GETTING THE DEAL THROUGH

Air Transport

in 40 jurisdictions worldwide

2011

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Published by
Getting The Deal Through
in association with:

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General

1 Which bodies regulate aviation in your country, under what basic laws?

Aviation in the US is regulated primarily by the US Department of Transportation (DoT) and the Federal Aviation Administration (FAA) pursuant to title 14 of the Code of Federal Regulations (FARs), 49 USC (Transportation Code), and the corresponding regulations.

Regulation of aviation operations

2 How is air transport regulated in terms of safety?

The FAA regulates safety of commercial and private air transport. Screening passengers and ensuring onboard security is the responsibility of the Department of Homeland Security's Transportation Security Administration. The National Transportation Safety Board (NTSB) conducts non-criminal aircraft accident investigations.

3 What safety regulation is provided for air operations that do not constitute public or commercial transport, and how is the distinction made?

The FARs, at 14 CFR section 1.1, define a commercial operator as:

> *A person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property [....W]here it is doubtful that an operator is for 'compensation or hire', the test applied is whether the carriage by air is merely incidental to the person's other business or is, in itself a major enterprise for profit.*

An air carrier means 'a person who undertakes directly by lease, or other arrangement, to engage in air transportation'. The operations of air carriers and commercial operators are regulated by FAR parts 119, 121 and 135. All other private operations are regulated under FAR part 91. Large private operations are also regulated under FAR part 125.

4 Is access to the market for the provision of air transport services regulated, and if so how?

Yes. Applicants seeking air carrier operating authority must acquire a certificate of public convenience and necessity, granted from the DoT under chapter 411 of the Transportation Code and part 201 of the FARs. For certain smaller operations, an exemption application may be filed pursuant to FAR part 298. Application for a certificate of public convenience and necessity must be made in writing and verified, and the carrier must demonstrate that it is 'fit, willing and able' to provide the proposed operations and comply with the rules and regulations. The applicant must have the managerial skills and technical ability to provide the service; it must have access to financial resources to begin operations without posing undue risk to consumers; it must also show a willingness and ability to comply with applicable regulations. If the applicant certifies fitness, and the DoT learns of any special issues, the application is handled with a 'show cause order'. The certificate specifies the terminal and intermediate points between which the air carrier is authorised to engage in transportation. The operating authority is not effective until the applicant has been certified by the FAA to conduct operations under the relevant category and it has obtained adequate liability insurance. See Paul Dempsey and Laurence Gesell, *Air Commerce and the Law* (2004), 226-231 (Air Commerce).

If seeking an exemption, the applicant may file an application pursuant to part 298 of the FARs, which establishes a class of air carriers known as 'air taxi operators', and provides certain exemptions to the economic regulations of the Transportation Code. An air taxi operator does not generally use large aircraft, does not hold a certificate of public convenience and necessity, has liability insurance, and has registered with the DoT as an air taxi operator.

5 What requirements apply in the areas of financial fitness and nationality of ownership regarding control of air carriers?

Financial fitness

To acquire a certificate of public convenience and necessity, an applicant must demonstrate financial fitness. The DoT has not identified specific financial fitness criteria. For a new applicant, however, the DoT imposes a 90-day 'zero revenue test'. This test requires proof of available funding to cover pre-operating costs plus a working capital reserve adequate to fund projected expenses for three months of flight operations without revenue. See, for example, Application of Sunbird Airways Inc, DoT Order 94-6-30 (1994). Filing for bankruptcy is grounds for enhanced scrutiny by the DoT.

Nationality of ownership and control

The DoT requires that an applicant for a certificate of public convenience and necessity be a citizen of the United States. The president and two-thirds of the board of directors and other managing officers of the corporation must be US citizens and 75 per cent of the voting interest in the corporation must be owned or controlled by US citizens (see FAR 204.2(c)(3)). The DoT has interpreted this requirement to mean that US citizens must also be in actual control of the carrier and must have control of at least 51 per cent of non-voting equity and 75 per cent of voting equity. See, for example, DHL Airways Inc, Docket No. OST-2002-13089-549 Recommended Decision of ALJ, pp35-38; Air Commerce at 232. Foreign entities may control up to 25 per cent of the stock and no more than 49 per cent of the combined stock and debt. Furthermore, the air transport agreement executed by the United States and the European Union in 2007 provides that an EU national's ownership of more than 50 per cent of a US carrier will not be deemed itself to constitute actual control of the US carrier and each situation is to be considered case by case.

6 What procedures are there to obtain licences or other rights to operate particular routes?

Subpart E of part 121 of the FARs prescribes rules for obtaining approval for routes by certificate holders conducting domestic or flag operations. The certificate holder must show it can conduct satisfactorily scheduled operations between each regular, provisional and refuelling airport over that route and that the services and facilities are available and adequate.

International routes are governed by the relevant bilateral or multilateral aviation treaties. In line with these treaties, the DoT issues international routes in competitive proceedings, and the president approves them in light of foreign policy and national defence considerations (*Air Commerce* at 233). Some of the factors the DoT considers in making this determination are market structure, route integration, fare and service proposals, incumbency, and the rapidity with which the applicant could enter the market.

There are requirements that affect, and limitations on, the number of flights airlines may operate out of certain high-density airports (see question 21).

7 What procedures are there for hearing or deciding contested applications for licences or other rights to operate particular routes?

Part 302 of the FARs establishes procedures for the conduct of all aviation economic proceedings before the DoT. This includes, among other things, US air carrier certificate procedures, foreign air carrier permit licensing and certificate cases involving international rates. Administrative law judges recommend or make initial decisions that are subject to approval by the relevant DoT decision maker, which is generally the assistant secretary for aviation and international affairs. The secretary of transportation may exercise the authority of the assistant secretary if the secretary believes a decision involves an important question of national transportation policy (see FAR part 302.18(c)).

8 Is there a declared policy on airline access or competition, and if so what is it?

Like other US industries, the airline industry is subject to US federal antitrust law, which is intended to preserve competition and open markets. Thus, as a general matter, the strong US policy of protecting and maintaining open, competitive markets applies to aviation.

In addition to the application of basic antitrust principles, the DoT has authority over airlines operating in the US. It is also authorised to apply antitrust-type policies and principles in its regulatory role to ensure that airlines operate in the public interest.

9 What requirements must a foreign air carrier satisfy in order to operate to or from your country?

The DoT must grant economic authority to a foreign air carrier navigating foreign aircraft in order to operate flights in the United States. Under section 41301 of the Transportation Code, the DoT may award a foreign air carrier permit. Alternatively, the DoT may grant an exemption from this permit requirement pursuant to section 40109 of the Transportation Code.

Part 211.20 of the FARs establishes the specific details an applicant must provide to obtain a foreign air carrier permit or exemption. The applicant must fully comply with the requirements of this regulation, and the DoT may require an applicant to provide additional information as necessary. The air transportation proposed must either be covered by an air transport agreement between the United States and the applicant's home country or available in the home country on the basis of reciprocity or comity. Once an application is filed, the applicant must serve a copy of the completed application to US carriers that serve the applicant's home country. The DoT further publishes public notice of all applications so that any interested party may comment. Although opposition to an application will not be cause for the DoT to deny the application, the DoT will consider such opposition in rendering its decision.

An applicant will obtain a foreign air carrier permit or exemption if granting such will serve the public interest. The DoT sets forth a number of factors it evaluates in determining whether the value of an applicant's service to, and within, the US serves the public interest. These include whether there is an effective aviation security agreement in place between the US and the home country and whether the FAA has identified any safety problems with the carrier.

Pursuant to part 129, a foreign air carrier, in addition to receiving its exemption or permit from the DoT, must also obtain FAA operations specifications. Applications must be submitted to the applicable FAA Flight Standards District Office (FSDO), the location of which is based on the principal place of business of the applicant. Part 129 of the FARs also requires that the foreign air carriers operate in accordance with the minimum international standards of the Convention on International Civil Aviation Organization, such as: airworthiness and registration certificates; maintenance programme; flight crewmember certificates; aircraft communication and navigation equipment; collision avoidance system; air traffic rules and procedures; and aircraft and flight deck security.

Additional rules in part 212 of the FAR may apply to charter flights originating in the US that are conducted by a foreign air carrier. Prior authorisation is required for such charter flights, but the DoT may issue a blanket authorisation or grant a waiver of such requirement if the waiver is in the public interest (see FAR part 212.9 and part 212.12).

10 Are there specific rules in place to ensure aviation services are offered to remote destinations when vital for the local economy?

Yes. Subchapter 2 of chapter 417 of the Transportation Code provides for subsidised basic essential air service to underserved rural markets. This service ensures transport to a hub airport with convenient connecting flights to a number of destinations. The minimum requirements for basic essential air service include two daily round trips, six days a week; flights at reasonable times considering the needs of the passengers with connecting flights; and prices that are not excessive compared to the prices of other air carriers serving similar places. With certain exceptions, service must be provided in an aircraft with an effective capacity of at least 15 passengers, and at least two engines and two pilots. The requirements for essential air service in Alaska are less stringent. See also, FAR part 271.

11 Are charter services specially regulated?

Yes. In addition to acquiring a certificate of public necessity and convenience from the DoT or an exemption under FAR part 298, a charter service provider must comply with the operating rules for charter services under FAR part 135. It contains some rules in addition to FAR part 91, which governs the operation of all aircraft.

Section 41104 of the Transportation Code imposes additional restrictions on charter services. The secretary of transportation may restrict the marketability, flexibility, accessibility or variety of charter air transportation (where a certificate of public convenience and necessity has been issued), but only to the extent required by the public interest. An air carrier may not provide, in an aircraft designed for more than nine passenger seats, regularly scheduled charter air transportation, unless such transportation is to and from an airport with an operating certificate issued under part 139 of the FARs. This restriction does not apply where the departure time, departure location, and arrival location are negotiated with the customer or the customer's representative. This restriction does not apply in Alaska.

12 Are airfares regulated, and if so, how?

Domestic airfares are not regulated. International fares are regulated pursuant to chapter 415 of the Transportation Code and international rate proceedings are conducted in accordance with FAR part 302, subpart E. Rates must be reasonable and not unreasonably discriminatory and every air carrier and foreign air carrier must file tariffs with the secretary of transportation showing the prices for foreign air transportation. The secretary of transportation may not decide a fare is unreasonable on the basis that the fare is too low or too high if the proposed fare is neither 5 per cent higher nor 50 per cent lower than the 'standard foreign fare level' established by the secretary of transportation (49 USC sections 41501, 41504, 41509). Tariffs must be filed and maintained pursuant to FAR part 221.

Aircraft

13 Who is entitled to be mentioned in the aircraft register? Do requirements or limitations apply to the ownership of an aircraft listed on your country's register?

The registration of aircraft is the responsibility of the FAA. Under the Transportation Code and the FARs, an aircraft is eligible for registration only if its owner is a US citizen and the aircraft is not registered under the laws of a foreign country. The citizenship requirement applies to individuals and partnerships, provided each member thereof is a citizen. It also applies to corporations, provided that the president, at least two-thirds of the board of directors and other managing officers, and owners of at least 75 per cent of the voting stock, are citizens (see FAR part 47.2).

An aircraft may be registered only in the owner's name; the term 'owner' includes a buyer or a lessee under a conditional sale contract. Under part 47.9 of the FARs, the owner does not need to meet the US citizenship requirement if the owner is organised and doing business under the laws of the US or any of its states; the aircraft is based and primarily used in the US (which the FAA has interpreted to mean that 60 per cent of flight hours are accumulated during non-stop flights between two points in the US in each six-month period); and the owner or lessee certifies as to the use and submits semi-annual reports to the FAA as to actual flight hours.

Under part 47.8 of the FARs, a shareholder voting trust may also be used to qualify a domestic corporation that is owned by foreign shareholders as a US citizen for the purpose of registration of an aircraft. The applicant must submit to the FAA registry a copy of the voting trust agreement, which identifies each voting interest of the applicant and is binding on each voting trustee, the applicant corporation, all foreign stockholders and each party to the transaction. The applicant must submit affidavits from each voting trustee, wherein they represent that they are a US citizen and that there is no reason why any other party to the agreement might influence their independent judgement. The voting trust agreement must provide for the succession of a voting trustee, and if the voting trust is modified such that US citizens hold less than 75 per cent control of the voting interests, the holder loses citizenship.

Pursuant to FAR part 47.7 an owner's trust over the aircraft may also be used to satisfy the US citizenship registration requirements. In this case, the foreign beneficial owner of the aircraft places the aircraft in a trust with a US citizen owner trustee. The trustee must also submit an affidavit to the FAA stating that it is not aware of any reason or relationship as a result of which the non-US citizen beneficiary would have more than 25 per cent aggregate power to influence or limit the trustee's authority. The trust itself must contain similar provisions.

Finally, FAR part 47 was amended in October 2010 so that, over a three-year period, the registration of all aircraft registered prior to 1 October 2010 will terminate, and such aircraft will be required to renew their registration to maintain US civil aircraft status. Furthermore, for all aircraft registered on or after 1 October 2010 the registration will have a recurrent three year expiration.

14 Is there a register of aircraft mortgages or charges, and if so how does it function?

Yes. Section 44107 of the Transportation Code provides for a system for recording conveyances, bills of sale, mortgages, contracts, and other instruments affecting interest in or title to an aircraft. Part 49 of the FARs covers the recording of title and security documents. There is no US citizenship requirement or other limit as to who may be a mortgagee. To be recorded, the instrument must identify all aircraft by make, model, serial number and US registration number. The fee for recording any conveyance or instrument is US$5. No fee is required for recording a bill of sale that accompanies an application for aircraft registration and the proper fee under part 47 of the FARs.

Recorded documents may be amended, and any amendment must be signed by both parties to the original instrument and filed with the registry. Each mortgage or other conveyance filed with the registry is valid and perfected from the time of filing as to all persons with whatever priority is given by state law.

The US has also ratified the Convention on International Interests in Mobile Equipment, which permits liens, contracts for sale, and international interests in aircraft objects to be perfected by notation on an electronic international registry. The Convention creates an international interest that is recognised in all contracting states and provides creditors with a range of default remedies.

The Convention applies to transactions involving aircraft objects concluded after 1 March 2006, and, at the time of the transaction's closing, either the aircraft is registered in the United States or the debtor is situated in the United States. Aircraft objects include fixed-wing aircraft certificated to transport at least eight persons or more than 6,050lbs of goods and airframes for helicopters certificated to carry at least five persons or goods in excess of 990lbs. All aircraft engines producing at least 550 horsepower, whether jet or propeller driven, must also be recorded.

Subpart F of part 49 of the FARs provides the requirements to be eligible for authorisation to transmit information to the international registry. Persons wishing to file their interest on the international registry must first obtain an access number, which is done by filing Form 8050-135 with the FAA along with any documents representing the transaction that meet the requirements of subpart C of part 49. These documents include an aircraft bill of sale, contract of conditional sale, a mortgage, an assignment of a mortgage, or other instruments affecting title to, or an interest in, aircraft. Once an access number has been authorised, parties may list their interest in an aircraft on the electronic international registry without filing any documents thereto (ie, bill of sale or aircraft registration).

15 What rights are there to detain aircraft, in respect of unpaid airport or air navigation charges, or other unpaid debts?

Air navigation authorities in the US generally have no specific rights to detain aircraft for unpaid navigation charges. To the extent that an air carrier has unpaid debts to any party and the air carrier is not otherwise under bankruptcy court protection, creditors that obtain a judgment against an aircraft operator have the same rights as any other judgment creditors under applicable state or federal law. Aircraft creditors that are consensual lien holders of aircraft also generally have the ability to foreclose upon their liens upon the occurrence of an event of default and seize the aircraft, again subject to applicable state laws and federal bankruptcy laws. Furthermore, under section 46304 of the Transportation Code, an aircraft may be subject to a lien if involved in a violation for which a civil penalty is applicable. The violations include failure to comply with a number of parts of the Transportation Code, including the proper procedure for certification. Any aircraft subject to a lien may be seized and placed in the custody of the FAA or DoT until the amount is paid or another solution has been arranged.

16 Do specific rules regulate the maintenance of aircraft?

Yes. Part 43 of the FARs prescribes the rules governing the maintenance, preventative maintenance, rebuilding and alteration of aircraft and stipulates that any aircraft repair requires the services of a certified mechanic or repairman, as provided in FAR part 65. The holder of an air carrier operating certificate or an operating certificate issued under part 121 or part 135 may perform maintenance, preventive maintenance and alternatives as provided in parts 121 or 135 (see FAR part 43.3).

