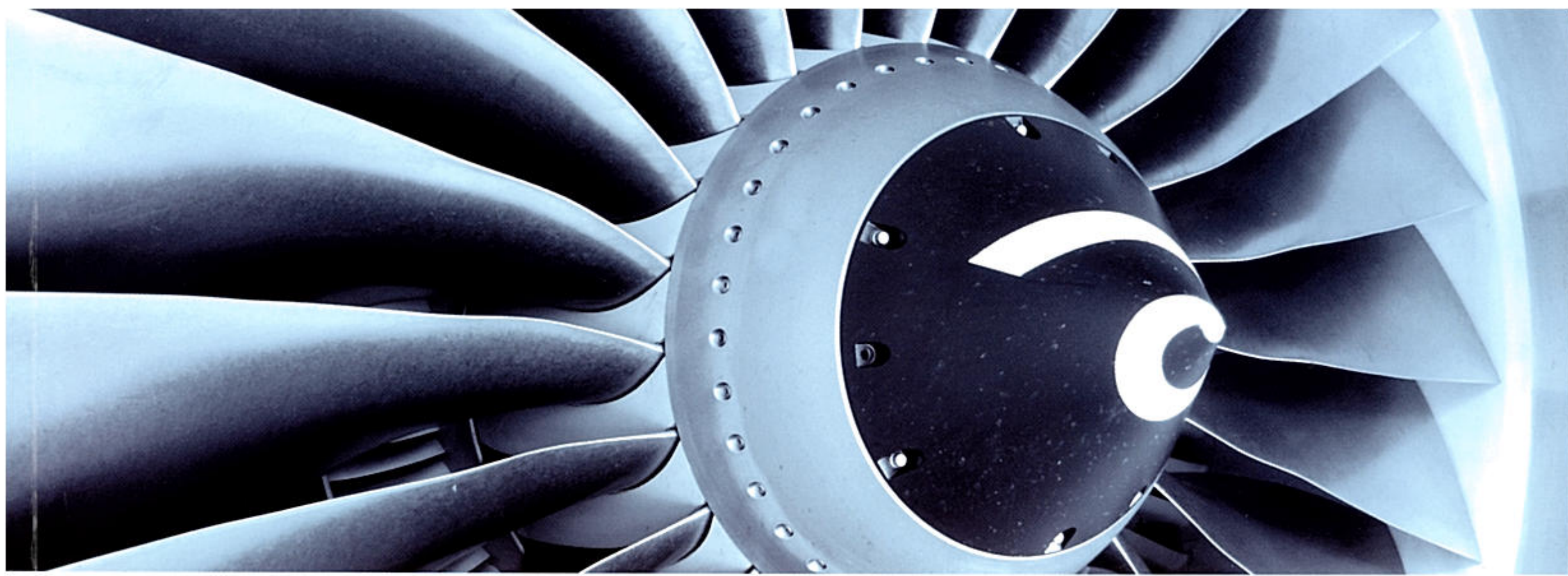

ICLG

The International Comparative Legal Guide to:

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A practical cross-border insight into aviation law

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collected was for the purposes of security and/or crime prevention, or whether it was collected in order to bolster the collecting entity's business intelligence and business requirements (for example, passenger manifests, passenger dietary requirements and so on).

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

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

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

It is fair to say that for all jurisdictions which have data protection laws of which this author is aware, personal data collected for the purposes of crime prevention may be collected without the consent of the data subject. Of course, this statement is subject to the proviso that all relevant legislative controls in relation to the collection and use of that data are adhered to and that the personal data is only used for the express purposes for which it is collected.

However, contrast this with the situation where the personal data of the passenger is collected for commercial reasons, for example when the passenger purchases an item at duty free and swipes her loyalty card, when they submit their information (perhaps by dropping their business card into a box) for the chance to win a prize, or when the passenger checks in for a flight. In the case of the latter, the rules around whether the personal data of the passenger may be transferred offshore or outside a particular geopolitical area (such as the European Union) will depend on the applicable law at the place of collection. For example, in the EU, the general rule is that personal data may not be transferred outside of the EU unless the passenger expressly consents, the transfer is to a country which has been designated as having an "adequate level of protection" under the Data Protection Directive 95/46 EC, the organisations between which the personal data is transferred have agreed certain model contract clauses, or the organisation to which the personal data is transferred is part of the US Safe Harbor Scheme.

That said, in the case of passengers travelling by air from the EU to the USA, personal passenger data (ranging from the passenger's name through to their frequent flier information, billing information and all available contact information) may be transferred from the EU to the USA in terms of an agreement between the United States of America and the European Union. [See Endnote 4.]

