

INVESTING IN AIRCRAFT: THE SOUTH AFRICAN LEGAL LANDSCAPE AND THE PARTNERSHIP MODEL OF AQUISITION



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CONTENTS	PAGE NO
1. Introduction	4
2. The Motivation for Investing in Aircraft	6
3. Partnerships and <i>En Commandite</i> Partnerships	9
4. The Taxation of Partnerships in South African Law	15
5. The Investment Decision	20
6. The National Credit Act	22
7. Regulatory Issues	29
8. The Public Liability of the Owner and Carrier	35
9. The Acquisition of the Aircraft: Common Law Principles	40
10. The Aircraft: the Concept of Property	44
11. Delivery of the Property	49
12. Legal Remedies	53
13. The Conflict of Laws	64
14. Insurance	65
15. Conclusion	70

1. INTRODUCTION

Financial advisors have in the past and continue to suggest that the most prudent course of action to be taken in adopting an investment strategy is to have a diversified portfolio.

In other words, as the age old adage states:

“Never put all your eggs in one basket”.

It is this financial strategy that has prompted the growth *inter alia* in South Africa of the alternative asset class of investments available to natural and juristic persons.

The investment class concerned would include investments in private equity funds, mezzanine debt, black economic empowerment (BEE) financing, infrastructure funding, development and environmental assets, entrepreneurial venture funding and non-mainstream movable assets such as transport containers (for marine vessels).

Included in this asset class would be investment in aircraft and aviation products.

The lack of sophisticated infrastructure in Africa has adversely impacted on the growth and development of Southern Africa, but it has presented a unique opportunity for South African funded aircraft charter operations to satisfy many of the transport dilemmas¹.

The rapid growth in the tourist industry in many African countries, combined with the diminished risk in the political and socio-economic elements in Central and North Africa, have created economic opportunities in private aviation².

¹ Information obtained from Skyeinvest Administration (Pty) Ltd

² Information obtained from Skyeinvest Administration (Pty) Ltd

In other words, private ownership of aircraft for gain has become commercially viable and very lucrative.

In South Africa, a popular model for the acquisition of aircraft is the silent partnership model, in terms of which a limited liability partnership acquires an aircraft for and on behalf of a number of individual private investors (the partners to the secret partnership) – which aircraft is then operated for gain in the private charter market of Africa and the Middle East.

This paper will seek to analyse private aviation investment in relation to the South African legal landscape, with special emphasis on the partnership model of acquisition in South African Law.

As is evident from the index above, this dissertation will seek to provide an overview *inter alia* of the following aspects of aircraft acquisition and ownership in *inter alia* the *en commandite* partnership model:

- The Motivation for Investing in Aircraft;
- Partnerships and *En Commandite* Partnerships;
- The Taxation of Partnerships in South African Law;
- The Investment Decision;
- The National Credit Act;
- Regulatory Issues;
- The Public Liability of the Owner and Carrier;
- The Acquisition of the Aircraft: Common Law Principles;

- The Aircraft: the Concept of Property;
- Delivery of the Property;
- Legal Remedies;
- Conflict of Laws; and
- Insurance.

Accordingly the reader should come away having read this work with a broader knowledge, although superficial in certain respects, of what the legal landscape looks like when one wishes to acquire and fund an aircraft for use in the private charter market, especially in the partnership model of acquisition.

2. THE MOTIVATION FOR INVESTING IN AIRCRAFT

The factors mitigating in favour of aircraft investment are numerous and certain of the more relevant factors are listed below, as follows:

- The vast majority of aircraft are priced in United States Dollars and earn income in United States Dollars - hence such an investment offers South Africans a Rand hedge investment opportunity and a means to insulate oneself against the Rand's potential devaluation;
- It has been documented that the aircraft industry is stable and growing;
- Although an aircraft is classified as a corporeal movable asset, aircraft operate in a highly regulated international environment that offers legal protection against unlawful/illegal movement of aircraft;

- As a result of the rigorous demands set for aircraft to be classified as airworthy, a significant portion of the running costs are absorbed by maintenance programmes set out by the aircraft manufacturer that requires frequent minor maintenance only;
- Like other mobile investments, investors can place a premium on this form of investment as it commands income returns that are determined by international trends;
- The asset is mobile and consequently can avoid political and social unrest;
- Its value is determined by the international market and it can be sold anywhere in the world;
- Aircraft can be insured against most forms of risk and these can be summarised to include:
 - Partial or total loss of the aircraft;
 - Damage caused to passengers or third parties and their property;
 - Theft;
 - Loss of income due to unscheduled repairs being required; and
 - Political risks, such as appropriation of the aircraft outside the country of registration³.

The value of aircraft tends to lag behind the economic cycle as spare capacity tends to overhang the market for a number of years after an

³ Information obtained from Skyeinvest Administration (Pty) Ltd

economy begins to show positive signs of growth. However, as the global economy begins to mature, a continued demand for aircraft is maintained and new aircraft are delivered to the market to meet latent demand. This demand tends to carry over beyond the peak of the economic cycle as the lead time between placing orders and taking delivery of the aircraft normally runs into many months and is often in excess of a year for very specialised or expensive aircraft. Due to this lead and lag process, values are usually driven well in excess of their intrinsic value at the peak of an economic cycle, and *vice versa*⁴.

Subsequent to September 11, the values of aircraft declined internationally. In addition the cost of insurance skyrocketed. This situation has reversed itself and since mid 2003, prices of aircraft have shown a marked increase and availability of used stock has declined. Similarly, the cost of insurance has also declined⁵.

In selecting an aircraft for acquisition, the highest returns are going to be made from aircraft with the highest risk profile. The risk that is being referred to relates to the size of the charter market available to the aircraft owner. The more specialised the niche, the more volatile the potential income flow. Passive investments tend also not to generate exceptional returns unless that capital is placed at significant risk⁶.

In terms of the asset's marketability, the risk to capital is significantly reduced due to the asset being saleable globally. The saleability of the aircraft is seen, in most instances, as being easy to arrange but it must be kept in mind that it is a very specialised asset⁷.

Fortunately the value of an aircraft will not be limited by its historical income generating capacity and, in the event of the aircraft being placed with a charter company that is not able to generate the level of

⁴ Information obtained from Skyeinvest Administration (Pty) Ltd

⁵ Information obtained from Skyeinvest Administration (Pty) Ltd

⁶ Information obtained from Skyeinvest Administration (Pty) Ltd

⁷ Information obtained from Skyeinvest Administration (Pty) Ltd

income that meets the investors' criteria, the aircraft can be sold in the knowledge that its sales value will not be determined by its historical income returns, as is the case with many other assets. In the charter market, a charter party does not look to the age of the aircraft or to the fact that it has the latest avionics or design: They are usually concerned with its capacity, flight time, availability and cost. It is for this reason that charter companies tend to make use of older aircraft that can be chartered at more competitive prices than newer aircraft⁸.

3. PARTNERSHIPS AND *EN COMMANDITE* PARTNERSHIPS

One of the more common investment "vehicles" that is used to house private aircraft investment in South Africa is the *en commandite* partnership.

A partnership is a legal relationship arising from an agreement between two or more persons (not exceeding twenty), each to contribute to an enterprise with the object of making profits and the division of such profits⁹. It was stated in the *locus classicus* decision of *Joubert v Tarry & Co*¹⁰ that the fundamentals of a partnership are that:

- Each partner must contribute to the partnership by way of money, labour or skill;
- The business must be executed for the joint benefit of all the partners;
- The objective of the partnership must be the generation of profits; and

⁸ Information obtained from Skyeinvest Administration (Pty) Ltd

⁹ The Law of Partnership and Voluntary Associations, Bamford, 3rd Edition, Juta & Co Limited, page 1

¹⁰ 1915 TPD 277

- A legitimate contract (known as the partnership agreement) must exist between the parties.

It has been said:

“The primary meaning of the word partnership is a contract of a particular kind, but it is also used to denote the relationship between the parties arising from the contract.”¹¹

Thus, a partnership can arise only by agreement between contracting parties¹². The agreement may have been expressed orally or in writing or may be inferred from conduct¹³. Where parties agree to become partners and only subsequently draw up a written contract, the partnership dates from the time of the oral agreement¹⁴.

An agreement of partnership attracts the ordinary rules of the Law of Contract. Thus, it may be rescinded on the ground of misrepresentation and its terms cannot be altered without the consent of all the contracting parties, unless a power to vary has been granted¹⁵.

In terms of the Companies Act¹⁶, the membership of a partnership is limited to 20 persons¹⁷.

The contribution made by a partner to a partnership may be money, things *in specie*, rights, labour, and skill or if there has been no contribution by one party, there will normally have been a donation¹⁸. A contribution need not be capable of pecuniary assessment: an agreement to share losses may be sufficient¹⁹.

¹¹ *ibid*, page 1

¹² *ibid*, page 1

¹³ *ibid*, page 1

¹⁴ *ibid*, page 2

¹⁵ *ibid*, page 2

¹⁶ Act 61 of 1973

¹⁷ Section 30 of Act 61 of 1973

¹⁸ The Law of Partnership and Voluntary Associations, *supra*, page 3

¹⁹ *ibid*, page 3

Various kinds of partnership were categorized in the Roman and Roman-Dutch law, distinguished mainly by the nature and scope of the enterprise undertaken²⁰. South African law recognizes all sorts and conditions of partnership, from the universal to the *ad hoc*, as in the joint purchase and maintenance of a cow, or that under a power of attorney to liquidate for reward the liabilities of a third party²¹.

The object of a partnership, namely to make profit, is essential to the formation of a partnership and normally, although not necessarily, distinguishes it from the following other legal relationships, namely:

- Co-ownership;
- Joint Transactions;
- Voluntary association;
- Concurrence of creditors in an assignment²².

The object of dividing profits, which may be express or implied, is essential, and no partnership is created if, although a joint enterprise is embarked upon, it is agreed that profits shall accrue to only one party²³. A share of the profits may, however, be conditional, and an expectation of profit is sufficient²⁴. Although the object of dividing profits is the "main test" of partnership, it is not decisive and while participation in profits raises a presumption of partnership, it does not necessarily imply a partnership²⁵. There may be a division of profits in the following legal relationships:

- Agency;

²⁰ *ibid*, page 4

²¹ *ibid*, page 4

²² *ibid*, page 4

²³ *ibid*, page 6

²⁴ *ibid*, page 6

²⁵ *ibid*, page 6

- Loan;
- Employment;
- Lease;
- Joint Ventures and Syndicates; and
- Trusts²⁶.

It has sometimes been stated as part of the definition of partnership that the parties must agree to share losses, although it is, however, permissible for one partner to have a share of the profits, and not be liable for any losses²⁷.

In essence, a partnership has no separate legal personality and is not a legal *persona*²⁸. A partnership is an association of individuals²⁹. It has, however, been said that a partnership is so far analogous to a corporate individual that it may be called a *quasi-persona*³⁰.

As far as the reciprocal duties of partners are concerned, these can be summarised as follows:

- The duty to make the contribution that a partner has agreed to contribute³¹. In the case of the partnership model to acquire aircraft, besides the managing partner (who would usually contribute skill/s), the contribution by the partners would usually be purely financial;

²⁶ *ibid*, pages 6 - 16

²⁷ *ibid*, page 13

²⁸ *ibid*, page 25

²⁹ *ibid*, page 26

³⁰ *Potchestroom Dairies v Standard Milk Supply Company* 1913 TPD, 506 at 513

³¹ *The Law of Partnership and Voluntary Associations*, *supra*, page 27

- The duty to allow co-partners to share in the management of the partnership³². In the case of the partnership model to acquire aircraft, the partnership agreement would ordinarily provide that for the purposes of expediency in management, all partners other than the managing partner would contract out of this duty;
- The duty to allow co-partners to use the Partnership Property³³. In the case of the partnership model to acquire aircraft, the partnership agreement would ordinarily provide for the partners other the managing partner to contract out of this duty;
- The duty of all co-partners to exercise reasonable care in the conduct of the partnership affairs³⁴. In the case of the partnership model to acquire aircraft, the partnership agreement would ordinarily provide for the managing partner to run the affairs of the partnership in all respects (most especially since the *en commandite* partnership's limited liability rests upon the principle that the identity of the co-partners remains undisclosed at all times – as explained below);
- The partners stand in a fiduciary relation to one another and therefore have a duty to observe the highest good faith, or *uberrimae fides*³⁵;
- The duty to account to co-partners in respect of whatever a partner has obtained on behalf of the partnership or that which he had a duty to obtain³⁶;
- The duty to allow co-partners to share in the profits of the partnership³⁷.

³² *ibid*, page 29

³³ *ibid*, page 29

³⁴ *ibid*, page 30

³⁵ *ibid*, page 31

³⁶ *ibid*, page 33

³⁷ *ibid*, page 37

Ordinary “disclosed” partnerships are the most common form of partnership, wherein all the partners are held jointly and severally liable for any obligation arising from the actions of any partner acting within his capacity as an agent of the partnership³⁸.

Another form of partnership is the family partnership³⁹. Business ventures carried on by members of a family are frequently in the form of a partnership⁴⁰. It was accepted in ITC 551 and ITC 642 that a parent and a minor child may legally be in partnership together⁴¹.

Limited partnerships, in the form of anonymous partnerships and *en commandite* partnerships offer a degree of protection to limited partners, by placing a limit on the extent of their liability⁴². An anonymous partnership allows for a partner to share in the profits and losses of the enterprise without him disclosing his identity and actively participating in the business⁴³.

En commandite partnerships are similar to anonymous partnerships, since both options have undisclosed partners with limited liability⁴⁴. The sleeping partner in an *en commandite* partnership, however, contributes a fixed sum to the partnership in order to receive a share of the profits – hence his liability is limited to the amount of his capital contribution⁴⁵.

Dissolution of a partnership may occur for several reasons, such as a decision to stop trading, the death or retirement of a partner, as well as when a new partner is permitted to join the partnership or when a partner becomes insolvent⁴⁶. Where a partner does not effectively

³⁸ The Treatment of Partnership Income and Expenditure in South African Tax Law, N M Perry, page 6

³⁹ *ibid*, page 7

⁴⁰ *ibid*, page 7

⁴¹ *ibid*, page 7

⁴² *ibid*, page 6

⁴³ *ibid*, page 6

⁴⁴ *ibid*, page 6

⁴⁵ *ibid*, page 6

⁴⁶ *ibid*, page 6

retire but merely withdraws from playing an active part in the partnership, allowing the other partners to continue managing the business, it does not automatically indicate that the partnership has ceased to be⁴⁷.

The effect of dissolution is that, by agreement or at the hands of a court appointed receiver, the assets of the partnership will be collected and liquidated to settle partnership liabilities.

A partnership agreement would traditionally make provision for what is known as "perpetual succession" – in terms of which the partnership will by artificial means survive in form even though in law dissolution has taken place. In a recent tax case ITC 1784, the court considered the true nature and effect of a partnership agreement, which was that each time a partner withdrew or was admitted the old partnership was dissolved and a new one constituted⁴⁸.

4. THE TAXATION OF PARTNERSHIPS IN SOUTH AFRICAN LAW

As stated above, a partnership is not a legal entity *per se*. For this reason partnerships are particularly useful as they are not taxed in their own right and consequently any income or trading loss, incurred in any one year, is apportioned amongst the partners and reflected in each individual partners' accounts and tax returns.

The Income Tax Act⁴⁹ ("the Income Tax Act") defines a 'taxpayer' as:

"any person chargeable with any tax leviable under this Act and includes every person required by this Act to furnish any return".

A partnership does not fall into this definition, nor is it specifically included by the Act's definition of a 'person'⁵⁰. It is also not a distinct

⁴⁷ *ibid*, page 25

⁴⁸ 67 SATC 40

⁴⁹ Act 58 of 1962

legal *persona* and therefore each partner is individually liable for tax, the partnership itself (not being a taxable entity) is not held liable⁵¹. Due to the above-mentioned characteristics, a partnership can be perceived as a conduit through which each partner's income flows to him⁵². As a conduit, the partnership does not affect the type of income that flows through it⁵³. Amounts received *inter alia* as interest, dividends and the like will retain their characteristics and therefore receive any distinctive treatment as a result⁵⁴.

While partnerships are not included in the definition of a 'person' in terms of the Income Tax Act, they are however incorporated in the Value Added Tax Act's⁵⁵ definition of a person⁵⁶. Such "persons" are given vendor-status (separate from the partners), regardless of the fact that they do not have a separate legal *persona*⁵⁷. This ensures that the partnership is left unaffected in terms of its vendor-status, should there be a change in the constitution of the partners that make up the enterprise⁵⁸.

Section 66(15) of the Income Tax Act demands the partnership produce a joint return in respect of the partnership business, as well as any other information that may occasionally be required by the revenue authorities, and hold each partner separately and individually liable for rendering of the joint return⁵⁹. It is however the South African Revenue Services' practice to accept a copy of the financial statements showing the partnership's total income for the tax year in place of a joint return⁶⁰.

⁵⁰ The Treatment of Partnership Income and Expenditure in South African Tax Law, *supra*, page 8

⁵¹ *ibid*, page 8

⁵² *ibid*, page 8

⁵³ *ibid*, page 8

⁵⁴ *ibid*, page 8

⁵⁵ Act 89 of 1991

⁵⁶ The Treatment of Partnership Income and Expenditure in South African Tax Law, *supra*, page 8

⁵⁷ *ibid*, page 8

⁵⁸ *ibid*, page 8

⁵⁹ *ibid*, page 8

⁶⁰ *ibid*, page 8

Where a partner joins an existing business and is to share in the profits made prior to the conclusion of the partnership agreement, the original owner continues to be liable for tax on the full amount up to the date that the partnership agreement is concluded⁶¹. In ITC 551 (1943)⁶² it was held that even though a partnership agreement can be entered into retrospectively, this will not however affect the above stated precedent since in order for the original owner to escape sole tax liability, he would have to prove that a partnership existed at the time the profits were made and that the conclusion of the partnership agreement merely confirmed that fact.

When calculating the partners' taxable income, it is the Commissioner's practice to first establish the partnership's taxable income, treating it as if it had a separate legal identity, and then to apportion that amount between the partners according to their agreed profit-sharing ratio⁶³. Each partner then pays tax on his share of the partnership income in addition to any additional income earned from other sources, less any rebates or deductions available to him⁶⁴. If the partnership is exposed as having made an assessed loss, each partner can set-off any income arising from another source against his portion (as settled in the partnership agreement) of the loss⁶⁵.

Partners are taxed on their profits, irrespective of their drawings⁶⁶.

Another practice of the Commissioner is treating each partner as a third party in any transactions he may have with the partnership, as set out in the partnership agreement⁶⁷. An example may be partners receiving salaries, rental income or interest on loans from the business - these amounts will be deductible in the calculation of the partnership's taxable income, but will be included in the receiving

⁶¹ *ibid*, page 9

⁶² 13 SATC 204

⁶³ The Treatment of Partnership Income and Expenditure in South African Tax Law, *supra*, page 9

⁶⁴ *ibid*, page 9

⁶⁵ *ibid*, page 9

⁶⁶ *ibid*, page 9

⁶⁷ *ibid*, page 10

partner's separate income calculation⁶⁸. In *COT v Newfield*⁶⁹, a Rhodesian case, the court held that where a partnership paid a partner a salary as compensation for services rendered to the partnership in terms of the partnership agreement, this was not a capital receipt in the form of a loan on capital account, but was instead a receipt representing gross income in the hands of the partner. The Commissioner's treatment therefore clashes with the general principle of law that a partnership is not a separate legal entity⁷⁰.

At the time of dissolution, the partnership accounts will generally be prepared to the period up to that date⁷¹. Taxable income will then be determined by taking into consideration every partner's amount of profit or loss for the period up to the dissolution date⁷².

Where the partnership agreement has provided for the remaining partners of a firm to compensate the outgoing partner for his share in the business, problems relating to accruals and allowed deductions pertaining to profits up until and after the date of dissolution often accompany these clauses⁷³. The question arises, on the one hand whether the outgoing partner is taxable on the share that he received, and on the other hand whether the remaining partners are taxable on the share paid to the outgoing partner⁷⁴.

Taxpayers, as defined, who own aircraft are entitled to deduct the Section 12C allowance for aircraft brought into use for the first time on or after 1 April 1995⁷⁵. Section 12C provides an allowance based on the cost of the asset, to be deducted in the year that the asset is brought into use and for the 5 years thereafter (in the case of new or used assets), 4 years (in the case of new assets brought into use

⁶⁸ *ibid*, page 10

⁶⁹ 1970 (3) SA 422 (RAD)

⁷⁰ The Treatment of Partnership Income and Expenditure in South African Tax Law, *supra*, page 10

⁷¹ *ibid*, page 25

⁷² *ibid*, page 25

⁷³ *ibid*, page 25

⁷⁴ *ibid*, page 25

⁷⁵ Silke: South African Income Tax, Jordaan *et al*, Butterworths, Durban, 2008, Page 147

between 1 July 1996 and 30 September 1999) and 3 years (in the case new assets brought into use on/after 1 March 2002)⁷⁶. In other words, the cost of the asset may be deducted over 5, 4 or 3 years⁷⁷. Only the 5 year deduction is available in the case of aircraft⁷⁸. To qualify for the allowance, the taxpayer must own the asset or have acquired same by means of an instalment credit agreement⁷⁹.

The taxpayers are liable for a recoupment arising on the sale of the aircraft – but in certain circumstances the recoupment can be set off against the cost of replacement aircraft⁸⁰. For an aircraft disposed on or after 22 December 2003, the taxpayer can choose (in terms of the provisions of paragraph 65 or 66 of the Eighth Schedule to the Income Tax Act⁸¹) to provide for a delayed recovery of the recoupment tax⁸². A taxpayer is also entitled to deduct a scrapping allowance on the scrapping of an aircraft⁸³.

In the Supreme Court of Appeal decision of *Chipkin (Natal) (Pty) Ltd v CSARS*⁸⁴, it was held that the taxpayer, which had deducted for tax purposes a portion of the cost of an aircraft purchased by an *en commandite* Partnership in which it was a partner, was obliged to write back the deduction when it disposed of its partnership interest. The basis of the decision was that a partnership is not a taxpayer and that because each partner owned an undivided share in the aircraft (which was a partnership asset), when the taxpayer disposed of its partnership interest it disposed of its share in the aircraft and accordingly recouped the amount it had paid for such share. The argument that a recoupment only occurred when the partnership sold the aircraft was rejected.

⁷⁶ *ibid*, Page 144

⁷⁷ *ibid*, Page 144

⁷⁸ *ibid*, Page 144

⁷⁹ *ibid*, Page 144

⁸⁰ *ibid*, Page 144

⁸¹ Act 58 of 1962

⁸² Silke: South African Income Tax, *supra*, Page 147

⁸³ *ibid*, Page 147

⁸⁴ 190/04 (unreported)

5. THE INVESTMENT DECISION

The decision to acquire an aircraft investment, by forming a partnership or otherwise, must of course be made not only with reference to the legal landscape but to fundamental investment principles. Once the decision to invest has been made, the manner of investment is important.

A potential investor may consider funding his investment with personal equity, with loan capital, or with a combination of debt and equity.

The criteria that would be applied to this decision lies firstly in determining whether the investment is generating a return in excess of the cost of debt. If this is the case, it would make sense for an investor to apply as much debt capital as a financier will allow. Where the quality of the return is not assured, the investor will need to determine the appropriate level of gearing that will take into account the potential volatility in the investment's return. The greater the level of insecurity in the reliability of those returns, the lower the level of gearing that should be considered.

In the instance of aircraft, there are higher levels of risk associated with the investment, *vis-a-vis* other investment options and for this reason investors will need to carefully determine what ratio of debt is appropriate to their personal financial circumstances after taking into account the total exposure that they have to the aircraft venture⁸⁵.

Financiers would prefer to hold the full interest in the aircraft as security, unless they are relying on other assets entirely for their security: In this instance it is usual for the financier to advance loans to the individual partners who are in a position to set their own levels

⁸⁵ Information obtained from Skyinvest Administration (Pty) Ltd

of gearing, based on their risk tolerance and personal circumstances⁸⁶. As a result, in the case of the partnership model of acquisition, the disclosed partner normally arranges the finances for the partners, who all agree to cede their interest in the aircraft to the financier. In this way the funds are advanced to the individual partners, who in turn invest the moneys in the partnership that in turn settles the purchase price of the aircraft⁸⁷.

The financial evaluation of the investment is an important aspect of the investment decision and the return that it is expected to generate should compensate investors for the risks that the investment is anticipated to generate⁸⁸. In the past, many investors were attracted to this investment due to the very attractive tax incentives that applied at the time⁸⁹. Since these tax advantages have largely been removed by the tax authorities, it can be safely shown that it is unlikely that investors would make an investment into aircraft purely for tax reasons⁹⁰.

Having said this, the onus still lies with the individual investors to prove that they entered into the transaction for commercial reasons and that they can prove this by the steps that they have taken to assure themselves of the financial viability of the venture: Those investors who cannot prove that they were making the investment to generate an income potentially run the risk of any capital gains from income generation that they may make being deemed as income by SARS and taxed accordingly⁹¹. This concept does not only apply to aircraft but reflects the decision making process that the receiver of Revenue can apply. An example of the Receiver deeming capital profits to be taxable as income could arise if the reasons provided by the investor for investing in an aircraft was to hedge against the

⁸⁶ Information obtained from Skyinvest Administration (Pty) Ltd

⁸⁷ Information obtained from Skyinvest Administration (Pty) Ltd

⁸⁸ Information obtained from Skyinvest Administration (Pty) Ltd

⁸⁹ Information obtained from Skyinvest Administration (Pty) Ltd

⁹⁰ Information obtained from Skyinvest Administration (Pty) Ltd

⁹¹ Information obtained from Skyinvest Administration (Pty) Ltd

devaluation of the Rand and that the generation of income was possibly an incidental attraction⁹².

It must be clear in the mind of an investor that he/she is entering into the investment to generate an income flow over an extended period of time that will compensate him/her adequately for the investment that has been made⁹³. The investor should not rely on the fact that there is a depreciation allowance or other tax advantages that may be available, the potential devaluation of the Rand or the ability to sell the aircraft overseas⁹⁴.

The recent changes to legislation which prohibits individuals (not juristic persons) from deducting losses from certain trades from their taxable income does not appear to affect these types of investments: An investment in aircraft is not a "suspect trade" as envisaged in the amended section in the Income Tax Act⁹⁵ as the aircraft is used by persons who are not relatives of the investors⁹⁶.

6. THE NATIONAL CREDIT ACT

Any investor who intends to gear the aircraft investment will have to deal with the requirements of the National Credit Act⁹⁷ ("the National Credit Act").

The Usury Act⁹⁸ and the Credit Agreements Act⁹⁹ have together regulated consumer credit in South Africa for more than a quarter of a century¹⁰⁰. The legislature has considered it wise to replace them with one piece of legislation, aptly named the National Credit Act. The Act is voluminous, with 173 sections and three schedules¹⁰¹. The

⁹² Information obtained from Skyeinvest Administration (Pty) Ltd

⁹³ Information obtained from Skyeinvest Administration (Pty) Ltd

⁹⁴ Information obtained from Skyeinvest Administration (Pty) Ltd

⁹⁵ Act 58 of 1962

⁹⁶ Information obtained from Skyeinvest Administration (Pty) Ltd

⁹⁷ Act 34 of 2005

⁹⁸ Act 73 of 1968

⁹⁹ Act 75 of 1980

¹⁰⁰ The National Credit Act Explained, J M Otto, Butterworths, page 1

¹⁰¹ *ibid*, page 1

20

regulations, which include the prescribed forms under the Act, are equally “impressive” when sheer volume is the criterion¹⁰². The Act, implemented in a piecemeal fashion, became fully operative on 1 June 2007¹⁰³.

The purposes of the Act is:

“to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers”¹⁰⁴.

The purposes set out above are attained by, amongst other things:

- Promoting the development of an accessible credit market, in particular to those people who have historically been unable to access credit;
- Ensuring consistent treatment of different credit products and credit providers;
- Promoting responsibility in the credit market by avoidance of over-indebtedness by consumers and reckless credit granting by credit providers;
- Educating consumers about credit and consumer rights;
- Providing consumers with disclosure of information;
- Protecting consumers against unfair or fraudulent conduct by credit providers and credit bureaux;
- Providing for a system of dispute resolution; and

¹⁰² *ibid*, page 1

¹⁰³ *ibid*, page 1

¹⁰⁴ The National Credit Act 34 of 2005

- Providing for debt restructuring¹⁰⁵.

The National Credit Act protects credit receivers over a wide spectrum and the protection extends to natural as well as juristic persons¹⁰⁶.

Credit providers must register with the National Credit Regulator before they may enter into credit agreements. Small credit providers are exempt from the Act¹⁰⁷.

The National Credit Regulator must police the Act and ensure compliance therewith¹⁰⁸. A National Consumer Tribunal is established by the National Credit Act and it has wide powers to make orders in terms of the Act¹⁰⁹. Its functions are, to a certain extent, comparable to that of a court, but it is not a court as such¹¹⁰.

The National Credit Act confers many rights upon consumers, and precious few on credit grantors - this is not surprising as one of the National Credit Act's aims, if not its main purpose, is to protect consumers¹¹¹.

The National Credit Act protects consumers by granting them *inter alia* the following rights/protective measures:

- The right to apply for credit and non-discrimination;
- The right to understandable language;
- The rights regarding information held by credit bureaux;
- Protection against marketing practices;

¹⁰⁵ The National Credit Act Explained, *supra*, page 6

¹⁰⁶ *ibid*, page 11

¹⁰⁷ *ibid*, page 11

¹⁰⁸ *ibid*, page 11

¹⁰⁹ *ibid*, page 11

¹¹⁰ *ibid*, page 11

¹¹¹ *ibid*, page 49

- Indemnity against lost cards;
- The right to documentation;
- The right to confidentiality and privacy;
- The right to apply for debt review and rearrangement of obligations;
- The right of cooling-off;
- The right of early settlement and prepayments;
- The right to surrender goods; and
- The right to statements of account¹¹².

The National Credit Act covers a variety of credit agreements and regulates the contents thereof. Certain provisions in credit agreements which may be to the detriment of consumers are prohibited, whereas the regulations under the National Credit Act prescribe the terms and provisions that have to be included in agreements in order to disclose the details of the transaction to the consumer¹¹³.

The National Credit Act attempts to prevent over-indebtedness of consumers, and assists them should they run into trouble¹¹⁴. Credit providers are obliged to evaluate a prospective debtor's creditworthiness before credit is extended¹¹⁵. In addition, a debtor who becomes over-committed may apply for a debt review and a

¹¹² *ibid*, page 49

¹¹³ *ibid*, page 11

¹¹⁴ *ibid*, page 11

¹¹⁵ *ibid*, page 11

rescheduling of his debts in order to enable him to pay them over an extended period of time¹¹⁶.

The National Credit Act covers a wide variety of credit agreements, including: direct personal loans, loans secured by mortgage bonds, overdrawn cheque accounts, credit cards, rendering of services, sales and leases of movable goods, and credit guarantees¹¹⁷. Save for certain exemptions which will be pointed out below, the National Credit Act applies to all credit agreements¹¹⁸.

An agreement constitutes a credit agreement if it is:

- A credit facility; or
- A credit transaction; or
- A credit guarantee; or
- Any combination of the above three transactions¹¹⁹.

An Instalment Sale Agreement is a credit agreement.

An Instalment Sale Agreement is an agreement in terms of which a movable thing is sold, the price is to be paid in instalments and the *res vendita* is delivered to the consumer¹²⁰. Ownership is reserved by the seller until the agreement is complied with, or ownership is transferred to the consumer coupled with a right to repossession should the consumer fail to satisfy his financial obligations¹²¹. The well-known instalment sale transaction of a motor vehicle or furniture, in terms whereof the purchaser pays the price over a number of years

¹¹⁶ *ibid*, page 11

¹¹⁷ *ibid*, page 15

¹¹⁸ *ibid*, page 15

¹¹⁹ *ibid*, page 15

¹²⁰ *ibid*, page 18

¹²¹ *ibid*, page 18

by means of monthly instalments, serves as an example of this type of agreement¹²².

A secured loan is another type of credit agreement.

In terms of a secured loan, credit is granted or money is advanced and the credit provider retains, or receives a pledge or cession of the title to any movable property or other thing of value as security for all amounts due¹²³. It is clear that the words "retains or receives a pledge or cession" all refer to the word "title" and can only mean ownership¹²⁴.

In legal theory, it is impossible to pledge or cede ownership, so once again, a meaning must be ascribed to the definition, and it will, as in the case of the definition of a mortgage agreement, be a strained one¹²⁵. In the South African context, where the Act has to be applied, the words used were probably intended to mean the pledge of a movable thing itself, not the pledge of ownership and the definition is also wide enough to cover a cession *in securitatem debiti*¹²⁶.

The National Credit Act does not apply to the following credit agreements, or to agreements concluded under the following circumstances, by the parties described below:

- Agreements in terms whereof the consumer is a juristic person and its asset value or annual turnover, together with that of its related juristic persons, equals or exceeds R1 million;
- Large agreements concluded by a consumer which is a juristic persona with an asset value or annual turnover beneath R1 million (a large agreement is either a mortgage agreement or a

¹²² *ibid*, page 18

¹²³ *ibid*, page 18

¹²⁴ *ibid*, page 18

¹²⁵ *ibid*, page 18

¹²⁶ *ibid*, page 18

credit transaction in terms whereof the principal debt equals or exceeds R250 000)¹²⁷.

The National Credit Act distinguishes between the aforementioned three categories of credit agreements and different rules apply to them. For example, the requirements regarding contents of the agreements, protection of juristic persons and settlement of a debt by advance payment thereof¹²⁸. The thresholds are laid down by regulation¹²⁹.

A credit agreement is an intermediate agreement if it is a credit facility with a credit limit above R15 000, or a credit transaction (except a credit guarantee or pawn transaction or mortgage agreement) and the principal debt under the credit transaction or guarantee falls between R15 000 and R250 000¹³⁰.

A credit agreement is a large transaction if it is a mortgage agreement (regardless of the size), or a credit transaction (except a pawn transaction or credit guarantee) and the principal debt under the credit transaction or guarantee equals or exceeds R250 000¹³¹.

7. REGULATORY ISSUES

Air Law is the body of rules governing the use of airspace, the benefits of such airspace for aviation and the nations of the world¹³². The "body of rules" which governs the airspace and makes up air law consists of the following rules/laws:

- Multilateral conventions;

- Bilateral agreements;

¹²⁷ *ibid*, page 24

¹²⁸ *ibid*, page 27

¹²⁹ *ibid*, page 27

¹³⁰ *ibid*, page 27

¹³¹ *ibid*, page 27

¹³² An Introduction to Air Law, IH Diederiks-Verschoor, Second Edition, Kluwer, Page 1

- National law;
- Contracts between states and airline companies; and
- Contracts between airline companies¹³³.

The Paris Convention was the first legal instrument to enter into force in the field of air law¹³⁴. It was ratified by 32 nations and its principal achievement was that it achieved complete and exclusive sovereignty of states over the airspace above a particular territory, in conformity with the Roman adage:

*"Cujus est solum, ejus est usque ad coelum et ad inferos"*¹³⁵.

In order to achieve a certain degree of uniformity some technical annexes were added to the Paris Convention, dealing with such matters as standards of airworthiness, certificates of competency for crew members, etc¹³⁶.

The Convention also established, in its Article 34, the CINA - The Commission Internationale de la Navigation Aérienne, which was granted far-reaching regulatory powers chiefly directed towards technical matters¹³⁷. Other functions listed in Article 34 was the centralised gathering and publication of information on air navigation, and the rendering of advice on matters submitted to it by member states¹³⁸.

The Paris Convention contained the first generally accepted definition of the term 'aircraft', the rather sweeping definition included aircraft, airships, gliders, free balloons, barrage balloons and helicopters – the

¹³³ *ibid*, page 1

¹³⁴ *ibid*, Page 4

¹³⁵ *ibid*, Page 4

¹³⁶ *ibid*, Page 4

¹³⁷ *ibid*, Page 4

¹³⁸ *ibid*, Page 4

criterion which should have been given preference is whether the machine has any lift¹³⁹.

The Paris Convention was followed by the Ibero-American Convention, concluded at Madrid in 1926¹⁴⁰. The latter contained provisions largely similar to those of the Paris Convention, provisions which were also recognised, however, by several Latin-American states invited for the purpose by the Spanish Government¹⁴¹.

In 1927, the United States initiated the drafting of an air navigation Convention for the Americas, the Pan-American Convention - this Convention was signed in Havana in 1928¹⁴².

All these Conventions have since been replaced by one single Convention, the well-known Chicago Convention: but it should always be remembered that this comprehensive international agreement owes much to its predecessors¹⁴³.

The principle organisations in aviation law are as follows:

- The 'Comite' International Technique d'Experts Juridiques Aériens' (CITEJA): During the first International Conference of Private Air Law, which was held in 1925, a "Comite International Technique d'Experts Juridiques Aériens" was called into being – which consisted of numerous legal committees, each of them charged with studying a particular subject related to air law, for instance the carrier's liability, mortgage of aircraft, etc¹⁴⁴. After a preliminary draft Convention had been completed, it was submitted to a diplomatic conference, and following approval of the text by

¹³⁹ *ibid*, Page 4

¹⁴⁰ *ibid*, Page 5

¹⁴¹ *ibid*, Page 5

¹⁴² *ibid*, Page 5

¹⁴³ *ibid*, Page 6

¹⁴⁴ *ibid*, Page 6

this body it was opened for signature by the states¹⁴⁵. CITEJA was concerned in particular with private law issues¹⁴⁶;

- The 'Commission Internationale de la Navigation Aérienne' (CINA): Both CITEJA (mentioned earlier) and CINA have been instrumental in laying the foundations of air law and were eventually incorporated in ICAO, the International Civil Aviation Organisation¹⁴⁷;

- PICAO, ICAO and IATA: Towards the end of Second World War, at a time when a spectacular expansion in world air traffic was about to take place, the Provisional International Civil Aviation Organisation (PICAO) was set up, as a forerunner of ICAO, which is still playing an outstanding role in world aviation matters¹⁴⁸. The latter was created in 1947, and it grew finally to become a body of official representatives of a number of nations now totalling more than 150¹⁴⁹. Note should be taken of the fact that ICAO is quite distinct in nature and origin from IATA, the International Air Transport Association, which is a purely private organization originally started in 1919 by six private airline companies¹⁵⁰. Both organisations are leading organisations in aviation matters¹⁵¹. ICAO became a Specialised Agency of the United Nations soon after its creation - its daily business is run by a Council, a permanent body which performs a variety of duties in the legal technical and recently also in the economic field¹⁵². It operates under the supervision of an Assembly with important budgetary powers¹⁵³. ICAO also has a Legal Committee, which is charged with preparing and drafting International treaties and

¹⁴⁵ *ibid*, Page 6

¹⁴⁶ *ibid*, Page 6

¹⁴⁷ *ibid*, Page 6

¹⁴⁸ *ibid*, Page 7

¹⁴⁹ *ibid*, Page 6

¹⁵⁰ *ibid*, Page 6

¹⁵¹ *ibid*, Page 6

¹⁵² *ibid*, Page 6

¹⁵³ *ibid*, Page 6

Conventions on air law prior to their submission to a Diplomatic Conference for final approval - the Legal Committee has taken over its duties from the former CITEJA and CINA¹⁵⁴.

Like ICAO, which is an organization of government representatives, IATA is a private organization of airlines designed to promote safe, regular and economical air transportation¹⁵⁵. IATA has strong ties with the governments involved in aviation matters and wields considerable influence internationally, for instance in fixing tariffs¹⁵⁶. Nearly all scheduled airline companies are represented in IATA - since 1974 charter airline companies can also qualify for admission, but none of them have so far availed themselves of this opportunity: they have, it would seem, preferred to remain members of their own organizations which are listed below¹⁵⁷:

- The National Air Carrier Association (NACA), an association of American air charter companies;
- The International Air Charter Association (IACA), comprising 13 independent European and American charter companies, established in June 1971;
- The Air Charter Carriers Association (ACCA), established in September 1971 and in which 12 European companies are represented.

Other organizations worth mentioning in this paragraph are the International Federation of Air Line Pilots Associations (IFALPA) and the International Union of Aviation Insurers, which was founded in 1934 - both these organizations, along with others, are represented at the ICAO Legal Committee's preparatory sessions in order to ensure

¹⁵⁴ *ibid*, Page 6

¹⁵⁵ *ibid*, Page 6

¹⁵⁶ *ibid*, Page 6

¹⁵⁷ *ibid*, Page 7

the best possible adaptation of Convention texts to current aviation practice¹⁵⁸.

On the 7th December 1944 50 states signed the Chicago Convention together with the two agreements annexed to it - The International Air Services Transit Agreement and the International Air Transport Agreement. At present, no less than 150 states have ratified or acceded to the Convention, while the Transit Agreement (unlike the Transport Agreement) has also been signed or ratified by a large number of states¹⁵⁹. On 24th September 1968, a Protocol was concluded in Buenos Aires and attached to the Chicago Convention, whereby French and Spanish texts were added¹⁶⁰. In 1977 the same status was accorded to the Russian text - as a result four texts are now authentic¹⁶¹. To the Convention have been added 18 Annexes which give technical rules in implementation of its Articles - they are titled as follows:

- Personnel Licensing;
- Rules of the Air;
- Meteorological Service for International Air Navigation;
- Aeronautical Charts;
- Units of Measurement to be Used in Air and Ground Operation;
- Operation of Aircraft';
- Aircraft Nationality and Registration Marks';
- Airworthiness of Aircraft;

¹⁵⁸ *ibid*, Page 8

¹⁵⁹ *ibid*, Page 10

¹⁶⁰ *ibid*, Page 10

¹⁶¹ *ibid*, Page 10

- Facilitation;
- Aeronautical Telecommunications;
- Air Traffic Services;
- Search and Rescue;
- Aircraft Accident Investigation;
- Aerodromes;
- Aeronautical Information Services;
- Environmental Protection;
- Security; and
- Safe Transport of Dangerous Goods by Air¹⁶².

One of the fundamental principles underlying the Convention is the fact that all states should be able to participate in air transportation on a basis of equality¹⁶³. The Convention's preamble provides a pointer in that direction, since it refers to the good faith of states in their dealings with each other and to the regard for equal opportunity and participation – the implementation of this principle, however, is hampered by the limitations of rights states can impose upon each other¹⁶⁴.

One of the major problems encountered by the type of international conventions cited above is the extent to which their provisions do not comply with national law of member states. This problem is illustrated

¹⁶² *ibid*, Page 10

¹⁶³ *ibid*, Page 11

¹⁶⁴ *ibid*, Page 11

with reference to a decision of the German Federal Supreme Court reported under the citation BGH VII ZR 105/81165: In its decision the court ruled that several terms of the IATA Recommended Practice 1013: General Conditions of Carriage (Passenger) to be inconsistent with the German Standard Contract Terms Act (*Gesetz zur Regelung des Rechts der Allgemeinen 2 Geschäftsbedingungen, AGBG*) and thus to be inadmissible within the scope of German law.

8. THE PUBLIC LIABILITY OF THE OWNER AND CARRIER

It was the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, dating back to 1929, which firmly established and elaborated, as one of its major tenets, the principle of the air carrier's liability for damage caused to passengers, baggage and goods, and also for damage caused by delay¹⁶⁶.

The rules of the Warsaw Convention are being applied all over the world and have demonstrated their reliability and usefulness - the passenger knows that, wherever and whenever he flies, there is a certain degree of uniformity in the rules of governing the carriers' liability, while the carrier, being aware of the extent of his liability, can make arrangements to insure himself against possible losses¹⁶⁷.

Article 17 of the Convention states that the carrier is liable for damage sustained in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger¹⁶⁸.

Article 18 of the Convention provides that the carrier is also liable for damage to checked baggage or goods¹⁶⁹. Moreover, in Article 19, the carrier has been made liable for damage occasioned by delay in the carriage of passengers, baggage or goods by air¹⁷⁰.

¹⁶⁵ Published in BGHZ 86, 284

¹⁶⁶ An Introduction to Air Law, *supra*, Page 45

¹⁶⁷ *ibid*, Page 45

¹⁶⁸ *ibid*, Page 54

¹⁶⁹ *ibid*, Page 54

¹⁷⁰ *ibid*, Page 54

It should be emphasised at this point that the rules of the Convention are applicable exclusively in the sphere of transportation: they do not, for instance, cover manufacturers or air traffic controllers; the liability of the latter will be governed by civil law, or common law, as the case may be¹⁷¹.

The contract of carriage puts the carrier under an obligation to affect the transport without damage and without delay, so the carrier is compelled to accomplish the transport within a reasonable period of time¹⁷². The legal basis of the liability of the carrier is a 'fault liability', but with a 'reversed' burden of proof, which means that the onus of proof lies with the carrier¹⁷³. The arrangement reflects a *quid pro quo* in the sense that the authors of the Convention have chosen to place the burden of proof on the carrier's shoulders in return for the passenger losing the benefit of unlimited liability of the carrier¹⁷⁴. The fact that in 1929 an aeroplane was still rather a novelty as a means of transport must be taken into account in judging the merits of this arrangement¹⁷⁵. Of course, the passenger can at all times safeguard his interests by taking out insurances¹⁷⁶.

Article 20 of the Convention states that the carrier is not liable if he proves that he and his employees have taken all necessary measures to avoid the damage, or that it was impossible for him, or them, to take such measures¹⁷⁷. The various types of acts which may be regarded as constituting 'necessary measures' has been left to the discretion of the courts¹⁷⁸.

The Convention mentions four courts that have jurisdiction to hear a claim:

¹⁷¹ *ibid*, Page 54

¹⁷² *ibid*, Page 54

¹⁷³ *ibid*, Page 54

¹⁷⁴ *ibid*, Page 54

¹⁷⁵ *ibid*, Page 54

¹⁷⁶ *ibid*, Page 54

¹⁷⁷ *ibid*, Page 54

¹⁷⁸ *ibid*, Page 54

- The court having jurisdiction at the place where the carrier is resident (the court of domicile);
- The court having jurisdiction at the place where the carrier has its principal place of business;
- The court having jurisdiction at the place where the carrier maintains an establishment through which the contract has been made;
- The court having jurisdiction at the place of destination¹⁷⁹.

In 1955, the Diplomatic Conference of the Hague proposed the adoption of a protocol to amend the Warsaw Convention – since some practical and legal problems had become evident in the application of the convention in the rapidly expanding world of aviation¹⁸⁰. The Hague Protocol included a number of improvements to the text of the Warsaw Convention – the most conspicuous of which were:

- The increase in the limit of liability for passengers; and
- An amendment that prevented carriers from having recourse to exclusions based on the carrier's wilful misconduct or gross negligence¹⁸¹.

The United States did not ratify the convention – due mainly to the limit placed on passenger claims¹⁸². The United States is however a signatory of the Montreal Agreement of 1966 – intended as a temporary solution to the impasse in respect of the Warsaw Convention.

¹⁷⁹ *ibid*, Page 64

¹⁸⁰ *ibid*, Page 68

¹⁸¹ *ibid*, Page 69

¹⁸² *ibid*, Page 76

Neither the Warsaw Convention nor the Hague Protocol attempted to define the term carrier – leaving some uncertainty as regards the position of the charter market that was growing dramatically around the world¹⁸³. Hence, the Guadalajara Convention (a supplementary convention to the Hague Protocol) was adopted in 1961¹⁸⁴ - providing for a version of the Warsaw Convention for the private charter market.

In the past few years, the issue that has uniformly garnered the most attention by international air carriers and the courts in the United States, Australia, Canada and Great Britain has been the alleged liability for Deep Vein Thrombosis (“DVT”) injuries incurred while one is a passenger travelling on an international flight: Since December 2005, the date of a seminal decision of the British House of Lords, the trend has clearly emerged that passengers cannot hold air carriers liable as a result of DVT incidents occurring on international routes governed by the Warsaw Convention¹⁸⁵. The Deep Vein Thrombosis and Air Travel Group Litigation¹⁸⁶ was a matter in which twenty-four plaintiffs sued eighteen airlines around the world: The House of Lords ruled in favour of the air carriers upholding the rulings of its lower courts¹⁸⁷.

In reaching its conclusion, the House of Lords noted the importance of international uniformity in interpreting the Warsaw Convention¹⁸⁸. In introductory comments and as a good hint as to which way the court was going to rule, the opinion noted that one of the goals of the Convention was to “bring some order” to the internal laws governing international air travel¹⁸⁹.

¹⁸³ *ibid*, Page 69

¹⁸⁴ *ibid*, Page 73

¹⁸⁵ The Future of International Air Carrier DVT Claims: Is the End Near?, Nelson Mullins Riley & Scarborough LLP, Provided by World Services Group

¹⁸⁶ UKHL 72 (2005)

¹⁸⁷ The Future of International Air Carrier DVT Claims: Is the End Near?, *supra*

¹⁸⁸ *ibid*

¹⁸⁹ *ibid*

The development of aviation law in South Africa has paralleled the growth and development of the aviation industry. Certain concepts, which originated in legal principles established early in the 20th Century at the birth of the aviation industry, have been maintained and integrated with the new legal features of modern aviation.

The South African aviation legal framework is to be found in the international treaties referred to above, as well as the domestic legislation and regulations, such as:

- The Carriage by Air Act of 1946 - which gives effect to the Warsaw Convention of 1929, in re the liability of carriers in international carriage and has facilitated the determination of legal issues and disputes in relation to a foreign jurisdiction, limitation of liability and successive carriage by more than one operator;
- The International Air Services Act of 1993 - which lays down the procedure to be followed when applying for international air service licences;
- The Air Services Licensing Act of 1990 - which stipulates the requirements for authority to conduct an air service within the boundaries of the Republic of South Africa;
- The Aviation Act of 1962 - in terms of which the Chicago Convention and the International Air Services Transit Agreement became part of South African Municipal Law;
- The Convention on the International Recognition of Rights in Aircraft Act of 1993 - which provides for the manner in which aircraft or shares in aircraft are mortgaged and for the legal effects of such mortgaging;

- The Civil Aviation Offences Act of 1972 - which gives effect to the Convention for the Suppression of Unlawful Seizure of Aircraft and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation¹⁹⁰.

The international and National legislation, conventions and regulations do create a minefield for the unwary. The potential investor would do well to be mindful of the regulatory demands of the aviation world – which demands are taxing.

9. THE ACQUISITION OF THE AIRCRAFT: COMMON LAW PRINCIPLES

When parties with the requisite intention agree that the one will make something available to the other in return for payment of a purchase price, the contract is one of sale¹⁹¹.

This contract of sale may contain provisions dealing with a variety of issues that are not essential to the contract of sale¹⁹². All that is essential in non-statutory law is that there be agreement, which need not be in writing, on the thing sold and the purchase price to be paid¹⁹³. In the absence of agreement on these two issues, there is no contract of sale¹⁹⁴.

Statutory law requires formalities in certain contracts¹⁹⁵.

The purchase and sale of aircraft is not governed by statutory law and hence compliance with statute and the requisite formalities is not necessary.

¹⁹⁰ An Introduction to Air Law, *supra*, Page 73

¹⁹¹ The law of Sale and Lease, AJ Kerr, Third Edition, Butterworths, 2004, Page 3

¹⁹² *ibid*, Page 3

¹⁹³ *ibid*, Page 3

¹⁹⁴ *ibid*, Page 3

¹⁹⁵ *ibid*, Page 3

In the law of sale, the thing to be sold can be movable and immovable, or corporeal and incorporeal, provided that the thing to be sold is not already the purchaser's property and that is capable of being subject to a private legal contract of sale (in other words, the thing must not be *res extra commercium*)¹⁹⁶.

Apart from legislative requirements, the amount of detail in a contract in relation to the thing sold may vary according to the wishes of the parties¹⁹⁷. Specifications, as in the case of aircraft, may be long and complicated or can be as simple as using the name of the aircraft that is the subject of the sale¹⁹⁸.

When the word "new" is used to describe the subject matter of a sale, or the *merx*, the thing sold is said to be in its pristine original state¹⁹⁹. Whether or not the thing sold is new may be the essence of the contract, since the purchaser may wish to buy a new car or (in this case) aircraft. Parties would usually expressly stipulate in the contract of sale the nature of the *merx* as to it being new or used. The category may also be implied and clear from the circumstances²⁰⁰. If one purchased a thing from a shop other than an antique shop, it would usually be a tacit term of the contract that the thing sold would be new²⁰¹.

If the thing sold is not in accordance with the representations made as to age, the seller is guilty of misrepresentation and the purchaser, if the misrepresentation induced the contract, is entitled to the usual remedies available in the case of misrepresentation²⁰².

If the identity of thing sold is not certain or ascertainable – there is no contract of sale²⁰³.

¹⁹⁶ *ibid*, Page 8

¹⁹⁷ *ibid*, Page 11

¹⁹⁸ *ibid*, Page 11

¹⁹⁹ *ibid*, Page 12

²⁰⁰ *ibid*, Page 14

²⁰¹ *ibid*, Page 14

²⁰² *ibid*, Page 15

²⁰³ *ibid*, Page 22

A thing still to be manufactured, like an aircraft that is ordered from a specification sheet, may be and often is the subject of sale agreements. This type of contract is known as an *emptio rei speratae*²⁰⁴. This type of contract must be distinguished from a sale agreement that has as its subject matter a hope (or *spes*) of a thing coming into existence²⁰⁵. This type of contract is valid even if nothing comes into existence²⁰⁶.

The basic rule on agreement on the price of a thing is as follows:

“It is a general rule in our law that there can be no valid contract of sale unless the parties have agreed, expressly or by implication, upon a purchase price. They may do so by fixing the amount of the price in their contract or they may agree upon some external standard by the application whereof it will be possible to determine the price without further reference to them”²⁰⁷.

In the law of sale, two statutes are of particular importance: the Alienation of Land Act²⁰⁸ and the Credit Agreements Act.

Besides the actions based on intentional, negligent and fraudulent misrepresentation and the action based on the implied warranties in a contract of sale, the remedies available to a purchaser are known as the *aedilition* actions, hand me downs from Roman Law known as the *actio rehibitoria* and the *actio quanti minoris*²⁰⁹. It is to be noted that the actions are available to both parties to a contract of sale²¹⁰.

²⁰⁴ *ibid*, Page 26

²⁰⁵ *ibid*, Page 27

²⁰⁶ *ibid*, Page 27

²⁰⁷ *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering* 1986 2 SA 555 (A) at 574

²⁰⁸ Act 68 of 1981

²⁰⁹ The law of Sale and Lease, *supra*, Page 109

²¹⁰ *ibid*, Page 109

The *actio rehibitoria* is an action for the setting aside of the contract of sale and the restitution of what was performed under the contract, so far as this is possible, when the *merx* is defective or diseased or the *merx* is sold in contravention of what was stated and promised²¹¹. The defects must have existed at the time of the sale and must be what are known as the “aedilician defects” – defects that can be classified in one of two respects:

- The class of goods into which the thing sold falls; and
- The purpose for which the thing is, or is deemed, to be sold²¹².

The first category is best illustrated by the statement that:

*“if, for example, he elects to pay a lower price or a thing made of pewter he cannot complain that it is defective merely because it cannot withstand the same wear as a similar object made of steel”*²¹³.

The test to be applied is whether the defect is of the type or nature that a reasonable man would not expect to exist in other article of a similar identity²¹⁴.

The basis of the second category is that a circumstance which would normally be described as a defect does not ground an adilitian action if it presents no handicap to using the thing sold for the purpose for which the thing was sold²¹⁵. Sometimes the purpose for which the thing was purchased is communicated to the seller or it can be inferred from the context in which the sale transaction takes place²¹⁶.

²¹¹ *ibid*, Page 114

²¹² *ibid*, Page 117

²¹³ Curtinacrafts (Pty) Ltd v Wilson 1969 4 SA 221 (E)

²¹⁴ Curtinacrafts (Pty) Ltd v Wilson 1969 4 SA 221 (E)

²¹⁵ The law of Sale and Lease, *supra*, Page 119

²¹⁶ *ibid*, Page 120

The judge in the *locus classicus* case of *Holmdene Brickworks (Pty) Ltd v Roberts Construction Company Ltd*²¹⁷ stated at 683H:

"In this context a defect may be described as an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the res vendita for the purpose for which it has been sold or for which it is commonly used".

If a thing was sold in contravention of what was said and promised, the *actio rebibitoria* lies whether or not what was said or promised referred to diseases or defects²¹⁸. The definition of the *dictum et promissum* was succinctly stated in the *locus classicus* decision of *Phame (Pty) Ltd v Paizes*²¹⁹ at 418A:

"a material statement made by the seller to the buyer during the negotiations bearing on the quality of the res vendita and going beyond mere commendation".

The *actio quanti minoris* is the action for return of a portion of the purchase price²²⁰.

10. THE AIRCRAFT: THE CONCEPT OF PROPERTY

The concept of "property" in private law broadly has two meanings: the right in a legal object and the object to which the right relates²²¹.

The recent developments in our constitutional law, pursuant to the incorporation of clauses protecting and regulating property as a fundamental right in the interim constitution²²² and the final constitution of 1996²²³, has brought a new significance to the term

²¹⁷ 1977 3 SA 670 (A)

²¹⁸ The law of Sale and Lease, *supra*, Page 124

²¹⁹ 1973 3 SA 397 (A)

²²⁰ The law of Sale and Lease, *supra*, Page 127

²²¹ The Law of Property, Silberberg & Schoeman *et al*, 5th edition, Lexisnexis Butterworths, 2006, Page 9

²²² Act 200 of 1993

²²³ Act 108 of 1996

“property” in our law. Accordingly, “property” for the purposes of South African Law extends beyond the two categories mentioned above²²⁴.

A right is a claim of a legal subject to a legal object as against other person/s²²⁵. Property in the sense of rights is traditionally seen as either ownership or real rights, but may also be perceived in the wider sense to include patrimonial rights – such as personal rights and immaterial property rights²²⁶. Patrimonial rights are rights having patrimonial value – and refer to right to patrimonial objects. Patrimonial objects have economic or material value²²⁷. Things, immaterial property and performances are patrimonial objects²²⁸. The right to things, immaterial property and performances are called real rights, personal rights and immaterial property rights²²⁹. To these rights may be added statutory rights granted by the legislature to a party to an agreement²³⁰.

Property, in the sense of objects of rights, is generally limited to corporeal things, but may also include, other patrimonial objects such as immaterial property and performances. In terms of the constitutional property clause, “property” includes corporeals and the private law patrimonial objects and patrimonial rights serving the function of patrimonial objects (namely incorporeals)²³¹. The meaning of property in section 25 of the Constitution is clearly stated not to be limited to land²³².

It is a fundamental principle in our law that ownership of a corporeal movable must, like ownership of land lie at the heart of the constitutional concept of property, both as regards the nature of a

²²⁴ The Law of Property, *supra*, Page 9

²²⁵ *ibid*, Page 9

²²⁶ *ibid*, Page 9

²²⁷ *ibid*, Page 9

²²⁸ *ibid*, Page 9

²²⁹ *ibid*, Page 9

²³⁰ *ibid*, Page 9

²³¹ *ibid*, Page 11

²³² *ibid*, Page 11

right involved as well as the object of the right and that it must therefore enjoy constitutional protection as “property”²³³.

As suggested above, “Property” for purposes of private and constitutional law may be divided into patrimonial rights and patrimonial objects²³⁴. The terms “property rights” and “objects of property rights” may also be used. The scope of the private law of property focuses mainly, but not exclusively, on real rights to things, things and real rights serving as the object of limited real rights²³⁵. As indicated, however, the influence of constitutional and public law is becoming increasingly important in determining the scope of property law²³⁶. In the context of expropriation and regulation of property in terms of section 25 of the Constitution, statutory rights against the state to certain resources or performances have also become important²³⁷.