Airports

17 Who owns the airports?

Airports in the US are privately and publicly owned, although the vast majority of airports that significantly contribute to air traffic are publicly owned and operated. Most of the privately owned airstrips and airfields are closed to public air traffic. Generally, a county, municipality or sub-governmental entity ('authority' or 'special district') owns or licenses the public airport. A few state-owned airports present exceptions to this rule.

18 What system is there for the licensing of airports?

Airports must be certified by the FAA, which in turn has promulgated rules in FAR part 139 setting forth the procedures required to receive an operating licence. Although the procedures depend on the size and type of the airport up for certification, all potential airport administrators must submit a written application and an airport certification manual or airport certification specifications to the FAA. The manual contains a description of operating procedures, facilities and equipment, responsibility assignments, along with other specific details depending again on the size and type of the proposed airport. Additionally, the airport must submit to a blanket inspection provision.

Even after satisfying federal requirements, airports may still be subject to state or other local municipal regulation providing for, among other things, site approval.

19 Is there a system of economic regulation of airports, and, if so, how does it function?

Federal oversight of airport administration is animated by the concern that airports might use airport revenue for non-airport purposes. To that end, several federal laws have been enacted providing economic regulation for airports.

The Anti-Head Tax Act of 1973, found in section 40116(e)(2) of the Transportation Code, permits state and local governments to collect 'reasonable' rental charges, landing fees and other service charges from aircraft operators for using facilities owned or operated by that state. Building on this provision, the Airport and Airway Improvement Act of 1982 (49 USC section 4710(a)(12)-(13)) implemented a fee and rental structure that makes the airport as self-sustaining as possible, insisting that charges be reasonable and used only for airport purposes. Also, in order to receive federal funding, airports are required to promise that they 'will be available for public use on reasonable conditions and without unjust discrimination' (49 USC section 47107(a)(1)).

The US Supreme Court answered the question as to what constitutes a 'reasonable' airport charge in 1994. Such a charge is reasonable when:

> *'(1) it is based on some fair approximation of the use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against inter-state commerce.'*

This test permits broad discretion on the part of airports as to how to collect fees and set rates. See *Northwest Airlines v. County of Kent*, 510 US 355, 369 (1994); see also *Air Commerce* at 474-75.

The Federal Aviation and Administration Authorisation Act of 1994 (FAAA) requires that airport charges, fees or taxes must be used for airport or aeronautical purposes only, again predicating federal funding on an affirmative recital by the airport similar to that required by the Airport and Airway Improvement Act.

The FAAA contains a provision that authorises the secretary of transportation to determine whether airport fees are reasonable, though this power does not extend to the setting of fee levels. Either an airline or an airport may trigger this provision by filing a complaint or making a request for review. Once the FAAA has been triggered, an administrative law judge makes a finding that, absent a contrary statement by the secretary of transportation within a set period of time, becomes the final decision of the DoT on the matter.

In 1995, the DoT issued a policy capping airport charges by requiring them not to charge any more than was required to break even. Under this policy, the department ordered refunds of certain airport fees determined to be excessive.

The FAA also imposed restrictions on any airport accepting funding coming from federal taxes on tickets. Such an airport must spend its revenues exclusively on capital or operating costs, the local airport system, or facilities owned or operated by the airport directly and substantially related to the air transportation of people and property.

Additionally, the FAA regulates airport access projects, requiring that such projects preserve or enhance the capacity, safety or security of the national air transportation system, reduce noise, or provide an opportunity for enhanced competition between carriers. Access projects must be for the exclusive use of airport patrons and employees, be built on airport-owned land or rights of way and be connected to the nearest public access of sufficient capacity.

Finally, airport sponsors may charge fees to recoup operation costs.

20 Are there laws or rules restricting or qualifying access to airports?

Two types of regulations restrict or qualify access to airports, though the recent trend has been towards their elimination.

First, runway time is divided into specific periods called slots, whereby air carriers reserve time on airport runways to accommodate their flights. Slots are the traditional means by which the government has restricted or qualified access to the airport, originally to reduce air traffic congestion and delay.

Second, the government has utilised 'perimeter rules' to restrict access to certain airports. For example, under the Washington Metropolitan Airports Act of 1986, Congress restricted all air traffic taking off from or landing at Ronald Reagan Washington National Airport to flights taking off from or landing at an airport within a 1,250 mile radius.

Many of these restrictions were relaxed by the Aviation Investment and Reform Act for the 21st Century, passed in 2000 under the Clinton Administration. That act eliminates a number of the previously imposed slot rules and permits discretionary exceptions to specific perimeter rules.

21 How are slots allocated at congested airports?

The first way slots at certain congested airports are allocated is under the High Density Slot Rule. Originally introduced in 1968, this rule identified a number of high-density airports and imposed specific slot restrictions. Administrative oversight is delegated to scheduling committees which often feature representatives from incumbent airlines, though the FAA does have the power to intervene if necessary. The number of slots under this scheme varies from airport to airport and slots are allocated among specific classes of users. Additionally, slots must be used 80 per cent of the time over a two-month period or they will lapse, though certain exceptions are sometimes granted in the case of bankruptcy.

The second way slots are allocated is under the Buy-Sell Slot Rule. This rule permits airlines holding slots in identified high density airports to sell them at market-dictated rates. The use provision found in the High Density Slot Rule also applies to this rule. Any lapsed or newly available slots may be distributed by the FAA via lottery. Additionally, the FAA may revoke or seize traded slots. The rule treats international and general aviation slots separately. Non-carriers are permitted to hold slots, making them available to be used as collateral on loans for financing purposes. Finally, slot owners may lease their slots to avoid the lapse provision. See 14 CFR sections 93.121-33; 93.211-27.

22 Are there any laws or rules specifically relating to ground handling?

Ground handling is typically carried out by fixed base operators (FBOs). They may be privately owned or operated by a department of the municipality the airport serves. The FBOs service the military and commercial airlines, and are tenants within the publicly held airports. Because the government landlord is partially insulated from liability arising from its actions, FBOs are afforded limited opportunities to negotiate what they might consider ideal rental terms and conditions.

Often, only one FBO services a particular airport. This gives rise to a potential special relationship between the airport sponsor and the FBO, which has raised the concern of possible competition stifling preferential treatment. On the other hand, if the FBO falls out of the sponsor's good graces, the FBO might be the target of discriminatory treatment.

While a provision of the Transportation Code, 49 USC section 47107(a)(4), expressly prohibits exclusive partnerships, the FAA unofficially supports a protectionist policy for FBOs and other airport operators (*Air Commerce* at 464). The tension between fostering an environment of open competition while desiring to protect certain businesses has made this area exceptionally litigious. Accordingly, Congress granted airports limited immunity from resulting antitrust lawsuits, only permitting awards of injunctive relief (15 USC sections 34 to 36).

In 2007, the TSA launched the Secure Fixed Base Operator Program (SFBOP) in partnership with the private sector. The SFBOP initiative will provide additional security for US bound flights.

23 Who provides air traffic control services? And how are they regulated?

Air traffic control services are primarily administered through the FAA. The FAA directly employs nearly all air traffic controllers and any new controllers must enrol in an FAA-approved training programme after passing a pre-employment exam. The agency also put into place a number of policies setting forth the specific procedures to be followed.

Liability and accidents

24 Are there any special rules in respect of death of, or injury to, passengers or loss or damage to baggage or cargo in respect of domestic carriage?

Under tort law, common carriers or other tortfeasors may be found liable for death or injury to passengers and property. A common carrier is defined as one who engages in the transportation of persons or things from place to place for hire, and which holds itself out to the public as serving it indiscriminately. Courts have held that common carriers have a duty of care to their passengers that is higher than reasonable care, and to demonstrate negligence, the plaintiff must show duty, breach, causation and damages.

If the negligence of any employee of the federal government acting within the scope of his employment is alleged to have caused injury or death, the Federal Tort Claims Act provides a judicial remedy against the US for damage claims.

Under part 254 of the FARs, airlines must pay for lost or damaged luggage, and may not limit their liability to less than US$3,300 per passenger. The DoT reviews the minimum limit on liability every two years.

Section 44112 of the Transportation Code should provide aircraft financiers with immunity from liability for aircraft accidents, provided that such financing party was not involved in the direct operations of the aircraft. However, the immunity granted in section 44112 has recently been denied by some state courts and the state and federal courts are now split on the scope of the immunity provided by section 44112.

25 Are there any special rules about the liability of aircraft operators for surface damage?

In May 2009 two new conventions in regard to surface loss and damage were adopted at an International Civil Aviation Organization (ICAO) conference, the Convention on Compensation for Damages to Third Parties resulting from Acts of Unlawful Interference Involving Aircraft and the Convention on Compensation for Damages Caused by Aircraft to Third Parties, which seeks to modernise and superseded the Rome Convention of 1952. Each convention is based on strict and limited liability. However, neither the Rome Convention, nor the two new conventions adopted at the May 2009 ICAO conference have been adopted in the US.

26 What system and procedures are in place for the investigation of air accidents?

Pursuant to chapter 11 of the Transportation Code, the NTSB is responsible for investigating accidents involving civil aircraft (49 USC sections 1101 to 1155). Accident investigations are conducted pursuant to part 831 of title 49 of the Code of Federal Regulations (DoT Regulations). Public hearings may be conducted as provided for in DoT Regulations part 845. The NTSB must report the facts, conditions and circumstances relating to each accident and the probable cause. The results are presented to an examiner, who later prepares a report to aid the NTSB in preparing its required final report. This report, which is usually released six months after the accident, will describe the probable cause, and identify problems and propose changes so the same type of accident does not recur. The NTSB is not responsible for prosecuting criminal behaviour or assigning blame.

All reports of investigations and findings are made public, and NTSB reports relating to any accident or investigation may be admissible into evidence in actions for damages subject to certain constraints.

27 Is there a mandatory accident and incident reporting system, and if so, how does it operate?

Yes. Part 830 of the DoT Regulations requires aircraft operators to notify the NTSB of aviation accidents and certain incidents. An accident is an occurrence associated with the operation of an aircraft that occurs between the time any person boards the aircraft with the intention of flight and the time when all such persons have disembarked, and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage. An incident is an occurrence other than an accident that affects or could affect the safety of operations.

The report should be filed with the nearest NTSB regional office. An initial phone call is sufficient but must be followed up in writing.

Competition law

28 Do sector-specific competition rules apply to aviation? If not, do the general competition law rules apply?

The aviation sector is governed by both US antitrust law rules and sector-specific competition law rules, which are similar to basic US antitrust principles.

The primary US antitrust laws, the Sherman Act and the Clayton Act, both apply to aviation. However, the US Federal Trade Commission is not empowered to enforce the Federal Trade Commission Act's prohibition of 'unfair methods of competition' and 'unfair or deceptive acts or practices' against air carriers subject to the Transportation Code. Nor does the Robinson-Patman Act's prohibition of certain kinds of price discrimination apply to airlines. The Transportation Code, which is enforced by the DoT, contains airline-specific antitrust rules similar to those contained in section 5 of the Federal Trade Commission Act.