With regard to loyalty card data, the loyalty card application form will (or should) have terms and conditions which dictate the purposes for which the personal data which is collected will be used, as well as details regarding what personal data is collected, where it will be held and to whom it will be transferred.

The example of the prize draw is a more challenging one – if a form is completed to enter into a prize draw, it may have terms and conditions regulating the collection of personal data but, in this author's view, if the form only refers to terms which cannot be read at the time of completion of the form it will not suffice. Similarly, when a business card is dropped into a box for a prize draw, it is rare for terms and conditions to be shown, with the subsequent challenge for the data collector (usually referred to as the data controller but, in cases where the collector is only collecting the data on behalf of another and is not determining the uses to which that personal data may be put, the collector is often referred to as the data processor) of demonstrating that it has the requisite consents in place to use the data (for example, to contact the data subject regarding future promotions and so on). It is, of course and at least in the EU, incumbent upon the data controller to establish in the event of a challenge [see Endnote 5] that it has the required consents in place. Practically speaking, this will require the data controller to demonstrate an acquiescence from the data subject to a general range of activities regarding their data [see Endnote 6]. Demonstrating acquiescence in the absence of a signature or ticked box on a form (submitted either manually or electronically) is challenging and so collectors and compilers of data need to be aware of their obligations in this regard, as well as the scope of what they are permitted to do with the personal data collected.

Other Concerns

Other concerns arise in relation to the collection, retention and use of personal data collected around the storage of the data, the location of that storage, and to whom the personal data may be transferred (whether as a result of the sale of a marketing list, an intra-group data-sharing arrangement or otherwise). Unfortunately, length constraints do not permit this short chapter to look into these issues in any depth; however it is worth noting that data controllers need to be constantly mindful of the consents which they have in place with the relevant data subjects, as well as what they are permitted to do in the absence of those consents [see Endnote 7].

Breaches

Breaches of the relevant legislation invariably lead to fines in the jurisdiction concerned. These are usually capped and are increasingly becoming larger, both in relation to the cap as well as in practice [see Endnote 8]. In jurisdictions where data protection legislation is still relatively new [see Endnote 9], it is often a challenge to know what approach the relevant regulator will take to breaches, and what types of fine they are willing to mete out.

In Conclusion

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

Endnotes

1. For a list of what constitutes sensitive personal data in the United Kingdom, the reader may refer to s.2 of the Data Protection Act 1998.
2. This is a concern which many privacy advocates argue is disproportionate to any gains in security which body scanners may offer.
3. Such as Heathrow Rewards.
4. Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security (Interinstitutional File 2011/0382 (NLE)).

5. Whether by a data subject challenging the legitimacy of the data controller's right to contact them, or the relevant data protection supervisory authority (usually investigating complaints from data subjects, around those data subjects being contacted by the data controller without their consent).
6. For instance, that the data subject consents to being contacted in relation to offers which the data controller "believes may interest them", generated either by the data controller itself or "third parties".
7. For example, without the consent of the data subject, data may be transferred out of the EU to organisations in the USA which have subscribed to the Safe Harbor Scheme, or from the EU to a country which has been endorsed by the EU as offering "an adequate level of protection".
8. Compare, for example, the caps set by the various data protection supervisory authorities throughout the EU pursuant to EU Directive 95/46 EC, with those under discussion for the draft EU Data Protection Regulation.
9. For example, South Africa obtained its first data protection specific legislation, the Protection of Personal Information Act in 2013 (the Act was passed into law on 26 November 2013), although at the time of writing this chapter (January 2014) the Act had yet to commence.

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

Kaye Scholer LLP

Philip Perrotta

Introduction

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

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

In no particular order, the trends identified include: the advent of airlines as competitive leasing companies in a major shift from their traditional business model; the equity alliance programme of a major international carrier as an alternative to the traditional airline alliance model; the development of major aircraft leasing companies into providers of pre-delivery payment finance (as an alternative revenue stream to replace the business being lost to certain airlines); the determination of another major international carrier to focus on maximum aircraft size and capacity as the key to its expansion plans; and, last but not least – and possibly flying in the face of macro-political and cultural evolution – the re-emergence of the capital markets available to aviation in the US as a primary focus of financing new aircraft equipment.

A. The Airline Leasing Company

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

Particular examples of note in that regard would include SriLankan Airlines' US$2.6 billion order for six Airbus A330-300 wide-body aircraft and four Airbus A350-900 wide-body aircraft, Spicejet's US$4.4 billion order for forty Boeing 737 Max narrow-body aircraft, and then VietJet's amazing US$9.2 billion order for up to a hundred Airbus A320/A321 CEO and NEO aircraft.

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

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

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

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

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

B. The Equity Alliance Programme (Etihad)

The concept of an airline alliance is of course nothing new. There are now three established global alliance networks of airlines who seek to

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