The following patrimonial rights or property rights with corresponding legal objects may be distinguished, namely:

- A real right: A right to a thing, a thing being an independent corporeal object (other than human beings) which is susceptible to legal control and which is valuable and useful to a persona;
- A personal right: A right to performance, performance being an act in the form of delivering something, doing or not doing something which one person can require a particular other person to perform;
- An immaterial property right: A right to immaterial property, immaterial property being the intangible expression of human

²³³ *ibid*, Page 11

²³⁴ *ibid*, Page 23

²³⁵ *ibid*, Page 23

²³⁶ *ibid*, Page 23

²³⁷ *ibid*, Page 23

skills, or inventions of the human mind, embodied in a tangible agent and which by law allotted to their authors;

- A limited real right to other patrimonial rights (serving as legal objects) such as real rights, personal rights and immaterial property rights;
- A statutory right: A right granted by the legislature to a party to an agreement to claim performance from the other party to the contract - performance in this instance is also an act in the form of delivering something (*dare*, *facere*, or *non facere*) which one person can require a particular person to perform;
- A statutory right against the state to certain resources or performances.

The term co-ownership, joint ownership or ownership in common, denotes that two or more persons own a thing at the same time in undivided shares, that is to say, each co-owner has the rights to a share in the entire thing, but the various shares need not be equal²³⁸.

Co-ownership may be created in numerous ways, for example as the result of a contract, bequest, marriage in community of property, partnership or by mixing (*commixtio*)²³⁹. Thus co-ownership may either be the result of some other legal relationship between the parties, for example a partnership, so-called "bound co-ownership" (*gebonde mede-eiendom*) or it may constitute the only legal relationship between the parties, so-called "free co-ownership" (*vrye mede-eiendom*)²⁴⁰.

Joint ownership covers various legal relationships in so far as the business partners and members of an unincorporated association

²³⁸ *ibid*, Page 133

²³⁹ *ibid*, Page 133

²⁴⁰ *ibid*, Page 133

(other than a *universitas*) are also co-owners of the property said to be owned by the partnership or the association²⁴¹.

The rights of partners and of members of an association are regulated by agreement which is designed to be more or less permanent and, although it is generally said that a partnership and an association have no separate legal personality (that is, rights and duties) apart from their members, there is no doubt that they have a limited ad hoc personality for certain purposes²⁴².

Co-owners may (although no co-owner can be compelled to do so) regulate their rights and duties in respect of the joint property by agreement - if such an agreement is concluded the dividing line between co-ownership per se and a partnership or other association is not always easy to draw²⁴³. But there is no doubt that as a matter of law co-ownership in itself cannot be equated with partnership, the latter being wider in ambit²⁴⁴. Partners may very well be co-owners of the property owned by the partners, but the converse does not apply in the absence of evidence clearly establishing this²⁴⁵.

As all co-owners are entitled to a share in the whole property, it is obvious that no co-owner has a right to destroy (*ius abutendi*) it and neither may one co-owner prevent any other co-owner from using the joint property reasonably and in proportion to his or her undivided share²⁴⁶. In *Erasmus v Afrikander Proprietary Mines Ltd* Trengrove J stated the law as follows:

"In the event of any dispute about the conduct of a co-owner and the manner in which he has made use of the joint property, the Court would have to consider whether the conduct complained of constitutes an unreasonable use, inconsistent

²⁴¹ *ibid*, Page 133

²⁴² *ibid*, Page 133

²⁴³ *ibid*, Page 133

²⁴⁴ *ibid*, Page 133

²⁴⁵ *ibid*, Page 133

²⁴⁶ *ibid*, Page 133

with the use to which the property was destined and to the detriment of the rights of the other co-owner, and, unless a co-owner's user of the joint property can be so described, interdict proceedings against him will not succeed."²⁴⁷

However, a co-owner cannot introduce an "innovation or change in the nature of the occupation of the land" without the consent of the co-owners²⁴⁸. Similarly a co-owner cannot permit strangers to share in the use of the property without the consent of all the other co-owners²⁴⁹.

A co-owner can only make such use of the joint property as constitutes ordinary and normal use thereof as the co-owners intended to be made of it by special agreement²⁵⁰. Every co-owner has the right freely and without reference to co-owners to alienate his or her share or part of his or her share subject of course to the provisions of the Subdivision of Agricultural Land Act²⁵¹ or agreement to the contrary.

11. DELIVERY OF THE PROPERTY

Delivery of property to a purchaser mostly involves an actual physical handing over of a thing, in which case we refer to actual delivery (*traditio vera*)²⁵². Delivery may, however, also involve changes in possession without any physical handing over taking place, based on changes in the intentions of the parties involved²⁵³. The so-called 'constructive' forms of delivery are especially important where actual physical handing over of a thing is not possible, for example in the case of aircraft²⁵⁴.

²⁴⁷ 1976 1 SA 950 (W)

²⁴⁸ The Law of Property, *supra*, Page 134

²⁴⁹ *ibid*, Page 135

²⁵⁰ *ibid*, Page 135

²⁵¹ *ibid*, Page 135

²⁵² *ibid*, Page 180

²⁵³ *ibid*, Page 180

²⁵⁴ *ibid*, Page 180

In the delivery of property arising out of/pursuant to a sale agreement, the thing or *merx* is physically handed over by the transferor to the transferee, while their intentions determine the nature of the real right which the latter obtains in it, *in casu* the right of ownership²⁵⁵.

The term "*traditio ficta*" or "constructive delivery" is applied to various methods of transferring ownership (or some other real right) by which no actual, physical handing over of the thing concerned takes place²⁵⁶. Constructive delivery is useful where the objects at stake cannot be handed with ease or where the circumstances of the particular case exclude physical delivery or renders it impractical²⁵⁷. Since the physical element of transfer is less obvious in such cases, and publicity of the transactions may thereby be impaired, additional requirements must be met in order for a delivery to qualify as "constructive"²⁵⁸. South African common law recognizes five different forms of constructive delivery, based on Roman Law and English law:

- symbolic delivery (*traditio symbolica*) - the concept of symbolic delivery is appropriately applied to all those transactions in which the transferor supplies the transferee with the means which will enable the latter to deal with the property in which he or she is supposed to have acquired a real right - in these cases the thing is neither handed over nor pointed out²⁵⁹;
- delivery with the long hand (*traditio longa manu*): Delivery with the long hand is a form of delivery which is most suitable and common when the goods to be delivered are so large or bulky that it is difficult to move (for example, a load of timber, stones in a quarry)²⁶⁰. Since no obvious change in possession occurs, strict requirements are set for this mode of acquisition and resort to it in respect of 'portable' movables would need some

²⁵⁵ *ibid*, Page 180

²⁵⁶ *ibid*, Page 180

²⁵⁷ *ibid*, Page 181

²⁵⁸ *ibid*, Page 181

²⁵⁹ *ibid*, Page 181

²⁶⁰ *ibid*, Page 182

very special explanation²⁶¹. The thing to be delivered must not only be placed within sight of the acquirer, but he or she must also be placed in a position to exercise physical control in respect of it²⁶²;

- delivery with the short hand (*traditio brevi manu*): Delivery with the short hand occurs when the intended transferee is already in possession of the thing in respect of which he or she will acquire ownership – for example as a lessee, borrower or depositary²⁶³. If the thing in question is now donated or sold to the transferee it is not necessary that there should be a further act of actual physical delivery for ownership to pass²⁶⁴. The original delivery serves for the second transaction between the parties and everything done at the time of the first transaction is considered to be done again at the time the second transaction is concluded²⁶⁵. Ownership passes as soon as the parties have the requisite intention to transfer and acquire ownership respectively, provided that all the other general requirements for the derivative acquisition of real rights are met, including delivery of the *merx*²⁶⁶;

- Delivery by *constitutum possessorium* denotes a form of delivery in which the transferor retains physical control over the thing in which he or she has agreed to transfer ownership (or another real right, excluding pledge) to the transferee, and only his or her mental attitude towards it undergoes a change²⁶⁷.

Possession can be described as a compound of a physical situation and a mental state involving the physical control (*corpus*) of a thing by a person and that person's mental attitude (*animus*) towards that

²⁶¹ *ibid*, Page 182

²⁶² *ibid*, Page 183

²⁶³ *ibid*, Page 184

²⁶⁴ *ibid*, Page 184

²⁶⁵ *ibid*, Page 184

²⁶⁶ *ibid*, Page 185

²⁶⁷ *ibid*, Page 188

thing²⁶⁸. It is also described as a factual, physical, corporeal relationship between a legal subject and a thing²⁶⁹. Although the minimum requirements of physical control and a specific mental attitude always need to be in place to constitute possession, the exact content of possession will depend on the context in which and the purpose for which it is used (Since physical control is essential, possession relates intrinsically to corporeal things)²⁷⁰. However, the law has also recognized quasi-possession relating to incorporeals, for example rights, with the intention of exercising the necessary control in these instances²⁷¹.

One also needs to draw a distinction between a *ius possidendi*, the right to possession, and a *ius possessionis*, the entitlements and privileges flowing from the mere fact of possession²⁷².

To acquire possession, effective physical control must be exercised over the thing concerned. Possession of both movable and immovable things can be acquired by either delivery (*traditio*), appropriation or occupation (*occupatio*)²⁷³. In the case of delivery, the physical element consists in the actual handing over of the thing by the existing possessor to the acquirer of possession, except in the case of the fictitious forms of delivery where the physical element takes on a less conspicuous form²⁷⁴. Appropriation or occupation is a unilateral method of acquiring possession, the physical element consisting in the taking of a thing, whether possessed or unpossessed, without the co-operation of a previous possessor²⁷⁵.

The measure of physical control required to acquire possession of a thing will depend on various factors, such as the nature and purpose of the thing - the nature of a thing will to some extent determine what

²⁶⁸ *ibid*, Page 273

²⁶⁹ *ibid*, Page 273

²⁷⁰ *ibid*, Page 273

²⁷¹ *ibid*, Page 273

²⁷² *ibid*, Page 273

²⁷³ *ibid*, Page 276

²⁷⁴ *ibid*, Page 276

²⁷⁵ *ibid*, Page 276

kind of control is needed. Aspects that would play a role are whether the thing is a movable or immovable thing, and whether it is small and manageable compared to a large unwieldy object²⁷⁶.

12. LEGAL REMEDIES

Ownership of aircraft for investment, by a partnership or otherwise, requires the conclusion of a number of agreements with third parties. The operation and maintenance of the aircraft is usually undertaken by third parties with whom complex service level agreements are generally concluded. In the course of these transactions, it will no doubt be necessary at some stage for the aircraft owner/s to have resort to the legal remedies available in South Africa to enforce financial and non-financial obligations. South African law provides various procedures to both debtor and creditor for the enforcement of both financial and non-financial obligations²⁷⁷.

In the case of the Creditor – he can:

- Issue Summons claiming the debt due, together with interest and costs. A civil judgment allows a Judgement Creditor to execute against the assets of the debtor concerned. If the assets are insufficient to satisfy the judgement debt, the creditor can resort to the Section 65 procedure contained in the Magistrates Court Act, and at the same time obtain an emoluments attachment order;
- Alone or with other creditor's apply to court for the compulsory sequestration of the debtor's estate – which will allow the collective debt procedure of the law of insolvency to be implemented²⁷⁸.

²⁷⁶ *ibid*, Page 276

²⁷⁷ Mars' Law of Insolvency in South Africa, Nagel *et al*, 9th Edition, Juta, 2006, Page 1

²⁷⁸ *ibid*, Page 1

South African case law has defined the test for “insolvency” as being when the debtors liabilities, fairly estimated, exceed his assets, fairly valued²⁷⁹.

The Insolvency Act²⁸⁰ (“the Insolvency Act”) defines “insolvency” as being when the debtors liabilities, fairly estimated, exceed his assets, fairly valued. An inability to pay debts is not necessarily indicative of insolvency – only *prima facie* insolvency – which of course shifts the burden of proof to the debtor to prove that his assets exceed his liabilities²⁸¹.

Actual insolvency is found when a debtor’s liabilities exceed his assets²⁸².

Commercial Insolvency refers to the situation where a debtor is unable to pay his debts due to cash flow or like problems, but his assets still exceed liabilities²⁸³.

The collective debt procedure that insolvency provides for is an orderly and fair distribution of the debtor’s assets²⁸⁴. The key concept in this process is the concept of *concursum creditorum* – defined succinctly in the *locus classicus* of *Walker v Syfret*²⁸⁵:

“The object of the Insolvency Act is to ensure a due distribution of assets to creditors in order of preference. The insolvency order crystallises the insolvents position - the hand of the law is laid upon the estate and at once the right of the general body of creditors has to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The

²⁷⁹ Venter v Volkskas Limited 1973 (3) SA175 T

²⁸⁰ Act 24 of 1936

²⁸¹ Mars’ Law of Insolvency in South Africa, *supra*, Page 2

²⁸² *ibid*, Page 2

²⁸³ *ibid*, Page 2

²⁸⁴ *ibid*, Page 2

²⁸⁵ 1911 AD 141

*claim of each creditor must then be dealt with as it existed at the issue of the order*²⁸⁶.”

Although it has been said that the Insolvency Act was passed for the benefit of creditors and not harassed debtors²⁸⁷, the act does provide a debtor with the facility for the so called friendly sequestration – providing a debtor with relief from pre-sequestration debts and the ability to rehabilitate oneself in due course (of course the Insolvency Act does have the “benefit to creditors” requirement for sequestration applications – a hurdle to the use of this mechanism as a debt relief measure)²⁸⁸.

South African Law does offer debtors alternative forms of debt relief that fall outside the Insolvency Act – such as “administration” as provided for in Section 74 of the Magistrates Court Act²⁸⁹ (which is limited to Debtors with a cumulative indebtedness not exceeding R80 000,00) and the measures contemplated in the National Credit Act dealt with hereinabove.

A number of acts and defaults on the part of a debtor constitute statutory acts of insolvency, the commission of any one of which entitles a creditor to apply for compulsory sequestration of a debtor's estate²⁹⁰, namely:

- Absence from the Republic or dwelling with the intention to evade or delay the payment of debts (Section 8(a) of the Insolvency Act);
- A failure to satisfy a judgment debt when called upon to do so by the sheriff of the court (Section 8(b) of the Insolvency Act);

²⁸⁶ Mars' Law of Insolvency in South Africa, *supra*, Page 3

²⁸⁷ R v Meer 1957 (3) SA 614 (N)

²⁸⁸ Mars' Law of Insolvency in South Africa, *supra*, Page 3

²⁸⁹ Act 32 of 1944

²⁹⁰ Mars' Law of Insolvency in South Africa, *supra*, Page 81

- Prejudicing or preferring creditors by an actual or attempted disposition of property (Section 8 (c) of the Insolvency Act);
- The removal or attempted removal of property with the intent to prejudice or prefer creditors (Section 8(d) of the Insolvency Act);
- Offers of arrangement with a creditor/s intended to release debtors wholly or in part from debts (Section 8(e) of the Insolvency Act);
- Having published a notice of surrender which has lapsed or been withdrawn in the circumstances contemplated in Section 8(f) of the Insolvency Act;
- Notice to all/any creditors of an inability to pay debts (Section 8(g) of the Insolvency Act);
- If being a trader, notice is given in the Government Gazette in term of Section 34(1) and the debtor is thereafter unable to pay all debts (Section 8(h) of the Insolvency Act).

In South Africa – jurisdiction in insolvency is vested in the provincial or local divisions of the High Court²⁹¹. In matters not governed by Section 149 of the Insolvency Act (where the legal proceedings under consideration relate to a debtor or his estate) the definition in Section 2 of the Insolvency Act does not operate and consequently the ordinary grounds of jurisdiction apply (as in the case of for example actions brought by trustees against third parties) where it is most often the case that the forum of the Defendant is to be followed²⁹². In matters governed by Section 149 of the Insolvency Act, the jurisdictional facts contained in the Section apply²⁹³.

²⁹¹ *ibid*, Page 19

²⁹² *ibid*, Page 19

²⁹³ *ibid*, Page 19

Proceedings for the compulsory sequestration of a debtor's estate may be instituted by any single creditor whose claim is not less than R100 or by any two or more creditors with an aggregate claim of not less than R200 or by agent/s of such creditors²⁹⁴. Wholly or partially secured creditors can apply for the sequestration of a debtor's estate. A creditor's claim need not be due but it must have accrued and constitute a liquidated claim – in other words fixed and determined (either by agreement, judgement or otherwise)²⁹⁵.

Once a sequestration order is granted, it is the duty of the Master of the High Court having jurisdiction to publish such order in the Government Gazette, whereafter it will be presumed that every person thereafter dealing with the insolvent has knowledge of such order²⁹⁶. As soon as the sheriff has received a sequestration order, he must attach and make an inventory of the movable property of the estate within his district and must thereafter take into his custody various items and records (including cash)²⁹⁷. As soon as an estate has been provisionally or finally sequestrated the Master of the High Court having jurisdiction must appoint a trustee to the estate – in whom the sequestrated estate vests²⁹⁸. The trustee's duty is to wind up the estate by taking control of, preserving and selling the assets of the estate²⁹⁹. The estate of the Insolvent spouse also vests in the trustee – release of the assets can be secured to the extent that the requirements of Section 21 of the Insolvency Act are met.

The effects of insolvency on the estate of the insolvent reaches to contracts concluded with the insolvent by innocent third parties – although a contract is not automatically terminated by a sequestration order, a trustee cannot be forced to give specific performance and must within a reasonable time decide whether or not to perform in

²⁹⁴ *ibid*, Page 104

²⁹⁵ *ibid*, Page 109

²⁹⁶ *ibid*, Page 160

²⁹⁷ *ibid*, Page 162

²⁹⁸ *ibid*, Page 167

²⁹⁹ *ibid*, Page 167

terms of a contract or not³⁰⁰. If a trustee elects not to perform the terms of a contract, the other contracting party is entitled to cancel or accept the repudiation, as the case may be, and claim damages by lodging a claim against the estate³⁰¹.

The effect on an instalment agreement as defined in the National Credit Act (where reservation of ownership is reserved by the credit grantor) is that the credit grantor loses ownership in the property which passes to the insolvent estate – the seller becomes a secured creditor for the balance due in respect of the property³⁰². The property is however the subject of a hypothec in favour of the credit grantor - who may demand that the trustee deliver the property to him as security for the claim against the estate³⁰³. Where the property was sold in terms of an instalment agreement and ownership passed immediately to the purchaser – the asset will fall into the insolvent estate and the seller will have nothing other than a concurrent claim against the insolvent estate³⁰⁴.

Sequestration has the effect that certain transactions entered into prior to insolvency may be set aside at the instance of the trustee or (in certain circumstances) a creditor³⁰⁵. Such transactions include dispositions made without value, voidable and undue preferences, collusive dispositions, alienation of a trader's business with notice and the return of goods bought in terms of an instalment sale transaction before sequestration³⁰⁶.

Most agreements relating to aviation matters, due to their international flavour, contain agreements to arbitrate in the event of a dispute.

Arbitration is the reference of a dispute between two or more parties for determination by a person or persons other than a court of

³⁰⁰ *ibid*, Page 222

³⁰¹ *ibid*, Page 224

³⁰² *ibid*, Page 232

³⁰³ *ibid*, Page 234

³⁰⁴ *ibid*, Page 234

³⁰⁵ *ibid*, Page 248

³⁰⁶ *ibid*, Page 248

competent jurisdiction³⁰⁷. The sources of law for arbitration can be found in many places, since the decision to arbitrate as opposed to litigate is in essence a decision that can be taken by agreement – hence the parties can choose the source of law. There are many features common between arbitration and litigation – which is hardly surprising since the one is simply an alternative dispute resolution mechanism that evolved out of the other. More particularly, what they are both able to achieve is that:

- They put an end to cases/disputes;
- An interruption of prescription takes place;
- There is the same sequence of proceedings and the necessity for proof³⁰⁸.

The appearance does not conceal the reality that the parties themselves choose to arbitrate as an alternative to litigation. The parties may choose the procedure to be applied. If they want an urgent “fast track” arbitration – they may have one³⁰⁹. If they want to dispense with the disclosure of documents – they may do so³¹⁰. In fact – they can dispense with the hearing altogether if they so please³¹¹.

The four distinct features of the arbitration process are as follows:

- The agreement to arbitrate: Since arbitration is the form of dispute resolution that parties can submit to by agreement only, if there is to be a valid arbitration then there must of course be a valid agreement to arbitrate³¹²;

³⁰⁷ The Law of Arbitration in South Africa, M Jacobs, Juta & Co, 1977, Page 1

³⁰⁸ The Law of Arbitration in South Africa, *supra*, Page 2

³⁰⁹ The Law and Practice of International Commercial Arbitration, Redfern *et al*, 4th Edition, Sweet and Maxwell, 2004, Page 1

³¹⁰ *ibid*, Page 1

³¹¹ *ibid*, Page 1

³¹² *ibid*, Page 6

- The choice of arbitrator/s: Unlike litigation, the arbitration process allows the parties to choose their own arbitrator/s³¹³;
- The decision of the arbitrator: The power to make a binding decision is of the utmost importance in any arbitration – it distinguishes the process from other forms of dispute resolution, such as mediation and conciliation which aim to arrive at a negotiated settlement³¹⁴;
- The Enforcement of the award: What makes the choice to arbitrate a feasible and viable alternative to other forms of alternative dispute resolution is that the award may be enforced by legal proceedings – both locally and internationally³¹⁵.

International Arbitration has become the standard method of determining international commercial disputes and all over the world states have modernized their laws pertaining to arbitration and cross border disputes to take account of this fact³¹⁶. Yet in essence arbitration remains as it always has been – a private method of dispute resolution³¹⁷. The system only works, however, because it is held in place by a complex system of national laws and international treaties³¹⁸. Even the most simple of international commercial arbitrations may require reference to as many as four national systems or rules of law:

- The law that governs and regulates the agreement to arbitrate;
- The Law that governs the arbitration itself;

³¹³ *ibid*, Page 10

³¹⁴ *ibid*, Page 12

³¹⁵ *ibid*, Page 13

³¹⁶ *ibid*, Page 1

³¹⁷ *ibid*, Page 1

³¹⁸ *ibid*, Page 2

- The law that is applied to the substantive legal matters before the arbitration;
- The Law that governs the recognition and enforcement of the award³¹⁹.

These laws may, however, be found/located in the same body of rules/law³²⁰.

An Agreement to arbitrate may be set out in a purpose made arbitration submission agreement or contained in an arbitration clause in an agreement³²¹. The parties to an arbitration would generally nominate the law that will apply to the arbitration, which nomination is often to be found in the agreement to arbitrate.

The decision to arbitrate as opposed to litigate has a number of material benefits, namely:

- It allows the parties to choose what law will apply to a dispute and where such a dispute will be determined (which is of course very important in an agreement between parties from different jurisdictions)³²²;
- An arbitration award, due to international treaties, is afforded far greater recognition internationally than a civil judgement³²³;
- In many circumstances, the speed with which a dispute can be dealt with by arbitration as opposed to submission to the civil courts of a state;
- Confidentiality – the proceedings and pleadings in arbitration are not open to the public and not a matter of public record³²⁴.

³¹⁹ *ibid*, Page 2

³²⁰ *ibid*, Page 147

³²¹ *ibid*, Page 2

³²² *ibid*, Page 26

³²³ *ibid*, Page 26

There are of course certain disadvantages to arbitration, namely:

- The costs of funding the arbitration (which are generally higher than the costs of litigating in the civil courts – mainly due to the fact that you are required to pay for the costs of the arbitrator and venue)³²⁵;
- Arbitrators have limited powers when compared with those of civil law presiding officers (for example – they do not have the power to order attendance of witnesses at hearings and cannot order joinder of parties)³²⁶;
- The doctrine of *stare decisis* (the doctrine of precedent) does not apply – hence the possibility of conflicting decisions³²⁷.

The South African Arbitration Act³²⁸ (“the Arbitration Act”) applies to all arbitrations that are conducted pursuant to a written arbitration agreement³²⁹. The act is not a codification of the powers of the courts pertaining to arbitration proceedings and the common law powers of the courts are applied to arbitrations falling within the ambit of the Act³³⁰.

The Arbitration Act contains both compulsory provisions that apply to all arbitrations falling within the ambit of the act, irrespective of the terms of the arbitration agreement, and provisions that are merely regulatory, which apply to the extent that the parties have not made their own arrangements³³¹. Since the Arbitration Act is not a codification of the South African Arbitration Law, a perusal of the act

³²⁴ *ibid*, Page 27

³²⁵ *ibid*, Page 28

³²⁶ *ibid*, Page 29

³²⁷ *ibid*, Page 30

³²⁸ Act 42 of 1965

³²⁹ Arbitration in South Africa – Law and practice, Butler and Finsen, Juta, 1993, Page 7

³³⁰ *ibid*, Page 7

³³¹ *ibid*, Page 7

gives a very incomplete picture of South African arbitration law and practice.

