:

1	The Use of Personal Data in the Commercial Aviation Industry – Alan D. Meneghetti, Locke Lord (UK) LLP	1
2	The Aviation Industry – Constant Change Leading to Tales of the Unexpected – Philip Perrotta, Arnold & Porter Kaye Scholer LLP	5
3	Digital Signatures, Subordinations and Drones – Erin M. Van Laanen & Brian A. Burget, McAfee & Taft, A.P.C.	10
4	The Need to Extend WALA’s Presence in the Airport Industry – Alan D. Meneghetti & Michael Siebold, Worldwide Airports Lawyers Association (WALA)	15

Country Question and Answer Chapters:

5	Austria	Kubes Passeyrer Attorneys at Law: Dr. David Kubes & Mag. Marko Marjanovic	17
6	Bolivia	Salazar & Asociados: Sergio Salazar-Machicado & Ignacio Salazar-Machicado	23
7	Brazil	DDSA – De Luca, Derenusson, Schuttoff e Azevedo Advogados: Ana Luisa Castro Cunha Derenusson	30
8	Canada	Alexander Holburn Beaudin + Lang LLP: Michael Dery & Darryl G. Pankratz	37
9	France	Clyde & Co: Maylis Casati-Ollier & Benjamin Potier	45
10	Germany	ARNECKE SIBETH: Holger Buerskens & Ulrich Steppeler	53
11	Ireland	Maples and Calder: Donna Ager & Mary Dunne	62
12	Italy	Studio Pierallini: Laura Pierallini & Francesco Grasseti	71
13	Japan	Mori Hamada & Matsumoto: Hiromi Hayashi	80
14	Kazakhstan	GRATA International: Marina Kahiani & Kamila Suleimenova	89
15	Lithuania	PRIMUS attorneys at law: Paulius Docka	104
16	Malaysia	Azmi & Associates: Norhisham Abd Bahrain & Rosinah Mohd Salleh	110
17	Malta	Dingli & Dingli Law Firm: Dr. Tonio Grech	117
18	Mexico	Cervantes Sainz, S.C.: Luis A. Cervantes Muñoz & Alejandro Zendejas Vásquez	123
19	Poland	MMMLegal Legal Counsels: Krystyna Marut & Anna Burchacińska-Mańko	129
20	Portugal	GDP Advogados: Francisco de Sousa Alves Dias	137
21	Romania	ONV LAW: Mihai Furtună & Ioana Anghel	142
22	South Africa	Christodoulou & Mavrikis Inc.: Chris Christodoulou & Antonia Harrison	150
23	Spain	Ventura Garcés & López-Ibor Abogados: Alfonso López-Ibor Aliño & Pablo Stöger Pérez	165
24	Sweden	Advokatfirman Eriksson & Partners AB: Stephan Eriksson & Martin Thysell	174
25	Switzerland	VISCHER AG: Urs Haegi & Dr. Thomas Weibel	180
26	Ukraine	Sayenko Kharenko: Andrei Liakhov & Vasyl Liutyi	187
27	United Kingdom	Locke Lord (UK) LLP: Alan D. Meneghetti & Arnold & Porter Kaye Scholer LLP: Philip Perrotta	195
28	USA	Condon & Forsyth LLP: Bartholomew J. Banino & Nicole M. Smith	207

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

USA

Bartholomew J. Banino



Nicole M. Smith



Condon & Forsyth LLP

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 subsidises 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.



Bartholomew J. Banino

Condon & Forsyth LLP
7 Times Square
New York, NY 10036
USA

Tel: +1 212 894 6818
Fax: +1 212 370 4453
Email: bbanino@condonlaw.com
URL: www.condonlaw.com

Bart Banino is a partner in Condon & Forsyth's New York office. He represents air carriers and other clients in cases involving mass air disasters, wrongful death, personal injury, cargo damage and loss, aircraft ground accidents, breach of contract, regulatory enforcement and employment issues. He has assisted air carriers in mass disaster and crisis management planning and also advised carriers and other clients on various commercial matters including contracts and leases. He is an author of numerous articles on aviation law and is a frequent lecturer on aviation issues.



Nicole M. Smith

Condon & Forsyth LLP
7 Times Square
New York, NY 10036
USA

Tel: +1 212 894 6773
Fax: +1 212 370 4453
Email: nsmith@condonlaw.com
URL: www.condonlaw.com

Nicole Smith is an associate in Condon & Forsyth's New York office. Her practice encompasses all aspects of aviation litigation and commercial matters. She has handled a variety of issues for the firm's aviation clients including personal injury, cargo damage and loss, commercial disputes, breach of contract actions, bankruptcy issues and regulatory matters.



Founded in 1935, Condon & Forsyth LLP is internationally recognised for its expertise in aviation, complex tort, product liability, insurance and commercial litigation.

With more than 40 attorneys in our New York and Los Angeles offices, we are the oldest and largest specialist aviation law firm in the United States with a varied practice that includes mass tort, insurance, class actions, and commercial and regulatory matters. Our partners are some of the world's leading experts in the field of aviation law and many have been honourably recognised in international publications such as *Chambers USA*, *The Legal 500* and *The International Who's Who of Business Lawyers*.

We represent clients from all over the world on matters arising both within the United States and abroad. We have successfully handled virtually every conceivable legal issue for aviation clients and their insurers and have established many of the landmark legal precedents in aviation law.

Other titles in the ICLG series include:

- Alternative Investment Funds
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms



59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk