



AVIATION LAW

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2015 / 2016

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Introduction

Aviation law comprises fields of public and private international law, as well as, in the narrower sense, the national law of South Africa, and includes:

- parliamentary and subordinate legislation on aviation matters;
- multilateral international conventions and recommendations of international bodies on aviation matters, some of which have the force of law in South Africa; and
- the common law as applied to situations peculiar to aviation.

Applicable Legislation

Carriage by Air Act

The Carriage by Air Act, No. 17 of 1946 (the Carriage by Air Act) gives the Convention for the Unification of Certain Rules for International Carriage by Air (commonly known as the Montreal Convention) the force of law in South Africa.

The Montreal Convention, which was opened for signature in Montreal on 28 May 1999, covers the rights and liabilities of carriers, passengers, consignors, consignees and other interested parties. It modernises and consolidates the liability system introduced by its predecessor, the Warsaw Convention 1929 and its related instruments, most notably through the introduction of a common liability standard. This standard relates to passenger death, injury and delay, baggage and cargo claims, and is applicable to all party states.

Air Services Licensing Act

The Air Services Licensing Act, No. 115 of 1990 (the Air Services Licensing Act), provides for the establishment of the Air Service Licensing Council and for the licensing and control of domestic air services.

The Domestic Air Services Regulations promulgated under the Air Services Licensing Act provide for certain classes and types of air service, categories of aircraft, and minimum insurance in respect of passenger liability, third party liability and cargo liability.

Airports Company Act

The Airports Company Act, No. 44 of 1993 (the Airports Company Act), provides for the:

- establishment of a public company, known as the Airports Company South Africa Limited (ACSA);
- transfer of the State's shares in ACSA; and
- regulation of certain activities at ACSA airports and matters connected therewith.

An "ACSA airport" refers to an aerodrome that was transferred to ACSA in terms of the Airports Company Act; an airport acquired or constructed by ACSA; or any other airport managed, controlled and operated by ACSA, which is an international or national airport. At present ACSA operates nine major airports in South Africa, three of which are international airports.

In terms of the Airports Company Act, ACSA has been granted permission to publish airport charges which include landing charges, parking charges and/or passenger service charges.

Air Traffic and Navigation Services Company Act

The Air Traffic and Navigation Services Company Act, No. 45 of 1993 (ATNSCA), provides for the establishment of a public company, the Air Traffic and Navigation Services Company Limited (ATNS), and the transfer of certain assets and functions of the State to ATNS.

The objectives of ATNS include the acquisition, establishment, development, provision, maintenance, management and control or operation of air navigation infrastructures, air traffic services, or air navigation services.

In terms of ATNSCA, ATNS publishes air traffic service charges which include amounts levied by ATNS on an operator of an aircraft or an aerodrome in connection with the use of any air navigation infrastructure or air traffic service by such operator.

International Air Services Act

The International Air Services Act, No. 60 of 1993 (IASA), provides for the regulation and control of international air services and for the establishment of an International Air Service Council.

It is significant that IASA prohibits, with certain exceptions, the use or attempted use of an aircraft to operate an international air service unless it is done so under, and in terms of, an international air service licence.

An “international air service” is defined as an air service that passes through the air space over the territory of South Africa and at least one other country. The definition excludes an air service passing through the air space over another country without operating an air service in that territory and where the route or journey starts and ends within South Africa.

A number of regulations have been promulgated in terms of IASA. These cover the different classes and types of international air services, applications and requirements for exemption from the obligation to obtain licences and permits.

Convention on the International Recognition of Rights in Aircraft Act

The Convention on the International Recognition of Rights in Aircraft Act, No. 59 of 1993 (CIRRAA), provides for the provisions of the Geneva Convention on the International Recognition of Rights in Aircraft of 1948 to be applied in South Africa. The convention made provision for the hypothecation of aircraft and shares in aircraft and for matters connected therewith.

The Mortgaging of Aircraft Regulations were promulgated under CIRRAA in 1997.

Convention on International Interests in Mobile Equipment Act

The Convention on International Interests in Mobile Equipment Act, No. 4 of 2007 (the Cape Town Act), came into operation in South Africa on 24 August 2007. The Cape Town Act incorporates the Convention on International Interests in Mobile Equipment (the Cape Town Convention) and the protocol thereto on Matters Specific to Aircraft Equipment (the Protocol) into South African law.

The Cape Town Convention provides an international legal regime for the creation, enforcement, registration and priority of security interests held by chargees, conditional sellers and lessors in respect of aircraft and aircraft engines.

The Civil Aviation Act

The Civil Aviation Act, No. 13 of 2009 (the Civil Aviation Act), was signed by the President on 25 May 2009 and, except for certain provisions, came into effect on 31 March 2010.

The Civil Aviation Act repealed the Aviation Act, No. 74 of 1962 (Aviation Act), the Civil Aviation Offences Act, No. 10 of 1972 (CAOA), and the South African Civil Aviation Authority Act, No. 40 of 1998 (SACAAA), in their entirety. It draws the provisions of these Acts together in one piece of legislation and streamlines the regulation of civil aviation in South Africa.

Other legislation described in this chapter is amended by the Civil Aviation Act where necessary. The Chicago Convention and Transit Agreement remains incorporated into South African national law by its inclusion in schedules to the Civil Aviation Act.

The Civil Aviation Act contemplates the continuation, modification and formation of various structures to oversee and regulate civil aviation in South Africa. These structures comprise the “forward planners”, the “executors”, the “investigators” and the “head”:

- The “forward-planners” – the National Aviation Security Committee – housed in the Department of Transport and comprising members with a broad skills base, are tasked with, among other things:
 - drafting the National Aviation Security Programme, currently known as the National Aviation Safety Plan (NASP);
 - proposing to the Minister of Transport (the Minister) policies and recommendations for the enhancement of civil aviation security; and
 - acting as a coordinator for the implementation of the NASP.
- The “executors” – the Civil Aviation Authority (successor to the South African Civil Aviation Authority) – comprising the director of Civil Aviation, the Civil Aviation Authority Board and the staff of the Civil Aviation Authority are tasked (under SACAAA) with, among other things, the controlling, regulation and promotion of civil aviation safety and security, and to oversee the functioning and development of the civil aviation industry. This is to be done by the director and the staff of the Civil Aviation Authority through the performance of a myriad of functions contemplated in the Civil Aviation Act, such as:
 - developing technical standards and regulatory requirements through consultation with industry;
 - offering training and advice to industry;
 - developing and disseminating technical and administrative practices for use by airlines and airports;
 - advising the Minister in respect of amendments to or the introduction of legislation, or the need to conclude any international agreement (a remnant of SACAAA);
 - implementing and enforcing the NASP; and
 - administering the Civil Aviation Act, CIRRAA and the Cape Town Act.
- The “investigators” – the Aviation Safety Investigation Board (ASIB) – comprising a small group of board members, the chairperson, the director of investigations, investigators and other staff appointed by the board. The ASIB is tasked to, among other things:
 - investigate the causes of and factors contributing to aircraft accidents occurring within South Africa and other limited territories specified in the Civil Aviation Act;
 - coordinate its efforts with certain other bodies authorised to conduct investigations;
 - report publicly on its findings without apportioning blame or liability; and
 - make recommendations in response to identifying safety deficiencies uncovered in the investigation of aircraft accidents.
- The “head” – the collective effect of the provisions of the Civil Aviation Act is that the Minister is the head of, and bears ultimate responsibility for, civil aviation safety and security oversight in South Africa.

Material damage or loss

Where material damage or loss is caused by an aircraft in flight, taking off or landing, or any person in any such aircraft or any article falling from any such aircraft, to any person or property on land or water, damages may be recovered from the registered owner of the aircraft, without proof of negligence or intention or other cause of action as though such damage or loss had been caused by his or her wilful act, neglect or default. This does not apply where the damage or loss was caused by or contributed to by the negligence or wilful act of the person by whom it was suffered. A registered owner or operator of an aircraft must have insurance as prescribed for any damage or loss that is caused by an aircraft to any person or property on land or water.

The definition of “registered owner” is drafted as widely as the corresponding definition in the Aviation Act, potentially encompassing:

- foreign (beneficial) owners;
- registered (nominee) owners whose names appear on the South African Civil Aircraft Register;
- a South-African based agent of a foreign (beneficial) owner; and
- any lessee or operator of the aircraft in question.

Notably, while the Aviation Act afforded relief to a registered owner which in good faith dry leased its aircraft to a lessee for more than 14 days (by transferring the onus of strict liability should material damage or loss be incurred during the subsistence of the lease) to the operator lessee, the Civil Aviation Act does not include any such protection.

Insurance

The Civil Aviation Act requires that a registered owner or operator of an aircraft must have insurance to cover the potential liability described above. The extent and form of the required insurance is yet to be prescribed by the Minister.

Regulations

The Civil Aviation Act provides that certain regulations will remain in force until replaced, notwithstanding the repeal of the legislation under which they were promulgated. The following regulations have been repealed and replaced:

- the Civil Aviation Regulations 1997 (promulgated under the Aviation Act) which deal with air navigation, operation of aircraft and the licensing and operation of aerodromes and heliports; and
- Civil Aviation Authority Regulations 2007 (promulgated under SACAAA) which provide for the appointment of members to, and management of, the South African Civil Aviation Authority.

Licences, permits, certificates, authorisations, permissions, registrations and determinations issued in terms of legislation repealed by the Civil Aviation Act, and which were valid immediately prior to the commencement of the Civil Aviation Act, will remain valid for the periods stipulated therein, unless suspended, terminated or cancelled under the Civil Aviation Act.

The following regulations have been promulgated under the Civil Aviation Act:

- the Civil Aviation Authority Passenger Safety Charge Regulations 2011, which impose a Civil Aviation Aircraft Passenger Safety Charge on aircraft passengers departing on a scheduled public air transport flight within South Africa;
- the Airport Slot Coordination Regulations 2012, which provide for the designation and coordination of airports; and
- the Civil Aviation Regulations 2011, which repeal Part 187: Fees and Charges of the Civil Aviation Regulations 1997, and provide updated fees and charges for various aviation matters.

The Chicago Convention and the International Air Services Transit Agreement

The Chicago Convention and the International Air Services Transit Agreement 1994 (the Transit Agreement), which are both incorporated as schedules to the Civil Aviation Act, bear mention.

The Chicago Convention is a multilateral treaty in terms of which the member states have agreed on certain principles and arrangements to allow for:

- international civil aviation to be developed in a safe and orderly manner; and
- international air transport services to be established on the basis of equality of opportunity and operated soundly and economically.

The Chicago Convention consists of four parts:

- Part I, which deals with air navigation and recognises that every state has complete and exclusive sovereignty over the airspace above its territory;
- Part II establishes the International Civil Aviation Organisation (ICAO), lists the ICAO's objectives, provides for a permanent seat, and confers legal capacity on the organisation in each member state;
- Part III concerns international air transport and stipulates that each contracting state ensures that its international airlines file reports on data required by the council, that member states are entitled to designated routes and airports for international traffic, and that the council will provide assistance in improving air navigation facilities in particular states; and
- Part IV contains supplementary provisions.

The Transit Agreement was adopted by South Africa in 1946, and is generally known as the Two Freedoms Agreement. The “two freedoms” of the air referred to are granted by the contracting states inter se in respect of scheduled international air services, namely the privileges of:

- flying across the territory of a member state without landing; and
- landing for non-traffic purposes.

In this context, the International Air Transport Agreement 1944, adopted by members of the International Air Transport Association (IATA), must be noted. It is commonly referred to as the Five Freedoms Agreement and includes the freedoms granted under the Transit Agreement and three more in respect of scheduled international air services, including the privileges of:

- putting down passengers, mail and cargo taken on in the territory of the state whose nationality the aircraft possesses;
- taking on passengers, mail and cargo destined for the territory of that state; and
- taking on or putting down passengers, mail and cargo destined for, or coming from, the territory of another member state.