The Sherman Act, inter alia, prohibits all contracts, combinations and conspiracies that unreasonably restrain trade. Price fixing, market allocation and customer allocation agreements are classic examples of such illegal agreements. The Sherman Act also prohibits monopolisation and any attempts to monopolise. The Clayton Act is the primary antitrust tool used to attack mergers and acquisitions that are anti-competitive.

In this connection, it is worth noting that the US Department of Justice (DoJ) is currently conducting a criminal price fixing investigation of airlines involved in providing air cargo services. The investigation has resulted in 17 guilty pleas and over US$1.6 billion in fines to date, the largest total of fines ever imposed in a single criminal antitrust investigation. That investigation is continuing. Following the announcement of the criminal investigation, antitrust class actions were brought by purchasers of air cargo services seeking treble damages from the airlines for price fixing. The cases were consolidated in the United States District Court for the Eastern District of New York and are currently pending. See *In re Air Cargo Shipping Services Antitrust Litigation,* MDL No. 1775 (EDNY 8 February 2007).

The competition laws exclusively applicable to the aviation sector are the Transportation Code and the Airline Deregulation Act. Section 41712 of the Transportation Code grants the secretary of transportation the authority to enjoin air carriers from engaging in 'an unfair or deceptive practice or unfair method of competition' either domestically or internationally, or both, if he or she finds that such would be in the public interest. The DoT also has the authority to issue regulations under this provision, governing the display of code-sharing agreements in computer reservation systems.

In addition, the Airline Deregulation Act gives the DoT the discretionary authority to grant antitrust immunity to anti-competitive carrier agreements if it determines that such agreements are 'necessary to meet a serious transportation need' or are necessary to achieve an important public benefit that cannot be achieved by reasonable and less anti-competitive alternatives (49 USC section 41309(b)(1)(A), (B)). Thus, for example, the DoT has granted limited antitrust immunity to code-sharing agreements between US and foreign air carriers because it has determined that such agreements were beneficial to the public. In this connection, airlines have continued to pursue new code-sharing agreements in the last year.

For instance, in July 2010, the DoT granted approval for American Airlines and four of its 'oneworld' international partners – British Airways, Iberia Airlines, Finnair, and Royal Jordanian Airlines – to more closely coordinate international services. The DoT determined that the integrated global alliance will provide travellers and shippers with a variety of benefits, including lower fares in some markets, new nonstop routes, improved services and better schedules. In addition, the DoT determined that the integration would enable the alliance to compete more vigorously with Star Alliance and SkyTeam. To address a potential loss of competition on select routes between the United States and London's Heathrow airport, the DoT required the applicants to make four pairs of Heathrow slots available to competitors.

In September 2010, the DoT proposed denying an antitrust immunity application made by Delta Air Lines and affiliates of the Virgin Blue Group – V Australia, Virgin Blue, and Pacific Blue Airlines –– with respect to joint services between the United States and Australia. The DoT stated that the airlines have failed to show that their alliance would have positive effects for consumers, such as lower fares or increased capacity. The DoT noted that Delta and its partners have not developed plans to operate as commercial partners and have limited their cooperation to a handful of routes, thereby limiting the public benefits their alliance might produce.

29 Is there a sector-specific regulator or are competition rules applied by the general competition authority?

The two principal antitrust regulators of the aviation sector are the DoT and the US Department of Justice. Neither the Federal Trade Commission nor the individual states have authority to enforce competition rules in the aviation industry. See 15 USC, sections 45(a)(2), 46(a) and (b) (air carriers are exempt from the jurisdiction of the FTC) and 49 USC, section 41713(b)(1) (air carriers are exempt from the enforcement of state antitrust laws).

The DoT has three main areas of regulatory authority: the discretionary authority to grant antitrust immunity to anti-competitive carrier agreements; the authority to enjoin air carriers from engaging in unfair or deceptive practices or methods of competition, such as predatory pricing; and the authority to oversee carrier 'joint-venture agreements', such as code-sharing and frequent flyer programmes.

The DoJ is responsible for enforcing the Sherman and Clayton Acts. Additionally, the DoJ is vested with the authority to review airline mergers and acquisitions.

30 How is the relevant market for the purposes of a competition assessment in the aviation sector defined by the competition authorities?

Competition assessment in the aviation sector focuses on the relevant geographic market and the relevant product market. The relevant product or service market will depend on the actual product or service being provided. The relevant product market in commercial aviation could, in the appropriate circumstances, be defined as scheduled passenger transportation. In other circumstances, it could be an air cargo transportation market. The actual relevant market will be determined by the unique circumstances surrounding the matter that is the subject of antitrust examination. The geographic market will also vary with the circumstances. However, in cases involving mergers, code-sharing alliances and joint ventures among carriers, competition will generally be examined in each 'city pair' in which the merging, code-sharing or joint-venturing carriers both offer service.

In a merger such as the one between Air France and KLM in 2004, where the merging airlines were members of competing code-sharing alliances, the DoJ examined the merger as if it were a combination of the transatlantic operations of all of the alliance members. In doing so, it examined all of the city pairs in which the alliance members competed. J Bruce McDonald, deputy assistant attorney general, Antitrust Division, US Department of Justice, Transportation Update: Remarks to the ABA Section of Antitrust Law Transportation Industry Committee (31 March 2004).