There are a number of private organisations in South Africa, the Arbitration Forum for example, that assist parties with the practice and conduct of arbitrations – in most cases they even have sets of rules that apply to arbitrations that are conducted under their auspices.

Section 72 of the Companies Act³³² expressly provides for a company to refer disputes to arbitration.

Even if a dispute is covered by a valid arbitration agreement, our courts have a discretion whether or not to hear a dispute that, by agreement, ought to have been submitted to arbitration.

The Arbitration Act does not provide for an appeal and, unless the arbitration agreement makes provision for an appeal, the decision of the arbitrator is final and binding³³³. The Arbitration Act provides that all matters/issues determined by the arbitration become *res iudicata* and neither party may reopen the matters/issues in a fresh arbitration or court action³³⁴. The arbitration act provides for a party to have an award made a court order, which is capable of being enforced in the same manner as any judgement³³⁵. A party who is dissatisfied with the award of an arbitrator has two remedies – namely remittal and setting aside³³⁶.

The remittance of the award to the arbitrator for reconsideration is possible, within certain time limits, by agreement or by court order an application³³⁷.

³³² Act 61 of 1973

³³³ Arbitration in South Africa – Law and practice, *supra*, Page 271

³³⁴ *ibid*, Page 271

³³⁵ *ibid*, Page 271

³³⁶ *ibid*, Page 285

³³⁷ *ibid*, Page 285

The setting aside of an award is possible only in the circumstances contemplated in the Arbitration Act – for example in the case of a gross irregularity in the conduct of the proceedings³³⁸.

13. THE CONFLICT OF LAWS

Since South African registered small aircraft and regional airliners are operated predominantly outside of our borders, owners of aircraft may encounter a cross border dispute.

The branch of South African law known as the "Conflict of Laws" is the area of law that deals with cases with a foreign element – namely a system of law that deals with an element of another legal system³³⁹.

For example, such a state of affairs may exist where a contract was to be performed in a foreign country or because a delict was committed in a foreign jurisdiction³⁴⁰.

In other words, if an action is launched in South Africa in respect of a delict committed in South Africa by one citizen against another – there is no foreign element to the matter, there is no conflict of laws and the court would naturally apply South African law. If however a case involved a contract concluded in Switzerland between two Swiss citizens, the South African court would apply Swiss Law to most aspects of the dispute³⁴¹. If the contract was between a South African and a Swiss citizen in respect of a contract to be performed in South Africa, then there would be a conflict of laws scenario.

The two questions that any court needs to deal with in dealing with a conflict of laws scenario is as follows:

- Does the local court have jurisdiction to hear the matter; and

³³⁸ *ibid*, Page 291

³³⁹ *The Conflict of Laws, Dicey et al, Sweet & Maxwell, London, 2006, Page 3*

³⁴⁰ *ibid*, Page 3

³⁴¹ *ibid*, Page 4

- Secondly, if so, what law should the court apply³⁴².

The justification of a court deciding to apply foreign law is simply this: it is intended to implement the reasonable and legitimate expectations of the parties to a transaction or occurrence³⁴³.

South African law has developed a body of jurisprudence that, together with international treaty, regulates any conflict of laws scenarios.

14. **INSURANCE**

Insurance is the result of man's attempts to insulate himself from risk and create financial security in the face of the dangers to life, person and property³⁴⁴.

Since an aircraft, or an interest in an aircraft, is likely to be the single largest investment in a corporeal movable, the procuring of suitable insurance is fundamental to the aviation investment model.

It is well known principle that the most fundamental distinctions between the insurance contracts on the market is between indemnity and non-indemnity insurance. In indemnity insurance contracts, the contract between the parties provides that the insurer will indemnify the insured for loss or damage actually suffered as the result of the happening of an insured event³⁴⁵. In the case of non-indemnity insurance, the contract of insurance provides for the insurer to pay the insured a specified sum in respect of loss or damage actually suffered as the result of the happening of an insured event³⁴⁶.

³⁴² *ibid*, Page 4

³⁴³ *ibid*, Page 4

³⁴⁴ General Principles of Insurance, Reineke & Van Der Merwe, Second Edition, Butterworths, 2007, page 1

³⁴⁵ *ibid*, page 13

³⁴⁶ *ibid*, page 14

Aviation insurance generally makes use of both classes of the insurance classified above.

The risks associated with aviation entails:

- A risk to the aircraft;
- A risk to cargo and passengers; and
- A risk to the general public and property of the public pursuant to the operation of aircraft.

Aviation insurance embraces risks associated with the operation of aircraft and the operation of aviation facilities on the ground³⁴⁷. More specifically, in relation to the insurance associated with the operation of an aircraft, aviation insurance has developed to encompass and mitigate the risks associated with the manufacture, ownership, operation and the maintenance of an aircraft³⁴⁸. In the operation of the aircraft, the risks insured against would be as follows:

- Hull Related Risks: The insurers undertake (at their option) to pay for, replace or repair, accidental loss of or damage to an aircraft arising out of the risks covered up to the limit of the amount insured subject to any deductables³⁴⁹. The risks usually covered are those of accidental loss of or damage to aircraft in flight, taxiing, moored or on the ground³⁵⁰. Exclusions usually include wear and tear, deterioration, breakdown and a defect/failure of the unit³⁵¹. Hull related risks insurance may also encompass the following types of insurance:

³⁴⁷ Aviation Insurance, R D Margo, Butterworths, London, 1980, page 6

³⁴⁸ *ibid*, page 6

³⁴⁹ *ibid*, page 93

³⁵⁰ *ibid*, page 98

³⁵¹ *ibid*, page 100

- Loss of Use Insurance: Since an idle aircraft can result in aircraft owners incurring substantial losses, it is common place for aircraft owners to procure "loss of Use" cover in terms of which the insurers agree to pay to the insured a sum arising out of/pursuant to the loss of use of the aircraft for the reasons defined in the policy, but most commonly as a result of accidental damage³⁵²;

- Breach of Warranty Insurance: Since the costs of aircraft acquisition are generally so high as to place them beyond the reach of most operators, banks and finance houses are often used to finance to the acquisition of such aircraft. In most cases, those providing finance would insist that the credit receiver procure breach of warranty insurance – in terms of which the bank or finance house will not be prejudiced in the event that the aircraft that has been financed is destroyed in consequence of a breach by the insured of a warranty in the policy which would ordinarily entitle the insurers to repudiate payment to the insured³⁵³. The amount recovered by the finance house or bank would be limited to that outstanding on the loan concerned³⁵⁴.

- Legal liabilities to third parties: Whilst there are variations in the wording of policies, insurers generally undertake under this form of cover to indemnify the insured for all sums which he shall become legally liable to pay as compensatory damages in respect of accidental bodily injury and accidental damage to property caused by the insured aircraft or by any person or object falling therefrom³⁵⁵;

³⁵² *ibid*, page 103

³⁵³ *ibid*, page 105

³⁵⁴ *ibid*, page 105

³⁵⁵ *ibid*, page 107

- Cargo Legal Liability Insurance: This type of cover is designed to indemnify an air carrier in respect of all sums which he should be legally liable to third parties for loss of or damage to cargo whilst such goods are being loaded, carried or unloaded from the insured aircraft³⁵⁶;

- War and Hijacking Insurance: This type of cover is available in the war risk insurance market and it provides for and insurer to procure the following types of cover:
 - Cover to insulate the insured from damage to the aircraft arising out of/pursuant to war, invasion, acts of foreign enemies, civil war and similar events;
 - Cover to insulate the insured from damage to the aircraft arising out of/pursuant to strikes, riots and similar events;
 - Cover to insulate the insured from damage to the aircraft arising out of/pursuant to acts of persons for political or terrorist purposes;
 - Cover to insulate the insured from damage to the aircraft arising out of/pursuant to acts of sabotage;
 - Cover to insulate the insured from damage to the aircraft arising out of/pursuant to hijacking or unlawful seizure;
 - Cover to insulate the insured from damage to the aircraft arising out of/pursuant to confiscation, nationalisation, detention or requisition for title or use by order of any government³⁵⁷.

³⁵⁶ *ibid*, page 128

³⁵⁷ *ibid*, pages 166-167

In the matter of Lloyds of London Underwriting Syndicates 969,48,1183 and 2183 v Skilya Property Investments (Pty) Ltd³⁵⁸, the Respondent was the owner of a Douglas DC 3 aircraft (popularly known as a Dakota) which it had insured under a hull all risks policy ('the hull policy') with the Houston Casualty Company. It covered the Respondent against the more common risks of flying an aircraft and moving it about on the ground. The cover was not all-embracing. Some risks were excluded. Among the excluded risks were so-called 'war risks', although the owners had a distinct "war risks" policy. The Appellants repudiated liability in respect of a claim for the loss of the aircraft (which had been seized and forfeited to the state) on the basis that the aircraft was lost whilst it was being used for an illegal purpose, the smuggling of four tons of South African duty free cigarettes into Mozambique. The court found that a risk such as confiscation for which the war policy provides cover is greatly increased by illegal use of the aircraft. It found that considering the two policies together as constituting a sensible business arrangement to provide greater cover for the respondent than was provided by the hull policy on its own, there is every reason to give the war policy a meaning that would acknowledge that its underwriter was not contractually prepared to take the risk of illegal use upon itself. The ultimate purpose of the flight of the aircraft was the repositioning of the aircraft at Nairobi for the distribution of relief supplies. First, however, the aircraft was to be used to convey cigarettes to Beira. The cost of the Beira leg for which the aircraft had been specially chartered was to be borne by the exporter of the cigarettes. It was a voyage charter in terms of which the use of the aircraft and crew were made available to the exporter. It was not a contract for the carriage of goods. The flight to Beira was not simply a diversion on the way to Nairobi. Because of flight control regulations, overflight clearances had to be arranged before take-off from Lanseria airport. From that time the first leg of the flight was undertaken for an illegal purpose even though the projected second leg of the flight, the repositioning of the aircraft at Nairobi, would have been legal. The court went on to

³⁵⁸ Unreported decision of the Supreme Court of Appeal, Case No 316/2002

find that the legality of the conveyance need have no bearing on the unlawful object: of importance is the object for which the aircraft was used not the manner in which it was used. The respondent relied on cases where provisions relating to the seizure or forfeiture of articles used for an illegal purpose were considered. They might have been of assistance if the aircraft had flown into Beira for another purpose and contraband cigarettes had been discovered on board. In this matter, the court held that the aircraft flew to Beira for no purpose other than to convey the cigarettes to that destination. The court went on to find that the wording the contract that the assured warranted compliance with all air transportation, air navigation and airworthiness enactments, regulations, rules, orders and requirements issued by any competent authority affecting the safe operation of the aircraft placed absolute liability on the insured and any breach of any of the rules and orders would invalidate its claim even if the breach occurred without its knowledge or consent and despite its reasonable efforts to prevent it.

15. **CONCLUSION**

Aircraft investment is not for the faint of heart. The investment decision, many would argue, makes financial sense on pure economic principles:

- The aviation industry, although closely linked to demand-side economics, is a growing and stable industry with opportunity in all corners of the globe;
- The investment product is a movable asset that does not depreciate in the same way as other movable assets; and
- The tax benefits to investment in aircraft make the decision an easy one.

The legal landscape, however, is complex and highly regulated. It certainly detracts from this mode of investment.

The partnership model of acquisition (and especially the *en commandite* partnership model) appears to be favoured by bankers and investors alike, for a variety of reasons, including:

- The partnership model avoids much of the limited liability problems of incorporated entities and the regulatory issues of the Companies Act;
- The partnership model facilitates pledge/cession of the interests of the individual investors in the movable/s to financiers;
- The Partnership model facilitates management of the affairs of the partnership via a single managing partner with little or no interference from the individual partners;
- The tax benefits accruing, via the partnership conduit, flow to the individual investors.

Although the “partnership” as a vehicle of business has by and large been sidelined, aircraft owners have in the past and continue to see the benefits associated with this mode of investment.

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