

Aviation Finance & Leasing

Contributing editor
Mark Bisset



2017

GETTING THE
DEAL THROUGH 

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Mark Bisset

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Preface

Aviation Finance & Leasing 2017

Fourth edition

Getting the Deal Through is delighted to publish the fourth edition of *Aviation Finance & Leasing*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Israel, Japan, Kenya, Lithuania, South Africa and United Arab Emirates.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Mark Bisset of Clyde & Co LLP, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
June 2017

Global overview

Mark Bisset

Clyde & Co LLP

Introduction

Aviation is one of the world's fastest-moving sectors, combining technology, innovation, entrepreneurialism, economic development, infrastructure support, demographic growth, contribution to globalisation and a touch of glamour. Progress in this sector is impressive in its speed and diversified in its nature.

Economic and traffic growth are two of the key indicators of growth in commercial aviation globally. Economic growth in a region generally has a strong impact on the increase in demand for air service. While in aggregate this is true, the degree to which air service grows in relation to gross domestic product (GDP) is not consistent throughout the world. Typically, in developing countries, air service grows at a much higher rate than GDP. Historic experience in Western Europe and North America shows that air traffic growth in a developed country with a mature air service market is less responsive to GDP than in a developing country. By way of illustration, Boeing's worldwide forecast for the ratio of air traffic demand growth to GDP growth over the next 20 years is approximately 1:5, albeit with regional variation. At any time and any place, few airlines have the internal cash available to self-finance acquisitions of new or used commercial aircraft, and most airlines seek financing from a variety of sources, including traditional bank debt, export credit guarantees, tax leases, capital markets and operating leases.

There has been much commentary in recent years relating to the enormous aviation potential of the economies of Brazil, Russia, India and China. Recently, Africa and the Asia-Pacific region have been regularly added to this list, and we may add Latin America and the Middle East to the regions already mentioned. In other words, heady growth (more than 6 per cent) is predicted in almost every region of the world with the exception of western Europe, which may be considered to have reached saturation point.

To cite growth forecasts from one of the two major manufacturers, Boeing predicts demand for 38,050 new aircraft in the next 20 years, valued at US\$5.6 trillion. Half of these aircraft will replace existing aircraft, such that by 2032 the world's commercial aircraft fleet is expected to comprise 43,000 aircraft. And, after many years of an Airbus and Boeing duopoly, new aircraft types are entering the market: the Bombardier C Series (in 2016 the CS100 was delivered to launch customer Swiss and the CS300 to launch customer Air Baltic), Comac ARJ21 regional jet, Comac C919, Superjet, MS-21 and the Mitsubishi Regional Jet. Of all these 38,050 new aircraft, 40 per cent are predicted to be required in Asia-Pacific; 20 per cent in Europe and North America and 20 per cent in the Middle East, Latin America, the CIS and Africa. Boeing delivered 748 aircraft in 2016 and booked net orders for 668 aircraft worth approximately US\$94 billion at list prices; Airbus delivered 688 aircraft in 2016 and posted 731 net orders for 2016. The surge in Airbus orders included 98 aircraft sold to Iran, the first of which was delivered in January 2017. But a December sales flurry by both Airbus and Boeing failed to prevent the combined book-to-bill ratio of the two giants dipping below 1 for the first time since 2009, placing a dent in record industry order backlogs amid concerns over the economy.

Global revenue passenger kilometres (RPKs) grew by 7.4 per cent in 2016. The average passenger load factor reached a record high of over 80 per cent. The top 15 airlines accounted for about half of world RPK growth. American, Delta and United topped the table, with Emirates jumping above Air France-KLM. The International Monetary Fund estimates that the world's GDP rose by 3.1 per cent in 2016. So RPKs did

better than the historic figure for air travel, growing at twice GDP. The International Air Transport Association estimates that the world's airlines made a record profit of US\$35.6 billion with a net profit margin of 5.1 per cent in 2016, helped considerably by the fall in fuel prices and low interest rates. Thus, compared with previous years, these are heady times. The level of finance required to sustain this expansion is astonishing. The commercial aircraft finance market is already a market valued annually in excess of US\$100 billion for the financing of new deliveries. (This is in addition to the secondary aircraft market, the business jets world, spare engine leasing or finance, and the engine aftermarket.) Deliveries of new aircraft will require an average of US\$125 billion of finance annually over the coming decade.

The purpose of this short introduction to the aviation finance world is not to predict how aviation finance will meet the challenge, but to take a snapshot of where we are now and to identify which threads are likely to be picked up going forwards. Given this context, we will examine:

- the main financing products currently available: commercial bank finance, leasing, export credit and the capital markets;
- developments in the emerging markets; and
- the progress of the Cape Town Convention.

Financing products

Commercial banks, lessors and export credit agencies account for the majority of aircraft financing, and the use of capital markets has expanded considerably over the past decade. Since the credit crunch of 2008 (indeed, since the liquidity crisis started in 2007), the availability of traditional debt has been severely constrained. To fill the subsequent funding gap, the export credit agencies (and, indeed, the manufacturers themselves) have stepped up to the plate. However, it is expected that it is the areas of capital markets and operating leasing that will see the most financing activity in terms of volume.

According to Boeing, the sources of US\$122 billion worth of finance for the purchase of aircraft in 2016 were as follows:

- capital markets: US\$36 billion (30 per cent);
- bank debt: US\$40 billion (33 per cent);
- cash: US\$34 billion (28 per cent);
- export credit: US\$8.5 billion (7 per cent); and
- manufacturer: the remainder.

In this overview we shall look at:

- enhanced equipment trust certificates (EETCs);
- asset-backed securities (ABS);
- export credit agency (ECA) financing;
- commercial bank finance; and
- leasing.

EETCs

An EETC is a publicly (but sometimes privately) issued, rated security that relies on the credit of a single issuer and is secured by aircraft. This is usually in the form of a special-purpose company or SPV, which is created with the sole purpose of owning the aircraft. While EETCs have traditionally been issued by United States airlines, because of the availability of section 1110 of the US Bankruptcy Code, the product should now be increasingly available to airlines in countries that have adopted the Cape Town 'Alternative A' insolvency regime (eg, recently, Air Canada, British Airways and Virgin Australia).

EETCs were effectively closed during the financial crisis, and re-opened in 2009 with an issuance by Continental. There is strong evidence, however, that in 2016 and 2017, airlines, especially US airlines, are increasingly looking to the debt capital markets as a source of funding. During the past 12 months or so, near-record levels of financings were completed in the primary securities markets accessed by airlines (and aircraft lessors) as compared to prior periods. Airlines have been issuing EETCs and unsecured bonds, while lessors have been issuing unsecured bonds and sponsoring aircraft and engine ABSs (see below).

EETCs are well suited to repeat issuances, and carriers with established histories in the market can achieve very competitive rates. One of the key developments of recent years has been a growing cadre of non-US investors in EETCs. According to Boeing, the growth in international EETC investors over the past several years is being driven by 'healthy airline fundamentals, a broader understanding of the strength of commercial aircraft as an asset class, and active outreach efforts by investment banks and manufacturers'. Between 2014 and 2016, investors from nine countries bought public EETC paper for the first time, with just two countries falling away. Over that same period, the overall allocation to international investors jumped from 5.8 per cent to 8.3 per cent, a rise of more than 40 per cent. As global EETC issuances gain further traction, and as non-US investors learn more about the aviation industry and the value of commercial aircraft, it is Boeing's expectation that this positive trend will continue.

ABS

ABS are issued in the private and capital markets, secured by aircraft or lease rental cash flows. The predominant forms of ABS are transaction structures as collateralised loan obligations and collateralised debt obligations (EETCs are not characterised as ABS since they are reliant on the single issuer). The newly reopened ABS market provides an efficient means for lessors to sell off portions of their portfolios. 2016 was another busy year for the capital markets in aircraft finance, with global airlines and lessors taking advantage of record-low coupons to raise more than US\$45 billion in secured and unsecured debt.

ECA financing

ECA-guaranteed loan products covered about 27 per cent of new aircraft financings in 2016. This is a financing supported by an ECA, of which the primary ones are:

- Brazil: BNDES – supports Embraer;
- Canada: EDC – supports Bombardier;
- France: COFACE – supports Airbus and ATR;
- Germany: Euler Hermes – supports Airbus;
- UK: ECGD – supports Airbus and Rolls-Royce; and
- US: US EX-IM – supports Boeing, CFM, IAE, GE and Pratt & Whitney.

ECA financings are currently regulated by the Organisation for Economic Co-operation and Development Aircraft Sector Understanding (ASU) arrangements; however, not all aircraft manufacturing countries are subject to the ASU rules (eg, China, Japan and Russia), which will be of increasing significance as these countries develop new aircraft types.

Having been of critical importance when filling the funding gap during the downturn in availability of traditional debt finance during the recent prolonged recession, ECA financing is likely to reduce over time in the light of the ASU's requirements to impose market-level fees and rates. The 2011 ASU requires each ECA to classify its borrowers into one of eight risk categories, based on these senior unsecured credit ratings. The new ASU thereby raises the export credit premium for all buyers and borrowers.

In addition, Ex-Im Bank's authorisation lapsed in mid-2015, which brought new approvals to an end and, although the bank had been re-authorised, its board had three empty seats and therefore lacked a quorum for large aircraft transactions, being restricted to deals under US\$10 million. In 2016, while campaigning to become president, Donald Trump criticised Ex-Im as 'a sort of feather bedding for politicians and others' and 'not necessary'; but since becoming president he appears to have changed his mind: 'actually, it's a good thing' he told the *Wall Street Journal*. President Trump has nominated a new chairman and a board member: if these are confirmed by the Senate

the bank could start providing aircraft guarantees again (though the new chairman (Scott Garrett) has been a critic of Ex-Im for years, once describing it as 'a bank that embodies the corruption of the free enterprise system'), and could stop large aircraft deals. There is a tradition of politicians becoming more supportive of Ex-Im as they learn more about it, and its critical role after the September 11 terrorist attacks should never be forgotten. With regard to Airbus, the UK, France and Germany suspended financial backing for export deals amid concern that the manufacturer may have failed fully to disclose the use of middlemen in certain transactions, but moves are afoot to re-open this flow of funding.

Commercial bank finance

Commercial banks currently fund approximately 33 per cent of new aircraft deliveries, however, such funding has recently become more subdued as a result of the credit crunch. A number of European banks (especially in Germany) have exited the market following the financial crisis. The remaining European (mainly French and German) banks and US banks are now joined by new market entrants in Australia, Japan, the Middle East and (in the case of financing Chinese airlines) China. The adoption of Basel III is likely to raise the operational costs for banks, which will, of course, be passed on to customers in the form of higher margins: increased capital adequacy requirements and other changes such as the net stable funding ratio rate being phased through to 2019 and are expected to have a significant effect on the availability of commercial bank finance. Bank debt is the most prevalent source of financing in China.

As well as traditional mortgage finance, more specialised products that remain available to a greater or lesser extent are:

- French lease: a cross-border tax lease where the lessor is domiciled in France; this is traditionally the preserve of the French commercial banks;
- Japanese operating lease (JOL): Japanese investors put up equity and the balance of funding is provided by a bank loan. Since the debt must be booked in Japan to avoid withholding tax, this product has historically been the preserve of Japanese banks such as the Bank of Tokyo-Mitsubishi. (A JOLCO is a JOL with a call option allowing the airline to purchase the aircraft.) The Japanese government is considering changes to the accelerated depreciation method, which threatens to reign in the JOLCO's tax benefits significantly, or even kill off the structure entirely; and
- *Kommanditgesellschaft* (KG): a product whereby the aircraft is acquired by a German limited partnership, financed by German investors and partly leveraged by bank loans from one of the banks specialising in this product (eg, NordLB).

Operating leases

Activity in the operating lease sector has restored momentum lost in the aircraft finance sector during the liquidity crisis, and the subsequent downturn in the finance sector and in the wider economy. About 40 per cent of new aircraft deliveries are currently facilitated by way of operating lease, and most analysts suggest that this proportion will rise to 50 per cent by 2020. In addition to traditional investors in aircraft equity, such as operating leasing companies (eg, AerCap, GECAS and DAE), hedge and private equity funds have recently become increasingly significant in this market.

Industry consolidation has continued, with DAE Capital acquiring AWAS in April 2017. DAE Capital was prepared to pay a significant premium for AWAS – bankers close to the deal say it paid a multiple of 1.15 times the portfolio's value for the platform. The deal propels DAE into a top 10 aircraft leasing platform. AWAS adds 214 owned aircraft and has orders for 23 aircraft, giving DAE a committed fleet of 394 aircraft valued at more than US\$14 billion.

As well as consolidation, a trend is new entrants into the market, especially in Asia and the Middle East, where traffic has been booming and plenty of capital is available. Of the top 25 aircraft lessors in the world in recent years, fewer than half were operating only a decade ago. Some are totally new, such as ICBC Leasing and CDB Leasing in China or DAE Aerospace in Dubai. Others are set up by serial entrepreneurs, such as Air Lease Corporation and Avolon (now owned by HNA Group). Some airlines with large order books have also set up leasing companies, such as Indonesia's Lion Group, which has already leased out 737 NGs into the Chinese market. Regional concentration

is continuing: for example, two-thirds of the Chinese lessor fleet is leased by Chinese carriers (the majority of Bohai Leasing's aircraft are leased to carriers owned by HNA such as Hainan Airlines). The balance of lessor ownership continues to move eastwards following a natural expansion of the growth in commercial aviation in Far Eastern emerging markets, with lessors in the Asia-Pacific region now owning or managing 25 per cent of the global fleet.

Emerging market developments

Africa

The strong level of growth predicted for the African aviation industry over the next 20 years (5 per cent per annum) is higher than the world average (4.7 per cent), and provides a major opportunity. The African Airlines Association estimates that its member airlines will double their combined fleet of 600 aircraft to 1,210 aircraft. In 2016 African airlines had their best growth performance since 2012, up 7.4 per cent. Growth is being underpinned by strong demand on routes to and from Asia and the Middle East. Capacity exactly matched demand, with the result that the load factor remained flat at 67.7 per cent.

Aviation in Africa is beset by hurdles to growth; the most notable relating to liberalisation, safety and infrastructure. With the exception of South Africa and, to some extent, Nigeria and Kenya, the banking system in much of sub-Saharan Africa is not well capitalised and local banks are not in a strong position to provide aircraft finance (with exceptions such as Investec, Nedbank and RMB in South Africa and FBN in Nigeria). The small size of most African airlines and the many difficulties in operating airlines means that many financial institutions are unwilling to invest in African airlines and charge higher rates, or will only do so if there is a government guarantee in place to cover default risk. The number of African airlines using finance or operating leases is still relatively low, at around 40 per cent, and tends to remain limited to top-tier airlines. The use of ECA financing has become common with development banks (Afrexim, Africa Development Bank, PTA Bank, Africa Finance Corporation) often used to fund the 15 per cent equity exposure.

Asia-Pacific and China

The increasing wealth and development of the region have created a burgeoning middle class, eager to travel. The increase in passenger demand has encouraged expansion, and to meet predicted passenger demand it is expected that China alone will need 3,200 aircraft in service by 2026, and 60 per cent of these aircraft will be leased (Chinese carriers have already ordered 1,500 of these, leaving a shortfall of 1,600 aircraft). Chinese airlines already have over 2,800 aircraft, which is roughly 13 per cent of the world's fleet. The fleet has been growing at a rate of 11 per cent per year since 2010. In 2016, Chinese airlines took delivery of 350 aircraft. Low-cost carriers now account for over 50 per cent of total seat capacity in the region.

In 2016, Asia-Pacific carriers recorded a demand increase of 8.3 per cent compared to 2015, which was the second-fastest increase among the regions. This pace is considerably ahead of the five-year growth average of 6.9 per cent. Capacity rose 7.7 per cent, pushing up the load factor 0.4 percentage points to 78.6 per cent.

Increasingly, Asian banks are becoming more involved in aviation finance transactions, not just in the region but across the world, filling the gap where European and US banks are restricting their lending. There is also a shift in the traditional use of US dollars to finance transactions. BOC Aviation has completed its first aviation financial transaction in Chinese yuan, with more than 50 per cent of the funds coming from private banks. China's financiers have been active in the leasing market since 2008, when five major finance leasing companies were established, sponsored by the largest state-owned banks.

The Asia-Pacific region will be the dominant region in terms of passenger numbers, having overtaken the US market with 40 per cent global passenger kilometres.

India

India's commercial aviation industry is rapidly expanding, with the Ministry of Civil Aviation predicting that by 2020 India will be the third-largest aviation market in the world, and by 2030 the largest. Aviation accounts for 1.5 per cent of India's GDP and serves around 150 million passengers per annum, with 90 million alone passing through Delhi.

Despite the growing demand for commercial flights and increasing passenger demand, commercial carriers are still suffering owing to heavy taxation and strict government regulations. In addition, after the default of Kingfisher Airlines in 2013 and Spice Jet in 2014, foreign financiers have become more reluctant to lease aircraft to Indian airlines as strict regulation makes it increasingly difficult to repossess aircraft, with some financiers withdrawing from the Indian market altogether. Although India is a signatory to the Cape Town Convention, the experience of Kingfisher and Spice Jet has been far from encouraging, although the government has moved quickly to address the shortcomings in, for example, recognition of irrevocable deregistration and export request authorisations, and a number of the difficult Kingfisher and Spice Jet repossession cases related to aircraft that were leased prior to India's ratification of the Cape Town Convention. This may have an effect on other airlines that rely on financing from foreign banks as it is becoming more commonplace for them to charge higher lease rentals or even require advance payments, which adds to the financial burden already on carriers.

Middle East

The Middle East is another region currently outpacing the global rate of growth of the aviation industry. In 2016, Middle East carriers had the strongest regional annual traffic growth for the fifth year in a row. RPKs expanded 11.8 per cent, consolidating the region's position as the third-largest market for international passengers. Capacity growth (13.7 per cent) continued to outstrip demand, with the result that the load factor fell 1.3 percentage points to 74.7 per cent. The geographical position of the Gulf, acting as a bridge between the rapidly developing Eastern markets, and more established markets in the West, continues to support the growth of locally based airlines. As the established European finance providers find their exposure to the region at capacity, and their levels of liquidity are also squeezed, local Middle Eastern banks have increasingly been entering the market, viewing the airline industry as an attractive opportunity to diversify their loan books. The big state-owned airlines, viewed as strong credits, have been able to demand very reasonable pricing in the commercial debt market.

Iran is, in theory, now open for deals. Aviation is one of the five markets where US sanctions are being lifted first. In January 2016, the Joint Comprehensive Plan of Action came into force, followed by General Licence J in July 2016. But it is not simple. Deals involving US-origin aircraft (ie, typically those that include 10 per cent or greater US-origin content by value) still require an OFAC licence, sanctions can snap back, and about 200 individuals or organisations remain on OFAC's Specially Designated Nationals (SDN) list, including Mahan Air. In January 2016, Iran Air signed an order with Airbus for 118 aircraft including 21 A320ceo family, 24 A321neo family, 27 A330-300 family, 18 A350-900, 16 A350-1000 and 12 A380; the first delivery under this order took place in January 2017. The airline has struggled to secure financing to complete the transaction and is reported to be in talks with the UK export credit agency UK Export Finance.

US airlines have been lobbying for years against the largest Middle Eastern carriers on the basis that these are allegedly government subsidised. In early 2017, Emirates cut the number of flights to five of the 12 cities in the US that it flies to, but this was because of a downturn in demand rather than because of political considerations.

The Cape Town Convention

One of the most significant legal developments in the past 10 years has been the introduction of the Cape Town Convention, which established a system of recognising international rights in aircraft and certain aviation assets. It came into force in 2006 and at this time, depending on whether a particular jurisdiction has ratified the relevant sections and absorbed the principle into local law, it gives genuine rights and the ability to give effective notice to third parties of ownership and security interests. This has, in certain circumstances, provided encouragement for prospective lessors and financiers considering the financing of aircraft and engines in jurisdictions that may hitherto have been viewed as difficult. An immense debt is due to the Aviation Working Group, and to all of those who have worked on the Convention over the past decade.

The Convention currently has 73 ratifications, and the Aircraft Protocol has been ratified by 66 contracting states (the Convention also applies to rolling stock and satellites and its applicability to aviation is governed by ratification of the Protocol). The Convention will become

increasingly important in international aviation finance as it gains more universal coverage, and a crucial tipping point may well be imminent ratification by all of the EU member states. It is highly likely that within the next few years the Convention will be the standard reference point for the creation, recognition and enforcement of aircraft security interests in the vast majority of countries with any relevance to aviation (which, to a greater or lesser extent, means all countries in the world).

Business jets

In its annual market forecast released in 2016, Bombardier Business Aircraft predicts up to 8,300 new business jet deliveries representing approximately US\$250 billion in industry revenues from 2016 to 2025 in the segments in which it competes. Bombardier Business Aircraft expects North America will account for the greatest number of new business jet deliveries between 2016 and 2025 with 3,930 aircraft,

followed by Europe, which remains the second largest market with 1,530 deliveries expected between 2016 and 2025. Business jet finance is a niche field where private wealth banks (eg, Credit Suisse, UBS, Bank of America and Citibank) and specialist asset financiers (such as Global Jet Capital) tend to predominate, though export credit is also available.

Conclusion

An annual financing requirement of US\$125 billion is a daunting target by any standard, but the aviation finance community has proved itself capable of meeting the challenge in the past, and will no doubt do so again, especially with new entrant capital. This is a robust, innovative and entrepreneurial part of the global finance community, working in a fast-changing sector, and can look forward with confidence to the next 20 years. Each chapter of this book will examine the legal context within which this community works.

Aircraft operating leases – New York law or English law?

Thomas A Zimmer and Neil Poland

Vedder Price

Aircraft operating leases – choice of law

It is common for leases of commercial and business aircraft to select either New York law or English law as the governing law. Most lenders, investors and lessors of aircraft are comfortable with leases governed by either New York or English law.

While the similarities between New York and English law-governed aircraft leases far outweigh the differences, lessors and lessees should understand the differences and use a lease tailored for the chosen governing law that takes into account these differences.

Similarities between New York law and English law

The key similarities between the New York and English legal systems include the following:

- **Freedom of contract** – Both systems recognise the fundamental principles of freedom of contract. Generally, the courts in both jurisdictions will uphold the terms of a contract freely entered into between commercial parties, although there are certain public policy exceptions in both jurisdictions.
- **Common law** – Both jurisdictions are common law legal systems, with the courts bound by legal precedent. With well-established precedents on many of the issues presented by leases, each system provides a high level of stability and certainty when it comes to enforcing the terms of an aircraft lease.
- **Security interests against aircraft and lease rentals** – Both New York and English law allow a lessor to grant a security interest in the rent receivable payable under the lease and the ownership rights of the lessor in the aircraft which is subject to the lease. Such rights can be perfected as against third-party claims against the lessor or the lessee although there are differences in the validity and perfection requirements under the two legal systems that are noted under ‘Filing requirements for aircraft leases and security assignments’.
- **Enforcement rights** – Both legal systems provide ‘self-help’ remedies of enforcement of certain contractual or security rights and relatively speedy procedures for pursuing legal redress in the event of a default by the lessee either through the courts or other alternative disputes procedures subject to the dispute resolution process provided for in the lease.
- **Ratification of Cape Town Convention** – Both the United States and the United Kingdom have ratified the Convention on International Interests in Mobile Equipment (2001) and the Protocol to the Convention on Matters Specific to Aircraft Equipment (together, CTC), although there are some differences in the implementation of the CTC.

Some key differences between aircraft leases governed by New York law and English law

There are a number of differences between aircraft leases governed by New York and English law that should be taken into account when choosing the governing law for an aircraft lease. The following is a brief description of some of the differences that we would advise parties to consider.

Recharacterisation risk

Under New York law and in certain circumstances, an instrument that purports to be a lease may be recharacterised as a security agreement

(a security interest disguised as a lease) and not a ‘true lease’. This can happen if the economic substance of the transaction is such that the lessee, and not the lessor, is deemed the economic owner of the aircraft. If an aircraft lease is recharacterised as a security interest, the lessor must take steps to perfect its security interest. Further, the remedies available to the titular lessor following a default by the lessee would be those of a secured creditor, and not those of an owner or lessor. Any excess proceeds resulting from a foreclosure sale of the aircraft beyond the secured amount would have to be paid over to the lessee.

In contrast, under English law there is no risk of recharacterisation of an aircraft lease as a security interest. There is no general legal definition of a finance lease or an operating lease, although the distinction is relevant for accounting and tax purposes.¹ If an instrument is structured as a lease under English law, a lessor may exercise its rights as owner as against the lessee regardless of the economic substance of the transaction. English law permits a lender or lessor to use ‘finance lease’ arrangements with the owner or lessor retaining ownership rights as against the lessee even if the transaction would not be deemed a ‘true lease’ under New York law.

Enforceability of foreign judgments

English or New York law-governed aircraft leases will typically provide that courts located in that jurisdiction shall have jurisdiction to resolve disputes under the lease, and that a judgment entered by those courts can be enforced in the jurisdiction where the lessee is based or where the aircraft is registered. However, the enforceability of a judgment entered by the courts of a foreign jurisdiction (for example, in the jurisdiction where the lessee is based or where the aircraft is registered) will require an examination of the laws of such jurisdiction and its position with respect to the enforcement of foreign judgments. This will include analysing any bilateral or multilateral treaties governing the enforcement of foreign judgments to which such foreign jurisdiction may be a signatory.

The United States has not ratified any treaty with the recognition and enforcement of foreign judicial judgments as a principal focus. Therefore, the recognition and enforcement of a judgment entered by a court in New York with respect to an aircraft lease would be subject to a case-by-case analysis, with input from foreign counsel being of critical importance. The courts of many jurisdictions outside the United States will recognise judgments issued by the courts in New York and it is customary for local counsel to provide a legal opinion to that effect.

In contrast with this position, as a member state of the EU,² the United Kingdom benefits from a number of instruments that regulate jurisdiction and the recognition and enforcement of judgments as between EU member states. The Brussels Regulation (Recast),³ for example, applies to the enforcement of judgments across the EU in proceedings instituted on or after 10 January 2015 and is directly effective in the United Kingdom and all other member states.⁴ Similarly, the 2007 Lugano Convention extends the recognition and enforcement of English judgments to certain European Free Trade Association countries, those being Denmark, Iceland, Norway and Switzerland.

The United Kingdom also benefits from a number of bilateral arrangements for the enforcement of judgments with certain non-EU countries (including members of the Commonwealth, the British Overseas Territories and a number of former British colonies). Importantly for a lessor, these arrangements extend to jurisdictions

often experienced in aircraft leasing transactions such as the Cayman Islands, Bermuda and the British Virgin Islands.⁵

To the extent that the parties cannot satisfy themselves that a judgment on the lease entered by a New York court or English court would be recognised and enforced in the courts of a foreign jurisdiction, the parties might consider providing for the arbitration of disputes if the foreign jurisdiction has adopted the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Under the New York Convention, to which both the United States and the United Kingdom are a party, an arbitral award determined by a New York arbitration tribunal on a New York law-governed lease or English arbitration tribunal on an English law-governed lease should be recognised by the courts of a foreign jurisdiction that has also adopted the New York Convention (subject to any requirements of the New York Convention).

Filing requirements for aircraft leases and security assignments

Under English law, there are no filing requirements for an aircraft lease per se, although, given that the United Kingdom aircraft register is an operator registry, a domestic operator would be responsible for aircraft registration as charterer by demise under the lease. Since the ratification of the CTC in the United Kingdom, a lease may be, and in practice often is, registered at the International Registry as an international interest.

Similarly, under English law, there is no requirement to make any filings with respect to such an assignment at Companies House (other than with respect to an assignor incorporated in the United Kingdom, in which case a filing at Companies House in the United Kingdom will need to be made to ensure that the security is enforceable). The only formality to perfect an assignment by way of security of a lessor's rights under an English law-governed lease is to serve notice of the assignment on the debtor. Again, since the ratification of the CTC in the United Kingdom, an English law-governed security assignment will typically be registered at the International Registry as an international interest.

Under New York law, while there is no filing requirement in respect to a 'true lease' under the Uniform Commercial Code (UCC), it is customary for a precautionary financing statement to be filed. In the case of aircraft registered with the Federal Aviation Administration (FAA), an aircraft lease must be filed for recording with the FAA in order to be valid against third parties without notice of the aircraft lease. If the CTC applies to the lease, the international interest created under the lease must be registered with the International Registry in order to have priority over subsequently registered international interests or unregistered interests, except for certain unregistered interests that are given priority over even registered interests.

Under New York law, a titular lessor whose lease is recharacterised as a security interest will be treated as a secured party and not as a lessor, and must take steps to perfect the security interest in order to be effective against third parties. These steps include the filing of appropriate financing statements under the UCC, the filing of the lease with the FAA in the case of FAA-registered aircraft and, if the CTC applies, registering the international interest created under the lease with the International Registry. If an aircraft lease is perceived to have a substantial risk of being recharacterised, the lease should include language expressly granting to the lessor a security interest in the aircraft along with appropriate remedies in the event that the lease is recharacterised as a security interest.

Under New York law, a lender who takes an assignment of the lessor's rights under an aircraft lease also must take steps to perfect the security assignment in order to be effective against third parties. These steps include taking possession of the chattel paper original of the lease, the filing of appropriate financing statements under the UCC, the filing of the security assignment with the FAA in the case of FAA-registered aircraft and, if the CTC applies, registering the international interests created under the lease and the security assignment with the International Registry.

Mitigation of damages (common law)

English common law establishes that the purpose of damages is to compensate the injured party for loss, so as to put the innocent party in the position in which it would have been had the relevant contract not been breached.⁶ To quantify the damages to be awarded, English courts

must be satisfied that, after the breach of contract that gave rise to the loss, a claimant has taken reasonable steps to mitigate (ie, avoid or reduce) the loss. This 'duty to mitigate',⁷ is framed by three principles:

- (i) a claimant cannot recover damages for any loss that could have been avoided by taking reasonable steps;
- (ii) if a claimant in fact avoids or mitigates his or her loss resulting from a defendant's breach, he or she cannot recover for such avoided loss, even though the steps he or she took were more than could reasonably be required under (i); and
- (iii) where a claimant incurs loss or expense in the course of taking reasonable steps to mitigate the loss resulting from a defendant's breach, a claimant may recover any expenses incurred in taking such steps, even if these prove to be greater than the loss thereby avoided.

Importantly, the English courts have confirmed that the burden of proving that a claimant failed to take reasonable steps to mitigate its loss falls on a defendant and that a lessor claiming damages against a lessee in default, for example, would not be 'under any obligation to do anything other than in the ordinary course of business' to mitigate its loss.

During negotiation of an English law-governed lease, lessees commonly request that the lessor agree to a contractual duty to mitigate losses. Lessors need to consider carefully whether it is in their commercial (and legal) interest to agree to a contractual obligation that is likely to impose a greater burden on the lessor than would be imposed by common law if the lease were otherwise silent on mitigation of loss.

While New York law recognises a general duty to mitigate damages, this is subject to the parties' freedom to contract with respect to remedies and other rights under the UCC. The statutory remedies granted to a lessor under the UCC, upon a default by the lessee, provide for a statutory mitigation mechanism. However, the UCC allows the parties to override the statutory remedies provided that the obligations of good faith, diligence, reasonableness and care may not be disclaimed by agreement. The obligations of good faith, diligence, reasonableness and care might be construed in specific circumstances to impose a mitigation obligation on a lessor whether or not one is imposed expressly. One advantage of the parties setting forth a specific contractual mitigation measure is that the UCC allows the parties to determine by agreement what standards should be applied in measuring performance as long as such standards are not manifestly unreasonable. This is often set forth in a non-exclusive liquidated damages provision setting forth an agreed formula for determining lessor's damages following a lessee default.

Remoteness of damage in the context of aircraft leasing (common law)

English common law places a further check on the ability of an injured party to recover contractual damages, where a loss results from a breach of contract that is deemed to be too remote. In order for damages to be recoverable, the loss claimed must either arise 'in the usual course of things' or 'may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract as the probable result of the breach of it'. In *Pindell Limited and BBAM Aircraft Holdings 98 (Labuan) Limited v AirAsia Berhad* [2010] EWHC 2516, the English courts examined the 'second limb' test for remoteness in the context of an aircraft leasing transaction. The court held that the loss of an onward sale of a 20-year-old Boeing 737-300 aircraft, owing to the late re-delivery of the aircraft by the lessee to the lessor, was not something which 'reasonable contracting parties in the shoes of [the parties] would, when making this contract, have had it in mind'. The court also highlighted that, on the proper interpretation of the contract against its commercial background, the loss of the onward sale was not something that the lessee had assumed responsibility for and, as such, the lessor was precluded from claiming damages for the loss of the future onward sale.

To offset risks as to a reduction in damages payable to a lessor as a result of a failure to mitigate loss or losses being deemed too remote, lessors may seek to draft express provisions in their lease that specifically address these points at the outset.

Under English law, one way this may be achieved is for a lessor to stipulate in its lease a predetermined amount of damages ('liquidated damages') that will be payable by the lessee upon the breach of certain

of the lessee's obligations under a lease.⁸ Similarly, to address claims that a loss suffered may be too remote, a lessor may seek to include broad indemnification provisions that contemplate, at the outset, potential losses that may occur throughout the lease term or as a result of the leasing of an aircraft or both. It should be noted, of course, that the ability of a lessor to incorporate such terms will depend on the relative bargaining power it has as regards a potential lessee and will ultimately be a matter for commercial negotiation.

Under New York law and the UCC, the parties to a lease may include rights and remedies for default in addition to or in substitution for those provided for under the UCC, subject to the obligations of good faith, diligence, reasonableness and care mentioned previously, which cannot be disclaimed by agreement. In the case of liquidated damages clauses, these are permissible but only in an amount that is reasonable in light of the then-anticipated harm caused by default. If the parties to a lease desire to allow for the recovery of certain losses, such as loss profit on an onward sale or lease of an aircraft, they would be well advised to expressly provide for such recovery in the lease.

Conclusion

While there are some differences in the treatment of aircraft leases governed by New York law and English law, if due care is taken in the drafting of the lease and attending to all actions required to perfect and protect the interests created under the lease, it should be possible to accomplish the commercial and other objectives of the parties in an aircraft lease whether it is governed by New York law or English law.

Notes

- 1 The International Accounting Standards Board's 'IFRS16 Leases' takes effect in January 2019, which will change the basis for reporting of leases, including the requirement for lessees to report leases on balance sheets.
- 2 As a result of the United Kingdom's referendum result on its continued EU membership and the commencement of its exit from the EU, the future applicability of relevant conventions is not currently clear.
- 3 Council Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).
- 4 Other than Denmark, however, note that the 2001 Brussels Regulation (Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) is directly effective in Denmark.
- 5 Such bilateral reciprocal enforcement treaties are implemented into English law by the Administration of Justice Act 1920, Part II, and the Foreign Judgement (Reciprocal Enforcement) Act 1933.
- 6 *Robinson v Harman* (1848) 1 Ex 850.
- 7 R Goode, *Commercial Law* (4th edn 2010) notes that 'this is not a positive duty at all, merely a factor limiting the recoverability of damages.'
- 8 Such liquidated damages must not be 'penal in nature'. *Cavendish Square Holding BV v El Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67.

Australia

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Australia was a signatory to the Rome Convention (1933); however, it denounced the convention in 2000, and it was replaced by the Damage by Aircraft Act 1999 (Cth).

Australia is a signatory to the Chicago Convention (1944) and ratified it in 1947. Australia is a signatory to the Geneva Convention (1948) (signed on 9 June 1950), but has not ratified it. Australia ratified the New York Convention of 1958 in 1975.

The Convention on International Interests in Mobile Equipment (Cape Town Convention) and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Aircraft Protocol) took effect in Australia on 1 September 2015.

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The principal pieces of legislation are the Civil Aviation Act 1988 (Cth), the Air Navigation Act 1920 (Cth) and the Air Services Act 1995 (Cth) – which allowed for the former Civil Aviation Authority to be split into Airservices Australia and the Civil Aviation Safety Authority (CASA). The Personal Property Securities Act 2009 (Cth) (PPSA) is applicable to the registration of security interests over aircraft and engines.

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Australia has made a declaration under the Cape Town Convention and Aircraft Protocol providing that parties to an aircraft lease, security agreement or contract of sale are free to choose the law that is to govern their contractual rights and obligations, wholly or in part. Australian courts will generally recognise the parties' choice of governing law and forum provided that such choice was made on a bona fide basis and not made in bad faith, illegally, against public policy or with the primary purpose of avoiding the laws of another jurisdiction. Usually parties will choose the governing laws of a state or territory in Australia where the aircraft or business is to be based (subject to stamp duty considerations).

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

In Australia, a bill of sale or a contract of sale is commonly used to transfer title to the aircraft; however, the aircraft is required to be registered

on the Australian Civil Aircraft Register, which is maintained by CASA to formalise the transfer.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

The bill of sale or contract of sale must be in writing, duly signed and delivered, and show consideration for the transfer of title in the aircraft or engine. There is no requirement for the document to be notarised, legalised or translated, although in some states it may be subject to stamp duty.

The former owner of the aircraft must complete a Form 027 Part 1 (Notice of Transfer of Ownership Former Owner) and provide the completed form to CASA within 14 days of the transfer of the aircraft. A copy of the completed form and the original certificate of registration needs to be provided to the new owner within 14 days.

To become the aircraft's new registration holder, the new owner of the aircraft needs to complete and provide a Form 027 Part 2 (application by new owner to become the registration holder) to CASA within 28 days of the date of transfer of the aircraft, otherwise the registration of the aircraft will be suspended. The CASA forms must be in English.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

The relevant aircraft registry is the Australian Civil Aircraft Register, which is both an owner and operator registry. The registry is open to the general public. Engines cannot be separately registered.

Section 4A(2) of the Civil Aviation Act provides that a provision of the Act or regulations may apply to an aircraft registered in a contracting state as if it were an Australian aircraft if an 83-bis agreement (Chicago Convention) has the effect of transferring a function of the contracting state to Australia.

Section 4A(3) provides that a provision of the Act or regulations does not apply to an Australian aircraft if an 83-bis agreement has the effect of transferring a function of Australia as the state of registry in respect of the aircraft to a contracting state.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

The owner and the operator can be registered on the Australian Civil Aircraft Register but a lessee's interest cannot be registered. Registration holders and operators must be legal entities and an 'eligible person' within the CASA regulations. Proof of identity is required. See question 5 for the relevant CASA forms.

A partnership cannot be a registration holder or a registered operator (as it is not a legal entity or an 'eligible person'), nor can a trust. A

trustee, however, can be noted as the registration holder on behalf of a trust provided a certified copy of the trust deed accompanies the application but not as a registered operator.

Registration is not possible for specific parts of an aircraft or engines on the Australian Civil Aircraft Register.

For leased aircraft, depending on contractual arrangements, the sole legal owner (ie, lessor) may become the registration holder. The registered operator must accept responsibility for the continuing airworthiness, maintenance and control of the aircraft.

It is not possible to register an ownership interest or a leasehold interest with any other registry in Australia other than the Australian Civil Aircraft Register, although it should be noted that the Cape Town Convention and Aircraft Protocol now allows for registration of ownership interests on the international register in Dublin.

It should also be noted that while an aircraft or engine lease, sublease or bailment may create a security interest in an aircraft or engine capable of being registered on the Personal Property Securities Register (PPSR), such a security interest will be defeated by a security interest registered over the same aircraft object registered on the Dublin register. See question 17.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

The owner must complete the relevant CASA forms. Timing in relation to registration and the delivery of the relevant forms is set out in question 5. A Form 029 – Registration Application is to be used by an owner of an aircraft when applying for initial registration. If the aircraft is already on the Australian Civil Aircraft Register and has an Australian ‘VH’ registration then a Form 027 – Transfer of Ownership must be used to transfer ownership.

Identification and the payment of relevant fees is required.

Title to an engine does not automatically vest in the owner of the host aircraft. An engine cannot be separately registered on the Australian Civil Aircraft Register.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

As the Australian Civil Aircraft Register is not a register of title, registration does not constitute proof of title. Ownership interests in an aircraft can only be confirmed through the parties’ relevant legal and commercial documentation (eg, bill of sale or contract of sale) outside of the CASA registration process, and where appropriate, through registration on the PPSR. Although the applicant legally declares to CASA that he or she is the owner of the aircraft, third parties cannot rely on the accuracy of the register or certificate of registration. A registered ownership interest with CASA will not be effective against third parties if the owner has no title or defective title and a party should therefore rely on the underlying title documentation, which is usually a bill of sale or contract of sale.

10 Registration of lease interests

Summarise the process to register a lease interest.

Lease interests cannot be registered on the Australian Civil Aircraft Register. However, as mentioned, certain leases of aircraft and engines (particularly where pooling arrangements provide for bailment of an indefinite duration) will require registration on the PPSR.

A failure to perfect a security interest may leave the aircraft or engines available to satisfy the obligations owed by the lessee to its creditors, or a purchaser of the aircraft or engines may take free of the lessor’s interest where the lessor has not perfected its interest.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

The Australian Civil Aircraft Register comprises a hard copy of a register of Australian aircraft certificates for each registered aircraft and is supported by an online database.

The certificate of registration (issued by CASA) contains the following information:

- manufacturer;
- model;
- serial number;
- engine type;
- number of engines;
- date when aircraft was first registered in Australia;
- year of manufacture;
- registration holder (and commencement date); and
- registered operator (and commencement date).

The certificate of registration does not state any mortgagee’s interest over the aircraft. Such security interests must be registered on the PPSR. CASA does not issue separate certificates of registration for engines.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

CASA may cancel registration of an aircraft if appropriate and will give notice to the registration holder and registered operator.

A registration holder can submit a Form 1538 – Request for CASA to record Irrevocable De-Registration and Export Request Authorisation (IDERA) on Australian Civil Aircraft Register to CASA indicating that the ‘authorised party’ (ie, mortgagee) is the only party that has the right to deregister and export a specified aircraft object. IDERAs are a voluntary measure providing greater security to creditors by preventing a debtor from flying an aircraft to a jurisdiction where the Cape Town Convention and Aircraft Protocol does not apply. The operator cannot block any proposed deregistration or export by an owner.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

Deregistration of an aircraft with CASA (and its export) has been typically undertaken utilising a deregistration power of attorney provided at the start of the transaction. An irrevocable deregistration power of attorney will survive the insolvency of the creator of the power, although see question 14 in relation to the relevance of these documents now that the Cape Town Convention and Aircraft Protocol and IDERA apply in Australia and are capable of being registered with CASA.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

As the Cape Town Convention and Aircraft Protocol is now effective in Australia, CASA now accepts IDERAs. The registration holder must complete and provide the original IDERA (Form 1538), along with any related fees to CASA.

A Form 1538 does not have to be countersigned by CASA. Provided the IDERA satisfies all requirements and there is no other IDERA recorded against the aircraft, CASA will record the IDERA on the Australian Civil Aircraft Register.

Although most financiers are likely to still require a deregistration power of attorney, it is expected that all owners and mortgagees in relation to Australian aircraft will now lodge a Form 1538.

To deregister an aircraft under an IDERA, the authorised party must submit a Deregistration Form (Form 1542). If there is a CDCL (ie, a letter issued by the authorised party transferring its rights to a certified designee recorded (such as a financier)), then the CDCL form must be submitted by the certified designee. Once CASA has sent a confirmation of deregistration letter to the registration holder and registered operator, the aircraft is no longer a registered aircraft in Australia and does not possess a certificate of airworthiness and must not be flown. In the event of a default, the lender will be able to exercise the IDERA to secure deregistration and export of an aircraft. This

ensures that an aircraft cannot legally be flown to another country to avoid recovery of the asset.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

A security document over an aircraft will usually be in the form of a specific security agreement over the aircraft or engine or a general security agreement over all of the assets of the grantor, creating a security interest in favour of the secured party (typically a financier). Generally, there is no specified form to these security agreements. These documents are not required to be registered on the Australian Civil Aircraft Register or the PPSR and are therefore not public documents. No maximum secured amounts or other economic details are required to be disclosed on the PPSR however the grantor (against whom the security interest is registered) may apply to the registrar of the PPSR for copies of the underlying documentation allegedly giving rise to the security interest if the validity of such security interest is disputed. The documents do not need to be in English (but typically are), however, registration of security interests on the PPSR must be in English.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

The security documents do not need to be notarised, legalised, translated or registered (although the security interests created by such documents need to be registered on the PPSR). Stamp duty on loan and security documentation has now been abolished in all states and territories in Australia. The PPSR registration costs to record the security interests are minimal.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

A security document does not need to be filed with CASA or the PPSR as a condition to its effective creation or perfection of a security interest against the debtor and third parties. However, a financing statement (which reflects the security interest created in respect of the 'collateral' (ie, aircraft and engines)) will need to be registered online with the PPSR to perfect the security interest. There are complexities around timing requirements for registrations, which are dependent on the nature of the security interests created.

The Cape Town Convention and Aircraft Protocol established an online registry in Dublin for recording security and purchase interests in most aircraft, aircraft engines and helicopters. Section 256 of the PPSA provides that the International Interests in Mobile Equipment (Cape Town Convention) Act 2013 (Cth) prevails over the PPSA to the extent of any inconsistency (ie, the Dublin registry will have priority to the extent of any inconsistency with the PPSR).

The Cape Town Convention and Aircraft Protocol only applies to aircraft objects as follows:

- airframes that can transport at least eight persons (including crew) or goods in excess of 2,750kg;
- helicopters that can transport at least five persons (including crew) or goods in excess of 450kg; and
- aircraft engines that have at least 1750lb of thrust.

Accordingly, if an aircraft object does not fall within any of these definitions then it will continue to be governed by the PPSA.

As the PPSA has a broader application (eg, it captures certain proceeds of sale not necessarily caught by the Cape Town Convention and Aircraft Protocol), it is expected that security interests in aircraft will, in practice, continue to be registered on the PPSR as well as on the International Registry of Mobile Assets in Dublin.

18 Registration of security

How is registration of a security interest certified?

When a secured party registers a security interest on the PPSR, a verification statement is sent to the secured party group's address for service by email and includes details such as secured party, grantor, collateral class and registration period. Neither PPSR search results nor the verification statement contain the ranking or priority of the security interest. However, the effect of registration upon the priority of security interests is demonstrated through the following default priority rules under the PPSA (although there are exceptions such as for a purchase money security interest (PMSI)), which includes a 'PPS Lease':

- a perfected security interest takes priority over an unperfected security interest;
- an earlier perfected security interest takes priority over a later perfected security interest; and
- an earlier unperfected security interest takes priority over a later unperfected security interest.

Aircraft (known as 'tangible property' under the PPSA), is a separate collateral class, and 'aircraft' is made up of four sub-classes: 'aircraft engine', 'airframe', 'helicopter' and 'small aircraft'. A registration in respect to aircraft will always require the identification of a sub-class and the inclusion of a serial number. Aircraft engines, airframes and helicopters must be described by the manufacturer's serial number, name and generic model designator. Security interests in aircraft and engines also need to be registered with the online international registry in Dublin established by the Cape Town Convention and Aircraft Protocol, which will have priority over security interests registered against the same aircraft object on the PPSR (see question 17).

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

Generally, with the exception of a PMSI, registration does confer priority over subsequent security interests. There is no priority notice system in place as such, although see question 18 in relation to priority rules.

The PPSR provides a disclaimer as to the accuracy of the information, and parties need to rely on the underlying financing and security documentation (or lease or bailment arrangement in respect of a PPS Lease) of an aircraft or engine. The PPSR acts as a notice board for the underlying security interest, and priorities can be amended contractually by way of deeds of priority or subordination.

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

A security trustee concept is recognised and may be used in granting security under Australian law in respect of aircraft and leases, and the nature of the security is a right in personam. A security agent trustee can hold security for a changing group of beneficiaries (ie, new lenders) without affecting the security provided. There is no need to make any amendments to the PPSR as the security agent trustee will remain the registered secured party. If the security interest in the aircraft is held directly (and not through a security trustee), then a novation of the lender will require a new security registration on the PPSR. Priority may not be apparent from a search of the PPSR.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

An aircraft and its engines are treated as separate goods and require separate security registrations on the PPSR.

A security interest can be registered in respect of an engine even if it is not installed on the host aircraft at the time of creation and an encumbered engine does not cease to be encumbered merely because it is removed from a host aircraft or installed on another aircraft (although it may breach the underlying security).

A security interest over spare parts of an aircraft can be registered on the PPSR under the collateral class of 'other goods'. Consideration

needs to be given to specific laws under the PPSA in respect of aircraft spare parts that are installed or affixed to an aircraft (or co-mingled) over which the secured party (of the spare parts) does not hold a security interest.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

Self-help remedies are available in Australia provided such rights are exercised in accordance with the lease terms and undertaken in a lawful manner; however, where a lessee disputes the lessor's right to possession following a lease termination, a court order is usually obtained. The owner must notify and obtain the consent of the person on whose property it would need to enter to effect physical repossession of the aircraft. Consent from the relevant airport authority will typically be required.

Aircraft leases in Australia will usually allow a lessee a grace period within which to remedy a default.

There are no statutory time limits imposed on a lessor to repossess the aircraft. See question 23 in relation to the Cape Town Convention and Aircraft Protocol.

23 Enforcement of security

Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

The Cape Town Convention and Aircraft Protocol provides that a creditor can enforce 'self-help' without reference to the court in an event of default, or an insolvency event. That is after a nominated waiting period (60 days), a creditor automatically gains the right to repossess the aircraft object. The courts have no powers to delay or prevent the enforcement of this remedy, however the courts still continue to have jurisdiction in relation to other aspects of the securities matter, such as the validity of the claim over a security interest.

The International Interests in Mobile Equipment (Cape Town Convention) Act 2013 (Cth) provides that Australian courts are restrained from exercising jurisdiction in relation to securities remedies that are subject to the Cape Town Convention, in favour of relevant 'self-help' provisions. In Australia a court order is usually obtained and a liquidator or receiver appointed. Voluntary administrations are common owing to the personal liabilities that directors risk for trading while insolvent under the Corporations Act 2001 (Cth).

Voluntary administration will give rise to a stay on civil actions against a company during the administration (which will continue until an agreement is reached with creditors or a decision is made to liquidate the company). During this time creditors may only enforce security if they hold security over the whole or substantially the whole of the assets of the company, which is typical for an aircraft security where a special purpose vehicle holds title to the aircraft.

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

A statutory lien against an aircraft in favour of Airservices Australia for unpaid service charges (eg, landing charges, route navigation charges, terminal navigation charges) or arising because of moneys owing to the Australian Taxation Office will have priority.

Airservices Australia has powers to sell the aircraft where services charges remain unpaid but must recognise any mortgagee's debt incurred prior to the lien.

Governments at both state and commonwealth level have constitutional authority to requisition aircraft (both ownership and use) but are subject to paying just and fair compensation (other than for seizures following certain crimes or sanctions) although typically commercial agreements are negotiated with airlines and operators in times of emergency.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

A 10 per cent goods and services tax (GST) may apply to the sale, transfer, redelivery or importation of an aircraft depending on the circumstances. There is a GST exemption on the export of aircraft provided the purchaser of the aircraft exports it from Australia under its own power within 60 days of taking physical possession.

Taxes might apply where a non-resident lessor of aircraft is leasing to an Australian airline directly from offshore. Generally, royalty withholding tax (RWT) will be deducted from rental payments made to a non-resident lessor unless among other things, a double tax agreement (DTA) is in place between Australia and the country of residence of the non-resident lessor provides otherwise.

If Australia does not have a DTA with the relevant country, the RWT is 30 per cent of the gross royalty. If a DTA is in place, the rate of withholding is typically around 10 per cent.

Withholding tax (of 10 per cent) on interest payments may be payable where the interest on a loan is being paid to an offshore financier. It is typical for loan documentation to contain gross-up clauses and these are recognised under Australian law.

If the lessor has an Australian permanent establishment, the lessor might be subject to Australian income tax.

Stamp duty, in the form of a conveyance duty, may apply to the sale or transfer of an aircraft if the aircraft is being transferred, particularly with a lease and the lessee is located in certain states. Stamp duty, in the form of mortgage duty, may be applicable if the aircraft is located in New South Wales and security is taken in respect of the aircraft.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

Generally, there are no restrictions with transferring funds to and from Australia, subject to compliance with the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth). Foreign exchange controls are implemented from time to time against specific countries, entities and persons resulting from sanctions legislation.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

If the default interest is excessive, it may at times be deemed by a court to be unenforceable as a penalty.

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

No import or export duty is payable with respect to an aircraft or engine; however, this may apply to spare parts. Customs legislation requires all imported spare parts for foreign-owned aircraft (even where a customs duty exemption may apply) to be reported.

GST may be payable on the import of the aircraft or engine as set out in question 25. Liability for payment attaches to the importer.

Insurance and reinsurance

29 Captive insurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

There are no requirements that insurances be placed with local insurers in Australia.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

While there is limited case law in this area, cut-through clauses are considered to be legally effective in Australia and there is argument that section 48 of the Insurance Contracts Act 1984 (Cth) will ensure that an absence of privity of contract between the reinsurer and the original insured should not be an impediment to enforceability.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Assignments of reinsurance are legally effective in Australia assuming there is a legally binding contract between the parties. An assignment of reinsurance will typically be provided where the insurers are located in jurisdictions where a cut-through clause may not be legally effective.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

If the owner of the aircraft is the employer of a negligent pilot then the owner will be vicariously liable for the negligence of his or her employee. The owner, lessor or financier will be liable only if its own negligence or contractual breach can be shown to be causative of loss and damage. However, previous strict liability on passive owners, lessors and financiers has been removed from Australian legislation, and now only apply to an operator of the aircraft, as discussed in question 33.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

No. The Damage by Aircraft Act 1999 (Cth) imposes strict liability on the owner (unless the owner has no active role in the operation of the aircraft) and the operator of the aircraft (ie, the person who retains control of its navigation is taken to be the operator of the aircraft). State legislation may also apply and is not uniform in relation to damage by aircraft.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

Australia's carriers' liability and insurance arrangements are outlined in the Civil Aviation (Carriers' Liability) Act 1959 (Cth) (CACL Act), which gives the force of law to a number of passenger liability regimes, including those arising under the Warsaw Convention, the Montreal Convention 1999 and a separate system of liability for domestic travel. The liability framework for domestic passenger travel is created under Part IV of the CACL Act, and is complemented by state legislation to create a national uniform scheme.

Arrangements for compulsory passenger insurance are outlined in Part IVA of the CACL Act.

The acceptable contract of insurance requirement for coverage of the carrier against personal injury liability is A\$725,000 for domestic carriage and 260,000 special drawing rights (within the meaning of the International Monetary Agreements Act 1947 (Cth)) for any Montreal Convention or other international carriage arrangements.

Liability arrangements for third-party (surface) victims are outlined in the Damage by Aircraft Act 1999 (Cth) and now increase the domestic passenger liability cap and mandatory insurance requirements from A\$500,000 to A\$725,000 per passenger as under the CACL Act.

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Austria

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Austria is party to the Chicago Convention (ratified 26 September 1948), the New York Convention (ratified 2 May 1961), the Warsaw Convention (ratified 27 December 1961), the Washington Convention (ratified 25 May 1971), the Tokyo Convention (ratified 8 May 1974), the Hague Convention (ratified 13 March 1974) and the Montreal Convention (ratified 28 June 2004).

Austria is not party to the Rome Convention (1933), the Geneva Convention (1948) and the Cape Town Convention (2001).

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The principal Austrian legislation applicable to aviation finance and leasing are the following:

- the General Austrian Civil Code, providing the basic legal framework for purchase and lease contracts in general as well as relevant provisions on transfer of title in, and taking security over, assets (eg, aircraft) and enforcement of security interests;
- the Austrian Aviation Act and related ordinances, providing relevant provisions relating to the aircraft register or the aircraft operation certificate;
- the Austrian Banking Act, providing the regulatory framework for financiers and commercial lessors of aircraft; and
- the Austrian Insolvency Code, providing relevant provisions on the implications of insolvency over assets of a debtor or a lessor and on the rights of holders of security interests.

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Parties are principally free to agree on the applicable law. According to the Austrian Private International Law Act (IPRG) rights in rem pertaining to registered aircraft (such as a pledge) are subject to the law of the jurisdiction where the aircraft is registered.

In case of a pledge or retention right derived from law securing claims for damages caused by the aircraft or expenses made for the aircraft, according to the IPRG, Austrian law shall be applicable if the triggering event takes place in Austria.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

Ownership title in an aircraft under Austrian law is principally transferred by agreement on a valid title (contractual agreement, ie, titulus)

and by physical delivery of the aircraft to the intended title holder (modus).

A bill of sale (alone) is principally not effective to validly transfer title to an aircraft under Austrian law, but may serve as written evidence for the transfer of title to an aircraft.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

Austrian law does not principally provide for a specified form for creating an enforceable transfer document for an aircraft. Under Austrian law the existence of concurrence of wills (for the intended transfer of ownership) between the parties constitutes the essential requirement for such transfer.

To effect the change of ownership in the Austrian aircraft registry, a document evidencing title to the aircraft of the owner (eg, purchase agreement or bill of sale) has to be filed with the competent authority in the course of the formal application at the aircraft registry.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

The Austrian aircraft registry is operated by Austro Control in Vienna (www.austrocontrol.at). The following information is to be registered in the aircraft registry:

- the ordinal number of the aircraft;
- the nationality and registration mark of the aircraft;
- the producer and the serial number of the aircraft;
- the maximum permissible take-off mass; and
- the name and address of the operator.

The Austrian aircraft registry is an operator registry. The registration in the Austrian registry is an administrative requirement and does not impact the legal ownership of an aircraft. Therefore, a registration within the registry (as operator of an aircraft) does not legally prove or constitute a valid ownership title to the aircraft.

There is no specific engine register in Austria.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

Since the Austrian aircraft registry is an operator registry, ownership, lease or security interests are not to be registered therein. There is no other Austrian registry in addition to the aircraft registry operated by Austro Control.

Other than with respect to the operator (ie, requirement of an aircraft operating certificate), there are neither restrictions on the legal status nor restrictions on the nationality of the legal owner of an

aircraft. Consequently, Austrian or foreign individuals as well as companies may be registered as the operator or owner of an aircraft.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

The following documents and information are required to be attached to the application form for registration of an aircraft in the Austrian aircraft registry and issuance of a registration number to the aircraft:

- name and address of the operator;
- name and address of the owner;
- documents evidencing title to the aircraft of the owner (eg, purchase agreement and bill of sale);
- documents evidencing that the operator is located in an EU member state or such state equated by bilateral agreement (excerpt of the respective commercial register required);
- declaration on the transfer of operatorship by owner, in case the owner does not operate the aircraft;
- documents evidencing the name and address of the aircraft manufacturer and their Austrian representatives;
- documents relating to the aircraft, type and the manufacturer's serial number;
- confirmation from the tax and revenue office pursuant to the Austrian Value Added Tax Act in case of an intra-community acquisition of the aircraft;
- documents from the manufacturer evidencing that the aircraft has not been registered in any other state (certificate of non-registration), or documents of the state in which the aircraft has been registered, evidencing that the aircraft is no longer registered (certificate of cancellation); and
- documents evidencing that the aircraft complies with the Austrian Civil Aircraft Noise Acceptance Ordinance (noise test report and noise certificate).

A specific form of the above-mentioned documents is not required by law. Application forms, as well as forms relating to a change of ownership or operatorship are available online.

Sole title to an engine does not automatically vest in the owner of a host aircraft or airframe.

Costs or fees for registration of an aircraft depend on the weight of the aircraft and amount up to €2,788 for aircraft over 20 tonnes. Fees for deregistration will range between €101 and €1,337. Fees for the issuance of an (initial) airworthiness review certificate will range from €333 to €20,512. Fees for the (ongoing) issuance of a certificate of airworthiness will range between €223 and €7,134.

A registration may be effected within a few days. In practice we recommend first getting in contact with the competent authority and individually clarifying the administrative requirements for registration of the specific aircraft. Such preliminary clarification might also speed up the registration procedure.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

The registration does not prove or constitute title to an aircraft; it has purely declaratory character. Therefore, third parties cannot rely on the registration of the ownership interest as recorded. The consequences of an Austrian registration are entitlement to operate the aircraft, Austrian nationality of the aircraft and a more difficult 'bona fide acquisition' of the aircraft, if the aircraft is acquired from any other entity than the registered owner.

10 Registration of lease interests

Summarise the process to register a lease interest.

The registration of lease interest is not feasible under Austrian law.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

The certificates are issued by Austro Control. The registration certificate contains information on the following:

- the registration number and the kind of the aircraft;
- the nationality and registration marks;
- the aircraft manufacturer and the manufacturer's designation of the aircraft;
- the manufacturer's serial number; and
- the name and address of the operator.

The legal owner, lease or security interests are not recorded or stated in the registration certificate. A separate engine certificate cannot be issued.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

Whereas the operator is principally responsible and competent for arranging registration and deregistration of an aircraft, the operator requires the owner's cooperation and consent as the owner is practically required to sign the relevant application forms submitted to the aircraft registry.

In practice, the owner as well as lenders or finance providers usually request a power of attorney (POA) from the operator to be in a position to deregister or arrange other changes to the registration of the aircraft and to avoid the operator blocking such intention for registration or deregistration or change. In this respect, the operating agreement or the finance agreement regularly contain further regulations between the parties.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

Principally, the parties are free to agree on the respective characteristics or necessities of the POA. POAs usually entitle the agent to freely deregister or register and export the aircraft. The underlying contractual relationship (eg, purchase contract and lease contract) usually set forth further provisions pertaining to such POA and potential admissibility requirements (eg, potential termination event for the finance contract). Such POA may be granted irrevocably or to more than one attorney.

Even in the case a POA has been granted irrevocably, it can be terminated for good cause and will lapse upon the opening of insolvency proceedings over the assets of the grantor.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

This is not applicable in Austria as Austria is not party to the Cape Town Convention.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

No mortgages over aircraft may be registered in Austria as such instrument is not foreseen under Austrian law.

Although pledge agreements governed by Austrian law over an aircraft are used by some market participants in Austria, there is great discussion in legal literature and doubts caused by Austrian Supreme Court decisions based on Austrian law principles of pledge, which provide that mobile assets are subject to the dead pledge principle. Such

principle provides that pledged mobile assets must be handed over by the pledgor to the pledgee or an agent of the pledgee (eg, an operator holding the aircraft for the pledgee).

For this reason, in Austria, finance leasing of aircraft (whereby the financier is the owner or title holder of the aircraft) is much more widely used (ie, title remains with the lessor as security until final payment) than aircraft credit agreements with pledges (whereby the pledgor is the owner or title holder of the aircraft).

The language used in such documents is usually German or English subject to the parties' agreement. We see more English language documents than German language documents.

There is no specific form required.

A maximum secured amount is not foreseen in Austrian law as a requirement in such documents.

We recommend that certain economic terms of the financing transaction are reflected in the agreements as to the individual and concrete underlying obligation or claim, which is to be properly defined and declared due and payable in order to be in the position to realise or exercise the security interest rights of the financier.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

There are no formal requirements with respect to financing or security agreements. There is no specific language required and there are no notarisation or stamping obligations.

In the course of ordinary court proceedings before Austrian courts all documents submitted to the court would need to be certified translated into the German language.

Perfection of a pledge requires physical delivery of the aircraft from the owner to the pledgee (dead pledge principle: see question 15). Usually, in the case a pledge is used, the aircraft is in the possession of the operator at the time of granting the pledge by the owner as pledgor to the financier as pledgee. Delivery of the aircraft can be effected by way of instruction of the operator (by the owner as pledgor) to hold and possess the aircraft for and on behalf of the pledgee. Additionally, it is necessary to mark the pledge as being subject to an Austrian law pledge by affixing plates to the airframe (and ideally also to each engine) in order to create external visibility of the pledge.

However, owing to certain constraints under Austrian law regarding pledges of mobile assets, aircraft finance leasing (whereby retention of title remains with the financier until the last payment) is much more widely used by market participants (see also question 15).

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

Austrian law neither provides for, nor offers the possibility of, filing the security document with the aviation authority (or any other registry) as a condition to its effective creation or perfection.

18 Registration of security

How is registration of a security interest certified?

Austrian law neither provides for, nor offers the possibility of, registration of a security interest with any register.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

Not applicable (see questions 17 and 18).

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

In Austria, typically, finance leasing of aircraft (whereby the financier is the owner or title holder of the aircraft) is used (ie, title remains with the lessor as security until final payment).

It is common practice that the lessors request additional security in order to secure their claims. Such security might be an abstract guarantee provided from a separate person or entity (eg, holding company or beneficial owner).

The concept of trust is recognised in Austria but not used in granting security.

An aircraft financing agreement and its related security interests may in principle be transferred by all parties, for example, to a new financier or to a new lessee. However, such transfer is usually limited by the terms of the agreements to the financier side, whereas the lessee (or grantor of security) usually requires prior written consent by the financier to the transfer of its contractual position.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

Airframes and engines are treated as separate items of property. Therefore, any security interest (either in the aircraft or airframe or in the engine) must be created separately. If airframes and engines are pledged, they are usually subject to the same pledge agreement. Separate pledge agreements may be more appropriate in case the engines have not yet (at the time of perfection of the security interest in the aircraft or airframe) been installed on the aircraft. Principally, a pledge over engines follows the same requirements for perfection as a pledge over the aircraft or airframe.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

Austrian law leasing agreements (or related tripartite agreements) usually foresee irrevocable powers of attorney by lessee and operator granting rights to the owner or lessor to repossess and (de)register the aircraft. A lessee will not be in a practical position with regard to the competent authorities (airports, Austro Control) to obstruct repossession by the owner or lessor. An operator may invoke its right of retention until his or her fees and costs with respect to the aircraft are paid in full.

Although a court order is principally not needed to be obtained by the lessor in case retention of title in the aircraft is validly existing and the underlying obligation became due and payable subject to proper termination, court proceedings might have to be opened (as a last resort) in order to regain possession from an obstructive operator.

23 Enforcement of security

Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

Enforcement measures have to be in line with respective regulations that principally provide for creditors' entitlement to an out-of-court realisation of the pledge (ie, repossession and sale of the aircraft) provided that the underlying claim became due and payable and the debtor or pledgor have been warned of the realisation of the pledge. The creditor shall wait with the realisation for one month after having warned the pledgor to realise the pledge; such stay period is shortened by law to one week in the case both parties are entrepreneurs. We recommend additionally clarifying within the security agreement (pledge agreement) that an out-of-court realisation of the pledge will take place in case of a termination owing to the lessee's payment default. Alternatively, the creditor may enforce the pledge via the court.

In the course of initiation of insolvency proceedings over the assets of the lessee, the lessor has a right of extraction from the assets under insolvency as owner of the aircraft.

In the course of initiation of insolvency proceedings over the assets of the pledgor, the pledgee (as secured creditor) would be entitled to a separate and preferential satisfaction (right to segregation) from the proceeds out of the sale of the aircraft by the insolvency administrator appointed by the competent court.

If the proceeds from the sale, for example, do not cover all of the creditor's claims, the creditor would have to register the remaining outstanding claims in the insolvency proceedings. In this case, the creditor (in respect of claims against the debtor) would be treated the same as other unsecured creditors (claims).

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

Austrian statutory law does not provide for a detention of the aircraft in respect of unpaid airport charges, air navigation charges or other unpaid debts.

Rights of liens to the aircraft may be based on claims against the legal owner of the aircraft. Claims against the operator, however, may not create a right of lien against the aircraft. An existing right of lien does not principally impact the validity of an existing aircraft security interest such as a pledge.

Unless there is suspicion of a criminal act in connection with the aircraft or its owner, or both, the Austrian state will not, in practice, confiscate an aircraft.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Subject to the applicable jurisdiction as to the delivery of the aircraft, as well as the type and use of the aircraft, VAT might be applicable. VAT may, under certain circumstances (subject to an individual assessment of the intended sales structure), be avoided (eg, delivery of the aircraft in international airspace).

Income from the leased asset or from the provision of finance services (eg, granting loans) may be subject to (corporate) income tax depending on whether the lessor or financier has its registered seat or permanent establishment in Austria.

Withholding tax does not apply to lease payments (principal or interest) or loan repayments.

Usually Austrian law facility agreements contain tax-indemnity or gross-up provisions to mitigate potential tax risks. Such clauses are principally effective under Austrian law.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

Austrian law does not generally provide for restrictions on international payments and exchange controls regarding civil aviation financing. Under the Austrian Banking Act certain finance providers are obliged to comply with relevant anti-money laundering and counter-terrorism financing provisions. Such provisions aim to identify ultimate beneficial ownership and report suspicious transactions to the competent authorities.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

Default interest rates are principally subject to agreement between the parties provided that such agreement is not contrary to principles of good faith. Therefore excessive interest rates (exceeding principal debt) may not be claimed under Austrian law. Such unlawful provisions within the parties' contractual agreement are at risk of being regarded null and void.

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Besides the existing VAT risk, for which the owner would be held liable by the competent tax authorities, and fees pertaining to the registration of the aircraft, Austrian aviation law provides for a permission to enter or leave the Austrian territory. Such permissions are subject to additional fees payable by the operator of between €49 and €404 depending on the weight of the aircraft.

Insurance and reinsurance

29 Captive insurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

No such captive insurance regime is applicable to aviation in Austria.

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30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

As Austrian law does not generally provide for a prohibition of cut-through clauses, an agreement foreseeing such cut-through clause on behalf of a policyholder is, in our view, legally effective.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Assignments of reinsurance are legally effective. Assignments of insurance claims are typically provided for in aviation leasing and finance transactions, whereas assignments of reinsurance claims cannot be regarded as being typically provided for.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

Unless owners, lessors or financiers do not have operational control over the aircraft they cannot be held liable for the operation of the aircraft.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

Austrian law has not adopted a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft as Austrian law has adopted a regime of strict liability for the operator. If aircraft are being operated by more than one operator, such operators shall principally be jointly and severally liable.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

The minimum requirements for the amount of third-party liability cover under Austrian law depends on the maximum take-off mass of the aircraft. The limits of liability that need to be covered by liability insurance range from 750,000 special drawing rights (as defined by the International Monetary Fund) for a maximum take-off mass of less than 500kg to 700 million special drawing rights for a maximum take-off mass of more than 500 tonnes.

Belgium

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Belgium is a state party to:

- the 1933 Rome Convention on precautionary arrest of aircraft (in force 1937);
- the 1944 Chicago Convention on international civil aviation (in force 1947);
- the 1948 Geneva Convention on the international recognition of rights in aircraft – although no registry has been established by Belgium – (in force 1994); and
- the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards (in force 1975, with a reserve on its application to awards made only in the territory of another contracting state).

By contrast with the European Union, of which Belgium is a member state, Belgium did not ratify the 2001 Cape Town Convention on international interests in mobile equipment.

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

Aviation law is regulated at national level by the 10 June 1937 Act amending the 16 November 1919 Act regulating air navigation.

Operating leasing activities are subject to the provisions of EC Regulation 1008/2008 on common rules for the operation of air services in the Community and those laid down in the Belgian Civil Aviation Authority (CAA) circular OPS No. 5.

The finance leasing industry is regulated under Royal Decree No. 55 of 10 November 1967, as amended from time to time, which provides that companies, which as a habitual activity enter into finance leases, require a prior licence and are subject to supervision by the Ministry of Economic Affairs. The condition for obtaining such licences are further detailed in the Ministerial Decree of 20 September 2012.

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Under the Belgian International Private Law Code, rights over aircraft registered in a public registry are governed by the law of the state of registration.

Sale and purchase agreements will be governed by the law expressly chosen by the parties.

However, the choice may be limited by any overriding principles of Belgian public policy and by the discretion of the courts to apply mandatory provisions of any jurisdiction with which the lease has a close connection, if such provisions are meant to be applicable whatever the

chosen law. In addition, the Belgian courts may apply Belgian law if it appears clearly impossible to determine the substantive rules of the chosen law. In case of insolvency of the owner or lessee, Belgian law will also apply to determine issues of title to or security over an aircraft if said aircraft is registered in Belgium.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

Under Belgian law, a sale and purchase agreement is deemed full and valid once the parties have agreed on the price and the specifications of the aircraft. Parties should therefore be particularly vigilant regarding the risk transfer before the delivery of the aircraft. A bill of sale is not required but a written document will be used as a proof of the existence of the agreement. The classical airframe sale and purchase agreement will contain provisions regarding the price, the specifications, the condition precedents, the time and place of transfer, the warranty of absence of any liens and liability disclaimers.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

Under Belgian law there are no specific formalities to be accomplished to validly transfer an aircraft. Sale and purchase documentation is only used as evidence of the transaction. However, it may have to be translated in the event of litigation into the proceedings language, which can be French, Dutch or German. Export, tax, customs and aircraft registration formalities must also be complied with in parallel.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

The Belgian aircraft registry is an operator registry where the owner of the aircraft does not need to be mentioned. The registration procedure is detailed in the Royal Decree regulating air navigation of 15 March 1954 and includes the submission of several documents such as a certificate of nationality, proof of rights over the aircraft, customs certificate, etc. Some Article 83-bis arrangements about the transfer of supervision of aircraft have been made between Belgium and other jurisdictions on an ad hoc basis and are available on the International Civil Aviation Organisation's website. There is no specific engine registry in Belgium.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

Registration of an aircraft lease is not possible in Belgium. However, the operator must file its title of ownership or lease to be able to register

the aircraft. Besides, the Belgian registry is not a register of title or of other rights. There is no specific register in which security rights over aircraft or engines can be registered. However, a pledge over aircraft may be registered in the classical commercial pledge register but only with the effect of giving it a certified date, which can be of great importance as to the determination of its rank. The 2013 Act on the creation and enforcement of security interests in moveable assets will, once it enters into force probably in 2018, permit the registration of a pledge over aircraft and engines by electronic means.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

Not applicable.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

Registration of a pledge or communication to the Belgian CAA of any pledge documentation does not constitute a proof of title. If the operator and the owner of the aircraft registered are the same entity, and the aircraft has been registered in the name of the owner, the registration certificate may be used as a *prima facie* proof of ownership pending the communication of additional evidence.

10 Registration of lease interests

Summarise the process to register a lease interest.

It is not possible to register a lease in Belgium. A copy of the lease must be filed with the Belgian CAA but this does not constitute registration of the lease.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

The aircraft registration merely indicates the name of the operator, the manufacturer's serial number and the aircraft type. Sometimes the existence of a lease may be indicated with the name of the lessor and lessee but it is not always the case and it depends on the will of the Belgian CAA. We are not aware of any indication of possible security interest or engine ownership on the certificate of registration.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

The deregistration will normally be requested by the operator that registered the aircraft. Deregistration is nevertheless automatic when the aircraft is no longer in use, or has been lost for six months, or where the prerequisites for registration are no longer fulfilled. However, any interested party can request deregistration. In practice, a power of attorney, duly authenticated by a public notary, in favour of the financiers or lessor is often attached to the security or lease agreement. Unless the validity of the power of attorney is disputed, the deregistration certificate is issued quickly.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

A power of attorney, duly authenticated by a public notary, in favour of the financiers or lessor is often attached to the security or lease agreement. However, even if the power of attorney is expressly said to be irrevocable, it can be revoked at any time, particularly in the case of bankruptcy or judicial composition of the lessee. Nevertheless, revocation can be considered as an event of default, depending on the circumstances.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

The 2001 Cape Town Convention on international interests in mobile equipment was not ratified by Belgium.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

Aircraft mortgages are not known under Belgian law. Pledges are generally used as a substitute. Their effectiveness depends on the continued possession of the aircraft by the pledgee or a third-party holder. In practice, the operator will act as third-party holder. A pledge, with the value of the secured transactions, can be registered in English with the Mortgage Conservatory Bureau but only to the effect of certifying the date of registration. There is no other registry available. There are no formal requirements or documentation for the creation of pledges over aircraft. A new Act on the creation and enforcement of security interests in moveable assets was adopted on 11 July 2013, but is not in force yet. This new Act will permit the creation of a pledge without transfer of possession by a mere registration in a central electronic register that will be open to both pledger and pledgee. This Act is expected to enter into force in 2018.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

There are no specific documentary formalities for the creation of a pledge. When the 2013 Act on the creation and enforcement of security interests in moveable assets enters into force, which is expected when the implementing royal decree is adopted, the creation will be effective through a mere electronic registration. The applicable price for such formalities will be indicated in the implementing royal decree.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

In Belgium it is not necessary to file security documents with the Belgian CAA or in any other registry. When the 2013 Act on the creation and enforcement of security interests in moveable assets enters into force, the creation will be effective through a mere electronic registration. The applicable formalities will be indicated in the implementing royal decree, which should be adopted later this year.

18 Registration of security

How is registration of a security interest certified?

There is no certification of registration of a security interest in Belgium. A stamp on the pledge with the date of submission may be obtained from the Mortgage Conservatory Bureau. When the 2013 Act on the creation and enforcement of security interests in moveable assets enters into force, further indication as to the issuance of certificate of registration and their validity should be specified. This information is not known at the moment.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

A registered pledge will normally take priority over unregistered and later registered security interests. But specific privileges and liens may coexist over the same aircraft, such as maintenance, repair and operations (MRO) privilege for repairs made on the aircraft, warehouse lien for unpaid rent and Eurocontrol's liens over unpaid charges.

Update and trends

A new Belgian Act on the creation and enforcement of security interests in moveable assets was adopted on 11 July 2013. However, the Act has not yet entered into force as implementing acts are still being discussed. The new Act will have major changes in the way pledges are created and enforced. It will, inter alia, be possible to create pledges over aircraft and engines without transfer of possession by a mere registration in a central electronic register, which will be open to both pledger and pledgee, and will provide ranking on the ground of the filing date. The creation will also be open to the security trustee for the benefit of third parties. Enforcement procedure will be simplified, with the pledgee able to enforce the pledge without prior court authorisation under specific conditions.

The Brexit negotiations are another interesting point to keep on the radar. Their impact on the aviation industry may be significant. In terms of aircraft finance, one possible risk would be to have decisions issued by UK courts not automatically recognised and easily enforceable in Belgium.

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

In Belgium, security over aircraft generally takes the form of a security deposit, parent company guarantee, assignment of receivables or insurance proceeds, or a pledge. The pledge is the most common form, which is a tripartite agreement requiring a permanent dispossession of the aircraft generally in the hands of the operator acting as a third-party holder.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

As moveable goods, engines in lease and finance agreements are traditionally secured by a pledge. As a conflict may arise if there is also a pledge over the airframe, recognition of rights agreements are generally signed between the involved parties.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

Self-help remedies are not allowed under Belgian law. Lessors or financiers will have to initiate court proceedings to obtain the authorisations to repossess the aircraft if the lessee does not voluntarily release possession of the aircraft. Lessor and financiers will generally submit a unilateral interim motion requesting conservatory seizure of the aircraft with transfer of its custody to a third party until a final decision is handed down.

23 Enforcement of security

Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

As self-help remedies are not allowed under Belgian law, the enforcement of the pledge will have to be authorised by the competent court, with the possibility for the pledgor to challenge the act of the pledgee, which will monitor the sale of the aircraft, and which is generally organised by way of a public auction. This procedure responds to the fact that under Belgian law the pledgee is only allowed to claim all or part of the proceeds of the sale of the pledge. Under the new 2013 Act on the creation and enforcement of security interests in moveable assets, self-remedy will be possible under specific conditions if provided in the pledge agreement once the Act enters into force (probably in 2018).