Recently, in August 2010, the DoJ closed its investigation into the proposed merger between UAL Corporation (parent of United Airlines Inc) and Continental Airlines Inc. The DoJ found that the proposed merger would combine the airlines' largely complementary networks, but would result in overlap on a limited number of routes in and out of Newark, New Jersey, where United and Continental offer competing non-stop service. To resolve the DoJ's competition

Update and trends

The participants in the 2007 OECD Aircraft Sector Understanding on Exports Credit for Civil Aircraft (ASU) are continuing their review of the ASU, which is expected to be completed at the end of 2010. This review may re-evaluate the informal home market rule, which prohibits Boeing and Airbus from seeking export credit financing on behalf of customers in their respective home markets. The Air Transport Association (ATA), a trade organisation in the US that represents the leading US airlines, has recently criticised the ASU, and seeks to limit export credit agency support to only airlines in the poorest countries for which market financing is not available as a result of political or credit risk. The ATA also opposes the implementation of any new 'domestic windows' through which government credit is offered to airlines to purchase aircraft made in their home countries. In the past, the ASU has largely been the concern of airframe manufacturers and their governments, and airline participation will add a new complication to the current review of the ASU, and may affect whether a new or renewed ASU may be agreed by the end of the year.

The United States and the European Union have also continued their talks on the historic Open Skies Agreement first signed in 2007. In June, 2010 a Second Stage Agreement was executed that affirms that the 2007 Open Skies Agreement will stay in place indefinitely. The Second Stage Agreement also, among other things, confirms that upon a loosening of the restrictions on foreign ownership of US airlines by a change to existing US law, the EU will reciprocally allow majority ownership of EU airlines by US citizens.

concerns, the merging airlines reached an agreement to transfer take-off and landing slots at Newark Liberty Airport to Southwest Airlines Co.

31 What are the main standards for assessing the competitive effect of a transaction?

The standard for assessing the competitive effect of an agreement examined under section 1 of the Sherman Act is whether the agreement unreasonably restrains trade in the relevant market. The standard for assessing the competitive effect of conduct challenged as monopolisation is whether a firm with monopoly power in the relevant market has engaged in conduct that has the effect of expanding or maintaining that monopoly. For attempted monopolisation, the standard is whether a firm with substantial market (but not monopoly) power has engaged in conduct that creates a 'dangerous probability of success' that it will monopolise the relevant market. For mergers and acquisitions, the test is whether the effect of the transaction 'may be substantially to lessen competition, or to tend to create a monopoly' in the relevant market. Finally, the Transportation Code provides that a transaction is anti-competitive if it represents an unfair method of competition or a deceptive practice, and is against the public interest.

32 What types of remedies have been imposed to remedy concerns identified by the competition authorities?

Both civil and criminal penalties can be imposed for antitrust violations. Violations of the Clayton Act can only result in civil liability whereas violations of the Sherman Act can result in both civil and criminal liability. Criminal penalties can be as high as US$1 million for individuals and US$100 million for corporations for each violation. In addition, individuals can be imprisoned for criminal violations of the Sherman Act. Only the most serious (per se) violations of the Sherman Act – such as price fixing, bid rigging and market allocation – are prosecuted criminally. In addition, the Department of Justice can seek injunctive relief barring private parties from continuing to engage in conduct that violates the antitrust laws. Injunctive relief is the standard form of relief sought when the Department of Justice seeks to block a merger.

With respect to criminal penalties under the Sherman Act, the current investigation by the DoJ against the air cargo carriers has, to date, resulted in 17 guilty pleas and approximately US$1.6 billion of aggregate criminal fines. British Airways (US$300 million; 23 August 2007); Korean Air (US$300 million; 24 August 2007); Qantas Airways (US$61 million; 14 January 2008); Japan Airlines (US$110 million; 7 May 2008); Air France-KLM (two pleas reflecting their pre-merger activities with total fines of US$350 million; 26 June 2008); Cathay Pacific Airways (US$60 million; 26 June 2008); Martinair (US$42 million; 26 June 2008); SAS Cargo Group (US$52 million; 26 June 2008); LAN Cargo SA and Aerolinhas Brasileiras SA (US$109 million; 22 January 2009); El Al Israel Airlines (US$15.7 million; 22 January 2009); Cargolux Airlines International SA (US$119 million; 9 April 2009); Nippon Cargo Airlines Co Ltd, (US$45 million; 9 April 2009); Asiana Airlines, Inc (US$50 million; 9 April 2009); Northwest Airlines LLC (US$38 million; 30 July 2010); and Polar Air Cargo LLC (US$17 million; 2 September 2010).

Violations of the antitrust laws can also create civil liability to third parties who are injured by those violations. Injured parties may recover treble damages for injury to their business or property caused by an antitrust violation. They are also entitled to recover their attorneys' fees.

Finally, the DoT may enjoin activities that violate the Transportation Code.

Financial support and state aid

33 Are there sector-specific rules regulating direct or indirect financial support to companies by the government or government-controlled agencies or companies (state aid) in the aviation sector? If not, do general state aid rules apply?

Although most airlines in the US are held by private shareholders, they can receive federal subsidies in particular contexts. First, under the Air Transportation Safety and System Stabilisation Act (ATS Act), airlines were permitted for a period of time to apply for federal assistance in the aftermath of the 11 September attacks in 2001. The ATS Act did not cover aid for damages incurred after 31 December 2001. Second, the government currently provides for war-risk insurance. Third, Congress granted the DoT authority to exempt airlines from certain economic regulations, subject to the extent the secretary determines necessary. Other exemptions are permissible, depending on public need. Fourth, airlines serving certain small communities receive federal subsidies (see question 10).

34 What are the main principles of the state aid rules applicable to the aviation sector?

The ATS Act delegated the power to dispense funds, both direct compensation and lines of credit, to the Air Transportation Stabilisation Board. To qualify for a grant of direct aid, the air carrier was required to show the precise financial loss suffered, either through sworn financial statements or 'other appropriate data' (ATS Act section 103(a)). To qualify for a federal credit instrument, the Board was required to determine that the applicant was an air carrier otherwise unable to secure credit, that the intended obligation is 'prudently incurred', and that the credit agreement would have been necessary to the maintenance of a safe, efficient and viable commercial aviation system (ATS Act section 102(c)(1)).