Reference is occasionally made to a sixth, seventh and eighth freedom. These are minor variations of the first five freedoms.

Other

The Civil Aviation Act also gives effect to the:

- Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963 (the Tokyo Convention);
- Convention for the Suppression of Unlawful Seizure of Aircraft, 1970 (the Hague Convention); and
- Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971.

It also provides for additional measures directed at the more effective control of safety of aircraft and airports.

Briefly:

- the Tokyo Convention provides jurisdiction and machinery to deal with crimes and other unlawful acts on international flights;
- the Hague Convention concerns the unlawful seizure or hijacking of aircraft; and
- the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation closes the gap in the measures against aircraft terrorism by dealing with sabotage committed on the ground and unlawful interference with air navigation installations, facilities and services at airports, control towers and radio installations.

Other Acts of Parliament

There are Acts of Parliament that relate to various other aspects of aviation. Some examples include:

- liability of a foreigner (not being a person ordinarily resident in South Africa or a company registered, managed or controlled in South Africa) to pay income tax upon a deemed basis if he or she embarks passengers or loads livestock, mail or goods in South Africa, as an owner or charterer of any aircraft (Income Tax Act, No. 58 of 1962);
- the reporting of the arrival and departure of aircraft, the boarding and searching thereof, and the sealing up of dutiable goods on a visiting aircraft (Customs and Excise Act, No. 91 of 1964); and
- the regulation of over-selling and over-booking of goods or services, and the granting of rights to consumers (including airline passengers), to cancel advance bookings notwithstanding any agreement between the consumer and supplier in question to the contrary (Consumer Protection Act, No. 68 of 2008).

The National Key Points Act, No. 102 of 1980, in terms of which certain places or areas (including airports) are declared national key points in the interest of national security, is also relevant as it subjects the owners of such points to the duty of safeguarding them.

International Associations/ Organisations

ICAO

ICAO, which was established under the Chicago Convention, has adopted international standards and recommended practices and procedures on a number of aviation matters and revises these from time to time.

The revisions are issued in the form of annexes to the Chicago Convention, and are generally applied by all member states. Any revisions to the Chicago Convention have the force of law in South Africa once ratified by the Minister in consultation with the Civil Aviation Authority.

IATA

IATA is an international association of air carriers established and maintained by airlines themselves as opposed to being the result of a treaty or agreement between states. It lays down, for example:

- standard conditions of carriage to be incorporated in tickets and consignment notes;
- standard fare structures on certain routes;
- the requirements for reductions of fares for large parties travelling together;
- rules for the licensing of travel agents to transact business for IATA carriers; and
- mutual arrangements for receiving and embarking passengers.

In practice, some of the IATA rules have become a part of aviation law.

International Conventions

The most important conventions ratified or adopted by South Africa and given the force of law were mentioned as part of the discussion of the South African legislation above.

In addition to these, South Africa is a party to the International Telecommunications Convention (Malaga, Torremolinos 1973) under which radio regulations became effective on 1 January 1975.

Significantly, South Africa is neither a signatory nor a party to the Rome Convention of 1952 and thus liability to third parties for surface damage is governed by the common law and legislation.

Common Law

The common law continues to play a significant role in South African aviation law and impacts, for example:

- the standard of skill required from a pilot and that required from a pupil pilot;
- the liability of a club member for negligent damage to an aircraft which the club has caused to be insured; and
- the application of the *volenti non fit iniuria* rule to a passenger on a hazardous flight. (This principle expresses that a person who willingly consents to another's act, in the form of either a specific harmful act or an activity involving a risk of harm, cannot later complain that a delict has been committed against him or her.)

Conclusion

South Africa has a well-developed body of aviation law that is continually updated in keeping with international standards and recommended practices. As such it provides a solid framework for a vibrant local aviation community.

Acknowledgments

This chapter is originally based on *The Law of South Africa, Vol 2(1)*, second edition: "Aviation and Air Transport" by MS Slabbert (original text by CS Margo, AM Conradie and RD Margo).

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