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

Several liens and rights will have priority over aircraft ownership or other security over aircraft. This includes MRO privilege for repairs made on the aircraft, warehouse lien for unpaid rent and Eurocontrol's liens over unpaid charges. It should also be mentioned that Brussels Airport and other regional airports have the power to deny take-off authorisation until outstanding landing rights are paid. Belgian authorities may also seize an aircraft if it infringes the Belgian legal and regulatory provisions.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

The Belgian tax regime is complex and depends on the type of lease and the location of the parties involved. As a general principle, rents and loan payments to a lessor or lender who is not a Belgian tax resident is subject to a 27 per cent withholding tax, save for exceptions such as double tax treaties. A 21 per cent VAT may also apply to rents and aircraft purchase. However, a VAT exemption may be obtained from the Ministry of Finance for remunerated international carriage of persons or goods as per article 42 of the VAT Code.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

Next to the anti-money laundering legislation and specific sanction regimes, cross-border electronic payment should be made through an authorised bank. No official consent is required. Transfer can easily be done in OECD currencies.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

Parties are free to set the amount of default interest that can be charged on the lease or loan payments. However, Belgian courts may decide, irrespective of the law governing the agreement, to reduce it if it is considered disproportionate.

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

In order to register an aircraft in Belgium, the operator must provide to the Belgian CAA a DL2 form from the Ministry of Finance evidencing that customs duties have been paid. The export of an aircraft is subject to custom formalities and in most cases to a prior licence. Save exceptions, the three regions of Belgium, namely Brussels, Flanders and Wallonia, are now responsible for the issuance of such licences.

Insurance and reinsurance

29 Captive insurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

In Belgium, it is not required that insurance be placed with insurers incorporated in Belgium. Nevertheless, as for aircraft registered in Belgium, insurance must be placed with an insurance company authorised to sell insurance products in Belgium. Reinsurance can be placed anywhere, but non-European reinsurance companies may need an approval from the National Bank of Belgium as per the 2016

Act on insurance and reinsurance companies that offer their products in Belgium.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

There is no legal relationship between the reinsurer and the insured party under Belgian reinsurance law, with the consequence that the insured party cannot directly seek payment from the reinsurers. To our knowledge the validity of cut-through clauses in the event of insolvency of the insurer has not been disputed before Belgian courts.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

We are not aware of any issue regarding the transfer of reinsurance portfolios. Assignment of reinsurances are typically provided in aviation leasing and finance transactions.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

Under Belgian civil law, only the person having custody over the aircraft is liable for any damage caused in the operation of the aircraft. Owners, lessors and financiers should not be liable for operation of the aircraft by the operator, unless the damage stems from their own negligence under general principles of tort.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

The 1952 Rome Convention on surface damage, which has been ratified by Belgium, provides that in cases where the identity of the owner of the aircraft is mentioned in the Belgian registry, the owner will be considered as the operator of the aircraft, with the consequence that it could be liable for the surface damage caused by the aircraft, unless the owner demonstrates that it is not the operator of the aircraft.

Strict liability also exists on the aircraft manufacturer under the 1991 Product Liability Act. If the manufacturer is based outside the European Union, strict liability will attach to the importer of the aircraft.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

Aviation insurance in Belgium is regulated by the European Regulation No. 785/2004 on insurance requirements for air carriers and aircraft operators, which sets minimum insurance limits.



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Bermuda

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Bermuda is not a signatory (or a party by extension from the United Kingdom) to the Rome Convention, the Geneva Convention, the Chicago Convention or the Cape Town Convention. Bermuda is, by Order-in-Council from the United Kingdom, a party to the New York Convention.

In relation to the Chicago Convention, however, certain provisions of that Convention with which the United Kingdom is obliged to ensure that its overseas territories (including Bermuda) comply are reflected in the Air Navigation (Overseas Territories) Order, 2013 and Overseas Territories Aviation Requirements, applicable in Bermuda.

In relation to the Cape Town Convention, following ratification of the Convention by the United Kingdom in November 2015, the Bermuda Senate gave final approval to the Bermuda International Interests in Mobile Equipment (Cape Town Convention) Act 2016 in July 2016, with the Governor's assent gazetted in August 2016. This domestic legislation means that the Cape Town Convention can now be extended by the United Kingdom to Bermuda, with such extension likely to take place during the course of 2017.

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The principal domestic legislation is the following:

- the Air Navigation (Overseas Territories) Order 2013, as amended (the Order);
- the Mortgaging of Aircraft and Aircraft Engines Act 1999 (the Act); and
- the Bermuda International Interests in Mobile Equipment (Cape Town Convention) Act 2016 (not yet in force).

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Except for public policy considerations, there are no restrictions under Bermuda law on the parties' freedom to choose the governing law of such arrangements.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

While there are no particular Bermudian requirements, title is usually transferred by means of a bill of sale.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

Except for general enforceability considerations, there are no specific formalities. It should be noted that a document executed in, brought in original form to or produced before the courts of Bermuda may be subject to Bermudian stamp duty.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

The Bermuda Register is a Category I register under the United States Federal Aviation Administration's Flight Standard Service International Aviation Assessment Programme. That categorisation evidences Bermuda's compliance with international standards in providing safety oversight of its air carriers that operate in the United States.

The Register is maintained by the new authority, the Bermuda Civil Aviation Authority (BCAA), which was formed in late 2016 and replaced the government department that previously oversaw aviation matters. Registration may be effected by a qualifying owner or charterer by demise of an aircraft (see question 7). While most of the aircraft on the Bermuda Register are corporate or privately owned jets, it is increasingly common to see its use for the registration of commercial aircraft.

Arrangements to register aircraft in the public transport category on the Bermuda Register most often require arrangements between the BCAA and the appropriate foreign civil aviation authority. The BCAA is responsible for the registration and issuance of permissions and validations for aircraft and flight crew on the Bermuda Register. The agreement with the foreign civil aviation authority provides for the delegation of regulatory oversight of the air operator in that foreign jurisdiction, setting out the safety regulatory oversight responsibilities of both countries in relation to Bermuda-registered aircraft.

Bermuda was the first country to register a safety regulatory oversight agreement with the International Civil Aviation Organisation (ICAO). The ICAO is a specialised agency of the United Nations that sets international standards for the safety, security, efficiency and regularity of air transport and serves as the medium for cooperation in all fields of civil aviation among its 185 contracting states.

The BCAA has an 83-bis arrangement in place with Russia, which has been in effect since 1999. International lessors and financiers regularly require Russian-operated aircraft in which they have an interest to be registered in Bermuda. Additional agreements are in place with Austria, Azerbaijan and Uzbekistan.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

Under the Order, the following persons are qualified to hold a legal or beneficial interest by way of ownership or by charter by demise in an aircraft registered in Bermuda (or a share therein):

- the Crown in right of Her Majesty's government in the United Kingdom or in right of the government of Bermuda;
- United Kingdom nationals;
- Commonwealth citizens;
- nationals of any European Economic Area (EEA) state;
- bodies incorporated in some part of the Commonwealth and that have their registered office as principal place of business in any part of the Commonwealth; or
- undertakings formed in accordance with the law of an EEA state and that have their registered office, central administration or principal place of business within the EEA.

A recent shift in government policy, which used to permit only Bermuda exempted companies to register an aircraft in Bermuda, has seen the extension to those categories of persons set out in the Order, as referenced above, of the ability to do so as well.

The BCAA has a discretion to cancel a registration on a charge of ownership, or if any unqualified person otherwise becomes entitled to a legal or beneficial interest by way of ownership of the aircraft or of a share therein, in which latter case the registration will become void and the Certificate of Registration must be returned to the BCAA.

With respect to interests in aircraft engines, it is possible to register a mortgage on the Bermuda Register of Aircraft Engine Mortgages pursuant to the Act. Mortgages can be registered against Bermuda-registered aircraft engines that are either owned by, or otherwise in the possession of, a Bermuda incorporated company (see question 17).

8 Registration of ownership interests

Summarise the process to register an ownership interest.

Persons wishing to register an aircraft must first prove eligibility to hold a legal or beneficial interest by way of ownership or charter by demise in an aircraft registered in Bermuda (or a share therein) as described above.

The BCAA requires all applicants to submit a preliminary online application for pre-approval, which will include, among other things, the following particulars:

- company name under which the aircraft is to be registered;
- make, model and serial number of the aircraft, its intended base and its principal geographic areas of operation;
- maintenance, operations and crewing arrangements;
- intended use of the aircraft (ie, in private or public transport); and
- name and contact information of the person who will be responsible for technical presentation of the aircraft to the BCAA during the registration process.

Aircraft registered in Bermuda must be operated in accordance with the Order and aircraft operated for valuable consideration on a per flight basis in carriage of passengers or cargo is generally deemed under the Order to be flying for the purpose of public transport.

Provided that the preliminary application is approved, the BCAA will issue an approval in principle, which lists the items that must be submitted to the BCAA in support of the formal application. The BCAA will inspect the aircraft prior to its registration and the issuance of a Certificate of Airworthiness, which is renewable annually following further inspection. The BCAA will also issue a Noise Certificate together with any other operational permissions as may be appropriate.

Simultaneously with the application to the BCAA, application is made for a Class Six Radio (Aeronautical Mobile Services) Licence. The radio licence is issued once the aircraft has been registered by the BCAA. A copy must be carried on board the aircraft together with all the registration and technical documents referenced above.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

While registration and the issue of a Certificate of Registration indicates that the BCAA considers the relevant application to be qualified for registration, and may, therefore, be considered prima facie evidence of ownership or the holding of an applicable charter by demise interest in the aircraft, registration is not proof of legal ownership and the Certificate of Registration will state so on its face.

10 Registration of lease interests

Summarise the process to register a lease interest.

See question 7, in the context of charterers by demise. In general terms, the BCAA will not concern itself with the terms of the lease itself.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

The Certificate of Registration is issued by the BCAA and set out therein are the following particulars:

- the number of the Certificate of Registration;
- the nationality mark and the registration mark given to the aircraft;
- the name of the constructor of the aircraft and its designation; and
- the serial number of the aircraft and the name and address of every person who is entitled as owner to a legal interest in the aircraft or in the case of an aircraft that is subject to a charter by demise, the name and address of the charterer by demise.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

Where the aircraft is subject to a mortgage registered on the Bermuda Register of Aircraft Mortgages or the Register of Aircraft Engine Mortgages, the aircraft will not be deregistered without the consent of all parties registered as mortgagees.

Although not a legal requirement, as a matter of practice, where there is a charter by demise over the aircraft, the BCAA will agree, if requested, not to deregister the aircraft without the consent of the registered owner.

The BCAA will, if requested, provide the lessor or owner of the aircraft with a 'comfort letter' whereby the BCAA acknowledges the ownership and leasing structure of the aircraft and confirms that it will not remove the aircraft from the Aircraft Register without receiving written authorisation from the lessor or owner. The BCAA will place a notation on the Aircraft Register of the undertaking so provided and of the ownership or leasing structure.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

Under Bermuda law, a deregistration power of attorney, when granted to secure an obligation owed, typically, to the finance parties, will be irrevocable until that obligation is discharged and will survive the insolvency of the grantor. The power of attorney may be granted to more than one attorney-in-fact on a joint or several basis, or both.

Further, under Bermuda law, a power of attorney is required to be executed as a deed. However, a deregistration power of attorney need not be governed by Bermuda law. It will frequently have the same governing law as the other transaction documents, for example, English law or New York law.

It is possible to send the deregistration power of attorney to the BCAA and obtain an acknowledgement from them with respect to it.

With regard to the deregistration process itself, there is no specific form of deregistration request and deregistration will, therefore, typically consist of the owner of the aircraft making a written application to the BCAA requesting cancellation of the Certificate of Registration.

In support of the application, the owner must enclose a resolution of the board of directors of the registrant company authorising the cancellation. The original Certificate of Registration and other documents issued at the time of registration must be returned to the BCAA for cancellation, as the aircraft cannot be deregistered until the BCAA receives the original of such signed certificate.

Except for any aircraft that is subject to an undischarged mortgage, the BCAA will deregister the aircraft in accordance with the registrant's instructions, and will issue a letter of deregistration, which confirms the deletion of the aircraft from the Bermuda Register. The aeronautical regulatory authority of the next intended state of registration will be informed of the deletion by the BCAA.

In addition, the other principal requirements for deregistration of an aircraft are:

- that any balance on the account for the aircraft is paid in full; and
- where a Certificate of Airworthiness for Export is required, the relevant party will need to make a request to the BCAA for such certificate and make arrangements for one of the BCAA surveyors or its agents to inspect the aircraft.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

The Air Navigation (Overseas Territories) Order, 2013, as amended, provides for the Cape Town Convention IDERA regime to be recognised and take effect in Bermuda once the Cape Town Convention is in force in Bermuda, which is expected to be later in 2017.

While the Cape Town Convention is not yet in force in the jurisdiction, registration of a registrable international interest or interests may be possible where an aircraft owned by a Bermudian entity has a connection to a jurisdiction that is a signatory.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

Security usually takes the form of a mortgage. There is no statutory format with which the mortgage must comply. The mortgage itself need not be governed by Bermuda law. The original mortgage deed need not be provided to the BCAA.

The following are also common in aviation finance structures:

- assignments of any charter agreements, insurances, warranties or aircraft leases relating to the aircraft. In addition, the borrower will usually deliver a deregistration power of attorney to the lender, the terms of which prohibit the borrower from deregistering the aircraft without the lender's consent;
- charges over the shares of the company owning an aircraft; and
- leasing or charter by demise arrangements, where the owner gives control and possession of the aircraft to the charterer. The charterer then becomes responsible for all responsibilities and liabilities associated with its operation.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

There are no specific documentary formalities under Bermuda law. No stamp duty or other documentary costs should be payable.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgage interest.

With respect to a mortgage over an aircraft registered on the Bermuda Aircraft Register, it is possible to register such mortgage on the Bermuda Register of Aircraft Mortgages and the Register of Aircraft

Engine Mortgages pursuant to the Act. Mortgages can be registered against Bermuda-registered aircraft and aircraft engines that are either owned by, or otherwise in the possession of, a Bermuda incorporated company. Such mortgages give the lender priority over unsecured creditors of the aircraft's owner, permit the lender to take possession of the aircraft in the event of a default by the borrower and permit the lender to sell the aircraft to realise monies to pay the lender's debt.

There are two specialised registers, one for the registration of aircraft mortgages and the other for the registration of aircraft engine mortgages. The Minister responsible for aviation is empowered to make regulations in respect of the administration of the two registers, as well as in respect of fees and charges in relation to the services provided under the Act, and in respect of making provision for the rights and liabilities of the mortgagors and mortgagees.

The procedure to effect registration of a mortgage is simple and straightforward, requiring an application by the mortgagee. The mortgagee must provide the BCAA with a short registration form summarising the principal points of the mortgage (ie, date, aircraft description, mortgagor contact details and confirmation of sum secured). An original of the registration form (although, in certain circumstances the BCAA may proceed on the basis of a pdf copy), signed by either the mortgagee or his or her agent or legal counsel must be submitted to the BCAA, together with a copy of the mortgage certified by the applicant to be a true and correct copy. The mortgage registration fee should also be submitted upon registration; this is calculated on an ad valorem basis depending on the sum secured, as follows (scheduled to be increased later in 2017):

- where the amount secured by the mortgage does not exceed BM\$5 million, the fee is BM\$200;
- where the amount secured by the mortgage does not exceed BM\$20 million, the fee is BM\$400; and
- where the amount secured by the mortgage does exceed BM\$20 million, the fee is BM\$800.

If the aircraft mortgage grants a charge over assets that goes beyond the scope of an aircraft or aircraft engine, and the registrant is a Bermuda incorporated company, the document should be registered with the Registrar of Companies under the Companies Act 1981 to protect the priority over those assets. Charges over shares and other ancillary security documents are also generally filed with the Registrar of Companies to protect priority if the registrant is a Bermuda incorporated company. Similarly, in leasing transactions, leasing documents are filed with the BCAA and are also generally registered with the Registrar of Companies under the Companies Act 1981 if the registrant is a Bermuda incorporated company.

18 Registration of security

How is registration of a security interest certified?

The BCAA will issue a certificate of registration, which is generally available on, or soon after, the date of registration. The certificate states the date and time of registration, whether it is the first or a subsequently registered mortgage with respect to the relevant aircraft, the principal details of the mortgage and acknowledges receipt of the relevant registration fee.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

A registered mortgage is given statutory priority over subsequently registered mortgages and unregistered mortgages. The priority of the registered mortgage will not be affected by the bankruptcy of the mortgagor, and the security interest will rank in preference to any right, claim or interest of other creditors. It should be noted, however, that possessory liens for work done on the aircraft (whether before or after the mortgage was created), over persons lawfully entitled to possession of the aircraft or with a right to detain the aircraft, will have priority over a registered mortgage. In addition, a previously registered mortgage or a mortgage created prior to the coming into force of the Act would have priority over a subsequently registered mortgage.

Registration of the mortgage cannot take effect until the aircraft is registered, but a lender can apply to file a priority notice with the BCAA in advance of the execution and delivery of an aircraft mortgage or aircraft engine mortgage. This provides notice of the lender's intention

to file a mortgage. If a mortgage is entered into the Aircraft Register or Aircraft Engine Register within 14 days of the priority notice being filed, the mortgage is deemed to have priority from the time the notice was registered. Lodging of a priority notice will prevent any other security interests over the aircraft being registered in advance of registration of the mortgage that is the subject of the priority notice.

The priority notice is a simple form, along the same lines as the mortgage registration form, and must be accompanied by the applicable nominal priority registration fee (BM\$80).

All registered mortgagees must provide their consent to removal of the aircraft in question from the Aircraft Register before such removal can take place, and a registered mortgage will continue to exist despite removal of the aircraft from the Aircraft Register.

Although registration of a mortgage does not constitute evidence of its validity, it does constitute express notice of all facts appearing on the Mortgage Register.

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

To protect the security held in an aircraft the following documents and options are available, depending on the structure of the transaction and the nature of the Bermuda-owning or leasing registrant (the registrant):

- a mortgage over the aircraft and its engines, filed appropriately;
- a charge granted over the shares of an owning registrant with the charge being filed with the Registrar of Companies, if the registrant is a Bermuda incorporated company;
- an irrevocable proxy from the registrant's parent authorising a security trustee or the like to vote the shares of the registrant. Most standard form Bermuda exempted company by-laws do not make accommodation for irrevocable proxies and would need to be amended in this regard if the registrant is a Bermuda incorporated company;
- executed, but undated, resignation letters from the directors and officers of an owning registrant and an irrevocable direction to complete the resignation letters, so that a security trustee would have the ability to step in upon a default pursuant to the terms of the charge over shares and direct an owning registrant without interference from the pre-existing company directors and officers;
- advance written approval from the Bermuda Monetary Authority (if the registrant is a Bermuda incorporated company) for a transfer of shares to the security trustee, lender or a designee or transferee (secured party) pursuant to the terms of a charge over shares (though if the secured party is a licensed bank or other licensed lending institution in an 'approved jurisdiction' (which includes, for example, Canada, the United States and all countries in the EU), no further governmental permissions are required);
- an undated share transfer form from the shareholder of an owning registrant and an undertaking by such registrant to transfer its shares upon the instruction of a security trustee or, in the alternative, amendment to the owning registrant's by-laws (if the registrant is a Bermuda incorporated company) to remove the standard discretion of the board to refuse to register a share transfer other than a transfer contemplated by the charge over shares;
- amendments to an owning registrant's by-laws (if the registrant is a Bermuda incorporated company) to add additional notice provisions for shareholder or board meetings where the purpose would be to achieve certain objects such as the winding up of the owning registrant or the sale of the owning registrant's assets;
- amendments to an owning registrant's memorandum of association (if the registrant is a Bermuda incorporated company) to the effect that the only business that it could conduct would be to acquire and operate the aircraft, namely, assisting in making the registrant bankruptcy remote by removing risks of additional business ventures;
- a deregistration power of attorney from the registrant and a letter of assurance from the BCAA recognising additional security interests held in the aircraft; and
- a letter of quiet enjoyment from the registrant to the ultimate operator.

The main security documents will usually not be governed by Bermuda law but by, for example, English or New York law, except that a charge over the shares of a Bermuda company (if the registrant is a Bermuda incorporated company) is often governed by local law.

The secured party is often a security trustee or collateral agent for the financing parties from time to time.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

The statutory definition of 'aircraft engine' in the Act includes all parts, equipment and data, and manuals and records relating to them. A registered mortgage may cover any store or spare parts for the aircraft, but does not include a mortgage created as a floating charge or a mortgage of spare parts on their own. It is possible to register a mortgage over an aircraft engine on the Bermuda Register of Aircraft Engine Mortgages pursuant to the Act (see question 17).

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

Subject to enforceability considerations under the governing law, the *lex situs* and any other relevant laws (other than Bermuda law), will typically be recognised by the Bermuda courts and enforce contractual arrangements such as lease termination provisions created under foreign laws. The Bermuda courts would also generally recognise self-help remedies by which the counterparties may take possession of the aircraft, for example, by dealing directly with the BCAA pursuant to a deregistration power of attorney to effect a deregistration.

23 Enforcement of security

Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

Similarly, the Bermuda courts would typically recognise self-help remedies in the context of an enforcement of security interests over the aircraft (and often over the shares of the aircraft-owning vehicle). Bermuda law will generally also respect the secured parties' security interests in the event of the insolvency of the relevant company (if the registrant is a Bermuda incorporated company).

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

See question 19. Generally, issues of compensation for detentions, requisitioning, etc, are typically also dealt with contractually in the transaction or insurance documentation.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Bermuda currently has no form of income, corporate or capital gains tax and no estate duty, inheritance tax or gift tax.

Additionally, if the registrant is a Bermuda incorporated company, Bermuda exempted companies (as well as exempted limited partnerships and exempted trusts) are entitled to obtain a tax assurance exempting such entity from the effects of any changes to the Bermuda tax regime until 31 March 2035 (with such date likely to be pushed back further closer thereto).

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

Bermuda has exchange controls, which apply to residents in respect of the Bermudian dollar pursuant to the Exchange Control Act 1972 and the Exchange Control Regulations 1973. Exempted companies are considered to be non-resident for exchange control purposes, so there are no controls on their freedom to make transfers and carry out transactions in all other currencies.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

Arrangements that provide for a penal rate of interest may be unenforceable under English common law principles, which are of persuasive, if not binding, authority before the courts of Bermuda.

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Aircraft registered on the Bermuda Aircraft Register are almost invariably located and operated outside of Bermuda.

Were an aircraft to be imported into Bermuda, it would be subject to Bermudian import duty.

Insurance and reinsurance**29 Captive insurance**

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

Bermuda is the largest jurisdiction for captive insurance, with captive insurance companies regulated by the Bermuda Monetary Authority.

In relation to aircraft insurance, apart from where the relevant aircraft is 'ordinarily based' in Bermuda, Bermuda insurance legislation does not apply and it is typically the case that insurance is placed in the principal aviation insurance centres of London and New York.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

There are no statutory provisions in relation to such clauses in Bermuda. The position under Bermuda law will reflect English common law principles, which are of persuasive, if not binding, effect before the courts of Bermuda.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Subject to the usual enforceability qualifications, such arrangements are effective under Bermuda law and are common in aircraft finance transactions.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

With respect to an owner, section 76 (4) of the UK Civil Aviation Act, 1982 is extended to Bermuda to the effect that loss or damage caused by an aircraft in flight or by a person in, or an article, animal or person falling from, such an aircraft, is transferred to the person to whom the owner has demised, let or hired out the aircraft if the demise, let or hire is for a period of more than 14 days and no crew member is employed by the owner.

In general terms, a lessor or financier would not otherwise be liable solely by operation of Bermuda law.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

Except as noted in question 32, the owner of the aircraft would be subject to strict liability by virtue of section 40(2) of the UK Civil Aviation Act, 1949, extended to Bermuda.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

There are no specific Bermuda law requirements.



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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Brazil is a signatory to the Cape Town Convention (2001). At present there is some controversy over the effective date of the Cape Town Convention, which may have been 1 March 2012, or 15 May 2013. The Brazilian regulations concerning the use of irrevocable deregistration and export authorisations (IDERAs) and filings of international interests with the International Registry were not promulgated until late April 2014. Consequently, many of those two features of the Cape Town Convention were not effective until that time. At present, no additional regulations or rules are needed to complete implementation of the Cape Town Convention; however, owing to the relatively new nature of the Cape Town Convention there are virtually no precedent cases of its use in Brazil. See question 14 for a description of the precedent uses of IDERAs.

Brazil is also a signatory to the Chicago Convention (1944) and the Geneva Convention (1948). Brazil is also a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

Brazil was a signatory to the Rome Convention (1939); however, when Brazil approved the Cape Town Convention, the Rome Convention approval was superseded.

In mid-August 2016 Brazil began to adhere to the Hague Convention relating to recognition of apostilled documents.

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

Legal authority concerning aircraft finance and leasing is contained in several laws. The principal domestic legislation is the Brazilian Aeronautical Code (1986). The Brazilian Congress is currently considering a complete overhaul of the Aeronautical Code. The Cape Town Convention is the most recent legal authority approved by Brazil relevant to aircraft finance. The Brazilian Bankruptcy Law contains a special article relating to aircraft leases, which may eventually be deemed revoked or amended by the Cape Town Convention. Laws relating to foreign exchange controls and import approvals also affect aviation finance and leasing, and the Brazilian Code of Civil Procedure still governs many aspects of aircraft repossession.

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

According to the Brazilian Aeronautical Code contracts that deal with rights in rem over aircraft are governed by the law of registration of the aircraft. Consequently, mortgages and bills of sale over aircraft on the Brazilian registry have traditionally been governed by Brazilian law.

According to Brazil's declarations to the Cape Town Convention, the freedom of parties to choose governing law may have been expanded to agreements that deal with rights in rem, though this has not yet been tested. Generally, parties have freedom to elect the governing law of their choice for other aircraft finance agreements such as leases and purchase and sale agreements. The Brazilian judiciary will apply the terms of foreign laws provided such terms do not violate Brazilian sovereignty, good customs or public morality. Two common provisions found in leases that are usually unenforceable in Brazil under these criteria are self-help remedies and unilateral option provisions that leave determinations to the discretion of one party.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

In most cases title to aircraft is transferred by execution and registration of a bill of sale. The Brazilian Aeronautical Registry (RAB) has a few peculiar requirements, in particular a requirement that a bill of sale be signed by the transferor, the transferee and two witnesses. Mere delivery of a bill of sale does not effectively transfer title. A bill of sale must be recorded with the RAB to transfer title. Sales should also be recorded with the International Registry.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

The general rules of documentary formalities (see question 16) apply to bills of sale subject to one important distinction, which is that bills of sale must be notarised by a notary who has witnessed all signatures. This makes the execution of undated bills of sale virtually impossible.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

The RAB is an owner register in the sense that ownership is obtained through registration with the RAB. Any change of ownership will be effective only upon registration with the RAB. A security interest is effective only upon registration with the RAB. The RAB is occasionally referred to as an operator register because the Brazilian operator makes most applications.

The RAB maintains an engine registration book; however, entry of an engine in that book does not carry the same significance as registration of aircraft. In practice, the book is used mainly for the registration of spare engines. The RAB accepts engine contracts for registration (eg, engine leases). Engines connected with leased aircraft are rarely entered into the engine registration book. Because Brazil has adopted the Cape Town Convention the registration of international interests in engines is one of the best ways for engine owners and lienholders to secure their rights in aircraft engines.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

Ownership interests in Brazilian-registered aircraft must be registered with the RAB. Equally, aircraft leases must be registered with the RAB. There are no limitations on the type of entity that may be registered as an aircraft owner. Operators must be Brazilian; however, owners may be non-Brazilian entities. The RAB is a centralised national register for aircraft. There are no other mandatory locations for registration.

Most leases and other aviation finance documents must be registered in general notarial offices (known as RTDs or RDDs). Such registration is necessary for purposes of admissibility in courts and official offices, and for validity of obligations.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

Ownership interests are established by registration of a bill of sale with the RAB. The applicable notarisation, apostille and consularisation requirements and costs associated therewith are described in question 16. Title to an aircraft presumes title to the engines associated with that aircraft unless agreements expressly contain provisions that override this general principle. For aircraft already on the Brazilian register, the date of title transfer is considered the date on which the bill of sale is filed for registration with the RAB.

The RAB requires incumbency documents for entities that are registering bills of sale. For non-Brazilian entities selling aircraft that are already registered with the RAB, this evidentiary requirement is usually satisfied by submission of an apostilled (or, if applicable as explained in question 16, consularised) power of attorney demonstrating that the signatory in Brazil had authority to sign the bill of sale (express mention of the authority to transfer title is necessary). If title to an aircraft was acquired outside Brazil, then the last bill of sale should be apostilled (or consularised) and submitted to the RAB.

Major aircraft manufacturers are aware of the RAB's requirements, and when delivering new aircraft to Brazilian operators customarily execute duplicate bills of sale for purposes of registration with the RAB.

For aircraft owned by owner trusts, see question 20 for an explanation of an additional document registration requirement.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

Registration of title with the RAB constitutes proof of title. At any time a third party can request a certificate (a registry extract) from the RAB that will confirm the name of the owner and the holders of registered liens, and will describe all documents and agreements filed in respect of a particular aircraft such as leases. Third parties are entitled to rely on the accuracy of ownership and lien information in such certificates. Although inaccuracies in such certificates arise from time to time, the RAB will correct manifest errors on request.

10 Registration of lease interests

Summarise the process to register a lease interest.

The procedure and requirements to register a lease interest are similar to the procedures described in question 8 in relation to ownership interests. Aircraft leases must be recorded with the RAB. The applicable notarisation, apostilling and consularisation requirements and costs associated therewith are described in question 16.

As with bills of sale, the RAB requires incumbency documents for entities that are registering a lease. For non-Brazilian entities selling aircraft that are already registered with the RAB, this evidentiary requirement is usually satisfied by submission of an apostilled or

consularised power of attorney, demonstrating that the signatory in Brazil had authority to sign the lease. Unlike powers of attorney for bills of sale, which must contain express powers, general powers of attorney are usually adequate for the execution of leases.

In rare cases where leases are signed outside Brazil, the leases must be notarised and apostilled or consularised as described in question 16. Most cross-border leases are signed in Brazil by attorneys acting under apostilled consularised powers of attorney.

The costs to procure 'sworn translations' and to register leases are described in question 16. In most cross-border leases, lessees usually accept the responsibility for procuring translations of leases and registering leases with the RAB and RTDs.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

There are two types of certificate of interest to financing parties: a certificate of registration and a registry extract (see question 9). A certificate of registration is the document issued to comply with article 29 of the Chicago Convention. A Brazilian certificate of registration identifies the name of the owner and the operator of an aircraft. It should be maintained on board an aircraft during operations. If an aircraft is mortgaged, a Brazilian certificate of registration will usually contain a notation that a mortgage exists; however, it will not provide details or even the name of the mortgagee.

A registry extract is a statement from the RAB confirming the name of the owner and any lienholders, and a description of all documents filed in respect of a particular aircraft. Parties can request registry extract certificates as often as they wish. There is no need for an original to be on board an aircraft at any time. In fact, there is no absolute need for a registry extract certificate to be issued at all. Financing parties usually require them because they serve as 'bring down' certificates to show the latest registration information on an aircraft and because they are more detailed than certificates of registration.

The RAB does not issue certificates of registration for engines. It is possible to obtain a registry extract certificate in respect of a spare engine that has a lease or other document filed in respect of it. Such certificates, however, certify the status of registered agreements but do not carry the same weight as certificates issued in respect of aircraft, which actually constitute aircraft ownership evidence.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

In normal circumstances, the Brazilian operator applies for deregistration and export authorisations. The RAB will not, however, deregister an aircraft without the express written consent of the owner and any registered mortgagee. The RAB rarely (if ever) gives notice to foreign owners and mortgagees. It simply does not deregister if the requisite consents are not presented with the deregistration application.

In cases of repossession it is possible that a lessor, owner or mortgagee (acting as assignee of a lessor) may need to deregister an aircraft. In such cases, the RAB will accept an application from the foreign party (owner, lessor, mortgage) provided the applicant demonstrates that it is entitled to deregister. In the past, such entitlement has usually been demonstrated in the form of a court order; however, there have been a few cases in which the RAB deregistered aircraft at the request of owners that did not have court orders. In some of these cases the lessees had abandoned the leased aircraft. In principle, certain export authorisations from the Brazilian tax and customs bureau are necessary, and it can be difficult for foreign owners to obtain such authorisations since they are supposed to be requested by the importer of record, which will always be the Brazilian operator.

See question 14 for a description of the precedents involving deregistration by owners using IDERA.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

Brazilian aviation finance transactions usually require the Brazilian lessee to issue a deregistration power of attorney. Most such powers of attorney purport to be irrevocable, and there is legal authority upholding the irrevocability of powers of attorney. But the revocability issue is not entirely settled. A power of attorney would survive a bankruptcy restructuring, however, it would not survive an order of liquidation. In practice, deregistration powers of attorney have been of limited utility; however, in a few cases they have been useful. Their utility has begun to diminish with the advent of Cape Town IDERAs.

The principal characteristic of deregistration powers of attorney is naming the lessor or owner as the lessee's attorney-in-fact to act with the RAB and several Brazilian agencies involved in issuing export authorisations. It is prudent to mention the agencies by name.

Deregistration powers of attorney, if executed in English, should be registered with RTDs (see questions 7 and 16 for an explanation of RTDs).

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

In Brazil's implementation of the Cape Town Convention the use of IDERAs was approved. No leave of a court is needed to exercise rights under an IDERA.

An IDERA should be filed and registered with the RAB. The RAB will not countersign an IDERA as prescribed by the Aircraft Protocol to the Cape Town Convention; however, the RAB will mention the registration of an IDERA in a registry extract certificate (see question 11).

The RAB applies its usual filing requirements to IDERAs (those requirements are described in question 16).

The RAB began accepting IDERAs for registration in late March 2014.

According to the RAB's regulations, an aircraft will be deregistered within five business days of receipt of a request by an authorised party or its designee. The applicant must certify to the RAB that it has the consent of the holders of any superior liens. During 2014 at least four aircraft were deregistered by owners using IDERAs and during 2016 at least one aircraft was deregistered using an IDERA. Most of those deregistrations arose in uncontested repossession cases. Court orders were not required. The RAB respected the five-business-day period stipulated in its regulations, including in one case where the repossession was contested.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

Most Brazilian security agreements take the form of a mortgage. There are some other types of Brazilian security agreements, in particular a form of document called a fiduciary sale agreement, that occasionally attract the attention of financiers; however, most lenders are more comfortable with mortgages coupled with security assignments.

As mentioned in question 3, mortgages have traditionally been governed by Brazilian law and using a non-Brazilian law mortgage based on the Cape Town Convention is as yet untested. Aircraft mortgages may be executed in English and most mortgages are executed in English. The requirement of sworn translations, described in question 16, applies to mortgages.

Under Brazilian law a mortgagee is not entitled to take possession of the mortgaged asset. The traditional remedy of a mortgagee is to prompt a court to take possession of the asset, auction it and then use the proceeds to satisfy the secured debt. This remedy is unattractive because of the relatively long period of time it would take to organise an auction and also to several other unknown factors in the process,

such as whether the court would conduct the auction in US dollars or Brazilian currency, and the means to remit the sale proceeds from Brazil after the auction.

Brazil has a considerable number of aircraft lease repossession cases that have had fairly favourable results for lessors, including precedents in 2015 and 2016. Thus it is common to include security assignments enabling a mortgagee to 'step into the shoes' of a lessor and repossess an aircraft as the lessor's assignee. Security assignments typically contain notices of assignment given to the Brazilian operator and acknowledgements or consent given by the Brazilian operator to a security trustee or the ultimate creditor. The Brazilian operator will usually agree to redirect payments to a security trustee and to recognise the exercise of lease remedies by the security trustee as assignee of the lessor.

There is a possibility that with the Cape Town Convention mortgagees will be allowed to repossess aircraft in their capacity as mortgagees, and not necessarily as assignees of lessors. Since most security packages include security assignments, there may be a need to test this issue in the near future.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

The following are general rules that apply to all documents being registered with the RAB and not merely security documents:

- documents that are not written in Portuguese must be registered with a sworn translation. A sworn translation refers to a translation prepared by a licensed Brazilian translator;
- documents that are signed outside Brazil must be apostilled or consularised by the Brazilian consulate responsible for the jurisdiction where the signature has taken place. If the jurisdiction is a signatory to the Hague Convention then an apostille is sufficient. If the jurisdiction is not a signatory to the Hague Convention then the document must be consularised. In most cases the consulates require local notarisation as a prerequisite to consularisation. In some cases the apostille of a government officer is required for consularisation. The rules of the various Brazilian consulates vary. There are a few traditional exceptions to the consularisation rule. The main exception applicable to aviation contracts is France. Based on a bilateral treaty between Brazil and France, documents executed in France require notarisation but do not require an apostille or consularisation;
- documents signed in Brazil by attorneys-in-fact pursuant to notarised and apostilled or consularised powers of attorney do not require a further apostille or consularisation;
- the RAB usually requires the signature of two witnesses on all documents being submitted for registration;
- all signatures must be notarised. There is a notarisation method that allows for signatures to be notarised after execution, without the notary actually witnessing the signature. This allows for the submission of undated documents in custody pending a closing. This simplified notarisation procedure does not apply to bills of sale; and
- documents signed outside Brazil or in languages other than Portuguese must be registered with RTDs (see question 7).

Costs to comply with these documentary requirements vary. The cost to obtain a sworn translation averages US\$30 per page; however, the actual cost is based on the number of characters in the Portuguese translation of the document. RAB registration costs are approximately US\$7 per page. RTD filing costs vary the most depending on the contents of the document and the jurisdiction of the RTD. The usual basis for RTD registration costs is based on the 'value of the document'. The RTD fees used to be subject to ceilings and aircraft leases usually exceed the ceilings. But even the ceilings can vary, sometimes being as little as US\$2,500 or as much as US\$8,500. Recently the state of Rio de Janeiro and the RTDs of a few other jurisdictions eliminated ceilings and in those locations the RTD costs have skyrocketed.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgage interest.

Similar to ownership interest and lease documents, security documents creating liens over Brazilian-registered aircraft must be filed with the RAB and should be filed with RTDs to ensure admissibility. The procedures described in questions 8, 10 and 16 apply to security documents. International interests arising from mortgages and other security agreements should also be registered with the International Registry.

18 Registration of security

How is registration of a security interest certified?

As stated in question 11, a certificate of registration will mention that an aircraft is subject to a mortgage but will not include any details such as the name of the mortgagee. A registry extract certificate confirms the full details of all mortgages and registered liens over aircraft (see questions 9 and 11 regarding registry extract certificates). For the International Registry priority search certificates are procured.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

Registration with the RAB confers priority over security interests registered subsequently unless an express agreement such as a subordination agreement is executed and establishes different priorities.

A third party interested in ascertaining the terms of a security interest may rely on a registry extract certificate (see questions 9 and 11). In addition, all of the documents registered with the RAB are in the public domain, and third parties can obtain copies when necessary.

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

Security interests over aircraft are usually structured as mortgages. The concept of trusts is not recognised in Brazil, and there are no 'Brazilian trusts'. But trusts from other jurisdictions are recognised as entities in Brazil and are frequently used to hold title or mortgage interests over aircraft registered in Brazil. Thus, many aircraft are registered in the names of owner trustees and many mortgages are registered in the names of security trustees.

In the case of owner trustees, there is no need to register changes in beneficiaries; however, since November 2013 the RAB has required the submission of trust agreements (which must be notarised, apostilled or consularised and translated as described in question 16). Although the RAB regulation does not expressly mention amendments to trust agreements, parties should consider submitting trust agreement amendments to the RAB. Trust agreements are not registered with the RAB per se. They are submitted for and retained in the RAB's internal records.

A security trustee may hold a mortgage interest for a large group of lenders or for a changing group of beneficiaries such as new lenders without affecting the security. Loan transfers would not affect the security. The only party with registered rights as a lienholder in Brazil would be the security trustee. The lenders' recourse against the security trustee would not be a Brazilian issue and would be adjudicated outside Brazil.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

For purposes of encumbrances, spare engines tend to be treated in the same way as aircraft. Spare engine mortgages should be registered with the RAB and RTDs for the reasons given above in respect of aircraft mortgages.

A security interest over a financed aircraft creates a security interest over the aircraft's engines unless the security agreement expressly

includes stipulations to the contrary. Engines should be described by model and serial number in aircraft mortgages. Whether an engine is installed on the aircraft at the time of creation is irrelevant to the creation of the lien (though location may have tax consequences).

It is generally understood that the installation of an engine on an airframe does not transfer title to that engine to the owner of the airframe. Equally, the removal of an engine from an airframe does not cause any title transfer. This principle has not been tested frequently, however, there have been a few challenges to this principle in past years. In the major bankruptcy case of Varig airlines in 2005 and 2006, this principle was upheld and disputes over engine ownership did not arise (disputes over other parts did arise in that case). With the introduction of engine registrations under the Cape Town Convention, the tendency is that this principle will be fortified in Brazil.

An engine that has been encumbered though registration of a mortgage or security agreement with the RAB will cease to be encumbered when a release is filed with the RAB.

Helicopter engines require special attention because of the frequency in which they are swapped from their airframes with the intention of title swaps. The general rules applicable to fixed-wing aircraft engines apply to helicopter engines as well; however, such rules do not always coincide with the commercial agreements relating to helicopter engine maintenance.

For engines (spare or otherwise) leased or acquired after 15 May 2013, international interest registrations should also be made to obtain rights under the Cape Town Convention.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

Self-help remedies are not available in Brazil, even with the advent of the Cape Town Convention. If a lessee is in default under an aircraft lease, the lessor may seek an immediate repossession order from a Brazilian judge. Based on a high court decision it is usually advisable for the lessor to give the lessee written notice of the default, even in the absence of a contractual obligation to provide such notice. In prior aircraft repossession cases filed against airlines that were not undergoing bankruptcy reorganisation procedures, the Brazilian courts have been fairly efficient in granting preliminary injunctions placing leased aircraft in the possession of the lessor. Such orders are not the equivalent to a summary judgment since they usually do not allow the lessor to export and deregister the aircraft until after the lessee has had an opportunity to present a defence. After the presentation of such a defence the court may grant the lessor definitive possession of the aircraft. At that point such a ruling would be roughly equivalent to a summary judgment. In short, a lessor can obtain preliminary possession in a matter of a few days. A summary judgment could be obtained in a matter of a few weeks or months, though much would depend on the lessee's defences.

The Brazilian Code of Civil Procedure that was in force and effect until the second half of March 2016 provided many opportunities for parties to file interlocutory appeals so lessees could try to slow proceedings by appealing decisions, including decisions on non-substantive issues. A new Code of Civil Procedure, which became effective in March 2016, is supposed to reduce the number of opportunities for filing interlocutory appeals, but there have as yet been no precedents to confirm this expectation. The reply to this question summarises a complex area of practice, and the advice of local counsel should always be sought whenever a lessor contemplates repossession.

23 Enforcement of security

Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

For the reasons explained in question 15, enforcement of security interests over aircraft in Brazil is rare. It will almost always be advantageous for the mortgagee to repossess an aircraft as assignee of a lessor then to foreclose on a mortgage in an effort to force a court-supervised sale of the aircraft. Self-help remedies are illegal, and the basic remedy a

mortgagee has under a Brazilian law mortgage is to take possession of the mortgaged asset. Arguably any holder of an international interest, including a mortgagee, should have Cape Town Convention remedies, such as taking possession, available. This has not yet been tested in Brazil, though mortgagees taking possession as assignees of lessors has been tested in the past.

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

According to the Brazilian Aeronautical Code, an aircraft mortgage will prevail over the ownership rights of the aircraft of the mortgagor and of any other third party, other than the following:

- court costs;
- employee credits;
- taxes;
- airport fees;
- amounts relating to emergency services to the aircraft;
- amounts paid directly by a pilot while discharging his or her duties when the same are indispensable for continuation of the flight; and
- amounts spent on maintenance.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Operating lease payments

Rent payments made to lessors incorporated in jurisdictions that are not considered tax havens under Brazilian law are exempt from withholding taxes. Actually, there is no 'withholding tax' per se. The relevant tax is Brazilian income tax that is withheld at source. There is a possibility that a lessee would have to withhold income tax on lease payments that do not relate to rent (eg, default interest). Maintenance reserves have not been subjected to any withholding tax.

Tax havens are defined as jurisdictions with annual corporate income tax rates under 20 per cent. The Brazilian Federal Revenue Service also publishes a list of countries that are deemed tax havens for taxation purposes. The list includes most offshore jurisdictions (eg, the Bahamas, Bermuda, the Cayman Islands, the Channel Islands and Singapore). In September 2016 Ireland was added to the list of tax havens. Neither the United States nor any state of the United States is on the tax haven list. Until October 2016 it was generally assumed that operating lease payments made to lessors incorporated in jurisdictions that are considered tax havens under Brazilian law would be subject to Brazilian income tax withheld at source (ie, in Brazil), at the rate of 25 per cent of the amount of the payment, however, following an uproar that arose in September 2016 when Ireland was added to the tax haven list, the Brazilian tax authority issued a clarification that operating lease rentals are not subject to the withholding tax even if the lessor is located in a jurisdiction that is considered a 'tax haven'. This applies to leases signed prior to the end of 2019 and to payments due prior to the end of 2022.

Finance lease payments

The interest portion of all payments would be subject to withholding tax of 15 per cent (or 25 per cent in the case of payments to tax havens); however, there is an exemption from this withholding tax that will remain in effect until the end of December 2022. The exemption applies to commercial airlines only.

Loan repayments

There are virtually no direct loan transactions for aircraft finance in Brazil. Payments would be subject to a 15 per cent withholding tax on the interest portion of each payment (25 per cent in the case of payments to tax havens).

Update and trends

Perhaps the 'hottest' topic that arose in 2016 related to withholding tax on operating leases, described in question 25. That issue seems to have been resolved for the time being, but may arise again in the future.

Title transfers

If title to a Brazilian-registered aircraft is transferred between two non-Brazilian parties, the only tax that might be applicable would be capital gains tax on the sale. Although this tax has been applicable since 2004, the Brazilian tax authorities have not sought to impose it on sales between non-Brazilian entities. There are questions concerning the jurisdiction of the Brazilian tax authorities over sales that do not involve any Brazilian taxpayer. If a Brazilian party is involved in such a sale, several taxes such as a state VAT and federal excise tax would be applicable.

Circulation of goods and services (ICMS) tax and industrial products (IPI) tax

There are two taxes that might be assessed on aircraft imports. These taxes are the responsibility of the Brazilian airlines. The airlines rarely pay these taxes as there are a number of legal methods available to avoid their assessment. One such tax is the ICMS tax. It is a state VAT-type tax. At least two Brazilian states do not apply it to commercial aircraft imports, and in other states there are arguments that allow airlines to obtain injunctions to avoid paying the tax. A Brazilian Supreme Court ruling supports the position that ICMS is not due on lease payments other than the final payment in a finance lease.

The IPI is a federal excise tax. It has a zero rate for most commercial aircraft, so Brazil's airlines are rarely concerned with it. For helicopter operators there is no exemption and importers usually pay it, though occasionally air taxi companies are able to obtain injunctions to avoid such payment. The rate is 5 per cent for air taxi companies and 10 per cent for other importers.

Gross-up

Gross-up provision of aircraft leases and other aviation finance agreements are usually valid.

Contribution for social security financing (COFINS) tax

COFINS is an additional tax on imports, and this was not applicable to aircraft imports in past years. Based on a change in law that occurred in 2013 the Brazilian tax authorities began to assess the COFINS tax on aircraft imports beginning in the last quarter of 2014. Airlines have been challenging the assessment of the COFINS tax on the importation of commercial aircraft under lease agreements. To date, most airlines have been able to avoid paying COFINS tax; however, this has been based on interim judicial rulings and not on final decisions on the merits of the applicability of the COFINS tax. If and when applicable, the COFINS tax would be 1 per cent of the value of an aircraft at the time of importation. The COFINS tax is due from the Brazilian importer of an aircraft.

Brazilian tax is complex and the foregoing explanation is a brief summary that should be verified with local counsel.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

Brazil has strict foreign exchange controls. A Brazilian aircraft lessee must register the financial terms of a lease with the Central Bank of Brazil through a computerised system called SISBACEN. The Central Bank registration in SISBACEN is commonly referred to as the ROF (financial transaction registration). The only common exception to such registration applies to leases with terms of less than 360 days. The registration usually takes one to two business days, though this period can vary. In normal ROF registration procedures, the operator does not need to submit the written lease to the Central Bank; however, the Central Bank has the right to require submission of a lease at any time.

Central Bank ROFs approve regularly scheduled payments due under a lease (eg, rent and maintenance reserves). Irregular payments such as default interest or losses and damages must be approved by the Central Bank on an ad hoc basis, before remittance. At present it is fairly easy for Brazilian lessees to obtain such approval.

The payment of insurance proceeds is also subject to Central Bank of Brazil approval, which is usually obtained without difficulty.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

There are usury rates in Brazil; however, there are questions as to whether such rates would apply to cross-border leases or loans. At present the limits are in the region of 20 per cent per annum so the issue does not arise frequently. Several years ago the Central Bank of Brazil limited default rates to 225 or 250 basis points over the regular rate of interest in a lease; however, those limitations have not been applied in recent years.

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Generally, lessors do not incur significant costs to bring aircraft into Brazil or to export them. In amicable situations the industry standard is that the Brazilian lessee bears all import and export-related costs. In a repossession scenario, a lessor will incur costs that can be significant; however, those costs are not charges of government agencies. The main costs in a repossession and export are legal fees, customs broker fees, court filing fees (usually 1 per cent of the value of a claim) and storage and maintenance costs. For example, in a repossession action if a lessor obtains preliminary relief but has to wait for a final decision the storage and maintenance costs will be borne by the lessor. Such costs may be contractually chargeable to the lessee, however, in an adverse repossession case recovery of those amounts from a lessee may be difficult. Lessors or owners repossessing aircraft through the courts must also post bonds, however, such bonds are not costs per se since they are returned to the plaintiff at the end of the proceedings, assuming the plaintiff prevails. There is some variation in the bond. As a general rule, 10–20 per cent of the amount of overdue rent is typical. See question 32 regarding liability.

Insurance and reinsurance

29 Captive insurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

Brazilian aircraft operators are required to place all primary insurance with Brazilian insurers and Brazilian primary insurers were, until the

end of 2016, required to offer 40 per cent of all reinsurance risk to reinsurers registered in Brazil on a right of first refusal basis. In the past, the Brazilian reinsurance market did not take up all of the 40 per cent risk offered to it so the effective reinsurance percentages underwritten by reinsurers outside Brazil were usually higher than 60 per cent. This right of first refusal percentage decreased to 30 per cent on 1 January 2017 and will decrease further, to 25 per cent, from 1 January 2018; to 20 per cent from 1 January 2019 and to 15 per cent from 1 January 2020. These lower percentages are applicable at the time of renewal of insurance policies, even if a lease has been executed prior to that time.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Cut-through clauses are valid provided the primary insurer is insolvent. In the absence of such insolvency, cut-through clauses may be deemed unenforceable.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Assignments of reinsurance are legally effective and are typically included in aviation lease and finance transactions.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

Generally, operators are liable for the operation of aircraft provided the agreement assigning operational responsibility is registered with the RAB. Therefore, in the case of leased aircraft, lessees (or sublessees where applicable), and not owners, are liable. In the absence of registration of the lease or operational agreement (which is rare), an owner would be presumed to be liable. If an aircraft is leased pursuant to an unregistered lease then the owner and operator would be jointly and severally liable for the operation of the aircraft.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

As explained in question 32, parties with no operational interest are not liable for the operational consequences of aircraft. In litigious situations there is always a risk of a victim lodging a claim against an owner, lessor or financier; however, the Brazilian Aeronautical Code places operational responsibility on the operator.

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34 Third-party liability insurance**Are there minimum requirements for the amount of third-party liability cover that must be in place?**

The Brazilian Aeronautical Code contains minimum third-party liability requirements commonly referred to as RETA. The RETA requirements are fairly low. The US dollar equivalent varies in accordance with currency fluctuations and other factors, but is in the region of US\$30,000 per person. Virtually all lease or other aviation finance contracts contain insurance requirements in line with international practices in relation to insurances. RETA cover is rarely, if ever, relied on as adequate in an aircraft finance transaction.

Cayman Islands

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

The Cayman Islands is not a signatory (or a party by extension from the UK) to the Rome Convention, the Geneva Convention or the Chicago Convention. It is now a party to the Convention on International Interests in Mobile Equipment and the associated Protocol to the Convention on International Interests in Mobile Equipment on matters specific to aircraft equipment (collectively, the Cape Town Convention).

In relation to the Chicago Convention, however, certain provisions of that Convention with which the United Kingdom is obliged to ensure that its overseas territories (including Cayman) comply are reflected in the Air Navigation (Overseas Territories) Order 2013 and Overseas Territories Aviation Requirements, applicable in Cayman.

The Cape Town Convention came into force in the Cayman Islands on 1 November 2015 following ratification of the Cape Town Convention by the United Kingdom and its extension to the Cayman Islands at its request. Upon such ratification and extension of the Cape Town Convention by the United Kingdom, the Cayman Islands Cape Town Convention Law 2009 was repealed. The aim of that legislation had been to mimic the principles and framework for the registration, recognition and enforcement of international interests contained in the Cape Town Convention in the absence of the Convention actually being in force in the Cayman Islands.

The Cayman Islands is, by Order-in-Council from the United Kingdom, a party to the New York Convention.

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The principal domestic legislation is as follows:

- the Air Navigation (Overseas Territories) Order, 2013 as amended;
- the Mortgaging of Aircraft Regulations, 2015 (these regulations have superseded the former, 1979 regulations, inter alia, to take account of the introduction of the Cape Town Convention into Cayman Islands law as referenced in question 1); and
- the International Interests in Mobile Equipment (Cape Town Convention) Law 2015.

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Save for public policy considerations, there are no restrictions under Cayman Islands law on the parties' freedom to choose the governing law of such arrangements.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

While there are no specific Cayman formalities, title is invariably transferred by way of bill of sale.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

Save for general enforceability considerations, there are no specific formalities. Note that a document executed in, brought in original form to, or produced before the courts of the Cayman Islands may be subject to Cayman Islands stamp duty.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

The aircraft registry is the Civil Aviation Authority of the Cayman Islands (CAACI). Registration may be effected by a qualifying owner or charterer by demise of an aircraft (see question 7). In general terms, this is a 'private use' register although the CAACI will look at applications that do not fit such criteria on a case-by-case basis.

The CAACI has an 83-bis arrangement in place with Saudi Arabia. There is no specific engine register. International interests that fall within the provisions of the Cape Town Convention may be registered against the airframe or separate engines at the International Registry maintained pursuant to the Cape Town Convention.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

The following persons are qualified to hold a legal or beneficial interest by way of ownership or by charter by demise in an aircraft registered in Cayman (or a share therein):

- the Crown in right of Her Majesty's government in the United Kingdom or in right of the government of the Cayman Islands;
- United Kingdom nationals;
- Commonwealth citizens;
- nationals of any European Economic Area (EEA) state;
- bodies incorporated in any part of the Commonwealth that have their registered office or principal place of business in any part of the Commonwealth; or
- undertakings formed in accordance with the law of an EEA state and that have their registered office, central administration or principal place of business within the EEA.

There is no ability to register interests in an aircraft on the Cayman Companies Register or any other register in the Cayman Islands, save that a mortgage over an aircraft registered on the Cayman Islands Aircraft Register may be registered in the Aircraft Mortgage Register maintained by the CAACI. Additionally, where a Cayman Islands company creates a mortgage or charge over any of its assets (including an aircraft), the details of such security shall be recorded in its register of mortgages and charges.

The CAACI has a discretion to cancel a registration on a change of ownership, or if an unqualified person otherwise becomes entitled to a legal or beneficial interest by way of ownership of the aircraft or of a share therein, in which latter case the registration will become void and the Certificate of Registration must be returned to the CAACI.

There is no ability separate from that relating to the airframe to register interests in engines on the Cayman Aircraft Register or Aircraft Mortgage Register.

As noted above, however, pursuant to the Cape Town Convention, relevant parties are now able to register applicable interests against applicable airframes or engines or both at the International Registry.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

The registration process may be initiated by completing and submitting all of the relevant application forms, and returning them to the CAACI for the approval of the Director General of Civil Aviation. The CAACI has established an online facility for doing so. The application forms must be accompanied by, inter alia, the company's certificate of incorporation or comparable document, a list of authorised company signatories and a general description of the company's activities and main base of aircraft operations. Where applicable, a statement must also be included that states the aircraft will only be operated within the definition of 'private category'. Private category is defined as being 'any purpose other than public transport or aerial work' and, therefore, an aircraft registered in the private category may not be used for the purposes of 'hire and reward'.

Persons wishing to register an aircraft must first prove eligibility to hold a legal or beneficial interest by way of ownership or charter by demise in an aircraft registered in Cayman (or a share therein) as described above.

Subject to receipt of an acceptable 'due diligence' report, an airworthiness survey will then be scheduled. Thereafter, subject to the surveyor making a recommendation for the issue of a Certificate of Airworthiness and receipt of an Export Certificate of Airworthiness or similar document, the deregistration process may be initiated.

Once accepted for registration, a registration mark prefixed with 'VP-C' will be assigned or the applicant may request a specific registration mark, which (if available) will be allocated.

Upon receiving notification from the existing state of registry that the aircraft has been removed from that register, a Cayman Certificate of Registration, Certificate of Airworthiness and all required documentation will be issued.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

While registration and the issue of a Certificate of Registration indicates that the CAACI considers the relevant applicant to be qualified for registration, and may therefore be considered prima facie evidence of ownership or the holding of an applicable charter by demise interest in the aircraft, registration is not proof of legal ownership and the Certificate of Registration will state on its face that such certificate is not proof of legal ownership.

10 Registration of lease interests

Summarise the process to register a lease interest.

See question 7, in the context of charterers by demise. In general terms, the CAACI will not concern itself with the specifics of the lease itself.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

The Certificate of Registration is issued by the CAACI. It sets out the following information: registration mark, aircraft type and serial number, name of registered owner (and whether such registered 'owner' holds a charter by demise interest) and the nationality of the registered owner.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

Where the aircraft is subject to a mortgage registered on the Cayman Aircraft Mortgage Register, the aircraft will not be deregistered without the consent of all parties registered as mortgagees.

Although not a legal requirement, as a matter of practice, where there is a charter by demise over the aircraft, the CAACI will agree, if requested, not to deregister the aircraft without the consent of the registered owner. The CAACI will, if requested, provide the lessor or owner of the aircraft with a 'comfort letter' whereby the CAACI acknowledges the ownership and leasing structure of the aircraft and confirms that it will not remove the aircraft from the Aircraft Register without receiving written authorisation from the lessor or owner. The CAACI will place a notation on the Aircraft Register of the undertaking so provided and of the ownership or leasing structure.

Additionally, see below in relation to deregistration powers of attorney (question 13) and irrevocable deregistration and export request authorisation (IDERAs) (question 14).

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

Under Cayman Islands law, a deregistration power of attorney when granted to secure an obligation owed, typically, to the finance parties will be irrevocable until that obligation is discharged and will survive the insolvency of the grantor. The power of attorney may be granted to more than one attorney-in-fact on a joint or several basis, or both.

Further, under Cayman Islands law, a power of attorney governed by Cayman Islands law is required to be executed as a deed.

A deregistration power of attorney need not, however, be governed by Cayman Islands law. It will frequently have the same governing law as the other transaction documents, for example, English law or New York law. It is possible to submit the deregistration power of attorney to the CAACI and obtain an acknowledgement from the CAACI with respect to it.

With regard to the deregistration process itself, there is no specific form of deregistration request and deregistration will, therefore, typically consist principally of the return to the CAACI of the original of the Certificate of Registration endorsed at section (iii) on the back and signed by the owner of the aircraft or an officer of the company (or by the relevant attorney-in-fact). The aircraft typically cannot be deregistered until the CAACI receives the original of such signed certificate.

In addition, the other principal requirements for deregistration of the aircraft are:

- that any balance on the account for the aircraft is paid in full; and
- where a Certificate of Airworthiness for Export is required, the relevant party will need to make a request to the CAACI for such certificate and make arrangements for one of the CAACI surveyors or its agents to inspect the aircraft.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

The Air Navigation (Overseas Territories) Order, provides for the Cape Town Convention IDERA regime to be recognised and take effect in the Cayman Islands.

Accordingly, relevant filings of IDERA or consents to deregister may be filed with (and acknowledged by) the CAACI in accordance with the Cape Town Convention. The CAACI requires that IDERA documentation so filed must be notarised and, additionally, each filing carries a fee of US\$304.88 at current rates.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

There is no statutory format with which the mortgage must comply. The mortgage itself need not be governed by Cayman Islands law. The original mortgage deed need not be provided to the CAACI (and, indeed, it is advisable that the original mortgage not be brought to the Cayman Islands in order to avoid the possibility of triggering a liability to Cayman Islands stamp duty (see question 16)).

Where the relevant mortgage is to be registered as an international interest at the International Registry under the Cape Town Convention, then such mortgage must be in such form as to constitute an international interest under the Cape Town Convention.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

There are no specific documentary formalities under Cayman Islands law, save that where the original mortgage is brought to the Cayman Islands, applicable Cayman Islands stamp duty may be payable (which may be up to US\$610 at current rates).

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

With respect to a mortgage over an aircraft registered on the Cayman Aircraft Register, it is possible to register such mortgage on the Cayman Aircraft Mortgage Register. Such registration will go to priority (subject, where applicable, to the rules of priority under the Cape Town Convention) but not validity.

The procedure to effect registration of a mortgage is simple and straightforward, requiring an application by the mortgagee. The mortgagee must provide the CAACI with a short registration form summarising the principal points of the mortgage (ie, date, aircraft description, mortgagor contact details and confirmation of sum secured). An original of the registration form (although, in certain circumstances the CAACI may proceed on the basis of a PDF), signed by either the mortgagee or his or her agent or legal counsel, must be submitted to the CAACI together with a copy of the mortgage certified by the applicant to be a true and correct copy. The mortgage registration fee should also be submitted upon registration, which fee is calculated on an ad valorem basis depending on the sum secured, up to a maximum amount (at current rates) of approximately US\$6,000.

Where the mortgage or other relevant security interest constitutes an international interest under the Cape Town Convention, then such international interest may also be registered at the International Registry pursuant to the Cape Town Convention.

18 Registration of security

How is registration of a security interest certified?

The CAACI will issue a notification of registration, which is generally available on the date of registration. The notification states the date and time of registration, whether it is the first or a subsequently registered mortgage with respect to the relevant aircraft, the principal details of the mortgage and acknowledges receipt of the relevant registration fee.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

A registered mortgage is given statutory priority over subsequently registered mortgages and unregistered mortgages. The priority of the registered mortgage will not be affected by the bankruptcy of the mortgagor, and the security interest will rank in preference to any right, claim or interest of other creditors. It should be noted, however, that possessory liens for work done on the aircraft (whether before or after the mortgage was created), or over persons lawfully entitled to possession of the aircraft, or with a right to detain the aircraft, will have priority over a registered mortgage. In addition, a previously registered mortgage or a mortgage created prior to 9 October 1979 would have priority over a subsequently registered mortgage.

Registration of the mortgage cannot take effect until the aircraft is registered, but the mortgagee may secure its interest prior to registration of the aircraft by submitting a priority notice to the CAACI. Lodging of a priority notice will prevent any other security interests over the aircraft being registered in advance of registration of the mortgage that is the subject of the priority notice.

The priority notice is a simple form, along the same lines as the mortgage registration form, and must be accompanied by the applicable nominal priority registration fee.

All registered mortgagees must provide their consent to removal of the aircraft in question from the Aircraft Register before such removal can take place, and a registered mortgage will continue to exist despite removal of the aircraft from the Aircraft Register. Moreover, by law, the Cayman Islands government is required to indemnify a mortgagee for loss suffered owing to an error or omission in the Mortgage Register or any inaccuracy in any entry that is made.

Although registration of a mortgage does not constitute evidence of its validity, it does constitute express notice of all facts appearing on the Mortgage Register.

Additionally, under the Mortgaging of Aircraft Regulations, the effects of registration of international interests at the International Registry is now recognised from the date of coming into effect of the Cape Town Convention in the Cayman Islands. The priority of pre-existing aircraft mortgages on the Cayman Aircraft Mortgage Register is preserved although from such date mortgages registered on the Cayman Aircraft Mortgage Register and as international interests at the International Registry will have their priority determined in accordance with the priority rules set out in the Convention, subject, in all cases, to the priority of certain non-consensual rights or interests that will in any event take priority under Cayman law and under the Cape Town Convention as applicable to the Cayman Islands (eg, Cayman government liens for unpaid taxes or charges and repairers' liens).

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

A typical security package for a financing involving the Cayman Islands will consist of an aircraft mortgage, a security assignment of the borrowing party's contractual rights (eg, under the relevant lease arrangements, the lease rentals or insurances) and a deregistration power of attorney or IDERA. It is often the case that the lenders will take security over the shares of the (often Cayman) owner or borrower. These documents will usually not be governed by Cayman law but by, for example, English or New York law, save that a share mortgage over the shares of a Cayman company is often governed by local law.

The secured party is often a security trustee or collateral agent for the financing parties from time to time.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

A mortgage to be registered on the Cayman Aircraft Mortgage Register may cover any store of spare parts (including engines) for the aircraft, but may not include a mortgage created as a floating charge or a mortgage of spare parts on their own. Parts that in the future may become attached to the aircraft can be part of a registered mortgage

provided they are sufficiently identifiable when acquired by the mortgagor and value is given. See also the comments above with respect to the registration of international interests over engines under the Cape Town Convention.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

Subject to enforceability considerations under the governing law, the *lex situs* and any other relevant laws (other than Cayman Islands law), the Cayman courts will typically recognise and enforce contractual arrangements such as lease termination provisions created under foreign laws. The Cayman courts would also generally recognise self-help remedies by which the counterparties may take possession of the aircraft.

23 Enforcement of security

Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

Similarly, the Cayman courts would typically recognise self-help remedies in the context of an enforcement of security interests over the aircraft (and often over the shares of the aircraft owning vehicle), for example, by dealing directly with the CAACI pursuant to a deregistration power of attorney or IDERA to effect a deregistration. Cayman Islands law will generally also respect the secured parties' security interests in the event of the insolvency of the relevant obligor.

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

See question 19. For aircraft present in, or that are brought to, the Cayman Islands itself, the relevant fees prescribed pursuant to the Airports Authority Law of the Cayman Islands shall be paid with respect to such aircraft. Under such Law, the Cayman Islands Airports Authority has a lien on every aircraft for the recovery of airport dues, fees and other charges imposed. Such Authority may enter, take control of and arrest and sell by public auction or private arrangement in compliance with applicable rules and regulations to that effect any aircraft over which it has a lien. The Authority shall not be a bailee for reward and has no liability for loss or damage occasioned thereby and thereto unless such loss or damage is owing to the wilful neglect or default of the Authority.

Generally, issues of compensation for detention, requisitioning, etc are typically also dealt with contractually in the transaction or insurance documentation.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

The Cayman Islands currently has no form of income, corporate or capital gains tax and no estate duty, inheritance tax or gift tax.

Additionally, Cayman Islands exempted companies (as well as exempted limited partnerships, exempted limited liability companies and exempted trusts) are entitled to obtain an undertaking as to tax concessions from the Governor-in-Council of the Cayman Islands exempting such entity from the effects of any changes to the Cayman Islands tax regime for a period of (in the case of an exempted company) 20 years from the date of such undertaking.

Update and trends

The Cayman Islands has long been a hub of the securitisation industry. In keeping with this, in recent times there has been a growing trend among aircraft operating lessors eager to access the capital markets to securitise portfolios of aircraft in asset-backed securitisation (ABS) transactions using Cayman Islands-incorporated special purpose vehicles (SPV). The notes issued by the SPV issuer in these transactions are typically then listed – often such listings have been made on the Irish Stock Exchange, but more recently we have seen a significant increase in ABS listings on the Cayman Islands Stock Exchange, with its favourable disclosure requirements and listing fee structure.

The Special Economic Zone in the Cayman Islands (SEZ) has recently created the Cayman Aviation Services Park to sit alongside the existing Cayman Maritime Services Park established in 2015. The Special Economic Zones (Cayman Enterprise City) (Amendment) Order 2017 provides that the Cayman Maritime and Aviation Services Park is designed to attract maritime and aviation services businesses to assist in establishing the Cayman Islands as the largest maritime and aviation services cluster in the region. Businesses may set up operations in the Cayman Islands under the SEZ regime and obtain the benefits and concessions provided by the SEZ.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

There is no exchange control legislation under Cayman Islands law, and accordingly there are no exchange control regulations imposed under Cayman Islands law.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

Arrangements that provide for a penal rate of interest may be unenforceable under English common law principles, which are of persuasive, if not binding, authority before the courts of the Cayman Islands.

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Aircraft registered on the Cayman Aircraft Register are almost invariably located and operated outside of the Cayman Islands.

Were an aircraft to be imported into the Cayman Islands, it would be subject to Cayman Islands import duty.

Insurance and reinsurance

29 Captive insurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

The Cayman Islands is the second largest jurisdiction for captive insurance after Bermuda, with over 700 captive insurance companies regulated by the Cayman Islands Monetary Authority. Cayman Islands insurance legislation has been updated recently, *inter alia*, to contemplate the use of portfolio insurance companies.

In relation to aircraft insurance, save where the relevant aircraft is 'ordinarily based' in the Cayman Islands, Cayman insurance legislation does not apply and it is typically the case that insurance is placed in the principal aviation insurance centres of London and New York.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

There are no Cayman statutory provisions in relation to such clauses. The position under Cayman law will reflect English common law

principles (which are of persuasive, if not binding, effect before the courts of the Cayman Islands).

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Subject to usual enforceability qualifications, such arrangements are effective under Cayman law and are common in aircraft finance transactions.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

With respect to an owner, section 76(4) of the UK Civil Aviation Act, 1982 is extended to the Cayman Islands to the effect that loss or damage caused by an aircraft in flight or by a person in, or an article, animal or person falling from, such an aircraft, is transferred to the person to whom the owner has demised, let or hired out the aircraft if the demise, let or hire is for a period of more than 14 days and no crew member is employed by the owner.

In general terms, a lessor or financier would not otherwise be liable solely by operation of Cayman Islands law.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

Save as noted in question 32, the owner of the aircraft would be subject to strict liability by virtue of section 40(2) of the UK Civil Aviation Act, 1949, extended to the Cayman Islands.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

There are no specific Cayman law requirements.



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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

The Dominican Republic is a party to the following major air law treaties:

- the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, dated 12 October 1929 and the Hague Protocol modifying said convention, dated 28 September 1955; both ratified on 25 February 1972 and in force since 25 May 1972;
- the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, dated 7 October 1952, to which it is one of the original signatories, but has not yet ratified;
- the Chicago Convention on International Civil Aviation, dated 7 December 1944, ratified on 25 January 1946 and in force since 4 April 1947. Protocols have been ratified regarding article 45 on 28 December 1954; articles 48(a), 49(e) and 61 on 28 December 1954; article 50(a) on 24 November 1961; article 50(a) on 2 October 1976; article 56 on 30 May 1972; article 83-bis on 21 March 2006; article 93-bis; and the Authentic Quinquelingual Text, with reservation, on 29 September 1995. All of these articles are in force with the exception of the last;
- the Geneva Convention on the International Recognition of Rights in Aircraft, dated 19 June 1948, to which it is one of the original signatories, but has not yet ratified;
- the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, dated 28 May 1999, ratified on 21 September 2007;
- the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, dated 14 September 1963, ratified on 3 December 1970;
- the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, dated 16 December 1970, ratified on 22 June 1978;
- the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, dated 23 November 1971, ratified on 28 November 1973, although it has not ratified its Supplementary Protocol dated 24 February 1988;
- the Montreal Convention on the Marking of Plastic Explosives for the Purpose of Detection, dated 1 March 1991, ratified on 9 March 2011; and
- the Beijing Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, dated 10 September 2010, ratified on 27 November 2012. The Supplementary Protocol of the same date was ratified on 22 March 2013. Neither have entered into force.

The Dominican Republic has neither signed nor ratified the Rome Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft, dated 29 May 1933 or the Cape Town Convention on International Interests in Mobile Equipment, dated 16 November 2001.

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

In addition to the generally applicable provisions contained in the Civil and Commercial Codes, the key domestic statute applicable to aviation-related finance, leasing and property in general is Civil Aviation Law No. 491-06, dated 22 December 2006, as amended by Law No. 67-13, dated 24 April 2013 (the Civil Aviation Law).

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

While the choice of foreign law by the parties is not expressly prohibited, a distinction must be made between the law of perfecting the mortgage and the law of its enforcement procedure. As to the law of perfecting title or security interest over aircraft in the Dominican Republic, Dominican law must govern.

Pursuant to section 47.7(c) of Dominican Aeronautical Regulation RAD-47 (RAD-47), all documents through which title or security interest over locally registered aircraft are incorporated, transferred or modified must be executed before a Dominican notary public, be it as an authentic act declared before and drafted by the notary public or a privately drafted document executed before and certified by said notary public.

In the specific case of mortgage agreements, these can only be incorporated via authentic act, declared before and drafted by a notary public in the presence of two witnesses as per the specific standards provided for under Dominican law.

Concerning the law that will govern the procedure for its enforcement, assuming that such a choice was valid under the applicable foreign laws and not contrary to public order, Dominican courts will, in principle, uphold such a clause.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

With regards to transfer, two scenarios must be taken into account: transfer of locally registered aircraft and transfer of aircraft registered abroad.

On the one hand, pursuant to article 92 et seq of the Civil Aviation Law and section 47.7 of RAD-47, title in locally registered aircraft is transferred via notification of the corresponding transfer contract before the National Aircraft Registry (RNA), which is under the purview of the Dominican Institute for Civil Aviation (IDAC), an autonomous public entity created by the Civil Aviation Law and responsible for the supervision and control of civil aviation in the Dominican Republic. Upon registration, IDAC proceeds to issue a registration document in favour of the new proprietor. The corresponding documentation must be registered before IDAC and the RNA within 10 days of their execution, pursuant to section 47.7(g) of RAD-47.

On the other hand, while Dominican law does not regulate the transfer of aircraft registered abroad, it does require that documents executed abroad comply with minimum requirements in order to be considered valid in the Dominican Republic. In this sense, transfer or title documentation related to aircraft being imported to the Dominican Republic for the purposes of local registration need to comply with the following requirements:

- it must be valid pursuant to the laws of the jurisdiction of origin;
- it must be duly apostilled or certified by consular authorities as applicable; and
- if it is drafted in a language other than Spanish, it must be accompanied by a Spanish translation certified by a locally accredited judicial interpreter.

Additionally, to the extent that the seller of such aircraft is registered in the Dominican Republic as an air operator and the sold aircraft is registered in its corresponding operations specifications (OpSpecs), it would have to declare to IDAC that it no longer owns said aircraft and request that it be excluded from its OpSpecs. Likewise, the buyer, to the extent that it is locally registered as an air operator, will have to update its OpSpecs correspondingly before IDAC in order to operate said aircraft in the Dominican Republic.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

As with question 4, this matter must be looked at from the standpoint of both locally registered aircraft and aircraft registered abroad. Pursuant to section 47.7(c) of RAD-47, to the extent that any such transfer document pertains to locally registered aircraft, it must be executed before a Dominican notary public, which in turn entails that said document be signed in the Dominican Republic. It may take the form of an authentic act, declared before and drafted by the acting notary public in question, or a privately drafted agreement, executed in the notary public's presence and certified as such.

Pursuant to section 47.7(p) of RAD-47, the acting notary public's signature would need to be certified by the office of the Attorney General prior to filing before IDAC. Given that it is technically possible for a privately drafted document to be generated in a language other than Spanish even if it is locally executed and notarised, such a document would have to be accompanied by a Spanish translation certified by a locally accredited judicial interpreter, whose signature would also require certification by the office of the Attorney General.

Schedule A, section 1 of RAD-47 requires that all locally generated transfer documents be recorded before the corresponding Civil Registrar's office prior to registration before the RNA.

With regards to any transfer or title documentation required in order to record an aircraft registered abroad under a locally registered air operator's OpSpecs, said documentation would need to comply with the same requirements set forth for documents executed abroad (see question 4).

We note that these requirements would also apply to any and all support documentation filed with regards to any request being made before IDAC. Additionally, pursuant to section 47.11 of RAD-47, any requests made before IDAC regarding the RNA as well as any documentation filed in support of said requests, must be physically signed, in ink, by a duly authorised representative of the requesting party.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

Pursuant to articles 85 and 92 of the Civil Aviation Law, the RNA, administered and maintained by IDAC, is a system whose purpose is to record all Dominican aircraft; that is, aircraft owned by either: Dominican individuals or corporations; foreign individuals or corporations that have established domicile in the Dominican Republic; or the Dominican state.

The RNA includes the following:

- nationality and registration marks and adequate specifications for the purposes of identifying individual aircraft;

- titles or instruments that incorporate, transfer, recognise, modify, extinguish or in any way affect the rights over an aircraft or aircraft engine that is being used or is intended to be used in Dominican aircraft;
- judicial decisions that recognise, transfer, modify or extinguish property over aircraft or liens over aircraft or aircraft engines, etc;
- foreclosures, injunctions or any other preventative or cautionary measures that may affect aircraft;
- contracts for the use of aircraft;
- cessations in the activities of aircraft;
- disabling or loss of aircraft and any substantial modifications that aircraft may be subject to;
- documentation regarding the owners of Dominican aircraft;
- insurance policies over aircraft or aircraft engines; and
- any event or document that may alter or be linked to an aircraft's legal status.

As confirmed under RAD-47, the information contained in the RNA is in the public record, and may be requested by third parties.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

As indicated above, ownership or lease interests or lease agreements over aircraft can be registered with the RNA. In this sense, the concept of 'owner' statutorily encompasses the following:

- Dominican individuals or corporations;
- foreign individuals or corporations that have established domicile in the Dominican Republic;
- the Dominican state; or
- persons with a legitimate interest over the corresponding aircraft, aircraft engine or individual parts (lessees, creditors, guarantors, etc).

Interests over aircraft engines are also subject to registration before the RNA. We note that, pursuant to article 1(jj) of the Civil Aviation Law, the concept of aircraft engine includes the following:

- engines being used in aircraft;
- engines that are intended to be used in aircraft; and
- individual parts of said engines, excluding propellers.

Aircraft registered in another state may obtain registration in the RNA upon cancellation of the prior registration.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

The registration of ownership interests is carried out via written request addressed to the General Director of IDAC. Supporting documentation must necessarily include the following:

- personal identification document (ID) of the petitioner, if a national individual;
- where the petitioner is a foreign individual, he or she must have his or her residence or domicile in the Dominican Republic;
- where the petitioner is a corporation, it must submit copies of its current valid Mercantile Registry and its corporate by-laws, duly registered before the Mercantile Registry via the Chamber of Commerce for petitioner's domicile. To the extent that the by-laws do not expressly provide for it, express corporate authorisation as contemplated under the by-laws must be provided for the representative signing the request and for the specific task being requested, also duly registered before the corresponding Chamber of Commerce;
- the petitioner must hold title or possess an instrument asserting its ownership of the aircraft. This must comply with all legal requirements respecting its validity (see question 5);
- a completed form IDAC 2000-24, from the Airworthiness Department;

- a Certificate of Airworthiness for the aircraft seeking to be registered;
- a Certificate of Export for the aircraft, in the event that it comes from a foreign country;
- whenever applicable, a Certificate of Deregistration of the aircraft issued by the state of last registration of the aircraft in question;
- original certificates of the aircraft insurance policies taken out by the aircraft's owner covering the established legal amounts (50,000 Dominican pesos for injuries to passengers and crew and 300,000 Dominican pesos for injuries to third parties on the ground);
- payment of all corresponding fees, which are collected administratively by IDAC;
- receipts showing payment of all applicable Dominican taxes and fees; and
- whenever the owner of the aircraft is an individual, he or she must provide a certificate indicating the absence of criminal record, issued by the national police. Corporations must provide this certification with regard to its shareholders.

While the request itself would not require notarisation or certification, supporting documentation would require it as indicated in question 5. This includes any necessary certified translations to the extent that the documents in question are drafted in a language other than Spanish.

Type of aircraft	Certificate cost (Dominican pesos)
Private aircraft, one to five passengers	100
Private aircraft, five or more passengers	150
Commercial aircraft, one to nine passengers	250
Commercial aircraft, 10–20 passengers	500
Commercial aircraft, 21–45 passengers	750
Commercial aircraft, 46 or more passengers	1,000
Training aircraft	50
Aircraft for aerial works	100

In addition to IDAC's service fees of 100 Dominican pesos and the yearly cost of the corresponding Certificate of Airworthiness pursuant to the table included above, there are costs associated to the request as a result of notarisations, certifications and apostilles that may be required as applicable.

The cost per document for each of these related services tends to be relatively small (less than 47 Dominican pesos). There is, however, one notable exception in the specific case of locally generated transfer documents. The required prior registration before the Civil Registrar's office entails administrative and tax costs of approximately 2 per cent of the sums involved in the corresponding document.

Unless otherwise specified, the owner of an aircraft is presumed to have title over said aircraft's engine. As indicated in question 7, the interests of third parties over said engine may be registered separately. Registration requests before IDAC have an average processing time of 15 calendar days. The fees referenced herein are current as of the date of publication but are subject to change as is the prerogative of the corresponding authorities.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

The effect of registration is declaratory in nature, establishing legal presumption of the registered owner's liability with regards to statutory and regulatory obligations stemming from the operation of the aircraft in question or any damage caused by it. It also provides prima facie, not definitive, evidence of ownership. Pursuant to article 91 of the Civil Aviation Law, registration of an ownership interest in the RNA does not represent proof of title and may be challenged in the event of absence of or defective title.

10 Registration of lease interests

Summarise the process to register a lease interest.

The registration of lease interests over locally registered aircraft is carried out via written request addressed to the General Director of IDAC. Supporting documentation must include the following:

- a personal ID of the petitioner, if a national individual;
- where the petitioner is a foreign individual, he or she must have his or her residence or domicile in the Dominican Republic;
- where the petitioner is a corporation, it must submit copies of its current valid Mercantile Registry and its corporate by-laws, duly registered before the Mercantile Registry via the Chamber of Commerce for petitioner's domicile. To the extent the by-laws do not expressly provide for it, express corporate authorisation as contemplated under the by-laws must be provided for the representative signing the request and for the specific task being requested, also duly registered before the corresponding Chamber of Commerce;
- possession of an instrument asserting lease interest over the aircraft. This must comply with all legal requirements respecting its validity (see question 5);
- payment of all corresponding fees, which are collected administratively by IDAC;
- receipts showing payment of all applicable Dominican taxes and fees; and
- whenever the owner of the aircraft is an individual, he or she must provide a certificate indicating the absence of criminal record, issued by the national police. Corporations must provide this certification with regard to their shareholders.

While the request itself would not require notarisation or certification, supporting documentation would require it as indicated in question 5, including any necessary certified translations to the extent that the documents in question are drafted in a language other than Spanish.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

Pursuant to article 86 of the Civil Aviation Law, the General Director of IDAC shall issue registration certificates in favour of eligible owners that successfully obtain registration. The registration certificate includes the following information with regard to the aircraft in question:

- nationality and registration marks;
- manufacturer and model;
- serial number;
- owner's name and domicile;
- date of issue;
- signature of the certificate's issuer; and
- any other information deemed relevant to IDAC.

Registration certificates do not include fields expressly dedicated to liens or mortgage interests over the registered aircraft. And although this information may be included in registration certificates under the label of 'relevant information', it is generally not the case. Nevertheless, this information is in the public domain and may be requested from IDAC by third parties with regard to specific aircraft. We note that registration certificates are not issued with regards to aircraft engines or spare parts, although certifications of ownership may be requested from IDAC on a case-by-case basis.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

Pursuant to Schedule A of RAD-47, deregistration or export of registered aircraft requires either evidence of the cancellation of any registered liens, or the express, written consent of the person or entity in whose favour the lien in question was established. Applicable

statutes and regulations do not expressly require IDAC to give notice of any such requests to potentially interested parties.

Pursuant to article 232 of the Civil Aviation Law, an interested party may oppose the amendment, suspension or cancellation of a registration certificate via written protest addressed to the Civil Aviation Board, an advisory entity to the executive branch that oversees IDAC's activities.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

The corresponding party is free to provide power of attorney for the purposes of deregistration or export. Such a power of attorney is generally required to make express mention of the authorised task before which entities said task would be carried out, although local authorities reserve the right to request that these powers of attorney comply with specific guidelines on a case-by-case basis.

These powers of attorney may be revoked by one of the two following means:

- express revocation via written document indicating said revocation, and its extent; and
- tacit revocation, via new power of attorney indicating a different attorney-in-fact. Such a power may be granted to more than one attorney insofar as the multiple attorneys are contemplated via a single document; additional documents would only result in tacit revocation of prior powers granted.

Assuming said power of attorney contains the necessary consents (see question above) and does not condition deregistration or export in any way, the person granted proxy would be able to carry out said deregistration or export as long as he or she has the required support documentation.

The power of attorney itself would not, in principle, be affected by the grantor's insolvency per se. Any deregistration or amendment carried out via that power of attorney would still be subject to opposition by third party, however, and if insolvency were to lead to a transfer in property, that transfer in property would indeed invalidate powers of attorney granted by the prior owner.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

As indicated in question 1, the Dominican Republic is not a party to the Cape Town Convention.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

Pursuant to articles 93, 103 and 104 of the Civil Aviation Law, notwithstanding the fact that they are moveable property, aircraft and aircraft engines are subject to mortgage as provided under the Civil Code for real estate. As a result, the corresponding documents must be authentic acts, declared before and drafted by Dominican notary public and drafted in Spanish.

Pursuant to article 2132 of the Civil Code, the secured amount must be included in the mortgage document itself in order for it to be deemed valid for registration. While the economic terms of the deal do not have to be expressly included, it is recommendable to include reference to the corresponding loan document (eg, loan agreement executed on a date by the parties) in order to more readily ensure the application of relevant provisions in a potential foreclosure.

Other security interests that may be recorded over aircraft or aircraft engines in the National Aircraft Registry are privileges and seizures. Pursuant to articles 102 and 105 of the Civil Aviation Law, the following are privileged creditor rights that may directly encumber registered aircraft as a result of the corresponding certified court order:

- fees and duties on air transport;
- attorneys' fees and court costs;

- sums owed to the previous owner of registered aircraft; and
- due salaries and severance payments.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

Depending on the type of security in question, different formal requirements will apply. As mentioned, mortgages over aircraft or aircraft engines can only be incorporated via authentic act declared before and drafted by a notary public in the presence of two witnesses, which in turn must be certified by the office of the Attorney General prior to filing before IDAC.

Much like the case discussed in question 8, the costs involved in obtaining prior certifications and registrations for securities are generally minimal, although they can certainly add up whenever a large volume of documents is involved.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

Assuming all documentary requirements discussed above have been met, perfection is obtained via registration before the RNA as indicated in article 104 of the Civil Aviation Law. The registration of security interests is carried out via written request addressed to the General Director of IDAC, which must include the following:

- a description of the aircraft or engine in question;
- nature, amount and status of the lien;
- designation of the court issuing the order, whenever applicable;
- designation of the court file to which the order corresponds, whenever applicable;
- transcription of the corresponding court order, whenever applicable;
- personal particulars (individual or corporation) of the person against whom the measure has been ordered; and
- if the requesting entity is a corporation, a duly authorised representative must make said request. If the request is made in-house, it must be printed on the corporate letterhead and be stamped with the company seal.

Supporting documentation, in turn, must include the following:

- the document validly incorporating the security interest in question (eg, a faithful, certified copy of the authentic act containing the mortgage agreement or a certified court order, as applicable);
- a copy of the registration certificate for the corresponding aircraft; and
- in the case of corporations, the corporate authorisation required by the corresponding by-laws for both the representative signing the request and for the specific task being requested. If these documents are foreign, they must be:
 - valid pursuant to the laws of the jurisdiction of origin;
 - duly apostilled or certified by consular authorities as applicable; and
 - to the extent that they are drafted in a language other than Spanish, accompanied by a Spanish translation certified by a locally accredited judicial interpreter.

With regard to costs, IDAC charges a service fee of 200 Dominican pesos for the registration of security interests. As in the case of transfer documentation, prior registration before the corresponding Civil Registrar's office is required, with its approximately 2 per cent ad valorem cost. Additional costs are limited to the generally minor expenses represented by required notarisations and certifications. Again, the fees referenced herein are current as of the date of publication, but are subject to change as is the prerogative of the corresponding authorities.

18 Registration of security

How is registration of a security interest certified?

Registration of the security interest can be certified by requesting and obtaining a legal status certificate from IDAC for the aircraft or engine in question. No registration certificate is issued for the security interest in particular, and the aircraft's registration certificate does not necessarily include registered liens.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

Registration makes the security interest in question opposable to third parties, such as unsecured creditors, as of the date and time of its registration. Based on section 47.29 of RAD-47, registrations are deemed to have been made on the date and time in which the corresponding request was completed and duly filed before IDAC. Priority operates based on this date and time with regards to other registered security interests over the same aircraft.

The National Aircraft Registry's main purpose is to allow third parties to transparently obtain information on the legal status of aircraft. However, third parties should not rely on the information contained in a given aircraft's registration certificate, owing to the fact that it may not include all relevant information on security interests or may be outdated. A legal status certificate from IDAC is the recommended source of information, since it should provide all current data.

20 Security structure and alteration

How is security over aircraft and leases typically structured?

What are the consequences of changes to the security or its beneficiaries?

Under Dominican law, security interests are in rem rights and, as a result, pursue the asset itself, not the person that owns it. In the event of novation, a new registration would be required given that, under Dominican law, the original loan would be deemed terminated, along with all accessory obligations, such as the security interest. Hence a new security interest would have to be incorporated and registered with regard to the new loan generated as a result of novation.

We note, however, that transfer of the loan to a new debtor is not considered to have novatory effect over said loan and hence would not strictly require a new registration. The obligation remains the same and the new lender is deemed to have rights of subrogation with regards to the original lender's prerogatives both under the loan and its accessories.

With regards to trusts, we note that Dominican law has only recently recognised and implemented the concept of the trust via the enactment of Law No. 189-11 and its corresponding regulations on 16 July 2011 and 2 March 2012, respectively. The use of a trust would effectively allow far more flexibility with regard to being able to make structural changes without the need to make new registration of security interests. However, given the current absence of significant costs to obtain registration of mortgages over aircraft before the National Aircraft Registry, the use of a trust, while convenient, might not necessarily be cost effective.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

Given that the definition of 'aircraft engine' provided under the Civil Aviation Law covers spare engines (eg, engines intended to be used in aircraft), these may also be the object of mortgage agreements registered before IDAC.

Unless otherwise specified, a security interest over an aircraft includes security interest over its installed engines. An effective security interest would not be created over an engine that is not installed on the aircraft in question or specifically referenced in the corresponding mortgage agreement.

Whenever an engine is encumbered as a result of being installed in an encumbered aircraft, we understand that said engine would cease to be encumbered upon being replaced by another engine or upon being expressly released from encumbrance by the corresponding parties.

If that engine has been encumbered individually (eg, spare engine), then as a result of the in rem nature of the encumbrance, it would only become unencumbered when the parties expressly release it.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

Following the lease's termination or in the event of a default under the lease, if the lessee does not voluntarily hand over control of the aircraft, the lessor cannot take possession of it without judicial intervention. In order to obtain possession, the lessor must procure a judgment for the delivery of the aircraft in question pursuant to the corresponding lease agreement. It must then issue a writ for specific delivery once the term established in the judgment for such delivery has expired.

23 Enforcement of security

Outline the basic measures to enforce a security interest.

How may the owner lawfully impede the mortgagee's right to enforce?

Enforcement requires the mortgagee to perform the immovable asset seizure process provided for under article 673 et seq of the Civil Procedure Code. The courts of the Dominican Republic will be involved in this execution process.

Where the mortgagee's credit is additionally guaranteed by collateral guaranties such as authentic promissory notes, drafted by and before notary public, which are of an executive nature, then an ex parte proceeding is technically available via executive seizure, pursuing the collection of debt owed in respect of the debtor's assets in general, including the mortgaged aircraft. This procedure is much less tedious than an immovable asset seizure and (in principle) only one judicial officer is involved (the bailiff), without the need for court intervention.

The aircraft is the asset in respect of which the guaranteed credit will be collected – through its sale pursuant to a public auction, both in the immovable assets seizure process as well as in the executive seizure process. These processes, once executed, do not automatically authorise the mortgagee to retain the property of the seized asset (ie, the aircraft), but to recover the amount of its debt from the auction. That said, sometimes, if at the auction there are no interested parties who submit a bid for the initial price, the auction will be declared 'not awarded' and, consequently, the mortgagee may keep the property of the seized asset for the time being.

It is also useful to highlight that, at the auction of the asset given as collateral – either through executive seizure or immovable assets seizure – the awarding of the mortgaged property will be made to the highest bidder paying in cash. In principle, it is not possible to pay the bid in the auction by way of compensation.

Insolvency proceedings as currently provided for under Dominican law only suspend the enforcement of unsecured debt; all forms of secured debt are unaffected. The debtor may only impede the mortgagee's right to enforce by either paying the amounts due in their entirety or challenging the foreclosure by evidencing technical errors or omissions in terms of due process. The debtor may also attempt to delay the foreclosure by requesting that the court modify the conditions of the public auction as a result of detected inconsistencies.

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

Liens as a result of due and unpaid taxes or unpaid salaries and severance benefits shall have priority over all other security interests.

Taxes and payment restrictions**25 Taxes**

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Lease payments are subject to VAT, known as ITBIS in the Dominican Republic, at the current applicable rate of 18 per cent. Lease payments and interest accrued are subject to annual income tax at the current, applicable rate of 29 per cent. If these payments are made abroad, they are subject to a 10 per cent withholding tax (WHT), which replaces applicable income tax.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

There are no exchange controls in place in the Dominican Republic. Nevertheless, with the exception of principal payments in the context of a loan, international payments are subject to a 10 per cent WHT.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

No.

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Neither importing nor exporting aircraft currently have any associated costs.

Insurance and reinsurance**29 Captive insurance**

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

Dominican law does not currently provide for a captive insurance regime.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Cut-through clauses are not legally effective given reinsurers' statutory obligation (under article 148 of Insurance and Bonds Law No. 146-02, which is a public order statute) to pay their corresponding transferors the amounts they would be responsible for under a claim.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

As implied in question 30, Dominican law recognises and regulates reinsurance contracts, which are indeed often involved in civil aviation matters in the Dominican Republic.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

Assuming the operator in question and the aircraft being operated by it are all appropriately registered, no.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

Strict liability is adopted with regards to the owner or lessee, as applicable and as evidenced by the corresponding records before the RNA. Financiers and other third parties with no operational interest in the aircraft are not presumed directly liable for any damages.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

Yes. Air operators are required to have a general liability policy encompassing the entirety of their operations, which must remain valid for the duration of their licence and have coverage of at least one million Dominican pesos or its US dollar equivalent to respond to any damages they may be liable for.

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

The United Kingdom is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

The United Kingdom is a signatory to, and has ratified the Chicago Convention (1944), which came into effect in the United Kingdom on 4 April 1947; and the Convention on International Interests in Mobile Equipment 2001 and the Protocol thereto on Matters Specific to Aircraft Equipment 2001 (collectively the Cape Town Convention), which came into effect in the United Kingdom on 1 November 2015.

The United Kingdom is a signatory to but has not ratified the following, and therefore the terms of these Conventions do not apply to domestic UK law:

- the Rome Convention (1933); and
- the Geneva Convention (1948).

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The main legislation in the United Kingdom on aviation is the Civil Aviation Act 1982 and Air Navigation Order 2009. European legislation has direct application in the United Kingdom. The Cape Town Convention has been implemented into United Kingdom law through the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015.

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Subject to the relevant provisions of the Rome I Regulation (EC) No. 593/2008 and Rome II Regulation (EC) No. 864/2007, a contract may be governed by the law chosen by the parties thereto provided that such choice is made clear or expressly demonstrated by the terms of the contract or the circumstances of the case. It is, of course, standard for contracts in relation to aircraft to contain an express governing law clause.

Following the *Blue Sky* case (*Blue Sky One Limited and others v Mahan Air and another* (2010) EWHC 631 (Comm)), the position of the English courts in relation to the taking of a mortgage over an aircraft that is governed by English law (in the sense that the parties have chosen English law as the *lex contractus*) is that, in relation to its proprietary aspects, such mortgage must be created in accordance with the domestic laws of the jurisdiction where the aircraft is located when the mortgage is executed (ie, the *lex situs*), in other words without regard to international conflicts of laws rules and the doctrine of *renvoi*. Otherwise, the mortgage may be declared void (in relation to its proprietary aspects) by the English courts. To take the example considered in the *Blue Sky*

case, an English law mortgage was held to be void against third parties because such mortgage had not been created in accordance with the domestic laws of the Netherlands, where the aircraft was physically located when the mortgage was created.

The *Blue Sky* case has had a considerable practical impact on aviation finance practice in that, when taking an English law mortgage over an aircraft or in effecting a sale of an aircraft, practitioners are now careful to ensure that the aircraft is physically located in England (or in English airspace) when the mortgage or sale instrument is executed, or in such other jurisdiction as will recognise an English law mortgage or bill of sale as a matter of domestic law. Where an aircraft is located in international airspace, it has become common to ensure that the mortgage or sale is recognised by the domestic laws of the aircraft's state of registry, though this follows from an interpretation of the relevant section of Dicey and Morris on Conflict of Laws, and was not decided in the *Blue Sky* case as such.

Under the Cape Town Convention, an 'international interest' is constituted over an aircraft object once the Cape Town Convention's validity conditions for creation of that interest are satisfied. The regulations that implement the Cape Town Convention in the United Kingdom provide that there is no requirement to apply the common law *lex situs* rule in the case of an international interest and, as such, there is therefore no need for an aircraft to be located in England or flown into English airspace in order to create a valid 'international interest'. This distinguishes an interest created under the Cape Town Convention from other interests created outside it. If a security interest is not an 'international interest', its validity under English law would still be determined by the application of *lex situs* and the *Blue Sky* case.

The UK mortgage register remains open post-ratification of the Cape Town Convention and financiers or lessors have continued to register any mortgage over a UK-registered aircraft at that register, as well as register the 'international interest' constituted by such mortgage at the International Registry. Most financiers or lessors continue to require a valid English law mortgage to be created in addition to an 'international interest', for example, where there are concerns as to enforcement in a non-Cape Town contracting state that may not recognise an 'international interest' but may recognise a validly created English law mortgage.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

Title to an aircraft may be transferred by a bill of sale or contract of sale. Title reservation agreements, in terms of which ownership of the aircraft does not pass until fulfilment of the condition or conditions stated in the agreement, are also possible. Title may be transferred by physical delivery, or any other mechanism that evidences the intent to transfer title, but a bill of sale is the most common form of title transfer mechanism, not least because a future purchaser will expect to be provided with evidence of chain of title in the form of back-to-birth bills of sale (ie, bills of sale showing a continuous chain of title back to the original equipment manufacturer). For certain types of equipment (eg, engine life limited parts), an inability to produce back-to-birth documentation will almost certainly render such equipment valueless.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

The bill of sale or contract of sale referred to in question 4 should, for certainty, be in writing (though it is technically possible to have an oral contract of sale for an aircraft) and must contain an obligation whereby one of the parties, having the power to dispose of the identifiable object specified therein, binds him or herself to transfer to the other the said object for a price (or other consideration), which the latter binds him or herself to pay to the former. The document must be duly executed (signed and delivered). There is no need for the document to be translated, stamped, notarised, apostilled or legalised for use in the United Kingdom, although there may, of course, be requirements if the document is to be used in another jurisdiction.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

The body responsible for the registration of aircraft in the United Kingdom is the Civil Aviation Authority (CAA), which maintains the register, called the UK Register of Civil Aircraft. The rules on registration are contained in the Air Navigation Order 2009.

Registration may be made in the name of either the owner or the operator of an aircraft, provided that such person is a 'qualified person'. In this respect, the operator may register as a 'charterer by demise' and its status as such will be recorded in the Certificate of Registration issued by the CAA (without the name of the actual owner appearing on the certificate). This is pursuant to Part 1 article 5(4) of the Air Navigation Order (2009), which provides that, if an aircraft is chartered by demise to a person qualified under paragraph (1), the CAA may register the aircraft in the United Kingdom. This is true whether an unqualified person is or is not entitled as owner of a legal or beneficial interest in the aircraft.

Under Part 1 article 4(3) of the Air Navigation Order (2009), an aircraft cannot be registered in the United Kingdom if it appears to the CAA that:

- the aircraft is registered outside of the United Kingdom, and that such registration does not cease by operation of law upon the aircraft being registered in the United Kingdom;
- an unqualified person holds any legal or beneficial interest by way of ownership in the aircraft or any share therein (unless the aircraft is chartered to a qualified person who effects the registration as charterer by demise);
- the aircraft could more suitably be registered in some other part of the Commonwealth; or
- it would not be expedient in the public interest for the aircraft to be or continue to be registered in the United Kingdom.

For the purposes of the Air Navigation Order (2009), pursuant to Part 1 article 5(1) a 'qualified person' comprises:

- the Crown in right of HM government of the United Kingdom;
- Commonwealth citizens, including British subjects;
- nationals of any EEA state;
- British protected persons;
- bodies incorporated in some part of the Commonwealth, having their principal place of business in the Commonwealth;
- undertakings formed in accordance with the law of an EEA state, having their registered office, central administration or principal place of business within the EEA; and
- firms carrying on business in Scotland.

However, an unqualified person holding a legal or beneficial interest by way of ownership of an aircraft may still obtain registration if he or she resides or has a place of business in the United Kingdom and the CAA is satisfied that the aircraft can be properly registered.

The rules on qualified persons date back to when British colonies did not have their own registration system. Nowadays, if the CAA receives an application from a Commonwealth citizen it may refuse the registration on the basis that it would be more practical to register the aircraft in the relevant national aircraft register.

The United Kingdom is not party to any ICAO 83-bis arrangements.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

An ownership interest can be registered as described in question 6. It should be noted that the UK Register of Civil Aircraft, maintained by the CAA, is not a register of legal ownership, and therefore registration does not constitute proof of ownership of a particular aircraft.

It is not possible to register an ownership interest against engines only, for example, engines that have been removed from the airframe to which they were previously attached, or spare engines.

A lease cannot be registered on the Registry for UK Civil Aircraft, and a lease interest in the aircraft or aircraft engines cannot be registered.

Ownership and leasehold interests that fall within the Cape Town Convention may be registered against an aircraft object at the International Registry.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

To register aircraft on the UK Register of Civil Aircraft, Form CA1 is submitted either by the owner or the 'charterer by demise' eligible to register in accordance with the Air Navigation Order 2009 (see question 6) and by payment of the appropriate fee. Evidence of insurance, or a declaration that the aircraft will not fly until evidence of insurance has been supplied to the CAA, must also be supplied with Form CA1.

Full guidance can be obtained at www.caa.co.uk/aircraft-registration.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

The registration of title to the aircraft constitutes prima facie evidence of ownership of the aircraft. However, such evidence is not conclusive and registration of title is not necessarily proof of title. For interests that fall within the Cape Town Convention, registration on the International Registry gives notice of the interest to third parties and protects the priority of the interest against subsequently registered interests or unregistered interests. A buyer of an aircraft object under a sale that is registered on the International Registry acquires its interest in that aircraft object free from an interest subsequently registered and from an unregistered interest, even if the buyer has actual knowledge of the unregistered interest.

10 Registration of lease interests

Summarise the process to register a lease interest.

The CAA does not allow for the registration of leases in the UK Register of Civil Aircraft.

A lease interest constituting an 'international interest' in a Cape Town Convention aircraft object is registrable on the International Registry. Registration is completed online in accordance with the International Registry regulations and procedures.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

The UK Registry of Civil Aviation will issue the certificate of registration, which will include the following particulars:

- the registration certificate number accorded to the aircraft;
- the nationality and registration mark of the aircraft;
- the manufacturer's name and designation of the aircraft;
- the serial number of the aircraft;
- the name and address of every person entitled as owner to a legal interest in the aircraft or a share therein;

- in the case of an aircraft that is the subject of a charter by demise, the name and address of the charterer. In such a case, the CAA will retain the name of the owner on file but will not make it available to the public; and
- in the case where the aircraft is registered by virtue of the fact that an unqualified person resides or has a place of business in the United Kingdom, an indication that it is so registered.

The certificate of registration does not indicate whether the aircraft is mortgaged or not.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

The CAA can cancel registration of an aircraft, if appropriate. As a matter of practice, cancellation of the registration requires the consent of all the parties registered as mortgagees in the Aircraft Mortgage Register in the case of a registered mortgage entered on the Register of Aircraft Mortgages created prior to 1 November 2015. If a registered mortgage is entered on the Register of Aircraft Mortgages that was created on or after 1 November 2015, the consent of the mortgagee (in terms of the Register of Aircraft Mortgages) is not required prior to deregistration (see question 14 for further details). (In the case of an aircraft subject to a charter by demise, the CAA may as a matter of policy notify the owner before deregistration is effected.) If, after an aircraft is registered in the UK Register of Civil Aircraft, an unqualified person becomes entitled to legal or beneficiary ownership of the aircraft, the registration of the aircraft will become void and the certificate of registration must be returned to the CAA.

If the aircraft is the subject of an IDERA pursuant to the Cape Town Convention, the IDERA must be revoked by the authorised party named in the IDERA before the aircraft can be deregistered. The consent of the registered owner or other party on the CAA's registration records is not required in relation to deregistration of the aircraft.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

A power of attorney must be created in accordance with the provisions of the Powers of Attorney Act 1971, which (among other things) provides that a power of attorney must be executed as a deed. A power of attorney is revocable unless it is 'connected with an interest', which means a security interest. An irrevocable power of attorney will survive the insolvency of the creator of the power. There is no guarantee that the CAA, or any other relevant body such as an airport authority, will recognise a deregistration power of attorney, but it is nevertheless standard for a lessor or mortgagee to take such power of attorney in the expectation that it will be effective.

The Cape Town Convention, as ratified by the United Kingdom, allows for the issuance of an IDERA by the registered owner of an aircraft (see question 14 for further details).

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

An IDERA may only be issued by the current registered owner of an aircraft (ie, the person in whose name the aircraft is registered), whether that be the actual legal owner or the operator (referred to in the United Kingdom as the 'charterer by demise'). An IDERA must be in the form prescribed by the CAA in Form CA50. The form must be submitted to the CAA for recordation. The request to issue an IDERA must relate to an existing international interest created on or after 1 November 2015. Only one IDERA can be recorded and current at any one time.

An authorised party named in an IDERA can designate a certified designee by submitting the appropriate form (Form CA52) to the CAA. Only one designation may be in place at any one time.

The authorised party of an IDERA can request the deregistration of an aircraft by submitting Form CA54 to the CAA. If, at the time of the IDERA deregistration request, a registered mortgage is currently entered on the Register of Aircraft Mortgages that was created prior to 1 November 2015, the mortgage must be discharged or the mortgagee must consent in writing to the deregistration of the aircraft. If, however, a registered mortgage is currently entered on the Register of Aircraft Mortgages that was created on or after 1 November 2015, consent of the mortgagee (in terms of the Register of Aircraft Mortgages) is not required prior to deregistration on the basis that, when requesting deregistration the authorised party or certified designee must make a declaration certifying that all registered interests ranking in priority to that of the authorised party have been discharged, and that the holders of such interests have consented to the deregistration and export of the aircraft. The consent of the registered owner or other party on the CAA's registration records is not required in relation to deregistration of the aircraft.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

A mortgage is the typical form of security over an aircraft. Under English law, a mortgage over an aircraft comprises two things:

- a personal contract to pay the debt; and
- the creation of a security interest over the aircraft to secure the repayment of the debt.

Mortgages of aircraft may be either legal or equitable and should be distinguished from the other forms of security available under English law (charges, pledges and liens).

There are no statutory requirements relating to the terms of the aircraft mortgages in England and, in practice, aircraft mortgages are 'tailor-made' to suit the parties' requirements. It is not necessary to stipulate a maximum amount that may be secured by the mortgage, and almost invariably mortgages secure 'all monies' owed by the mortgagor (or other party) to the mortgagee. It is not necessary for the economic terms of the deal (principal, interest or repayment terms) to be reflected in the mortgage itself, though these will of course need to be ascertainable on enforcement (eg, usually by reference to the relevant loan agreement). It is permissible under English law for the mortgagor to provide security such as an aircraft mortgage for the debts of a third party, provided that there is 'consideration' for so doing or else the mortgage is executed as a deed.

The mortgage does not need to be in the English language though, for the purpose of proceedings in an English court, a certified translation will be required if the mortgage is not written in English.

In order to constitute an international interest under the Cape Town Convention, the mortgage must meet the requirement for validity of an international interest set forth in the Cape Town Convention.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

The mortgage does not require notarisation, apostillation, legislation or stamping. It is common for the mortgage to be made by way of deed and the formalities for the creation of a deed should therefore be complied with. There are no stamp or other documentary costs as such.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

The CAA maintains the Register of Aircraft Mortgages, pursuant to the Mortgaging of Aircraft Order 1972. There are no restrictions as to who can be registered as a mortgagee. A mortgage of an aircraft entered in the Register of Aircraft Mortgages has priority over any other mortgage

of or charge on that aircraft, other than another mortgage entered in the Register of Aircraft Mortgages before the mortgage in question.

Applicants for registration of a mortgage must complete and provide to the CAA Form CA1577, together with a certified copy of the mortgage. The registration fee varies according to the aircraft's maximum take-off weight (MTOW). Further detail is available on the CAA website (www.caa.co.uk).

A potential mortgagee of a registered aircraft can 'preregister' a mortgage with the CAA by entering a priority notice utilising Form CA1330 and paying a registration fee, which varies according to the MTOW of the relevant aircraft. The priority notice remains valid for 14 working days from and including the date of entry. During this period either the relevant aircraft mortgage must be registered or a further priority notice entered, securing a further 14 working days' priority. The relevant mortgage, once registered with the CAA, will then take its priority from the date of registration of the original priority notice.

If the security document creates an international interest, registration of that international interest at the International Registry means that the security will take priority over subsequently registered interests and unregistered interests subject to certain exceptions. Registration is completed online in accordance with the International Registry regulations and procedures.

If the mortgagor is a company incorporated in England and Wales, it will be necessary to also register the mortgage at Companies House pursuant to the provisions of the Companies Act 2006, within 21 days of the creation of the mortgage. Otherwise the mortgage will be void against an administrator, liquidator or secured creditor of the insolvent mortgagor.

18 Registration of security

How is registration of a security interest certified?

The CAA will confirm in writing to the applicant once an aircraft mortgage application has been successful. This will not state the priority of the mortgage, which is determined by the date of registration.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

An aircraft mortgage registered on the UK Aircraft Mortgage Register will take priority over all other unregistered or subsequently registered mortgages. Registration constitutes notice of the mortgage to all third parties, who are deemed to have express notice of all of the details appearing in the Mortgage Register.

A search of the UK Aircraft Mortgage Register for entries made against an aircraft can be made by submitting Form CA350 to the CAA and paying the search fee. The result is usually available within a few hours (it being noted that the CAA is open 10am–4pm on working days).

It should be noted that certain interests may take priority over a registered mortgage, namely 'liens for work done' (ie, the right to retain an aircraft that may be exercised by an unpaid repairer of the aircraft) and statutory detention rights (eg, the CAA for unpaid Eurocontrol charges and the UK Environment Agency for unpaid EU Emission Trading Scheme (ETS) penalties). There is limited case law in England relevant to the priority of liens and detention rights, but the general view is that liens and detention rights will take priority over a registered aircraft mortgage, notwithstanding that liens and detention rights are not registrable (see question 24 for further information).

If the security document creates an international interest, registration of that international interest at the International Registry means that the security will take priority over subsequently registered interests and unregistered interests subject to certain exceptions.

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

The concept of a security trustee is recognised in England and is commonly applied in granting of security over aircraft. A mortgage may be granted in favour of the beneficiary or in favour of a security trustee appointed or acting under a trust for the benefit of persons to whom a debt or other obligation is due.

The security trustee would be recognised as the mortgagee, and will be entitled to exercise all the rights in relation to the mortgage accorded to mortgagees. Accordingly, the mortgage will only refer to and recognise the security trustee as the person in whose favour the mortgage is registered, without any reference to the underlying lenders. The lender syndicate may therefore vary without any necessity to amend the mortgage.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

A mortgage may be created over a spare engine but it is not possible to register such a mortgage at the UK Register of Aircraft Mortgages. If the mortgagor is a company incorporated in England and Wales, it will be necessary to register the spare engine mortgage at Companies House otherwise the mortgage will be void against an administrator, liquidator or secured creditor of the insolvent mortgagor. As with a mortgage over a whole aircraft, a spare engine mortgage is tailored by the parties to it.

When the spare engine is installed on an airframe located in England, the separate interests of airframe and engine owners or mortgagees will continue to be recognised, in other words England does not have a 'doctrine of accession' whereby title to a spare engine would automatically transfer to the owner of the airframe on which such engine is installed.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

English law permits a lessor to repossess an aircraft without the need to obtain a court order (the 'self-help' remedy). In such circumstances, the lessor may only exercise such rights as have been granted to it under the lease, peaceably and lawfully. Accordingly the exercise of such rights on a self-help basis usually requires the lessee to accede to the exercise of the rights, and the more common course of action, in the more usual case where the lessee objects to repossession, is for the lessor to apply to court for a possession order.

The majority of cases arising out of the finance or lease of an aircraft are likely to be heard by the Commercial Court of the Queen's Bench Division of the High Court in London. The lessor's costs can be claimed procedurally and pursuant to express indemnity provisions in the transaction documentation as damages. We would expect there to be an element of irrecoverable costs; as a rule of thumb these would be approximately 25–30 per cent of total costs incurred.

While it is dependent on the court's schedule, there is a good prospect of having the lessor's claim finally decided within two months from service of the Claim Form. However, there are three court procedures that may be used to obtain swift judgment:

- failure to acknowledge particulars of claim: in this case, judgment can be obtained in 14 days;
- failure to file a defence: if the lessee fails to file a defence then judgment may be obtained in 28 days; and
- no arguable defence: the lessor may proceed to summary judgment.

Many of the points made in question 23 will also be relevant to enforcement by a lessor.

23 Enforcement of security

Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

Similarly to the above, the mortgagee of an aircraft registered with the CAA may take peaceful possession of an aircraft following a self-help remedy. The mortgagee will have the power to sell the aircraft if such power is set out in the mortgage.

However, there are circumstances where it may be safest for the mortgagee to proceed by way of court order, for example:

- where the mortgagor opposes repossession;
- when there is uncertainty as to whether or not an event of default has occurred; or
- where there may be competing third-party interests.

Self-help remedies, because they do not involve a court's judgment on the rights of the mortgagee, leave open the risk of later claims by the mortgagor (or other parties having an interest in the aircraft) for wrongful interference with the aircraft, more particularly:

- in the event of wrongful taking of possession by the mortgagee exercising a self-help remedy, damages may be very high;
- the taking of possession may involve the mortgagee in the civil offence of trespass;
- a private sale by the mortgagee (as 'mortgagee-in-possession') may be challenged on various grounds such as the authority of the mortgagee to pass good title, the right to sell, and the lack of sale at the best price reasonably obtainable; and
- a judicial order will assist in demonstrating to third parties, such as airport authorities, that the bank's right to seize the aircraft has arisen.

With respect to trespass, a standard mortgage will contain a right to enter premises to repossess the relevant aircraft. However, the right to enter upon any premises where the aircraft may be located is a right granted only by the mortgagor. It would not permit the mortgagee to enter the premises of third parties. This is a strong argument for proceeding by way of court order, unless whoever has possession of the aircraft is willing to grant the mortgagee access to it (and the aircraft's technical records).

In a case of urgency, an injunction may be sought preventing the movement of the aircraft, before the issue of the mortgagee's claim form (a 'freezing injunction'). The application can be made quickly (within 24 hours or less if the evidence is ready). Where there are strong grounds for its justification (such as the possibility of the aircraft being removed from England), an application may be made without notice to the mortgagor supported by a witness statement. The mortgagee is obliged to disclose all relevant information, so as not to mislead the court. Failure to do so can have adverse consequences, such as the later release of the injunction and liability in damages to the mortgagor.

A completely private sale (ie, without any court involvement) of the aircraft is not generally possible except by exercising self-help remedies or by appointing a receiver. The mortgagee is obligated by law to obtain the best price reasonably obtainable. Judicial sale of the aircraft would be made pursuant to a court order and the court will specify the procedural requirements. A sale by public auction will often be required with certain notice requirements, for example publication in the national press and certain aviation publications. It may be possible for the mortgagee to request a private sale if it can be shown that a higher price would be obtained by such a sale.

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

The following aircraft-related liens and rights could have priority over aircraft ownership or an aircraft security interest:

- airport charges: providing the aerodrome authority the right to detain and sell the aircraft or any other aircraft for which the person in default is the operator at the time the detention begins. The application to sell the aircraft must be brought to the notice of persons whose interests may be affected (including the owner, lessor or mortgagee of the aircraft) to allow such person(s) an opportunity of becoming a party to the proceedings;
- air navigation charges (such as NATS and Eurocontrol charges): providing the CAA the right to detain and sell the aircraft or any other aircraft for which the person in default is the operator at the time the detention begins. The application to sell the aircraft must be brought to the notice of persons whose interests may be affected (including the owner, lessor or mortgagee of the

aircraft) to allow such persons an opportunity of becoming a party to the proceedings;

- licensing, public health, noise, emissions, patent or safety conventions: providing the relevant authority with a right to detain the aircraft;
- unpaid customs duties: providing customs authorities with a right to detain and, in some cases, impose forfeiture of the aircraft;
- unpaid EU ETS penalties: providing the Secretary of State the right to detain and sell any aircraft for which the person in default is the operator at the time the detention begins. The application to sell the aircraft must be brought to the notice of persons whose interests may be affected (including the owner, lessor or mortgagee of the aircraft) to allow such persons an opportunity of becoming a party to the proceedings;
- tax law contraventions: providing the tax authorities with a right to detain and sell the aircraft;
- possessory repairers' liens: in circumstances where a repairer or an outfitter has, in its lawful and continuous possession, an aircraft on which it has bestowed labour, enhancing the aircraft's value, that person will have a common law lien on the aircraft to the extent it remains unpaid for its labour. There are a number of prerequisites for such a lien to exist. Liens may also be created by contract; and
- seller's lien: giving an unpaid seller the right to detain the aircraft, stop the aircraft in transit if the buyer is insolvent and resell the aircraft.

It is believed by the main authorities in this area that the order of priority in respect of liens and detention rights will be as follows:

- statutory detention rights, for example, in relation to Eurocontrol charges;
- contractual liens created prior to the date of registration of a registered mortgage;
- possessory liens;
- registered mortgages in order of registration; and
- unregistered mortgages.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Corporation tax

Broadly speaking, a company carrying on a trade of leasing in the United Kingdom will be subject to UK corporation tax on the profits of that business. Rents will generally be taxable, although only the interest element of any receipts under a 'long funding lease' will be considered taxable income for these purposes. Deductions against rental income will generally be available for revenue expenditure incurred wholly and exclusively for the purposes of the trade, including for the interest (but not the principal) element of payments under any borrowing incurred on the provision of the aircraft.

Additionally, a UK lessor purchasing an aircraft for leasing could be entitled to claim capital allowances which it can deduct in computing its taxable profits. Capital allowances are intended to reflect depreciation of an asset on which capital expenditure has been incurred and may generally be claimed by the lessor in the case of operating and finance leases and by the user in the case of hire purchase, conditional sale and credit sale agreements.

VAT

The UK VAT regime with regards to the supply of aircraft is codified in the Value Added Tax Act 1994. In order to be zero-rated for VAT purposes, aircraft must fall under item No. 2 of Schedule 8 of the Value Added Tax Act 1994, which was itself implemented by section 21 of the Finance (No. 3) Act (2010). This item No. 2 says that: '[t]he supply, repair or maintenance of a qualifying aircraft...' will be zero-rated for VAT purposes.

The VAT rules (HMRC Notice 744C, December 2010) therefore apply to the supply of an aircraft or aircraft equipment. HMRC considers that the word 'supply' in this context includes:

- sale, import or acquisition of an aircraft or aircraft equipment; and
- charter of an aircraft or aircraft equipment, including hire or lease.

Update and trends

Following the 2016 referendum vote to leave the EU, the UK government issued article 50 notification and thereby triggered the process to withdraw from the EU on 29 March 2017, setting the date for the UK to leave by April 2019 (unless negotiations are extended by agreement). The UK government's intention is for a Great Reform Act to repeal the European Communities Act 1972 and restate in UK law all enactments previously in force under EU law. This Act will be enacted before or during the article 50 negotiations; it would not come into force until the date of exit. It would smooth the transition by ensuring that all laws remain in force until specifically repealed. However, there is considerable uncertainty in respect of the future of swathes of EU aviation law applicable in the UK and reliant on agreement with the EU, which impact UK airlines (eg, Regulation (EC) No. 1008/2008 on ownership and control and traffic rights). In respect of aviation finance, the Cape Town Convention and the Aircraft Protocol are mixed agreements (ie, agreements ratified by the UK and the EU); the UK government's view is that, as a matter of international law, the UK is a contracting state under the Cape Town Convention and Aircraft Protocol, and that this will not be affected by the UK leaving the EU.

While the supply of 'qualifying aircraft' is zero-rated, supplies of all other aircraft will be standard rated (at the current rate of 20 per cent).

In note (A1)(b) to Schedule 8 of the Value Added Tax Act (1994), a 'qualifying aircraft' is described as any aircraft which 'is used by an airline operating for reward chiefly on international routes'.

Following the decision of the Court of Justice of the European Union in the *Kimber* case (C-382/02), the test of a 'qualifying aircraft' is whether the airline itself operates chiefly on international routes and not whether a particular aircraft operates chiefly on international routes. In essence this means that supplies of aircraft will be zero-rated even if the aircraft operates only on domestic routes, providing it is used by an airline operating for reward chiefly on international routes.

In note (C1) to Schedule 8 of the Value Added Tax Act 1994, an 'airline' is defined as 'an undertaking which provides services for the carriage by air of passengers or cargo (or both)'. The undertaking concerned may be a sole trader, partnership or company or other entity, but it is not necessary for the undertaking to be a single entity. For example, a VAT or corporate group of companies may be considered as an airline.

An airline will need to operate at least one aircraft, which it may own, lease or hire. This definition includes commercial business jet operators. However, HMRC states that if the business does not have an air operators certificate (AOC) this will provide an indication that the business is unlikely to be considered as an airline for this purpose (HMRC Notice 744C). Where a business does not hold an AOC they will likely be asked for evidence of how they are operating as an airline.

The airline must be providing passenger or freight transportation on scheduled or unscheduled flights (or a mixture of both), and receiving consideration for that supply. This must be a business operation in nature for VAT purposes. There is a significant body of case law in relation to the requirements for a taxpayer to be operating a business for VAT purposes. However, there is no requirement for an airline to be operating at a profit.

An international route is any route that is not a domestic route within UK airspace. A non-UK airline that mainly flies between airports in its own territory should therefore be regarded nonetheless as international for these purposes.

Therefore, any UK airline that flies even only one route that is not a UK domestic route will be operating on international routes.

For an airline to be operating 'chiefly' on international routes, the non-domestic or international route operations of an airline must exceed its domestic route operations. The European Court of Justice in *Kimber* left it open to the national courts to assess the extent of domestic and international operations. They made it clear that 'in doing so [the national courts] may take account of all information which indicates the relative importance of the type of operations concerned, in particular turnover'.

In the United Kingdom, HMRC has given advice to airlines in applying the test. They have stated that the test can be based on the value of turnover attributable to international routes compared with

that attributable to domestic routes, the relative number of passengers carried, mileage or any other method that produces 'a fair and reasonable' result 'capable of verification by HMRC' (HMRC Notice 744C). In line with the advice of the Court in *Kimber*, HMRC notes that turnover will be particularly significant when comparing the operations of an airline.

When considering whether an airline meets this test, HMRC will allow airlines to base their current position on a 'backward look over [the] last financial year'. Airlines may also base the test on a shorter or rolling period if they prefer, but the period, frequency and parameters of the test must be consistent and must not be frequently changed so as to 'manipulate a particular outcome'. In some cases, a forward-looking test may be allowed where material changes in the business have occurred or where business plans and projections support such a view.

Most aircraft are owned by special purpose companies, whose sole purpose is to own the aircraft. Such companies are often set up by leasing companies or banks. As such, many supplies will be to such special purpose companies, rather than 'airlines'. However, HMRC considers that where supplies are provided through such 'intermediaries', as they term them, the supplier may 'look through' the transaction (or series of transactions) and treat their supply as zero-rated. This will only be possible if the ultimate consumer of the supply of either goods or services is an airline operating a qualifying aircraft, and if the entities in the supply chain are fully taxable for the purposes of the transaction so that no input tax restriction would occur at any point in the chain (ie, so that there would be no recoverable VAT).

Withholding tax

Lease rentals and instalment payments under hire-purchase agreements do not attract withholding tax and it is generally accepted that it will not apply to the 'finance charge' element of payments under conditional or credit sale agreements. Nonetheless, there remains a risk that payments under hire-purchase agreements could in some circumstances be regarded as annual payments for tax purposes and, for that reason, a lease will normally provide that the lessee will bear any withholding tax that may be imposed by 'grossing up' payments due to the lessor. It is standard from the lessor's point of view to include such a provision, in order to cover the risk that withholding tax could arise as a result of a change of law, or of its interpretation.

Stamp duty

No stamp duty is payable in respect of the creation of an aircraft lease.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

No restrictions apply except in relation to sanctions legislation.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

As a general rule, in the aviation finance and leasing context there are no such limitations.

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

No import or export duty is payable in respect of civil aircraft used for commercial purposes.

Insurance and reinsurance

29 Captive insurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

There are no requirements that insurances be placed with local insurers.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

While there is limited case law in this area, cut-through clauses are considered to be legally effective.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Assignments of reinsurance are legally effective, subject to usual prerequisites on the creation of any legally enforceable contract. An assignment of reinsurance will typically be provided where the insurers are located in a jurisdiction where a cut-through clause is legally ineffective.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

Apart from independent liability in respect of their own acts and omissions, the only relevant circumstance is strict liability as discussed in question 33.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

Under section 76(2) of the Civil Aviation Act 1982, the owner of an aircraft has strict liability for loss and damage caused by the aircraft to third persons and property on the surface, although by section 76(4), liability will pass to a charterer by demise where the aircraft is chartered for a period of more than 14 days. The owner or lessor may be entitled to a contractual indemnity from the lessee.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

EU Regulation No. 785/2004 (as amended by EU Regulation No. 285/2010) implemented in the UK by the Civil Aviation (Insurance) Regulations (2005), imposes insurance requirements on all air carriers and aircraft operators flying within, into, out of or over the territory of a member state. Air carriers (ie, air transport undertakings with a valid operating licence) must have aviation-specific insurance cover in respect of passengers, baggage, cargo and third parties (including property and persons on the ground). The insured risks must include acts of war, terrorism, hijacking, acts of sabotage, unlawful seizure of aircraft and civil commotion.

An air operator is defined as 'the person or entity, not being an air carrier, who has continual effective disposal of the use or operation of the aircraft; the natural or legal person in whose name the aircraft is registered shall be presumed to be the operator, unless that person can prove that another person is the operator'.

Air carriers and operators must ensure that there is cover for every flight, whether or not the aircraft is owned, leased or operated through joint or franchised operations such as code-sharing or similar agreements.

Penalties are imposed for non-compliance including fines and imprisonment.

Commercial operations must obtain the following minimum levels of cover:

- passengers: 250,000 special drawing rights (SDR) per passenger;
- baggage: 1,131 SDR per passenger; and
- cargo: 19 SDR per kilogram.

Third-party minimum insurance limits vary depending on the maximum take-off mass of the aircraft. There are 10 categories ranging from under 500kg (750,000 SDR) to over 500 tonnes (700 million SDR).

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

France is a party to the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (1933), the Chicago Convention on International Civil Aviation (1944) and the Geneva Convention on the International Recognition of Rights in Aircraft (1948). France is also a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). It should be noted, however, that although France has signed the Cape Town Convention on International Interests in Mobile Equipment (2001), it has not yet ratified it, and therefore it is not in effect in France.

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The Transport Code (the Code), in particular Part VI in respect of civil aviation, is the principal piece of domestic legislation in France that governs aviation finance and leasing. Also of relevance are the Civil Code, the Commercial Code, the Customs Code and the General Tax Code. National legislation is supplemented by international conventions and European regulations.

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

As a very general principle, there are no such restrictions on choice-of-law clauses for such contracts in France. Therefore, as a general rule, aircraft purchase agreements, bills of sale and leases can be, and often are, governed by a foreign law. We would, however, recommend that for French-registered aircraft the mortgage is governed by French law.

In addition, there are a few exceptions to this general principle, particularly relating to public order policy in France. The most relevant exception for day-to-day aircraft finance transactions is that bank account pledges and pledges over a company's shares where such accounts or companies are domiciled in France need to be governed by French law.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

Title to an aircraft is generally transferred through a bill of sale, which is an effective mode of title transfer in France. Generally, it should be noted that for purposes of the registration of the ownership of an aircraft on the French aircraft registry (the Register) maintained by the French civil aviation authorities (DGAC), a bill of sale would either

need to be countersigned or accepted by the buyer or be accompanied by a separate certificate of acceptance.

It should be noted that the Register is an owner register, and therefore the owner must apply for the registration with the DGAC. Article L6121-1 of the Code provides that inscription of the aircraft on the Register serves as proof of title. In order to effect a change in ownership of an aircraft, the following documents need to be submitted to the DGAC, along with the necessary French government administrative form (CERFA):

- an original bill of sale from the previous owner to the new owner. It should be signed by the buyer as well as the seller, and if it does not reflect the purchase price or include an acknowledgment of the receipt of consideration, a duly acquitted invoice showing the price may also be required by the DGAC;
- if applicable, a power of attorney and relevant chain of authority from the new owner in favour of the person completing the registration formalities;
- a certified copy of the certificate of incorporation of the new owner (or equivalent document);
- a certified copy of the by-laws (or equivalent document) of the new owner;
- a document evidencing the registered office of the new owner (in the event that this information does not already appear in the certificate of incorporation or by-laws or articles of incorporation);
- a list of the authorised representatives of the new owner (directors, executive officers, etc) together with samples of their signatures;
- Customs Form 846A, or a Certificate of Acquisition of Means of Transport from the EU, if the aircraft is located outside of France;
- a Certificate of Airworthiness (though if the aircraft is already registered on the Register and the existing certificate is current, no new certificate will be required);
- a Certificate of Noise Limitation (though if the aircraft is already registered on the Register and the existing certificate is current, no new certificate will be required); and
- if the aircraft has been previously registered on another civil aircraft registry, a certificate of deregistration from the previous registry will be also required.

In practical terms, while a bill of sale is an effective mode of transfer of title to an aircraft, if the aircraft is registered or is to be registered in France, to make such title enforceable against third parties the aircraft must be registered with the DGAC using the process outlined above.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

For a comprehensive list of documents required to register the ownership or change in ownership of an aircraft in France, see question 4. It should be noted, however, that there are no requirements that these documents are legalised or pre-stamped in order for there to be an effective registration, and it is generally acceptable to submit these documents in English without providing a French translation. However, as a matter of good practice, it is advisable that powers of attorney in favour of the person completing the registration process are notarised.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

As discussed in question 4, the Register of civil aircraft is maintained by the Aircraft Registration Office at the DGAC. The Register is a public register for civil aircraft, and is an 'owner' registry. In accordance with article L6111-3 of the Code, an aircraft can only be registered in France if it has a valid certificate of airworthiness and it fulfils one of the following conditions:

- it is owned by a physical person that is a French citizen or a citizen of either another member state of the EU or of another member state of the European Economic Area (EEA);
- it is owned by a legal entity organised under the laws of a member state of the EU or another member state of the EEA having its registered office or principal place of business in France or another member state of the EU or the EEA; or
- it is operated by a French airline with an operating licence issued by the French aviation authorities.

Furthermore, in accordance with article L6111-3 of the Code, the DGAC has the authority to issue an exemption to the above rules under certain limited circumstances.

The French DGAC has good relationships with a number of civil aircraft registries throughout the world and for any new aircraft being registered in France or for any aircraft being deregistered from the French Register and transferred to a new jurisdiction, there are a number of mechanisms in place for communications between the DGAC and such other civil aviation authorities.

It should be noted that there is not a specific engine register in France. However, for engine leases, it is possible to register ownership over engines and spare engines against a French airline with the commercial court in the jurisdiction where the airline has its registered office. Such registration would serve as proof of title against a bankruptcy administrator or trustee in the event of any bankruptcy or liquidation procedures against the airline without the need for protracted litigation to prove ownership of the engine.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

As discussed above, the Register is an owner registry, and therefore it is required that the ownership interest in an aircraft is registered with the DGAC. An ownership interest in an aircraft can also be registered with another registry, for example the Companies and Trade Registry; however, it is not necessary as registration with the DGAC serves as proof of title.

In respect of the ability to register a lease interest, it is possible (and also recommended) to register a lease over aircraft with the DGAC, as this will shift the burden of liability in the event of an incident involving the aircraft from the joint liability of the owner and the operator to the operator. Pursuant to article L6131-4 of the Code, in respect of a leased aircraft, the owner and the operator are jointly liable as regards third parties; however, if the lease is registered with the Register, the owner will only be responsible if the third party can prove fault on the part of the owner.

Although the public record of the Register will only reflect the owner and the operator of the aircraft, where there is a head lease and a sublease (and any further sub-subleases) in place over an aircraft, the lease chain must also be documented to the DGAC as proof of the authority of the operator to lease the aircraft and linking the lease to the actual owner of the aircraft.

As noted in question 6, although there is no separate register for engines, and the engines belonging to an aircraft will not be reflected on the Register, it is possible to register ownership over engines and spare engines against a French airline with the commercial court in the jurisdiction where the airline has its registered office.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

As discussed in question 4, there is a list of documents and forms that are required to register an aircraft or effect the change of ownership over a French-registered aircraft with the DGAC. In terms of timing, it largely depends on the ability of the owner and lessee to provide the relevant documents. We generally recommend that such documents are submitted for review with the DGAC in advance of the proposed date of registration (or change of title). We would also recommend that as much advance notice as possible is given in order to make an appointment with the DGAC to effect the registration. It should be noted that the DGAC is open during regular business days in France (Monday to Friday to the exclusion of public holidays) from 9am to 4pm (local time). It is not generally possible to effect the registration (or deregistration) procedure outside of these hours. It is possible to submit documents in advance with the DGAC, who will then be able to complete the registration at a predetermined time and date without attendance in person by the owner or its attorney. The actual cost charged by the DGAC for registration is nominal.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

As described above, registration with the DGAC serves as proof of title in relation to third parties. Third parties can therefore rely on the accuracy of the Register at the DGAC.

Regarding absent or defective title, third parties can challenge registration at the DGAC in the courts, although they will be asked to prove whether title is missing or defective.

10 Registration of lease interests

Summarise the process to register a lease interest.

In order to complete the registration of a lease interest with the DGAC, the following need to be submitted:

- an original of the relevant lease to the operator of the aircraft;
- if applicable, a power of attorney and relevant chain of authority from the owner in favour of the registering person;
- a certified copy of the certificate of incorporation of the owner (or equivalent document);
- a certified copy of the by-laws (or equivalent document) of the owner;
- a document evidencing the registered office of the owner (in the event that this information does not already appear in the certificate of incorporation or by-laws or articles of incorporation);
- a list of the authorised representatives of the owner (directors, executive officers, etc) together with samples of their signatures;
- evidence of the authority of the various representatives of the signatories of the lease, together with samples of their signatures;
- an original or certified copy of the Acceptance Certificate or other document showing the effective date of the lease; and
- a completed DGAC filing form.

In addition, proof of the authority of the signatory of the lease on behalf of the lessee will also need to be submitted including any powers of attorney or chain of powers of attorney in favour of the relevant signatory.

As indicated in question 7, where there is a chain of leases, proof of the chain of leases (either providing certified copies or originals of each of the leases in the lease chain or an original lease summary duly executed by each of the parties in the lease chain and setting out a summary of relevant information) must be submitted to the DGAC. Furthermore, proof of signatory authority of each party in the lease chain must also be provided.

It is not necessary that these documents be notarised, and generally the DGAC will accept documents in English or in French. It is good practice, however, for powers of attorney pursuant to which documents are being signed or actions are being taken before the DGAC to be notarised. As with the registration of the ownership, the cost of the registration of the lease is minimal.

11 Certificate of registration**What is the regime for certification of registered aviation interests in your jurisdiction?**

The Certificate of Registration is issued by the DGAC instantly upon completion of the registration process. The certificate contains the following information:

- nationality and registration mark of the aircraft;
- details of the manufacturer and the manufacturer's designation of the aircraft type;
- aircraft serial number;
- name and address of the owner;
- home aerodrome of the aircraft;
- certification that the aircraft has been duly entered on the aircraft register in accordance with the Chicago Convention on International Civil Aviation of 1944 and with the relevant provisions of the Code;
- date of issue; and
- a list of interests, charges or both including the lease and any mortgages that are registered in respect of the aircraft, including the date on which such interests have been registered.

In respect of the lease and mortgage interests, the Certificate of Registration will reflect the name and address of the operator of the aircraft, and the name and address of the relevant mortgagee, if any.

As indicated previously, there is not a separate registration in respect of the engines and engine references are not reflected on the Certificate of Registration.

12 Deregistration and export**Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?**

In order to deregister an aircraft, a request for deregistration must be presented to the DGAC in the name of the owner. This can be completed by an attorney-in-fact through the issuance of a power of attorney; however, proof of the signatory authority of the person issuing such power on behalf of the owner would be required if such person is not already 'known' to the DGAC (ie, where such person is different from the person who has previously been presented to the DGAC at the time of registration of the aircraft as having signatory authority for the owner).

Before the owner would be allowed to deregister an aircraft over which a mortgage has also been recorded, the consent of the mortgagee and the release of any recorded mortgages would be required. The mortgagee would not be able to deregister and export the aircraft without the owner's consent, and to exercise rights over the aircraft the mortgagee would need to enforce its rights under the mortgage through legal proceedings, which would ultimately result in a public sale of the aircraft. Generally, this can be avoided through cooperation of the owner and the mortgagee for the deregistration and export of the aircraft.

Deregistration can be effected immediately upon the presentation of a request to the DGAC (together with any required supporting evidence of signatory authority) to deregister the aircraft and related lease, provided all mortgages have been released. The deregistration of the mortgage can also be effected immediately upon presentation of the relevant documentation.

The consent of the lessee or operator is not required, and generally the operator would not be able to block the deregistration or the export of the aircraft. However, it should be noted that where the aircraft is in the possession and control of the operator, the owner would not be able to take possession and control of the aircraft without the operator's consent. Self-help remedies are not permitted in France, and therefore the owner would not be able to take redelivery or repossession of the aircraft without the assistance of the courts.

13 Powers of attorney**What are the principal characteristics of deregistration and export powers of attorney?**

As the Register is an owner registry, it is not necessary to obtain a deregistration power of attorney from the lessee or operator. Furthermore, powers of attorney as a matter of French law are generally revocable, even if they state that they are irrevocable. Where deregistration powers of attorney are issued, these are not registered with the DGAC; however, an original of any power of attorney to deregister the aircraft would need to be filed with the DGAC at the time of the deregistration of the aircraft.

14 Cape Town Convention and IDERA**If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.**

The Cape Town Convention is not applicable in France.

Security**15 Security document (mortgage) form and content****What is the typical form of a security document over the aircraft and what must it contain?**

An aircraft mortgage is the usual form of security over a French-registered aircraft. Generally, it is recommended that a French law mortgage be entered into by the parties. In accordance with article L6122-2 of the Code, the mortgage must be in writing or will otherwise be void. Article L6122-3 provides that the mortgage covers the entire aircraft, its engines, components and spare parts that belong to the aircraft and which are intended to be part of the aircraft whether they are incorporated thereon or temporarily separated. Further, to be effective as against third parties, the mortgage must be registered with the Register in accordance with article L6122-8 of the Code.

Although the mortgage must be in writing and specify the items to which it is intended to apply, there is no prescribed form. Generally, a French mortgage will be in French, and if required by the parties, will be accompanied by an English translation. The mortgage must usually state the principal amount and the interest and, according to the provisions of article L6122-12 of the Code, the registration of the mortgage secures, with the same priority as the capital, the payment of interest for the year in which enforcement proceedings with respect to the mortgage are commenced, and the amount of interest for the three years that preceded such year.

In accordance with articles L6122-1 et seq of the Code, where there is more than one recorded mortgage, ranking will be determined by the order of the dates of registration. A recorded mortgage is generally valid for a period of 10 years from the date of its recordation with the DGAC, and must otherwise be renewed in order to continue after such date.

16 Security documentary requirements and costs**What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?**

There is no requirement for a security document such as a mortgage to be notarised, legalised, consularised or apostilled in order for it to be registered with the DGAC. The mortgage must be registered in order to be valid as against third parties, but there are no other required formalities. The cost of registration of the mortgage is a minimal fee. It is not based on the amount of the secured obligation.

17 Security registration requirements**Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.**

An aircraft mortgage must be filed with the DGAC in order for it to be effective as against third parties in France. The mortgage should be

registered with the DGAC along with the other necessary documents as set out below. To complete the registration of the mortgage, the following documents would need to be lodged with the DGAC:

- an original of the mortgage agreement;
- the necessary power of attorney to the individual effecting registration on behalf of the mortgagee;
- evidence of the authority of each of the signatories to the mortgage agreement; and
- CERFA for the registration of the mortgage at the DGAC.

It is neither possible nor necessary to register other forms of security assignments such as an assignment rights under a lease agreement. However, it should be noted that under French private international law, any assignment of rights must be perfected as regards the assigned debtor in accordance with the governing law of the relevant assigned rights, and as regards third parties in accordance with the laws of the state in which the assigned debtor is domiciled. An assignment of rights that relates either to rights arising under a contract governed by French law, or to rights against an entity domiciled in France, will therefore only be fully enforceable in France if notified to the assigned debtor by a French bailiff or process server in accordance with French procedural rules. It should be noted that French law does not provide a time limit to effect such notification. On the basis of these rules, an assignment of a lease by a lessor where the lessee is a French entity would only be enforceable in France against the lessee once it has been notified to the lessee in accordance with such procedural rules.

18 Registration of security

How is registration of a security interest certified?

A registered security interest, such as an aircraft mortgage that is a lien on the aircraft, would be recorded with the DGAC and reflected on the Certificate of Registration issued by the DGAC (see question 11). In addition, following the registration, the DGAC can issue an extract of information regarding the status of the registration of the aircraft, which would reflect all registered liens against the aircraft. Any security interests registered would be reflected immediately upon registration. Although the extract would not necessarily state the rank or priority, in accordance with article L6122-10, if there is more than one mortgage filed in respect of an aircraft, their rank will be determined by the order of the date of registration. Therefore, it would be possible to determine the rank of any mortgages filed against an aircraft through the public records available at the DGAC.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

As mentioned above, as a general rule under French law the order of priority is conferred by the order in which such interests are registered. Registration of a security interest would be valid as against third parties. As discussed in question 24, there are, however, certain rights and interests that would have priority over prior recorded liens, and such liens or interests may not be reflected on the Register.

20 Security structure and alteration

How is security over aircraft and leases typically structured?

What are the consequences of changes to the security or its beneficiaries?

Although French law has, in recent years, introduced a concept of 'trust', as is common with most other civil law jurisdictions, the concept is not analogous to the concept of a trust as they operate in common law jurisdictions. Generally, they are not used as a means of granting security; however, the concept of a security agent, acting on behalf of lenders, is a common mechanism for granting security on behalf of a syndicate of lenders for mortgages, bank account pledges and charges over other assets.

However, French courts will most likely give limited recognition to foreign trusts in the sense that a validly constituted foreign trustee, who is considered by the law applicable to the trust to be the legal owner of the right in question (such as the lease rights to an aircraft as assigned), should be recognised under French law as having the right to enforce in its name the assigned right. There is no clear jurisprudence

on this point, but the generally accepted view is that a validly constituted foreign trust that does not have the effect of avoiding a rule of French public policy (eg, if the trust could be deemed to alter the rights of succession under French family law or if the trust related to immovable property located in France) will be recognised in France.

If there were a change in the security agent, then generally, an amendment to the mortgage to reflect the new beneficiary would need to be registered with the DGAC. In addition, if there is only one lender who is also the beneficiary of the mortgage, then a transfer of the lender's interest in the loan and the security documents to another lender would also require the filing of an amendment to the registered mortgage. On the other hand, if there were only a transfer of interest in a loan by one or more lenders in a syndicate, but the security agent or registered beneficiary does not change, while it may be recommended to reflect the change in lenders in the form of an amendment to the mortgage (to the extent such a transfer is not anticipated under the mortgage), it would not be necessary to file each such transfer or amendment to the loan or mortgage agreement unless the interest of each lender under the mortgage has also been registered and is reflected on the Register.

A mortgage in France (including an aircraft mortgage) is considered to be a right in rem rather than in personam as it attaches to the asset itself.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

As indicated above, there is no separate engine register in France, and it is not possible to take a mortgage over an engine separate from the aircraft or over a spare engine that is leased in France. Generally, the engines form a part of the aircraft, and the registration of the aircraft and any mortgage granted in respect thereof would also cover the engines. However, where there is a separate engine lease, as discussed previously, it would be prudent to record the lease with the commercial court of the jurisdiction of the lessee that provides notice to third parties (including an eventual bankruptcy trustee of the lessee) that the property is not owned by the lessee. In the context of a separate engine lease, this is particularly important as the ownership right in the engine is not otherwise recorded with the DGAC. An aircraft mortgage would make reference to the separate engines and would be effective to create a security interest over an engine that is not installed on the aircraft at the time of creation (assuming that the non-installed engine is also in France or is in a jurisdiction that would recognise the creation of the security interest in France).

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

As a general rule, self-help remedies are not available in France, and in the event of non-cooperation of the lessee, a lessor would require the assistance of the courts. It is, however, possible to obtain an ex parte court order if a prima facie case can be demonstrated that by the terms of the lease agreement, the lessor is entitled to terminate the leasing of the relevant equipment owing to defaults or following the expiry of the lease. Such an action does not entitle the owner to repossess the equipment but rather it results in the equipment being arrested and placed under the control of the court. This is the first step of the process that must be followed by an action on the merits, which does not necessarily have to take place in France. At the subsequent litigation on the merits, the lessee would have the right to present its case in respect of any arguments it might make regarding the owner's exercise of default remedies.

Update and trends

In the past year, there has been a lot of activity in the transfer of ownership of aircraft among lessors and an increase in activity in US-asset backed securitisations, which included various French-registered aircraft. With the lifting of sanctions in Iran and the order books announced by Boeing and Airbus to Iranian airlines thereafter, there is increased interest in this 'new' market, which could create new financing structures. In addition, there is still a lot of curiosity and uncertainty in respect of Brexit as well as the French presidential election, which could result in significant changes to French finances and tax regimes.

23 Enforcement of security

Outline the basic measures to enforce a security interest.

How may the owner lawfully impede the mortgagee's right to enforce?

As with the termination of a lease, self-help remedies in respect of a security interest are not available. Similar to the procedure above, a court order authorising the arrest will be required, and the aircraft or other equipment, when arrested, would remain under the jurisdiction of the court.

As a prerequisite to enforcing a security interest such as a mortgage, it is necessary to make a formal demand for payment on the counterparty, which can only be made on the basis of an enforceable order to pay a sum of money, which means, in practice, a final judgment from a French court or a foreign judgment that has been made enforceable in France. Once the demand is made and sufficient time for payment has elapsed, the equipment can be arrested by a bailiff and the equipment would be subject to a judicial sale. The sale proceeds would then be applied to the debt of the counterparty to the lender in preference and priority, subject to any liens and mortgages having preference.

As there would be the need to obtain a court order, the debt counterparty would be entitled to raise any defences it might have in respect of the mortgagee's right to enforce the security interest.

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

There are certain statutory liens that can attach to an aircraft with respect to compensation due:

- for court costs incurred in the forced sale of an aircraft;
- for the salvage of an aircraft; and
- for expenses necessary for preservation of the aircraft, which would have priority over other security interest and the rights to proceeds following the enforcement of a mortgage.

In addition, in certain situations, airport authorities and companies who have repaired the aircraft have the right to cause the aircraft to be detained if certain charges or costs of repairs are not paid. The possessory right of retention applicable to the provider of services is a powerful right that would be enforceable against the owner or lessor if the lessee has relinquished possession of the aircraft to the service provider, but such right does not give rise to sell the aircraft and ceases to exist once the aircraft or equipment is no longer in the possession of the service provider. Furthermore, there are a number of services for which airport authorities are entitled to charge including landing charges, aerial navigation service charges, parking fees, passenger and baggage installation charges, etc, which would give rise to retention rights in respect of an aircraft.

Although Paris Aéroport (formerly known as Aéroports de Paris (ADP)), the publicly owned company that runs Paris' three main airports, regularly exercises its retention rights for unpaid airport charges, it should be noted that only charges with respect to a particular aircraft, however, will give rise to the right of detention of that aircraft (ie, there is no right to detain one aircraft for charges with respect to another aircraft operated by the same airline). Furthermore, a decision rendered

on 2 July 2003 by the State Council, France's highest Administrative Court, and indirectly confirmed in a similar case before the Disputes Tribunal decided on 19 January 2004, held that after the termination of a lease of an aircraft, ADP cannot exercise its detention right against the owner of the aircraft for unpaid airport charges incurred by the operator.

There are provisions under French law relating to the requisition of title and requisition for use as codified in the French Code of Defence. Although the owner or lessee would be entitled to requisition indemnities, there is no set statutory amount, and the sufficiency of any such indemnities could be contested before the French civil courts.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

In respect of transfer taxes, the general rule is that pursuant to articles 256 et seq of the French General Tax Code, value added tax (VAT) is assessed on the supply of goods (including aircraft) delivered in France. This would apply to the following:

- the sale or transfer of title to aircraft, engines and spare parts;
- the supply of maintenance services; and
- rental payments under an aircraft lease.

The current rate of VAT for the supply of such services is 20 per cent.

However, there is an exception to VAT liability, both with respect to the sale and exchange of aircraft, parts and supplies as well as in respect of lease payments where the aircraft or the parts and supplies are destined for use on aircraft which are operated by airlines that meet the international service test set out in article 262 II of the French General Tax Code. This exception provides that no VAT is due on either the supply of aircraft, spare parts to, or rental payments with respect thereto, by an airline whose services between France and foreign destinations represent at least 80 per cent of its services. This test is applied on a fleet-wide basis and not just by reference to the individual aircraft in question. It should be noted that in this regard, French overseas territories and departments are considered to be foreign destinations.

A number of French airlines and all but a few non-French airlines benefit from this exemption. The French tax authorities publish a list of French airlines that benefit from the exemption, as well as a list of the non-French airlines that do not benefit from the exemption.

In the event that VAT were applicable to a particular sale or transfer of title to an aircraft, it would be prudent to transfer title while the aircraft is located outside of France or over international waters. Where VAT is applicable to a leasing operation with a French lessee, it would not be possible to avoid VAT which would be payable by the lessee to the lessor.

No other transfer taxes (such as stamp duty) would be payable in respect of the transfer of title or leasing of an aircraft, engine or parts.

In respect of withholding taxes, rental payments made by a French lessee to a foreign lessor are, as a matter of French domestic law, subject to withholding tax under article 182B of the General Tax Code at a rate of 33.33 per cent, unless such rate is reduced or eliminated under any applicable double taxation treaty. There are a number of such treaties in place between France and other countries, which effectively reduce the withholding tax to zero, and lease transactions can often be structured such that no withholding tax would be applicable.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

Currently, there are no approvals or consents necessary in France for the remittance of lease or loan payments in US dollars, which is the most common currency used for aircraft finance and lease documentation. A framework for exchange controls is still in existence under French law whereby the government could, under special circumstances, notably in times of crisis to assure the defence of national interests, impose pre-authorisation and reporting requirements for financial operations between France and foreign countries.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

While there is generally no specific limitation in the amount of default interest that can be charged on a lease or loan payments, it should be noted that pursuant to article 1244-1 of the French Civil Code, a judge has the power to do the following:

- postpone payments by a debtor after taking into account the state of affairs of the debtor and the needs of the creditor provided such postponements do not exceed two years in the aggregate;
- reduce the interest rate in respect of any amount for which such French court has granted to a debtor to delay to pay such amount, provided that such lower interest rate shall not be less than the legal rate in France;
- order that any amount thereafter paid by a debtor be allocated to the payment of principal in priority to any other amounts owed by such debtor; and
- grant any such measures subject to the debtor's granting security to assure the payment of the overdue indebtedness or taking measures to facilitate the payment of such overdue indebtedness.

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

There are certain customs formalities that must be completed upon the import of an aircraft and registration of the aircraft in France. VAT may be payable at the time of import but, as indicated in question 25, aircraft on lease to airlines that meet the international flight exemption would be exempt from any VAT on importation. The DGAC will generally require a completed customs import form where an aircraft is imported from outside the EU. Although certain documents may be required to be completed in the name of the owner, it is generally the operator or lessee that would be required to complete these formalities and who would be responsible for any importation costs. There would not be any taxes or fees payable on export of the aircraft.

Insurance and reinsurance**29 Captive insurance**

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

There are no captive insurance regimes applicable to aviation in France, and there is no minimum or maximum percentage of insurance that must be retained in France. Generally, insurances for French airlines are placed on the international aviation insurance markets.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Yes, generally, cut-through clauses under insurance and reinsurance documentation are legally effective in France.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

As with any assignment of rights against a French debtor (and as seen in question 17), any assignment of rights must be perfected by notification of the assignment to the French debtor by a French bailiff or process server in accordance with French procedural rules. Assignments of insurances and reinsurances, if any, are often used in aviation leasing and finance transactions in France.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

French law will not impose responsibility with respect to the operation, maintenance or insurance on a lessor or financier. Such responsibilities stay with the operator. As discussed in question 33, however, there is a presumption of liability on both the owner and the operator of an aircraft, provided that where the lease has been registered with the Register the presumption of liability is shifted to the operator, and the owner could only be held liable where the claimant can prove fault on the part of the owner.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

The concepts of strict liability and vicarious liability do exist under the laws of France. As indicated in question 7, pursuant to article L6131-4 of the Code, where an aircraft is leased, the owner and operator are jointly liable as regards third parties. However, if the lease is registered with the Register, the owner will only be responsible if the third party can prove fault on the part of the owner. Hence, registration of the lease shifts the presumption of liability to the operator. There would be no presumption of liability in respect of financiers and others with no operational interest in the aircraft, and they would not be liable under the regime of strict liability.

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34 Third-party liability insurance**Are there minimum requirements for the amount of third-party liability cover that must be in place?**

The European Parliament has put in place certain minimum insurance requirements for air carriers and aircraft operators. Regulation (EC) No. 785/2004 of the European Parliament and of the Council of 21 April 2004 sets forth the relevant minimum passenger, baggage, cargo and third-party liability requirements for air carriers and aircraft operators flying within, into, out of, or over the territory of a member state of the EU. There are no further or more stringent minimum insurance requirements in place in France.

Germany

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Germany has ratified the International Conventions of Warsaw (1929, effective 29 December 1933), including the Hague Protocol for the amendment of the Warsaw Convention (1955, effective 1 August 1963), the Conventions of Chicago (1944, effective 8 June 1956), Geneva (1948, effective 5 October 1959) and Montreal (1999, effective 28 June 2004). The Rome Conventions (1933, amended 1952 and effective 4 February 1958), the Montreal Protocol (1978, effective 25 July 2002) and the Cape Town Convention (2001, effective 1 March 2006) have not been ratified by Germany. Germany is a signatory to the New York Convention (1958, effective date 7 June 1959).

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The Air Traffic Act is the German basic law on aviation, modelled on the Chicago Convention, containing provisions on registration, operation, conduct and liability in regard to aircraft, personnel, air carriers and airports. It is, inter alia, supplemented by the Air Traffic Licensing Regulation on the prerequisite for aircraft to be allowed to fly in Germany.

The Aircraft Mortgage Act concerns aircraft used as collateral for loan agreements by way of a registered mortgage, and contains numerous specific regulations on registered liens (general, procedure of registration and contents, execution, transfer, change and expiry, extension on spare parts and organisation of register).

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

In the interest of legal security, German international private law restricts the parties' choice of law regarding property. Whereas commonly the rule of *lex situs* (the place where the property is situated) is applied on immovables as well as moveables, this is highly impractical for aircraft that, being means of transportation, typically cross borders several times a day. Therefore, by specific statutory rule, any interests in airborne vehicles are governed by the law of the country of origin, meaning their nationality (article 45, paragraph 1, No. 1 of the Introductory Act to the (German) Civil Code). According to article 17 of the Chicago Convention, aircraft have the nationality of the state in which they are registered. For example, registration of an aircraft in the German Aircraft Register (see question 6) results in making the aircraft a German one and consequentially making German substantive law applicable on any interests in the aircraft. The nationality of unregistered aircraft may be more difficult to determine. Nevertheless, with regard to internationally agreed legal principles,

an aircraft owned by a national will have the same nationality (see section 3(1)(1)(1) of the Air Traffic Act for the corresponding prerequisite for registration; see question 7).

The applicable law on securities over aircraft (see question 15) follows its property status. The law applicable on a secured claim is usually determined by the law of the country where the party required to effect the characteristic performance of the underlying contract (for example, the seller in a contract of sale) has its habitual residence (article 4(2) of the Rome I Convention). However, if the contractual status differs from the property status, the latter also may be applied on the secured claim itself to avoid splitting up the statutes between security and secured claim.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

Title in an aircraft is transferred following general rules of German civil law on the transfer of ownership of moveables. Thus, a bill of sale alone is not sufficient, as a sale and purchase agreement only imposes a contractual duty on the seller to transfer the ownership of the aircraft to the buyer (section 433(1)(1) of the German Civil Code). To actually transfer title in an aircraft, the owner – in execution of the underlying contract of sale – usually has to deliver the aircraft to the buyer while both parties agree that the change of direct possession also results in a change of ownership (see section 929(1) of the German Civil Code). Other forms of transfer are permissible, especially if the aircraft is to be used as collateral security. In this case, the former owner (debtor), while effectively making the acquirer (creditor) the new owner of the aircraft, will only provide him or her with indirect possession and remain in direct possession him or herself (see section 930 of the German Civil Code). This enables him or her to still use the aircraft and eventually pay back the loan from the proceeds of operation.

Registry of an aircraft in the Aircraft Register (see questions 6 and 9) does not have any legal impact on the transfer of title, it still follows the general rules for transfer of ownership of moveables (section 98(1)(1) of the Aircraft Mortgage Act).

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

There are no such formal requirements in German law. The registration of aircraft ownership serves other purposes (see question 6).

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

German aircraft are only allowed to fly in Germany when they are licensed for traffic after their airworthiness is proven, and when they are properly registered by the Federal Aviation Office, according to section 2(1) of the Air Traffic Act in conjunction with section 14 of the Air Traffic Licensing Regulation. In a narrow sense, the Aircraft Register is maintained at the Federal Aviation Office as one of two

registers (see section 64(1) of the Air Traffic Act; the other, on 'aerial sports equipment', being irrelevant in this context). The registration serves the public purpose of supervising air traffic safety, identifying individual aircraft (compare section 2(5) of the Air Traffic Act) and enables the Federal Aviation Office to use the stored data to provide information in statutorily specified situations (section 64(2)(7–9) of the Air Traffic Act). The data to be registered is comprehensive and encompasses type, design, identification number of the airframe, as well as the marks regarding nationality and unique code of the aircraft. In addition, the page number of the register, and in case of existing security the page number of the mortgage register (see question 17), as well as the name and address of the owner have to be put down (section 64(3) of the Air Traffic Act). Regarding planes as the most common type of aircraft, even more data has to be recorded, for instance concerning their usual location, liability insurance and design of engines installed (section 64(4) of the Air Traffic Act).

In contrast to the German land register or ship register, the Aircraft Register does not have a comparable significance in private law (see question 9), even if the data stored in the register under certain conditions may be used to facilitate enforcement of private claims (section 64(8) of the Air Traffic Act).

Certificates and licences of foreign aircraft registered in a contracting state of the Chicago Convention are usually recognised in Germany (article 33 of the Convention). In case such aircraft is operated pursuant to a lease or similar agreement by an operator residing in Germany, according to article 83-bis, together with section 3a(2 and 3) of the Air Traffic Act the state of registry may, by agreement with Germany, transfer to it certain functions and duties as state of registry in respect of that aircraft, for example, regarding its operation, airworthiness and the competency of its personnel as well as general 'rules of the air'. Germany has so far closed five bilateral agreements: with Italy (18 July 2007), Austria (1 January 2010), Sweden (3 November 2010), Spain (17 December 2010) and Denmark (26 September 2012).

There is no separate registry for aircraft engines (section 64(4)(3) of the Air Traffic Act; see question 7).

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

In order not to misunderstand the mechanics of the German Aircraft Register, it should be noted that following its main public function to provide for air traffic safety (see question 6), the register is not a 'table' to record existing ownership or lease interests as proof towards third parties. On the contrary, these interests are a prerequisite for registration in the first place.

Basically, an aircraft may only be recorded in the German Aircraft Register if it is not already registered in any other Aircraft Register in a foreign country and if it is wholly owned by a German or EU member state national, or at least by a national of a country where EU aviation law applies (section 3(1)(1) of the Air Traffic Act, together with phrase 2 and 3 respectively). 'Wholly owned' means that ownership may be divided between several individuals, but all of them have to be German or EU nationals. This also applies if several owners are members of a private partnership or an association without legal personality.

Should the aircraft be owned by a corporation (eg, a limited liability company or a stock corporation) or by a company according to commercial law (general partnership or limited partnership), following the provision's wording, the administrative seat of the company has to be in Germany, thus 'EU area' is not sufficient. In addition, more than 50 per cent of its assets have to be in the hands of German or EU nationals and the majority of its authorised representatives or persons personally liable have to be German or EU nationals.

An aircraft not owned in the manner described above may still be recorded in the German Aircraft Register, if German or EU nationals are entitled to acquire ownership of the aircraft following a contract of sale, for example, in the case of a hire-purchase agreement or payment in instalments with reservation of title. Likewise, it is sufficient that they have a right to possession of the aircraft according to a

rental or similar agreement with a minimum duration of six months (section 3(1)(1)(2) of the Air Traffic Act; compare article 1, No. 1 of the Geneva Convention). Thus, all typical kinds of leasing contracts are covered (for example, dry or wet-lease agreements). The Federal Aviation Office may allow for exceptions in singular cases (section 3(2) of the Air Traffic Act), for example, if the rental agreement falls short of the statutory minimum duration by just a few days.

Ownership of an aircraft can additionally be registered in a German or EU Commercial Register in order to show it as an asset of a merchant or a company. Having a different function to the Aircraft Register (financial versus safety reasons), there is no conflict. The legal basis for both the registrations is still to be found in general property law, meaning the registering entity has to be owner of the aircraft or at least must be entitled to it in a comparable manner.

How to deal with the legal relationship between the aircraft and its engines still is much discussed in Germany. However, the independent economic value of the engines, their intentionally 'loose' connection with the aircraft in order to facilitate quick exchange and the statutory regulation of security interests in the aircraft and possible spare parts (see question 21) points to a classification of the engines not as an integral part, but as an accessory of the aircraft as the 'main object' (section 97 of the German Civil Code). Therefore, engines do not automatically share the legal fate of the aircraft itself (airframe, fuselage, etc), but may be the object of independent rights or claims of a third party. Nevertheless, as the Aircraft Register only asks for German or EU ownership of the aircraft itself as precondition for its registration, and merely mentions the engines as part of the data on the aircraft that has to be recorded in the course of registration (section 64(4)(3) of the Air Traffic Act), any legal interest in the engines by a third party cannot be registered separately.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

There is no specific procedure for the registration of ownership interests in an aircraft. As German or EU ownership of the aircraft is a prerequisite for its registration (see question 7), the registering party has to prove its ownership in relation to the Federal Aviation Office. This may be done without regard to specific formalities, and even by only establishing *prima facie* evidence, for example, submitting the contract of sale or any other purchase certificate.

The title to an engine is not automatically vested in the owner of a host aircraft, but it may not be registered separately (see question 7).

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

The registration of an aircraft in the Aircraft Register aims to facilitate the supervision of air traffic safety and to disseminate selected information to certain authorised recipients (see question 6), so it remains without effect on private law rights or claims and does not provide any proof of title against third parties (section 98(1)(1) of the Aircraft Mortgage Act). In contrast, for example, to the land register, a registration in the Aircraft Register does not allow for an acquisition 'in good faith' (see section 932(2) of the German Civil Code) by a third party that erroneously believes the registered entity to be the owner of the respective aircraft. However, in the opposite case where the prospective acquirer knows that his or her contractual partner differs from the registered party, the agreement would not be in good faith and thus unable to receive title to the aircraft if his or her contractual partner actually did not own the aircraft.

10 Registration of lease interests

Summarise the process to register a lease interest.

There is no specific procedure for the registration of lease interests in an aircraft. As certain lease interests in the aircraft by German or EU nationals are an alternative prerequisite for its registration besides ownership of the aircraft (see question 7), the registering party has to prove such interests as regards the Federal Aviation Office, usually by way of submitting the respective lease contract or another comparable certificate.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

After registering an aircraft in the German Aircraft Register, the Federal Aviation Office issues a certificate of registration following international (International Civil Aviation Organization (ICAO)) usage (according to section 14 of the German Air Navigation Certification Order, Annex 1, sample 1). As part of the 'ship's papers', it must be carried on board the aircraft at all times. With nomenclature in German and English, it contains information on the register itself (volume, page), on the aircraft (class, nationality and registration marks, manufacturer, designation, serial number) as well as on the owner (name, address, possible entries on change of ownership on the backside) and certifies that the aircraft has been duly registered in the Aircraft Register and the rights to it are registered by the local court in Braunschweig at the seat of the Federal Aviation Office. As there is no exclusive register for engines, no separate engine certificate of registration is issued.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

The owner of the aircraft has to apply for deregistration, including cases of export, at the Federal Aviation Office, using a standard form (Federal Aviation Office-No. 11). The mortgagee does not have the authority to have the encumbered aircraft deregistered or exported. On the other hand, he or she also does not have to consent to such action by the owner, as a registered mortgage does not expire in case of change of ownership (see question 19). The operator may block deregistration or export only if he or she is contractually empowered to do so.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

A representative of the owner with proper deregistration power of attorney, presenting the standard form signed by the owner (see question 12), may have an aircraft deregistered and exported. Powers of attorney usually are revocable; if not, they still may be revoked for good cause. They are grantable to more than one attorney but cannot be registered. If the grantor becomes insolvent, the power of attorney commonly expires (section 117(1) of the Insolvency Act) as the agent otherwise could unlawfully extract the aircraft from the insolvency assets by way of deregistration.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

Not applicable, as the Cape Town Convention has not been ratified by Germany.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

When using registered aircraft (see question 6) as security, the German Aircraft Mortgage Act provides for an exclusive (compare section 9 of the Aircraft Mortgage Act) registered mortgage (according to section 1 of the Aircraft Mortgage Act). The act resembles a mixture of general regulations on common mortgages on immoveable property and pledges on moveables. While in many legal aspects being similar to the latter, the debtor does not have to part with direct possession of the aircraft, as the content of the register assures the necessary legal certainty.

Because of the registration requirement that asks for extensive information to be provided in the process (see question 17), the security

document itself is not subject to specific formalities. Its language typically will be German, but is subject to the envisaged use and context of the security. The document will at least contain a description of the secured claim, as the mortgage, being a strictly accessory collateral, in every aspect follows the claim like a 'mirror image' in existence and amount (compare section 4 of the Aircraft Mortgage Act). To create a registered mortgage, the owner of the aircraft – in case of aircraft financing usually also being the debtor of the claim to be secured – has to agree with the creditor to procure such mortgage and register the mortgage with the Aircraft Mortgage Register (section 5 of the Aircraft Mortgage Act). The parties may limit the liability of the mortgaged aircraft to a certain fixed amount (section 3 of the Aircraft Mortgage Act), which is usually documented. Only German aircraft in the aforementioned statutory sense can be encumbered with a registered mortgage (see questions 6 and 17). Securities on foreign aircraft follow different provisions, even if enforcement rules are similar (see section 103 et seq of the Aircraft Mortgage Act).

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

In order to properly register a mortgage on an aircraft, the approval of registration by the owner of the aircraft has to be notarised at the very least (section 86(1) of the Aircraft Mortgage Act, together with section 37(1) of the Ship Register Regulation). As the agreement to procure a mortgage does not become binding on the parties before registration (section 5(2) of the Aircraft Mortgage Act), the agreement itself, as well as the application for registration, are commonly also notarised. Documentary costs vary in regard to the amount of the secured claim (see sections 34(1), 53(1), 97 and 98 of the Act on Court and Notary Fees).

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

Registering an aircraft mortgage may be a lengthy process that asks for several steps to be taken one after the other, as follows:

- after the parties have agreed on procuring an aircraft mortgage, either of them (owner or debtor, or creditor) may apply for its registration (section 86(1) of the Aircraft Mortgage Act, together with section 23 of the Ship Register Regulation). Like the Aircraft Register itself, the Aircraft Mortgage Register is maintained by the Braunschweig local court (section 78 of the Aircraft Mortgage Act). It will only carry out the registration if the person whose right is affected by the registration of the mortgage is already registered as a legitimate party;
- in order to authorise him or herself in the aforementioned sense (compare section 86(1) of the Aircraft Mortgage Act, together with section 46 of the Ship Register Regulation), the owner has to apply to have his or her aircraft registered in the Aircraft Mortgage Register before he or she can have the mortgage registered (section 79(1) of the Aircraft Mortgage Act). For every aircraft registered, a new page is reserved, which is divided into two parts, one for the aircraft itself and one for any mortgages it might be encumbered with (section 81(1) of the Aircraft Mortgage Act, together with section 2 of the Aircraft Mortgage Register Regulation);
- only the person or entity that is registered as owner in the Aircraft Register is entitled to have an aircraft registered in the Aircraft Mortgage Register (section 79(2) of the Aircraft Mortgage Act; see question 6). The application has to contain the following:
 - the page number of the Aircraft Register;
 - the marks regarding nationality and unique code of the aircraft;
 - the type and design of the aircraft;
 - the identification number of the airframe;
 - the name and address of the owner according to the Aircraft Register. The applicant has to prove that the data to be recorded corresponds with the data from the Aircraft Register. When applying as owner him or herself, ownership has to be substantiated with prima facie evidence (section 80 of the Aircraft Mortgage Act); and

- once the aircraft is registered in the Aircraft Mortgage Register, its now 'legitimate' owner may finally have the mortgage itself registered by approving his or her or the creditor's application for registration. The latter has to cover – as usually already covered in the (notarised) approval – the name of the creditor, the amount of the secured claim as well as any applicable interest rates or similar accessory performances due. In case of a mortgage with limited amount (section 3 of the Aircraft Mortgage Act), the respective limit has to be noted instead of the face value of the claim (section 24(1) of the Aircraft Mortgage Act). Registration costs vary in regard to the amount of the secured claim (see sections 34(1), 53(1) and 55(2) of the Act on Court and Notary Fees).

18 Registration of security

How is registration of a security interest certified?

Concerning certificates about records in the Aircraft Mortgage Register, there is no equivalent to the official Certificate of Registration for the Aircraft Register (see question 11). In contrast to the Ship Certificate (as defined in Annex 4 to section 39(a) of the Implementing Regulation regarding the Ship Register Regulation), there is no designated space to record any encumbrances in the document. However, as the Aircraft Mortgage Register is public, the register court may be asked for (certified) copies of any registrations that serve as evidence (section 85(1)(2), together with section 15 of the Aircraft Mortgage Act).

The rank (absolute and relative) of a security interest, which indicates its priority, is clearly visible from the register's pages. A mortgage always is recorded in part 2 of the register (part 1 being reserved for the aircraft itself), starting at the top with no. 1 and continuing further downward if any additional mortgages are registered. Where a single aircraft is encumbered with more than one mortgage, their relative rank is discernible from the respective pages, as older mortgages have priority over newer ones (section 25(1)(1) of the Aircraft Mortgage Act). For example, an earlier registered mortgage at 'upper' position 1 outranks a later registered mortgage at 'lower' position 2, 3, etc. Should a registered security be deleted for whatever reason, any 'lower' entries will move up one position, so if no. 3 were deleted, nos. 1 and 2 remain untouched, but no. 4 becomes 3 and 5 becomes 4, etc.

Subsequent changes of rank as well as reservations of certain positions are permissible, but such alterations again have to be recorded in the register and thus are easily recognised (compare sections 26 and 27 of the Aircraft Mortgage Act).

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

Registration of a security interest usually confers priority over other securities that might be registered subsequently (section 25(1)(1) of the Aircraft Mortgage Act; see question 18).

Third parties can rely on the accuracy of the public registration of the security interest, as it is presumed by law that the person who is registered as the mortgage's beneficiary in the Aircraft Mortgage Register is actually entitled to such right as long as there is no proof to the contrary (section 15(1) of the Aircraft Mortgage Act). A potential buyer of the mortgage is protected as long as he or she does not know that the registered seller of the security is not actually entitled to such right (section 16(1)(1) of the Aircraft Mortgage Act). Should the ownership of the aircraft be transferred to a third party, the registered mortgage does not expire as would any other encumbrance following general property law, but remains intact and the buyer only acquires encumbered ownership (section 98(1)(2) of the Aircraft Mortgage Act).

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

In German law the concept of trust is well known, and according to modern majority view can be employed in different ways when providing security. However, as the concept itself is not free from criticism and crosses the border between obligation and property law, it is used as a form of 'stand-alone security' at the most. It will not be employed in addition to the registered mortgage on aircraft, itself already being

comprehensively and exclusively regulated (compare section 9(1)(1) of the Aircraft Mortgage Act).

The registered mortgage as laid down in section 1 of the Aircraft Mortgage Act is a right in rem, as it rests on the ownership of the aircraft it encumbers, regardless of the owner's identity. Regarding changes to the security or its beneficiaries, several constellations have to be differentiated:

- changing the aircraft's substance, in other words value, will generally just affect the proceeds resulting from a possible foreclosure (see question 23). Only in cases of severe degradation of the aircraft or its being extensively damaged by the owner, thus endangering the security in the sense of recoverability of the secured loan, may the creditor be granted an extraordinary right to immediately have the aircraft auctioned in order to provide for compensation (section 39 of the Aircraft Mortgage Act);
- changing the aircraft's ownership leaves the encumbering security untouched (section 98(1)(2) of the Aircraft Mortgage Act; see question 19); and
- changing the secured claim, be it in amount or regarding the beneficiary, generally results in corresponding changes to the security (compare sections 4 and 51 of the Aircraft Mortgage Act). Nevertheless, by agreement between owner and beneficiary, a novation is permissible as an exception that has to be recorded in the Aircraft Mortgage Register (section 55(1) of the Aircraft Mortgage Act). If the old claim is not only replaced by a new one, but the beneficiary is changing as well, the owner and the new beneficiary have to conclude an agreement with the previous one consenting before the change can be registered (section 55(2) of the Aircraft Mortgage Act).

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

Engines are to be seen as an accessory of the aircraft (see question 7), so that a security interest in the aircraft itself also covers the engines installed at the time it is created, provided they are also owned by the owner of the host aircraft as recorded in the Aircraft Register (section 31(1)(1) of the Aircraft Mortgage Act). Although the qualification as an accessory is not precluded by the fact that the object in question is only temporarily used for a single host aircraft (section 31(1)(2) of the Aircraft Mortgage Act) – which is typical for engines because they are regularly swapped between different aircraft – the engine is an accessory of a specific host aircraft as long as it is dedicated to it, which necessitates some kind of close spatial connection (compare section 97(1)(1) of the German Civil Code). In other words, the engine must at least be in the course of being installed in the host aircraft at the time of creating the security.

An engine is released from joint liability as collateral together with the aircraft:

- if it is transferred to a third party and removed from the aircraft before it is seized by the mortgagee (section 31(2)(1) of the Aircraft Mortgage Act);
- if it loses its classification as accessory of the aircraft 'during the ordinary course of business', namely when being swapped with another engine following a typical maintenance schedule (section 31(3)(1) of the Aircraft Mortgage Act); and
- if it is placed in a spare parts storage (section 31(3)(2) of the Aircraft Mortgage Act).

To avoid the two latter cases of release, the owner of the aircraft may agree with the creditor to extend the mortgage to all spare parts in the inventory of a specific domestic or foreign spare parts storage and have the extension recorded in the Aircraft Mortgage Register. The extension depends on the existence of the aircraft mortgage itself and is subject to a comprehensive statutory regulation (section 68 et seq of the Aircraft Mortgage Act).

An independent security interest in the engines cannot be created; thus, if the engine in question is neither owned by the host aircraft's owner nor is the engine (about to be) installed in the aircraft at the time of creating the security, the engine is not covered by the mortgage at all.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

There are no self-help remedies available to the owner or lessor. In order to repossess the aircraft, he or she has to proceed in accordance with the German laws of debt enforcement. That necessitates obtaining an enforceable title for this claim from the relevant German civil court. The title has to contain the necessary enforcement clause and needs to be duly served on the debtor. The owner can then apply for the enforcement title with a bailiff, who will put him or her in possession of the aircraft. However, as this procedure can be rather lengthy, in the lease agreement the lessee already may submit to subjecting the aircraft to immediate enforcement proceedings in case of default on his or her part. This allows the owner to directly apply for enforcement of his or her claim.

Requirements for terminating the lease agreement by the owner or lessor, as well as possibilities for the lessee to object against possible claims for damages by the owner, very much depend on the details of the respective agreement and the reasons giving rise to termination in the first place. Skipping contractual provisions because of their near-endless variety, litigation over the repossession of the aircraft will only follow an extraordinary termination of the leasing agreement by the lessor, which, as severe interference with an ongoing contractual relation in turn, requires 'good cause'. These typically are misuse of the leased object, repeated delays of payment or other serious breach of contract by the lessee. Thus, it will be difficult for him or her to impede any claims put up by the owner, let alone denying wilful misconduct on his or her part.

23 Enforcement of security

Outline the basic measures to enforce a security interest.

How may the owner lawfully impede the mortgagee's right to enforce?

To enforce an aircraft mortgage, the beneficiary is limited to execution according to statutory regulations (section 47(1) of the Aircraft Mortgage Act) and may not avail him or herself of any self-help remedies or similar private measures of enforcement. Execution procedure follows slightly modified provisions on immovables, typically leading to a compulsory auction of the aircraft (section 99(1) of the Aircraft Mortgage Act, together with sections 864(1) and 870a(1)(1) of the Code of Civil Procedure). Competent for any execution is the local court in Braunschweig (section 171b(1) of the Act on Compulsory Auction and Administration).

Initiating compulsory auction procedures by the court results in seizure of the aircraft in favour of the creditor or mortgagee (section 20(1), together with section 171a(1) of the Act on Compulsory Auction and Administration). It encompasses all objects that are covered by the aircraft mortgage, for example, accessories such as the engines mounted on the aircraft (section 20(2) of the Act on Compulsory Auction and Administration, together with section 31 of the Aircraft Mortgage Act; see question 21). The aircraft is then delivered into custody and may no longer be operated (section 171c(2)(1) of the Act on Compulsory Auction and Administration). As this measure is usually very detrimental to a lessee of the aircraft, the mortgagee by statutory order legally replaces the previous owner or lessor of the aircraft and thus will have to grant the lessee further use of the aircraft for the time being, if he or she was already in possession of the aircraft (sections 171f and 169 of the Aircraft Mortgage Act, together with sections 578a(1), 567(1), 566(1) and 535(1)(1) of the German Civil Code). On the other hand, the lessee may not demand that the execution procedures be suspended.

The auction itself is organised by the court and follows common practice (see section 66 et seq of the Act on Compulsory Auction and Administration). The mortgagee is entitled to the proceeds according to the yet unpaid amount of his or her secured claim, but among other things certain other costs will have to be settled first (section 10 of the Act on Compulsory Auction and Administration). The highest bidder obtains ownership of the aircraft through a public authority (section 90(1) of the Act on Compulsory Auction and Administration). He or she will automatically become party to an existing contract of lease

Update and trends

Owing to the insolvency of a Russian air carrier, 2016 had a particularly strong focus on repossession cases. As Germany has not ratified the Cape Town Convention and self-help is not available under German law, the owner has to enforce his or her claim through the courts. An interim injunction directed only to the return of the aircraft board documents in combination with a freezing injunction or flight ban might be the best approach in many cases. However, because of time constraints, a mixture of law and practice – not necessarily requiring an interim injunction – has proven to be the best and fastest way in Germany for a successful recovery of aircraft from a defaulting airline. The last year has shown that with support from an expert legal team with considerable experience in handling repossession cases, knowledge of established methods, valuable contacts with the respective authorities as well as sound preparation and good timing, an owner has a very good chance of successfully repossessing its aircraft in Germany.

(see above), but may exceptionally terminate the agreement subject to statutory notice periods (section 57a of the Act on Compulsory Auction and Administration). All other rights resting on the aircraft expire; however, they may continue in regard to the proceeds (sections 91(1) and 92(1) of the Act on Compulsory Auction and Administration). Loss of a right to possession of the aircraft based on rental or leasing agreement of a duration of more than six months (compare section 3(1)(2) of the Air Traffic Act; see question 7) is compensated by regular payments corresponding to the contractual period as agreed upon (sections 171n and 92(2) of the Act on Compulsory Auction and Administration).

Should the debtor be insolvent, the insolvency administrator in certain limited cases may suspend conflicting execution measures for an interim period (section 30d of the Act on Compulsory Auction and Administration). In turn the creditor or mortgagee may apply for continuation of execution procedures if the reason for suspension has ceased to exist or if the administrator or the debtor respectively assents to continue (section 30f(1)(1) of the Act on Compulsory Auction and Administration).

Anyone risking losing a right to the aircraft as a result of its compulsory auction (eg, the owner or even the party in possession of the aircraft) may prevent impending execution measures by fulfilling the creditor's claim through payment, set-off or deposit, in this way also legally stepping into the creditor's shoes (section 50 of the Aircraft Mortgage Act).

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

Any existing security interests because of salvage or inevitable maintenance measures by third parties will have priority (section 76(2) of the Aircraft Mortgage Act). On the other hand, liens for repairs and comparable statutory pledges are not applicable on registered aircraft (section 9(1)(2) of the Aircraft Mortgage Act). Aircraft may be seized when enforcing a private claim, with the result of creating an ordinary registered mortgage (section 99(2) of the Aircraft Mortgage Act). However, most aircraft are protected from such seizure by specific provisions (section 1 of the Act on Inadmissibility of Seizure of Aircraft).

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

The sale (including the transfer of title) of aircraft is generally subject to German VAT of 19 per cent whenever:

- the delivery of the aircraft originates in Germany, regardless of its final destination (section 1(1)(1), together with section 3(6) of the VAT Act). The tax burden rests on the seller (section 13a(1)(1) of the VAT Act); or

- the delivery of the aircraft, originating in another EU member state, according to the terms of contract ends in Germany (sections 1(1)(5), 1a(1) and 3d(1) of the VAT Act). The tax burden rests on the purchaser (section 13a(1)(2) of the VAT Act).

The sale is subject to German import VAT whenever the delivery of the aircraft ends in Germany, originating in a non-EU member state (section 1(1)(4) of the VAT Act). The tax burden rests on the person who legally owes duties for a customs debt incurred on importation, namely the applicant (sections 13a(2) and 21(2) of the VAT Act, together with article 201(3)(1) of the Community Customs Code).

However, sales of aircraft benefit widely from tax exemptions, so that in all three cases no VAT is commonly due (sections 4(2), 4b(2) and 5(1)(2), each together with section 8(2)(1) of the VAT Act). To be precise, delivery, refurbishment, repair, maintenance, chartering and leasing of aircraft is tax free, if intended for a company that in its everyday business is mainly engaged in non-gratuitous cross-border or purely foreign transportation. Regardless of such business, no VAT applies in case of an aircraft's export from Germany to a third country, in other words non-EU member state (section 4(1)(a), together with section 6(1)(1) of the VAT Act).

German VAT does not apply to lease payments or loan repayments as they do not constitute a performance in a fiscal sense. Also, there is no withholding tax on lease payments or loan repayments from the German jurisdiction to another.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

Germans, in other words 'natives' (according to section 63 of the Foreign Trade Ordinance, together with Appendix A, Chapter 2, No. 2.05 of Regulation (EC) No. 2223/96), have to report all international payments executed or received in an amount over €12,500 to the German Central Bank within seven days of the transaction (sections 67(1) and (4)(1), together with section 71(7) of the Foreign Trade Ordinance) using a specific document (Z4) that, inter alia, contains information on the reporting party as well as on the purpose and the amount of the payment.

There are no exchange controls in effect in Germany, as imposing any payment restrictions is prohibited for EU member states (article 63(2) TFEU).

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

The statutory default interest rate is 8.17 per cent as of 1 January 2016, if none of the parties qualifies as consumer (sections 288(2) and 247(1)

of the German Civil Code). There is no statutory limit for individual agreements on higher interest rates, but if contained in (the more commonly used) general terms and conditions the rate is limited by the amount of damage actually suffered because of delayed payment (section 309(5)(b) of the German Civil Code).

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

No. According to the (European) Community Customs Code that governs exchange of goods between EU member states like Germany and third countries (article 1), the duties legally owed where a customs debt on importation or exportation is incurred (see articles 201 and 209 of the Code, respectively), are based on the EC Customs Tariff (article 20(1) of the Code). In its 'combined nomenclature', civil aircraft are declared exempt from duty.

Insurance and reinsurance

29 Captive insurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

The most common specific insurances in German aviation practice are as follows:

- aviation hull insurance, covering damage to aircraft from the outside because of adverse weather conditions, crashes or forced landings, etc;
- aviation casualty insurance, covering damage to persons' health on board an aircraft because of accidents; and
- aviation liability insurance, covering damage to third parties on the surface and on board an aircraft in the course of its operation.

Liability insurance is of special importance as it is compulsory under EU law and a prerequisite for an aircraft to be operated in Germany (see question 34). The respective insurance company has to be licensed for business in Germany (section 105(1) of the Air Traffic Licensing Regulation) to ensure that it is properly supervised by German or EU authorities.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

This depends on the content of the specific agreement.



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31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Generally, such assignments can be effective. It depends, however, on the specific clauses of the agreement.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

No. Liability for any damage resulting from the operation of an aircraft according to EU and German law is limited to the aircraft operator for damage to third parties on the surface (article 1 et seq of the Rome Convention and section 33 et seq of the Air Traffic Act) and to the air carrier for damage to third parties on board the aircraft itself (article 17 et seq of the Montreal Convention and section 44 et seq of the Air Traffic Act). Thus, a lessor or financier will never be liable, and the owner only in case of simultaneously being aircraft operator or air carrier (compare article 4(2) of Regulation (EC) No. 785/2004).

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

No. See question 32.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

EU, as well as subsidiary German, law (see sections 43(1) and 44 of the Air Traffic Act and section 101 of the Air Traffic Licensing Regulation) again distinguishes between liability for damage suffered on board the aircraft itself, resting on the air carrier, and liability for damage suffered on the surface, resting on the aircraft operator:

- insurance for (inside) passengers, baggage and cargo: according to article 6 of Regulation (EC) No. 785/2004 as amended by Regulation (EU) No. 285/2010, minimum insurance cover is 250,000 special drawing rights (SDR) per passenger, equalling €312,387 (conversion date: 4 May 2017); 1,131 SDR (€1,413) per passengers' baggage and 19 SDR (€23.74) per kilogram of cargo; and
- insurance for (outside) third parties: according to article 7 of Regulation (EC) No. 785/2004, minimum insurance cover per accident for each aircraft operated is determined by its maximum take-off mass or weight (MTOM or MTOW). Operators of common aircraft within the 'heavy' class (ICAO/FAA) with an MTOM usually between 50 and 200 or 200 and 500 tonnes have to provide insurance amounting to 300–500 million SDR (€374 million–€625 million). Only the Airbus A380-800, with an MTOM of over 500 tonnes, falls into the top bracket necessitating insurance cover of at least 700 million SDR (€874 million).

German provisions contain the same amounts for German aircraft (section 103(2)(1) of the Air Traffic Licensing Regulation; section 103(2)(3) of the Air Traffic Licensing Regulation, together with section 47(4) of the Air Traffic Act; section 104(3)(1) of the Air Traffic Licensing Regulation and section 102(2) of the Air Traffic Licensing Regulation, together with section 37(1) of the Air Traffic Act respectively).

A foreign aircraft entering German airspace has to carry a certificate proving the existence of equivalent liability insurance for third parties to avoid being grounded on its first landing on German surface (section 99(4) of the Air Traffic Licensing Regulation). When taking on board additional passengers in Germany, the existence of liability insurance for such passengers must also be proven by certificate in order to continue the journey (section 99(5) of the Air Traffic Licensing Regulation).

India

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

India has ratified the Chicago Convention, but has opted not to ratify article 3 (Civil and State Aircraft) and article 83 (Transfer of Certain Functions and Duties) thereunder. India has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York in 1958 (the New York Convention). An award made in a country that is a party to the New York Convention, and that has further been notified as a reciprocating territory by the government of India, is treated as a 'foreign award' under Indian law.

India acceded to the Cape Town Convention on International Interests in Mobile Equipment and the Protocol to the Cape Town Convention on International Interests in Mobile Equipment (Protocol) on 31 March 2008. However, only specific provisions of the Cape Town Convention and the Protocol have become effective from 1 July 2008. It is pertinent to note that although the Cape Town Convention has been ratified, the government of India has not yet enacted legislation implementing the opt-in declarations of the provisions of such in India.

India is a party to the Warsaw Convention (1929), the Hague Protocol (1955) and the Montreal Convention (1999) and the provisions provided therein, subject to the provisions of the Carriage by Air Act 1972 (Carriage Act), have the force of law in India in relation to any carriage by air irrespective of the nationality of the aircraft performing the carriage. India has not signed the Geneva Convention on the International Recognition of Rights in Aircraft (1948) or the Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft (1933).

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

There is no principal domestic legislation applicable to aviation finance and leasing. However, various aspects of an aircraft leasing and financing transaction are governed inter alia by the Indian contract laws, Indian company laws, and Indian foreign exchange regulations. Also, the (Indian) Aircraft Act, 1934, read along with the (Indian) Aircraft Rules, 1937 and the Civil Aviation Requirements, as prescribed by the Directorate General of Civil Aviation (DGCA) from time to time, govern certain aspects of aircraft leasing in India.

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Indian law, in general, recognises the freedom of the parties from different jurisdictions to choose the proper law of contract. Therefore, Indian law will generally recognise a title transfer that is valid under the governing law of the contract, unless such recognition is against public

policy in India, or unless the choice of law appears to have been made with a view to avoid any mandatory requirements under Indian law.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

Title in an aircraft can be transferred by execution of a sale agreement or a bill of sale between the seller and the buyer of the aircraft. If such agreement is executed outside India and is then brought into India, whether by way of physical delivery or fax, email or any other electronic means for any purpose, the same will have to be stamped within the statutorily prescribed period in accordance with the stamp laws in force in the relevant state in which the transaction documents are brought.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

As mentioned in question 4, documents that are executed outside India, and are subsequently brought into India, must be stamped within the statutorily prescribed period in accordance with the stamp laws in force in the relevant state in which the transaction documents are brought. In addition to the stamp duty requirement, the transfer documents should be notarised and apostilled for submitting to governmental authorities, essentially the DGCA.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

The aircraft register in India is maintained by the DGCA. This register contains details in relation to the aircraft such as the following:

- the type of aircraft;
- the year of manufacture;
- the full name and address of the owner or lessor; and
- the full name and address of the operator or lessee.

This register is open for inspection by members of the public, both at the DGCA headquarters as well as on the DGCA website.

India has ratified article 83-bis of the Convention on International Civil Aviation and has also suitably amended the Aircraft Rules. There is no engine-specific register in India.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

As stated above, the DGCA's aircraft register is an owner registry although it also includes details of the operator, if different from the

owner. There is no separate register for leases and aircraft engines maintained in India. Further, once registered with the DGCA, there is no requirement to have the aircraft ownership registered at any other registry in India. In case of a leased aircraft, in addition to the details mentioned above, details (names, nationalities and address) of the lessor and lessee, including the period of validity of the lease agreement, will also be required to be mentioned.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

The owner of the aircraft is required to register his or her interests in the aircraft with the DGCA by filing a prescribed form, along with providing supporting documentary proof in relation to the details mentioned therein together with the prescribed fee (calculated on the basis of the maximum permissible take-off weight of the aircraft). The DGCA has prescribed a period of two working days from the receipt of the form, fees and necessary supporting documents for an aircraft to be registered and a certificate of registration to be issued to the owner.

As mentioned above, there is no separate registration of title to the engine of an aircraft.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

The register of the DGCA is merely a 'notation' register; courts in India would accept the certificate of registration, issued by DGCA, as prima facie evidence of lessor, lender or owner interest in the aircraft. It would be difficult to defend a case in the courts against third parties if the owner has no or defective title as per the records of the DGCA.

10 Registration of lease interests

Summarise the process to register a lease interest.

See question 7.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

The DGCA issues the certificate of registration for the aircraft. The following details are recorded in this certificate:

- the type of aircraft;
- the manufacturer's serial number;
- the year of manufacture;
- the nationality and registration marks of the aircraft;
- the full name, nationality and address of the owner or lessor;
- the full name, nationality and address of the operator or lessee;
- the usual station of the aircraft;
- the date of registration of the aircraft and the period of validity of such registration; and
- the name of the security interest holder, if any.

There is no separate engine certificate of registration in India.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

Under Indian law, the registration and deregistration of an aircraft may only be done by the owner or the owner's authorised representatives. Under the Aviation Rules, the holder of an irrevocable deregistration and export request authorisation (IDERA) may apply to the DGCA for cancellation of the registration of the aircraft prior to the expiry of the aircraft lease after:

- providing the original or notarised copy of the IDERA; and
- ensuring that either:
 - all registered interests in respect of the aircraft have been discharged; or
 - the holders of such registered interests have consented to the deregistration or export of the aircraft.

In the normal course of things, it is not possible for the operator to block any proposed deregistration or export by an owner or mortgagee. However, there have been instances in the past where the operator has delayed deregistration or export of the aircraft by raising disputes regarding the termination of the underlying lease agreement before the Indian courts.

It is important to note that notwithstanding the above, the Aircraft Rules provide that any entity of the government of India, any intergovernmental organisation or any other private provider of public services in India shall have the right to arrest, detain, attach or sell an aircraft object for payment of amounts owed to the government of India (or any such entity directly providing services or performing the functions of the government of India) in respect of that object.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

A valid deregistration power of attorney (DPOA) executed by the lessee or operator in favour of the owner or lessor enables such owner or lessor to deregister the aircraft without the need for judicial intervention. Further, Indian law provides for both revocable and irrevocable powers of attorney, the distinction being that for a power of attorney to be irrevocable it must be coupled with an interest of the attorney being appointed in exercising the power under the power of attorney. Based on our experience, it is advisable that a duly stamped and notarised copy of a DPOA (executed by the operator in favour of the owner) be filed with the DGCA in addition to the IDERA (discussed in more detail below), as this expedites procedures at the time of enforcement.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

An IDERA can be filed with the DGCA and the acknowledgement of the DGCA can be obtained. While there is no requirement that an IDERA be countersigned by the aviation authority (ie, the DGCA) it is advisable that the acknowledgement of the DGCA be obtained as this ensures that the DGCA will note the fact of issuance of the IDERA by the operator and that the owner or lessor is entitled to exercise its rights under the IDERA. While the DGCA does not have any preferred way to deal with a financier as the beneficiary's 'certified designee', they may at the time of making any filing ask for any further supporting documents relating to such financing arrangements.

The IDERA process exists in parallel with the DPOA, and the courts have recognised the IDERA as an instrument similar to the DPOA.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

The security document is not required to be in any specified format or in any particular language. In practice, such security documents generally record the maximum secured amount and the underlying economic terms of the deal such as principal, interest and repayment dates.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

The documentary formalities for creation of an enforceable security are similar to the formalities in relation to the title transfer documents. In this regard, see questions 4 and 5. If the owner of an aircraft is an Indian company or a company with a registered place of business in India, then additional requirements to perfect the security will apply, such as filing of charges (discussed in more detail below).

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgage interest.

There is no separate register of aircraft mortgages in India. However, the Civil Aviation Requirements require the owner of an aircraft to file a notarised and apostilled copy of the mortgage documents evidencing the creation of the charge with the DGCA, which will endorse the name of the mortgagor on the certificate of registration.

As per law, if the mortgagor is an Indian company or a company with a registered place of business in India, the mortgagor must, within a prescribed period, register any charge (which includes a mortgage) created with the relevant Registrar of Companies (ROC) in the prescribed form. The Indian company laws require such filing to be made within 30 days of the creation of the charge, in the prescribed form, along with the complete particulars of the charge, including the instrument creating such charge.

18 Registration of security

How is registration of a security interest certified?

The registration of a security interest is certified by an acknowledgement given by the ROC at the time such registration is done by filing the prescribed forms along with the supporting documents. The ROC maintains a register of charges, which evidences the existence of the charge over the aircraft, records the nature and details of the instrument creating the charge. The register of charges is a public document and constitutes notice to third parties of the existence of such charge. Only charges created by Indian owners of aircraft are required to be registered with the ROC. There is no requirement to do so for a foreign owner of an aircraft operated in India.

In respect of filings made with the DGCA, an acknowledgement of the same may be obtained at the time of making the filing.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

See question 18. Priority of charges is based on the date of creation of charges, not on the basis of date of registration of charges, provided the charges are in fact registered within the statutorily prescribed period.

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

The concept of trust and security trustee is recognised in India. Typically, in financing transactions involving one or more lenders, the security over aircraft and leases is structured through a security trustee who holds and enforces the security interests on behalf of the lenders.

As per law, a mortgagee's right in an aircraft is a right in personam. Indian law also facilitates arrangements whereby a security trustee may hold the security for a changing group of beneficiaries. When the underlying loan is transferred or if the lenders change, although there is no security register in India it is advisable to intimate the DGCA about such changes.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

There is no requirement or regime in India for registration of a lease or mortgage of an engine, separate from that of the aircraft. In relation to leased aircraft, typically the engines are not considered as separate items.

In our experience, provisions in relation to title, security and obligations or restrictions in relation to spare parts are set out in the lease agreement, which also records evidence of owner's title and beneficial interest in relation to the parts (present and future) and also on the spare parts (present and future), whether such spare parts are repaired or replaced.

Enforcement measures**22 Repossession following lease termination**

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

An aircraft may be repossessed through the DGCA (DGCA process); or by initiating legal action (court process).

DGCA process

Under Indian law, the validity of the certificate of registration is co-terminus with the validity of the lease deed. Hence, after termination of the lease, all parties with an interest in the aircraft are required to submit to the DGCA separate plain-paper applications along with the necessary documents seeking the deregistration of the aircraft. Thereafter, an approval from the Bureau of Civil Aviation Security is required to obtain physical custody of the aircraft.

In the case of a hostile repossession, the owner, lessor or security trustee may repossess the aircraft on the basis of a duly stamped and notarised DPOA, an IDERA or both, if such instruments have been issued by the lessee in their favour. See question 12 for further information in this regard.

Court process

In the event that the lessor chooses not to follow the DGCA process or the DGCA fails or refuses to deregister the aircraft, the lessor may initiate legal action to repossess the aircraft. As the DGCA is a government body, the lessor can file a writ petition in the High Court, within whose jurisdiction the DGCA's order was passed, seeking to quash the DGCA's order and asking for a direction to be issued to the DGCA to rehear the application for deregistration and repossession.

23 Enforcement of security

Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

The manner of enforcement of a security interest largely depends upon the type of interest to be enforced.

Immoveable property

Creditors in India can take security over immoveable property by way of mortgage. In India, mortgages are commonly in the form of an equitable mortgage or English mortgage. A mortgagee's right depends on the type of mortgage in question.

Equitable mortgage

In an equitable mortgage, the mortgagee may enforce his or her security by filing a civil suit for either sale of the mortgaged property, or to sue the mortgagor personally for the mortgage money subject to the fulfilment of certain conditions. A mortgagee may also request the court to appoint a receiver for the mortgaged property in certain circumstances.

English mortgage

In an English mortgage, the mortgagee may enforce his or her security by filing a civil suit for either sale of the mortgaged property, or to sue the mortgagor personally for the mortgage money subject to the fulfilment of certain conditions. In addition, in an English mortgage, a mortgagee may also have the power to sell the mortgaged property without the intervention of the court if certain conditions are satisfied.

Moveable property

Moveable properties are most commonly charged by way of execution of a 'Deed of Hypothecation'. A Deed of Hypothecation usually contains provisions entitling the creditor (beneficiary of the hypothecation) to appoint a private receiver (to take possession of the hypothecated properties) and sell the hypothecated properties without requiring the intervention of a court. Courts in India have, by and large, been consistent in upholding the lender's right to thus take possession of hypothecated properties and sell the same, provided the Deed of Hypothecation so empowers the lender.

Cash or bank accounts

Cash and bank accounts are charged in the same manner as moveable properties, namely by way of execution of a deed of hypothecation. Upon default, if the bank accounts being charged are maintained with the lending bank itself, the lending bank shall have the right to appropriate monies lying credited in the account towards its dues. A charge by way of hypothecation may be created over account balances and bank accounts maintained with banks other than the lending bank as well. The manner of enforcement of a hypothecation created over bank accounts maintained with banks other than the lending bank will depend upon the process and procedure that had been followed at the time of creation of the hypothecation.

Securities

There are two separate regimes under which securities are pledged under Indian law, depending on the form of securities (ie, whether the securities are evidenced by physical certificates, or whether the securities are electronic or dematerialised). In the event that physical securities have been pledged, the lender has the right to sell the pledged securities and adjust the consideration received against its dues. In the event, dematerialised securities have been pledged, then the lender must first acquire the securities in its own name and thereafter transfer the securities to a buyer and appropriate the consideration for the sale towards its dues.

Effect of insolvency

Under the Insolvency and Bankruptcy Code, 2016 (IBC), if an order has been passed by the National Company Law Tribunal (NCLT) to commence a corporate insolvency resolution process (CIRP) against a corporate debtor (insolvency commencement date), a moratorium becomes applicable for a period of 180 days (extendable by up to a maximum of 90 days) (CIRP period). During the CIRP period, no suit or legal proceeding can be commenced (including any action to enforce security interest) against the corporate debtor and no pending proceeding can be proceeded with against the corporate debtor. Additionally, recovery of any property by a lessor where such property is in the possession of the corporate debtor is also prohibited during the moratorium.

However, in liquidation proceedings, a lessor is permitted to repossess its property. Section 36(4) of the IBC specifically lays down that assets owned by a third party, which are in the possession of the corporate debtor, shall be excluded from the liquidation estate. In liquidation proceedings, a secured creditor may either:

- relinquish its security, in which case its entire debt ranks second in the waterfall of payments made for liquidation of the general assets of the corporate debtor (after liquidation-related costs); or
- opt to stay out of the liquidation and enforce its security outside of the IBC liquidation process. To the extent that the secured debt is not discharged by the enforcement proceeds, the remaining debt of the secured creditor will rank much lower in the waterfall of payments (ranking after liquidation costs, secured creditors who have relinquished their security, employee or workmen's dues and unsecured financial debts).

The IBC also provides for clawback of transactions in certain instances. Under sections 43 and 45 of the IBC, the NCLT may reverse any transaction that is deemed to be a preferential transaction or an undervalued transaction, respectively, in the period leading up to the commencement of the CIRP. The relevant look-back period for scrutinising suspect transactions is two years in the case of a related party and one year with any other person. Under section 50 of the IBC, the NCLT may reverse any transaction that is deemed to be an extortionate credit transaction, in the two-year period leading up to the commencement of the CIRP.

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

The laws of India recognise the following liens in favour of third parties:

- airline employees for unpaid wages;
- repairers for repairs of aircraft in the repairers' possession, to the extent of service or services performed; and
- governmental or other unpaid statutory dues.

In the event an aircraft has been detained by any authority for the non-payment of dues by the operator, the owner of the aircraft may be required to seek relief from the courts. There have been numerous instances where the courts have held that the aforementioned liens are to be borne by the operator and their failure to pay cannot result in the detention of the aircraft.

In addition, Indian laws permit the central government to empower any authority to detain an aircraft if such detention is necessary to secure compliance with a domestic legislation or when such detention is necessary to prevent a contravention of any such legislation or to implement any order made by any court. For instance, the Airport Authority of India has been authorised to detain an aircraft until all fees owed to it by the operator have been paid.

In addition, the central government has the power to give directions to detain or requisition either foreign-owned or locally owned aircraft in the interest of public safety and security. There is no statutory requirement for the central government to compensate the affected parties. However, as India has entered to bilateral investment agreements with several countries, a foreign investor could resort to legal protection accorded under such agreements, against the government of India for any discriminatory treatment and claim adequate compensation for any such detention or expropriation.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Lease rentals payable to a non-resident for use of aircraft for the purpose of a business carried on in India by the payer (whether by resident or non-resident) is taxable in India as royalty under the domestic tax law, and is subject to tax withholding at the rate of 10 per cent (plus applicable surcharge and education cess) on a gross basis.

The loan repayments to non-residents may comprise two components: principal and interest. The principal amount of loan would not be taxable in India and would not be subject to tax withholding in India. However, the interest element would be taxable in India under the domestic tax law if the loan is borrowed for the purpose of a business carried on in India by the payer (whether by resident or non-resident) and would be subject to tax withholding in India at the applicable rates, which may vary from 5 per cent (plus applicable surcharge and education cess) to 40 per cent (plus applicable surcharge and education cess), depending on the nature of debt instrument. Further, the gain, if any, arising to a non-resident from a transfer of an aircraft registered and operated in India may be subject to capital gains tax in India under the domestic tax law. The rate of tax would depend upon the period of holding of the aircraft. If the aircraft is held for a period exceeding three years, then the capital gains, if any, would be taxed at the rate of 20 per cent (plus applicable surcharge and education cess), otherwise the same would be taxed at the rate of 40 per cent (plus applicable surcharge and education cess). The same would be subject to tax withholding accordingly. However, all three above-mentioned tax liabilities may be subject to any benefits available under the applicable tax treaty.

There may not be any way to minimise the aforesaid tax liabilities. The capital gains tax, if any, applicable on sale of an aircraft registered and operated in India, would not be impacted by whether the aircraft is on the ground or in the airspace of the jurisdiction.

Further, grossing-up provisions are recognised under Indian income-tax laws. However, in case of gross-up, for the purposes of deduction of tax, the amount on which tax is required to be deducted and deposited to the account of the central government shall be increased to an amount such that after the deduction of tax thereon, the net income is equal to the actual amount paid to the recipient of payments. Typically, value added tax is not payable on lease payments made under lease agreements executed outside India.

26 Exchange control**Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?**

India is an exchange-controlled jurisdiction, and matters relating to remittance or repatriation of foreign exchange are governed by the provisions of the Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder.

Under law, Indian operators do not require any approval of the Reserve Bank of India (RBI) for any remittance of operating lease rentals, opening of letters of credit towards security deposit, etc, in respect of import of aircraft, aircraft engines or helicopters on an operating lease basis. However, for other payments (eg, rentals in financial lease transactions, indemnity payments and payments towards insurance premia), the prior approval of the RBI might be required.

27 Default interest**Are there any limitations on the amount of default interest that can be charged on lease or loan payments?**

While there are no express limitations on the amount of default interest that can be charged on lease or loan payments, the courts have been active to ensure that such interest is not usurious or excessive. In determining if the rate of interest charged is excessive, the courts may consider the market rate, inflation and also a fall in the bank rate. In the absence of any agreement or statutory provision or mercantile usage, the courts may also defer to the market rate upon establishment of a totality of circumstances justifying the exercise of such equitable jurisdiction.

28 Customs, import and export**Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?****Import**

To import an aircraft into India, the owner of the aircraft must apply for a temporary certificate of registration. The fee payable in respect of a temporary certificate of registration for an aircraft is 25 per cent of the fee payable for applying for a certificate of registration (which varies depending on the maximum permissible take-off weight of the aircraft). In addition to the temporary certificate of registration, the owner of the aircraft will also need to apply to the Director-General of Foreign Trade (DGFT) for an import licence. The custom duty payable for an import licence is waived for import of aircraft by operators who have been approved by the Ministry of Civil Aviation to provide non-scheduled (passenger) and non-scheduled (charter) services. However, in certain cases a 'no objection certificate' may be required from the DGCA for import of the aircraft prior to availing such exemption.

Export

Except where an exemption has been granted by the DGCA and DGFT, no owner can export an Indian-registered aircraft from India without obtaining an export licence. The costs for obtaining this licence vary from case to case. In addition to obtaining the export licence, the owner of the aircraft will need to obtain a 'ferry flight permit', for flying the aircraft outside India. An application for a ferry flight permit can be made along with the request for deregistration. There are no costs involved in obtaining a ferry flight permit.

Insurance and reinsurance**29 Captive insurance****Summarise any captive insurance regime in your jurisdiction as applicable to aviation.**

As per law, an operator of aircraft in India has an obligation to maintain adequate insurance to cover its liability towards passengers and their baggage, crew, cargo, hull loss and third-party risks in compliance with the requirements of the Carriage Act, or any other applicable law. In aircraft lease financing transactions, the lessee is required to obtain such insurance from an Indian insurer that is generally reinsured with an offshore reinsurer subject to satisfying certain requirements, including that such reinsurer shall maintain a prescribed credit rating of an international credit rating agency.

However, an Indian insurer must also reinsure a minimum of 5 per cent of the sum assured on each policy (which shall be capped at a sum of 30 per cent (or such other sum prescribed by the regulatory authority) of the sum assured on each policy) with an Indian reinsurer.

30 Cut-through clauses**Are cut-through clauses under the insurance and reinsurance documentation legally effective?**

In our view, the prior approval of the RBI is likely to be required to be obtained by the Indian insurer in order to include a cut-through clause. However, several insurers in India take the view that the approval of the RBI is not required for including a cut-through clause. In any event, this is a compliance item for the Indian insurer and not for any other party.

31 Reinsurance**Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?**

In our view, a prior approval from the RBI is likely to be required in connection with assignment of reinsurances. However, several Indian insurers tend to take the view that no prior approval from the RBI is required.



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That said, we have seen that the assignment of reinsurances in favour of lenders is an Indian industry standard in aircraft financing transactions.

32 Liability**Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?**

No. Under Indian law, the liability for damages is imposed only on the carrier and the owner is not liable for the operator's actions as long as ownership is clearly distinct from operation of the aircraft and the owner is not involved in the actual operation of the aircraft.

33 Strict liability**Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?**

While the common law principle of strict liability exists in India, its application is limited to matters not covered by a specific statute. Since an aircraft or carrier's liability in India is codified in the Carriage Act, the common law principle of strict liability finds no application to instances covered by the Carriage Act.

34 Third-party liability insurance**Are there minimum requirements for the amount of third-party liability cover that must be in place?**

Yes. As per the Carriage Act, the operator of an aircraft has an obligation to maintain insurance for an amount that is adequate to cover its liability towards passengers and their baggage, crew, cargo, hull loss and third-party risks.

Israel

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Israel ratified the Chicago Convention (1944) in 1949 and the New York Convention (1958) in 1959. However, Israel is not party to the Geneva Convention (1948) or the Cape Town Convention (2001). Israel did sign the Rome Convention (1933), but to this date has not ratified it.

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The principal domestic legislation governing aviation finance and leasing in Israel is the Aviation Law, 2011 and the Aviation Regulations (Registration and Marking of Aircraft), 1973 (the Registration Regulations). Additional laws governing this subject are the following:

- the Companies Ordinance, 1983;
- the Pledges Law, 1967;
- the Contracts Law (General Part), 1973 (the Contracts Law);
- the Contracts Law (Remedies for Breach of Contract), 1970; and
- the Rental and Borrowing Law, 1971.

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Israeli legislation does not categorically restrict parties from choosing the proper law by which their contract shall be governed. Thus, a foreign choice of law should be upheld if it is not immoral, illegal or against public policy, in accordance with section 30 of the Contracts Law. In such case, the relevant foreign law needs to be proven to the court by an expert witness in the relevant law.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

Title in aircraft is customarily transferred by a bill of sale.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

Although there is a form of bill of sale attached to the Registration Regulations, the Israeli Registrar of Aircraft (the Registrar) would normally accept any form of a bill of sale (or other document) that clearly demonstrates transfer of ownership of the aircraft, either in original or a true certified copy. If the bill of sale is in a language other than Hebrew or English, the Registrar may require a notarised translation

into Hebrew or English. There are certain registration fees for payment and forms for completion, which may also be required.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

The Israeli Aircraft Registry (the Registry) is an owner registry established pursuant to the Registration Regulations maintained by and operated by the Civil Aviation Authority, a statutory authority within the Ministry of Transport and Road Safety. To our knowledge, there are no currently effective 83-bis arrangements in place. Israel does not maintain a specific engine register.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

As the Registry is an owner registry, an ownership interest in an aircraft may be registered. A lease interest in an aircraft may not be recorded in the Registry. Eligibility for registration of an aircraft in the Registry is limited to citizens and permanent residents of Israel, or Israeli corporations of which two-thirds of its directors are Israeli citizens or permanent residents. Notwithstanding the aforesaid, the Minister of Transport and Road Safety may permit the registration of a foreign-owned aircraft not registered in a foreign state if the Minister is convinced that there exists a sufficient link between the aircraft and Israel. Furthermore, said Minister is authorised to refuse the registration of an aircraft in the Registry if he or she is convinced that the registration may harm the security of Israel or its foreign affairs. Israel does not maintain any other registry for registration of ownership interests in aircraft nor does it maintain a specific engine register.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

In order to register an aircraft, an owner must submit an original aircraft registration application signed by the owner with the following attachments:

- a duly executed bill of sale or other evidence of ownership;
- a receipt for the payment of the applicable registration fees;
- if previously registered in a foreign country, sufficient proof that such registration has been cancelled or is no longer valid;
- corporate authorisation duly empowering the individual executing the application to do so (in case of a corporation);
- if requested by the Registrar, proof of payment of any applicable customs, duties, taxes and levies; and
- if the application is executed by an agent or representative of the owner of the aircraft, details of the representative together with a notarised power of attorney from the owner (or a certified copy thereof) presented not later than three years from its issuance,

unless it expressly provides that it shall be in effect for more than three years.

The Registration Regulations also provide for additional registration requirements in special circumstances such as in transfers by force of law, realisation of security, etc.

Title to an engine would not automatically vest in the owner of a host aircraft and this matter is dependent on the underlying circumstances.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

Pursuant to the Registration Regulations, registration of an ownership interest in the Registry does not constitute proof of title. The Registration Regulations do provide that registration shall constitute conclusive evidence of the aircraft's nationality for international purposes, and prima facie evidence of its nationality for the purpose of any proceedings taken in accordance with the laws of Israel.

10 Registration of lease interests

Summarise the process to register a lease interest.

There is no specific process to register a lease interest with the Registrar.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

The certificate of registration is issued by the Registrar and contains the following:

- aircraft serial number;
- nationality and registration marks;
- aircraft manufacturer and manufacturer's designation of aircraft;
- owner's name and address;
- date of issue of certificate of registration;
- details of the Registrar;
- details of any charges and attachments on or to the aircraft (if applicable); and
- information on the different circumstances wherein the certificate will expire (as prescribed by the Registration Regulations) and other matters addressing completion of the application form, requirement on change of address, etc.

As noted, the Registrar does not issue separate engine certificates of registration.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

Since the Registry is an owner registry the deregistration of aircraft would require the execution of the relevant application forms by the owner itself (or representative thereof).

Under the Registration Regulations, if the interests of the financing party holding a charge or attachment in the aircraft are registered with the Registry, the Registrar will not permit any change to be made in the registration of the aircraft without the consent of the holder of the charge or by order of the court or chief execution officer expressly transferring or cancelling the charge or attachment.

The operator of the aircraft has no standing in itself in regard to registration or deregistration of an aircraft and thus cannot block any such action without obtaining an appropriate court order.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

A power of attorney must comply with general requirements of Israeli law governing powers of attorney. The courts will generally uphold an irrevocable power of attorney if it is expressly designated as such.

The Registration Regulations enable owners to issue notarised or certified powers of attorneys to their agents or representatives for the purpose of executing registration and deregistration applications. Any such power of attorney may not be utilised after three years of its granting unless it is expressly granted for a longer period. Given the aforesaid, if the chargee is deemed the 'agent' or 'representative' of the owner then such chargee may be able to deregister the aircraft by filing the relevant application forms with the Registrar. It should be noted that given the general insolvency laws in Israel and the fact that under the Pledges Law only certain prescribed financial institutions are entitled to 'self help' when realising secured assets, any recognition of a deregistration power of attorney may be subject to the discretion of the courts and therefore there is no guarantee that the Registrar (or any other relevant governmental body) would recognise a deregistration and export power of attorney; however, it is quite customary for a secured lender to request and receive the same.

A power of attorney would normally expire upon the liquidation or bankruptcy of the grantor.

It is not possible to register the deregistration and export power of attorney.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

The Cape Town Convention is not in effect in Israel.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

Security over an aircraft typically takes the form of either a charge (debenture) or a pledge, depending on the type of granting entity. There is no limitation in entering into a security document in English provided that in the case of security created by an Israeli company, a certified Hebrew translation of the security document must be provided to the Companies Registrar for registration.

There is no specified form for such security document and normally such documents are crafted to reflect the commercial agreement but at the very least should state the following:

- the details of the parties;
- the assets being secured;
- the type of security being granted;
- the amount secured (whether fixed or unlimited); and
- any limitations on future grants of security.

There is no requirement to record the economic terms of the deal within the security document.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

There are no particular documentary formalities when creating a charge or pledge over an aircraft other than in relation to the filing of the relevant charge or pledge with the appropriate public authority (see question 17). There are no stamp or other documentary costs as such.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgage interest.

In the case of an Israeli company, the security document must be in the form of a debenture to be registered with the Companies Registrar within 21 days of its creation, otherwise it may have no effect against a liquidator or other creditors. In the case of a foreign entity or an Israeli individual or partnership, the security document should take the form

of a pledge and be filed with one of the pledge registration offices based on the residence of the pledgor so as to be valid and effective against other creditors.

The registration process varies somewhat depending on the person or entity creating such interest; however, it does generally require the completion of a prescribed form containing the basic terms of the relevant security interest together with the underlying security document (in case of filings to the Companies Registrar). There are no costs for filing a charge with the Companies Registrar; however, filing a pledge with the Pledges Registrar is accompanied by a nominal fee depending on the term of the pledge. The registration of a charge would remain in effect until it is expressly released; however, registration of a pledge is for a limited amount of time and must be renewed as applicable.

Once filed the relevant authority issues a certificate evidencing the registration of the security interest and registers such interests within its records. The certificate of pledge is normally issued immediately upon filing, while the issuance of a certificate of charge may take longer.

Once the pledge or charge is duly registered it is recommended that such security interest be noted in the Registry with such security interest endorsed by the Registrar upon the aircraft's certificate of registration. Once such security interest is noted in the Registry by the Registrar, the Registrar will refrain from making any change to the registration of the aircraft without the consent of the secured party or by court order.

18 Registration of security

How is registration of a security interest certified?

The Pledges Registrar and Companies Registrar issue certificates evidencing the registration of the relevant security. Such certificates do not state the rank or priority of the relevant security interest.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

As noted, a charge over an aircraft must be filed within 21 days of its creation for it to have any effect against a liquidator or creditors. Once a certificate is issued following registration, it serves as conclusive evidence that all requirements for registration are met. Should the security interest be registered with the Pledges Registrar, the pledge shall be effective upon other creditors only upon registration thereof. Third parties may generally rely upon the accuracy of such public registrations.

The general principle under Israeli bankruptcy laws is that in a conflict between secured rights that have equal ranking, the earlier right shall have priority.

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

Security over aircraft is typically structured by creating a specific charge over an aircraft and identifiable engines, parts and equipment (including identifiable spare engines and spare parts) and a separate floating charge over any other parts of the aircraft not covered by the fixed charge. This is done in order to defeat any claims that the fixed charge does not cover any item that did not attach to the aircraft at the time of the original charge. Should the security be granted over lease payments, such security is normally constructed as an assignment by way of charge (which is substantially similar to an English law security assignment).

The concept of a security trustee is generally recognised in Israel and used in granting of security depending on the particular circumstances. In such cases the relevant security is granted in favour of the security trustee on behalf of the relevant beneficiaries. It is also possible to register the security in favour of the beneficiaries together with the security trustee. In circumstances where security is granted for the benefit of a security trustee, the security trustee is considered the holder of the security and may exercise any rights associated therewith. In such circumstances the security would be registered in the name of the security trustee without naming the underlying syndicate so that variation of the relevant beneficiaries would not normally require amendment of the actual charge. Should a beneficiary be named as an additional

chargee in the original registration, any change of such beneficiary may require re-registration of the charge, which may impact priority.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

Security over a clearly identifiable and distinguishable spare engine may take the form of an independent fixed charge or a pledge over the spare engine itself in a similar manner as security over the aircraft itself would be created, as noted above. If the spare engine is not identifiable at the time of creation of the relevant security interest over the aircraft it is possible for Israeli companies to register a floating charge over any spare engine relating to the host aircraft, which would normally only crystallise into a fixed charge upon the default of the relevant debtor or its bankruptcy (subject to the terms of the relevant debenture). In both cases, once registered, the relevant charging or pledging of the spare engine would create an effective security interest.

Separate security over a financed engine that is installed on a financed host aircraft would normally be treated as separate independent security and would remain in effect even if removed from the aircraft.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

Where the lessee prevents the lessor from taking possession of the aircraft, the lessor will usually have no other choice but to apply to the relevant court for a declaration as to its right to take possession, its ownership of the aircraft or relief by way of court order for the return of the asset. Under Israeli law the parties to an agreement are not prevented from incorporating a clause into an agreement to allow for 'self-help' in certain circumstances. However, in practice, a lessor will typically turn to the police or the courts for assistance to recover the property. That said, it should be noted that the self-help provisions in the Moveable Property Law, 1971 limit the period of self-help to 30 days from the first day of unlawful possession.

23 Enforcement of security

Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

A pledge or charge over an aircraft may generally be realised by court order or by the chief execution officer (the head of the execution office, which is part of the enforcement and collection authority), the latter of which is considered as the more efficient means of realisation. The chief execution officer would attempt to sell the aircraft to the highest bidder who, usually, must bid above the official appraised value previously sought by the chief execution officer. Self-help remedies are available to limited types of Israeli financial institutions expressly listed in the Pledges Law, 1967 although in most cases such institutions would utilise the court or execution office to exercise their security. It is possible to attempt to detain the aircraft by means of an ex parte application for temporary injunction or attachment should there be compelling arguments to do so, for instance, if irreparable damages would otherwise be caused to the creditor. Insolvency proceedings are not intended to limit a secured creditor's rights from exercising its security and commencing legal proceedings against a debtor. That said, recent amendments to Israeli law have limited the ability of secured creditors from exercising their security in certain restructuring proceedings unless it is demonstrated that:

- the secured asset does not afford the secured creditor appropriate protection and no other means of protection have been put in place; or
- the realisation of the security would not impair the likelihood of recovery of the relevant company.

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

In most cases the holder of a fixed charge or pledge over an aircraft would have priority over other creditors; however, there are certain limited creditors that may be granted priority over such secured creditors including the following:

- expenses of a receiver appointed to realise a debenture;
- certain costs of the execution office;
- holders of possessory liens such as mechanics' liens or the like (a variety of different civil laws grant such possessory lien rights including to the Airports Authority); and
- holders of set-off rights whose debt existed prior to the insolvency.

The Registration and Mobilisation of Equipment to the Israeli Defence Forces Law, 1987 grants authority to the Minister of Defence to requisition any aircraft located in Israel with a reasonable payment made to the owner and additional compensation if any damages are suffered during such time.

Taxes and payment restrictions**25 Taxes**

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Corporation tax on lease or loan payments

Under the Income Tax Ordinance (New Version), 1961 (the Ordinance), non-residents of Israel are subject to income tax in Israel only in respect to income accrued or derived from a source in Israel. However, under Israeli law there is a specific exemption from income tax for interest and leasing or rental payments made by an Israeli resident to a non-Israeli resident in connection with an aircraft that transports passengers or cargo in international lines. In addition, one should also examine the applicable international tax treaty, which may shift the tax liability to the corresponding contracting state (subject to the terms of the relevant treaty).

Withholding taxes

Where a financier or owner is a resident of a foreign country and is liable for tax in Israel, in many cases such tax is remitted to the Israeli Tax Authorities (ITA) by means of a deduction or withholding by the lessee or borrower. Payments that constitute taxable income in Israel that are made to non-Israeli resident companies or individuals by Israeli taxpayers, are generally subject to withholding of tax at the source at a rate ranging between 20 and 25 per cent, unless a specific exemption is applicable under the Ordinance or a specific treaty. Even if a specific exemption does apply, in practice, a specific exemption certificate issued by the ITA may be required by the financial institutions in Israel effecting the relevant payment. It is customary to include a gross-up provision in the applicable lease or loan documentation, which, if properly drafted, should effectively mitigate the tax risk relating to withholding.

Value added tax

Section 2 of the Value Added Tax Law, 1975 (the VAT Law), provides that Israeli VAT (currently at 17 per cent) is imposed on a transaction in Israel and on the import of goods into Israel. This would apply to payments made in connection with a purchase or leasing of an aircraft and on interest payments related to loan payments on a financed aircraft. However, certain transactions are zero-rated for the purpose of VAT such as the sale of aircraft to a dealer (such as a lessee) whose business is the provision of regular flight services and in scheduled lines for the transportation of passengers or the transportation of cargo for consideration.

Under the VAT Law the party liable for payment of any VAT due on the importation of goods into Israel is the 'owner' of the goods, a term that is defined in a very broad manner and thus may apply to both the lessor and lessee.

Capital gains tax

Any sale of an aircraft may also be subject to capital gains tax in Israel and the delivery mechanisms should be constructed accordingly to mitigate any such risk.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

There are no exchange controls or restrictions regarding international payments under Israeli law that are specific to civil aviation financing.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

Under the Regulation of Non-Bank Loans Law, 1993, which governs loans granted by lenders that are not Israeli 'banking corporations' or 'auxiliary corporations', the amount of default interest charged may not exceed one-fifth of the actual cost of the credit. In addition, the Interest Law, 1957, authorises the Minister of Finance to determine the maximum rate of interest that a lender may receive from a borrower (currently limited to 17 per cent).

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

There may be customs duties payable in connection with the importation of aircraft depending on the category of aircraft and on whether the importation is on a temporary or permanent basis. Additionally, there may be additional customs charges and fees in relation to the importation of the aircraft. The party liable for payment of any customs due on the importation of goods into Israel is the owner of the goods, a term which is defined in a very broad manner to include a lessee. If the lessee fails to pay such customs (if applicable), the actual owner may have liability, which could be assessed in rem against the asset.

There may be costs relating to the exportation of the aircraft specifically in relation to deregistration of the aircraft.

Insurance and reinsurance**29 Captive insurance**

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

There is no captive insurance regime in Israel relating to aircraft. Local practice for aircraft used in international transport is to place insurance in the international markets.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

As a matter of general contract law a cut-through clause should be enforceable if properly drafted in a manner clearly establishing privity.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

If the assignment of reinsurance is properly drafted and proper notice is provided, an assignment of reinsurance should typically be recognised by the courts.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

The owner of an asset or its financier may be liable in tort or on other grounds in Israel for damages caused in connection with the operation of the aircraft or the activities of the operator if sufficient linkage is established between the damage caused and the acts or omissions of the relevant entity under general principles of tort laws.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

Israel has not adopted a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft. However, if the lessor is deemed the importer of the aircraft into Israel it may have exposure under the Defective Products Liability Law, 1980.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

Currently there are no minimum requirements for the amount of third-party liability cover; however, there are draft regulations on this subject matter in circulation.

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Italy has ratified and is a party to the following mayor air law treaties:

- the Rome Convention of 1933 for the unification of certain rules relating to damage caused by aircraft to third parties on the surface;
- the Chicago Convention of 1944 on international civil aviation;
- the Geneva Convention of 1948 on the recognition of rights in aircraft;
- the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards; and
- the Montreal Convention of 1999 for the Unification of Certain Rules for International Carriage by Air.

Italy has signed, but has not yet ratified, the Cape Town Convention of 2001 on international interests in mobile equipment and the related Protocol on Matters specific to Aircraft Equipment. Therefore, at present the said Convention and Protocol do not apply to Italian-registered aircraft.

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The principal rules and provisions governing the aviation sector (including financing, leasing, ownership, securities, registration, operation and liability in connection with civil aircraft) are set out by the Italian Civil Code and the Italian Navigation Code.

Other relevant laws for the aviation sector are the following:

- Legislative Decree No. 185/2005, implementing Directive 2000/79/EC concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation;
- Legislative Decree No. 69/2006, implementing fines for breach of EC Regulation No. 261/2004 on compensation and assistance to passengers in the event of denied boarding, flight cancellations or long delays to flights;
- Legislative Decree No. 197/2007, implementing fines for breach of EC Regulation No. 785/2004 on insurance requirements for air carriers and aircraft operators;
- Ministerial Decree dated 10 December 2008, providing guidelines in the matter of fares of airport services rendered on an exclusive basis; and
- Legislative Decree No. 24/2009, implementing fines for breach of EC Regulation No. 1107/2006 on the rights of disabled persons and persons with reduced mobility when travelling by air.

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

As a general principle, the parties are free to specify the applicable law for contracts concerning the transfer of aircraft title, aircraft leasing and creation of security over aircraft. In order to be recognised and enforceable within the Italian system, contractual terms and conditions must be compliant with Italian public order rules (public policy). The concept of public policy includes, among others, the Italian Constitution, public safety regulations and mandatory provisions arising by operation of Italian law.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

The transfer of title in an aircraft registered with the Italian Aircraft Registry is perfected by means of the execution of a bilateral agreement between the seller and the buyer. Pursuant to article 2684 of the Italian Civil Code and article 865 of the Italian Navigation Code, a bilateral aircraft sale and purchase agreement must be also filed with the Italian Aircraft Registry in order to be opposed to any third party (effects of public disclosure).

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

An aircraft sale and purchase agreement must be in writing, notarised (meaning that an Italian Public Notary must certify the identity and powers of the relevant signatories), filed with the Italian Public Registry of Private Deeds and thereafter with the Italian Aircraft Registry.

An aircraft sale and purchase agreement can also be executed abroad by the parties and notarised by a foreign notary public. If so, such foreign notarised agreement (and apostilled, if required) shall be submitted to an Italian notary public along with a sworn translation into Italian, and then filed with the Italian Public Registry of Private Deeds as well as with the Italian Aircraft Registry.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

The Italian Aircraft Registry is held by the Italian Civil Aviation Authority (ENAC). It is an owner registry in which aircraft operators can also be registered (if other than the owner). The following information is recorded in the Aircraft Registry:

- manufacturer, type, model, manufacturer's serial number and marks of the aircraft;
- name and legal seat of the owner;
- name and legal seat of the operator (if other than the owner); and
- mortgage details (if any).

On the basis of article 83-bis of the International Civil Aviation Organization Convention, Italy has entered into several bilateral arrangements with other countries in respect of the transfer of functions, tasks and liabilities for the surveillance of the operations, personnel and continuing airworthiness of foreign-registered aircraft. In practice the most-used arrangements are the ones in place with, respectively, Ireland and Austria.

There is no separate registry for aircraft engines in Italy.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

An ownership interest can be registered with the Italian Aircraft Registry. Pursuant to article 750 of the Italian Navigation Code, aircraft can be registered with the Italian Aircraft Registry provided that certain nationality requirements are met. In particular – to satisfy the nationality requirements for the registration with the Aircraft Registry – the aircraft must be wholly or mainly the property of:

- state, regions, provinces, municipalities and any other Italian or EU member states' public or private body;
- Italian citizens or citizens of other EU member states; or
- companies established or with registered offices in Italy or other EU member states, whose share capital is the whole or major property of Italian or other EU member states' citizens, or Italian or other EU member states' body corporate with the same characteristics of shareholding and whose president and most part of the directors, including the managing director are Italian or other EU member states' citizens.

If the nationality requirements are met the relevant aircraft is registered with the Aircraft Registry in the name of the aircraft owner.

Pursuant to the second paragraph of article 756 of the Italian Navigation Code, if an aircraft owner does not meet the nationality requirements, ENAC may allow the registration of aircraft that are effectively used by, but not property of, companies holding a EU air carrier licence. In such case, the aircraft is registered in the name of the EU operator, and the title – based upon which the registration is made (such as a lease) – shall result from the Aircraft Registry and from the certificate of registration of the relevant aircraft, along with details of the aircraft owner that are also recorded with the Aircraft Registry and also mentioned on the certificate of registration of the relevant aircraft.

A lease interest can be registered with the Italian Aircraft Registry by submitting to ENAC a copy of the relevant lease agreement previously filed with the Italian Public Registry of Private Deeds (if such lease agreement were in a foreign language the said Registry and ENAC would require a sworn translation into Italian thereof).

The Italian Aircraft Registry is the sole registry where an ownership interest in an aircraft can be registered. Owing to the fact that there is no separate registry for aircraft engines in Italy, as a general principle engines are supposed to be property of the owner of the aircraft on which they are installed, unless a different ownership interest can be proven in accordance with Italian laws. In that respect, pursuant to article 247 of the Italian Navigation Code, the ownership interest in any separable part of aircraft (including engines) is valid and can be enforced against the owner of the aircraft (and against any third party) whether such interest is reflected either in a deed with an undisputable date (such as a bill of sale or a recognition agreement) or in the aircraft certificate of registration (which is not common practice with ENAC).

8 Registration of ownership interests

Summarise the process to register an ownership interest.

There is a list of documents and forms to be recorded with ENAC in order to register an aircraft with the Italian Aircraft Registry or perfect a transfer of title thereunder.

For an aircraft registration, the filing of the following documents, among others, is required:

- the application for registration signed by the owner;
- a notarised (and apostilled, if required) deed giving evidence of the ownership interest in the aircraft (see questions 4 and 5);
- an updated extract of the owner from the competent Chamber of Commerce;
- a certificate of non-registration (for new aircraft) or a certificate of deregistration (for used aircraft) issued by the Civil Aviation Authority of the aircraft's country of origin; and
- a copy of the application for the issuance of the aircraft certificate of airworthiness by the ENAC Operational Department.

The ENAC fees for an aircraft registration are equal to €106 for aircraft with maximum take-off weight (MTOW) of less than 5,700kg; and €206 for aircraft with MTOW equal to or higher than 5,700kg.

For a transfer of title in an aircraft, the filing of the following documents, among others, is required:

- the application for transfer of title signed by the buyer;
- a notarised (and apostilled, if required) deed giving evidence of the transfer of title in the aircraft (see questions 4 and 5);
- an updated extract of the buyer from the competent Chamber of Commerce;
- a certified copy of the minutes of the seller's board of directors resolving to sell the aircraft; and
- the original certificate of registration of the aircraft.

The ENAC fees for a transfer of title in an aircraft are equal to €110.

See question 7 regarding the title to an engine.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

The registration of aircraft with the Italian Aircraft Registry serves as a proof of title toward any third party (effects of public disclosure), which can rely on the ownership interest recorded with the Registry and reflected on the aircraft certificate of registration.

Any third party can challenge an ownership interest recorded with the Italian Aircraft Registry by way of a legal action before the courts, arguing the lack of – or the defective – title in the relevant aircraft and filing proper evidence to support the challenge.

10 Registration of lease interests

Summarise the process to register a lease interest.

A lease interest can be registered with the Italian Aircraft Registry by submitting to ENAC a copy of the relevant lease agreement previously filed with the Italian Public Registry of Private Deeds (if such lease agreement was in a foreign language the said Registry and ENAC would require a sworn translation into Italian thereof).

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

The aircraft certificate of registration is issued by ENAC as soon as the registration process with the Italian Aircraft Registry is completed. The certificate contains the following information:

- the date of registration;
- the manufacturer, type, model, manufacturer's serial number and marks of the aircraft;
- the name and legal seat of the owner;
- the name and legal seat of the operator (if other than the owner); and
- the mortgage details (if any).

As previously mentioned, there is no separate registry for aircraft engines in Italy nor the issuance of a separate engine certificate of registration. Engine details are not reflected on the certificate of registration. See question 7 regarding aircraft engines.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

Yes, the deregistration and export of an aircraft cannot be made without the consent of the owner or the mortgagee. Indeed, the owner is the sole party entitled to decide as to whether or not to move the aircraft to a foreign registry (eg, for sale to another party or for logistics reasons) and ENAC requires the prior release of any recorded mortgage by the relevant mortgagee in order to deregister an aircraft from the Italian Aircraft Registry.

The operator cannot block an aircraft deregistration or export to the extent that the aircraft is registered in the name of the owner. However, it must be taken into account that the original certificate of registration is mandatorily kept on board the aircraft by the operator and the same certificate is required by ENAC to complete the deregistration process (see questions 22 and 23 regarding aircraft repossession).

On the other hand, if the aircraft is registered in the name of the operator and the latter does not cooperate in the deregistration process, then ENAC may require satisfactory evidence that the operator is in breach of its obligations under the lease and, as a consequence thereof, the leasing has been lawfully terminated. ENAC may also require that such evidence be a judicial decision from the Italian or foreign competent courts.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

As a general note, a deregistration and export power of attorney enables the relevant attorneys to freely deregister and export the aircraft from Italy to the extent that the operator or grantor cooperates in the process (see question 12).

In addition, a power of attorney expressed to be irrevocable may nevertheless be revoked under certain circumstances for 'cause' in accordance to article 1723 of the Italian Civil Code. Furthermore, a power of attorney would not survive the grantor's insolvency and may also be limited in circumstances of conflict of interest.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

The Cape Town Convention is not effective in Italy, as the Italian legislator has not yet ratified it.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

A mortgage is the sole security interest that can be voluntarily created over an aircraft. Pursuant to article 1030 of the Italian Navigation Code, a mortgage must be recorded with the Italian Aircraft Registry and reflected on the aircraft certificate of registration.