Also, Congress created subsidies to airlines that provide service to specific small communities through its Essential Air Services

Program. This ensures that small communities that were served by certified air carriers before deregulation maintain a minimum level of scheduled air service.

35 Are there exemptions from the state aid rules or situations in which they do not apply?

Exemptions to the state aid rules are not required, owing to the specific and targeted nature of federal subsidies to airlines such as those found in the ATS Act and Essential Air Services Programme.

36 Must clearance from the competition authorities be obtained before state aid may be granted?

In most cases, no. The ATS Act provided a forward-looking application process by the Airline Transportation Stabilisation Board, while competition authority procedures permit backwards-looking analysis of potential violations. Applications for ATS Act aid covering direct losses suffered after 31 December 2001 are not permitted. See responses to questions 28 to 31.

Clearance is required, however, for subsidies under the Essential Air Services Programme. This programme is regulated by the DoT. See question 10.

37 If so, what are the main procedural steps to obtain clearance?

Not applicable. See question 10.

38 If no clearance is obtained, what procedures apply to recover unlawfully granted state aid?

Not applicable.

Miscellaneous

39 Is there any aviation-specific passenger protection legislation?

FAR part 374 gives responsibility to the DoT for enforcing air carrier compliance with the Consumer Credit Protection Act (the Act). A violation of the Act is also a violation of the Transportation Code.

For carriers holding certificates of public convenience and necessity, FAR part 250 provides that for oversold flights, carriers must ensure that the smallest number of passengers with confirmed reservations be denied boarding involuntarily. The carrier should ask for volunteers to receive compensation for giving up their seats. For passengers who are denied boarding involuntarily, the carrier must pay 200 per cent of the sum of the passenger's remaining flight coupons up to his next stop-over, up to a maximum of US$800. The carrier's liability will be capped at US$400 if it arranges for comparable transport that will arrive no later than two hours after the planned arrival of the original flight, if domestic, and no later than four hours after the planned arrival of the original flight, if international. Carriers may offer free or reduced transport in lieu of the cash if its value is equal to or greater than the amount owed to the passenger. Every carrier must file a quarterly report of passengers denied confirmed space.

Federal regulations also govern false and misleading advertising, lost and damaged baggage, handicapped access, smoking aboard aircraft, gambling, and code sharing. Furthermore, in December 2009 the DoT adopted new consumer protection rules in regard to tarmac delays. Among other things, FAR parts 234, 253, 259 and 399 were amended, with limited exceptions, to mandate that tarmac delays be limited to three hours, require air carriers to provide adequate food and potable water for passengers within two hours of an aircraft being delayed on the tarmac, to maintain operable lavatories, and provide, if necessary, medical attention.

To protect passengers that have purchased package holidays, FAR part 212.8 provides that air carriers operating charter flights must file a currently effective agreement between the air carrier and an FDIC-insured bank, stating that all advanced charter payments will be held in escrow by the bank with the Department of Transportation. The charterer is to make all advanced payments to the designated bank, and the bank is to pay out the balance only after the carrier certifies in writing that the charter has been completed. Alternatively, the carrier may elect to file with the DoT a surety bond with guarantees to the US government for the performance of all charter trips. The bond must provide that the charterer has 60 days after the cancellation of a charter trip in which to file a claim against the carrier. If no such claim is made, the surety shall be released from all liability.

There is no specific passenger protection legislation in regard to domestic airfares, which are negotiated and international airfare is

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regulated as provided in Chapter 415 of the Transportation Code. See answer to question 12. The DoT does, however, maintain jurisdiction over any unfair and deceptive trade practice. See 49 USC section 41712.

40 Are there mandatory insurance requirements for the operators of aircraft?

US and foreign direct air carriers must have in effect aircraft accident liability insurance coverage that satisfies federal requirements. The minimum air carrier insurance requirements in the US is US$300,000 for bodily injury or death, or for damage to the property of others, for any one person in any one occurrence, and a total of US$20 million per involved aircraft for each occurrence, except that for aircraft of 60 seats or fewer or 18,000lbs maximum payload capacity, carriers only need coverage of US$2 million per involved aircraft. In regard to passengers, US and foreign air carriers must maintain accident liability insurance for injury or death with minimum limits of $300,000 for any one passenger, with a total per involved aircraft limit for each occurrence of $300,000 times 75 per cent of the number of installed seats. Different rules exist for US air taxi operators and Canadian charter air taxi operators.

41 What legal requirements are there with regard to aviation security?

In addition to multilateral resolutions, the US has internal legislation regarding aviation security. Among other procedures, screening of passengers and baggage for weapons is authorised, and background checks for airline and airport employees and deployment of bomb detection technology for baggage are required. In 2002, the Homeland Security Act consolidated 22 agencies, including the Transportation Security Administration (TSA), into the Department of Homeland Security (DHS). The DHS is responsible for transportation security, customs, immigration and agricultural inspections. X-ray and metal detector devices are used at security checkpoints and there are detailed requirements for security personnel.

42 What serious crimes exist with regard to aviation?

Chapters 449 and 463 of the Transportation Code contain various crimes that are either felonies or misdemeanours. These crimes include, among other things: air piracy, interference with crew members, air sabotage, carrying weapons or explosives on the plane, receiving illegal rebates, violating the Hazardous Materials Transportation Act and falsifying records.

AIR TRANSPORT 2011 ISSN 1751-9098