A mortgage must be in the Italian language and contain, among others: the name and legal seat of the mortgagor and the mortgagee; type, model, marks and manufacturer's serial number of the aircraft over which the security is recorded; and the secured amount.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

A mortgage on an aircraft can only be created by means of a public deed executed by the aircraft owner (mortgagor), certified by a notary public and then registered with the Italian Aircraft Registry.

The costs associated with the creation of a mortgage include the notary public's fees for the execution and notarisation of the mortgage and the ENAC fees for registering the mortgage with the Italian Aircraft Registry (both varying on the basis of the secured amount specified in the mortgage deed). In addition, the perfection of a mortgage attracts a registration tax in the flat amount of €200 (if the mortgage is granted directly by the borrower to the lender) or, otherwise, in the proportional amount equal to 0.5 per cent of the sum secured by the mortgage.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

Yes, the mortgage deed must be registered with the Italian Aircraft Registry as a condition to its effective creation against the debtor and third parties. Failing such registration means that the mortgage is null and void, as if it had never come into existence.

The process to register a mortgage requires, at first, the execution of a mortgage deed by the aircraft owner (mortgagor) before a notary public. Subsequently the notarised mortgage deed must be filed with the Italian Aircraft Registry along with:

- an application for registration, signed by the mortgagor;
- two enrolment notes (summarising details of the mortgagor, the mortgagee, the aircraft and the secured amount); and
- the original certificate of registration of the aircraft.

18 Registration of security

How is registration of a security interest certified?

The existence of a mortgage is certified by way of the registration with the Italian Aircraft Registry and the relevant note on the aircraft certificate of registration, which is duly updated and reissued by ENAC upon the notarised mortgage being submitted to ENAC by the mortgagor.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

Under Italian law the main effects of the registration of a mortgage are the following:

- to provide public notice of the existence of the mortgage toward any third party;
- to grant the mortgagee with security and priority over all subsequent mortgages (ie, mortgages with a lower rank);
- to create a right in rem over the aircraft in favour of the mortgagee;
- to prevent any modifications to the essential features of the aircraft being made without the mortgagee's prior express consent; and
- to prevent the deregistration of the aircraft without the prior release or cancellation of the mortgage.

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

The financing of Italian-registered aircraft is structured either by way of financial leases (ie, the ownership is kept by the lender acting as financial lessor) or by way of loan agreements secured by mortgages over the aircraft (ie, the borrower or owner grants a mortgage to the lender).

As a general remark, the Italian laws recognise the concept of trust. Italy is party to the Hague Convention of 1985 on the law applicable to trusts and on their recognition (ratified by Law No. 364 of 16 October 1989). Nevertheless, notwithstanding the implementation of the Hague Convention, the concept and the role of a trust are not often utilised within the Italian system. On the other hand, a trust acting on behalf of foreign lenders is a common mechanism in cross-border lease and financing transactions involving Italian aircraft operators, to the extent that the same does not have the effect of breaching rules of Italian public policy. On such basis, the role of a trust is recognised in Italy and indeed an aircraft ownership can be registered in the name of a foreign trust with the Italian Aircraft Registry. Also, an aircraft mortgage

can be granted in favour of foreign trusts acting as mortgagees not in their individual capacity but in representation of a pool of lenders.

In case of a change to the security or its beneficiaries, as a general principle the execution of novation or assignment agreements would be required under the Italian laws.

As far as the nature of an aircraft security, mortgages over Italian-registered aircraft are considered to be a right in rem rather than in personam, as they are attached over the asset and not over the asset's beneficiary. Therefore, mortgages stay on the ownership of the aircraft, regardless of the identity of the aircraft owner. On the contrary, a mortgage interest cannot be assigned by the mortgagee, unless in conjunction with the assignment of the mortgagee's credit behind the grant of the mortgage. If so, pursuant to article 2843 of the Italian Civil Code, the transfer of the mortgage interest to the assignee is effective upon recordation of the relevant credit assignment with the Italian Aircraft Registry.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

Under Italian laws engines are considered to be part of an aircraft, even if materially separate. There is no specific public register for engines, but rather for the aircraft in its entirety (ie, the Italian Aircraft Registry). Accordingly, pursuant to article 1029 of the Italian Navigation Code, a mortgage recorded over an aircraft encumbers as well on its appurtenances and separate parts (including engines), irrespective of whether they are installed on the airframe or not. The sole exception to the mentioned rule is when the ownership interest in an engine is from a party different from the aircraft owner and such ownership interest is reflected either in a deed having undisputable date (such as a bill of sale or a recognition agreement) or in the aircraft certificate of registration (which is not common practice with ENAC). If a different ownership interest can be proven by one of the said means, then the aircraft mortgage does not affect the engine.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

There are no self-help remedies available in Italy for the owner or lessor to repossess an aircraft following a lease termination, at least to the extent that such remedies would entitle the enforcing party to take measures without a court-supervised procedure. Indeed, under the Italian laws a judicial order of the competent court is necessary to take possession of the aircraft in case of non-cooperation by the relevant lessee. Therefore, the owner or lessor may either enforce a foreign judgment in Italy (as long as such judgment is recognised by the Italian system) or act before the Italian competent court claiming:

- an injunction of return of the aircraft pursuant to article 633 of the Italian Civil Procedure Code, which can be granted *inaudita altera parte* (ie, without notice to the lessee) and either immediately enforceable or subject to a waiting period of 40 days for possible objection by the lessee; and/or
- precautionary measures (including seizure or attachment of the aircraft).

The lessee may oppose the issuance of the said measures by counter-arguing and providing evidence that the owner or lessor is not entitled to claim the aircraft repossession (for instance, because the lease would not be terminated or no event default would exist). As a general principle, the insolvency of the lessee and the absence of disputes about the lessee's default or the like would expedite the repossession process, while – on the contrary – disputes about sums to be paid, or the claimant's right to repossess or the existence of any default under the lease, would slow the process.

The above measures – if and when granted or recognised by the Italian competent court – are materially enforced on Italian territory by taking physical repossession of the aircraft through the assistance of the competent court bailiff.

23 Enforcement of security

Outline the basic measures to enforce a security interest.

How may the owner lawfully impede the mortgagee's right to enforce?

Self-help remedies are not permitted to enforce a security interest, likewise in the event of a lease termination. Therefore, any action carried out by the secured parties against the aircraft (or against its owner) must be taken by way of the judicial system. In particular, a mortgagee could start an enforcement action pursuant to the rules set out by the Italian Civil Procedure Code, asking the competent court to order the sale of the aircraft by public auction and then satisfy the mortgagee's credit through the assignment of the relevant sale proceeds (or a quota thereof).

It must also be noted that in no circumstances can the parties agree on the transfer of title of the encumbered aircraft to the mortgagee in the event the mortgagor is in default of its obligations under the relevant agreement (eg, loan, credit facility). Any similar arrangement between the mortgagor and the mortgage is null and void pursuant to article 2744 of the Italian Civil Code.

Regarding the effect of an insolvency upon a creditor's enforcement right, consider that, pursuant to article 168 of the Italian Bankruptcy Law (Royal Decree No. 267 dated 16 March 1942, as subsequently amended and supplemented from time to time), no enforcement and precautionary measures can be commenced or continued by any creditor against the assets of the insolvent company after the relevant insolvency procedure has started ('stay of proceeding' rule).

The aircraft owner may lawfully impede the mortgagee's enforcement by challenging such remedy before the competent court and providing proper evidence that the secured party has not got the right to proceed (eg, because no default has occurred under the financing or the relevant credit or interest have been fully repaid).

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

Specific liens and rights have priority over both aircraft ownership and aircraft mortgage interest pursuant to article 1023 of the Italian Navigation Code and include, among others, the following:

- judicial costs due to the state;
- expenses incurred in the common interest of the creditors for enforcement measures against the aircraft (including enforcement procedures (ie, the judicial procedure for the sale of the aircraft by public auction before the court));
- wages of the captain and the crew;
- airport duties and similar charges and taxes;
- indemnities and rewards for giving assistance to, and the rescue of, the aircraft; and
- compensations for death or bodily injury of passengers or for loss of the cargo or the baggage.

In addition, pursuant to Law No. 324 dated 5 May 1976, the aircraft owner is jointly liable with the operator for any unpaid duties, charges, taxes and interest due for flight operations to and from the Italian airports.

Pursuant to article 802 of the Italian Navigation Code, ENAC can prevent the aircraft from taking off, by warning the airport manager or ENAV (ie, the Italian Air Traffic Control Authority), in the event of any default in the payment of taxes, duties or fees, including charges for landing, take-off and parking of aircraft; taxes for cargo loading and unloading; fees for the supply of handling services; and fees pertaining to ENAV (such as overflight or terminal charges).

The Italian government and other public authorities may confiscate or requisition an aircraft if such measure is because of a matter of serious public interest or for military needs. In these circumstances the aircraft owner is fairly compensated.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

As a general rule, Italian VAT applies on the sale of goods (including aircraft) and the supply of services (including leases) that are finalised in Italy between business entities, as well as on the importation of goods from a non-European country to Italy. The current VAT standard rate is 22 per cent.

Referring to prospective tax liabilities arising in Italy for foreign lessors leasing aircraft to Italian operators, as a general rule we note that lease rents attract Italian income taxes (the current rate of corporate income tax is 27.5 per cent). This general rule applies when aircraft are taken on lease from foreign lessors, to the extent that Italy and the lessor's country of origin have not concluded a taxation treaty providing for a different taxation regime. Indeed, the Italian government has entered into several tax treaties with foreign countries to avoid the double taxation on income and to prevent fraud or fiscal evasion.

For instance, the convention executed between Italy and the United States has fixed a reduced rate at 5 per cent of the lease rents, while under the convention between Italy and the United Kingdom the rate is equal to 8 per cent of the lease rents. Other treaties (such as those executed between Italy and, respectively, Austria and Ireland) provide a tax exemption on the payment of lease rents as long as specific requirements are met by the lessors.

Gross-up clauses provided in respect of lease rents payments are effective and commonly agreed for leasing transactions between foreign lessors and Italian operators.

As a general principle, the leasing of aircraft is subject to a VAT regime. VAT is actually not assessed on payments to be made under a lease if the relevant lessee qualifies as an international airline (ie, it chiefly operates its flights for profit on international routes).

Sales of aircraft located in Italy attract VAT at the same rate. VAT does not apply if the sold aircraft is subsequently exported by the buyer within 90 days of the closing date of the relevant transaction. VAT also does not apply if an aircraft is purchased by an airline qualifying as an international carrier, meaning that most of its flights are chiefly operated for reward on international routes.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

No restriction on international payments or exchange controls exist in Italy. Therefore, proceeds or other payments arising from contracts or liability in turn can be freely remitted abroad.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

Under the Italian system (Law No. 108/1996) (the Usury Law), limitations to default interests are calculated by increasing the global average effective rates established by the Bank of Italy (TEGM) of one-quarter plus a fixed rate of 4 per cent. In any case, the difference between a default interest and the Bank of Italy's TEGM cannot exceed 8 per cent (usury limitations).

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

As a general rule, the importation of aircraft from non-European countries into Italy is subject to VAT at the standard rate of 22 per cent. The owner and importer of the aircraft is responsible for paying VAT, provided that any other party with an interest in the importation (such as the foreign seller or lessor) is deemed liable for such payments by the Italian Tax Authority and the product is not released by customs until the payments are made.

An exemption from the aforementioned rule is established when the importation into Italy is carried out by an international airline (ie, it chiefly operates flights for profit on international routes).

On the other hand, no customs duties are due for the importation of civil aircraft, irrespective of whether they are imported by a qualified international airline or otherwise.

Insurance and reinsurance

29 Captive insurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

The insurance regime applicable in Italy is that set out by the European legal framework for all EU member states (mainly EC Regulation No. 785/2004, as amended by EU Regulation No. 285/2010). Accordingly, the Italian laws and regulations on aviation insurance are meant to reflect and implement the EU legislation.

Insurance for civil aircraft can be placed with Italian or foreign insurers at the operator's own choice, as long as the relevant insurers are duly licensed to run their business and the agreed coverage is compliant with the requirements set out by the aforementioned EU legal framework in respect of passengers, baggage, cargo and third parties. It is noteworthy that the EU legislation applies to all airlines and aircraft operators flying into, out of, or over the territory of an EU member state, irrespective of their nationality.



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30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Generally speaking, yes, cut-through clauses under insurance and reinsurance documentation are legally effective in Italy.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Assignments of reinsurance are typically executed in connection with aircraft leasing and finance transactions, always provided that – as a general principle – any assignment of rights against an Italian debtor is legally effective upon the assignment being duly notified to, or accepted by, the debtor, pursuant to article 1264 of the Italian Civil Code.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

An owner, lessor or financier is not liable for the operation of the aircraft or the activities of the operator as long as the statement of the operator is duly rendered by the aircraft operator and recorded with the Italian Aircraft Registry, pursuant to article 874 of the Italian Navigation Code. Once the said statement is recorded with the Italian Aircraft Registry, the operator is exclusively liable for the operation, maintenance and insurance of the aircraft.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

Generally speaking, no, provided the considerations on priority liens and rights arising by operation of law, mentioned in question 24, are complied with.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

Airlines and aircraft operators shall be insured in accordance with EC Regulation No. 785/2004 (as amended by EU Regulation No. 285/2010) with regard to their aviation-specific liability for passengers, baggage, cargo and third parties. The insured risks shall include acts of war, terrorism, hijacking, acts of sabotage, unlawful seizure of aircraft and civil commotion. In particular:

- for liability in respect of passengers, the minimum insurance cover shall be 250,000 special drawing rights (SDRs) per passenger (at present, approximately equal to €322,172);
- for liability in respect of baggage, the minimum insurance cover shall be 1,131 SDRs per passenger in commercial operations (at present, approximately equal to €1,457);
- for liability in respect of cargo, the minimum insurance cover shall be 19 SDRs (at present, approximately equal to €24); and
- for liability in respect of third parties, the minimum insurance cover per accident is determined on the basis of the aircraft MTOW (for instance, aircraft between 50 and 200 tonnes shall be insured for €386 million and aircraft over 500 tonnes shall be insured for €902 million).

Japan

Katsu Sengoku and Kentaro Miyagi

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Japan has ratified the Chicago Convention (1944), the New York Convention (1958) and the Montreal Convention (1999) but has not ratified the Rome Convention (1933), the Geneva Convention (1948) or the Cape Town Convention (2001).

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The Civil Aeronautics Act (Act No. 231 of 1952) (together with the orders and regulations thereunder) generally regulates matters related to civil aviation activities (including the registration system for aircraft), implementing the Chicago Convention. The Aircraft Mortgage Act (Act No. 66 of 1953) provides for security interests in aircraft and the registrations thereof. The Aircraft Registration Cabinet Order (Cabinet Order No. 296 of 1953) (together with the regulations thereunder) provides the rules for the registration of aircraft and aircraft mortgages. Apart from the registration of aircraft and aircraft mortgages, the foregoing legislation does not particularly regulate aviation finance and leasing, to which general civil and commercial laws (including the Civil Code (Act No. 89 of 1896) and the Commercial Code (Act No. 48 of 1899)) are applicable. Unless otherwise mentioned, 'aircraft' means aircraft registered (or to be registered) in Japan with the aircraft registry maintained by the Ministry of Land, Infrastructure, Transport and Tourism of Japan (the Aeronautics Authority) subject to the legislation set out above.

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Article 13 of the Act on General Rules for Application of Laws (Act No. 78 of 2006) provides that property rights over moveable or immoveable assets and any other registrable rights shall be governed by the law of the jurisdiction where the assets subject to those rights are located and that acquisition or loss of those rights shall be governed by the law of the jurisdiction where the relevant assets are located at the time such acquisition or loss is factually complete. It is not clear whether article 13 directly applies to matters related to aircraft. The prevailing view is that a transfer of title to or creation of a mortgage on aircraft would be governed by the law of the state of registration, but there is a possibility that a Japanese court would look to the law of the jurisdiction where the aircraft location is considered more relevant than its registration. Therefore, a transfer of title to, or creation of a mortgage on (and the rights and remedies of the mortgagee thereunder), an aircraft registered and located in Japan would be governed by Japanese law. If an aircraft is registered (or, in certain cases, located) outside Japan, the laws of the relevant jurisdiction would govern the title transfer and creation of the mortgage.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

Title to an aircraft is transferred by the seller's disposition, which is usually evidenced by a bill of sale. See question 9 regarding the perfection of transfers.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

There are no specific formality requirements for a transfer document, but it must be issued by the owner and must specify the purchaser, the aircraft to be transferred, the transfer date and the seller's agreement to transfer title to the purchaser. For the purpose of registration with the aircraft registry, a Japanese translation also needs to accompany a transfer document written in English or languages other than Japanese. In addition, if a transfer document is issued by a foreign entity or person, it should be publicly notarised. A transfer document executed in Japan is subject to stamp duty in an amount tied to the purchase price shown thereon. If the purchase price is not shown thereon, the amount of the required stamp duty is ¥200.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

The aircraft registry in Japan is maintained by the Aeronautics Authority. The aircraft registry is an owner registry, and the interests of operators or lessees in aircraft cannot be registered. The aircraft registry is open to the public and anyone may access it and obtain an official certificate of entry for a nominal administrative charge.

There are no well-used 83-bis arrangements between Japan and other jurisdictions. Japan has not yet entered into such arrangements with other jurisdictions. The aircraft registry is for the registration of aircraft and there is no engine-specific registration system in Japan.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

An aircraft with foreign nationality cannot be registered in Japan. Any person described below will not be eligible for ownership registration (ownership requirements):

- an individual without Japanese nationality;
- a foreign state or a foreign governmental entity or its equivalent;
- a juridical person or other association established under the laws of a foreign jurisdiction; or
- a juridical person whose representative falls under any of the above or one-third or more of whose directors or voting shares fall under, or are held by, any person falling under any of the above.

Owing to these ownership requirements, a foreign owner of an aircraft (such as an operating lessor established outside Japan) cannot register its ownership with the aircraft registry. To enable a foreign owner to lease an aircraft registered to a Japanese operator in Japan, there is an established practice of nominating a special purpose vehicle that satisfies the ownership requirements to hold title to such aircraft.

Neither lease interests in, nor lease agreements for, aircraft can be registered with the aircraft registry. As there is no registration system for interests in aircraft engines in Japan, the interests of owners, operators and lessees in aircraft engines cannot be registered with the aircraft registry (see question 21).

8 Registration of ownership interests

Summarise the process to register an ownership interest.

An application for registration with the aircraft registry of an ownership interest in an aircraft must be made by the new owner of the aircraft (or its attorney) and is required to describe the following particulars:

- the type and model of the aircraft;
- the manufacturer of the aircraft;
- the manufacturer's serial number of the aircraft;
- the home base of the aircraft;
- the registration mark of the aircraft (if already given);
- the name and address of the applicant;
- the name and address of the attorney of the applicant (if the application is made by an attorney);
- the grounds for registration and the date thereof;
- the purpose of registration;
- the date of the application; and
- the amount of the applicable registration tax and the tonnage of the aircraft.

The supporting documents that need to be submitted to the Aeronautics Authority (in the case of initial registration in Japan by a corporate owner of an imported aircraft) are as follows:

- a power of attorney issued by the applicant (if the application is made by an attorney);
- an original and a copy of the certificate of airworthiness for export, issued by the exporter's country;
- a notarised bill of sale issued by the seller or manufacturer;
- a certificate of non-registration issued by the exporter's country;
- a seal certificate of the representative of the new owner (issued within the last three months);
- a commercial registration certificate of the new owner (issued within the last three months);
- evidence of the home base of the aircraft (such as an original permission letter issued by an airport operator);
- evidence of the aircraft's weight;
- an official payment slip of the registration tax (if the registration tax exceeds ¥30,000); and
- documents evidencing that the new owner satisfies the ownership requirements. (The Aeronautics Authority might require further documents for registration.)

The registration tax will be in the amount of ¥30,000 per tonne. According to the Aeronautics Authority, it usually takes one week from the application date to obtain an official transcript of entry of ownership of the aircraft. Unless otherwise specifically agreed, title to an engine automatically accompanies a transfer of the ownership interest in the host aircraft and vests in the new owner of that aircraft if the aircraft and the engine are owned by the same person.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

Registration is not a requirement for the effectiveness of the transfer of an ownership interest in an aircraft, therefore, the transfer can be effective without registration of the ownership interest (provided that a new owner of a Japanese-registered aircraft is required to apply for the transfer of the registration for the aircraft within 15 days of the transfer, and failure to do so could trigger a non-penal fine of up to ¥300,000). However, registration of an ownership interest in an aircraft has the

effect of perfecting the transfer of the same as against third parties (such as competing transferees and bankruptcy trustees). Accordingly, a transferee of an aircraft cannot assert its ownership if another person receives a competing transfer and completes its registration first. On the other hand, although registration requires a number of supporting documents, which would enhance the trustworthiness of the aircraft registry, its accuracy is not officially guaranteed. Accordingly, as a general rule, a person who purchased an aircraft from a seller who is not the real owner does not acquire an effective ownership interest in the aircraft even if such seller was shown as the registered owner in the aircraft registry.

10 Registration of lease interests

Summarise the process to register a lease interest.

No registration system for lease interests exists in Japan.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

When an aircraft is initially registered in Japan, the Aeronautics Authority issues to the applicant a certificate of registration, which must be kept on board the aircraft. The certificate of registration shows the following:

- the nationality mark and registration mark;
- the manufacturer and manufacturer's designation (ie, the type and model) of the aircraft;
- the aircraft serial number;
- the name of the owner; and
- the address of the owner.

However, the certificate does not show the owner's, operator's or any mortgagees' interests in the aircraft. No separate engine certificate of registration will be issued.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

An aircraft can be deregistered by the owner submitting an application for deregistration with the supporting documents to the Aeronautics Authority. When applying for such deregistration, the owner needs to submit a consent letter from any party having registered interests in the aircraft (such as a registered mortgagee) to the Aeronautics Authority unless the deregistration is mandatorily required owing to a total loss of the aircraft or non-satisfaction of the ownership requirements. Therefore, a registered mortgagee may block the proposed deregistration, but a lessee cannot do the same as leasehold interests cannot be registered. In addition, if the aircraft needs to be deregistered because of non-satisfaction of the ownership requirements, the Aeronautics Authority will notify the mortgagee of the aircraft to give them an opportunity to enforce the mortgage. The mortgagee will be given three months to commence the enforcement procedures, during which time the Aeronautics Authority will suspend the deregistration.

The export of an aircraft from Japan is to be made by obtaining an export permit from the Director-General of customs. An application for such permit must be accompanied by supporting documents, including the relevant invoice and the permits, approvals and certificates required under export and other laws and regulations. No consent of the mortgagee or the operator is required for the export. In the event that the aircraft is to be exported to certain restricted countries, export permission from the Ministry of Economy, Trade and Industry may be required under the Foreign Exchange and Foreign Trade Act (Act No. 228 of 1949).

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

A deregistration power of attorney in Japan is to be granted by the owner of the aircraft and addressed to the Aeronautics Authority. Once it is effectively issued, it will authorise the attorney or attorneys named therein to act in accordance with the terms thereof. However,

under the current practice of the Aeronautics Authority, a deregistration power of attorney dated within three months prior to the application for deregistration would be required, and an application for the deregistration would need to be accompanied by the commercial registration certificate and the seal certificate of the owner, each issued within three months of the application for deregistration.

A deregistration power of attorney may be revoked regardless of a statement to the effect that it is irrevocable if a justifiable reason is shown.

The matters related to export are handled by customs and not by the Aeronautics Authority. The authorisation for the registration and the export may be included in one power of attorney.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

Japan has not ratified the Cape Town Convention.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

The typical form of a security over the aircraft is an aircraft mortgage. There are two types of aircraft mortgages: ordinary mortgages, which secure specified obligations, and revolving mortgages, which secure unspecified obligations falling under a certain agreed scope up to the agreed maximum secured amount. An ordinary mortgage secures the principal of the secured obligation together with interest and default interest accrued thereon during the two years prior to the commencement of its court sale (see question 23 regarding court sales in Japan), whereas a revolving mortgage secures the principal of the secured obligation together with interest and default interest accrued thereon up to the pre-agreed maximum secured amount. With respect to a revolving mortgage, crystallisation of the secured obligations is necessary before it can be enforced.

An aircraft mortgage may be created by an agreement between the mortgagor and the mortgagee. To create an effective aircraft mortgage, the mortgage agreement needs to specify the aircraft subject to the mortgage and (in the case of an ordinary mortgage) the secured obligations or (in the case of a revolving mortgage) the scope of the secured obligations. There is no language requirement for a Japanese mortgage, and there is no specified form for it. However, for the purpose of registering a mortgage, certain economic conditions of the secured obligations need to be specified (see question 17).

A mortgage can be registered in two ways. A full registration of an aircraft mortgage effectively perfects the mortgage as against third parties. A provisional registration will also be available and will confer priority over subsequently registered security interests but will need to be converted into (typically by both the mortgagor and the mortgagee) a full registration before the mortgage can be enforced. Owing to the nominal amount of registration tax enforced to provisionally register an aircraft mortgage, it is common to keep the registration of an aircraft mortgage provisional until an actual credit risk involving the mortgagor occurs. To provisionally register an aircraft mortgage, in practice a mortgage option agreement is prepared for registration purposes in which an aircraft mortgage is created upon the mortgagee's exercise of an option.

An aircraft registered in Japan cannot be the subject of a pledge (article 23 of the Aircraft Mortgage Act). Although it is possible to create a security interest in an aircraft by way of collateral assignment or provisional registration of a transfer of ownership interest, such alternative security interests are not common in Japan owing to the relatively high registration taxes and the ownership requirements for the transferees.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

A mortgage does not need to be notarised, legalised or stamped to be enforceable. When registering a mortgage under a foreign language

mortgage agreement, a Japanese translation needs to be filed with the Aeronautics Authority. Likewise, in order to commence court proceedings in connection with a mortgage agreement, its Japanese translation must be submitted to the court. For the matters covered by a mortgage agreement, see question 15. There are no documentary costs, such as stamp duties, imposed on aircraft mortgages. See question 17 regarding the registration tax on an aircraft mortgage.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

Registration of a mortgage is not a condition to its effective creation but is required for its perfection as against third parties.

An application for registration of an ordinary mortgage with the aircraft registry must be made jointly by both the mortgagee and the mortgagor, and the application form needs to describe the amount to be secured, the interest rate (if relevant), any conditions to the secured obligations, and any special agreement on the scope of the coverage of the mortgage (if any part or engine of an aircraft is excluded from the coverage of the mortgage over the aircraft). In the case of a revolving mortgage, the application form needs to describe the scope of the secured obligations and the agreed maximum secured amount, any special agreement on the scope of the coverage of the mortgage (if any part or engine of an aircraft is excluded from the coverage of the mortgage over the aircraft), and any date of crystallisation, if agreed. If the obligor of the secured obligation is different from the mortgagor, the application also needs to describe the name and address of the obligor.

The supporting documents that need to be submitted to the Aeronautics Authority (in the case of registration by a corporate mortgagee and a corporate mortgagor) are as follows:

- powers of attorney issued by the mortgagor and the mortgagee (if the application is made by an attorney);
- seal certificates of the representatives of the mortgagor and the mortgagee (issued within the last three months) (or their equivalent for a foreign corporation);
- commercial registration certificates of the mortgagor and the mortgagee (issued within the last three months) (or their equivalent for a foreign corporation);
- an original and a copy of the mortgage agreement; and
- an official payment slip of the registration tax (if the registration tax exceeds ¥30,000). (The Aeronautics Authority might require further documents for the registration.)

The registration tax will be in the amount of 0.3 per cent of the amount of the secured obligations (or, in the case of a revolving mortgage, the maximum secured amount). On the other hand, the registration tax for provisional registration is ¥2,000 per aircraft, which is the main reason that provisional registrations are often used when registering an aircraft mortgage. According to the Aeronautics Authority, it usually takes one week from the application date to obtain an official transcript of entry of the mortgage.

18 Registration of security

How is registration of a security interest certified?

When the procedure for registration or provisional registration of a mortgage is completed, the entry will be made in the aircraft registry. An official transcript of entry of such updated aircraft registry will be available approximately one week after the application.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

A full registration of an aircraft mortgage will perfect the creation of the aircraft mortgage as against third parties (such as competing transferees, mortgagees and bankruptcy trustees) and confer priority over subsequently registered security interests. A provisional registration also confers priority over subsequently registered security interests but needs to be converted into a full registration before the aircraft mortgage can be enforced.

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

While Japanese law recognises the concept of a trust, the security trustee structure is not typically used to grant security over aircraft in favour of a group of lenders (especially for domestic transactions). It is a general principle under Japanese law that the creditor of a secured obligation and the security holder need to be the same. However, the Trust Act (Act No. 108 of 2006) introduced a security trust scheme, under which a trustee holds the security interest on behalf of lenders. In order to engage in the security trustee business in Japan, certain licences under the Trust Business Act (Act No. 154 of 2004) or the Act on Provision, etc of Trust Business by Financial Institutions (Act No. 43 of 1943) are required. In addition, another point to be noted is that there remains uncertainty in the enforcement procedure for a security held by a security trustee. If an aircraft mortgage is held by a security trustee, no change in the registration with the aircraft registry or assignment of the aircraft mortgage is necessary with respect to loan transfers.

It is common in Japan (especially for domestic transactions) for the owner of an aircraft to create an aircraft mortgage on the aircraft in favour of the respective lenders. In this case, a loan transfer would trigger assignment of the mortgage. The registration of the assigned mortgage needs to be updated to perfect such assignment.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

Effect of aircraft mortgage on engines installed thereon

Moveable assets (including aircraft engines and spare parts) constituting an integral part of an aircraft are subject to an aircraft mortgage created over that aircraft unless the mortgage agreement otherwise provides (and is registered with the aircraft registry) or the mortgagor's addition of such moveable assets constitutes a fraudulent act against creditors and as such is rescinded. If an engine is not installed on the aircraft at the time of creation of an aircraft mortgage, such engine would not be covered by such aircraft mortgage, but once it is installed on the mortgaged aircraft, the engine will be subject to the then-existing mortgage if that engine is owned by the owner or mortgagor of the aircraft and unless otherwise agreed in the mortgage agreement or the installation of that engine is rescinded. On the other hand, it is not clear, because of the lack of judicial precedents, if an engine installed on a mortgaged aircraft qualifies as being subject to the aircraft mortgage even after it is removed from the mortgaged aircraft, or even if in the affirmative, how the mortgage can be foreclosed upon with respect to such removed engine.

Security over spare engines not installed on a host aircraft

Spare engines could be subject to a pledge but, as a pledgee may not allow the pledgor to possess the pledged property under article 345 of the Civil Code, pledges are not typically used for creating security interests in spare engines not installed on a host aircraft. Alternatively, a collateral assignment of a spare engine can be made by its owner in favour of a creditor. In creating a collateral assignment over a spare engine, the owner will transfer title to the engine to its creditor only for the purpose of securing its obligations. A collateral assignment can be perfected as against third parties by transferring the possession of the engine to the creditor, but such delivery can be made fictionally with the owner continuing to possess the engine and can also be made by way of registration under the Act on Special Provisions, etc of the Civil Code Concerning the Perfection Requirements for the Assignment of Moveables and Claims (Act No. 104 of 1998). A holder of a collateral assignment can enforce its rights by selling the spare engine to a third party or by retaining the spare engine, but the holder is required to pay to the owner the difference between the sale proceeds or the fair value of the spare engine and the secured obligations. The spare engine could cease to be subject to the collateral assignment if a bona fide purchaser purchases the engine without knowledge of the existence of the collateral assignment on such engine without fault.

Security over spare engines installed on a host aircraft

It is theoretically possible to create a collateral assignment over a spare engine installed on a host aircraft. If the aircraft and the spare engine are owned by the same person (such as an airline) and the aircraft is subject to an aircraft mortgage, the fact that the spare engine is not subject to the aircraft mortgage should be recorded on the aircraft registry. In addition, such spare engine could cease to be subject to the collateral assignment if a bona fide purchaser purchases the aircraft (including the engines installed thereon) or the spare engine only without knowledge of the existence of the collateral assignment on the engine without fault.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

Japan is a jurisdiction where no self-help remedy per se is permissible. If the lessee refuses to redeliver the aircraft to the lessor even following lease termination, the lessor needs to commence a court procedure against the lessee to repossess the aircraft from the lessee.

To prevent the lessee from transferring its possession of the aircraft to a third party to frustrate the repossession thereof, the lessor may petition the competent court for a provisional remedy or injunction called a provisional disposition, which prohibits the lessee from transferring its possession of the aircraft to a third party. Although the required court fee is nominal, the court may require that the lessor post a deposit to cover the damage that may be incurred by the lessee. The court has discretionary power in determining if a deposit is required and the amount thereof. The lessee could impede the owner's rights to exercise default remedies by arguing that the lease termination is not effective and that it still has the right to possess the aircraft.

23 Enforcement of security

Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

As mentioned in question 22, self-help is not permitted in Japan. If the owner and, if different, the operator are cooperative with the mortgagee, the mortgagee can sell the aircraft to a third party or retain it by itself and apply the sale proceeds (or the fair value) of the aircraft to the secured obligations if permitted in the mortgage agreement. Otherwise, the mortgagee needs to commence a court procedure to foreclose upon the mortgage by way of a public sale supervised by a court (a court sale). To commence a court sale procedure, the mortgagee needs to file an application for foreclosure of security interests with supporting documents (including an official transcript of entry of the aircraft registry). Once the court sale procedure commences, the court will order the court enforcement officer to deprive the certificate of registration, the certificate of airworthiness and other documents to be kept on board the aircraft to detain the aircraft and enable the court sale. Even before the application for the foreclosure, the mortgagee may petition the competent court to order the detention if it is probable that a court sale would be difficult without having detained the aircraft at that time. Unless an objection is made to the commencement order for a court sale, a court sale procedure may commence and the aircraft can be detained by way of an *ex parte* application.

In Japan, bankruptcy proceedings under the Bankruptcy Act (Act No. 75 of 2004), special liquidation proceedings under the Companies Act (Act No. 86 of 2005), civil rehabilitation proceedings under the Civil Rehabilitation Act (Act No. 225 of 1999) and corporate reorganisation proceedings under the Corporate Reorganisation Act (Act No. 154 of 2002) are the main insolvency proceedings. When being applied to a corporate entity, the former two proceedings aim to liquidate the entity and the latter two aim to rehabilitate or reorganise the entity. A mortgagor with a perfected aircraft mortgage may enforce its rights under the mortgage even after the commencement of bankruptcy, special liquidation or civil rehabilitation proceedings outside these proceedings. However, once corporate reorganisation proceedings commence, a mortgagee cannot foreclose upon the mortgage and

will receive distributions in accordance with the reorganisation plan approved by the creditors' meeting and the court.

The owner could impede the mortgagee's enforcement rights by not cooperating with the mortgagee, which would make it difficult to foreclose upon the mortgage by a private sale even if foreclosure is permitted under the mortgage agreement. In that case, the mortgagee will need to commence a court sale procedure as mentioned above.

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

Registered aircraft mortgages have priority in aircraft in accordance with the order of the registrations. A seller or repairer of an aircraft may have a statutory lien over the aircraft but the priority of a statutory lien is below that of a registered mortgage on the same. On the other hand, a tax claim may have priority over a registered mortgage on an aircraft with respect to taxes that had been due prior to the date of registration of the mortgage. Therefore, it should be noted that, if an aircraft mortgage is created and perfected by an owner that is delinquent on taxes, such mortgage could be subordinate to the tax claims against the owner. Another lien having (de facto) priority over a registered mortgage is a possessory lien. A possessory lien under the Civil Code is the right to retain possession of property until the possessor receives full payment of the obligation having arisen with respect to such property. The Commercial Code also provides for another type of possessory lien, which arises on property owned by the debtor to secure an obligation arising through commercial transactions between merchants (including corporations) notwithstanding whether the obligation has arisen with respect to the property. Airport charges or repairer's fees can be secured by these possessory liens arising on an aircraft. A possessory lien has de facto priority in the subject property because the holder of a possessory lien may detain the property until the secured obligations owed to it are paid in full, even if a court sale is commenced and completed.

An aircraft will not be confiscated or requisitioned for use by the Japanese government except in certain unusual circumstances such as where the aircraft is used to engage in criminal acts. However, it could be possible for an unsecured creditor of the owner of the aircraft to attach the aircraft to collect its claims pursuant to the general enforcement proceedings, save where it is unlikely that there will be any excess above the secured creditor's claims with respect to that aircraft (provided that registered mortgagees have priority over such unsecured creditors if the aircraft mortgage has been registered before the attachment).

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Withholding tax

Interest payments under a loan agreement or rent payments under a lease agreement by a Japanese party to a non-Japanese party may be subject to Japanese withholding tax. If the recipient of these payments acts through a permanent establishment in Japan that holds an effective exemption certificate from the tax authority or is qualified to receive such payments without withholding tax under a double taxation treaty between Japan and the jurisdiction where that recipient resides, the payer is not required to withhold this tax from the payments.

Consumption tax

A sale of an aircraft and its lease (excluding a certain type of finance lease) may be subject to Japanese consumption tax (which is a tax similar to value added tax and currently is imposed at the rate of 8 per cent of the purchase price or each rent) if such sale or lease is 'conducted in Japan'. Whether such sale or lease of an aircraft is conducted in Japan will be determined by the location of the aircraft registry. Even if a sale of an aircraft is deemed to be conducted in Japan, certain exports or leases of aircraft from Japan are exempt from Japanese consumption taxes.

Fixed asset tax

Aircraft as depreciable assets may be subject to Japanese property tax (or fixed asset tax). Japanese fixed asset tax is a local tax levied by the local government where an aircraft's home base is located. The annual amount of that tax is 1.4 per cent of the taxable base (or the quoted value) of the aircraft, which could be reduced in certain cases, including aircraft operated for international flights.

Stamp duty

Certain documents (including loan agreements, aircraft purchase and sale agreements, assignments of contracts (such as assignments of insurance) and guarantees) are subject to Japanese stamp duty if they are executed in Japan. On the other hand, documents executed outside Japan are not subject to Japanese stamp duty even if a party (or parties) to such documents is a Japanese entity. The tax authority in Japan currently treats an agreement or document as being executed outside Japan when the last party to the agreement or document executes and releases the same outside of Japan.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

The Foreign Exchange and Foreign Trade Act provides that certain payments or transfers of money (in an amount exceeding ¥30 million) between Japan and foreign countries may be subject to routine ex post facto reporting to the Minister of Finance through the Bank of Japan. Save where the relevant payments violate international or domestic sanctions, regular commercial payments in aviation financing or lease transactions will not be subject to any approval or notification requirements.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

The Interest Rate Restriction Act (Act No. 100 of 1954) restricts the rate of interest on loans. The Act Regulating the Receipt of Contributions, the Receipt of Deposits, and Interest Rates (Act No. 195 of 1954) prohibits receiving interest at a rate in excess of 20 per cent per annum, a breach of which may trigger criminal penalties. Default interest is considered to be a part of the rate of interest regulated under these acts, and receipt by a commercial lender of default interest at a rate in excess of 20 per cent could be both null and void and trigger criminal penalties. No limitation is set on the amount or rate of default interest under a lease agreement (unless it is against the public order and good morals doctrine).

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

No fees, charges or the like are required to apply for an import or export permit in respect of a commercial aircraft from the Director-General of customs, provided that the import of an aircraft into Japan is subject to import consumption taxes imposed on the entity that imports the aircraft into Japan. If the importer or exporter retains a customs agent, fees for the customs agent would be required. For more details on exports of aircraft from Japan, see question 12.

Insurance and reinsurance

29 Captive insurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

There is no requirement that insurance be placed in Japan nor is there a typical captive insurance regime. However, it is typical for Japanese operators to place insurance in the local market. All the Japanese insurance companies that provide aviation insurance have formed the Japan Aviation Insurance Pool (JAIP). When a member of the JAIP underwrites aviation insurance, the aviation insurance will be put in an insurance pool provided by the JAIP and will be allocated to the members

of the JAIP according to a certain ratio, and then a reinsurance will be placed to cover that insurance. The JAIP sets out the standards for insurance premiums applicable to JAIP members.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

In the case of a cut-through clause governed by foreign law (such as English law), a court in Japan would look to that governing law to decide its effectiveness. In the case of a cut-through clause governed by Japanese law, such clause is considered to be a 'contract for the benefit of third parties', and once the beneficiary (such as the insured or additional insured under the primary insurance policy) expresses its intention to the reinsurer to enjoy the benefit under the cut-through clause, such clause effectively binds the reinsurer.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Assignments of reinsurance by domestic insurers can be made legally and effectively. To perfect such assignment as against third parties, notice of assignment to the reinsurer or acknowledgement of assignment from the reinsurer must be made by a document with a dated stamp such as a notarised document or a content-certified mail. It is generally the case that the Japanese insurance market is considered an internationally reputable insurance market and an assignment of reinsurances is not considered typical.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

As a matter of general principle, for a person to be legally liable for any loss caused in connection with the operation of an aircraft or the activities of an operator, that person needs to be held to have (individually or jointly) caused such loss wilfully or negligently. Unless an owner, lessor or financier is acting wilfully or negligently or is in a position to exercise any effective control over the operation of the aircraft or the activities of the operator, such person would not be liable for such operation or activities as a matter of law.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

In Japan, there is no general rule of strict liability for owners, lessors or financiers of aircraft. Unless they have (individually or jointly) caused any loss related to the aircraft wilfully or negligently, they would not be liable as a matter of Japanese law.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

The Aeronautics Authority has the authority in consideration of the public interest to order that insurance contracts are entered into to cover the liability an operator may incur owing to aircraft accidents, but there is no specific minimum requirement for the amount of third-party liability coverage that must be in place. Further, Japan has ratified the Montreal Convention (1999), article 50 of which provides that the member states shall require carriers to maintain adequate insurance covering their liability thereunder.

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Kenya is not a party to the Rome Convention (1933). Kenya is signatory to and has ratified the Chicago Convention (1944); it was ratified on 1 May 1964 and came into effect on 31 May 1964. Kenya ratified the Geneva Convention (1948) on 15 January 1997 and it came into force on 15 April 1997.

Kenya ratified the Cape Town Convention (2001) on 13 October 2006. The provisions of the Convention (including the Protocol) have been given effect by the International Interests in Aircraft Equipment Act 2013 (International Interests Act), which came into operation on 9 March 2013.

Kenya is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 following its accession on 10 February 1989.

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The principal legislation is the Civil Aviation Act 2013 as amended. The Cape Town Convention has been given effect in Kenya by the International Interests Act.

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

There are no restrictions on choice-of-law clauses in contracts generally. The parties are free to agree on the law that is to govern their contractual rights and obligations and Kenyan courts will generally recognise and give effect to governing law and jurisdiction provisions in contracts.

However, decisions of the English courts are of persuasive value to the Kenyan courts. Accordingly, the *Blue Sky* case (*Blue Sky One Limited and others v Mahan Air and another* [2010] EWHC 631 (Comm)) could impact on the governing law for a mortgage over an aircraft notwithstanding that the contract may specify the laws of Kenya as the governing law. The *Blue Sky* case found that such a mortgage must be created in accordance with the domestic laws of the jurisdiction where the aircraft is physically situated when the mortgage is executed, and if not, it may be declared void. Therefore, when taking a Kenyan law mortgage over an aircraft or effecting a sale of an aircraft governed by Kenyan law, it is recommended practice to ensure that the aircraft is physically located in Kenya or present in Kenyan airspace when the mortgage or sale instrument is executed.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

Title in an aircraft may effectively be transferred by a bill of sale. In submitting an application for aircraft registration to the civil authority, it is required that the applicant show evidence of ownership and this is typically accepted to be in the form of a certified copy of the aircraft's current bill of sale.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

Although oral contracts are legally binding, they may be difficult to enforce. A bill of sale should be in writing and must be duly executed by the transferor with a statement that the aircraft is being transferred to the transferor absolutely, for sufficient consideration. It must be stamped with the requisite duty in accordance with the Stamp Duty Act (Chapter 480 of the Laws of Kenya) within 30 days of execution or, if executed outside Kenya, within 30 days of first being introduced into Kenya in order to be admissible as evidence in a Kenyan court. Failure to stamp a stampable instrument constitutes a criminal offence under said Act, punishable by fine. There is no requirement for the bill of sale to be notarised, legalised or apostilled. English is the official language of Kenya and while there is no legal requirement for translation of a bill of sale, from a practical perspective any document not in the English language may need to be translated if required for presentation in any formal capacity.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

The aircraft registry identifies the owner of an aircraft, and, if different from the owner, the operator. The body that is responsible for the registration of civil aircraft is known as the Kenya Civil Aviation Authority (KCAA), which maintains in its premises a register for this purpose. The KCAA does not maintain a specific engine register.

Kenya is currently not a party to any 83-bis arrangements.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

An aircraft is eligible for registration in Kenya if owned by a citizen of Kenya, an individual citizen of a foreign state who is lawfully admitted for residency in Kenya, a corporation lawfully organised and doing business in Kenya, or a government entity of Kenya, provided that the aircraft is not registered under the laws of any foreign country.

In addition, a 'qualified' person shall be entitled to be the owner of a legal or beneficial interest in an aircraft registered in Kenya. Qualified persons are:

- the government of Kenya;
- citizens of Kenya or bona fide residents of Kenya;
- such other persons as the KCAA may approve, on condition that the aircraft is not used for commercial air transport, flying training or aerial work and such other conditions as the KCAA may specify; and
- bodies corporate, established under subject laws of Kenya, or established under and subject to the laws of such country as the KCAA may approve.

The rules on registration are contained in the Civil Aviation (Aircraft Nationality and Registration Marks) Regulations 2013. Subject to these Regulations, an aircraft shall not be registered or continue to be registered in Kenya where:

- the aircraft is registered outside of Kenya;
- an unqualified person is entitled as owner to any legal or beneficial interest in the aircraft or to any share therein;
- it would be inexpedient in the public interest for the aircraft to be or to continue to be registered in Kenya; or
- the aircraft does not qualify to be issued with a certificate of airworthiness as specified in the Civil Aviation (Airworthiness) Regulations 2013.

Despite the foregoing, an unqualified person who holds a legal or beneficial interest in the aircraft, or a share therein and who resides or has a place of business in Kenya may obtain registration of an aircraft provided the KCAA is satisfied that the aircraft can be properly registered and provided that while registered, the aircraft is not used for the purpose of commercial air transport operations or aerial work.

In addition, where an aircraft is leased or is the subject of a lease, charter or hire purchase agreement to a qualified person the KCAA may, whether or not an unqualified person is entitled as owner to a legal or beneficial interest therein, register the aircraft in the names of the parties to the charter or hire purchase agreement upon being satisfied that the aircraft may otherwise remain so registered during the continuation of the lease, charter or hire-purchase agreement.

An ownership interest over an aircraft can be registered with the KCAA as described above. However, registration does not constitute proof of ownership of the particular aircraft as the Kenya civil aircraft register is not a register of legal ownership.

In addition to the details of the owner, in the case of a lease agreement or financial arrangement, the KCAA will include the names and addresses of the lessee and lessor or the financier, as the case may be.

Interests in aircraft engines cannot be registered.

Ownership and leasehold interests over an aircraft object and falling under the Cape Town Convention may be registered at the International Registry.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

Form KCAA (L) 100 is completed and submitted in accordance with the Civil Aviation (Aircraft Nationality and Registration Marks) Regulations by the owner or on behalf of the owner. Upon review and approval of the supporting documentation, an authorisation payment slip is issued to allow for payment of the requisite fees (currently approximately US\$150).

A certified copy of the aircraft's current insurance certificate and the original Kenya Revenue Authority's customs department's certificate of clearance for aircraft must also be provided as part of the supporting documents. Other supporting documents include evidence of title (bill of sale) and evidence of power of attorney of any signatory to the application.

Further guidance is available in the KCAA's Advisory Circular CAA-AC-AWS001B of April 2013.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

The certificate of registration issued by the KCAA upon registration of an aircraft is not proof of the aircraft ownership or title. However, the certificate provides prima facie evidence of ownership of the particular aircraft.

For ownership interests registered under the International Registry, the buyer of an aircraft object will acquire an interest in the object subject to the interests registered at the time and interest in the aircraft object will be free from an unregistered interest even if the buyer has actual knowledge of such an interest. Registration gives notice to third parties of the existence of an interest and the first registration of an interest has priority over subsequent registrations and unregistered interests.

10 Registration of lease interests

Summarise the process to register a lease interest.

In the case of a lease arrangement the KCAA will include the names and addresses of lessee and lessor on the register and on the certificate of registration. These details should be included in the application form KCAA (L) 100 that is submitted at the time of registering the aircraft. A certified copy of the lease agreement should accompany the application. An interest constituting an 'international interest' in an aircraft object under the Cape Town Convention is registrable on the International Registry.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

The Civil Aviation (Aircraft Nationality and Registration Marks) Regulations 2013 prescribe the requirements and process for registration of aviation interests. The KCAA will issue the certificate of registration with the following particulars:

- the serial number of the particular certificate;
- the certificate form number;
- the certificate of registration of aircraft number issued to the aircraft;
- the nationality and registration mark of the aircraft;
- the manufacturer's name and designation of the aircraft;
- the aircraft serial number;
- the name and address of the owner or every person who is entitled as owner to a legal interest in the aircraft or a share therein;
- in the case of a lease agreement or financial arrangement, the names and addresses of lessee and lessor or as the case may be, the financier;
- the name or logo of the issuing authority; and
- the conditions with regard to which the aircraft is registered.

The KCAA will not issue a separate engine certificate of registration.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

The KCAA requires an owner or a mortgagee whose interest has been included on the register and certificate of registration to consent to any deregistration of an aircraft.

If at any time after an aircraft has been registered in Kenya an unqualified person becomes entitled as owner to a legal or beneficial interest in the aircraft or share therein, the registration of the aircraft becomes void and the certificate of registration should be returned for cancellation.

If the aircraft is subject to an irrevocable deregistration and export request authorisation (IDERA) pursuant to the Cape Town Convention, the KCAA will require that the IDERA be revoked in writing by the authorised party named in the IDERA before deregistration.

The consent of a lessee is not required in relation to deregistration and export.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

A deregistration power of attorney provided in Kenya will typically be irrevocable and executed as a deed. However, there is no mandatory requirement to provide the same. An irrevocable power of attorney will survive the grantor's insolvency. Where a power of attorney is coupled with an interest given to secure a proprietary interest of the grantee of the power, or the performance of an obligation owed to the grantee, then so long as the grantee has that interest or the obligation remains undischarged, the power is irrevocable even in the case of the grantor's insolvency.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

An IDERA may be issued by an aircraft's operator in favour of an authorised party, typically the registered owner or a creditor. The IDERA must be in the form prescribed in the Protocol to the Cape Town Convention and the form must be lodged with the KCAA for acknowledgment and countersigning by the Director General of the KCAA. The lodging of the IDERA is done based on an existing registered interest and will therefore be lodged after the certificate of registration for the aircraft has been issued. Notwithstanding the use of an IDERA, it is advisable to still maintain parallel powers of attorney for deregistration and export as an IDERA is not a document that another government entity is obliged to recognise.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

A mortgage is the typical form of security over an aircraft. Mortgages over an aircraft may be either legal or equitable mortgages.

In practice, aircraft mortgages are prepared based on the freedom of the parties to contract on the terms to be included. It is not required for a mortgage to state the maximum secured amount; however, for stamp duty purposes it is necessary to identify an amount secured. In order to comply with the International Interests Act, the aircraft mortgage is required to be in writing, relate to an identifiable aircraft object and should enable the secured obligations to be determined.

The official language of Kenya is English and mortgage documents will typically be drafted in this language. Under the Companies Act 2015, the Registrar of Companies is permitted to refuse to accept any document lodged or submitted to it for registration in a language other than English.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

Stamp duty is payable on a security instrument within 30 days of execution of the document if executed in Kenya. If executed outside Kenya, the duty is payable within 30 days of the document subsequently being brought into the country. Failure to stamp a document renders the document inadmissible as evidence in a court of law. The rate of stamp duty depends on the particular instrument. For instance, stamp duty payable on a mortgage or an assignment by way of security is 0.1 per cent of the amount secured by the instrument.

Certified translations of security documents may be provided; however, most documents will typically be drawn in English.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgage interest.

The KCAA does not maintain an aircraft mortgages registry. Kenya ratified the Geneva Convention in 1997, but a registry has not been established.

Pursuant to the Companies Act, the Registrar of Companies maintains a register of certain types of charges (including mortgages) created by a company, including a charge on an aircraft owned by the company or in which it has a proprietary interest. The registry enables parties to conduct searches and in so doing, identify any registered encumbrances on a company incorporated in Kenya and certain of its assets.

Subject to the following paragraphs, in order to perfect a security under the Companies Act, the stamped security document is presented for registration together with a completed form CR25. It is required that this is done 30 days from the day of creation of the security interest. If created outside Kenya, the charge must be presented for registration within 21 days of the day on which a copy of it could have been received in Kenya, if dispatched with due diligence. If not registered within the prescribed period, the charge will be void as against an administrator, liquidator or creditor upon insolvency. However, this does not affect the operation of the contract or obligation for repayment of the money secured, which once the charge is void, immediately becomes payable.

Registration fees will vary depending on the amount secured by the charge.

Notwithstanding the provisions of the Companies Act, the International Interests Act provides that the requirement for registration of charges under the Companies Act shall not apply to a charge created after the commencement of the International Interests Act, on any aircraft objects falling within the scope of the Convention and the Protocol. Registration of a security interest in an aircraft under the Companies Act where the aircraft falls within the scope of the Convention and Protocol is therefore not mandatory for its enforcement against any liquidator, administrator or creditor, but can nonetheless be effected at the option of the secured creditor.

If the security creates an international interest then registration is completed online at the International Registry following the International Registry regulations and procedures.

18 Registration of security

How is registration of a security interest certified?

A certificate of the registration of a Mortgage is issued by the Registrar of Companies. The certificate does not indicate the rank or priority of the security interest and this will be determined by the date of registration.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

A charge registered at the Companies Registry will take priority over all other unregistered charges or charges subsequently registered.

A search may be conducted over the specific company file at the Companies Registry to identify any registrable security interests registered against the company. In addition, a company is required to keep a register of charges and its creditors have the right to inspect the register.

Common law and statutory rights of lien or detention rights may take priority over a registered security interest (eg, a common law lien may be exercised by a repairer or maintenance facility that has not been paid and has possession of the aircraft or by the KCAA in respect of unpaid navigation charges).

Where there is a registration of a security interest at the International Registry, the security will take priority in accordance with the Cape Town Convention provisions.

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

The concept of a security trustee is recognised in Kenya and a mortgage may be granted in favour of and made in the name of a security trustee acting on behalf of the beneficiaries.

A security trustee can hold a security in its name for a changing group of beneficiaries without affecting the security as the security would have been registered in its name without reference to the underlying beneficiaries. The security trustee will exercise all rights available to a mortgagee under a mortgage.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

A mortgage may be created over a spare engine in the same way it is created over an aircraft. See question 20 regarding the registration of security interests pursuant to the Companies Act and the Cape Town Convention.

Kenya adopts the English common law principle of accession that if any property receives an accession by natural or artificial means, the original owner is entitled, by his or her right of possession, to the property in its improved state.

It is common practice in security documents to define the aircraft as including all engines installed periodically. To avoid a dispute, it is advised that the owner of an aircraft or other security holder expressly recognise third-party ownership or legal interests in an engine, and undertake that it will not claim an interest in an engine.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

Kenyan law permits a lessor to exercise self-help remedies subject to the terms of a lease without necessarily applying for a court order. In such instances, a lessee can accede to a lessor's request to return or surrender the aircraft. Alternatively, if the lessor can gain access to the aircraft, the lessor can proceed with repossession.

In the event a lessee is not cooperative, a lessor can apply to the High Court for an order to repossess or sell the aircraft, or both. In principle, the lessee is to be served with the court application; however, if the lessor is of the opinion that the aircraft is at risk (cannibalisation of engines or parts, or removal of the aircraft from the jurisdiction), an ex parte application can be made to the court on an urgent basis, and orders granted to repossess the aircraft. In either of the cases, the lessor shall need to notify the KCAA of the termination of lease and of its intention to exercise its right to re-register the aircraft, or deregister and export the aircraft from Kenya.

The lessor's rights to repossession can be impeded by a lessee by applying to the courts for injunctive orders to prevent repossession of the aircraft by a lessor or orders for the restoration of the repossessed aircraft.

23 Enforcement of security

Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

The enforcement by a creditor of its interest can be achieved by the voluntary surrender of the aircraft by the owner, or by a creditor either exercising self-help remedies or obtaining such court orders that allow for the enforcement of the rights subject to the terms of a security agreement. Under a mortgage, the remedies available are typically the repossession and sale of the aircraft.

Where there is a registered international interest, the remedies available to a creditor under the Cape Town Convention are as follows:

- taking possession or control of the aircraft;

- the selling or granting of a lease; or
- collecting and receiving income arising from the management or use of the aircraft.

The above remedies can be exercised without necessarily going to court. However, it is generally prudent for a creditor to obtain a court order to minimise the risk of any subsequent action that an owner can take as a result of a creditor exercising their rights (eg, a creditor being subject to a claim for trespass by the owner or an aggrieved third party). It is standard practice for a security agreement to grant a creditor a right of egress but such a right is limited to an owner's property; conversely, a court order grants the same right of egress and can on application extend this right to such premises not captured by the provisions of a security agreement.

In addition, the Consumer Protection Act 2012 requires the holder of a security interest in a security agreement incidental to an agreement in respect of which delivery, performance or payment in full is not made when the parties enter the agreement, to obtain the leave of the court when the debtor has paid two-thirds or more of its payment obligations thereunder, in order to repossess or sell the aircraft. The court shall in such an instance use its own discretion to either deny or grant leave or grant leave subject to terms and conditions the court advises.

A mortgagee can seek additional court orders to authorise or compel the assistance of the police or such other public entities deemed necessary by it to obtain the relief sought. An ex parte detention order can be also obtained but such orders are issued on the grounds that there is an immediate or imminent risk to the aircraft departing the court's jurisdiction. Equally under the court process, provided an owner can satisfy the legal requirements for the grant of injunctive orders, a court may provide injunctive orders to restrain a mortgagee from exercising its power of sale, repossession or leasing of the aircraft pending determination of the substantive suit.

Where the security interest is a registered international interest, in the event an owner is insolvent and the insolvency is a default event under a mortgage, the International Interests Act, provides that the owner or a receiver or administrator of the owner has a period of 60 days within which to give possession of the aircraft to the mortgagee.

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

Under Regulation 6(1) of the Civil Aviation (Charges for Air Navigation Services) Regulations 2014, the director of the KCAA, or any person authorised by him or her in writing, may detain any aircraft whose owner has refused or neglected to pay the prescribed charges payable.

Repairers who have undertaken work on an aircraft may have a lien over the aircraft and a lienholder subject to any existing contract and statute, can exercise a power of sale.

Under the Insolvency Act 2015, certain debts shall have priority over all other claims, including those of secured creditors. In summary, these are:

- first, costs related to the administration of the liquidation (including fees of the liquidator or trustee, legal and court fees to institute insolvency proceeds and the preservation of assets);
- second, employee wages and dues, tax dues deducted from employee income, as well as court and tribunal fees in relation to employer and employee disputes; and
- third, taxes due on a company such as corporate and withholding tax, along with customs and excise tax.

In addition, Kenya made a declaration under article 39(1)(a) of the Cape Town Convention that the following rights and interests shall have priority over a registered international interest 'whether in or outside insolvency proceedings':

- payments due to workers arising out of employment relations;
- liens created by repairers on objects in their possession;
- liens created by bailees on objects in their possession; and
- taxes, duties and levies due to the government.

Kenya also made a declaration under article 39(1)(b) of the Convention that nothing in the Cape Town Convention shall affect the right of a

state or state entity, intergovernmental organisation or other private provider of public services to arrest or detain an object under the laws of that state for payment of amounts owed to such entity, organisation or provider directly relating to those services in respect of that object or another object.

Seizure, confiscation and requisition

Under the Kenya Defence Forces Act 2012, an officer of the defence forces may, if necessary in the interests of defence or public safety, issue a requisition. In such an occurrence, the owner (or operator if leased) shall be entitled to payment for the use of the aircraft, any damage caused (except a total loss or damage attributable to fair wear and tear) and, in the event of total loss, the value of the aircraft immediately preceding the occurrence of the loss.

There are also powers given to the president under sections 3 and 4(2)(g) of the Preservation of Public Security Act (Chapter 57 of the Laws of Kenya) to publish regulations for the preservation of public security, which may make provision for the compulsory acquisition, requisition, control or disposition of any moveable property. No regulations of this nature have been published as at this time.

Additionally, an aircraft can be confiscated or forfeited if it is used in the commission of an offence, pursuant to section 47 of the Narcotics Drugs and Psychotropic Substances Act, 1994. A notice of seizure is granted to the owner. In the event the owner is convicted, a notice shall be published and a party with a security interest in the aircraft shall thereafter have 30 days to apply to the High Court for relief, failure of which all interests shall be void upon a final order being made by the court.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Income tax

Pursuant to section 35(1)(c) of the Income Tax Act (Chapter 470 of the Laws of Kenya), there is no obligation to deduct and withhold tax from any payments of rent for aircraft or aircraft engines made to a non-resident person not having a permanent establishment in Kenya. However, any payment of interest (whether on a loan repayment or in any other manner) is subject to withholding tax, at the rate of 15 per cent for payments to both a resident and to a non-resident person not having a permanent establishment in Kenya. A permanent establishment is defined as a fixed place of business in which that person carries on business. Gross-up provisions are effective and are in practice included in cross-border leases where the lessee or sublessee is a Kenyan entity.

VAT

The hiring, leasing and chartering of aircraft are currently exempt under the VAT Act 2013; accordingly, payments for these services do not attract VAT.

Stamp duty

A transfer of an aircraft is effected by a bill of sale. A bill of sale may be assessed for stamp duty as a 'conveyance', which attracts stamp duty at the rate of 2 per cent of the transfer amount. As it is not necessary to pay the stamp duty unless the original instrument is brought into Kenya and the original bill of sale is not normally required for the process of aircraft registration, this liability can be minimised by executing and retaining the bill of sale outside the jurisdiction. However, a stampable instrument must be stamped in order to be admissible as evidence in a Kenyan court and if it is executed outside Kenya, this must be done within 30 days of first being introduced into Kenya. Failure to stamp a stampable instrument within the statutory timelines constitutes a criminal offence under the Stamp Duty Act, punishable by fine.

Update and trends

The existing civil aviation regulations are being reviewed with the aim of benefiting the public and stakeholders, as well as enhancing Kenya's regional presence as an aviation hub. Among the regulations under review are regulations on aircraft and personnel licensing, aerodromes and the operation and registration of aircraft.

A notable proposal on the review of granting an aircraft service licence is amending the existing licensing requirement for a minimum 51 per cent voting requirement to be held by the state, a Kenyan citizen or both.

The KCAA is also currently close to publishing regulations regarding commercial drones' activities.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

There are currently no exchange controls in Kenya and no restrictions apply to international payments except a requirement by the Central Bank of Kenya that, for any amount above US\$10,000, information should be provided by either the recipient or by the sender, or both, to support the authenticity of the transaction. The remitting or receiving local bank shall make the enquiries on behalf of the Central Bank of Kenya and shall submit documents reflecting or supporting the transaction (eg, a copy of an aircraft purchase and sale agreement, escrow agreement).

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

There are no prescribed limitations set on the amount of default interest that can be charged on a lease or loan payments. However, a Kenyan court might not give effect to any of the provisions of a lease or loan agreement providing for the payment by the borrower or lessee of interest on overdue amounts if the amount expressed as being payable were a penalty, or in the nature of a penalty.

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Aircraft of any weight are currently exempt from import VAT under the VAT Act. Under the Miscellaneous Fees and Levies Act 2016, aircraft are also exempt from the 2 per cent import declaration fee paid on all goods imported into Kenya for home use. Pursuant to section 8(2) of the Miscellaneous Fees and Levies Act, a railway development levy of 1.5 per cent of the customs value of the aircraft shall be paid by the importer of an aircraft for home use at the time of entering the aircraft into the country. Upon confirming the payment of the tax and levies, the Customs Services Department of the Kenya Revenue Authority issues an importer with a customs clearance certificate.

There is no duty payable on the export of an aircraft.

Insurance and reinsurance

29 Captive insurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

Pursuant to Regulation 5 of the Civil Aviation (Insurance) Regulations 2009, aircraft registered in Kenya are required to be issued with a certificate of insurance by a company registered in Kenya under the Insurance Act to carry on aviation insurance business. However, the Regulations permit the Commissioner of Insurance to approve the issuance of insurance policies by any other insurer.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

There are no statutory restrictions on cut-through provisions and they are considered legally effective and subject to principles of the laws of contract.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Assignment of reinsurances are considered legally effective.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

Apart from the circumstances of strict liability in relation to an owner, discussed in question 33, Kenya does not create a regime for strict liability for parties without operational control of an aircraft.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

Under section 59(2) of the Civil Aviation Act, the owner of an aircraft shall be held strictly liable for material loss and damage caused by the aircraft to a third party or property, unless the loss or damage was contributed by negligence of the person by whom it was suffered. Where such material loss or damage is caused in circumstances in which damages are recoverable in respect of such loss or damage by virtue only of section 59(2) and a legal liability is created in some person other than the owner to pay damages in respect of such loss or damage, the owner shall be entitled to be indemnified by that other person against any claim in respect of such loss or damage. Pursuant to section 59(3), where the aircraft has been demised, let or hired for a period exceeding 14 days and during such time the owner had no operational control over the aircraft, the liability under section 59(2) shall be borne by the person to whom the aircraft has been demised, let or hired.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

The Civil Aviation (Insurance) Regulations require a commercial aircraft to carry insurance in respect of passenger liability, cargo, baggage and mail risks. In addition, it also states that no person shall fly or cause or permit any other person to fly an aircraft, unless they have an insurance policy that covers third-party risks, which, as per the Regulations, has a set minimum of approximately US\$600,000.



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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Lithuania is a party to the following major air law treaties:

- the Chicago Convention on International Civil Aviation (1944), effective from 7 February 1992, and a number of protocols relating to its amendments;
- the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage (1929), effective from 19 February 1997 and its Hague Protocol (1955), effective from 19 February 1997;
- the Guadalajara Supplementary Convention to the Warsaw Convention (1961), effective from 9 March 1997;
- the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963), effective from 19 February 1997;
- the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970), effective from 3 January 1997;
- the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971) and its Protocol (1988), effective from 3 January 1997;
- the Montreal Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991), effective from 21 June 1998; and
- the Montreal Convention for the Unification of Certain Rules for International Carriage by Air (1999), effective from 29 January 2005.

Also, Lithuania is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), effective from 12 June 1995.

The Rome Convention (1933), the Geneva Convention (1948) and the Cape Town Convention (2001) have not yet been ratified in Lithuania.

On 6 April 2009, the Council of the EU adopted a Decision on the accession of the European Community to the Convention on international interests in mobile equipment and its Protocol on matters specific to aircraft equipment, adopted jointly in Cape Town on 16 November 2001. Thus, the Cape Town Convention is applicable insofar as the Community has exclusive jurisdiction over the matters governed by the Cape Town Convention and the Protocol.

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The basic legal acts related to aviation finance and leasing are the Law on Aviation (2000) and the Civil Code (2001), expanded in various specific secondary legislation (ie, decrees of the government of Lithuania, orders of the Minister of Transport (particularly, the Order on the Approval of the Rules of Aircraft Leasing Agreements (2011) and the Order concerning the Approval of the Rules of Civil Aircraft Registration)). Orders of the Director of the Civil Aviation Administration (CAA) and Orders of the General Director of the State Enterprise 'Air Navigation' are also relevant for certain aspects of aviation leasing.

Also, since Lithuania is a member of the EU, the respective *aquis communautaire* constitutes an integral part of the Lithuanian legal system.

The Law on Banks (2004) and the Law on Companies (2000), together with resolutions of the Bank of Lithuania, establish a legal framework for aviation finance in case the financing originates from Lithuanian lenders.

The 20th Business Accounting Standard adopted by the Lithuanian Authority of Audit and Accounting 'Operative lease, finance lease and loan-for-use' sets out how a finance lease, operating lease and loan-for-use shall be recorded in accounting and presented in financial statements.

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Apart from the Civil Code that recognises the freedom of contract, Rome I Regulation (EC) No. 593/2008 is directly applicable in Lithuania. Aircraft lease, finance and security transactions where one party is based in a foreign jurisdiction are customarily governed under the English or New York laws and such choice of law (as well as the choice of any other foreign law) should normally be recognised in Lithuania respecting the freedom of contract, provided the choice is expressly demonstrated in the contract and there are no contradicting overriding Lithuanian rules.

By reason of the Civil Code, an aircraft bearing a Lithuanian registration shall be deemed as immovable property in Lithuania and transactions on the transfer of ownership rights and other rights in rem to an immovable property (aircraft) shall be subject to notarial certification in Lithuania. For this reason, transfer of interests in or creation of security interest (eg, mortgage) over an aircraft bearing Lithuanian registration has to be carried out in accordance with Lithuanian law requirements, and relevant agreements have to be made governed by the laws of Lithuania.

It is customary that the parties enter into an English or New York law governed agreement regarding the transfer of interest in or creation of security interest over aircraft and also enter into additional Lithuanian law-governed agreements so as to ensure validity of the transfer of interest or creation of security in Lithuania.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

As noted, an aircraft bearing Lithuanian registration shall be considered as immovable property and transfer of immovable property is subject to notarial certification in Lithuania. A signed and notarised agreement creates a contractual duty on the seller to transfer the ownership of an aircraft to the buyer. The ownership of an aircraft is transferred by delivery, which is evidenced by parties signing a respective delivery and acceptance certificate or a similar document mentioned in the

sale and purchase or another agreement on the transfer of an aircraft. The respective provisions of delivery and acceptance certificate can be incorporated into the contract of sale and then the title to an aircraft is transferred after the agreement is signed and notarised.

In practice, the English law or New York law bill of sale is recognised as a document evidencing the title to the aircraft when a foreign aircraft is newly registered in Lithuania. In those cases, an original bill of sale or its notarised copy must be submitted to the civil aviation authority. Also, if an aircraft registered in Lithuania is deregistered from the Lithuanian civil aircraft register, such asset ceases to be an immoveable property in the sense of Lithuanian laws and, strictly speaking, it is not required that the transfer of title is made in accordance with Lithuanian law.

However, if an aircraft is already registered in Lithuania and the parties need to sustain the Lithuanian aircraft registration after the transfer of title, then such transfer of title must be made in accordance with the laws of Lithuania and the sale and purchase or another agreement on the transfer of title needs to be notarised locally.

As a matter of practice, the deregistration and re-registration of an aircraft is linked with many technical practicalities, thus, a Lithuanian sale and purchase agreement is often concluded for the aircraft re-registration purposes; however, the parties enter into a parallel English or New York law sale and purchase agreement, which is further accompanied by a bill of sale.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

As noted in question 4, the aircraft sale and purchase or a similar agreement on the transfer of aircraft must be concluded in a written form and notarised. The delivery and acceptance certificate (or equivalent document) made in accordance with the agreement on transfer of aircraft effects and evidences the transfer of title. It is, however, not required by Lithuanian law that the delivery and acceptance certificate must be certified by a public notary. Transfer of title shall be effective after the relevant documents are signed and notarised (if applicable).

Failure to notarise the Lithuanian law-based aircraft sale and purchase agreement renders the sale transaction null and void ab initio.

The Lithuanian public notary may notarise the documents made in Lithuanian or in Lithuanian and any other foreign language, thus, as a matter of practice, international aircraft sale and purchase transactions are often made bilingual.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

The body managing the Civil Aircraft Registry of the Republic of Lithuania is the CAA. Generally, the Lithuanian civil aircraft register is an owners register. Also, it is a public and not a 'private use only' register.

The aircraft is registered in the name of an owner and the owner is indicated in the aircraft certificate of registration. The register also records the operators of an aircraft. In case an aircraft is leased to an intermediate lessor and further subleased to the ultimate operator, the owner and the ultimate operator are recorded in the aircraft certificate of registration. A mortgagee is not recorded in the aircraft certificate of registration.

Generally, the entry in the registry is based on the principles of the Chicago Convention. Once the aircraft is registered, it bears an alphanumeric string starting with 'LY', which indicates the Lithuanian nationality of the aircraft.

An aircraft may be registered in the Lithuanian Civil Aircraft Registry only if there is a link with Lithuania. It is not possible to register an aircraft in Lithuania on the basis of lease-in lease-out structures. According to the Law on Aviation, a civil aircraft may be registered in the Lithuania if:

- the owner of an aircraft is a citizen of Lithuania or a legal entity registered in Lithuania, the Lithuanian state or municipality;
- the aircraft has a certificate of airworthiness; and
- the aircraft is not registered in the aircraft register of another state.

An aircraft belonging to a legal or natural person of a foreign state, if it is constantly operated from an airport in Lithuania, may also be

registered in the Civil Aircraft Register of the Republic of Lithuania. Finally, an aircraft being operated by a Lithuanian legal or natural person may be registered in the Civil Aircraft Register if it is constantly flown from a Lithuanian airport or an airport in another EU country.

It is possible that an aircraft registered in Lithuania can be operated permanently in airports of other countries if such aircraft is covered by a bilateral agreement on the implementation of article 83-bis of the Convention on International Civil Aviation for the transfer of surveillance of responsibilities (operations, maintenance and continuing airworthiness) entered into between the Lithuanian CAA and a foreign state civil aviation authority (83-bis agreements).

It is up to the discretion of the CAA to enter into an 83-bis agreement with a foreign aviation authority. It is required by the CAA that an aircraft to be covered by an 83-bis agreement to be operated outside Lithuania must be owned by a Lithuanian resident (natural or legal person), and transfer of title to a Lithuanian subsidiary can be an issue for foreign financiers.

There is no separate register for engines or rights in engines in Lithuania.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

An aircraft is registered in the name of the owner and the owner is indicated in the aircraft certificate of registration. A person that is indicated on the bill of sale or equivalent ownership document shall be registered as an owner of the aircraft. However, the aircraft certificate of registration is not a proof of ownership over the aircraft.

An operator of the aircraft is also registered in Lithuania. In this context, the CAA needs to see the link between the owner of an aircraft and its operator. For this reason, a lease agreement or equivalent documents translated into Lithuanian must be submitted to the CAA for aircraft registration purposes.

There is no limitation on who can be recorded as owner, as long as it is a validly incorporated and existing legal entity or a natural person. Legal entities must provide a copy of the certificate of registration to be recorded as owner and natural persons must provide a copy of ID. As a matter of practicality, owner trustees are recorded as owners in the aircraft certificate of registration.

Lease interests are not specifically registered in Lithuania, except that the ultimate operator is recorded on the certificate of registration of an aircraft. For example, if an aircraft is leased to an intermediate lessor and further subleased to the ultimate operator, the owner and the ultimate operator only are recorded in the aircraft certificate of registration.

The interest in aircraft engines is also not registered. The description of the aircraft also includes certain technical aircraft documentation, including the type and number of engines. However, no interest in the engines is created by registering the aircraft.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

The procedure of registering an aircraft is regulated by the Rules of the Aircraft Registration as approved by Order No. 3-439 of 10 October 2005 by the Minister of Communications and Transport (the Aircraft Registration Rules).

The application for aircraft registration must be made by an owner or its duly authorised representative. Normally, the application for aircraft registration is submitted by persons who are acting on the basis of a power of attorney. A nominal fee must also be paid so that the application is processed. The registration fee depends on the specifications of the aircraft.

Along with the application, a person must submit the following documents:

- an original document or a notarised copy proving the basis of the ownership of the aircraft (such as a sale and purchase agreement, a bill of sale, etc). If the document is written in a foreign

language, an original translation or a notarised copy must be provided. Customarily an original bill of sale or its notarised copy is submitted. It would suffice for a representative of the CAA to see the original bill of sale and this would immediately be returned to the owner;

- an acceptance certificate;
- an aircraft deregistration certificate or equivalent document. If it is not possible to present such document, an application should specify the reasons for its absence;
- a certified registration (incorporation) certificate of an owner or an ID copy in the case of a natural person;
- a certificate of airworthiness;
- an original document or a notarised copy of an aircraft lease agreement or equivalent document proving the right of an operator to use and operate the aircraft; and
- if an owner is not a Lithuanian resident, confirmation that the aircraft will be operated permanently from Lithuanian airports must be provided.

The CAA will process the application within 21 days.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

Although the registration of an aircraft is made on the basis of the bill of sale or equivalent ownership document, the CAA does not perform specific checks on the actual owner of the aircraft. The Aircraft Registration Rules make it specific that the certificate of registration of an aircraft is not a proof of ownership. In practical terms, a third party is expected to rely on the acquisition bill of sale and, in case of doubt, to collect back-to-birth bills of sale showing the chain of title back to the manufacturer in order to confirm the ownership interest in the aircraft.

The registered ownership interest in the aircraft (if defective or otherwise) can be challenged in court and the Lithuanian courts should assume jurisdiction to hear this type of dispute.

10 Registration of lease interests

Summarise the process to register a lease interest.

Lease agreements translated into Lithuanian are submitted to the CAA to evidence the link as between the owner and the operator (the head lease agreements as between the owner and the intermediate lessor must also be submitted to the CAA). Accordingly, the operator is recorded in the certificate of registration. However, otherwise, lease interests are not subject to registration in Lithuania.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

The certificate of registration is issued by the CAA. Information on the certificate contains the following:

- nationality and registration marks of an aircraft;
- manufacturer and manufacturer's designation of an aircraft;
- aircraft serial number;
- name and address of the owner;
- name and address of the operator;
- a note that the aircraft is registered in accordance with the Chicago Convention and the Law on Aviation;
- date of issue of the certificate;
- signature block; and
- remarks, if any.

Additional remarks related to registration may also be stated. There is no separate certificate of engine registration as the engines are registered as a part of an aircraft. Also, the certificate of registration does not state the mortgagee's interest over aircraft and such interest can be evidenced by an extract from the Register of Mortgages of the State Enterprise Centre of Registers and can also be acknowledged by the CAA in a letter to be issued on behalf of the CAA upon request of a relevant party.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

The aircraft can be deregistered if a relevant application is submitted to the CAA by an owner. However, if the aircraft is mortgaged or seized by a court order, the aircraft cannot be deregistered without the consent of a mortgagee or a court order lifting the seizure order. A lessee's consent is not required to deregister the aircraft and it is not essential for the aviation authority to give notice prior to deregistration. The CAA can cancel registration of an aircraft upon its own motion if the aircraft does not meet the requirements for its registration; however, in practice, the CAA tends not to exercise this right, unless there is a very good reason.

The certificate of deregistration is issued only after the original aircraft certificate of registration is returned to the Aviation Authority. It should be noted that the certificate of registration must be kept in the aircraft while it is operated. It is not possible to give a definite answer regarding the situation that would arise if an owner did not surrender the original aircraft registration certificate; however, we are of the opinion that the general principle of reasonableness would be considered and the CAA would make a final decision giving due regard to the exact reasons why the original documents were not returned.

As noted, the operator may not block the deregistration and exportation. However, an operator may seek a court injunction if, for example, a contractual quiet enjoyment covenant is breached. Also, if the operator is recorded as a user of the aircraft, the owner may ferry the aircraft out of the country only after the aircraft is re-registered or the operator is deleted from the certificate of registration, and a flight permit is received from a relevant aviation authority.

The owner shall be entitled to export the aircraft out of Lithuania.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

The owner of the aircraft or a person authorised on the aircraft owner's behalf is entitled to deregister the aircraft from the Civil Aircraft Registry of the Republic of Lithuania, subject to a consent from a mortgagee (if applicable) and save when such right to deregister the aircraft is restricted by a court injunction.

Most international lessors require deregistration and export powers of attorney (DPoA) issued by their lessees. Such DPoA are usually notarised in order to avoid disputes about the authority of the grantor and authenticity of the DPoA. However, strictly speaking, the owner of an aircraft may enforce the right to deregister the aircraft without invoking such power of attorney. By reason of the Lithuanian law, a lessee may neither register, nor deregister the aircraft without a power of attorney issued by an owner. Therefore, it is arguable that the lessee's authority to permit the deregistration of the aircraft is null and void, because of the rule that no one can transfer more rights than he or she, him or herself, has.

The legal standing regarding the irrevocability of power of attorneys is not completely certain. The Civil Code includes such case that 'a contract may determine the cases, when an irrevocable power of attorney is issued'. However, the possibility may not be completely eliminated that the refusal or revocation of any power of attorney potentially made by a principal may be deemed enforceable by reason of the Lithuanian law.

A DPoA can be issued to more than one attorney and they survive the grantor's insolvency as long as the grantor is not liquidated and still existing. DPoAs notarised by a public notary are registered with the Register of Powers of Attorney.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

Lithuania is not a signatory to the Cape Town Convention and Aircraft Protocol. The irrevocable deregistration and export request authorisation (the Cape Town Power of Attorney) is not required by the CAA and is not relevant for the Lithuanian jurisdiction in general.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

Mortgage is the typical contractual security that can be created in Lithuania. A mortgage agreement must be notarised in order to create a valid security over the aircraft. As long as the notarisation is required, such documents have to be concluded either in Lithuanian, or be multilingual, in which case the public notary certifies the Lithuanian version (and the Lithuanian language will prevail) and the foreign version serves for informative purposes if one of the parties does not speak the local language.

As a matter of practice, the public notary prepares a draft of a mortgage agreement tailored for the needs of the parties. There is no specific form for this type of document, however, the mortgage agreement must be compliant with the requirements of Lithuanian laws and typically includes the following:

- the identities of the debtor, creditor and mortgagor;
- the object of the mortgage (aircraft engines can be specifically identified when the aircraft is described);
- the total or agreed value of the mortgaged object;
- the obligation of the debtors secured by the mortgage;
- the maximum secured amount (if the parties agree);
- the date of fixing the debt amount;
- the term within which the obligations must be fulfilled;
- the default interest rate;
- the number of contact counterparts; and
- boilerplate clauses that clarify the relations between parties.

Inclusion of economic terms in the mortgage agreement is necessary; however, it may sometimes suffice to provide a reference to the major agreement (eg, facility agreement) that specifies the secured obligations.

There are various types of mortgages available under the Civil Code (eg, a maximum mortgage, a conditional mortgage, a simple mortgage) and the mortgage agreement must contain additional information depending on the type of mortgage agreed between parties.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

As noted in question 15, a mortgage agreement must be concluded in a written form in Lithuanian and be notarised. In terms of the costs, the notarisation of a mortgage agreement will cost approximately €150 excluding VAT; in addition, one has to pay a compensation for the searches in public registers of around €1 and compensation for the services of the State Enterprise Centre of Registers of around €30. The documents legalisation costs are €15 per apostille. Document translation costs may vary, but translation of one A4 page should cost around €10 excluding VAT.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgage interest.

The registration of a mortgage is not a condition for the effective creation and its perfection against the debtor, but it is normally a condition for perfection of the mortgage against third parties.

The mortgage agreement shall be recorded by the public notary and the relevant data shall be electronically transferred by the public notary to the Register of Mortgages of the State Enterprise Centre of Registers and then the Civil Aircraft Register. The recordation of the mortgage is evidenced by an extract from the Register of Mortgages and acknowledgement of the mortgage by the CAA, which can be made in a letter to be issued on behalf of the CAA upon request by the relevant party. The registration of the mortgage at the Register of Mortgages is made on the same or the next business day upon receipt of data from the public notary; however, it may take a few days for the

CAA to receive data from the Register of Mortgages and to acknowledge the mortgage.

If a hypothec creditor (mortgagee) wishes to remove a mortgage, it must file a written declaration on the deregistration of a mortgage before a public notary and the public notary submits the data on the end of the mortgage to the Register of Mortgages and then the Register of Mortgages submits the data to the Civil Aircraft Register.

18 Registration of security

How is registration of a security interest certified?

On the same day or on the day after the mortgage agreement is notarised, the State Enterprise Centre of Registers issues a notification to the public notary confirming the registration of the mortgage in the Register of Mortgages. The notification specifies the following:

- the mortgage registration number;
- the registration date and time;
- the type of hypothec (eg, consensual);
- the date and time of conclusion of the mortgage contract;
- the notarial register number;
- the name of the creditor, debtor and the person offering security; and
- the obligation secured by the mortgage.

Recordation of a mortgage can be evidenced at any time by an extract from the Register of Mortgages and acknowledgement of the mortgage by the Lithuanian civil aviation authority, which is made in a letter to be issued upon request by the relevant party.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

The hypothec creditor has priority claim over other creditors, including subsequently registered mortgages, in respect of the mortgaged assets. The role of hypothec creditor is very important if the debtor defaults and bankruptcy proceedings are initiated. Such hypothec creditor becomes a super-priority creditor broadly outside the bankruptcy that is entitled to satisfy its claim from the mortgaged assets before other claims are satisfied (eg, bankruptcy administrator claims, taxes, employee remuneration).

As noted above, a mortgage creation notice is basically addressed to the public notary. The registration of a mortgage at the Register of Mortgages is a valid notice binding third parties from the date the record is made. All third parties may rely on the accuracy of the newly issued extract of the public Register of Mortgages and the data contained therein, since the data recorded in the register is deemed to be true and correct until contested under the procedures set by law (*prima facie* effect).

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

Lithuanian law does not distinguish between legal and beneficial interest. Similarly, the concept of trust is not recognised in the Lithuanian jurisdiction. The Lithuanian mortgage agreement includes the debtor, creditor and the mortgagor (the debtor and mortgagor may be the same person).

However, it is not possible to include a security trustee that, for example, acts as an agent of lenders under and in connection with the English or New York law-governed finance documents, in Lithuanian mortgage documents.

Also, a change of lenders triggers the slight modification of mortgage documentation, as the security registration would be affected and the new lender needs to be recorded in the Mortgage Register locally. As a practical solution, the borrower and security agent may agree that an independent payment obligation (or parallel debt) is created in favour of a security trustee, which can be secured locally.

Under Lithuanian law, an aircraft mortgage is a proprietary right. With the transfer of title to a mortgaged aircraft, the mortgage follows the aircraft. The mortgage does not give the mortgagee a title to the mortgaged property, which remains in the ownership of the mortgagor.

The mortgage of an aircraft does not prevent the mortgagor from transferring title to the mortgaged aircraft to a third party, unless otherwise agreed by parties.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

Security over an engine can be created either as security over the part of the aircraft in which it is installed or separately from the aircraft as the security over separate equipment.

As long as an engine does not qualify as a part of the aircraft (eg, a spare engine) and is physically located in Lithuania, it can be separately encumbered by entering into a pledge agreement. By virtue of the Lithuanian law, a spare engine can be made subject to a possessory or non-possessory right of pledge. For the creation of non-possessory pledge, the notarisation of a private agreement is required and it is registered in the Mortgage Register.

As long as the aircraft engine is not considered a part of aircraft, which is an immoveable property under Lithuanian law, pledge agreement can be governed by foreign laws in the case of a counter party to such agreement is a foreign entity.

The pledged engine does not cease to be encumbered upon its removal or installation on another aircraft.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

As long as the contract provides for cases where the lessor may terminate the agreement and repossess the aircraft, the lessor may enforce such right subject to the terms and conditions of the agreement and its governing law. Lithuanian law states that parties may agree on the conditions of terminating the agreement; however, if no such agreement is made, relevant provisions of Lithuanian law apply, stating that the nature of the lessee's breach must be taken into consideration (as material or non-material) and the lessor must file a default notice requesting the lessee to comply with its respective obligations prior to terminating the lease.

Provided that the lease agreement or respective provisions of governing law provide such right for the lessor, after an event of default or subsequent termination by the lessor of the leasing of an aircraft to the lessee, the lessor would be entitled to repossess the aircraft without additional fees or duties (other than a deregistration fee).

However, the repossession must be exercised peacefully. In the event an operator does not voluntarily surrender the aircraft, the owner or lessor would not be entitled to enforce the repossession by force. The use of self-help remedies is very limited under Lithuanian law and it is allowed only when expressly permitted by law. The owner or lessor shall be permitted to repossess the aircraft without the cooperation of an operator when it is so specifically authorised by the court. An enforceable court order shall be enforced by a bailiff (with assistance of the police if necessary).

An operator may obstruct repossession of an aircraft by refusing to surrender the aircraft, its documents or by making an application to the court for injunction. However, we are not aware of practical cases where a Lithuanian operator challenged the repossession or otherwise physically obstructed the process.

23 Enforcement of security

Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

In the event of default, the mortgagee may enforce its claims from the value of the mortgaged assets and proceeds received from its disposal. In practical terms, a mortgagee should apply to a public notary to receive an executive writ. The executive writ permits the mortgagee to enforce a security interest in an out-of-court procedure. The notary verifies if the information in the mortgagee's application conforms to the information in the Mortgage Register. After the notary makes an

executive writ, it can be submitted for execution to the public bailiff. The mortgaged assets will either be sold by public auction or be given to the mortgagee to administer.

In the event insolvency proceedings are opened against the debtor, the court shall appoint a bankruptcy administrator to manage assets of the company, including organisation of public auctions aimed at selling outstanding assets of the debtor.

The owner may obstruct the enforcement of a mortgage by challenging the executive writ issued by the notary in court, challenging actions of the bailiff, making a respective application to the court for injunction or filing any other counterclaims.

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

Under certain circumstances, an owner or operator may be deprived of possession or use of aircraft by any government entity or any other person and such liens of public law shall have priority over aircraft ownership or an aircraft security interest.

The Law on State of Emergency (6 June 2002, as amended), provides that temporary utilisation or requisition of means of transport or other property for remuneration is allowed during a state of emergency in accordance with the procedures set out by the government of Lithuania in order to prevent or eliminate or to save lives or protect the health and property of the people.

The Criminal Code (26 September 2000, as amended) provides the possibility for the state to confiscate property, which was the tool or means of the criminal activity. The property belonging to an owner may be confiscated if the owner of the property must have and could have been aware that the property has been used while committing a grave or a very grave crime.

The Civil Code provides a legal basis for a lawful possessor of assets to detain assets until the claim is satisfied. This right is commonly exercised by maintenance repair organisations refusing to release an aircraft prior to payment.

The Order of the Director of the CAA, of 10 September 2010, on the Approval of the Rules on the Prohibition to Lease and Aircraft Detention provides for a prohibition to leave Lithuanian airports to be imposed if, among other things, airport charges or air navigation fees are not discharged in respect of that aircraft.

A court injunction allows any relevant creditor to issue a request to the court to seize the aircraft until the dispute is resolved.

However, the party detaining the aircraft shall not have the right to sell the aircraft, unless the aircraft is confiscated. The mortgagee should not cease to be a super-priority creditor; however, the owner's or mortgagee's right to compensation will be determined according to general principles of civil law as well as in conjunction with the claim made by a third party.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Aircraft lease contracts

Payments under an aircraft lease agreement do not attract a withholding tax, provided that the transaction is made on the arm's-length basis. A zero per cent VAT rate would be applicable on lease rentals provided the aircraft is leased to a taxable person that receives more than half of its annual income from transporting passengers or cargo, or both, on international routes for consideration (the qualified airline).

Loan contracts

If a loan is provided to a Lithuanian resident, the interest earned from the loan provided by foreign residents (lenders) that are not incorporated in the European Economic Area (EEA) or in countries with which Lithuania has concluded a double taxation avoidance treaty, shall be taxed at 10 per cent rate and the tax must be withheld by the Lithuanian

borrower. If a loan is provided to a non-Lithuanian tax resident, interest on such loan will not trigger Lithuanian taxes.

A foreign company providing loans to its Lithuanian special purpose company should also consider the 'thin capitalisation rule', particularly if interest paid to its parent that provided a loan can be treated as permitted deduction for the purposes of calculation of Lithuanian corporate tax. The Resolution of the Government of the Republic of Lithuania 'On the Approval of the Rules for the Requalification of Income and Payments' (9 December 2003) provides for certain specific rules of re-qualification of income or payments. These rules were drafted for the purpose of creating an incentive to abstain from reducing the profit tax base in cases where equity investments that are subject to profit tax (and dividend taxation, if applicable) are replaced by loans. In particular, the rules set out that share of capital lent for remuneration to a Lithuanian entity by the controlling lender, which is in excess of a 4:1 ratio between such lent capital for remuneration and fixed capital, shall be qualified as controlled lent capital. Subject to certain exemptions, interest payable on the use of controlled lent capital shall be considered unrelated to the earning of income and shall not be deductible, for the purpose of calculating taxable profit of the controlled Lithuanian entity, from income of the Lithuanian entity.

Transfers of aircraft

The sale of an aircraft that takes place within the territory of Lithuania falls within the scope of Lithuanian VAT. However, a zero per cent VAT rate is applied in case the aircraft is sold to a qualified airline. The financing parties should be cautious if they decide to transfer the title of an aircraft on the ground. The Lithuanian tax authorities tend to take a restrictive approach, which means that supplies of aircraft to a qualified airline only would trigger zero per cent VAT, but not if supplying an aircraft to a new asset management company, even when the qualified airline operates the relevant aircraft.

In the event the sale of the aircraft is made outside Lithuania, such transaction does not trigger Lithuanian VAT. There is no applicable case law on transfers in international airspace; however, such transfers should qualify as transfers outside Lithuanian territory, provided the Lithuanian jurisdiction was not artificially circumvented.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

There are no exchange control laws in Lithuania relating to the payment of foreign currency obligations.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

There is no statutory limitation on the default interest rate. However, in case the interest rate is not agreed, a default interest rate of 6 per cent per annum would be applied in business-to-business transactions. However, a Lithuanian court is entitled to exercise some policing over default interest rates and can reduce clearly excessive interest rates (even if they were contractually agreed).

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Lithuania, being a member of the EU, is bound by the Community Customs Code, which sets the rules, arrangement and procedures applicable to goods traded between EU member and non-member states. As a general rule, the importation of aircraft from non-EU countries into Lithuania is subject to import VAT at the standard rate of 21 per cent.

According to Commission Regulation (EC) No. 1549/2006 of 17 October 2006 amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, a relief from customs duty shall be applied to the aircraft, provided the aircraft is classified as civil aircraft, and, pursuant to Commission Regulation No. 2454/93, the aircraft was assigned

by an applicant to the prescribed end-use by submitting a proof of conducted commercial flight. However, the end-use relief does not apply to VAT and excise duties.

Provided an aircraft is imported out of the EU, the import declaration needs to be filed with the Lithuanian customs authorities in order to accomplish customs procedures.

In the event the aircraft contains certain ozone-depleting substances, Regulation (EC) No. 1005/2009 on substances that deplete the ozone layers, should also be considered. This means that the relevant party has to be issued with a licence in accordance with Regulation (EC) No. 1005/2009.

Insurance and reinsurance

29 Captive insurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

There are no mandatory fronting requirements under the laws of Lithuania provided insurance is placed with insurance companies of EEA countries. Other insurance companies from third countries are subject to permission from the Bank of Lithuania.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

The concept of the cut-through clause is not developed in Lithuanian insurance law. However, it is a common practice that aircraft lease agreements governed by English or New York laws specify certain requirements for reinsurance, particularly that the reinsurance should contain cut-through clauses in a form reasonably satisfactory to the lessor. It is not certain how cut-through clauses would be enforced in Lithuania as, owing to the absence of fronting requirements, cut-through clauses are not really relevant.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Lithuanian insurance laws are fully compliant with applicable EU regulations. However, it is considered to be a business risk of the fronting company (insurer) to settle the insured claim. Thus, the fronting company would deal with reinsurers and then make the payments in accordance with the initial insurance contract. Assignments of insurance (reinsurance) should generally be enforceable from the perspective of Lithuanian law.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

An owner, lessor or financier is not liable for the actions or omissions of the operator. According to the laws of EU and Lithuania, liability for operating the aircraft is only restricted to the operator. The legislation on liability is laid down according to the Montreal Convention for the Unification of Certain Rules for International Carriage by Air. The legislation is also compliant with Regulation (EC) No. 785/2004 of the European Parliament and of the Council of 21 April 2004. The CAA controls the compliance of operators regarding this regulation.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

According to the provisions of the Civil Code, a person whose activity is linked to transport vehicles shall be liable for compensation of damage caused by such vehicles that constitute a special danger for surrounding persons, unless he or she proves that the damage was caused by superior force or victims' wilful acts or gross negligence.

However, under Lithuanian law, owners, lessors, financiers or others with no operational interest in an aircraft would not be held strictly liable (ie, liable without fault) or vicariously liable (ie, liable without fault for another party's obligations) for damages caused when an aircraft was operated by a third party. An owner, however, might be required to prove that it did not have the operational control.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

As a member of the EU, Lithuania is bound by the requirements of Regulation (EC) No. 785/2004 on insurance requirements for air carriers and aircraft operators (accidents with respect to passengers, cargo and third parties), and applies the minimum insurance requirements provided in this regulation. The regulation specifies the minimal insurance coverage for liability of third parties. The minimum insurance coverage per accident, for each aircraft, depends on the maximum take-off mass. The CAA is authorised to control whether operators comply with the requirements of this regulation.

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Malta is a party to the major air law treaties, including the following:

- the Chicago Convention on International Civil Aviation (1944), ratified on 5 January 1965;
- the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), ratified on 22 June 2000;
- the Convention relating to Cooperation for the Safety of Air Navigation (Eurocontrol), as amended (1960), ratified on 1 July 1989;
- the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963), ratified on 28 June 1991;
- the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970), ratified on 14 June 1991;
- the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971) and Protocol (1988), ratified on 14 June 1991; and
- the Cape Town Convention (2001) (the Convention) and Protocol to the Convention on Matters specific to Aircraft Equipment (2001) (the Aircraft Protocol), ratified on 1 October 2010.

In terms of the European Union Act (Chapter 460 of the laws of Malta), EU Regulations, Directives and other acts adopted by the European Union are binding on and applicable in Malta.

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The Aircraft Registration Act (Chapter 503 of the laws of Malta) (the Act), as amended by the Aircraft Registration (Amendment) Act 2016 (Act No. LII of 2016, which came into force on 13 April 2017), is the principal legislative instrument applicable to aviation finance and leasing, regulating, inter alia, the registration of aircraft and aircraft mortgages, and the leasing and operation of aircraft. The Act also served to transpose the Convention and the Aircraft Protocol and brought about other legislative amendments to the fiscal regime applicable to aircraft registration and financing. The First Schedule of the Act (the First Schedule) is the implementing law of the Convention and the Aircraft Protocol.

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Subject to the relevant provisions of the Rome I Regulation (EC) No. 593/2008 and Rome II Regulation (EC) No. 864/2007, a contract (or part thereof) may be governed by the law chosen by the parties thereto provided that said choice is made clear or expressly demonstrated by the terms of the contract or the circumstances of the case. Mortgages registered in terms of the Act are regulated by the provisions

of the Act. The prescribed form does not permit for the selection of a governing law, resulting in Maltese law being generally assumed (an assumption as yet untested by the local courts) to be the law applicable to the mortgage. With respect to security interests, the existence or validity of the security interest, its construction and its effects, are governed by the proper law applicable to the security agreement, and when executed or perfected in accordance with the proper law, shall be recognised and given effect to in Malta in accordance with the provisions of the Act.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

Title to an aircraft object may be transferred by a bill of sale or contract of sale. Title reservation agreements, in terms of which ownership of the aircraft object does not pass until fulfilment of the condition or conditions stated therein, are also possible.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

The bill of sale or contract of sale referred to in the preceding section must be in writing, and must contain an obligation whereby one of the parties, having the power to dispose of the identifiable object specified therein, binds him or herself to transfer to the other the said object for a price that the latter binds him or herself to pay to the former.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

The National Aircraft Register (the National Register) is maintained by the Director General for Civil Aviation (DG). This National Register contains, inter alia, details of the following:

- the aircraft and engines;
- the registrant;
- ownership rights in the aircraft and engines;
- mortgages; and
- irrevocable deregistration and export request authorisations (IDERA) or any other power of attorney.

The National Register also contains annotations permitted or required by the Act, most notably any ownership rights in aircraft or engines, the lessor and lessee rights in relation to the aircraft and engines, information on the international interest and the details of the resident agent where the owner is an international registrant. No specific engine register exists but interests in engines may be noted in the National Register at the request of the registrant. Where the engines are not the property of the registrant, prior consent of the owner is required for such an annotation to be made.

Applicants who may register aircraft in the National Register include an owner of aircraft under construction, an operator of an aircraft under temporary title (such as a lease) and a buyer under a

conditional sale or title reservation agreement (each a 'registrant'). Registration of aircraft and engines under the terms of a trust is also possible.

If the aircraft is intended to provide air services (ie, not solely for private use) the registrant must be a qualified person (see question 7).

Registrants of private aircraft are not subject to the qualifying requirements of aircraft used for 'air services', which are required to obtain a Maltese operating licence. If the aircraft is not used for air services, it may be registered by any aviation undertaking established in an Organisation for Economic Co-operation and Development member country.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

Where an application for registration of an aircraft is made by a registrant, the persons holding an interest by way of ownership or title in the aircraft (or a share therein) may include a request in writing to the DG to have such persons' ownership interests or title noted in the National Register.

The following persons are entitled to register any aircraft in the National Register:

- the government of Malta;
- a citizen of Malta, Switzerland, an EU state or a European Economic Area state (each a 'qualifying state'), having a place of residence or business in a qualifying state; and
- an undertaking established in a qualifying state and having its registered office, central administration and principal place of business within a qualifying state, whereof not less than 50 per cent of the undertaking is owned and effectively controlled by the government of Malta, any EU member state or by citizens of a qualifying state, whether directly or indirectly through one or more intermediate undertakings.

An aircraft in construction and an aircraft not used to provide air services may be registered by a citizen of a qualifying state, but not having a place of residence or business in a qualifying state; or an undertaking established in a qualifying state, but with less than 50 per cent of its ownership held by citizens of a qualifying state, and having its effective control carried out in a qualifying state, provided however that each of its shareholders and directors are a citizen of, or an undertaking established in, an 'approved jurisdiction' in terms of the Aircraft Registration (Approved Jurisdiction) Regulations (2011). For the purposes of the Act, such person or undertaking is referred to as an 'international registrant', provided such person:

- has legal capacity to own or operate an aircraft in terms of law;
- appoints a local resident agent to represent him or her in Malta for matters concerning the registration of the aircraft; and
- complies with applicable regulations and guidelines.

The Maltese legal framework does not provide for any registries other than the National Register, in which an ownership interest in an aircraft or engine may be registered.

The notations that may be made in the National Register upon a request by the registrant or any other person who demonstrates an interest having such information noted in the National Register, include the following:

- ownership rights in the aircraft or engines;
- lessor rights relating to the aircraft or engine when the lessor is a person different from the owner, although the same person may appear on the register as lessee;
- the lessee rights in relation to the aircraft or engine and all matters relating thereto;
- details of the resident agent where the registrant is an international registrant; and
- information on any international interest registered in the International Registry and the debtor thereof.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

A request for notation in the National Register as to the ownership interest in the aircraft is made pursuant to the application for registration of the aircraft. The relevant part of the application is to be signed by the owner and countersigned by the registrant. A copy of the bill of sale or other proof of ownership of the aircraft would need to be submitted to the Civil Aviation Directorate (CAD) together with the application.

On a general note, where documentation submitted to the CAD emanates from outside Malta the following conditions are to be satisfied:

- where the document originates from within the EU, this needs to be a certified true copy and legalised; and
- where the document originates from outside the EU, this needs to be notarised and apostilled.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

The certificate of registration constitutes prima facie evidence of its contents. Accordingly, should the holder of an interest, whether by way of ownership or title in the aircraft or a share therein, make a request to have such interest noted in the certificate of registration together with his or her personal details respectively, this would constitute proof of title that can be relied upon by third parties.

Registration in the National Register, whether by way of notation or record, has the following legal effects:

- it renders information public and considered to be within the knowledge of third parties;
- the registration becomes effective against third parties;
- it creates priority, according to the provisions of the Act and applicable law, between different rights, provided that except for the preservation of special privileges or reservation of title of aircraft or accessories of aircraft in accordance with the provisions of the Act, the notation of ownership or lessee rights shall not imply priority over those of the holder of a registered mortgage;
- where expressly conditional on registration, it shall create legal effects between the parties to certain transactions; and
- all other effects under applicable law.

10 Registration of lease interests

Summarise the process to register a lease interest.

A notation in the National Register as to the lease interest in the aircraft is also made at time of registration through the insertion of the necessary information in the application for registration. A copy of the aircraft lease or operating agreement would need to be submitted to the CAD together with the application for registration.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

A non-transferable certificate of registration may be requested from the DG. This would include details relating to the following:

- date of issue and number of certificate of registration;
- nationality marks of the aircraft and the registration marks assigned to it by the DG;
- constructor of the aircraft;
- manufacturer, serial numbers and physical details of the engines attached to the aircraft and any replacement engines to the extent that such are designated for use on the aircraft and, when the engines or replacement engines do not belong to the registrant, the same details shall be recorded in the National Aircraft Register with the consent of the owner of the said engines or replacement engines; and
- the name and address of the registrant and the name, address and ownership interests or title of the owner, if different.

A certificate of registration may be issued when the aircraft is still under construction, but such certificate shall expressly state that the

aircraft is not permitted to operate until it complies with the provisions of the applicable law.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

Where an IDERA is in force, the authorised person indicated therein will not be able to deregister the aircraft and procure the export and physical transfer of the aircraft without the prior consent in writing of the holders of any registered interest ranking in priority to that of the authorised person.

Prior to the exercise of such right, the authorised person shall be required to certify to the CAD that all registered interests ranking in priority to that of such authorised person have been discharged or that the holders of such interests have consented to the deregistration and export. Moreover, reasonable prior notice of deregistration and export is to be given to the debtor and any guarantor. Where any other person having rights over the aircraft or aircraft objects has had such interest annotated in the register, reasonable notice is also to be given to such person.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

A power of attorney or IDERA may be registered in the National Register or in the International Registry. Where a mandate or power of attorney (irrevocable or otherwise) granting powers relating to the exercise of rights relating to the aircraft, or to the closure of the register on behalf of the registrant, is granted for a stated period of time after which it shall lapse, such date must be recorded in the register and the registration of the mandate will cease to have effect after such date.

Where the request in writing is made by an authorised person, pursuant to an IDERA or power of attorney that has been registered in the National Register or in the International Registry, such request shall be acted upon in all cases (unless the holder of the IDERA that has been registered ranks in priority after any mortgage or any international interest registered, in which case the registration of the aircraft subject of an undischarged mortgage shall not become void or cancelled by the DG unless all mortgagees have consented), provided that the authorised person certifies that all registered interests ranking in priority to that of the authorised person have been discharged or that the holders of such interests have consented to the deregistration and export.

Revocation of an IDERA, where recorded by the CAD, requires the written consent of the authorised person.

An irrevocable mandate by way of security survives the insolvency of the debtor or the creditor and continues to be binding on, or continue for the benefit of, the heirs or liquidator (or similar officer) of the debtor, or the creditor, in accordance with its terms.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

Article 13(2) of the Act and article 25 of the First Schedule provide for the granting of an IDERA by the registered owner to a third party. The IDERA has to be submitted to the CAD in the format specified in the Second Schedule of the Act, and should be signed by the registrant and submitted in duplicate together with sufficient evidence that the signatory has due authority (by way of power of attorney or corporate authorisation) to bind the registered owner by his or her signature. It may be possible to request the CAD to issue a letter of undertaking acknowledging the IDERA and the registration thereof.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

Mortgages

It is possible to register a mortgage in the National Register over an aircraft by means of a statutory form executed by the mortgagor in favour of the mortgagee in the presence of, and attested by, a witness. The mortgage is drawn up in the English language and may be registered in favour of the creditor him or herself or a security trustee appointed or acting under a trust for the benefit of the creditors.

Mortgages may be registered as security for payment of a principal sum and interest, an account current or the performance of any other obligation, including a future obligation, due by a debtor to a creditor. The Act does not require that the value of the indebtedness is specified in the mortgage unless it is intended to secure a future obligation, in which case a maximum sum by way of principal for which the mortgage is granted must be expressly stated (such sum would also be reflected in the National Register). It is not necessary to record any other economic terms (such as interest and repayment dates).

Convention and aircraft protocol

In addition to the registration of a mortgage referred to above, in terms of the First Schedule creditors and debtors may also create international interests over airframes, aircraft engines or helicopters ('aircraft objects') and register such interests in the International Registry. International interests must be constituted pursuant to an instrument in writing executed by the chargor (or, in the case of title reservation agreements and leases, by the conditional seller or lessor) who has the power to dispose of the aircraft object specified therein. There is no requirement to specify a sum or maximum sum secured, however the agreement must at least specify what obligations are being secured.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

The following is a list of documents to be submitted to the CAD for registration of a mortgage:

- an original version of a mortgage on the prescribed form signed by the mortgagor and attested by a witness;
- if the mortgage form is being signed by an authorised attorney in Malta, an original power of attorney granted by the mortgagor; and
- copies of corporate authorisations, authorising the granting of the mortgage and the named attorney to execute the mortgage in Malta.

Other formalities (such as certification of copies, notarisation and legalisation) are required in connection with documents executed outside of Malta. The costs for legalisation and notarisation of such documents vary, typically in our experience within the region of €50–€75 and €50–€150 respectively (exclusive of VAT), depending on the type and length of the document.

The formalities for registration of international interests in the International Registry are set out in question 15.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

The mortgage must be registered with the CAD and will have no effect until it is recorded in the National Register. The mortgage takes its priority from the date and time of its registration in the National Register by the DG.

The process for registration is relatively straightforward. Once all necessary documents (see question 16) are readily available in Malta, they are delivered to the DG for registration for immediate recording of the mortgage by the DG. With a view to avoiding any delays in the recording of the mortgage, pre-vetting is advisable.

The fees payable for the registration of mortgages or amendments are set out in the Fifth Schedule of the Act.

18 Registration of security

How is registration of a security interest certified?

After the mortgage has been submitted, the DG will note on the original mortgage that it has been recorded by him or her, stating the date and time of that record. A transcript of the National Register may be requested by the mortgagor or mortgagee. The transcript will show, inter alia, the security interest registered on the aircraft and its priority.

With regards to international interests registered in the International Registry, a certificate issued by the International Registry constitutes prima facie proof that it has been issued and of the facts stated therein.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

The registration of a mortgage renders it effective and also creates priority over subsequent mortgages. If there are a number of mortgages registered over the same aircraft, the mortgagees will be entitled in priority, one over the other, according to the date and the time at which each mortgage is recorded in the National Register.

Since the Convention came into force in Malta on 1 February 2011, all mortgages registered in the National Register after said date rank after any international interest, prospective international interest and any other right or interest registered in the International Registry, irrespective of the date and time of registration in the International Registry.

20 Security structure and alteration

How is security over aircraft and leases typically structured?

What are the consequences of changes to the security or its beneficiaries?

The concept of a security trustee is recognised in Malta and commonly applied in granting of security over aircraft. A mortgage may be granted in favour of the beneficiary or in favour of a security trustee appointed or acting under a trust for the benefit of persons to whom a debt or other obligation is due.

The security trustee would be recognised as the mortgagee, and will be entitled to exercise all the rights in relation to the mortgage accorded to mortgagees under the Act. Accordingly, the mortgage will only refer to and recognise the security trustee as the person in whose favour the mortgage is registered, without any reference to the underlying lenders.

A mortgage constitutes a right in rem over the aircraft.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

Mortgages on aircraft can be registered in the National Register in terms of Part IV of the Act. For the purposes of this Part of the Act, an aircraft includes, inter alia, any engines owned by the owner of the aircraft, whether attached to the aircraft or not, as well as any replacement engines that are designated for use on the aircraft and owned by the owner of the aircraft but temporarily not attached to the aircraft.

Security over the aircraft would not, however, extend to any engine attached to the airframe when such engine is not the property of the owner of the airframe granting the security, notwithstanding that the engines may be specifically referred to in the instrument of mortgage, the National Register or elsewhere. In terms of article 573 of the Civil Code (Chapter 16 of the laws of Malta), where an engine attached to an airframe is not also owned by the airframe owner, each of the owners retains the ownership of their respective asset.

Also, in terms of the First Schedule, international interests on aircraft engines may be registered in the International Registry.

International interests that may be registered in the International Registry are interests in aircraft objects:

- granted by the chargor under a security agreement;
- vested in a person who is the conditional seller under a title reservation agreement; or
- vested in a person who is the lessor under a leasing agreement.

Engines and separate items on or in an aircraft may themselves be subject to special privileges in accordance with the provisions of the Civil Code, in security of the debts specified therein.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

International interests may be registered in the International Registry in favour of the lessor in accordance with the First Schedule. Such interest is recognised and enforceable under the laws of Malta, and is attributed the status and all rights and powers specified in the First Schedule with reference to a registered aircraft, irrespective of whether it is recorded in the National Register.

In the event of a default under a title reservation agreement or leasing agreement, the conditional seller or the lessor (as the case may be) is entitled to:

- terminate the agreement and take possession or control of any aircraft object to which the agreement relates; or
- apply to court requesting issuance of an order authorising or directing either of these acts.

In addition to the remedies specified above, in terms of the First Schedule the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in such provisions:

- procure the deregistration of the aircraft; and
- procure the export and physical transfer of the aircraft object from the territory in which it is situated. It is important to note that the creditor is only entitled to exercise the said remedies with the prior written consent of the holder of any prior ranking registered interest.

The First Schedule also provides that a creditor may exercise any additional remedies permitted by law, including any remedies agreed upon by the parties to the extent that they are not inconsistent with the mandatory provisions of article 22 of the First Schedule regulating possible derogations from certain specified provisions of the First Schedule.

23 Enforcement of security

Outline the basic measures to enforce a security interest.

How may the owner lawfully impede the mortgagee's right to enforce?

Remedies

The remedies with regards to enforcement depend primarily on the nature of the security interest (ie, whether the person enforcing the security is a chargor, a conditional seller or a lessor).

The rights pertaining to a lessor or a conditional seller are set out in question 22. With respect to a chargee, in the event of a default, it may, to the extent that the chargor has at any time so agreed, exercise any one or more of the following remedies:

- take possession or control of any aircraft object charged to it;
- sell or grant a lease of any such aircraft object; or
- collect or receive any income or profits arising from the management or use of any such aircraft object.

Alternatively, the chargee may apply for a court order authorising or directing any of the acts referred to above. It is pertinent to note that, with respect to the rights specified in (ii) and (iii) above, a chargee has an obligation to give reasonable prior notice to interested persons in the manner specified in the First Schedule.

In addition to the above, the holder of a mortgage registered in the National Register is entitled to request extensions, pay fees, receive

certificates and do other things in the name of the owner in order to maintain the registration of the aircraft in the relevant registry. The mortgagee may also apply to the court for the judicial sale of the aircraft or engine. Furthermore, a mortgagee must act in a commercially reasonable manner and is bound by fiduciary duties towards the debtor and any other creditors when effecting the sale of an aircraft.

Interim relief

A creditor is also entitled, pending final determination of its claim and to the extent that the debtor has at any time so agreed, to obtain from a court speedy relief (no more than 10 calendar days in cases (i) to (iii) below and no more than 30 calendar days in cases (iv) and (v) below, from the date of application for relief) in the form of one or more of the following orders as the creditor requests:

- (i) preservation of the aircraft object and its value;
- (ii) possession, control or custody of the aircraft object;
- (iii) immobilisation of the aircraft object;
- (iv) lease or, except where covered by (i) to (iii), management of the aircraft object and the income therefrom; and
- (v) sale and application of proceeds therefrom.

Vesting of aircraft object in satisfaction; redemption

In addition to the above remedies, at any time after the occurrence of an event of default, the mortgagee (charge), other preferred creditors and the mortgagor may agree that ownership of (or any other interest of the mortgagor, including any lessor rights) any aircraft covered by the mortgage is to vest in the mortgagee in or towards satisfaction of the secured obligations. Irrespective of any agreement reached, the mortgagee may request the court to order that the aircraft covered by the mortgage is to vest in the mortgagee in or towards the satisfaction of the secured obligations, provided that court shall grant such order if the amount of the secured obligations, after taking into account any payment to be made by the mortgagee to any preferred creditors, to be satisfied by such vesting is more than the value of the aircraft.

In addition to these remedies, holders of security interests have the right to procure the deregistration of the aircraft and the export and physical transfer of the aircraft object from the territory in which it is situated, as specified above.

Holders of international interests and mortgagees may also file an ex parte application in court, requesting the issuance of a warrant of arrest against an aircraft.

Insolvency

In terms of the Act, aircraft constitute a particular class of moveables and form separate assets within the estate of their owners for the security of actions and claims to which the aircraft itself is subject. The expression 'claims to which the aircraft is subject' or 'aircraft claims' is construed to refer to debts or other obligations secured by mortgages, international interests or security interests and claims that enjoy a special privilege under article 42 of the Act.

Accordingly, subject to rules in the Companies Act (Chapter 386 of the laws of Malta) regulating the granting of fraudulent preferences, all mortgages, special privileges and all actions and claims to which an aircraft is subject are not affected by the insolvency of the owner, provided the mortgage predates, or the special privilege, action or claim arose prior to, inception thereof. The Act expressly excludes the company recovery procedure of the Companies Act from applying in respect of a Maltese company that owns, holds, operates, charters, manages or leases any aircraft or engine.

Any judicial sale proceedings instituted and any other enforcement actions initiated by any registered mortgagee or creditor enjoying a special privilege (see question 24) will not be interrupted or hindered by any liquidator (or similar) for any cause other than a cause that could be set up by the owner of the aircraft.

The provisions of article 27A of the Act provide a specific regime in relation to insolvency proceedings of an aircraft company (where the memorandum and articles of association of the said company expressly so provide) to be exercised only by the holders of a mortgage, an international interest or a security interest or trustees or agents for such persons, over aircraft or related assets, singly or collectively, including as a class or classes of creditors, to the exclusion of any other persons for as long as the interest of the persons so indicated remains in force. An 'aircraft company' is defined as a company whose centre of

main interests is in Malta or is registered in Malta and the sole asset of which is an aircraft or aircraft engines and other related assets.

In addition to the above, given that Malta opted for Alternative 'A' of article XI of the Aircraft Protocol, in terms of the First Schedule the liquidator or debtor must give possession of the aircraft object to the creditor by no later than the earlier of:

- the end of the waiting period (which is defined as 30 calendar days from the date of the insolvency-related event); or
- the date on which the creditor would be entitled to possession of the aircraft object.

Until possession is given to the creditor, the insolvency administrator or the debtor (as the case may be) have an obligation to preserve and maintain the aircraft object and its value and the creditor is entitled to apply for any form of interim relief available by law. In the event that all defaults (other than a default constituted by the opening of insolvency proceedings) are cured and the debtor agrees to perform all future obligations under the agreement with the creditor, within the time specified above, possession of the aircraft object would not be given to the creditor.

Furthermore, the CAD shall make available to the creditor any right such creditor may have to procure the deregistration of the aircraft and procure the export and physical transfer of the aircraft object from where it is situated, no later than five working days after the date on which the creditor notifies the registry that he or she is entitled to procure those remedies in accordance with the First Schedule.

Debtor's obligation to cooperate

The Act imposes an obligation on the debtor and the person in possession of the aircraft object to provide its full cooperation to the holder of a security interest that is enforcing his or her rights including, but not limited to, surrendering and submitting all data, manuals, technical records, parts, accessories and appurtenances belonging to the aircraft object.

Executive title

Maltese law grants an international interest registered in the International Registry the status of an executive title where:

- it secures the rights of a seller under a conditional sale with reservation of ownership rights; or
- it secures the rights of a lessor under a lease agreement.

Mortgages are also granted the status of an executive title where the obligation secured is a certain debt, liquidated and due or where a maximum sum secured pursuant to the said mortgage is specified in the mortgage.

An executive title is, in effect, equivalent to a judgment, which can constitute the basis for seeking enforcement including, through the issuance of executive warrants (such as an executive warrant of arrest), an order for the judicial sale by auction of the aircraft or the approval of a private sale by the court (which would give the purchaser a title that is free from all privileges and encumbrances).

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

The following debts are, in terms of the Act, secured by a special privilege over the aircraft as well as by insurance proceeds (provided that such privilege does not apply in relation to an indemnity payable under a liability policy) and proceeds from any indemnity arising from any mishaps:

- judicial costs incurred in respect of the sale of the aircraft and the distribution of the proceeds thereof, pursuant to the enforcement of any mortgage or other executive title;
- fees and other charges due to the DG arising under the applicable law in respect of the aircraft;
- wages due to crew in respect of their employment on the aircraft;
- any debt due to the holder of a possessory lien for the repair and preservation of the aircraft, to the extent of the service performed on and value added to the aircraft;

- the expenses incurred for the repair and preservation of the aircraft, to the extent of the service performed on and value added to the aircraft; and
- wages and expenses for salvage in respect of the aircraft.

The same applies in the case of the following; however, only after registration in the International Registry:

- taxes, duties and levies due to the government of Malta in respect of the aircraft; and
- wages and expenses for assistance or recovery in respect of the aircraft.

Upon the registration of such privileges in the register, the person registering the aircraft, its owner, or its operator is to be notified of the registration by the registrant of the privilege. The requirement for registration of the privilege for taxes, duties and levies due to the government of Malta and the specific ranking position of such claim in terms of the Act is applicable and binding with reference to such claims notwithstanding the provisions of other special laws of Malta that may govern such claims.

The above are applicable, *mutatis mutandis*, to aircraft engines.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Maltese income tax legislation provides for tax measures favourable to both lessors and lessees of aircraft. No withholding tax is payable on lease payments where the lessor is not a tax resident. Guidance issued by the Inland Revenue Department serves to provide clear rules on the tax treatment of the finance charge, available tax deductions to aircraft finance lessors and capital allowances for leases.

Corporate tax

Income derived from the ownership, leasing or operation of aircraft or aircraft engines engaged in the international transport of passengers or goods is deemed to arise outside Malta for Maltese income tax purposes, irrespective of the country of registration of the aircraft or engines and whether the aircraft calls at or operates from Malta. Income tax is not paid in Malta unless the income therefrom is actually received in a Maltese bank account. Moreover, it is pertinent to note that in terms of a majority of double tax treaties to which Malta is a party, profits derived from the operation of an aircraft in international traffic are taxable only in the contracting state in which the place of effective management of the enterprise is situated. Thus, if the effective management of a company is situated in Malta, such profits may in terms of the pertinent tax treaty be subject to tax solely in Malta, which in any case would be exempt from tax unless remitted to Malta.

Leasing rules

Operators setting up a company in Malta may avail themselves of attractive finance leasing rules that minimise the tax burden considerably. This is applicable to arrangements that do not exceed four years. The lessor is charged to tax on the annual finance charge (difference between the total lease payments and the capital element) divided by the number of years of the lease, while the lessee is allowed a deduction in respect of finance charges, maintenance, repairs, and insurance, plus capital allowances in respect of the aircraft. Where the lessee exercises an option to purchase the aircraft at the end of the finance lease, and provided the lessor is not trading in the purchase and sale of aircraft, the purchase price received by the lessor is considered to be of a capital nature, and not taxed.

A favourable tax treatment for operating leases is also available. In such cases, the lessor is taxable on the full amount of the lease income and if it maintains the burden of wear and tear, it will be able to claim capital allowances in respect of the aircraft. The lessee, on the other hand, is entitled to deduct the full amount of the lease payments and to claim capital allowances on the aircraft if it maintains the burden of wear and tear. Accelerated tax depreciation rates (six years for the aircraft and engines and four years for the interior of the aircraft) also apply.

Investment tax credits and fringe benefits

The repair, overhaul or maintenance of aircraft, engines or equipment incorporated or used in such aircraft is one of the qualifying activities in terms of the investment aid tax credits, and a company offering such services would be eligible for tax credits (at varying percentages depending on size) on profits derived from such qualifying activities.

No taxable fringe benefit shall be deemed to arise in Malta in the case of private use of an aircraft by an individual who is a non-resident employee or officer of an employer or corporate entity whose business activities include the ownership, leasing or operation of one or more aircraft or aircraft engine used for, or employed in, the international transport of passengers or goods.

VAT

With respect to VAT, leasing of aircraft is chargeable to VAT on the deemed use of the aircraft within European airspace. In order to establish the percentage of use of an aircraft within EU airspace, the VAT Department has issued a formula that takes into account essential features of the aircraft on the basis of which the percentage of use is established. Through such a scheme, the lessor would be entitled to claim the original VAT incurred upon the acquisition of the aircraft as it becomes engaged in performing the economic activity of chartering the aircraft. No VAT is charged in respect of the supply, acquisition, importation, chartering, maintenance, servicing and provisioning of aircraft to be used by airline operators for reward chiefly for international transport of passengers, goods or both.

The above framework sits alongside other elements such as the following:

- a reduced income tax rate of 15 per cent for highly qualified persons in the aviation sector;
- no stamp duty on the transfer of aircraft, airframes, engines and other aircraft related assets; and
- provisions for allowing redomiciliation of companies, with no exit or entry taxes.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

No exchange control restrictions apply.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

As a general rule, interest can be charged at up to a maximum rate of 8 per cent per annum. In addition, the compounding of interest is not enforceable in Malta unless the obligation to pay interest is due for a period of more than one year and certain procedures are followed. However, in terms of the provisions of the Commercial Code (Chapter 13 of the laws of Malta) on late payments in commercial transactions, the legal interest for late payment is set at the applicable European Central Bank reference rate plus 8 per cent. Limitations on the rate of interest and the compounding thereof are not applicable in certain circumstances specified in the Interest Rate (Exemption) Regulations (Subsidiary Legislation 16.06) including, *inter alia*, to:

- debts or obligations when:
 - obligations arise under a contract governed or otherwise regulated by the law of a country other than Malta;
 - the agreed interest rate or compounding of interest are in accordance with international market conditions prevailing at the time that the debt or obligation has been contracted; and
 - the payor of interest is not a natural person. The same position applies in the case of security governed by Maltese law relating to such types of debts or obligations; and
- debts and other obligations that are secured by a mortgage, or due under a lease of a ship or aircraft, including an aircraft engine, whether registered in Malta or otherwise and whether governed by Maltese law or otherwise.

The same position applies in the case of security governed by Maltese law relating to such types of debts or obligations.

Update and trends

Legal updates

In April 2017, a number of highly anticipated amendments to Maltese laws were introduced. Act No. LII of 2016 amended the Act, the Code of Organisation and Civil Procedure (Chapter 12 of the laws of Malta) (the COCP), the Civil Code (Chapter 16 of the laws of Malta), the Financial Institutions Act (Chapter 376 of the laws of Malta) (the FIA) and Interest Rate (Exemption) Regulations (the IRR).

The provisions of the COCP were revised to reflect certain changes deemed necessary in the aviation sector. In particular, the COCP was amended to extend the jurisdiction of the Maltese courts for proceedings in rem to include aircraft engines in respect of claims set out therein and to provide for the possibility of requesting the issue of a warrant of arrest in respect of an aircraft to which an aircraft engine is attached to secure a debt or claim subject to the limitations provided therein.

The Civil Code was revised to better reflect the needs of the aviation industry. In particular, the sale or purchase of aircraft, including aircraft engines, as well as the promise to sell and lease an aircraft, are now governed, *inter alia*, in accordance with the terms and conditions of the relevant agreement entered into between the parties and international usages of trade applicable in the context, and in case of conflict with the provisions of the Civil Code, such terms and conditions shall prevail.

The FIA has also been amended. An exemption for finance leasing of ships and aircraft has been introduced. This exemption is applicable in specified circumstances.

The IRR have also been amended to remove limits on interest rates in respect of debts and other obligations that are secured by a mortgage

over or due under the lease of an aircraft or aircraft engine whether registered in Malta or otherwise, and whether governed by Maltese law or otherwise.

Other updates

The changes to the Act and the various laws referred to above are testament to the commitment of the government to ensure that the aviation sector continues to flourish. The aviation sector remains a significant contributor to the local economy. Malta offers an ideal location with a suitable business environment and a highly skilled workforce to deliver operations.

The growth of Malta's maintenance, repair and overhaul sector continues – SR Technics recently concluded a memorandum of understanding with Malta Enterprise and Malta Industrial Parks Limited in connection with plans for SR Technics to expand and modernise its facilities.

The number of air operator's certificates (AOC) issued by the Civil Aviation Directorate (CAD) in Malta continues to increase. There are currently 30 AOCs issued by the CAD. TAG Aviation Europe recently received their AOC and registered a private jet on the aircraft registry in Malta.

The aircraft registry continues to grow, with 247 aircraft registered as at 3 May 2017. The number of aircraft registered in Malta as at 15 August 2015 was 201.

Finally, Malta International Airport is presently undergoing an ambitious reconfiguration and facility upgrading project in its terminal, with works being carried out in all parts thereof.

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

No import duty is payable in respect of civil aircraft. Aircraft are not deemed to be chargeable assets for stamp duty purposes.

Insurance and reinsurance

29 Captive insurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

The Civil Aviation (Insurance Requirements for Air Carriers and Aircraft Operators) Order (SL 499.41) (the Order), which implements the rules promulgated in terms of Regulation (EC) No. 785/2004 on insurance requirements for air carriers and aircraft operators (as amended), requires that no aircraft may be flown in Malta without having insurance cover that meets the requirements of such Regulation. The Order does not require that insurance must be placed with a domestic insurer, and there is no prevailing practice to place insurance in the local market. In fact, only a limited number of reinsurance principals authorised by the local insurance regulator to carry on the business of insurance in or from Malta are authorised to provide insurance in relation to aircraft.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

In terms of the Act, proceeds from an insurance policy related to an aircraft are secured by a special privilege upon the aircraft. Moreover a mortgage would attach to any proceeds from any indemnity arising from any mishaps as well as any insurance proceeds, except in relation to an indemnity payable under a liability policy.

It is possible in terms of Maltese law for a person to stipulate for the benefit of a third party, subject to the satisfaction of the following criteria:

- the third person must be defined;
- the third person must have signified his or her intention to avail him or herself of the stipulation; and
- the stipulation must constitute:
 - the mode or condition made by the person for his or her own benefit (such 'mode' has been interpreted by Maltese courts to

refer to an obligation that, if not present in the contract, would render the contract a gratuitous one); or

- a donation or grant made by him or her to others.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

In terms of Maltese law, a debt, right or cause of action may be assigned subject to the satisfaction of the requisites essential for its validity, namely agreement as to the subject of the assignment and the price, and, except in the case of a right transferable by the delivery of the respective document of title, the execution in writing of a deed of assignment.

An assignee may not, in regard to third parties, exercise the rights assigned to him or her, except where the debtor has acknowledged the assignment, or after due notice of the assignment has been given to the debtor by means of a judicial act by the assignee him or herself or by the assignor.

As a signatory of the Convention, all associated rights (defined therein as all rights to payment or other performance by a debtor secured by or associated with the aircraft object) including, *inter alia*, reinsurance contracts associated with the aircraft, are capable of being assigned unless otherwise agreed between the parties.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

The Sixth Schedule of the Act promulgates sanctions for specified administrative offences in relation to the obligations of the registrant to notify the DG of certain events, cancellation of registration, the marks to be borne by aircraft registered in Malta and the appointment of a resident agent in respect of an international registrant.

The Civil Aviation Act (Chapter 232 of the laws of Malta) imposes certain penalties, including that if an aircraft is flown in such a manner as to be the cause of unnecessary danger to any person or property, the pilot or the person in charge of the aircraft shall be liable for the payment of a fine not exceeding €2,500 or to imprisonment not exceeding six months or to both such fine and imprisonment.

Where material loss or damage is caused to any person or property by, or by a person in, or an article or person falling from, an aircraft while in flight, taking off or landing, then unless the loss or damage was

caused or contributed to by the negligence of the person by whom it was suffered, damages in respect of the loss or damage shall be recoverable.

Where aircraft have been bona fide demised, let or hired out, for any period exceeding 14 days, by the owner thereof, and no pilot, commander, navigator or operative member of the crew of the aircraft is in the employment of the owner, the relevant sections of the Civil Aviation Act (Chapter 232 of the laws of Malta) whereby liability for damages would attach to the owner of the aircraft so leased would be applicable to the person to whom the aircraft has been so demised, let or hired out, as if such person were the owner of the aircraft.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

In terms of the Civil Aviation Act (Chapter 232 of the laws of Malta), where the owner can prove to the satisfaction of the court that the aircraft was so flown without his or her actual fault or privity, liability would not attach to the owner but to the person having the operational interest in the aircraft.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

The Civil Aviation (Insurance Requirements for Air Carriers and Aircraft Operators) Order regulates such matters. Aircraft with a maximum take-off mass of less than 500kg, and microlights that are used for non-commercial purposes, or local flight instruction not entailing the crossing of international borders, are required to have a minimum insurance cover per accident of 750,000 special drawing rights (SDR) per passenger. In respect of non-commercial operations by aircraft with a maximum take-off mass of less than 2,700kg, the minimum insurance cover shall be 100,000 SDR per passenger.

The requirements with respect to all other aircraft set out in Regulation (EC) No. 785/2004 (see question 29) apply.

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Mexico is party to the following treaties and conventions:

- the Rome Convention (1933), signed on 26 October 1961 and ratified on 6 September 1985;
- the Chicago Convention (1944), ratified on 25 June 1946;
- the Geneva Convention (1948), signed in 1952; Part 1 ratified in 1983 and Part 3 ratified in 2008;
- the Cape Town Convention (2001), ratified on 31 July 2007; and
- the New York Convention (1958), ratified on 14 April 1971.

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The principal domestic legislation applicable to aviation finance and leasing are the Civil Aviation Law (including its related rules and regulations), the Federal Civil Code and the Commerce Code.

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

There are no restrictions on choice of law clauses in contracts to the transfer of interests in or creation of security over aircraft.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

Title in an aircraft is usually transferred through a bill of sale.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

The existing documental requirements to perfect transfer of title of an aircraft and its related formalities would be as follows.

In writing, notarisation would be necessary in specific cases, as well as the legalisation or apostille of the corresponding document, depending upon whether the parties involved are part of the Hague Convention.

Translation of the document would be necessary in any and all events by a duly authorised translator, or the document could be executed in two languages.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

The Mexican Aeronautic Registry is an operator registry, and is a public registry where information is available to any person or entity that evidences its legal interest in the information requested or to be requested. Transfer of regulatory and oversight functions may verify.

Notwithstanding that an interest on an engine may be registered through various legal structures (ie, via lease agreement or a pledge), the Mexican Aeronautic Registry is not an engine registry per se.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

The ownership or lease interest in, or lease agreement over, aircraft is subject to registration before the Mexican Aeronautic Registry.

No limitations exist on who can be recorded as owner. In addition to the above, as of November 2007, Mexico is part of the Cape Town Convention on International Interest in Mobile Equipment and its Protocol on Matters Specific to Aircraft Equipment, therefore, any international interest must be registered before the International Registry.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

Mortgages, pledges, ownership and any and all liens in connection to aircraft and engines are registered before the Mexican Aeronautic Registry, an entity under the subordination of the Directorate General of Civil Aeronautics (DGAC).

The Mexican Aeronautic Registry is under the supervision of the Ministry of Communications and Transport. Documents through which property, possession and other rights on Mexican aircraft are acquired, transmitted, modified or extinguished, including such aircraft-related engines, as well as the lease of Mexican or foreign aircraft, should be filed with the Registry.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

The registration of an ownership interest before the Mexican Aeronautic Registry constitutes proof of title, and the parties can rely on the accuracy of the public registration of the ownership as recorded and evidenced in an Aircraft Certificate of Registration or on the relevant documents filed for registration and duly stamped by the Mexican Aeronautic Registry.

The ownership interest would be effective against third parties, even if the owner has no title or a defective title.

10 Registration of lease interests

Summarise the process to register a lease interest.

Article 14 of the Mexican Aeronautic Registry Regulation establishes the requirements for any interested party to register a lease interest. The petition must be in written form, with the following requirements to be completed by the applicant:

- name;
- Certificate of Incorporation;
- power of attorney;
- domicile to receive notification within Mexican territory;
- evidence of the payment of duties regarding the document or documents to be registered; and
- the transaction documents duly executed by the parties, formalised before a notary public, legalised or apostilled as applicable and duly translated into Spanish by a duly authorised translator if applicable.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

The certificate of registration should have the following information, pursuant to article 100 of the Civil Aviation Regulation:

- place and date of issuance, and registration number;
- registration numbers and marks;
- model of the aircraft and engines;
- name of the manufacturer;
- manufacturer's serial number;
- year of manufacture;
- name and domicile of the owner, and title of ownership;
- if applicable, name and domicile of the operator and documents related (ie, lease, among other things);
- if applicable, name and domicile of the mortgagor or person with a title of interest, type and date of the interest;
- base of operation of the aircraft;
- type of operation of the aircraft; and
- any other registration related to the Mexican Aeronautic Registry pursuant to the applicable regulations.

Within 10 business days of the filing, the officers of the Registry should have recorded the documents.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

In accordance with article 46 of the Civil Aviation Law, if there is a mortgage in place no deregistration process would be effective without the prior written consent of the mortgagee. Moreover, the deregistration could be performed by a written request filed by the owner or the legitimated possessor (operator). However, in practice, the Aviation Authority requests the consent of the operator in the event that the owner files the deregistration petition.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

The power of attorney must comply with the Federal Civil Code or the applicable local Civil Code. The power of attorney must be duly formalised before a Mexican notary public. If the power of attorney is granted outside Mexico, it must be certified by a notary public, legalised or apostilled, as applicable, duly translated into Spanish by a translator authorised by the local or federal court, and formalised by a Mexican notary public. In accordance with Mexican legislation, the power of attorney is irrevocable and no authorisation is required to exercise it. Furthermore, the power could be granted in favour of one or several attorneys.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

Pursuant to the declarations set forth by the Mexican government to the Cape Town Convention, the IDERA process is not applicable in the Mexican jurisdiction.

Security**15 Security document (mortgage) form and content**

What is the typical form of a security document over the aircraft and what must it contain?

Pursuant to the Civil Code, the mortgage must be granted and formalised before a notary public. In the event that the security is granted outside Mexico, the document must be legalised or apostilled, as applicable, and duly translated into Spanish by a translator authorised by the local or federal court. The security should contain economic terms and conditions agreed by the parties.

In accordance with article 101 of the Regulation of the Civil Aviation Law, the security document must be authorised by the Ministry of Communications and Transport and duly recorded with the Mexican Aeronautic Registry.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

The mortgage must be granted and formalised before a notary public. In the event that the security is granted outside Mexico, the document must be legalised or apostilled, as applicable, and duly translated into Spanish by a translator authorised by the local or federal court.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

Pursuant to article 101 of the Regulation of the Civil Aviation Law, the security must be filed before the Mexican Aeronautic Registry; and in accordance with the Cape Town Convention and its Protocol, the security could be registered before the International Registry.

In accordance with the regulations of the Mexican Aeronautic Registry, in order to register a security the applicant must provide the following:

- name;
- Certificate of Incorporation;
- power of attorney;
- domicile to receive notification within Mexican territory;
- evidence of the payment of duties regarding the document or documents to be registered;
- authorisation granted by the Ministry of Communications and Transport to the carrier to execute the security document; and
- the transaction documents duly executed by the parties, formalised before a notary public, legalised or apostilled as applicable and duly translated into Spanish by an authorised translator if applicable.

The officers of the Registry should record the documents within 10 business days of the filing.

18 Registration of security

How is registration of a security interest certified?

The officers of the Registry record the security document within its corresponding section in accordance with the regulations of the Mexican Aeronautic Registry. Furthermore, the officers modify or incorporate the registration of the security document into the Certificate

of Registration of the aircraft. In addition to the above, any party of the security document has the right to request before the Mexican Aeronautic Registry an evidence of the said registration.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

The registration of a security document before the Mexican Aeronautic Registry confers priority over subsequent interest and, owing to its registration, it is enforceable before third parties. The Mexican Aeronautic Registry has a designated section before which the security documents are duly recorded on a date basis.

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

According to the Civil Aviation Law, any alterations carried out in previously recorded interests before the Mexican Aeronautic Registry must be duly recorded before said Registry, otherwise they will not be effective before the new involved parties. This attests to the fact that the interests and rights are in rem and not in personam.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

Pursuant to the Civil Code, the security document must be granted and formalised before a notary public. In the event that the security is granted outside Mexico, the document must be legalised or apostilled, as applicable, and duly translated into Spanish by a translator authorised by the local or federal court. The security should contain financial terms and conditions agreed by the parties. The said security document must be duly registered before the Mexican Aeronautic Registry.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

The return of an aircraft lessor or owner at the end of the lease term, or otherwise upon termination or following the occurrence of an event of default, does not require the consent or approval of, the giving of notice to, the registration with, or the taking of any other action in respect of any government entity of Mexico. It does not contravene any laws of Mexico. However, if a lessee does not return the aircraft voluntarily, a court order based on a final judgment will be required in order to retrieve possession of the same.

The following are the deregistration criteria established in article 46 of the Civil Aviation Law:

The cancellation of the registration marks of an aircraft before the Mexican Aeronautic Registry will have as a consequence the loss of its Mexican nationality and may be made in the following cases:

- (i) *at the written request of the owner or person in legitimate possession of the aircraft. The deregistration of an aircraft with a registered lien will not take place, without the consent of the person that holds such lien;*
- (ii) *through a judicial order or an order of other competent authority;*
- (iii) *in case of destruction, loss or abandonment of the aircraft;*
- (iv) *for the conclusion of the term of a temporary registration;*
- (v) *for the registration of the aircraft in another country; and*
- (vi) *for any of the events described in the respective regulations.*

The Registration Certificate is a relevant element or document that is always requested by the DGAC in order to proceed with a deregistration request. This document is therefore always delivered to the lessee, therefore it is important to have physical possession of such document.

No self-help remedies are available in Mexico.

23 Enforcement of security

Outline the basic measures to enforce a security interest.

How may the owner lawfully impede the mortgagee's right to enforce?

Self-help remedies are not available in Mexico. A court order must be obtained to detain an aircraft. An aircraft cannot be detained by an ex parte application.

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

The obligation to pay rent under a lease or sublease is the direct and unconditional general obligation of a Mexican operator, and will rank in right of payment at least *pari passu* with all unsecured debt of the Mexican operator.

A Mexican operator is subject to civil and commercial law, and its actions constitute private and commercial acts. Neither the operator nor any of its revenues, properties or assets enjoys any right of immunity from suit, set-off, or attachment upon or prior to judgment or in aid of execution in respect of its obligations under a lease or a sublease transaction.

Employee rights and tax liabilities have priority under Mexican legislation.

If the ownership or a mortgage have been duly filed before the Mexican Aeronautic Registry, and the operator does not have any potential or partial ownership or property rights on an aircraft, the equipment may be repossessed.

An aircraft may not be confiscated, seized or detained for any reason whatsoever, unless a criminal action involves the aircraft (ie, drug trafficking).

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

No payment of rent, to be made by an operator under a lease or sublease, and no insurance proceeds to be paid under any of the insurance policies to be maintained under a lease or a sublease, should be subject to any Mexican withholding tax or will give rise to any other taxes imposed by Mexico or any political subdivision or fiscal or taxing authority thereof. Neither a lease nor a sublease of an aircraft to a Mexican operator; the use and operation of an aircraft leased or subleased by a Mexican operator; nor any other transactions from the operator should result in the owner, a mortgagor, a lessee or sublessee being subject to any taxes imposed by Mexico or any political subdivision or fiscal or taxing authority thereof. Neither the transfer and delivery of an aircraft to a Mexican operator, nor the ownership of the aircraft by the owner, nor the return of the aircraft at the end of the term of a lease or sublease or following the occurrence of a default or event of default should result in any taxes imposed by the Mexican government or any political subdivision or fiscal or taxing authority thereof upon or with respect to any such transfer, delivery or return with respect to the aircraft; except that:

- a Mexican withholding tax will apply to the amount of each rental payment made by the Mexican operator to a lessor or sublessor; and
- a 1.8 per cent annual asset tax on the value of the assets lease or subleased would apply.

The above Mexican taxes are almost always paid by the Mexican operator, depending on the structure of the transaction documents.

Subject to the nationality of the parties involved in the lease or sublease transaction, the Mexican operator may be qualified, under a double taxation treaty, to certain benefits and rights thereto, which may cause or enable the Mexican operator to avoid such withholding and asset taxes.

The Mexican operator is also obliged to pay all filing fees upon filing, which will be assessed by the Mexican Aeronautic Registry in respect of a lease or a sublease, in order for the registration process to be accomplished. The obligation of the operator to pay such taxes and fees, and the execution or performance of any act relating to the payment of the same by the operator directly or indirectly to the appropriate Mexican tax authorities, should not under Mexican law create an implication of any type of ownership interest by the operator in an aircraft, or in any way negatively affect the rights of the owner, lessor or sublessor in an aircraft.

Taxes would apply in relation to a sale or transfer of title of an aircraft within Mexican territory.

Additionally, a 16 per cent value added tax would be imposed on a temporary import of an aircraft into Mexican territory.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

No restrictions exist in relation to international payments, and exchange controls are in effect in Mexico.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

In Mexico, no limitation exists on the amount of default interests.

According to article 2,395 of the Federal Civil Code, the legal interest is 9 per cent calculated on an annual basis. A conventional interest may be agreed by the parties of a transaction, and the interest percentage may be higher or lower than the legal interest. Nevertheless, when such an interest is so disproportionate that it may reasonably generate the belief that an abuse exists and affects the debtor, such an interest may be reduced by a judge.

Additionally, jurisprudence exists in congruence with excessive interests, as stated in the Federal Civil Code.

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Import and export costs, as well as customs duties, exist when bringing an aircraft into Mexico.

Aside from a customs broker's variable fee, a 16 per cent value added tax exists.

In the case of repossession, the owner or mortgagee is entitled to export the aircraft without the operator's assistance. Nevertheless, such owner or mortgagee would need to absorb the corresponding export costs.

Insurance and reinsurance

29 Captive insurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

Chapter XIII, article 74 of the Civil Aviation Law provides that an insurance policy (Mexican insurance) needs to be obtained and contracted with an insurance entity duly qualified to do business in the country. This is in addition to the civil liability coverage that any and all operators require.

No minimum or maximum percentage of the insurance is prevented or considered in the Civil Aviation Law.

The coverage limits are based on a minimum salary wages concept, and such figures vary each year depending on the increase of the minimum salary wage.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Cut-through clauses under the insurance and reinsurance documentation are legally effective.

Update and trends

A discussion regarding the Cape Town Convention and its Protocol could arise in the next months in order for Mexico to achieve the supposed benefits in financial terms.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Reinsurance is regulated by the National Commission of Insurances and Bonds (NCIB).

Assignment of reinsurance is legally effective in Mexico. Essentially, the reinsurance market is a niche for foreign reinsurance companies. Any and all reinsurance companies, whether Mexican or foreign, have to be duly registered and approved by the NCIB.

Assignments of reinsurance are typically provided on aviation leasing and finance transactions.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

The owner, lessor or financier are not liable for the operation of the aircraft or the activities of the operator, unless such owner, lessor or financier is directly or indirectly involved in the operation of the aircraft.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

Article 61 of the Civil Aviation Law establishes that the authorised operators ('permit or concession holders') of the aircraft shall be responsible for the damages caused to passengers, cargo or luggage being transported.

Based on the provisions of the Civil Aviation Law, the airline or the operator is responsible for damages caused to passengers.

Pursuant to article 1,915 of the Civil Code for the Federal District, the damage repair shall consist of the restatement of the situation prior to such damage, and when that consists of the payment of damages, pursuant to the following rules.

When damage is caused to individuals and causes death, or total or partial temporary or permanent disability, the amount of the indemnity shall be fixed applying the tariffs established in the Federal Labour Law. The basis to compute the corresponding indemnity shall be four times the highest daily minimum salary in force in the region.

Pursuant to articles 500 and 502 of the Federal Labour Law, the indemnity payment to be made in the event of the death of the victim shall be equivalent to two months' salary for funeral expenses and the payment of an amount equivalent to 5,000 days' salary.

In accordance with article 62 of the Civil Aviation Law, the right to recover damages is subject to that prescribed by article 1,915 of the Civil Code for the Federal District in common matters, and for all of Mexico in federal matters, the only exception being that the recoverable amount shall be three times the amount provided in such article.

Consequently, pursuant to the above, the recoverable material damages, under article 1,915 of the Civil Code, would be the amount equivalent to the minimum salary in force at the time of the death, multiplied by 790 (5,000 plus 60 days for funeral expenses). This result is multiplied by four.

When the Civil Aviation Law applies to the recoverable damages, the amount resulting from the numerical operations described in the previous paragraph is multiplied by three (article 62 of the Civil Aviation Law).

Moral damage

It is important to note that article 62 of the Civil Aviation Law only prescribes that damage to passengers is subject to the indemnities established by article 1,915 of the Civil Code for the Federal District. Such legal provision only prescribes the recovery for material damages.

Nevertheless, it is possible that a Mexican court would analyse and grant moral damages to the plaintiff if the court finds that a moral damage has been caused to such plaintiff.

Pursuant to article 1,916, a moral damage consists of ill effects suffered by a person to his or her feelings, likings, religious beliefs, decorum, honour, reputation, private life, configuration and physical aspect or the consideration that third parties may have of him or her.

In accordance with articles 1,916 and 1,916-bis of the Civil Code for the Federal District, the indemnity for moral damage must be established through a monetary amount determined by the judicial authority, taking into account the following.

The affected rights of the victim

The plaintiff must prove that they have actually suffered in terms of their feelings, likings, religious beliefs, decorum, honour, reputation, private life, configuration and physical aspects or else the considerations that third parties may have of him or her. It is not enough, pursuant to Mexican law, to make a general statement indicating that a damage has been caused. Instead, the plaintiff must demonstrate to the court the alleged actual damage.

Degree of responsibility

Pursuant to this principle, the court shall determine in any event the existence of an illicit conduct, and in its case, the extent or degree of same. An illicit act or conduct is defined by article 1,830 of the Civil Code as that which is contrary to the laws of public order or against customary good behaviour.

It should be noted that, pursuant to article 1,916-bis of the Civil Code for the Federal District, in any and all events, whoever claims recovery for moral damages must fully prove the illicit conduct of the defendant and the direct damage caused by such conduct.

The economic situation of the liable party and that of the victim

The plaintiff must submit documents to the court that gives evidence of their annual income so that the court, based on such documents, can justly determine a fair indemnity with respect to the moral damage, in case that it finds that such damage existed.

The other circumstances

The court can only take into account those damages that are a direct consequence of the illicit conduct. In this regard, article 1,916-bis of the Civil Code for the Federal District expressly establishes the above.

No other recoverable damages

The Civil Code and the Civil Aviation Law establish the recoverable damages in favour of the victims, in the terms prescribed above.

Mexican law will not recognise other damages in addition to material and moral damages, and consequently, it does not recognise punitive damages or damages for pain and suffering or similar concepts, and consequently those items are not recoverable damages under Mexican law.

34 Third-party liability insurance**Are there minimum requirements for the amount of third-party liability cover that must be in place?**

The Civil Aviation Law under article 72 establishes the minimum amount for third-party liability cover.

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

New Zealand is a signatory to and has ratified the Convention on International Civil Aviation of 1944.

New Zealand is not a party to the Convention on the International Recognition of Rights in Aircraft Geneva 1948, nor is it a party to the Convention for the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft of 1933.

New Zealand has acceded to the 2001 Cape Town Convention on International Interests in Mobile Equipment and the associated Protocol on Matters Specific to Aircraft Equipment (Cape Town Convention).

The Cape Town Convention became part of New Zealand law on 1 November 2010 pursuant to the Civil Aviation (Cape Town Convention and Other Matters) Amendment Act 2010, which amended the Civil Aviation Act 1990 (Civil Aviation Act). The Cape Town Convention has primacy in place of other New Zealand legislation that deals with the same matters.

New Zealand has also acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

There is no New Zealand legislation peculiar to aircraft financing and leasing other than, as noted in question 1, the Cape Town Convention.

Other legislation that is relevant to aviation finance and leasing in New Zealand, particularly where the borrower or lessee is a New Zealand incorporated company is as follows:

- the Companies Act 1993;
- the Receiverships Act 1993;
- the Personal Property Securities Act 1999; and
- the Corporations (Investigation and Management) Act 1989.

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

There are no restrictions on choice of law clauses in contracts transferring interests in, or creating security interest over aircraft provided that the choice of law is bona fide, has a connection with the commercial realities of the transaction and is not for any reason contrary to public policy.

Notwithstanding a valid choice of law in a mortgage or transfer document, a New Zealand court is likely to follow the English courts and require the mortgage or transfer to be effective in accordance with the domestic laws of the jurisdiction where the aircraft is located when the mortgage was granted or transfer completed. Where the aircraft is

in international airspace at the relevant time the mortgage or the transfer should be recognised by the domestic laws of the aircraft's state of registry in order to be enforceable in New Zealand.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

Title to an aircraft is customarily transferred by way of a bill of sale, which is usually issued in accordance with an agreement for sale and purchase of the aircraft.

New Zealand law will also give effect to a transfer of title of the aircraft by way of delivery although in practice this would be unusual.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

There are no formalities peculiar to the transfer of an aircraft. For instance, there is no prescribed form or requirement for notarisation, legalisation or stamping.

That said, if the bill of sale or other sale documentation is to be registered on the International Registry (IR) as a 'contract of sale' then, in addition to other Cape Town Convention prerequisites, the contract of sale must be in writing and relate to an aircraft object.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

The New Zealand Register of Aircraft (Aircraft Register) is administered by the Civil Aviation Authority of New Zealand (CAA). The CAA is a statutory body established under the Civil Aviation Act. The CAA has control over the registration and operation of aircraft.

The Aircraft Register is a public registry. Only the person entitled to lawful possession of the aircraft for 28 days or longer (operator) is entitled to appear on the Aircraft Register. Accordingly, no ownership or security interest can be registered.

New Zealand has no aircraft engine register.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

Evidence of ownership or a lessee interest in an aircraft or an aircraft engine cannot be registered on the Aircraft Register (see question 6). A lessee that is the operator will appear on the Aircraft Register in that capacity.

An owner's or lessee's interest can be recorded on the IR by registration of the contract of sale or the 'international interest' constituted by the transfer of ownership document or the lease, as the case may be.

Lease (but not ownership) interests may also be registerable on the New Zealand Personal Property Securities Register (PPSR), which effectively acts as a noticeboard of such deemed security interests. Registrations on the IR will have priority over the equivalent registrations on the PPSR.

Similar considerations apply for aircraft engines.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

As noted in questions 6 and 7, the Aircraft Register is only an operator register.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

Registration of an aircraft on the Aircraft Register is not evidence as to title and no party should rely on that registration as evidence of any ownership interest.

10 Registration of lease interests

Summarise the process to register a lease interest.

A lease interest is not registerable on the Aircraft Register. Registration of a lease may nevertheless be registerable on the IR as an international interest or on the PPSR as a deemed security interest (see question 7).

A lease interest constituting an international interest is registerable on the IR. Such registration is completed online in accordance with the IR regulations and procedures. Standard IR fees will apply.

A lease interest (ie, a lease for more than one year) may also be registered on the PPSR. Registrations are completed online and registration fees are prescribed from time to time.

As both registrations are completed online, no supporting documents are required.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

The CAA will issue a Certificate of Registration for an aircraft (but not an engine) entered on the Aircraft Register. That Certificate of Registration will identify the aircraft by:

- manufacturer;
- manufacturer's designation;
- New Zealand registration mark;
- manufacturer's serial number; and
- the operator's name and address.

In addition, a Certificate of Airworthiness must be obtained from the CAA before an aircraft registered on the Aircraft Register can operate.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

Unless an Irrevocable Deregistration Request and Export Authorisation (IDERA) has been submitted to the CAA, no consent of the owner or mortgagee is required to any deregistration or export of the aircraft from New Zealand. An IDERA is required to be submitted to the CAA in the prescribed form. Where there is no IDERA, the CAA is not required to give notice of that deregistration to any interested parties.

Where no IDERA has been registered, there is no ability to block any proposed deregistration or export unless the deregistration or export is in breach of any contractual arrangements, in which case the owner or mortgagee may be entitled to seek injunctive or similar relief.

Where an IDERA has been registered with the CAA then the operator cannot deal with the registration of the aircraft unless the authorised party has submitted an IDERA removal request to the CAA or the operator has obtained the written consent of the authorised party (noted on the IDERA) and provided it to the CAA.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

There are no particular formalities or characteristics of a deregistration power of attorney other than it should be in the form of a deed if governed by New Zealand law. If the requisite powers are granted under the deregistration power of attorney it should allow the deregistration and export of the aircraft. Deregistration powers of attorney can be granted in favour of multiple attorneys.

A deregistration power of attorney expressed to be irrevocable and given for valuable consideration will not be revoked by notice of events (such as death, mental deficiency or bankruptcy of the grantor), which would otherwise revoke a power of attorney.

Even prior to the implementation of the Cape Town Convention de-registration powers of attorney were not customary in New Zealand. The reason for this is that when an aircraft was repossessed, the lessee or mortgagor would, through losing its right to lawful possession, no longer be entitled to hold the Certificate of Registration and that right would revert to the person then entitled to possession following repossession.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

As noted in question 12, the CAA has prescribed a form of IDERA consistent with the form set out in the Cape Town Convention. The IDERA must be signed by the operator. The IDERA does not provide for countersigning by the CAA. As a matter of practice, the IDERA is granted directly in favour of the mortgagee and a separate designation letter is not used. The original signed IDERA must be submitted to the CAA together with the prescribed submission form and payment of the requisite CAA fee. On receipt of the IDERA, the CAA has a statutory obligation to record the IDERA against the aircraft on the Aircraft Register.

An IDERA, once registered, may only be deregistered with the authority of the authorised party noted on the IDERA.

Deregistration powers of attorney are now even less commonly used in New Zealand (see question 13) as they have largely been superseded by IDERA's.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

Security over an aircraft is usually granted by way of a mortgage. There is no prescribed form. If the mortgage contains a power of attorney or a guarantee it should be prepared as a deed if governed by New Zealand law. Mortgages are invariably in the English language.

An aircraft mortgage can state a maximum secured amount. However, usually no maximum sum is stated. A mortgage can include a stated priority limit (as opposed to maximum secured amount) to protect its priority against subsequent mortgagees.

The economic terms of the deal are not required to be included within the mortgage itself and would more often be included within the loan agreement.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

There are no documentary formalities such as notarisation, legalisation, stamping or translation required on the creation of a security interest over an aircraft nor are there any documentary costs.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

It is not possible to register security documents or evidence of security documents with the CAA (see question 7). Where the security document constitutes an international interest under the Cape Town Convention, registration can be made on the IR. Similarly, registration can also be completed on the PPSR by registering a financing statement.

As priority under the IR and PPSR is generally based on time of registration, registration should be completed in each case without delay.

The process to register a mortgage interest is the same as for a lease interest (see question 10).

18 Registration of security

How is registration of a security interest certified?

Where the security interest is registered as an international interest on the IR, evidence of that registration is achieved by obtaining a post registration Priority Search Certificate in respect of the relevant airframe and engines from the IR.

If registration is completed under the PPSR, a verification statement in respect of that financing statement is automatically issued by the PPSR immediately following registration. Further evidence of the registration of that financing statement and other financing statements relating to the same collateral can be obtained by undertaking PPSR post-registration searches of the debtor or lessee (by entity name and, where relevant, New Zealand company number) and of the aircraft (by reference to its nationality mark and manufacturer's serial number).

In each case, subject to contractual arrangements to the contrary, priority is generally determined in order of the time of registration.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

Priority of registrations on both the IR and the PPSR are generally, in the absence of contractual arrangements to the contrary, determined on a first in time basis (see question 18). Both the IR and the PPSR are public registers and are searchable. Parties can generally rely on the accuracy of these registers.

Non-consensual interests in the nature of possessory liens such as workman's liens entitle the lienholder to possession of the aircraft until its charges have been met, notwithstanding the prior registration of the mortgage on the IR or the PPSR. Such interests are not required to be registered.

Security interests registered on the PPSR prior to 1 November 2010 continue to have priority over 'international interests' registered on the IR subsequent to that date but not otherwise.

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

A mortgage or other security such as a security assignment over a lease can be granted either in favour of the lender or a security agent for existing and future lenders. Security agents are well recognised and commonly appointed to hold security over aircraft. A change in the identity of the beneficiaries will generally not require any amendment to the security held by the security agent. Loan transfers that are effected by way of novation should not affect the security held by the security agent. Consequently, security registrations should not be affected and no new registrations should be required if a loan is transferred to a new lender without any change in the security agent.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

Security over engines usually takes the same form as security over an aircraft (see question 15).

The security over a spare engine can be included within the aircraft mortgage along with the airframe and installed engines.

Under the Cape Town Convention, independent security interests exist over the airframe and each engine (including a spare engine) and are registered separately on the IR.

An encumbered engine should not cease to be encumbered solely by removal or installation on another aircraft and these security interests should continue to attach to that engine.

Enforcement measures**22 Repossession following lease termination**

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

In the event of a lease termination, repossession can be achieved as a self-help remedy. A court order, although available where repossession has not been made available consensually, is not required. A lessor undertaking self-help repossession must nevertheless act peaceably and lawfully. In cases where the aircraft is at risk, an order for possession can generally be obtained from the courts on an urgent and, if necessary, ex parte, basis.

Where the default or right to repossession of the aircraft is contentious, a lessee may similarly apply for a court order restraining the lessor from entering into possession of the aircraft. Where the identity and availability of the lessor is known and unless there is urgency such an application should not be on an ex parte basis or at least without notice to the lessor.

Where the lessee is a New Zealand registered company and is insolvent it may enter into voluntary administration under the Companies Act, thereby immediately creating a creditor's moratorium that would not allow the aircraft to be repossessed. However, this moratorium would be subject to the rights of the lessor under Alternative A of the Cape Town Convention. Consequently, on the expiry of the 60-calendar-day waiting period, the lessor would have a right to possession of the aircraft regardless of the creditors' moratorium, subject to the right of the lessee to purge the default.

23 Enforcement of security

Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

Enforcement of a security interest would involve the same considerations as termination of a lease (see question 22).

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

Possessory liens in the nature of mechanics or workman's liens entitle the lienholder to maintain possession of the aircraft or the relevant parts until its charges have been met. An owner or mortgagee seeking to take possession of the aircraft would be required to discharge those liens before it could take possession.

No statutory liens arise as a consequence of the non-payment of landing or navigation charges or employee rights.

Under the Defence Act 1990 in an actual or imminent emergency an aircraft can be requisitioned for the deployment outside New Zealand of New Zealand armed forces. Compensation is payable for its use including for any loss or damage.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

New Zealand non-resident withholding tax can apply at the rate of 15 per cent to the following:

- aviation-related lease payments (where the aircraft is leased to a non-resident lessee for use in New Zealand or a New Zealand resident lessee) to a non-resident lessor; or
- interest payments to a non-resident lender.

Withholding tax does not apply to principal loan repayments.

Tax treaty relief may be available to eliminate the New Zealand withholding tax liability for non-resident lessors of certain tax jurisdictions where the lease is treated as an operating lease for New Zealand tax purposes.

In relation to New Zealand withholding tax chargeable on interest payments, such withholding tax can be reduced to zero per cent if the borrower and lender are not associated for New Zealand tax purposes and the borrower opts to pay the Approved Issuer Levy (AIL) at 2 per cent of the interest payment amount instead. A borrower can opt to pay under the AIL regime by registering itself and the transaction with the New Zealand Inland Revenue. Where the lease is treated as a finance lease for New Zealand tax purposes, all or part of a lease payment may be deemed to be an interest payment for New Zealand tax purposes. The lessee may also opt into the AIL regime to reduce the New Zealand withholding tax chargeable on the deemed interest component of any such finance lease payment.

The tax position can differ if the non-resident lessor or lender has a branch or other fixed place of business in New Zealand.

Parties should determine the New Zealand tax consequences of transactions so as to be able to ascertain and agree which party should bear the cost of any potential New Zealand withholding tax or AIL. A gross-up provision dealing with withholding tax and any other taxes is enforceable.

In addition, New Zealand has a system of goods and services tax (GST) in relation to supplies of goods and services made within or deemed to be made within New Zealand. GST is in the nature of a value added tax and generally applies at the rate of 15 per cent.

Where a non-resident supplier sells an aircraft to a New Zealand GST registered purchaser, no GST should apply to the sale unless the parties agree otherwise. However, where the sale of the aircraft is between two non-resident parties then GST would apply to the sale unless the aircraft is not physically located in New Zealand at the relevant time of supply (which can be triggered at the time an invoice is issued or when a deposit or such other monies are paid).

In addition, GST is also payable on the importation of the aircraft into New Zealand. Such GST is in the nature of a customs duty. It is

therefore important that the parties to a transaction ensure that the importer (usually the New Zealand resident lessee or purchaser of the aircraft) has the ability to recover such GST.

There is no stamp duty payable in New Zealand.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

There are no exchange controls or other restrictions in relation to international payments other than where such payments may contravene counter-terrorism laws and the like.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

Unless the amounts of default interest were such that they could be regarded as a penalty rather than being in the nature of a genuine pre-estimate of loss or, in the case of loan payments, could be regarded as 'oppressive' (ie, harsh, unjustly burdensome, unconscionable or in breach of reasonable standards of commercial practice) then there should be no limitation on the amounts charged.

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

As discussed in question 25, GST will generally be payable by the importer on importation of the aircraft into New Zealand.

Insurance and reinsurance

29 Captive insurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

There is no captive insurance regime applicable to aviation in New Zealand and there is no requirement that insurance be placed with local insurers. In practice, aviation insurance is generally not placed in the local market.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

As a matter of contract a cut-through clause should be enforceable provided that it is drafted to allow the airline the benefit of the reinsurance policy in accordance with the Contracts (Privity) Act 1982.

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31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Assignments of reinsurance should in principle be effective under New Zealand law. However, they are typically not provided on aviation leasing and financing transactions in New Zealand.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

In the normal course, a passive lessor or financier should not be liable for the operation of an aircraft or the activities of the operator.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

Where an owner, lessor, financier or other party has no operational involvement with the aircraft it should not have liability for any strict liability offences.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

Under the Civil Aviation Act, the Minister of Transport or the Secretary of Transport may require an applicant for, or the holder of, an air services licence to furnish satisfactory proof that its liability in relation to death or bodily injury or damage to property is covered by insurance. This reflects the obligation in article 50 of the Convention for the Unification of Certain Rules for International Carriage by Air of 1999 (the Montreal Convention) that state parties require their carriers to maintain adequate insurance cover in respect of liability under the Montreal Convention.

Panama

Maria de Lourdes Marengo

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Panama is not a signatory to the Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

Panama has ratified the Chicago Convention on International Civil Aviation (1944), the Geneva Convention on International Recognition of Rights in Aircraft (1948), the Cape Town Convention (2001) and the New York Convention of 1958 (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

Aircraft finance and leasing are governed by the following:

- Decree Law 2 (1955), which regulates mortgages on chattel property;
- Law 129 (2013), which modernises the law of mortgages on chattel property;
- Law 21 (2003) on Civil Aviation;
- Law 29 (2003), which adopts the Cape Town Convention;
- the provisions of the Civil Code and the Commerce Code of the Republic of Panama; and
- the administrative practices observed by the Civil Aeronautics Authority (AAC).

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Purchase contracts and aircraft mortgages would be deemed acts of commerce and the parties thereto may choose the applicable law to govern the terms thereof. However, the laws of Panama govern the title and mortgage with respect to particular requirements that should appear therein, as well as their registration and the effect thereof. The courts of Panama generally uphold choice of law clauses, but may refuse to enforce terms that are contrary to public policy in Panama.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

Title is transferred by execution of a purchase agreement or a bill of sale between seller and buyer. However, such transfer does not affect third parties until the corresponding document is translated into Spanish by a Panamanian-certified public translator if executed in another language, protocolised and filed with the Public Registry in Panama.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

The purchase contract or the bill of sale, and acceptance thereof as applicable, should be translated into Spanish if executed in another language, protocolised and registered at the Public Registry together with a certificate of appraisal issued by the AAC.

Thereafter the following documents must be filed with the AAC:

- evidence of registration of the purchase contract or bill of sale with the Public Registry;
- a certificate of cancellation from the previous registry;
- a certificate from the Public Registry showing that the interested party is a valid legal entity in existence, together with the name of its legal representative in respect of companies organised in accordance with the laws of Panama. If the owner is a foreign entity, it must file an official certificate of existence from its place of incorporation; and
- a power of attorney in favour of a law firm in Panama to execute the required documents and complete registration proceedings.

All documents coming from abroad must be certified by a notary public. The notary must state that the signature is authentic and that, pursuant to sufficient evidence provided to him or her, the party signing is duly authorised to sign on behalf of the company. Thereafter, the signature of the notary must be certified according to the 1961 Hague Convention on the apostille or by a Panamanian consul in the place of issuance.

Once the information provided by the applicant has been verified by the AAC, the aircraft will be assigned its registration marks. Thereafter the interested party should complete various technical and legal requirements to obtain its certificate of registration, such as the issuance or validation of a certificate of airworthiness, as well as the payment of the relevant registration fees.

The AAC may issue a provisional certificate of registration if the owner of the aircraft demonstrates that proceedings have been initiated in order to conduct registration of ownership at the Public Registry.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

The AAC is responsible for directing and regulating air transportation services in Panama. It maintains a National Aeronautical Registry where all aircraft with Panamanian registration marks are recorded. Such Registry maintains records of both owners and operators.

In addition, the Public Registry of the Republic of Panama has an Aeronautical Section where titles, leases and mortgages on aircraft must be registered in order to make them effective against third parties.

There are 83-bis arrangements in place between Panama and other jurisdictions.

There is no specific engine register. However, there is a section of mortgages on chattel property at the Public Registry, where mortgages on engines are registered together with the corresponding title.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

Titles and leases over aircraft must be registered at the Public Registry and filed with the AAC. Title and lease agreements must be translated into Spanish by a Panamanian certified public translator if executed in another language, protocolised and registered at the Public Registry. Only the person that holds the title can be registered as owner. Once the title and lease are recorded with the Public Registry, these must be filed with the AAC for issuance of the definite registration certificate that will show the title holder as owner and the lessee as operator.

There is no engine registry, but it is possible to register title on engines when registering a mortgage on engines at the section of mortgage on chattel property of the Public Registry.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

Generally, a mortgage on an aircraft will cover the parts and engines incorporated therein whether they are present or future accessories or improvements. Ownership on engines capable of individualisation and determination can be mortgaged separately. The title and the mortgage over the engine must be translated into Spanish if executed in another language, processed and filed with the Public Registry for registration. If the documents are issued abroad, the notarisation and legalisation requirements stated in question 5 apply.

The registration fees are US\$100 for review by the Public Registry, plus US\$250 for each US\$100,000 or fraction with a cap of US\$4,200. Additionally, notarial fees in the amount of US\$14 per page and translation fees based on the length of the document apply.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

Registration constitutes proof of title. Third parties may rely on the public records, as according to the Aviation Law, title, leases and mortgages become effective against third parties as of the time these are filed with the Public Registry. Law 129 of 2013, which modernises the mortgages on chattel property, provides that the mortgage is effective against third parties as of the date of registration. Regulation of Law 129 is pending and will hopefully clarify whether the mortgage will affect third parties as of the date of filing or the date of registration at the Public Registry.

10 Registration of lease interests

Summarise the process to register a lease interest.

Lease interests can be recorded with the Public Registry. The lease agreement, evidence of the existence of lessee and lessor, and the corresponding corporate authorities must be translated into Spanish if executed in another language, and processed and filed with the Public Registry.

Documents executed abroad must comply with the notarisation and legalisation requirements stated in question 5.

The registration fees are US\$100 for review by the Public Registry, plus US\$1.50 for each US\$1,000 or fraction. Additionally, the previously mentioned notarial and translation fees apply.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

Records at the Public Registry and the AAC reveal complete details in respect of the ownership of the aircraft, mortgages, leases and any judicial measures against the aircraft and a complete description of the aircraft, its marks and registration details.

Public Registry certificates are issued to any interested party, and contain at least the above-mentioned information.

Upon registration, the AAC issues a certificate of registration to the owner or operator showing the registration number, owner, operator and type of service.

When the mortgage on an engine is recorded at the Public Registry, it is possible to obtain a Public Registry certificate stating ownership and mortgage details.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

The registration of an aircraft will be deleted, upon request, by an interested party (ie, the owner or operator) or as a matter of course by the AAC whenever:

- it is requested by the owner or operator of the aircraft;
- the AAC authorises registration of the aircraft in another country, which will occur whenever the aircraft is free of any limitation or encumbrance or given the consent of its registered creditors;
- it is necessary to designate the aircraft out of service;
- the ownership of the aircraft is going to be transferred to a person who is not qualified to register an aircraft in Panama;
- there is a total loss of the aircraft;
- the aircraft appears registered in another country; or
- in other cases as provided in the regulations.

Generally deregistration powers of attorney are issued in favour of owner and mortgagee, and filed with the AAC in order to facilitate deregistration. Accordingly, in principle the lessee or operator should not be able to block deregistration.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

Deregistration powers of attorney enable the owner or mortgagee to freely deregister and export the aircraft. Panamanian commercial and aviation law do not expressly regulate whether powers of attorney may be irrevocable. Panamanian shipping law expressly recognises irrevocable powers of attorney. In practice, irrevocable powers of attorney are widely used in aviation.

Powers of attorney may be issued to more than one attorney.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

IDERAs are filed with the AAC. The form of IDERA used in Panama is not countersigned by the AAC. The IDERA is not recorded with the Public Registry. It is filed with the AAC. The AAC has no preferred way of dealing with financiers.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

The typical form of security over an aircraft is a mortgage. The mortgagor maintains the use and possession of the aircraft while mortgaged. It is possible to constitute several mortgages over an aircraft, provided that written notice is given to all prior mortgagees. There is no specific form. The mortgage must be translated into Spanish if executed in another language, and must include the following:

- the full names and details of the parties and their representatives;
- the economic terms including the maximum amount secured;
- the interest agreed;
- the manner in which payments will be made;
- a complete description of the mortgaged aircraft indicating its value;

- the place where the aircraft will be located; and
- any other lawful conditions agreed to by the parties.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

The mortgage, evidence of the existence of mortgagor and mortgagee, and the corresponding corporate authorities must be translated into Spanish if executed in another language, and processed and registered with the Public Registry.

Documents executed abroad must comply with the notarisation and legalisation requirements stated in question 5.

The registration fees are US\$100 for review by the Public Registry, plus US\$2.50 for each US\$1,000 or fraction with a cap of US\$51,250. Additionally, the previously mentioned notarial and translation fees apply.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgage interest.

According to the Aeronautical Law, the mortgage is valid between the parties as of the time of execution but must be recorded with the Public Registry in order to be effective against third parties. The law of Mortgages on Chattel Property provides that the mortgage will be effective against third parties as of the date of registration with the Public Registry. This discrepancy must be resolved in pending regulations. Registration can be achieved within five to 10 days. Registration may be expedited if fast-track registration fees in the amount of US\$300 are paid. The mortgage will remain valid throughout the term of the mortgage.

18 Registration of security

How is registration of a security interest certified?

Public Registry certificates and AAC certificates confirming title, leases, mortgages and operators can be obtained as stated in question 11. Other security interests cannot be registered in Panama.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

It is not possible to register other security interests in Panama.

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

Security over an aircraft is constituted through mortgages. Any changes to the mortgage must be filed with the Public Registry in order to be effective against third parties. The aircraft mortgage creates a right in rem.

Trusts are recognised and regulated in Panama as contractual arrangements and are commonly used in finance transactions. Generally a trust is created and the security trustee acts as mortgagee. The trust does not need to be registered and accordingly changes to the beneficiaries of the trust do not require registration.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

Generally, a mortgage on an aircraft will cover its accessories and improvements, such as spare parts and engines incorporated therein, whether they are present or future accessories of improvements. Engines and other spare parts capable of individualisation and determination and able of being sufficiently identified can be mortgaged separately from the aircraft.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

Upon an event of default under the lease, the lessor would have to initiate either ordinary or special judicial proceedings to repossess the aircraft. Panamanian law does not recognise self-help remedies.

The termination of the lease must be recorded with the Public Registry and filed with the AAC, and the certificate of operation of the aircraft with lessee as operator must be cancelled. There are no other non-contractual procedures or requirements that apply to lease termination.

23 Enforcement of security

Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

The mortgage may be executed judicially or extra-judicially when the parties have agreed to the latter form of enforcement in the contract.

The mortgagee may pursue either executive or special judicial proceedings for the enforcement of its rights under the mortgage.

If the debtor has repaid at least one-half of the loan, the court will decree the sale of the aircraft in accordance with the terms of executive proceedings, save that there will only be one auction and the base amount will be the sum owed plus costs and expenses. If there is no bidder willing to pay the price, the aircraft will be adjudicated to the mortgagee. The obligations arising under the mortgage are extinguished by the judicial sale.

If the debtor has paid less than one-half of the amount owed, the aircraft will be adjudicated to the mortgagee and the obligation secured will be extinguished. The debtor may, within 10 days of being notified of the sale, request the sale of the aircraft to a party other than the mortgagee, provided that it deposits with the court an amount sufficient to cover the expenses of the sale, and satisfies the court that it will pay the balance owed in the event that the sale price does not cover the amount owed. If the mortgage allows the mortgagee to take possession and administer the aircraft, the court may allow the mortgagee to take over the administration of the aircraft pending its judicial sale.

When the parties agree in the contract to an extrajudicial execution, they must appoint a legal representative who must take the necessary steps to notify the execution to the mortgagor. Once the mortgagor receives the notice of execution, he or she may deliver the aircraft to the mortgagee or file an opposition to the execution process.

In the case of extrajudicial execution, the value of the aircraft will be fixed by an expert appraiser appointed jointly by both parties in the contract or in a later agreement.

The aircraft may be detained by way of an ex parte application.

The mortgage has priority over other creditors' rights except for those listed in question 24.

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

According to the Aeronautical Law the following claims have priority over all other claims:

- national taxes over the aircraft;
- aircraft mortgage;
- the salaries and other social benefits due to the crew; and
- the amounts owed to the air transport sector on account of the operations of the aircraft in its last flight.

The priority among several mortgages on the aircraft will be determined by the date of registration at the Public Registry.

Furthermore, Panama has made the following declaration in respect of article 39 of the Cape Town Convention:

In respect of article 39 of the Convention, the following non-consensual rights and interests shall prevail over an international interest registered in accordance with the Convention:

- a) any sums due from or capable of being demanded from the debtor by way of salaries, pensions and other social security benefits and employment allowances owed in respect of employees of that debtor;*
- b) any sums due from or capable of being levied from the debtor by way of fiscal and para-fiscal contributions owed in respect of employees of that debtor;*
- c) any sums due or capable of being levied from the debtor, by way of taxes, duties or contributions payable to the Panamanian state or to the decentralised bodies that collect such revenue, in accordance with Panama's internal laws;*
- d) the right of Panama to arrest, attach or confiscate mobile equipment and aircraft equipment in the event of breach of the customs or criminal laws of Panama; and*
- e) courts' costs in connection with the foreclosure of the mortgage, and national taxes over the aircraft.*

These different priorities may create a conflict of laws that would have to be resolved by the Panamanian Judicial Branch once a case of this nature is presented.

Executive interference concerning expropriation or requisition of aircraft (or other property) is rare in Panama. The Panamanian Constitution expressly provides for the confiscation, or expropriation, of private property in the event of war, national catastrophe or suspension of constitutional rights. The government could decree the requisition of an aircraft upon payment of compensation.

In the event that an aircraft is mortgaged or attached, the amount of compensation for the expropriation thereof would be deposited with the National Bank and creditors would be notified of the proper action to be taken in respect thereof.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

ITBMS tax

Panamanian tax laws provide for a specific tax for transfer of chattel property and services (ITBMS), which is applied to those assets transferred or services provided in the territory of Panama. This is regardless of the place where the contract has been entered into or the place where payment is made. ITBMS tax would apply for the sale of aircraft located within the territory of Panama.

Under general tax provisions, lease contracts are considered a service rendered by lessor and thus are subject to the ITBMS tax.

Currently the applicable ITBMS rate is 7 per cent.

Income tax

Payments made by the lessee to the lessor and payments made by mortgagor to the mortgagee are subject to income tax. The applicable corporate tax rate is 25 per cent of net taxable income.

Withholding tax

Payments made by the lessee or mortgagor to a non-domiciled lessor or mortgagee pursuant to a lease or a mortgage of an aircraft economically used within Panama, or by a local operator for international transportation, are subject to a withholding tax of 50 per cent of the applicable tax rate on 100 per cent of the amounts credited to the non-domiciled lessor, unless reciprocity agreements are in effect between Panama and the country of the lessor. The United States has a tax reciprocity agreement (exchange of notes) with Panama, whereas the gross income derived from lease or mortgage payments of aircraft engaged in international transportation are exempt from income tax.

Import tax

Aircraft operators engaged in public transportation services or aviation-related business are exempt from import taxes on aircraft and spare parts including engines.

Gross-up provisions are not enforceable.

Tax liability may be minimised when double taxation treaties are in effect between the countries of the parties.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

There are no restrictions on the remittance of funds abroad from Panama or exchange controls. No central bank or official consents are required.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

There are no limitations on the amount of default interest that can be charged on a lease or loan.

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

For import taxes refer to question 25. There are no restrictions on the export of aircraft from Panama.

Under Panamanian law an aircraft may be detained, and in some cases sold, by public authorities for liens created by the operator, or for failure to comply with legal requirements, or when the aircraft is used in illegal activities, or in the case of war, national catastrophe or suspension of constitutional rights.

Insurance and reinsurance

29 Captive insurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

International aircraft carriers and airport concessionaires are obliged to obtain insurance coverage for damages to third parties on the ground, crew members, passengers and any other parties that may suffer harm as a result of their operations.

Maritime insurance regulations are also applicable to aviation insurance, to the extent that they are pertinent and compatible.

Pursuant to article 153 of Law 12 on Insurance (2012), it is mandatory for entities, companies and persons domiciled in Panama to enter into contracts with insurance companies authorised to do business in Panama with respect to all insurance on assets and persons located in Panama. Foreign insurers may not cover assets or persons located in Panama, unless there is a fronting arrangement with a local insurance company or if any of the following exceptions apply:

- there is a breach of any treaties or international agreements entered into by the Republic of Panama;
- the insurance coverage does not exist in the Republic of Panama; or
- it is impossible to obtain insurance owing to rejection of coverage by the licensed insurers in Panama.

The superintendency, prior to verification that it is not possible to obtain such insurance in Panama, may authorise its contracting abroad if all legal requirements, among which, the withholding and payment of income tax as provided by the Fiscal Code, are fulfilled. The companies, entities or persons must register the authorisations granted in this connection with the Superintendent.

Reinsurance may be placed with local or foreign licenced reinsurers.

Under Panamanian law, captive insurance may apply to any foreign risks, including aviation-related risks. Captive insurance activities undertaken in Panama may not cover risks located in Panama.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Cut-through clauses are permitted under freedom of contracting principles of Panamanian law.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Assignments of reinsurance are legally effective and are typically provided on aviation leasing and finance transactions.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

An owner lessor is not liable for the operation of the aircraft or the activities of the operator. However, the aircraft may be detained for enforcement of liens or for acts of the operator.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

Panama does not create a regime of strict liability for owners, lessors or financiers with no operational interest.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

According to the Aviation Law the indemnification that the carrier must pay is as follows:

- for damages to passengers: 25,000 balboas;
- for loss, damage or destruction of hand luggage: up to 33.20 balboas; and
- for loss, destruction or breakdown of cargo or paid luggage: up to 24.75 balboas.

If the cargo or paid luggage is transported according to the declared value, and the interested party has paid the additional fees according to the company's fee, the limit of indemnification will be the value declared.

These limits of liability are not payable if it is proved that the damage is the result of an action or omission of the carrier or the operator or their dependants, with the intention of causing the damage, or being reckless or knowing that the damage would be caused; however, in the case of an action or omission of the dependants, it is necessary to prove that these were acting in their duties as such.

The amount of compensation, subject to the preceding article, shall not exceed the following per aircraft event:

- 16,600 balboas for aircraft whose weight does not exceed 1,000kg;
- 16,600 balboas plus 13.25 balboas per kilogram over 1,000kg for aircraft weighing between 1,000kg and 6,000kg;
- 82,850 balboas plus 8.3 balboas per kilogram over 6,000kg for aircraft weighing between 6,000kg and 20,000kg;
- 199,000.50 balboas plus 5 balboas per kilogram over 20,000kg for aircraft weighing more than 50,000kg; and
- 349,000.50 balboas plus 3,325 balboas per kilogram over 50,000kg for aircraft weighing more than 50,000kg.

Indemnification in case of death or injuries shall not exceed 25,000 balboas per death or injured person.

For the purposes of these provisions, weight means the maximum weight of aircraft authorised by the airworthiness certificate for take-off.



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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

The Philippines is a signatory to, and has ratified, the 1948 Geneva Convention on the International Recognition of Rights in Aircraft and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The Philippines is not a signatory to the 1933 Rome Convention for the unification of certain rules relating to the precautionary arrest of aircraft or the 2001 Cape Town Convention on International Interests in Mobile Equipment.

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The principal domestic pieces of legislation applicable to aviation finance and leasing are Republic Act No. 386 (the Civil Code of the Philippines) and Republic Act No. 9497 (the Civil Aviation Authority Act of 2008 (the CAAP Law)).

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Under the Civil Code, personal property is subject to the law of the country where it is situated. This covers transactions involving sale, mortgage, barter, exchange, lease assignment, or any form of alienation relating to the personal property.

Philippine law also allows contracting parties to select a foreign law to govern their contract. In such case, the chosen law should bear a substantive relationship to the transaction. Philippine courts will generally respect such choice of law, as long as the foreign law is not contrary to law, morals, good customs, public order or public policy, and is not designed to evade some provisions of law of another jurisdiction having a closer connection with the transaction contemplated therein.

While the choice of a foreign law as the governing law will generally be recognised by Philippine courts, such courts may, in disregard of the chosen law, apply the laws of the Philippines with respect to matters bearing upon the authority and capacity of any Philippine national to enter into and perform its obligations under the contract, in determining compliance of the contract with all requirements of governmental approvals in the Philippines, in determining compliance of the contract with the formalities required under Philippine law for the conveyance of, and the creation of security interests in, properties situated in the Philippines, and insofar as Philippine law may have a closer connection to the transactions contemplated therein.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

The execution of a bill of sale, coupled with delivery, is effective to transfer title over an aircraft. Delivery may be accomplished by actual or real delivery, constructive or legal delivery, or delivery in any other manner signifying an agreement that the possession is transferred to the buyer.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

The transfer document should state the interest in the aircraft of the person by whom such conveyance is made or executed and the interest transferred by the conveyance.

In addition to being in writing, the transfer document must also comply with the formal requirements for documents similar to conveyance of an interest in land (ie, signed on each page, notarised following a specific notarial attestation format).

Any conveyance affecting title to or interest in any Philippine-registered aircraft or any portion thereof must be recorded with the Civil Aviation Authority of the Philippines (the CAAP) in order to be valid and effective against third persons (section 49 of the CAAP Law).

If executed abroad, the transfer document should be consularised at the Philippine consulate in the jurisdiction where it was signed. The CAAP will also require documentation showing the authority of the persons who executed the transfer document (eg, special power of attorney, a board resolution or an equivalent corporate authorisation), which should, likewise, be notarised and, if executed abroad, consularised.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

The aircraft registry is maintained by the CAAP, which has a broad range of powers and functions including the duty to operate as the sole and exclusive registry for aircraft, aircraft engines, as well as liens and security interests thereon. There is no separate engine registry in the Philippines.

The CAAP registry is an operator registry. The CAAP Law provides that, except as otherwise provided in the Philippine Constitution and existing treaty or treaties to which the Philippines is a party, no aircraft shall be eligible for registration in the Philippines unless it is owned by or leased to a citizen of the Philippines or corporations or associations organised under the laws of the Philippines at least 60 per cent of whose capital is owned by Filipino citizens (section 44 of the CAAP Law). Thus, the nationality of the owner or the operator is the principal factor in determining which entity will be issued the Philippine certificate of registration. The owner of the aircraft (if not qualified to be the entity named in the aircraft registry) may still record its interest in the aircraft register and cause the annotation on the Philippine certificate of registration of the aircraft to reflect such interest.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

As mentioned in question 6, an ownership or lease interest in an aircraft may be entered in the CAAP registry. Interests in aircraft engines, whether as owner, operator, or lessee, may likewise be registered.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

For registration of an aircraft with the CAAP, a deregistration fax and email have to be issued by the former registry, if any. A proper application for the issuance of the certificate of registration is made in writing, signed and sworn to by the owner (ie, notarised), if eligible, or lessee of any aircraft eligible for registration. The application shall state the date and place of filing, specification, construction and technical description of the aircraft and such other information that may be required by the CAAP. A standard application form is available from the CAAP.

The application for registration is filed with the CAAP Engineering and Registration Division, Airworthiness Department and Flight Standards Inspectorate Service.

The supporting documents that must be attached to the initial certificate of registration application form are as follows:

- documentary evidence of ownership or for leased aircraft, a notarised duplicate signed copy of the lease agreement (if the lease agreement is signed outside the Philippines, it must be notarised and consularised at the Philippine consulate in the jurisdiction where it was signed);
- special power of attorney or equivalent document such as a board resolution authorising the applicant to sign on behalf of the applicant owner or lessee;
- customs clearance or tax exemption (if applicable), customs release or payment;
- certificate of non-registration, if factory new;
- official receipt, payment of registration fee (which depends on the gross weight of the aircraft);
- official receipt, payment of recordation fee of approximately US\$8;
- CAAP Accounting Clearance;
- assignment of registration number or RP-C number (note: the applicant must reserve a registration number that must be used within 90 days, otherwise the reserved number is automatically cancelled);
- constitutive documents of the applicant owner or lessee; and
- a certified true copy of the aircraft's certificate of insurance.

Additionally, for aircraft for hire to the general public, the following must also be submitted:

- a Civil Aeronautics Board (CAB) permit or approval; and
- air operator certificate.

The CAAP may require the submission of additional supporting documents. If the CAAP Director General, upon considering the application for registration, finds that the aircraft is eligible for registration, such aircraft shall be registered and a certificate of registration will be issued.

As a general rule, title to engine is presumed to vest with the owner of the aircraft, unless title to the engine is specifically claimed by a different party, and a separate certificate of engine registration is sought from the CAAP.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

Registration of an ownership interest in an aircraft is considered as proof of title that is binding on third parties. Third parties may rely on the accuracy of such registration.

10 Registration of lease interests

Summarise the process to register a lease interest.

An aircraft may also be registered in the name of a lessee, which must be a citizen of the Philippines or a corporation or association organised under the laws of the Philippines at least 60 per cent of whose capital is owned by Filipino citizens. The timing, prescribed forms, supporting documents and other requirements for the registration of a lease interest and issuance of a certificate of registration in the name of a lessee is the same as that for an owner (see question 8).

See also question 5 with respect to the formalities for the lease agreement, to qualify for registration with the CAAP.

A minimal recording fee of approximately US\$8 is charged for the registration of the lease with the CAAP.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

The CAAP is the sole and exclusive registry for aircraft, aircraft engines, as well as liens and security interests thereon. Any and all interests registered with the CAAP must be annotated on the certificate of registration of the aircraft to bind third parties. Certification of registered aviation interests is accomplished through the issuance by the CAAP of a certified true copy of the certificate of registration of the aircraft.

Certificates of registration for aircraft recorded in the CAAP reflect the following:

- usage (whether for commercial air transport, general aviation or aerial works);
- nationality or common mark and registration;
- name of manufacturer and designation of aircraft;
- aircraft serial number;
- name of owner or operator;
- address of owner or operator;
- date of issue;
- fees paid and the official receipt number pertaining to the payment; and
- leases, mortgages and encumbrances, if any, on the back page.

The certificate of registration, with the validating official receipt, is required to be carried in the aircraft at all times.

A separate engine certificate of registration may be issued by the CAAP. Conveyances affecting title to, or interest in, aircraft engines may also be recorded in the CAAP registry.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

The appropriate party to apply for deregistration is the entity in whose name the aircraft is registered (ie, the owner (if eligible) or the lessee). To this extent, the owner or lessee (as may be applicable) must consent to the deregistration of the aircraft and, without such consent, the owner or lessee (as may be applicable) may block the proposed deregistration of the aircraft by a third party. On the other hand, the owner or lessee (as may be applicable) may delegate such power through a special power of attorney in favour of a third party.

Deregistration will not be permitted without the consent of any recorded mortgagee or lessee, whose interests are recorded in the CAAP registry and annotated at the back of the certificate of registration of the aircraft.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

The entity in whose name the aircraft is registered may delegate the power to apply for deregistration of the aircraft through a power of attorney in favour of a third party. The power of attorney creates an agency between the registered owner or lessee and the attorney-in-fact, who is provided with authority to represent the registered owner

or lessee before the appropriate government agencies for the deregistration and exportation of the aircraft.

The Philippines recognises the concept of an irrevocable power of attorney coupled with an interest if a bilateral contract depends on such agency, or if such agency is the means of fulfilling an obligation. The deregistration power of attorney is typically issued specifically to ensure the fulfilment by the lessee of its obligations under a lease (ie, the deregistration of the aircraft, among others, upon the termination or expiry of the lease).

In financing transactions, registered owners of an aircraft also issue deregistration powers of attorney in favour of a security agent (or trustee, representing the interest of lenders).

A deregistration power of attorney may be granted in favour of more than one attorney-in-fact.

Although not strictly a security interest over an aircraft that is required to be registered with the CAAP, the CAAP has allowed the registration of deregistration powers of attorney in the most recent transactions.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

The Philippines is currently not a party to the Cape Town Convention.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

A security document over the aircraft typically takes the form of a chattel mortgage. Under Philippine law, a chattel mortgage must sufficiently describe the mortgaged property and the secured obligation. A chattel mortgage can only cover obligations existing at the time the mortgage is constituted, and may refer to a determined principal amount and undetermined interest, penalties and other charges, by making reference to the principal financing document.

The chattel mortgage is typically written in English (being one of the official languages of the Philippines). For purposes of registration with the CAAP, the formal requirements similar to documents relating to a conveyance of land are also applicable. The chattel mortgage must be registered with the CAAP in order to bind third persons. If the chattel mortgage is not recorded, it is nevertheless binding as between the parties.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

The formalities discussed in question 5 for conveyance of an interest are also applicable to security documents.

The CAAP collects a nominal fee of approximately US\$8 for every security document filed for registration.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

Yes. Any conveyance that affects title to, or interest in, an aircraft of Philippine registry, or any portion thereof (which includes a security document) must be recorded in the CAAP registry to be valid against third parties having no actual notice thereof. Although no period for the recordation of the security document is specified in the CAAP Law, it is recommended that the instrument be recorded promptly after execution.

To register a security interest over an aircraft with the CAAP, the security document must be filed and recorded in the registry of the

CAAP and annotated on the rear portion of the certificate of registration. See question 16 for the formalities and other requirements.

Once registered, there is no requirement to periodically renew the registered security interests.

18 Registration of security

How is registration of a security interest certified?

After registration, a security interest is annotated on the rear portion of the certificate of registration of the aircraft. The CAAP does not issue a separate certificate or evidence of registration of the security interest. Upon written request of a third party conducting a search on an aircraft, with the consent of the party whose ownership or leasehold (as applicable) interests are registered with the CAAP, the CAAP may issue a certified copy of the certificate of registration with all the annotations reflected at the back.

The annotation of the security interest does not state the rank or priority of such security interest.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

The registration of a security interest with the CAAP constitutes public notice to third parties and is valid and binding against all persons from the date of its recordation with the CAAP. Third parties may rely on the accuracy of such registration.

Generally, prior registration coupled with good faith, confers a better right over the aircraft in favour of the registered interest holder.

20 Security structure and alteration

How is security over aircraft and leases typically structured?

What are the consequences of changes to the security or its beneficiaries?

The concept of trust is recognised in the Philippines. The typical security structure involves a security agent holding the security over the aircraft and leases in trust for a changing pool of beneficiaries. The registration of a security document with the CAAP operates as notice and binds the lessee and third parties to its terms. In that regard, the security constitutes a right in rem.

The change in the identity of the beneficiaries in whose favour the security agent holds the assignment will not affect the security interest under a particular security document. On the other hand, a change in the security agent would require a new registration and annotation process with the CAAP.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

A security document over spare engines typically takes the form of a chattel mortgage. See question 15 for the creation and registration of a chattel mortgage.

Unless otherwise stipulated by the parties, a security interest created over a financed aircraft generally covers the installed engines, on the assumption that the owner of the aircraft and the installed engines are one and the same entity. A security interest may, however, be created over an engine independently, whether installed or uninstalled, especially so if the engines are owned by an entity other than the owner of the aircraft.

Unless the parties stipulate otherwise, the removal of an engine or the installation of an engine on another aircraft will not cause the encumbrance on it to be discharged or lifted.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

No court proceeding is necessary if the lessee voluntarily relinquishes possession of the aircraft. However, in the event that the lessee refuses to voluntarily redeliver the aircraft to the lessor, judicial intervention

will be necessary to forcibly take possession of the aircraft. The lessor may elect to file an action in the Philippines, or alternatively in a foreign jurisdiction.

Filing an action in the Philippines

The owner may file an action for replevin for the recovery of the aircraft, with an application for the issuance of a writ of replevin, which is a provisional remedy, relying on the termination of the lease as the lessor's cause of action. Replevin, broadly understood, is both a form of principal remedy and of a provisional relief. It may refer either to the action itself, in other words, to regain the possession of personal chattels being wrongfully detained from the plaintiff by another, or to the provisional remedy that would allow the plaintiff to retain the thing during the pendency of the action and hold it *pendente lite*. The action is primarily possessory in nature and generally determines nothing more than the right of possession.

Upon filing of the case in court, the owner may include in the complaint an application for the immediate delivery of the aircraft to the owner while the principal action is still being litigated, upon a showing that the owner has good legal basis for seeking such interim possession and posting of a replevin bond equivalent to double the value of the property, intended to indemnify the lessee against any loss it may suffer by reason of it being compelled to surrender the possession of the aircraft pending trial of the action.

To impede the lessor's remedy, the lessee may object in court as to the sufficiency of the bond or the sureties. The court may deny its objection or, if the objection is held to be valid, require the submission of a new bond. Alternatively, the lessee may submit to the court, copy furnished the lessor, a redelivery bond equivalent to double the value of the aircraft as stated in the lessor's affidavit for the return of the aircraft to it.

Filing an action for enforcement of a foreign judgment in the Philippines

Instead of filing an action in the Philippines, the owner may file an action in a foreign tribunal and, consequently, commence an action for recognition and enforcement of the foreign judgment in the Philippines with replevin as provisional remedy.

A final judgment may be enforced before a Philippine court without a rehearing on the merits, but such judgment may be repelled by evidence that such foreign court did not have jurisdiction in accordance with the jurisdictional rules of such court, the party against whom the judgment was rendered had no notice of the proceedings, or the judgment of such foreign court was obtained through collusion or fraud or was based on clear mistake of law or fact (section 48 of Rule 39 of the Rules of Court).

23 Enforcement of security

Outline the basic measures to enforce a security interest.

How may the owner lawfully impede the mortgagee's right to enforce?

The mortgagee may resort to either judicial foreclosure of the mortgage or extrajudicial foreclosure as provided under Act No. 1508 (the Chattel Mortgage Law). Recourse to an extrajudicial foreclosure of mortgage is premised on the voluntary surrender of the aircraft by the owner to the mortgagee. In case the owner refuses to turn over the aircraft to the mortgagee, the mortgagee must invoke the aid of the competent court by filing a replevin case against the owner prior to applying for extrajudicial foreclosure.

Self-help remedies are not available to a mortgagee who does not have possession of the aircraft. When possession has already been lost, the mortgagee must resort to judicial process for the recovery of property (see article 536 of the Civil Code).

If an insolvency proceeding is instituted in the Philippines against an owner that is a Philippine entity, and a commencement order (which includes a stay order) is issued in due course in connection with such proceedings, the creditor must file, in a timely and proper manner, its notice of claim before the court hears the proceeding in order to participate in the rehabilitation proceedings; nonetheless, a creditor who fails to file a notice of claim in accordance with the commencement order shall be entitled to receive distributions arising from the rehabilitation proceedings. In the case of a secured creditor, the issuance of

the commencement order does not in any way diminish or impair the security or lien of such secured creditor, or the value of his or her lien or security, except that his or her right to enforce the said security or lien may be suspended during the term of the stay order.

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

The Director General of the CAAP has the power to impose liens on aircraft and machinery in the following cases:

- if the charges and other fees are not paid in full on the due date or any part of the charges or the late payment penalty thereto remains unpaid; and
- where there is failure to pay administrative fines arising from violation of any rules and regulations promulgated by the CAAP (section 73 of the CAAP Law).

Under the National Internal Revenue Code, a tax lien is created in favour of the government over the property of the taxpayer for failure to pay Philippine taxes (section 219 of the National Internal Revenue Code). However, the lien is not valid against any mortgagee, purchaser or judgment creditor until notice of the lien is filed by the Commissioner of Internal Revenue in the Register of Deeds of the province or city where the property of the taxpayer is located. Under the Customs Modernization and Tariff Act, the liability for customs duties constitutes a lien on the imported goods that may be enforced while such goods are under customs' custody (section 405 of the Customs Modernization and Tariff Act).

Under Executive Order No. 903, the Manila International Airport Authority (the MIAA), which is empowered to levy and collect dues, charges and fees or concessions for any service provided by the MIAA, on its own authority, may detain any aircraft, equipment or furniture belonging to the owner or agent of said aircraft, until the amounts due to it have been paid. This could effectively be a lien over the aircraft in favour of the government.

Aside from the MIAA (which has authority over the Ninoy Aquino International Airport), the Mactan Cebu International Airport Authority (which has authority over the Mactan Cebu International Airport), the Subic Bay Metropolitan Authority (which has authority over the Subic Bay International Airport) and the Clark International Airport Corporation (which has authority over the Diosdado Macapagal International Airport), all other airports are under the control and authority of the CAAP. Only the charter of the MIAA contains the provision in relation to the authority to detain aircraft for non-payment of duties, fees and charges.

The Civil Code recognises possessory liens in respect of claims for the unpaid price of moveables sold and in respect of credits for the making, repair, safekeeping or preservation of personal property – such as an aircraft – thus made, repaired, kept or possessed (article 2241 of the Civil Code).

If the aircraft is taken, seized or detained by the state through the fault of the lessee, the owner is entitled to recover damages from the lessee.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Non-resident foreign entities are taxed only on income derived from sources within the Philippines (section 23(F) of the National Internal Revenue Code).

Lease payments received by a non-resident lessor of aircraft, machinery and other equipment from a Philippine lessee constitute Philippine-sourced income and are subject to a final withholding tax at the rate of 7.5 per cent (section 28(B)(4) of the National Internal Revenue Code), unless there is an existing tax treaty between the Philippines and the country of residence of the lessor (International Tax Affairs Division (ITAD) Ruling No. 067-02, dated 24 April 2002).

In the case of loan repayment, interest income received by a non-resident creditor from a Philippine borrower constitutes Philippine-sourced income and is subject to a final withholding tax at the rate of 20 per cent (section 28(B)(5)(a) of the National Internal Revenue Code), unless there is an existing tax treaty between the Philippines and the country of residence of the lender (ITAD Ruling No. 074-00, dated 2 June 2000).

In the case of personal property that is purchased and sold by a taxpayer, income derived from the sale is treated as derived entirely from the country in which it is sold, which means the place where the property is marketed (section 159 of the Revenue Regulations No. 2-40). In this connection, the site of sale of personal property for taxation purposes is the place where the sale is perfected and consummated. A contract of sale is perfected at the moment there is a meeting of minds upon the object of the contract and the price and is consummated upon delivery of the object of the contract (Bureau of Internal Revenue Ruling No. DA-512-04, dated 30 September 2004). Thus, if personal property (eg, aircraft) is purchased in any place and is sold outside the Philippines, any income derived from the sale thereof will be considered as sourced outside the Philippines, and the seller, who is a non-resident foreign entity, will not be liable for Philippine income tax. On the other hand, if personal property is purchased in any place and is sold in the Philippines – as when the sale is perfected and consummated while the aircraft is on the ground or in Philippine airspace – any income derived from the sale thereof will likely be considered as sourced in the Philippines, and the seller should be liable for Philippine income tax.

In the case of personal property that is produced and sold by a taxpayer, the following rules apply with respect to the income derived from such sale:

- if the personal property is produced (in whole or in part) within the Philippines and is sold outside the Philippines; or
- if the personal property is produced (in whole or in part) outside the Philippines and is sold within the Philippines, income derived in such cases shall be treated as derived partly from within and partly from outside the Philippines.

The seller shall be liable for income tax on the income deemed as derived from Philippine sources.

Generally, the assumption of tax by a party other than the taxpayer itself constitutes an additional income for the original taxpayer. The assumption of tax, absent any law expressly allowing it, consequently gives rise to tax (*Old Colony Trust Co v Commissioner*, 279 US 716).

In the Philippines, the franchise of airline companies may provide for tax relief with respect to Philippine-sourced income of foreign lessors or lenders. To illustrate, the national carrier, Philippine Airlines' legislative franchise provides that Philippine Airlines must pay the lower of the basic corporate income tax or the franchise tax to the Philippine government during the life of the franchise and such payment shall be in lieu of all other taxes, including all taxes on lease rentals, interest, fees and other charges payable to lessors, whether foreign or domestic, of aircraft, engines, equipment, machinery, spare parts and other property rented, leased or chartered by Philippine Airlines; and taxes on interest, fees and other charges on foreign loans obtained and other obligations incurred by Philippine Airlines, where the payment of such tax is assumed by Philippine Airlines. Gross-up provisions in lease and loan agreements qualify as assumption of taxes otherwise payable by a foreign lessor or lender, allowing Philippine Airlines to avail itself of the tax exemption provided by its legislative franchise. Under Philippine tax law, the sale, importation or lease of passenger or cargo vessels and aircraft, including the engine, equipment and spare parts thereof for domestic or international transport operations is exempt from value-added tax (section 109(1)(S) of the National Internal Revenue Code). Accordingly, no value-added tax should be payable.

Any other payments (not considered lease rentals and other than indemnification for actual losses incurred by a lessor) made to the lessor under the lease, which constitute Philippine-sourced income under Philippine tax laws, will generally be subject to a 30 per cent final withholding tax, in the absence of an applicable tax treaty.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

Yes, cross-border transfers of Philippine pesos and foreign currencies are regulated in the Philippines. Any person importing, exporting or bringing with him or her into or out of the Philippines, or electronically transferring legal tender Philippine notes and coins, cheques, money orders and other bills of exchange drawn in Philippine pesos against banks operating in the Philippines in an amount exceeding approximately US\$1,000 must secure prior authorisation from the Central Bank of the Philippines (BSP), which is the central monetary authority.

On the other hand, any person who brings foreign currency into or out of the Philippines, as well as other foreign currency-denominated bearer monetary instruments, in excess of US\$10,000 or its equivalent, is required to declare the same in writing and to furnish information on the source and purpose of the transport of such currency or monetary instrument.

With regard to sourcing foreign currencies for making payments, authorised agent banks in the Philippines may sell foreign currency for non-trade purposes (such as lease payments) to a Philippine resident without the prior approval of the BSP. As a general rule, only an application to purchase foreign exchange is required to be submitted to an authorised agent bank to purchase foreign currency. To purchase amounts in excess of US\$500,000 for individuals and US\$1 million for corporations, however, the application to purchase foreign exchange must be accompanied by supporting documents. For charters and leases of vessels or aircraft, it must be supported by the billing statement from the non-resident lessor or owner of the vessel or aircraft and a photocopy of the contract or agreement (section 2, Annex A, Appendix 1 and glossary of terms of the Manual of Foreign Exchange Transactions).

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

Subject to the general principles of equity under the Civil Code, there are no limitations on the amount of default interest that can be charged in a lease or loan agreement.

The BSP has implemented a market-oriented interest rate policy since 1983. The BSP has adopted the policy that the rate of interest, including commissions, premiums, fees and other charges, on a loan or forbearance of any money, goods or credits, regardless of maturity and whether secured or unsecured, that may be charged or collected by any person, whether natural or juridical, shall not be subject to any ceiling prescribed under or pursuant to the Usury Law, as amended (Central Bank Circular No. 905, Series of 1982, effective on 1 January 1983).

Based on jurisprudence, the courts may adjust contractually stipulated interest and penalties if they are determined to be unconscionable.

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Aircraft, equipment and machinery, spare parts and catering supplies imported by and for the use of scheduled airlines operating under congressional franchise, provided that such articles or supplies are not locally available in reasonable quantity, quality and price and are necessary or incidental for the proper operation of the scheduled airline importing the same, are considered conditionally free imports that are exempt from the payment of import duties, subject to the regulations to be promulgated by the Customs Commissioner (section 105(u) of the Tariff and Customs Code). The liability generally attaches to the mortgagee.

Insurance and reinsurance**29 Captive insurance**

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

By express provision of law, a Philippine entity is not allowed to procure or accept policies or contracts of insurance from any insurance company not authorised to transact business in the Philippines, covering risks, life or non-life, situated in the Philippines. The restriction for obtaining insurance coverage locally does not apply to reinsurance. However, no insurance company may cede all or part of any risk situated in the Philippines by way of reinsurance directly to any foreign insurer not authorised to do business in the Philippines unless such foreign insurer or, if the services of a non-resident broker is utilised, such non-resident reinsurer or broker is represented by a resident agent duly registered with the Philippine Insurance Commission.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Cut-through clauses are generally valid under Philippine law.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Assignments of reinsurance are legally effective under Philippine law. Assignments of reinsurance are typically provided in aviation leasing and finance transactions we handle.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

Being the entity in whose favour the CAB has issued permits to engage in air commerce or air transportation, the lessee is generally the party liable for the operation, maintenance and insurance of the aircraft.

The owner, lessor or financier will only be held liable for any damage caused by the aircraft to third parties owing to its own fault or negligence (article 2176 of the Civil Code).

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

While Philippine law generally recognises the concept of strict or vicarious liability, such liability has generally not been applied to the lessor as owner or lender as secured party of the equipment for the action or inaction of the operator. Generally, the lessor or financier will only be held liable for any damage caused by the equipment to third parties through its own fault or negligence (article 2176 of the Civil Code).

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

While no specific amount is prescribed, as a minimum, any person operating an aircraft must have a valid insurance guarantee covering aircraft hull, each person, freight and mail on board the aircraft, and third-party liability.

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Portugal

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Cuatrecasas

Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Portugal has approved but not ratified the 1933 Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft.

Portugal is a party to the 1944 Chicago Convention on International Civil Aviation and to the 1948 Geneva Convention on the International Recognition of Rights in Aircraft.

Portugal is also a party to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed on 12 October 1929 and to the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, signed on 28 May 1999.

The Cape Town Convention on International Interests in Mobile Equipment of 2001 and the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment are not in force in Portugal.

Portugal is a party to the New York Convention of 1958 (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards), and will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting state.

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The general legal provisions of the Civil Code (Book II, Title II, Chapter IV of article 1022 et seq) governing the rights and obligations of lessors and lessees also apply to the lease of aircraft. A lease contract is defined therein as the agreement whereby a party undertakes to grant the other the temporary use of an asset for consideration. Unless otherwise agreed, the lessee undertakes to return the asset in the same condition at the end of the contract, save for the deteriorations inherent to cautious use of the asset in accordance with the purpose of the contract.

Portuguese law makes a distinction between operating leases, where the temporary use of an asset is the main purpose of the contract, and financial leases, which are defined by Decree-Law No. 149/95 of 24 June 1995, as amended and supplemented by Decree-Law No. 265/97 of 2 October 1997, Rectification No. 17-B/97 of 31 October 1997, Decree-Law No. 285/2001 of 3 November 2001 and Decree-Law No. 30/2008 of 25 February 2008, as the agreement whereby a party undertakes, for consideration, to cede to the other the temporary use of an asset, purchased or manufactured in accordance with the lessee's instructions, which the lessee has the right to buy at the end of the agreed period of time for a pre-established or pre-determinable price.

In both operating and financial leases, the legal ownership of the asset remains with the lessor until its purchase by the lessee or another party. For accounting and tax purposes, the economic substance prevails over the legal form, and therefore a lease agreement may be qualified as a financial or an operating lease for accounting and tax purposes regardless of its legal qualification or the contract title as attributed by the parties.

Financial lease companies, governed by Decree-Law No. 72/95 of 5 April 1995, as amended by Decree-Law No. 285/2001,

Decree-Law No. 186/2002 of 21 August 2002, Decree-Law No. 157/2014 of 24 October 2014 and Decree-Law No. 100/2015 of 2 June 2015, are credit institutions that deal exclusively with financial lease activity. As a complementary activity, financial lease companies may alienate, assign the exploitation, lease or perform other management acts over assets that have been returned by virtue of termination of a financial lease contract, or in the event of the lessee not exercising the right to acquire its ownership.

Besides financial lease companies, only credit institutions, financial companies and financial credit institutions may legally enter into financial lease agreements as lessors.

Decree-Law No. 298/92 of 31 December 1992, as amended and supplemented (with the last amendment under Decree Law No. 20/2016 of 20 April 2016), governs the process for the establishment and carrying out of the activity of credit institutions and financial companies, largely reflecting EU Directives. In this Legal Framework of Credit Institutions and Financial Companies, a credit institution is an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account, whereas a financial company is a company that is not a credit institution and whose main activity consists in one or more of the following: credit operations, including granting guaranties and other engagements, financial lease and factoring.

Financial credit institutions were created and are governed by Decree-Law No. 186/2002. These are defined as credit institutions with the purpose of carrying out the same operations as banks, with the exception of receiving deposits.

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Portuguese rules of conflict of laws provide that the creation and assignment of interests over any means of transportation subject to registration are governed by the laws of the country of the relevant registry (article 46(3) of the Civil Code).

Hence the transfer of title or the creation of a mortgage as regards an aircraft that is registered in Portugal falls under the scope of this rule: if an aircraft is registered in Portugal at the time of the transfer of its ownership or at the time of the creation of a mortgage, these must be governed by Portuguese law and should be registered with the National Aircraft Registry (RAN).

The parties may choose the law governing the bill of sale, pursuant to Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), but for the contract to have a transfer of title effect it must be valid and legally effective in accordance with the governing law, and the sale will have to be registered in accordance with the law of registration.

If the envisaged security involves the creation of a mortgage over an aircraft that is registered in Portugal at the time of creation of such security, this security must take the form of a mortgage governed by Portuguese law, and it must be registered with RAN to become valid, effective and enforceable in Portugal.

Moreover, and in view of the above, if the lessor of an aircraft on lease to a lessee assigns by way of security or otherwise grants a security interest pursuant to a security assignment governed by a foreign law, any rights thus purported to be created over an aircraft registered in Portugal will only be enforceable for parties inside Portugal. They will be contractual obligations of such parties, but they will not grant security rights over such aircraft registered in Portugal, in view of the Portuguese rule of conflict of laws mentioned above.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

A bill of sale or a purchase agreement, evidencing the owner's title to the aircraft, is effective to transfer title in an aircraft that is registered in Portugal at the time of the transfer as between transferor and transferee.

The new owner should apply for registration of ownership with RAN for the transfer to become valid and effective as regards third parties.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

All documents to be filed with RAN must be notarised, and the signature notarisation should state the signatories' authority.

Documents issued or executed in other jurisdictions must be legalised through apostille (the Hague Convention of 5 October 1961), or by a Portuguese consulate, before being filed for registration in Portugal. However, documents to be filed in relation to aircraft registration may be written in English, without the need for translation into Portuguese.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

In Portugal, the registration of aircraft is the responsibility of RAN, which is a department of the Portuguese Civil Aviation Authority (ANAC). RAN is a substantive register, and registration establishes the recognition and priority of interests of owners and mortgagees.

The registration of title and any other interest constitutes evidence of the ownership as well as of any other rights and interests to and in the aircraft.

Registration publicises the relevant fact, and so will constitute public notice to third parties.

Moreover, under Regulation (EC) No. 1008/2008 of 24 September 2008 on common rules for the operation of air services in the EC, an aircraft used by an EC air carrier must be registered in the national register or within the EC.

Hence, if an aircraft is operated by a Portuguese airline under a lease, both such aircraft and the lease must be recorded with RAN to enable the airline to operate the aircraft.

Portugal has entered into bilateral agreements for the transfer of oversight responsibilities under article 83-bis of the Convention on International Civil Aviation (Chicago Convention) with Spain (20 June 1997), Italy (14 July 2010) and Germany (2 July 2011). Each possible 83-bis situation should, as a matter of caution, be reviewed on a case-by-case basis.

There is no specific separate engine register. Engines are registered with RAN.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

Both ownership and the lease interest resulting from a lease agreement over aircraft can be registered with RAN.

There are no limitations on who can be recorded as owner, and an ownership interest regarding aircraft cannot and should not be registered with any registry other than RAN.

RAN also records owners' and lessees' interests in autonomous equipment, including engines.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

The following is a basic list of the required documentation to register an ownership interest:

- notarised and apostilled bill of sale (or purchase agreement) evidencing the owner's title;
- deregistration certificate issued by the original registry office, if the aircraft was previously registered in another state;
- customs clearance certificate (on the importation of the aircraft to Portugal); for EU member states, it is enough to fill in the traffic form if the import is made through the airport, and such form will then be stamped by Portuguese customs;
- petition by the owner to the chairperson of ANAC applying for the ownership registration; and
- notarised and apostilled power of attorney enabling a local counsel (or other appropriate representative) to sign the above-mentioned petition on behalf of the owner and proceed with the filing for the ownership registration.

The following are the complementary licences to be granted for the operation of the aircraft in Portugal (assuming the lessee is a local operator):

- airworthiness certificate;
- radio station licence;
- air navigation diary;
- noise certificate; and
- aircraft logbooks.

For registration of an aircraft in Portugal, including the registration of two engines and auxiliary power unit, the overall total cost is currently €769.66.

The recognition of the rights of the new owner takes effect from the date the documents are filed with RAN.

Title to an engine that is mentioned in the registration petition applying for the ownership registration of an aircraft shall automatically vest in the owner of such aircraft, unless the engine ownership is specifically registered with a different owner.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

Registration constitutes proof of title, and third parties can rely on the accuracy of the public registration of the ownership interest (as recorded on the certificate of registration).

A registered ownership interest is effective against third parties until a new owner files for the registration of ownership or any interested party legally challenges the registered owner's defective interest.

10 Registration of lease interests

Summarise the process to register a lease interest.

To record and perfect the registration of a lease, the following basic documentation is required (assuming the aircraft has already been registered in accordance with question 8):

- a notarised and apostilled lease agreement;
- a petition by the lessor or owner to the chairperson of the board of directors of ANAC, applying for lease registration; and
- a notarised and apostilled power of attorney enabling a local counsel (or other appropriate representative) to sign the above-mentioned petition on behalf of the lessor and proceed with the filing for the lease registration.

The registration of a lease, by itself, if the aircraft is already registered, does not have any cost, and the corresponding certificate issued to evidence the registration of the lease interests is also obtained without any additional cost.

All documents to be filed with RAN must be certified or notarised, and they must also be legalised with the Hague Apostille of 5 October 1961 or at the nearest Portuguese consulate.

The recognition of the rights of the lessor and lessee takes effect from the date the documents are filed with RAN.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

The certificate of registration is issued by ANAC.

RAN registration records the following facts, and a certificate shall be issued to evidence same:

- the aircraft registration number;
- the manufacturer's serial number of the aircraft and of the engines;
- the name and address of the owner or lessor, and of any lessee, as well as any other interest in the aircraft (co-ownership, mortgages, etc); and
- the name and address of the relevant party.

A separate engine certificate of registration may be obtained if the engine is registered separately from the aircraft, and ownership, security and lease interests may be recorded for an engine.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

The deregistration or export of the aircraft must be petitioned or consented by the aircraft owner.

From a Portuguese registration perspective, it is the registered owner of the aircraft that is entitled to the rights over the aircraft, limited only by any liens and interests, created pursuant to Portuguese law, as may be registered with RAN.

If the aircraft has been mortgaged, the specific consent in writing (duly notarised and legalised) of the lender or mortgagee will also be required.

In any case, the owner must submit evidence to RAN that the lease has been duly terminated.

The operator can block the export by filing a lawsuit, namely claiming that the lease has not been duly terminated.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

A deregistration power of attorney shall enable the owner, the attorneys mentioned therein or both to act as representative of the lessee or operator and deregister and export the aircraft.

An irrevocable deregistration power of attorney granted by lessee to lessor should be a condition precedent (a pre-delivery requirement) in a lease.

It is important that the wording of the irrevocable deregistration power of attorney complies with the Portuguese rules governing voluntary representation, namely that the attorney be expressly authorised by the grantor to represent both the grantor and the attorney in any act or contract to avoid a conflict of the attorney representing both parties' interests, which is forbidden by Portuguese law unless expressly authorised by the grantor, as business with oneself.

By using the irrevocable deregistration power of attorney, the lessor will be able to deregister the aircraft, and a court intervention will not usually be required unless the lessee would seek to contend that such repossession was wrongful.

The lessor has to have cooperation from the lessee to have access to the airport, the aircraft and the technical books in order to obtain the certificate of airworthiness for export issued by ANAC if required by the country of destination.

In case the lessor has no cooperation from the lessee, the alternative is to initiate proceedings against the lessee, in this case an injunction for provisional possession followed, within 30 days, by the main suit to claim effective possession.

If the lessee is declared insolvent, the deregistration power of attorney will be terminated by mere effect of the law upon the declaration of insolvency of the lessee.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

The Cape Town Convention and Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment are not in force in Portugal.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

If the aircraft is registered in Portugal at the time of creation of a mortgage, the mortgage must be governed by Portuguese law and registered with RAN.

Such mortgage shall grant the mortgagee a security that shall be effective in rem over the specific mortgaged aircraft, and enforceable towards all, against any third parties, namely common creditors of the mortgagor and subsequently registered mortgagees.

A mortgage created under Portuguese law does not involve the transfer of ownership or the possession of the mortgaged assets, and it does not allow the mortgagee to directly dispose of the mortgaged asset.

The mortgagee shall have a preferred interest to be repaid out of the proceeds of the sale of the mortgaged asset (the aircraft, in this case), prior to the mortgagor's ordinary or common creditors, and to subsequently registered mortgages over the same aircraft, pursuant to specific court foreclosure proceedings.

Under Portuguese law, a mortgage can be created and registered against a future or conditional debt, provided it is for a specific amount or a specific obligation that can be determined. The mortgage may also comprise any incidental obligations provided they are mentioned in the mortgage title and duly registered. Therefore it may cover all forms of interest payments, namely those usually contemplated in a lease agreement, as well as any additional amount related to the foreclosure or collection costs, such as attorney's fees, court costs, and related expenses.

The agreed interest rate should be expressly mentioned in the mortgage document for registration purposes, as otherwise the Portuguese legal interest rate shall be deemed applicable to the guaranteed principal (the Portuguese legal interest rate is a variable rate, periodically fixed by joint decree of the Ministries of Justice and of Finance).

Note that, notwithstanding any stipulation of the parties to the contrary, a mortgage created under Portuguese law cannot comprise more than three years of interest, but a new mortgage can be registered with relation to outstanding interest.

A mortgage created under Portuguese law may be denominated in euros or in any foreign currency that may be legally converted to euros.

A mortgage over an aircraft registered in Portugal must be governed by Portuguese Law, but it may be written in English.

RAN will accept the filing of the relevant documents in English. The Portuguese translation of the aircraft mortgage documents will only be required if such documents have to be submitted to a Portuguese court.

For registration purposes, the total mortgage amount must be indicated, comprising:

- the principal amount;
- the costs, charges and expenses arising out of, or in connection with, the enforcement of the mortgage, including (but not limited to) court fees, litigation fees, lawyer's fees and any other disbursements made by the mortgagee in order to enforce its rights under the mortgage, up to an amount equivalent, for the purpose of registration, to 10 per cent of the principal amount; and
- the maximum amount of interest over the outstanding principal amount, which will yield over a period of 36 consecutive calendar months (the maximum period permitted by Portuguese law).

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

The mortgage must be notarised and legalised with the Hague Apostille, or at the nearest Portuguese consulate.

If it is written in English, no translation is required.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

To record and perfect the registration of a mortgage, the following basic documents are required (assuming the aircraft has already been registered in Portugal, in accordance with question 8):

- a notarised and apostilled mortgage;
- a petition by the aircraft owner to the chairperson of ANAC applying for the mortgage registration; and
- a notarised and apostilled power of attorney enabling a local counsel (or other appropriate representative) to sign the above-mentioned petition on behalf of the owner and proceed with the filing for the mortgage registration.

The recognition of the rights of the mortgagee takes effect from the date the documents are filed with RAN.

Note that the registration of a mortgage created under Portuguese law is mandatory and an essential legal requirement for the mortgage to be valid and effective, even with relation to the parties thereto.

The registration need not be renewed, but a new mortgage may be required, and should be registered, with relation to outstanding interest, in view of the above-mentioned rule that a mortgage created under Portuguese law cannot comprise more than three years of interest.

As to RAN registration charges for a mortgage, these will be calculated in accordance with the actual mortgage total amount (which will be converted into euros for the calculation of registration charges if the mortgage is denominated in another currency).

The registrar will calculate the amount payable for the registration of each mortgage based on the mortgage total amount.

For registration of a mortgage, the basis for calculating the cost of the mortgage is 1/100,000 over the actual mortgage total amount, the following limit amounts to be paid to ANAC are as follows:

- minimum limit per mortgage: €72.33; and
- maximum limit per mortgage: €947.72.

18 Registration of security

How is registration of a security interest certified?

The registration of a mortgage is evidence by means of a registration certificate, which shall state the rank or priority of the mortgage.

The registration certificate is issued by ANAC, and will normally be available within five days from filing for registration.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

Registration of a mortgage created under Portuguese law is mandatory. It is an essential legal requirement for the creation and perfection of a mortgage, for it to be valid and effective between mortgagee and mortgagor.

Registration confers priority over subsequent security interests, and third parties can rely on the accuracy of the public registration of the security interest as recorded on the certificate of registration.

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

Portugal does not recognise the concept of trust or the role of a security trustee.

Under Portuguese rules of conflict of laws, the creation and assignment of interests over any means of transportation subject to registration must be governed by the laws of the country of the relevant registry, as discussed above. Hence the creation of a mortgage over an aircraft registered in Portugal must be governed by and registered in accordance with Portuguese law.

Typically, security over aircraft is granted by means of a mortgage.

Security over leases is also typically structured by means of the assignment of the rents as guaranty.

A mortgage created and registered in accordance with Portuguese law is a right in rem.

Loan transfers that operate as classic novations do not affect the security, if the mortgage created and registered in accordance with Portuguese law, nor do new security registrations need to be effected if the loan is transferred to a new lender. But there must always be some connection (eg, by means of an agreement) between the registered owner of the aircraft and its lessor.

Changes to the security or its beneficiaries, in terms such that the identity of the aircraft owner or the lessor of the aircraft remain unchanged, will not trigger the requirement for an update of the aircraft registration.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

A mortgage over a spare engine that is not installed on a host aircraft follows very much the same process as the mortgage of an aircraft, as regards its form and required registration.

If the engine is installed on a host aircraft, it follows the mortgage of the aircraft unless the engine has a different registered owner.

Whether a security interest over financed aircraft creates an independent security interest over its engines, or the aircraft and engines are treated as a single item of property, depends on the terms of such security.

An effective security interest can be created over an engine if it is registered separately and not as installed on the aircraft at the time of creation (assuming that the non-installed engine is also in the jurisdiction).

An encumbered engine shall cease to be encumbered upon the express consent of the mortgagee for the cancellation of such encumbrance.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

For the repossession of the aircraft and its export from Portugal, it will be necessary for the registered owner to apply for deregistration with RAN.

The consent of the lessee or operator is not necessary, but it is necessary to submit evidence to RAN demonstrating that the lease agreement has been terminated.

With cooperation from the lessee or operator, the deregistration process should take five to seven days.

Without cooperation from the lessee or operator, and provided that the lessor has an irrevocable power of attorney granted by the lessee or operator and no injunction is filed with the court to prevent it, deregistration should take 10–15 days.

The lessee may file with the court for an interim measure that will effectively, albeit temporarily, prevent ANAC from deregistering the aircraft and authorising its exportation, pending the discussion in a lawsuit of the termination dispute.

23 Enforcement of security

Outline the basic measures to enforce a security interest.

How may the owner lawfully impede the mortgagee's right to enforce?

As mentioned above, a mortgage created under Portuguese law does not involve the transfer of ownership nor does it grant the mortgagee any possession rights over the mortgage assets. Any provisions purporting

to grant the mortgagee the right to directly dispose of the mortgaged asset will be deemed null and void.

The mortgagee shall have a preferred interest to be repaid out of the proceeds of the sale of the mortgaged asset (the aircraft, in this case), prior to the mortgagor's ordinary or common creditors, and to subsequently registered mortgages over the same aircraft, pursuant to specific court foreclosure proceedings.

The owner may not lawfully impede the mortgagee's right to enforce.

In insolvency proceedings, secured claims, which are those with security in rem over assets in the estate, up to the value of such assets, are not affected and will cover the claims and also the interest on them.

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

The following rights or interest will take precedence over aircraft ownership or an aircraft security interest:

- any previously registered mortgage;
- any possessory lien arising out of work done on the aircraft or in connection with expenses incurred to preserve and avoid deterioration of the aircraft; or
- privileged credits in respect of taxes and duties owed to the state (including aircraft charges and air navigation charges) or the municipalities, and crews' wages.

The airport authorities have a specific possessory lien of the aircraft in the case of lack of mandatory information or non-payment by the lessee or operator of the applicable airport fees. Notwithstanding, note that all the above-mentioned rights arise out of debts that are typically debts of the operator or lessee. In a lease situation, where the owner or lessor and the operator or lessee are separate entities, the lessee's debts are not deemed guaranteed by an aircraft on lease, and only privileged credits arising from the owner or lessor's debts, if any, will take precedence over the registered lease.

Public requisition of the aircraft may occur in time of war or serious national emergency. Compensation would then be due.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Under the general rules, withholding of Portuguese corporate income tax (PCIT) will be levied over the aviation-related lease payments, whenever the lessee is a Portuguese tax resident entity and the lessor is a non-Portuguese tax resident entity (without a permanent establishment located in Portugal to which the rental income is imputable). This withholding tax on the lease rents would be levied at a 25 per cent flat rate (domestic rate), except where a double tax treaty (DTT) entered into by Portugal applies, in which case such 25 per cent PCIT domestic withholding rate may be reduced under the applicable DTT (since income derived from the lease of commercial or industrial equipment is generally qualified as a royalty, PCIT would be withheld under the rates provided for in article 12 of the applicable DTT). To apply for the DTT benefits, some formal procedures will have to be fulfilled (more precisely, in the alternative, said benefit must be claimed by way of the form Mod 21-RFI, which must be duly certified by the tax authorities of the income recipient's country of residence or a non-certified version of the form Mod 21-RFI properly filled out jointly with a tax certificate issued by the tax authorities of the country of residence attesting that the recipient of the income is a residence of such country).

The withholding of PCIT may, however, be exempt whenever the conditions provided for in EU Council Directive 2003/49/EC of 3 June 2003, applicable to interest and royalty payments made between associated companies of different member states, are met; notably, a direct minimum participation of 25 per cent between the lessor and the lessee, held for at least an uninterrupted period of two years or, where both the

lessor and the lessee are held in, at least, 25 per cent by the same entity, during the two years preceding the attribution of income. Moreover, the relevant companies must have one of the legal forms listed in the Annex to the Directive and must be subject to PCIT or to an equivalent tax in their country of residence.

Additionally, an ad hoc exemption from PCIT on the lease rents may, however, be granted on public services grounds, upon formal request to be submitted by the lessee to the Portuguese Minister of Finance, provided that the lessor is a non-Portuguese resident entity without a permanent establishment located therein to which the rental income is imputable.

As for VAT, the aircraft lease agreements are qualified as supplies of services that would be located in Portugal whenever the lessee or recipient of the service is a Portuguese taxable person (the general place of supply rule for business-to-business transactions foreseen in the domestic rule equivalent to article 44 of the Council VAT Directive 2006/112/EC of 28 November 2006 would apply). This means that the VAT that may be due will have to be accounted for and paid to the Portuguese Tax Authorities by the lessee under the reverse-charge mechanism. A VAT exemption may, however, be applicable if the aircraft being leased is aimed to be used by an airline operating for reward chiefly on international routes (ie, whenever, by reference to the preceding 12 months, the percentage of turnover attributable to international air traffic or, alternatively, the number of passengers carried in international routes exceeds 50 per cent of the total turnover or passengers).

In general, a final PCIT withholding of 25 per cent would be levied over the interest component of a loan repayment whenever the debtor is a Portuguese tax resident entity and the creditor is a non-Portuguese tax resident entity (without a permanent establishment located therein to which the interest income is imputable). This withholding tax on interest may be reduced where a DTT entered into by Portugal applies (see above the formal requirements for the concession of DTT's benefits).

Moreover, where both the creditor and the debtor are entities resident for tax purposes in the EU, the withholding of PCIT on interest may, however, be exempt whenever the conditions provided for in EU Council Directive 2003/49/EC, applicable to interest and royalty payments made between associated companies of different member states, are met (see above the main conditions that must be met).

Also, regarding the payment of interest to non-Portuguese tax resident entities not having a permanent establishment located therein, to which said income is imputable, an ad hoc exemption from withholding of PCIT may be granted on public services grounds, upon formal request to be submitted by the debtor to the Portuguese Minister of Finance.

In principle, a loan repayment would not trigger any Portuguese VAT taxation since the VAT exemption provided for financial transactions would apply to the interest component of the payments.

Whenever the entity transferring the ownership of the aircraft is not resident in the Portuguese territory, nor does it have a permanent establishment located therein to which such transaction is imputable, the transfer of the aircraft will not trigger any PCIT taxation. If, rather than transferring the ownership of the aircraft, you were to transfer the stock (or the beneficial interest) in the company that owns the aircraft (aircraft special purpose entity (SPE)), no PCIT will be due either, whenever the seller is a non-Portuguese tax-resident company without a permanent establishment located therein to which such transaction is imputable, and the aircraft SPE whose stock (or the beneficial interest) is being transferred is also not resident in Portugal.

As for VAT, the transfer of the ownership of the aircraft will be liable to Portuguese VAT, provided that the aircraft is put at the acquirer's disposal in Portuguese territory (ie, the aircraft is on Portuguese soil or airspace at the moment it is transferred to the acquirer). Therefore, if the acquirer of the aircraft is an entity established in Portugal for VAT purposes, then the VAT that may be due would have to be accounted for and paid to the Portuguese tax authorities by the acquirer. Conversely, if the acquirer of the aircraft is an entity not established in Portugal for VAT purposes, then the reverse-charge mechanism would not apply. As a consequence, the non-established seller would have to:

- trigger a VAT registration in Portugal (and, if resident outside the EU territory, also appoint a tax representative in Portugal); and
- account for and pay any Portuguese VAT due.

Notwithstanding the above, a VAT exemption may apply provided that the aircraft being transmitted is aimed to be used by airlines operating

for reward chiefly on international routes (which would have to be demonstrated by the applicant – see above).

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

There are no restrictions on international payments nor exchange controls in effect in Portugal, and capital import and export, as well as cash conversion to other currencies, are, in general, free as regards both EU and non-EU countries.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

No. Maximum interest rates are only applicable to credit granted to consumers, that is, natural persons taking out loans for purposes unrelated to their commercial or professional activity and provided that the amount of the loan is comprised within certain amounts.

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

According to the EU regulations, there are no customs duties to bring the aircraft into Portugal or to take it out provided the importer entity obtains the required customs qualification as end use for the aircraft.

To obtain such qualification, a customs clearance officer is generally retained and the average fee for their services is €800–€1,000.

The liability shall attach to the airline, as the importing entity must be the holder of an air transport licence and an air operator's certificate.

Insurance and reinsurance

29 Captive insurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

The Portuguese insurance legal regime applicable to aviation is currently set forth in Decree-Law No. 321/89 of 25 September 1989, as amended by Decree-Law No. 208/2004 of 19 August 2004; and in Regulation (EC) No. 785/2004 of the European Parliament and of the Council of 21 April 2004, as amended by Regulation (EC) No. 1137/2008 of the European Parliament and of the Council of 22 October 2008; and by Commission Regulation (EU) No. 285/2010 of 6 April 2010 on insurance requirements for air carriers and aircraft operators. The purpose of these pieces of legislation is to set forth minimum insurance requirements for air carriers and aircraft in respect of passengers, baggage, cargo and third parties, for both commercial and private flights.

Additionally, Decree-Law No. 223/2005 of 27 December 2005 sets forth the insurance requirements applicable regarding non-commercial operations by aircraft with a maximum take-off mass (MTOM) of 2,700kg or less.

Insurance and reinsurance activities are regulated and therefore the exercise of said activities by, and the incorporation of, insurance or reinsurance companies in Portugal is subject to specific requirements set forth in the Portuguese Legal Regime applicable to Insurance and Reinsurance Activities (PLRIRA), approved by Law No. 147/2015 of 9 September 2015, which has enacted into Portuguese law Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (as amended).

Although there is no specific requirement under Portuguese law regarding a captive insurance regime specifically applicable to aviation, the PLRIRA expressly allows the incorporation of captive reinsurance companies.

In Portugal, aviation insurance and reinsurance agreements may be entered into with any insurance or reinsurance company incorporated in Portugal or authorised to exercise its activity in Portugal.

Provided the above-mentioned requirements are met, no specific provision applies requiring the insurance or reinsurance agreement to be placed in the jurisdiction.

Furthermore, regarding reinsurance agreements, there is no minimum or maximum percentage of the insurance that must be retained in the Portuguese jurisdiction. In fact, the PLRIRA authorises reinsurance agreements to be placed with reinsurance companies whose head offices are located outside the EU territory, and that are not established in Portugal, provided these are duly authorised to carry out the reinsurance activity in the relevant country. However, whenever said reinsurance company's head offices are located within the territory of a country who has not entered into an agreement with the EU on supervision requirements, said reinsurance company will be required to grant additional guarantees as set forth by regulations issued by the Portuguese Supervisory Authority.

Finally, note that there are no legal requirements determining the placement of the reinsurance with more than one reinsurance company.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Although cut-through clauses are more commonly used in reinsurance agreements entered into with captive reinsurers, we may find them also included in reinsurance agreements entered into with reinsurance companies.

Pursuant to the Portuguese Insurance Law (approved by Decree-Law No. 72/2008 of 16 April 2008), unless otherwise set forth by law or in the reinsurance agreement, the reinsurance agreement does not grant to the policy holder any rights or obligations with regard to the reinsurer, or vice versa.

Notwithstanding the above, the same provision establishes that the above-mentioned general rule does not jeopardise the validity and enforceability of the clauses pursuant to which the insurer grants to the policyholder the ownership or the exercise of rights initially granted to the insurer pursuant to the reinsurance agreement, provided said clauses are admissible in accordance with the general law.

Considering that, pursuant to Portuguese law, at least part of the credits towards the reinsurers are included among the assets representing the technical provisions, and that said assets are deemed as a privileged patrimony specially aimed at guaranteeing the credits emerging from the insurance agreements, and that in case of insolvency of the insurer the policyholders are granted by law a privileged credit over said patrimony, in the scenario of the insolvency of the insurer, the validity and enforceability of cut-through clauses may be challenged on the basis that they constitute an unauthorised preference in liquidation.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

As a general rule, Portuguese law authorises not only the assignment of rights but also the assignment of the contractual position entitling one of the counterparties to transfer to a third party not only the rights but also the obligations emerging from a given agreement.

While in the first case the validity and enforceability of the assignment is not subject to the authorisation of the counterparty (in this case the only exceptions to the general rule of free assignability: the agreement itself prohibits assignment; the assignment is prohibited by law; or the agreements calls for the performance of 'personal services'), the assignment of rights and obligations is subject to the prior authorisation of the counterparty. Should that authorisation be granted before the execution of the assignment, it will only become perfected upon its notification to the counterparty.

Notwithstanding the above, assignments of reinsurance are not common regarding aviation leasing and finance transactions. Generally, said assignment may only occur in run-off situations.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

For the purposes of determining potential liabilities, Portuguese law classifies three categories of entities:

- the owner (ie, the registered owner of the aircraft);
- the user (ie, the entity using the aircraft); and
- the air transporter (ie, the entity authorised to provide air services by transporting persons, luggage, cargo or mail in such aircraft).

The owner will only be liable if it is also the user of the aircraft.

If the use of the aircraft has been ceded to another party (eg, operator or lessee), the user will be liable for the operation of the aircraft and related activities of the operator, and no liability shall accrue to the owner or lessor.

The financier shall not be liable for the operation of the aircraft or the activities of the operator.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

In compliance with Regulation (EC) No. 785/2004 (as amended by Regulation (EC) No. 1137/2008, and by Commission Regulation (EU) No. 285/2010) on insurance requirements for air carriers and aircraft operators, Decree-Law No. 321/89 sets forth that air carriers and aircraft operators shall be insured in accordance with said law as regards their aviation-specific liability in respect of passengers, baggage, cargo and third parties. The insured risks shall include acts of war, terrorism, hijacking, acts of sabotage, unlawful seizure of aircraft and civil commotion.

Furthermore, it sets forth that air carriers and aircraft operators shall ensure that insurance cover exists for each and every flight, regardless of whether the aircraft operated is at their disposal through ownership or any form of lease agreement or through joint or franchise operations, code-sharing or any other agreement of the same nature.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

The minimum requirements applicable by Portuguese law are the ones set forth in Regulation (EC) No. 785/2004 (as amended by Regulation (EC) No. 1137/2008, and by Commission Regulation (EU) No. 285/2010) on insurance requirements for air carriers and aircraft operators (see table).

Category	MTOM (kg)	Minimum insurance (million special drawing rights)
1	<500	0.75
2	<1,000	1.5
3	<2,700	3
4	<6,000	7
5	<12,000	18
6	<25,000	80
7	<50,000	150
8	<2,000,000	300
9	<5,000,000	500
10	≥5,000,000	700

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Russia is a party to the following:

- the Chicago Convention on International Civil Aviation of 1944 (the Chicago Convention);
- the Cape Town Convention on International Interests in Mobile Equipment of 2011 and the associated Protocol on Matters Specific to Aircraft Equipment (the Cape Town Convention); and
- the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

All of the above are currently effective in Russia.

Russia is not a party to the Geneva Convention on the International Recognition of Rights in Aircraft of 1948 or the Rome Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft of 1933.

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The principal Russian legislation in this sphere includes the Civil Code of the Russian Federation (the Civil Code) and the Air Code of the Russian Federation (the Air Code), expanded in various specific laws and by-laws.

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

The main principle stated in the Civil Code is that proprietary rights (including ownership and mortgage interests) in an aircraft are governed by the law of the jurisdiction where the aircraft is registered. Thus, to create valid ownership title to, or mortgage interest in, an aircraft, relevant contracts must be valid and effective under the law of the jurisdiction where the aircraft is registered.

Under Russian law, parties to a contract may agree that any foreign law is governing if there is a sufficient foreign element in the transaction (eg, a foreign entity or, potentially, a foreign asset is involved). Russian courts should recognise the choice of law unless such choice of law contradicts Russian public policy or imperative norms of Russian law (such as application of Russian governing law to agreements in relation to immovable property located in Russia (see question 6)).

Finance transactions with Russian airlines are normally structured to ensure that the ownership title to the aircraft vests in a bankruptcy-remote special purpose vehicle (SPV) established outside of Russia (eg, in Bermuda or Ireland). The aircraft is further leased to a Russian airline directly or sometimes through a chain of SPVs established for registration (eg, in Bermuda or Ireland) and tax (eg, in Ireland or Cyprus) purposes (the Standard Structure).

In the Standard Structure, all finance, security and lease documents are normally governed by English or New York law.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

If an aircraft is registered in the Russian Aircraft Register (all terms from this paragraph are defined in question 6), the title to such aircraft must be transferred by a sale and purchase agreement governed by Russian law. Such transfer of title will be effective from the moment of its registration in the Register of Rights.

If the aircraft is registered in a foreign register, the ownership title to the aircraft normally vests in a bankruptcy-remote SPV outside of Russia, and transfer of title happens between non-Russian entities and outside of Russia (see questions 20 and 25). Current market practice is for relevant transfer agreements to be governed by applicable foreign law.

It is not clear to what extent Russian regulations on registration of rights to aircraft and transactions connected with them (the Registration Regulations) may apply to transfer agreements governed by foreign law in relation to aircraft registered in a foreign register (the 'foreign transfer agreement') (see questions 6 and 7). Current market practice is to assume that the Registration Regulations would not apply to such foreign transfer agreements. Therefore, the moment of transfer of title to such aircraft is regulated by the governing law of the transfer agreement and provisions of the transfer agreement itself.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

There are no specific Russian law requirements in respect of a foreign transfer agreement. If a Russian entity is a party to the transfer agreement, it must be in written form, with no other specific requirements applied. For registration requirements, see questions 4, 6 and 7.

To be presented as evidence in a Russian court or to any Russian authority, the transfer agreement must be in Russian or have a certified translation into Russian.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

There are two types of aircraft registers in Russia, as follows:

- for national registration, the State Register of Civil Aircraft of the Russian Federation (the Russian Aircraft Register); and
- for title registration, the Unified Register of Rights to Aircraft and Transactions Therewith (the Register of Rights).

Both registers are maintained by the Federal Aviation Agency of the Russian Federation Ministry of Transport (Rosaviation) and are publicly available. The Russian Aircraft Register is an owners registry. With respect to the Register of Rights, any person having or acquiring a right in an aircraft subject to registration may apply for such registration, which will serve as public evidence of such rights.

In accordance with provisions of the Air Code, an aircraft operated by a Russian airline should be registered either in the Russian Aircraft Register or in a register of a country with which Russia concluded an agreement on the maintenance of continuing airworthiness, under article 83-bis of the Chicago Convention (Foreign Register). Currently, the most widely used foreign registers in Russia are Bermuda and Irish registers.

An aircraft registered in the Russian Aircraft Register acquires Russian nationality and becomes an immoveable property under Russian law. This leads to various consequences:

- agreements relating to such aircraft must be governed by Russian law if the aircraft is located in Russia (there is no clear statutory criteria for determining the location of an aircraft (ie, whether the decisive criteria should be the place of its registration, actual physical location or the location of its base airport, owner or operator));
- Russian arbitrazh courts (the system of Russian commercial courts) have exclusive jurisdiction over claims with respect to the rights relating to such aircraft; and
- legal interests in such aircraft, such as ownership title and mortgage interest, shall be registered in the Register of Rights.

It is not clear to what extent the Russian regime of immoveable property and Registration Regulations should be applied to an aircraft registered in the Foreign Register (for registration regulations, see question 7). However, current market practice for non-Russian manufactured aircraft finance and leasing is to register the aircraft in the Foreign Register (other than helicopters, which are registered in the Russian Aircraft Register) and use the Standard Structure despite this risk.

There is currently no separate register for engines or rights in engines in Russia.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

The registration regulations require that the occurrence, transfer, termination of property rights (including ownership title and mortgage interest) and encumbrances over such rights with respect to civil aircraft subject to state registration shall be registered in the Register of Rights (no other registers are available for this purpose). Registration of any interest in an aircraft in the Register of Rights may be initiated by a person holding or intending to acquire the relevant interest. There are no limitations on jurisdiction of the holder of interest in the aircraft for the purpose of such registration.

Bearing in mind aircraft registration provisions of the Air Code (see question 6), there is a theoretical risk that, on the basis of literal application of the Registration Regulations and the Air Code, rights in an aircraft operated by Russian airlines and registered in the Foreign Register may be subject to the Registration Regulations.

In relation to aircraft lease agreements, there are some contradictory interpretations on whether they are subject to state registration in the Register of Rights. This is because of a contradiction between registration requirements applicable to immoveable property and transportation vehicles.

The position that aircraft leasing falls under the exception available for transportation vehicles was confirmed by the Supreme Arbitrazh Court of Russia. Therefore, in our view, registration of an aircraft lease in the Register of Rights should be treated as voluntary (for information purposes) rather than obligatory.

Our current understanding is that the Registration Regulations should be applicable to aircraft registered in the Russian Aircraft Register and Russian law agreements. It is in line with current market practice not to register in the Register of Rights the ownership title, mortgage interest and lease interest related to aircraft registered in the Foreign Register.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

Registration of any interest in the Register of Rights is possible only after registration of the underlying interest. There is no limitation on how far the registration authorities should investigate the existing ownership title, and there is a risk that they may request documents with respect to the whole chain of transfers of title up to a purchase from a manufacturer.

The Registration Regulations provide for the maximum period of one month after filing of all necessary documents, for registration of rights and encumbrances in the Register of Rights.

Together with the application for registration of ownership interest, the applying party should file documents (in Russian or containing certified translation into Russian):

- confirming its rights to file the application, including rights of the signatory to sign such application;
- creating the relevant interest (eg, sale and purchase agreement);
- identifying the aircraft; and
- confirming payment of state duty for registration.

A more precise list of the documents necessary for registration of ownership interest in the aircraft should be considered on a case-by-case basis, depending on the background of a particular transaction. Documents filed for registration must contain all information required for such registration.

State duty for issuance of the certificate confirming ownership interest in an aircraft varies depending on the type (weight) of the aircraft, but does not exceed 5,000 Russian roubles.

Russian law does not provide for registration of any interest in engines. The description of an aircraft for the purpose of registration of some interest in it must contain the serial numbers of engines installed in the aircraft. However, as we understand, there is no intention to create registration of interest in engines themselves this way.

Registration of ownership interest in the host aircraft should not automatically vest the title to the engines installed in such aircraft in the aircraft owner.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

Registration of the ownership interest in the Register of Rights is the only evidence of such interest. It does not remedy a defective title, but registered interest in an aircraft may only be challenged in court.

10 Registration of lease interests

Summarise the process to register a lease interest.

The process of registration of a lease interest is substantially similar to the process of registration of the ownership interest (see question 8). See our considerations on the necessity of registration of lease interest in question 7. Lease interest in an aircraft may be registered only if the ownership interest in such aircraft is registered in the Register of Rights.

State duty for registration of a lease interest varies, depending on the type (weight) of the aircraft, but does not exceed 5,000 roubles.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

Registration of ownership of an aircraft in the Register of Rights is confirmed by a certificate issued by Rosaviation. The content of such certificate is stipulated by the Registration Regulations. The certificate contains information about the owner and the aircraft itself. State registration of an agreement subject to registration in the Register of Rights is confirmed by a registration stamp on the agreement.

Information about rights relating to an aircraft may be requested from Rosaviation in the form of an extract from the Registry of Rights.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

The Russian Aircraft Register is the owners register. No consent is required from the lessee for the purpose of deregistration, and there are no notification requirements in this respect.

There is no legal way for the operator to block such deregistration.

Export of the aircraft from Russia requires flight permission from Rosaviation and customs clearance of the aircraft. Normally, it is the lessee who is responsible for compliance with these formalities.

Russian customs regulation is based on the assumption that the customs regime will be closed by the same person who has imported the aircraft into Russia (the lessee). Although export of a repossessed aircraft by its owner is theoretically possible, it is not directly regulated and may be cumbersome, especially if the lessee failed to pay customs duties during the term of lease or did not comply with a particular customs regime.

There has been a court decision with respect to leased vehicles imported into Russia under the same temporary import regime normally used for import of aircraft. The decision confirmed in three instances the right of the lessor or owner to export the leased asset and conduct export customs clearance in the name of the owner or lessor in case of termination of the lease agreement.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

No power of attorney is currently required for deregistration of an aircraft from the Russian Aircraft Register, since it is the owners register.

At the same time, the deregistration and export power of attorney (DPoA) is a standard instrument in aircraft leasing, even though it has not been widely tested in Russia. The DPoA may be useful for deregistration of the aircraft from the Foreign Register and export of the aircraft from Russia.

Until changes to the Civil Code, DPoAs were often governed by English law and executed in the UK or Germany because it was not possible to issue an irrevocable power of attorney for a term of more than three years in Russia.

Currently the Civil Code provides for the possibility to issue an irrevocable power of attorney for an extended time period. Such irrevocable power of attorney may be issued for the purpose of performance or security of performance of any obligation of the person issuing such power of attorney in relations with the attorney or any third parties, if such obligation is connected to entrepreneur activity. Such irrevocable power of attorney must be certified by a notary and may be revoked after performance of the obligation that it relates to, if the attorney abuses its powers or there are certain circumstances certifying that abuse might occur. Information on revocation of powers of attorneys is publicly available.

Under Russian law, a power of attorney automatically terminates in case of the liquidation of a company that issued such power of attorney. DPoAs do not require any registration or filing in Russia.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

Russia has made the declaration on IDERA to the Cape Town Convention, but as an IDERA is a new instrument for Russia, there is no established practice of its use.

IDERA is not required for the deregistration of an aircraft from the Russian Aircraft Register. However, export authority contained in IDERA may be useful for the export of aircraft registered in the Foreign Register from Russia.

The form of IDERA effective in Russia contains standard deregistration and export authorities, and it must be countersigned and recorded by Rosaviation in accordance with the Cape Town Convention.

No specific regulations have been adopted in Russia in relation to IDERAs and any recording thereof. Therefore, while Rosaviation may still be able to record IDERAs relating to aircraft registered in the Russian Aircraft Register, recording of IDERAs in relation to aircraft registered in the Foreign Register remains an open issue, and effectiveness of an IDERA without such record is questionable.

A DPoA and an IDERA have different spheres of application and at the beginning of the transaction it cannot be predicted where aircraft may be located at the time of repossession. It is advisable to obtain both a DPoA and an IDERA in parallel.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

As a general rule, the validity and effectiveness of mortgage interest is assessed under the law of the jurisdiction where the aircraft is registered. In the Standard Structure, an aircraft mortgage agreement is governed by foreign law and should be enforced outside of Russia.

However, there is a risk that a Russian court may assume its exclusive jurisdiction over disputes relating to an aircraft if it is considered to be immovable property and apply Russian law to the aircraft mortgage agreement on the same ground (see question 6).

The main contractual security applicable to aircraft under Russian law is a mortgage. The mortgage can be both possessory and non-possessory, but does not give the mortgagee a title to the mortgaged property, which remains in the ownership of the mortgagor. The mortgage provides the mortgagee with a priority right to discharge its claims under the secured documents from the value of the mortgaged aircraft or proceeds received from its disposal.

A mortgage over an aircraft registered in the Russian Aircraft Register must be governed by Russian law and registered in the Register of Rights. Without the registration in the Register of Rights a mortgage is invalid.

There are no specific requirements for the language of security documents that are not subject to state registration in Russia. If the aircraft mortgage is to be notarised by a Russian notary or registered in the Register of Rights, it must be in Russian or bilingual with the Russian language prevailing. Any document to be filed as evidence in Russian courts must be in Russian or accompanied by a certified translation into Russian.

A Russian mortgage must contain a detailed description of the secured obligations, including their nature, amounts and schedule of payments under the secured document, detailed description of the mortgaged property and its value. In the absence of these terms, the mortgage agreement is invalid.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

An aircraft mortgage must be concluded in written form and is generally not subject to notarisation requirement (other than the aircraft mortgage securing a notarised document). The parties may also specifically agree on a notarised form of the agreement. The failure to meet statutory or contractual requirements to the form of the agreement entails invalidity of such agreement.

The notarial fee may vary depending on the grounds for notarisation and value of the aircraft, and should be confirmed on a case-by-case basis.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

The Russian registration requirement for an aircraft mortgage is similar to registration requirements applicable to the ownership title, discussed in question 7.

An aircraft mortgage is effective upon its registration in the Register of Rights. The process and costs of registration of mortgage interest are similar to the registration of ownership and lease interest (see question 8).

In the Standard Structure, an aircraft mortgage is governed by foreign law and is not registered in the Register of Rights. However, since this practice has not been tested in Russian courts, the risk that enforcement of such aircraft mortgage may meet certain resistance in a Russian court remains. We would advise for an alternative security to be arranged (see question 20).

18 Registration of security

How is registration of a security interest certified?

Upon registration of aircraft mortgage, the relevant record is created in the Register of Rights and a registration stamp is placed on a mortgage agreement.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

An aircraft mortgage subject to registration in Russia is effective upon its registration in the Register of Rights.

If there are several mortgages over the same aircraft, the order of priority between them will be established in accordance with the time of registration.

Registration of an aircraft mortgage in the Register of Rights is the only evidence of such mortgage interest. Registered mortgage interest may only be challenged in court.

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

For the Standard Structure, see question 3.

In the Standard Structure, an aircraft mortgage is governed by foreign law and is not registered in Russia (remaining under the risk of falling under Russian registration requirements to it, see question 17). At the same time, there is usually alternative security, such as a share charge over an SPV and common law governed security assignments over lease agreements. Such alternative security is intended to minimise the lenders' risks associated with enforceability of an aircraft mortgage in Russia, and provide them with maximum flexibility at the time of enforcement.

Since, in the Standard Structure, finance documents and most of the security (unless specifically required otherwise by the jurisdiction where the aircraft is registered) are governed by common law, the common law concept of security agent or trustee is commonly used. There is no concept of trust in Russian law, but it should be interpreted and applied in accordance with the governing law of finance documents. Since there is no Russian security involved it does not need to be adjusted to Russian law requirements.

Under Russian law, an aircraft mortgage is a proprietary right (see question 15). Any change of beneficiaries may be made by way of transfer of beneficiaries' rights under the mortgage agreement, together with their secured rights.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

It is possible to take security over an engine either as part of the aircraft in which it is installed or separately from the aircraft as separate equipment. If any of the parties to the security agreement over the spare engines is a foreign entity, parties will be able to choose foreign governing law. Under Russian law such security would take the form of a pledge, with the pledgee acquiring a priority right to discharge its claims under secured documents from the value of the pledged engine or proceeds received from its disposal.

Under Russian law, the moment of creation of security over an engine, and its termination, do not depend on whether it has been installed in or removed from the aircraft.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

It is questionable to what extent repossession of aircraft without recourse to a court or arbitration will work if the lessee is not cooperative. Although it is not directly prohibited by Russian law, there are many practical matters where owner's or lessor's actions without cooperation of lessee or third parties (eg, maintenance facilities, airports) may not be practically possible or could be dangerously close to a breach of law (administrative or criminal).

Russia has made the declaration on out-of-court enforcement to the Cape Town Convention. However, it has not yet been tested in practice.

Repossession of aircraft on the basis of a court decision or arbitral award is the most clear and straightforward way.

For the purpose of repossession, the owner or lessor must comply with provisions of the lease agreement and its governing law. Under Russian law, before terminating a lease the lessor is obliged to send a default notice requesting that the lessee comply with its respective obligations under the lease agreement.

The only lawful way for the lessee to impede the owner's right to exercise default remedies is to file various counterclaims or requests to postpone or reschedule hearings on various grounds. There are no standard grounds that may be considered outside of the particular enforcement scenario.

23 Enforcement of security

Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

Foreign security should be enforced in accordance with its governing law.

Under Russian law, the Russian law pledge or mortgage gives the pledgee or mortgagee rights of claim in case of the pledgor's or mortgagor's default, which shall be satisfied from the value of the pledged or mortgaged property.

The enforcement may be performed through courts or by means of an out-of-court procedure to which the parties should specifically agree.

Out-of-court enforcement of a Russian law pledge or mortgage requires notary endorsement to be made in the beginning of enforcement. Since such endorsement can be made only on the notarised agreement, the relevant pledge or mortgage agreement must be executed in the presence of a notary if out-of-court enforcement option is required.

For certain ex parte claims that may impede a mortgage or pledge enforcement, see question 24.

If bankruptcy proceedings have commenced with respect to the lessee, and the lease agreement has not been terminated, then the rights of the lessee under the lease agreement will fall into the lessee's bankruptcy estate. The leased aircraft itself, not being the lessee's property, will not be included in the lessee's bankruptcy estate.

Russia has made a declaration to the Cape Town Convention providing for the obligation of the insolvency administrator or the debtor upon the occurrence of an insolvency-related event, to give possession of the aircraft to the creditor no later than at the end of a 60-day waiting period.

At the liquidation stage (where all creditor claims are subject to satisfaction), the satisfaction of unsecured payment claims (ie, not secured by Russian law pledge or mortgage from a Russian lessee) against the insolvent company is generally subject to statutory order of priorities with the contractual claims being satisfied last.

The only lawful way for the owner to impede the mortgagee's right to exercise default remedies is to file various counterclaims or requests to postpone or reschedule hearings on various grounds. There are no standard grounds that may be considered outside of scenario of the particular enforcement. Under Russian law, a pledgor may request a court to postpone the sale of pledged property for a term not longer than one year.

Update and trends

The bankruptcy case of Transaero Airlines, which was the second largest airline in Russia prior to the case, is ongoing and it remains to be seen how certain matters will be handled (for example, practical implementation of the Cape Town Convention provisions).

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

Lien within commercial relations

A person possessing a defaulting party's asset on a legal or contractual basis may refuse to return that asset until the defaulting party performs its obligations. For the purpose of liens, Russian law does not distinguish property owned by the defaulting party from the property leased to it.

Generally, a creditor who has validly exercised a right of lien also has a right to sell the asset to obtain payment of the relevant debt. We believe that in this case the owner has good reason for challenging such actions and for repossession of its property, especially when the leasing is terminated prior to such sale.

Requisition

An aircraft may be subject to requisition in emergency events. In this case the state is obliged to pay the entire value of the aircraft to its owner. The owner may dispute such amounts paid in court. The owner may also demand that the requisitioned property be returned after the relevant events have passed.

Criminal or administrative offence

The aircraft may be arrested or confiscated as an object of a criminal or administrative offence (eg, in the case of breach of the customs regime or non-payment of customs duties).

We are not aware of any cases of Russian authorities exercising their rights to confiscate an aircraft.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Formally, the lessee would be required to withhold Russian corporate income tax in respect of rent payments under the lease agreement (10 or 20 per cent, depending on the way the aircraft is used). Twenty per cent withholding tax may also apply to damages, interest or other payments under the lease. At the same time, where a relevant double tax treaty provides for a tax relief and the lessee was provided with a tax residency confirmation of the lessor together with confirmation of its beneficial entitlement to income, no obligation to withhold should arise.

There is some uncertainty in Russian tax legislation with respect to whether rent payments payable by a Russian lessee to a foreign lessor are subject to Russian VAT. At the same time, there are official clarifications of Russian tax authorities that provide some comfort by confirming that no VAT is applicable in such case. Current market practice is in line with such clarifications.

In theory, Russian VAT may apply to the transfer of title to the aircraft. Although Russian legislation provides for no mechanism of VAT assessments when both transferor and transferee have no presence in Russia, it may be worth transferring the title to the aircraft outside Russia (preferably in international airspace to prevent the similar risks in other jurisdictions).

Tax gross-up provisions are standard for lease and finance documents. Historically, Russian tax law was based on a principle that everyone has to discharge his or her tax liabilities personally, and there were doubts as to whether gross-up provisions were consistent with this principle. Recently, the Russian tax legislation has been amended to explicitly permit settlement of a taxpayer's obligations by third parties.

However, because of somewhat vague drafting of the amendments, there is still some residual risk that gross-up provisions may be unenforceable in Russia.

A loan is usually provided to the non-Russian SPV owner, so Russian taxes are not applicable to loan repayment. Registration of the aircraft in the Russian Aircraft Register may trigger some additional tax considerations.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

The Russian obligor must open a deal passport for particular contracts under which payments will be made to a foreign person, with the Russian authorised bank servicing such payments. Failure by the Russian obligor to open a deal passport may influence the technical ability of the Russian obligor to make a payment, but will not affect the validity of the Russian obligor's obligations under the relevant agreement.

Russian law does not impose any other restrictions related to international payments.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

There are no statutory limitations on the amount of default interest. However, a Russian court may reduce its amount on the grounds that it is clearly incommensurate with the consequences of the default.

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Importation of aircraft into Russia is generally subject to 18 per cent VAT and customs duties up to 18.6 per cent (this may vary depending on the aircraft type).

Certain aircraft could benefit from full conditional exemption from customs duty and import VAT depending on its type, manufacturer, empty weight and seat capacity.

In addition to the above, deferral of customs duties and VAT is available under certain customs procedures, such as temporary import.

Generally no customs duties or taxes are payable upon export of assets, other than customs processing fees. Exportation costs would also include broker's fees and possible overheads.

The aircraft owner or mortgagee should not be liable for any payment of customs duties (subject to risk of arrest or confiscation of the aircraft; see question 24).

Insurance and reinsurance

29 Captive insurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

Insurance under Russian law is a licensed activity, and interests and liabilities of Russian airlines must be insured by Russian insurance companies. There are multiple insurance companies specialising in aviation insurance.

At the same time, Russian law permits a two-level structure with initial insurance in the Russian market and reinsurance in an international market. Such structure is widely used in aircraft finance and leasing.

In July 2016 a new law was passed in Russia establishing the National Reinsurance Company, which is 100 per cent owned by the Central Bank of the Russian Federation. The new law contains a requirement to obligatorily reinsure up to 10 per cent of the total reinsurance amount with the National Reinsurance Company.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

There are no cut-through clauses in Russian law insurance. Although reinsurance cut-through clauses are standard for common law lease

agreements with Russian lessees, they might not be enforceable in Russia. There is a view that, owing to Russian currency control restrictions, the payment of reinsurance amounts by the reinsurer directly to the loss payee based on a cut-through clause will be in breach of Russian law.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Assignment of reinsurance placed outside of Russia is typical, and Russian law is not applied to it. However, there might be issues with enforcement of such assignment in Russia.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

By default, the owner of an aircraft is deemed to be liable for the damage caused by such aircraft and will need to prove that operational control was with the lessee to avoid such liability.

The owner, financier or lessor may be held liable for damages caused by an accident only if it is involved in the operation of an aircraft or its maintenance, or if the relevant damage was its fault. Russia is a party to the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface of 1952, setting out criteria for operational control over the aircraft.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

No. See question 32.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

For flights over the territory of Russia, a minimum amount of third-party liability cover is calculated as statutory minimum wage as of the date of the insurance contract multiplied by two and multiplied by maximum take-off weight of the aircraft in kilograms. For international flights, regulation of the relevant state must be taken into account for calculation of this minimum amount.

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

South Africa is not party to the Rome Convention (1933), but is party to the Chicago Convention (1944), the Geneva Convention (1948), the Cape Town Convention (2001) and the New York Convention (1958). The conventions to which South Africa is party remain in effect.

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The principal legislation in South Africa that regulates aviation in general is the Civil Aviation Act No. 13 of 2009.

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Generally speaking, the parties are free to choose the governing law in contracts and South Africa will generally enforce the law chosen by the parties, unless the law in question is against public policy.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

A bill of sale would be effective to transfer title to an aircraft provided the parties intend and agree that this will be the document of conveyance through which beneficial title will be transferred by way of constructive delivery.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

In general there are no such formalities in relation to a bill of sale. Documents executed outside of South Africa may, however, require authentication to be used in formal court proceedings in South Africa.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

South Africa maintains an operators registry. There is no separate engine registry.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

The South African Civil Aviation Authority distinguishes between registered and beneficial ownership. The entity or person registered as the owner of an aircraft with the South African aircraft registry need not be the beneficial owner.

Only entities that are South African nationals (defined, in the case of companies, with reference to a 75 per cent minimum holding) may be the registered owner of an aircraft under local rules.

The rules of the local civil aviation authority do not allow for the filing of lease agreements or similar instruments or of ownership interests other than the interests of the registered owner. There is also no mechanism in South Africa through which the owner of an interest in an aircraft may register such interest with any registry other than the aircraft registry maintained by the Civil Aviation Authority.

There is further no mechanism in South African under which an owner's, operator's or lessee's rights in an engine may be separately registered. An interest in an engine may only be registered together with the interest in the airframe to which such engine relates.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

Registration of an ownership interest may be obtained by filing the prescribed form (CAR47A-2) with the Civil Aviation Authority together with supporting documents, including supporting signing authorities for the relevant entity. In general there are no formalities for local documents but those documents (eg, powers of attorney), executed outside of South Africa and which are to be used in an application for registration of an aircraft in South Africa may require notarisation and apostille to be effective. Also, local documents may require to be certified as true and correct copies to be accepted by the Civil Aviation Authority.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

As mentioned above, the aircraft registry distinguishes between registered and beneficial title. In short, nothing substantive can be gleaned from the registry in relation to a registered title interest as this will only inform as to registered and not beneficial title. Put another way it would not be possible to draw any conclusions as to the identity of the beneficial title holder of an aircraft nor as to the quality of the title held by such person through an inspection of the aircraft register. Furthermore, other interests in an aircraft, such as lease interests, can also not be determined by reference to the said register.

10 Registration of lease interests

Summarise the process to register a lease interest.

As mentioned, the registration of lease interests is not currently possible under the current rules of the Civil Aviation Authority.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

Certificates of registration over aircraft registered in South Africa are only issued by the Civil Aviation Authority. The registration certificate reflects the details of the registered owner of the aircraft. As mentioned above, it is not possible to glean any information regarding the beneficial ownership of an aircraft from the certificate of registration.

If a South African aircraft mortgage is registered over an aircraft the details of the mortgagee will be reflected on the certificate of registration. The mortgagee will need to apply to have the details of the mortgage reflected on the certificate of registration. This is typically done at the time of filing for the registration of the relevant mortgage.

Under the current rules of the Civil Aviation Authority it is not possible to obtain a separate certificate of registration in relation to an engine nor to separately register interests in relation to aircraft engines.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

Both the registered owner and the mortgagee of an aircraft would need to consent to the deregistration of the aircraft with the Civil Aviation Authority.

As the registered owner of the aircraft would need to file for deregistration of the aircraft by executing the prescribed form, the registered owner could, by not executing such form, effectively block the deregistration of the aircraft. The same would apply to a mortgagee where the mortgage interest of such mortgagee had been registered against title to an aircraft.

The export of the aircraft would be separately regulated but the export could only be effected once deregistration had been achieved. As mentioned, the registered owner of an aircraft may well be the operator and therefore an operator in these circumstances could 'block' the deregistration and export of the aircraft even if either of these actions is sought by the mortgagee or beneficial owner of the aircraft in question.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

Deregistration powers of attorney are habitually used in domestic aircraft financing and leasing transactions. Typically, these instruments allow the holder of the power of attorney to deregister and export the aircraft. Although these instruments may be expressed to be irrevocable they may be revocable in the instance of the grantor's insolvency.

Deregistration powers of attorney may be granted to more than one holder (where the holders' interests are distinct) although this is typically done under the auspices of separate documents.

Although these instruments are widely used in aircraft financing and leasing transactions in South Africa we are not aware of any instance where a document of this nature has been relied on to effect deregistration of an aircraft. Although there is no reason for these documents not to be effective to achieve the purpose for which they are expressed to be given, the concern is that administrative barriers may be encountered from the aviation authority. This may then necessitate the use of formal proceedings to achieve the required result.

It is not possible to register or file deregistration powers of attorney under the rules of the Civil Aviation Authority.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

There are no particularly notable requirements of the IDERA used in South African finance and leasing transactions.

These documents are typically filed with the Civil Aviation Authority for counter-signature. This process is not always handled with alacrity by the relevant authority so delays in this regard should be anticipated.

Apart from the foregoing there are no formal registration requirements relating to IDERAs.

The Civil Aviation Authority does not have any preferred way to deal with the financier as the beneficiary's certified designee.

Typically IDERAs are used alongside deregistration powers of attorney, although the precise interface between the operation of these documents has not, to our knowledge, been tested locally.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

In South Africa security over aircraft may only be taken and registered by way of an aircraft mortgage registered with the Civil Aviation Authority.

An aircraft mortgage may be obtained by the filing of a prescribed form (MAR 2.1) with the Civil Aviation Authority. The form identifies the mortgagor and mortgagee as well as the relevant cause of indebtedness and the amount secured. As the form itself is fairly rudimentary the practice has been to accompany the prescribed form with a mortgage agreement in financing transactions. The mortgage agreement is simply attached to the prescribed form as an annexure.

It is preferable, for enforcement purposes, that the mortgage agreement also be regulated by South African law. The mortgage agreement mentioned is used to supplement the detail provided on the prescribed form by the inclusion of customary aircraft mortgage provisions including provisions relating to the hypothecation of replacement engines.

The prescribed form and the form of mortgage agreement are in English. The form of mortgage agreement may also be used to record the more detailed provisions of the underlying indebtedness (eg, details as to the payment of principal, interest and the dates on which such amounts are payable).

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

There are no formalities directly relating to the completion or filing of the prescribed form mentioned above. However, where the prescribed form is executed locally under a power of attorney obtained from a foreign entity, then the power of attorney typically requires notarisation and apostille in order to be accepted by the Civil Aviation Authority. The power of attorney must also be accompanied by a signing authority.

There are no stamp duties associated with the filing or registration of a local aircraft mortgage. There are, however, costs payable to the Civil Aviation Authority for the registration of a local aircraft mortgage. These costs are nominal in foreign currency terms (less than US\$150 at current rates of exchange).

There is no requirement that the documents be translated as all documents are in English.

There will be local counsel costs associated with the preparation of the mortgage agreement.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgage interest.

An aircraft mortgage can only be created in South Africa by the registration of form MAR 2.1 with the Civil Aviation Authority, as detailed above. It is only through this process that an enforceable and perfected security interest will be created.

In order to register an aircraft mortgage the mortgagee needs to file the documents mentioned below with the Civil Aviation Authority. In order to do this an appointment needs to be made with the said authority. The filing of multiple instruments (eg, deregistration of any prior mortgage and registration of one or more new mortgages) may well require separate appointments for the filing of each instrument. It is therefore preferable that these appointments be made in advance, particularly where the exigencies of a particular financing transaction may require the mortgage to be filed at a particular time (such as on closing).

The prescribed form must be accompanied by an authorised signatories list as well as relevant signing authorities. As mentioned above, if the mortgage documents are being executed locally under a power of attorney then the executed power of attorney, duly notarised and apostilled where required, must also be filed. The form MAR 2.1 also needs to be accompanied by an application to amend the registration of the aircraft. This is done by way of a further prescribed form, CAR47A-2. Form CAR47A-2 also needs to be accompanied by the signing authorities of the person applying to amend the registration of the aircraft. At least three representatives of the applicant are required to authorise the entry into of the said application.

Once all the required documents have been filed with the Civil Aviation Authority there is typically a seven-working day waiting period for registration. Practically, however, the time period for registration of aircraft mortgages may exceed this, although it is unusual to wait more than 14 days for registration.

Once registered, the mortgage will be regarded as effective and enforceable on the date on which the filing for its registration was made. There is no requirement for renewal. Once registered, the aircraft mortgage will remain effective and enforceable until deregistered.

See above in regard to the costs of registration of an aircraft mortgage.

18 Registration of security

How is registration of a security interest certified?

Once an aircraft mortgage has been registered with the Civil Aviation Authority the Authority will endorse the details of the mortgage onto the current certificate of registration for the relevant aircraft. The endorsement will not necessarily list the priority of the relevant aircraft mortgages. Once an aircraft mortgage has been registered, the updated certificate of registration is issued together with the confirmation of registration of the related aircraft mortgage.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

Priority in South African mortgages can only be created by way of order of registration. There is no priority notice system in place.

The noting of the aircraft mortgage on a certificate of registration comprises constructive notice to third parties of the existence of an aircraft mortgage over the aircraft. In general, third parties may rely on the aircraft mortgage information contained on a certificate of registration but this does not preclude the possibility of administrative error and therefore the aircraft mortgage information so contained cannot be conclusively regarded as correct.

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

In single creditor financings security is generally taken directly by the relevant creditor. This applies to both local and foreign financings.

In local financings where there are multiple creditors and a single cause of indebtedness (such as a single loan agreement with multiple lenders participating through a single tranche), it may be possible for more than one mortgagee to be noted as such on the aircraft mortgage.

To cater for changes in lenders, however, South African security arrangements in syndicated financings are typically structured through what is locally called a 'debt guarantor structure'. The effect of this arrangement is to simulate, through a series of contractual arrangements and by the use of a special purpose debt guarantor, the effect of a typical security trust or security agency arrangement. Security trusts and security agency arrangements are not deployed in South African financings owing to a quirk of South African law and there is a question mark over whether registered security of this nature may be held by more than one person or through agency.

Although South African law and the local courts will respect and enforce foreign law, security trusts and security agency arrangements, this can become more complicated where, for example, a foreign law form of aircraft mortgage agreement (eg, one under English or New York law) is registered together with the prescribed form MAR 2.1, which is a South African law document.

The use of debt guarantor arrangements described above will obviate the need to update the aircraft security each time there is a change in creditor.

There is no formal way in which an aircraft mortgage may be amended once registered. We have seen the filing of amendment documents to registered mortgages but, as mentioned, there are no regulations in force to suggest that this practice works legally. In other words, if an amendment document was filed in relation to a registered aircraft mortgage, it may be that the registered mortgage would remain unamended. The only foolproof way in which a registered aircraft mortgage can be amended is by filing for deregistration and filing a new mortgage. This can obviously give rise to many complications in a secured financing.

Although not tested in South African law it would seem that a registered aircraft mortgage would create a real right of security over the asset. The mortgage agreement, however, might be regarded as creating only a personal right as it is really the prescribed form that creates the enforceable security interest over the aircraft.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

The law allows for the registration of an aircraft mortgage over an airframe and its engines. There is no mechanism through which an engine can be separately hypothecated by way of an aircraft mortgage.

If a security interest was required over an engine this would need to be obtained through the registration of special notarial security in South Africa. This type of security is akin to a fixed charge and is inflexible, particularly in relation to any replacement or sale of the engine in question.

When an aircraft mortgage is registered over an aircraft the aircraft mortgage will also cover the engines. The security interest will be effected even though the relevant engine is not installed at the time of the creation of the security interest as long as it relates to the airframe being mortgaged.

The prescribed form MAR 2.1 does not allow for the mortgaging of replacement engines. This is something that is usually achieved through the use of the mortgage agreement described above.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

Absent agreement repossession would need to be pursued by way of formal proceedings in the High Courts of South Africa. Usually this would be done by way of application proceedings. These proceedings may be launched on an urgent basis and without notice to the counterparty where the circumstances require.

There are no general rights of self-help available to lessors or lenders.

In circumstances where lease termination is contested court proceedings may be required to establish the right to terminate and that such right has been properly exercised.

A lessee may lawfully impede an owner's right to exercise default remedies by contesting the basis upon which the default has been called and, in turn, the right to exercise the relevant remedies. This presupposes that there are grounds for the lessee to contest.

23 Enforcement of security

Outline the basic measures to enforce a security interest.

How may the owner lawfully impede the mortgagee's right to enforce?

Absent agreement security interests would need to be enforced by way of formal proceedings in the High Courts of South Africa. Usually this would be done by way of application proceedings. These proceedings may be launched on an urgent basis and without notice to the counterpart where the circumstances require.

There are no general rights of self-help available to lessors or lenders.

An aircraft may be detained by way of ex parte proceedings where the circumstances require. Usually this would be where, if the counterpart was given notice of the proceedings, there is a risk that the aircraft will be moved to avoid detention.

A local owner may lawfully impede a mortgagee's right to enforce security by contesting the basis upon which the underlying default has been called and, in turn, the right to exercise the relevant enforcement remedies. This presupposes that there are grounds for the owner to contest.

The laws of insolvency may well affect the rights of an enforcing creditor.

Simply, in the context of a lease, the liquidator would have an election as to whether or not to abide by the terms of the lease. If the liquidator elected to abide by the lease he or she would need to make sure that the insolvent debtor performed all of its obligations under that instrument. If the liquidator elected to terminate the lease then the lessor would be entitled to repossess the asset.

In the context of a secured loan the enforcing creditor would need to work through the liquidator in order to enforce the security held by it over the asset. This would entail agreeing the valuation of the asset with the liquidator or causing the asset to be sold by way of a public auction. The proceeds of the valuation or sale of the asset would be paid to the secured creditor from the insolvent estate on the winding up of the estate.

Mention is also to be made of section 84 of the South African Insolvency Act (Act No. 24 of 1936) in the context of conditional sale transactions. In terms of this provision, notwithstanding any reservation of ownership by the conditional seller of the asset, ownership of the asset will pass to the insolvent conditional purchaser. The conditional seller is, however, afforded a statutory hypothec over the asset to secure its claim against the insolvent conditional purchaser.

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

The following liens and rights may have priority over aircraft ownership or an aircraft security interest, namely, expropriation, nationalisation and requisition rights of the state, all forms of possessory liens, liens for unpaid flight charges and other taxes and duties.

Compensation should be payable by the state for the exercise of any of the aforesaid rights. Although the governing legislation does provide for the mechanism to contest the level of compensation offered, from a practical stance, it may be difficult to effectively exercise this right.

Update and trends

Following the adoption of the Cape Town Convention into local law it has become clear that the exercise of certain of the rights under the relevant protocols may be inconsistent with the provisions of South African insolvency, company and other laws, including laws of civil procedure. A process is underway to consider the basis upon which local law may be amended to allow for the proper exercise of rights under the adopted protocols of the Cape Town Convention.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

In local transactions there are no taxes that apply to lease payments or loan repayments under prevailing legislation. In relation to transfers of aircraft, however, VAT may be payable by the transferee to the transferor at the prevailing rate (currently 14 per cent).

Where an aircraft based in South Africa or in South African airspace is being sold between two non-residents no VAT or other taxes will be payable on the transfer of the aircraft. This presupposes, however, that, inter alia, neither of the non-residents was registered or required to be registered as a vendor for South African VAT purposes.

In circumstances of a local borrower or lessee no taxes would apply to payments to the foreign lender or lessor. Foreign lessors under operating leases may, however, be required to register for VAT purposes in South Africa. In almost all instances an application for exemption from this obligation is filed by the foreign lessor. Absent an exemption, rental and other payments under the lease in question might be subjected to VAT.

In general, there are no withholding taxes on loan or lease payments due to non-residents. There is a question mark, however, around withholding taxes applicable to payments under local guarantees issued for these obligations, but the consensus seems to be that no withholding taxes would apply to these payments under current law.

Gross-up provisions would be effective in South Africa.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

No South African resident may incur any obligation to any non-resident without exchange control approval. The relevant approval is issued by the Financial Surveillance Department of the South African Reserve Bank. The approval needs to cover the entry into by the local entity of the relevant instrument as well as the performance by such entity of all of its obligations under that instrument. Foreign lessors and lenders need to ensure that the application for the said approval is wide enough to cover all forms of payments due under the relevant instrument.

Generally, the relevant approval is applied for by the local entity, usually through its retail bankers. The approval may take up to six to eight weeks to obtain and therefore this timing parameter needs to be borne in mind when entering into transactions of this nature.

Sometimes the relevant approval can be time limited and attention should be paid to this to ensure that the approval limits do not precede the time for performance of the obligations under the relevant instrument.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

The only restriction is under the relevant exchange control rules where, under current regulations, normal interest or similar charges payable on cross-border instruments may not exceed the equivalent of the South African prime rate (currently 10.5 per cent per annum) plus 200 basis points. This excludes default interest; however, the rate of default interest should not be excessive as it is unlikely that this will be allowed under the exchange control rules.

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Import VAT is payable on the importation of an aircraft into South Africa, other than on a temporary basis.

There may be costs associated with the export of an aircraft, although these should be fairly nominal if the import VAT is paid.

Generally speaking, the obligation to pay the relevant duties falls on the local entity, although, in the context of a repossession, it is likely that, for practical purposes, such costs may need to be paid by the foreign entity seeking the export.

Insurance and reinsurance**29 Captive insurance**

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

There is no captive insurance regime relevant to aviation in South Africa. There is also no domestic requirement that insurances be placed in South Africa.

Generally in local or smaller transactions, insurances are placed in the local market (these may be reinsured through the foreign markets). In almost all transactions involving a cross-border element the requirement is that insurances be placed in the internationally accepted aviation markets.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Generally the requirement for cut-through clauses appears in cross-border leasing or lending transactions. The insurances under these transactions are generally placed in the internationally accepted aviation markets. The enforceability or otherwise of these clauses will thus depend on the governing law of the relevant instruments. South Africa will generally enforce these arrangements if they are enforceable under the governing law of the jurisdiction by which they are expressed to be governed.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Assignments of reinsurances are not typically provided in aviation leasing and finance transactions. We are not aware that any assignment of reinsurance has been tested locally. See question 30 in regard to cut-through clauses. We believe that similar principles will apply to an assignment of reinsurance.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

Strictly speaking the answer is no but there is always the spectre of a delictual (tort) or other derivative claim in this context.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

The owner of an aircraft carries strict liability for damage it causes under the governing legislation in South Africa. The owner for this purpose is the registered owner of the aircraft and not the beneficial owner. Certain prescribed insurances are required to be effected by the registered owner to cover this liability.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

Yes. The limits were, however, set some time ago and are inadequate and do not reflect current market requirements.



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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Sweden acceded, and is a party, to the Rome Convention (1933) as of 1939, the Chicago Convention (1944) as of 1946, the Geneva Convention (1948) as of 1955 and the New York Convention (1958) as of 1972.

Sweden has acceded to the Cape Town Convention (2001) (the Convention) and the corresponding protocol (the Protocol), effective as of 1 April 2016.

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The primary aviation legislation in Sweden consists of the following:

- the Act on International Security Rights in Chattel and Goods (2015);
- the Aviation Act (2010);
- the Aviation Ordinance (2010);
- the Operational Register Ordinance (1986);
- the Registration of Rights to Aircraft Act (1955); and
- the Act on Damage Caused to Third Parties by Air Carriage (1922).

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

There are no such restrictions under Swedish law. Instead, the parties are free to specify the applicable law.

Pursuant to the Geneva Convention, and the Swedish implementation thereof in the Act pursuant to Sweden's accession to the 1948 Convention concerning International Recognition of Rights to Aircraft 1955, Swedish law recognises a foreign law security right created by way of contract as security for debt, provided that the security right has been validly constituted in accordance with the law of the convention state where the aircraft was registered at the time of the right's constitution, and provided that the right is duly recorded in a public record in that convention state. Thus, the law where the aircraft is registered would be the applicable law in relation to a security right in an aircraft registered in a convention jurisdiction, regardless of any choice of law clauses. Furthermore, by reason of Sweden's accession to the Cape Town Convention, Swedish law recognises an international security right duly created in accordance with the Convention. As regards other non-convention jurisdictions, Swedish international private law would recognise the law where the aircraft is registered provided that such application is not viewed as manifestly incompatible with Swedish public policy.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

The title in an aircraft is transferred by a valid and enforceable agreement (such as a bill of sale) between the parties.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

There are no formalities required for enforceability of the transfer.

However, if the aircraft is registered in Sweden, the Swedish Transport Agency should immediately be given notice of a change in ownership of the aircraft by filing, for example, the original bill of sale or a certified copy thereof. If the bill of sale is in a language other than Swedish, Norwegian, Danish or English, a certified translation to one of those languages has to be provided.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

There are two Swedish public registers with respect to aircraft:

- the Operational Register, in which aircraft registered in Sweden are recorded; and
- the Rights Register, in which a right in rem for an aircraft registered in Sweden can be recorded.

The Operational Register contains information about the owner and the operator of the aircraft. Both registers are maintained by the Swedish Transport Agency. There is no separate engine register in Sweden, and a registration in the Operational Register or the Rights Register would include, inter alia, the airframe, engines, propellers, radio equipment, instruments and other fittings, irrespective of whether they are installed on the aircraft or temporarily separated from it.

As at April 2017, Sweden has 83-bis arrangements in place with Estonia, Germany, Ireland, Italy, Latvia, Luxembourg and Spain.

As Sweden has acceded to the Cape Town Convention and the Protocol, registration of security rights in aircraft (including separate registration of right in an engine) can be made in the International Register that follows from the Convention. There is nothing prohibiting registrations in both the Swedish Rights Register and the International Register. However, registrations in the International Register will have priority unless a right has been registered in the Swedish Rights Register prior to the Swedish entry into force of the Convention.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

An aircraft owner may be registered in the Operational Register only if it is wholly owned by one of the following:

- the Swedish state;
- a Swedish municipality or county council;
- a citizen within the European Economic Area (EEA) or the estate of such a person;
- a company, association, trust or estate of Swedish nationality or having its seat in a country within the EEA; or
- a European economic interest grouping domiciled in Sweden.

In addition, the Swedish Transport Agency may allow an aircraft to be registered in the Operational Register if the aircraft is normally operated in Sweden by one of the legal entities listed above. The Swedish Transport Agency generally grants such a registration when a foreign owner or lessor has leased the aircraft to a Swedish operator or lessee. The ownership may also be registered in the Rights Register. The ownership interest cannot be registered with any other Swedish registry besides these two.

A lease can be registered in the Rights Register (eg, by submitting the lease agreement) and if not registered in the Rights Register the lease must immediately be registered in the Operational Register if the term of the lease is for an indefinite period or for at least one month. The lease may be registered in the Rights Register and noted in the Operational Register if the lessor or user so requests. In addition, it must be registered in the Operational Register if the lessee shall assume the strict third-party liability imposed on the owner or lessor pursuant to the Act on Damage Caused to Third Parties by Air Carriage (1922) (see questions 32 and 33). The operator under a lease is normally registered in the Operational Register.

Furthermore, in accordance with EC Regulation No. 1008/2008 and Schedule 3 of EEC Regulation No. 3922/91 (EU-OPS), a dry lease agreement to which a Swedish (or other EU member) air carrier is a party, or a wet lease agreement under which the Swedish (or other EU member) air carrier is the lessee of the wet-leased aircraft, is subject to prior approval by the Swedish Transport Agency.

The ownership of, or any lease interest in, engines or other spare parts cannot be registered separately in the Rights Register. However, engines or other spare parts may be separately encumbered by assignment under the Chattel Sales Act (1845), provided that they are not installed on the aircraft. Furthermore, as described in question 6, it is possible to separately register rights to an engine in the International Register.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

For first-time registration in the Operational Register, the following documents must be submitted:

- (i) an original application form (available on the Swedish Transport Agency's website), signed by the owner;
- (ii) an original or certified copy or copies of the bill or bills of sale or other documentation proving the owner's acquisition of title to the aircraft as well as the ownership chain for the aircraft;
- (iii) a certified copy of the owner's birth certificate, or if the owner is a corporate entity, a certified copy of the certificate of registration not older than six months;
- (iv) evidence of the fact that the aircraft has been deregistered from a foreign aircraft register, to be sent by the relevant foreign register directly to the Swedish Transport Agency, or a certificate from the relevant aviation authority evidencing that the aircraft has not been registered previously;
- (v) an original or certified copy of a certificate of insurance in accordance with EC Regulation No. 785/2004 on insurance requirements for air carriers and aircraft operators (as amended by EC

Regulation No. 285/2010), where the Swedish registration designation appears; and

- (vi) an original application form for registration of an emergency locator transmitter (ELT406 MHz) (available on the Swedish Transport Agency's website), regarding an aircraft exceeding 500kg.

The Swedish Transport Agency must immediately be given notice of a change in ownership of an aircraft registered in Sweden by submitting the documents listed under (i)–(iii) (the application form should be signed by both the new and previous owner and incorporation documents should be provided for both parties), as well as the original copy of the aircraft's nationality and registration certificate.

The fee for registration of an aircraft in the Operational Register is currently 7,500 Swedish kronor for a first-time registration and 3,000 Swedish kronor for a registration concerning change of ownership. In addition, there is an annual fee for being registered in the amount of 400 Swedish kronor. The time period between the filing of the application and the registration or transfer of ownership will depend on the Swedish Transport Agency's workload, but is generally not longer than two weeks.

Rights Register

A transfer of ownership to an aircraft can also be registered in the Rights Register. The following documents and information must be submitted:

- an original application form, signed by the new owner;
- the original bill of sale together with two certified copies thereof;
- a certified copy of the new owner's birth certificate, or if the new owner is a corporate entity, a certified copy of the certificate of registration not older than six months; and
- a document proving that the person acting on behalf of the previous owner is an authorised signatory of the previous owner.

The registration is effected as of the date of filing if the registration is received by the Swedish Transport Agency before noon on a business day (provided that the application is granted). If received in the afternoon it will be effected on the following day. The registration is generally completed within two weeks.

There is no cost for the actual registration of the ownership in the Rights Register, but the cost of obtaining a certificate of ownership is currently 8,000 Swedish kronor.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

Operational Register

Registration in the Operational Register does not have an effect on the rights to an aircraft. It merely determines whether an aircraft should be considered to be registered in Sweden or not. Thus, it is only a 'notation' registration. Once registered, the Swedish Transport Agency issues a certificate of registration (nationality and registration certificate) for the aircraft.

Rights Register

Registration in the Rights Register provides proof of ownership and thereby creates priority and protection for the registered owner against third party claims. A registration of ownership in the Rights Register shall, as of the date of filing of the relevant documents with the Swedish Transport Agency, be deemed to be known by all persons whose rights to the aircraft are dependent on good faith in relation to the registration. Registration of the ownership in the Rights Register thus provides protection against bona fide purchasers of the aircraft as of the date on which the registration is made. However, as regards creditors of the previous owner of the aircraft, protection is not obtained until the next day and consequently the aircraft is used to cover the debts of the previous owner up to and including the day when the application for registration was made by the new owner.

10 Registration of lease interests

Summarise the process to register a lease interest.

The lease can be noted in the Operational Register by a request in writing signed by both parties and providing details of the lessee (as operator of the aircraft), and information on whether the lessee shall assume strict third-party liability, pursuant to the Act on Damage Caused to Third Parties by Air Carriage (1922) (see questions 32 and 33).

The lease may be registered in the Rights Register, and the following documents should then be submitted:

- an original application form, signed by the lessee;
- the original lease agreement, together with two certified copies thereof;
- a certified copy of the lessee's birth certificate, or if the lessee is a corporate entity, a certified copy of the certificate of registration not older than six months; and
- a document proving that the person acting on behalf of the lessor is an authorised signatory of the lessor.

There is no cost for the actual registration of a lease in the rights register, but the cost of obtaining a certificate (ie, proof of right of lease) is currently 8,000 Swedish kronor.

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

The Swedish Transport Agency issues certificates of registration (nationality and registration certificate) for the aircraft upon a registration in the Operational Register. A certificate of registration contains information about nationality and registration mark, manufacturer and manufacturer's designation of aircraft, aircraft serial number, owner and the owner's address.

For a fee, the Swedish Transport Agency can issue certificates regarding the rights for the aircraft (general ownership through acquisition, leases and mortgages) registered in the Rights Register.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

An aircraft may be deregistered if the owner so requests in writing. An aircraft can only be deregistered or exported if there are no rights registered in the Rights Register or a notice in the Rights Register as regards retention of title (or a similar reservation concerning the right to assign, lease or mortgage), or if consent has been obtained from the relevant parties holding rights registered or noted in the Rights Register (eg, mortgagees). An operator cannot block a proposed deregistration or export by the registered owner.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

Deregistration and export powers of attorneys are not common in Sweden. It should be noted that it has not been established by judicial precedent or otherwise by Swedish law that a power of attorney can be made irrevocable, and it is therefore possible to argue that any power of attorney can be revoked. However, in light of Sweden having given a declaration in relation to article XIII of the Protocol it should be possible to deregister an aircraft upon the written request of the holder of the power of attorney provided that the power of attorney has been registered with the Swedish Transport Agency.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

Sweden has acceded to the Cape Town Convention, the provisions thereof being in effect as of 1 April 2016. As Sweden allows for

irrevocable powers of attorney (see question 13), it is possible for a creditor who has been granted a power of attorney (ie, IDERA) from the registered owner or operator of the aircraft to request for deregistration and export with the Swedish Transport Agency. The Agency shall grant such request without any trial of the case on its merits. However, given the relevant rules' recent entry into force, the practical application of deregistration and export powers of attorney in Sweden remains to be unveiled.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

The security document usually consists of a promissory note governed by Swedish law, and the aircraft owner (registered in the Rights Register) is required to agree to the security granted in the aircraft by signing the security document or promissory note. The owner's signature must be witnessed by at least two other persons. The promissory note must contain information about the nationality and registration mark of the aircraft and the principal amount (in Swedish or foreign currency) to which the security relates. The interest should be specified. However, it should be noted that the security will not secure interest accumulated for a period extending to three years. It is not a requirement to file the separate loan agreement if such an agreement coexists with the promissory note.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

If the promissory note is in a language other than Swedish, Norwegian, Danish or English, a certified translation to one of those languages has to be provided once filed in original with the Swedish Transport Agency for registration in the Rights Register.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

In order to create a security right, the owner must first be registered as the owner in the Rights Register, which requires that the aircraft is registered in the Operational Register. In addition, the promissory note in original must be delivered to the mortgagee in order to be enforceable against the mortgagor and the security must be registered in the Rights Register in order to obtain perfection against other creditors and third parties.

Registration of a security interest in the Rights Register requires that the following documents are submitted:

- an original application form, signed by the owner;
- the original security document or promissory note in original; and
- a certified copy of the owner's birth certificate, or if the owner is a corporate entity, a certified copy of the certificate of registration not older than six months.

Upon registration, the original promissory note will be returned together with relevant documentation such as a certificate or abstract from the Rights Register. There is no cost for the actual registration in the Rights Register besides the stamp duty, but the cost of obtaining an additional certificate evidencing the registration of the security is currently 8,000 Swedish kronor.

The registration will be effectuated as of the date of filing if the registration is received by the Swedish Transport Agency before noon on a business day (provided that the application is granted), and if received by the Swedish Transport Agency in the afternoon it will be effectuated on the following day.

In addition, stamp duty of 1 per cent of the principal value secured by the security is levied and payable by the owner of the aircraft. However, pursuant to the Act regarding Sweden's accession to the

1948 Convention concerning International Recognition of Rights to Aircraft (1955), such stamp duty would not apply to a security (which by nature would be recognised in Sweden) that is transferred to the Rights Register upon the request of the mortgagee when the aircraft is transferred to the Operational Register. However, the aircraft must be registered in Sweden for three months in order for the transferred security's priority right to be recognised under Swedish law.

18 Registration of security

How is registration of a security interest certified?

The rank or priority is stated in the Rights Register, and can be evidenced by the certificate or an abstract from the Rights Register. The Swedish Transport Agency can, for a fee, issue additional certificates as regards security registered in the Rights Register. Provided that the security is registered, the certificate can be issued the day after the day on which the order is made.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

The registration of a security in the Rights Register perfects the security and thus creates priority and protection for the holder against third-party claims. If not registered, the mortgagee has no better right than unsecured creditors. The date of filing of the application for registration of the security with the Swedish Transport Agency determines the priority. If several applications are made during the same day, they rank equally. Third parties may rely on the Rights Register.

20 Security structure and alteration

How is security over aircraft and leases typically structured?

What are the consequences of changes to the security or its beneficiaries?

Swedish law does not recognise the concept of trusts. However, a security agent may act on behalf of itself and the financiers provided that it has been duly appointed by the financiers. Security held by the security agent must be properly separated from the security agent's own assets. The security is a right in rem and not in personam that is perfected through registration. The promissory note to be registered in the Rights Register will set out the identity of the mortgagee. However, it is not a requirement (although it is possible) that the details of the mortgagee are noted in the Rights Register in order to obtain perfection. In addition, there is a risk of clawback of the security if registered by the owner in the Rights Register within three months of the owner being declared bankrupt.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

Engines and spare parts may not be registered separately in the Rights Register, and engines that are installed on a host aircraft on more than a purely temporary basis will be included in the registered mortgages if owed by the owner of the aircraft. This may also apply to engines installed by a lessor, although the legal situation in Sweden regarding this issue is not entirely clear. A security may also cover spare parts (including engines) belonging to the owner of the aircraft. The spare parts must then be described in terms of the characteristics as well as the approximate number thereof in the security document or in an appendix thereto, and the spare parts must be stored at locations in Sweden or another state that has acceded to the Geneva Convention. In addition, a certificate from a reliable person stating that the spare parts belong to the owner of the aircraft must be submitted to the Swedish Transport Agency, and the spare parts must be clearly marked at the storage location as mortgaged and provide details of the scope of the mortgage, contact details of the mortgagee, and that the mortgage has been registered in the Rights Register.

Notwithstanding that it is not possible to separately register engines in the Rights Register, such registration is possible in the International Register currently kept by Aviareto Ltd, as described in question 6.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

The owner would be required to pursue its claim through judicial procedures in order to repossess the aircraft, as self-help is not permitted under Swedish law. The judicial procedures available to the owner would be court proceedings or summary proceedings with the Swedish Enforcement Authority including enforcement assistance with repossession. The latter would generally entail submitting an application form, the lease agreement and any notices of termination and payment of a nominal application fee. Once the Swedish Enforcement Authority grants the application, the lessor will be informed of the date of repossession. The owner would be precluded from repossessing or foreclosing the aircraft in an insolvency situation and the repossession would then have to be granted by the receiver in bankruptcy.

There are no sole legal steps to ensure successful repossession.

In relation to lease agreements falling within the scope of the Convention and the Protocol it should be noted that Sweden has, in relation to article 54.2 of the Convention, declared that remedies available to a creditor (under, for example, articles 8–10 of the Convention) may be taken without having to obtain approval from a court. Sweden's declaration to said article entails that all remedies available to the creditor under the Convention may be carried out without application to a court, unless otherwise specified under the relevant provision of the Convention.

23 Enforcement of security

Outline the basic measures to enforce a security interest.

How may the owner lawfully impede the mortgagee's right to enforce?

Judicial procedures must be undertaken in order to enforce a security interest in the aircraft, as self-help is not permitted under Swedish law. If the mortgagee takes possession of the aircraft without the owner's consent, the mortgagee is likely to commit a criminal offence under Swedish law and may also be liable for damages. The judicial procedures available would be court proceedings or summary proceedings with the Swedish Enforcement Authority. Summary proceedings entail submitting a written application to the Swedish Enforcement Authority stating the amount claimed and containing a request that the claim is to be satisfied by execution of the mortgaged aircraft. The mortgagor will be requested to respond to the claim in writing and if the mortgagor fails to do so the Swedish Enforcement Authority will issue an order that payment should be paid out of the mortgaged aircraft. However, if the mortgagor challenges the application and raises any defence to the claim, the application will, upon the mortgagee's request, be forwarded for ordinary court proceedings. Ordinary court proceedings would entail that the mortgagee files a summons application (if the matter is not upon the mortgagee's request forwarded from the Swedish Enforcement Authority). The court then issues a writ of summons, which is followed by service of the writ of summons, written submissions, one or more preparatory hearings and a main hearing. Should the mortgagor (or its representatives) not appear, the court may render judgment in default.

There exists a right to detain the aircraft by way of court application provided that:

- the mortgagee has a legitimate claim on the mortgagor, being the owner of the aircraft;
- there is a risk that the aircraft will be removed from Sweden or otherwise disposed of in a way that impedes the mortgagee's possibilities to recover the claim; and
- the mortgagee can provide security for damage that might be caused to the mortgagor (this may be disregarded in certain circumstances).

The mortgagor has a right to submit a response to the application, but an ex parte application is possible if the detention is urgent. However, pursuant to the Aircraft Exemption from Provisional Attachment Act (1939), special provisions may apply to, inter alia, aircraft assigned

for government service and aircraft for transportation when ready for departure.

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

There are some preferred creditors, which include secured creditors. Any potential claims would generally rank as follows:

- fees for the administrator of a reorganisation;
- claims related to agreements entered into by the administrator during a reorganisation;
- claims secured by a salvage lien (ie, compensation due as a result of salvage of the aircraft, parts thereof, goods or people on board);
- mortgagee's (secured) claims, where claims secured by a registration in the International Register will have priority over nationally registered rights unless registration in the Swedish Rights Register has been made prior to the Convention's entry into force;
- claims secured by a repairman's lien or other rights of retention;
- taxes;
- corporate mortgages;
- salary claims; and
- pension claims.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Assuming the lessor or lessee has no physical or permanent presence in Sweden, the lessor or lessee will not need to register for tax purposes in Sweden. Aircraft (intended for transportation of fare-paying passengers) are generally exempt from Swedish VAT. However, the exemption may not apply in relation to certain lease structures in respect of the head lease where the sublessor is a Swedish entity. Such Swedish entity may be imposed and required to report VAT in relation to the head lease. Nevertheless, deduction possibilities will render in no increased VAT expenses. See question 17 regarding stamp duty for mortgages.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

No. However, if direct and indirect payments (to or from Sweden) exceed 150,000 Swedish kronor, or if the aggregated payments amount to 150,000 Swedish kronor, the intermediary arranging the payments must report certain information by submitting a statement of income for the previous income year to the Swedish Tax Agency no later than by 31 January the subsequent year. In addition, certain restrictions may apply should extraordinary circumstances prevail (such as war or exceptional short-term capital movements) in Sweden.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

No. However, the Swedish Contracts Act (1915) contains a general clause stating that any term in an agreement found unconscionable as regards the contents of the agreement, the circumstances prevailing at the time the agreement was entered into, subsequent circumstances and circumstances in general, may be set aside or modified, although the demands for a term or agreement to be found unconscionable are rather stringent.

Update and trends

As of 1 April 2016, the Cape Town Convention and the Protocol entered into force following Sweden's accession thereto. One of the most prominent arguments for Sweden's accession was to achieve the foreseeability for financiers of aircraft that the Convention and the Protocol create, which is hoped to result in, inter alia, more airline carriers conducting operations out of Sweden with aircraft registered in Sweden. In relation to the practical application of the Convention and the Protocol by Swedish authorities (including the Swedish Transport Agency), certain practice is beginning to develop, although it remains to be seen how various issues arising therefrom will be handled in practice.

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

No, not in relation to commercial aircraft to be solely imported to, or exported from, Sweden.

Insurance and reinsurance

29 Captive insurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

There is no prevailing practice to place the insurance in the Swedish market. There are certain activities for which there are requirements under Swedish law that insurance must have a local connection. None of these activities are, however, likely to apply.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

A cut-through clause accessing reinsurance would, in general, be considered valid under Swedish law. However, the insurance company providing the reinsurance cover may be deemed to conduct insurance business in Sweden by way of usage of cut-through clauses and thereby trigger a licensing requirement for insurance business under Swedish law.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

The Swedish Insurance Contracts Act (2005) does not apply to reinsurance contracts. The reinsurance market for aviation in Sweden is rather limited, and Swedish law provides little guidance, therefore foreign customary law is used for reference. However, the assignment of reinsurance is likely to be legally effective under Swedish law if permitted under the reinsurance contract. In the absence of such a provision in the contract, the general principle under Swedish law would be that rights or obligations under the reinsurance contract can only be assigned if the other party has consented thereto.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

According to the Act on Damage Caused to Third Parties by Air Carriage (1922), a lessor (as owner) of an aircraft will be strictly liable for all damage caused to third parties in operating the aircraft.

However, the lessee or operator and not the lessor or owner will be liable for damage caused to third parties by air carriage in the event that:

- the lessee and operator and the lessor enter into an agreement stating that the lessee and not the lessor shall be liable;
- the lease is for a term exceeding one year;

- the lessee or operator is entitled to use its own or other pilots or commanders on the aircraft or is entitled to use the aircraft for commercial air transport purposes; and
- the lessee's right to use the aircraft is registered with the Swedish Transport Agency in the Operational Register.

It is unlikely that a financier or mortgagee could be held liable for any actions or omissions of the counterparty.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

See question 32.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

EC Regulation No. 285/2010 of 6 April 2010 amending EC Regulation No. 785/2004 of the European Parliament and of the Council on insurance requirements for air carriers and aircraft operators provides for minimum insurance requirements in respect of liability for passengers, baggage, cargo and third parties and is applicable in Sweden. It specifies minimum insurance requirements in respect of third-party liability coverage ranging from 0.75 to 700 million special drawing rights, depending on the specific aircraft's maximum take-off weight.

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Switzerland is a party to the Rome Convention (1933), the Chicago Convention (1944), the Geneva Convention (1948) as well as the Warsaw Convention (1929) and the Montreal Convention (1999). The Cape Town Convention (2001) and its Aircraft Protocol have been signed but not yet ratified by Switzerland.

Switzerland joined the Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe (1956). Most of the EU aviation legislation is applicable in Switzerland, as a result of the entry into force on 1 June 2002 of the Agreement between the European Community and the Swiss Confederation on Air Transport (1999).

Switzerland is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The main sources of domestic legislation applicable to aviation finance and leasing are the Swiss Civil Code, the Swiss Code of Obligations, the Federal Aviation Act, the Ordinance on Aviation (OAv), the Federal Act on Aircraft Records Register (AARR) and its implementing Regulation.

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

A distinction must be made between the obligating act (the agreement generating the obligations of the contractors) and the act of disposal (the actual performance of the obligations contracted under the obligating act).

The parties to an agreement are free to choose the law governing their obligating act (aircraft sale and purchase, loan, lease and mortgage agreement).

As regards the act of disposal (ownership transfer, creation of a mortgage), the parties' choices depend on the registration of the aircraft. If the aircraft is Swiss (HB) registered but is not on the Swiss Aircraft Records Register (see question 6) or has been removed from such register at the time of ownership transfer (no mortgage registration is possible in such situation), the *lex rei sitae* applies to the act of disposal (ie, the Swiss moveable properties law if the aircraft is located in Switzerland). The parties may agree on one of the other laws set forth in article 104 of the Federal Act on International Private Law, but such agreement is not binding on third parties.

If the aircraft is HB registered and is on the Swiss Aircraft Records Register at the time of the act of disposal, the ownership transfer or the creation of the mortgage are governed by the AARR and the parties cannot agree on another governing law.

In case of a foreign (non-HB registered) aircraft, the act of disposal is in principle governed by the law of the country of registration of the aircraft. However, if the foreign aircraft registration is cancelled (eg, in anticipation of a re-registration in another country) as of the time of ownership transfer (no mortgage registration should be possible in such situation), this transfer should again be governed by the *lex rei sitae* (ie, the Swiss moveable properties law if the aircraft is located in Switzerland), with the right for the parties to agree on another governing law within the limits set forth above.

It is prudent to ensure any ownership transfer or aircraft mortgage creation complies with the AARR (as applicable), the *lex rei sitae*, the laws of the country of the current (or in case the aircraft is not registered, the previous) registration, the laws of the future country of registration (as applicable) and the law governing the agreement (obligating act).

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

If the AARR provisions apply because the aircraft is on the Swiss Aircraft Records Register (see questions 3 and 6), the transfer of ownership requires a valid cause (usually a sale and purchase agreement) and the registration, upon seller's request, of the new owner as owner with the Swiss Aircraft Records Register.

If the Swiss moveable properties law applies (see question 3), the transfer requires a valid cause (usually a sale and purchase agreement), an *in rem* contract (generally implicit, under which the parties express at the time of transfer their intent to complete the transfer) and the transfer of possession over the aircraft.

A bill of sale is not sufficient under Swiss law.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

If the transfer of ownership occurs through registration of the new owner with the Swiss Aircraft Records Register (see question 4), the sale and purchase agreement must be in writing and an official notice (see question 8) must be filed with the Swiss Aircraft Records Register.

If the aircraft is not on the Swiss Aircraft Records Register, no specific form is required (the written form is, however, recommended for evidence purposes).

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

The Swiss Federal Office of Civil Aviation (FOCA) holds two aircraft registries, both of which are public:

- the Swiss Aircraft Registry, with which all HB aircraft are mandatorily registered. The Swiss Aircraft Registry mentions the name of the owner (nationality restrictions apply to aircraft operated non-commercially) and the operator of the aircraft; however, such mention of ownership does not provide any proof of title; and

- the Swiss Aircraft Records Register, with which an HB aircraft (already registered with the Swiss Aircraft Registry) may be registered upon request of its owner, provided that it has an address for notices in Switzerland. As soon as an HB-registered aircraft is registered with the Swiss Aircraft Records Register, the Swiss legal system applies to such aircraft rules similar to those governing immovable property. An ownership interest, or any mortgage, is to be registered with the Swiss Aircraft Records Register.

There is no specific engine register in Switzerland.

Switzerland is a party to numerous delegation agreements on the implementation of article 83-bis of the Chicago Convention.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

The registration of interests in, or the annotation of other rights over, an aircraft requires such aircraft to be registered with the Swiss Aircraft Records Register (see question 6).

The fact that a person or entity in possession of an aircraft is not the owner of such aircraft may be mentioned in a public registry (mentioning title retention agreements) held by the Debt Enforcement Office of the place of residence or principal place of business of such person or entity.

Engines can be registered with the Swiss Aircraft Records Register only in relation to a specific aircraft (which is registered with the Swiss Aircraft Records Register) as an integral part of, or an accessory to, such aircraft.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

Before an aircraft can be registered with the Swiss Aircraft Records Register, it first has to be registered with the Swiss Aircraft Registry so as to become an HB-registered aircraft (see question 6), and has therefore to comply with the relevant regulatory requirements, including nationality.

If the aircraft is not yet registered with the Swiss Aircraft Records Register, the ownership interest is registered with the Swiss Aircraft Records Register at the same time as the aircraft itself. Such registration is effected by filing the following with the FOCA:

- the appropriate form (request for registration) signed by the owner, providing a description of the aircraft including its engines as integral parts and any accessories, and the name and contact details of the owner with an address for notices in Switzerland;
- any documentary proof of ownership such as an aircraft purchase agreement or an original bill of sale (a 'Swiss' bill of sale form is available, though not mandatory);
- an excerpt from the title retention registry of the place of residence or principal place of business of the owner (see question 7); and
- documentary proof of the signatory's authorisation to act on behalf of the owner. Such documentary proof should be provided as originals or copies that will have to be notarised and apostilled or legalised in another way depending on the country in which the relevant documents and copies are processed.

The exact requirements of the FOCA as to the form of the documents can and should be discussed and agreed upon with the FOCA in advance. Provided that the owner is represented by an experienced and reliable Swiss counsel, it is reasonable to expect the registration of the aircraft to take place immediately upon the Swiss counsel's instruction email to the FOCA asking for registration of the aircraft. Such celerity is possible only to the extent that:

- a PDF copy of all documentation has been submitted to and approved by the FOCA in advance (see questions 15 and 16); and
- the Swiss counsel can confirm that the original documents are being couriered to the FOCA on the same day.

Aircraft registrations with the Swiss Aircraft Records Register are subject to publication with the Swiss Official Gazette of Commerce and with one or several newspapers. The cost of such publication is about 1,000 Swiss francs. Third parties have 30 days from such publication to notify the FOCA of any interest that they may have in the aircraft. Provided that no third party has notified any interest, the title of the owner becomes effectively protected from the date of receipt by the FOCA of the request for registration of the aircraft with the Swiss Aircraft Records Register.

In case of a transfer of ownership to an aircraft already registered with the Swiss Aircraft Records Register, documents similar to those listed above have to be filed with the FOCA. An official notice (in a form available in German and French on the FOCA website) can be used instead of the request for registration. The supporting documents are similar to those mentioned above.

The fees charged by the FOCA for the registration of an aircraft with the Swiss Aircraft Records Register depend on the maximum take-off weight of the aircraft (the maximum fee is 10,320 Swiss francs and the minimum fee is 195 Swiss francs). Engines registered with the Swiss Aircraft Records Register as integral parts of an aircraft are considered as part of the aircraft even if they are not installed on the aircraft.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

The contents of the Swiss Aircraft Registry do not have any legal effect (see question 6). The registrations made with the Swiss Aircraft Records Register are subject to a presumption of knowledge. Third parties acting in good faith are protected in their acquisitions based on information contained on the Swiss Aircraft Records Register. The Swiss Confederation may be liable for the damage incurred by third parties as a consequence of inaccuracies in the Swiss Aircraft Records Register.

10 Registration of lease interests

Summarise the process to register a lease interest.

Provided that an aircraft is registered with the Swiss Aircraft Records Register, the right to use such aircraft can be annotated with the Swiss Aircraft Records Register if the right is granted under a lease agreement or charter agreement with a term of at least six months.

Documents similar to those listed in relation to the registration of an ownership interest have to be filed by the owner with the FOCA, together with the same official notice (see question 8).

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

Aviation interests are registered with the Swiss Aircraft Records Register (see question 6). The head of the Swiss Aircraft Records Register issues, upon request, excerpts from the register mentioning the following:

- the specification of the aircraft and its integral parts and accessories (if any) (see question 8);
- the identity and details of the owner;
- the identity and details of the mortgagee, or a registered lessee (if any); and
- if a mortgage is registered, the secured amount and the rank of such mortgage.

No excerpt can be issued in relation to separate engines (see question 7).

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

The deregistration request (indicating, as the case may be, the country in which the aircraft is anticipated to be re-registered) must be executed by the owner, irrespective of whether the aircraft is registered

only with the Swiss Aircraft Registry, or also with the Swiss Aircraft Records Register (see question 6). In the latter instance, the aircraft will not be deregistered without the prior written consent of a mortgagee (if any). The aircraft will not be deregistered until the FOCA is in possession of the originals of the Certificate of Registration and the Certificate of Airworthiness of the aircraft.

The operator has various means to block the deregistration, such as applying for provisional measures aiming at protecting its right to use the aircraft, or keeping the original board documents of the aircraft (in which event the FOCA is entitled to force the operator to return the original board documents). If a lease interest has been registered with the Swiss Aircraft Records Register (see question 10), the current practice of the FOCA (which has not been tested at court) does not allow the relevant lessee to oppose deregistration. The FOCA will, however, inform the lessee of the pending deregistration.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

Deregistration and export powers of attorney are of limited interest in Switzerland. The self-help remedies of a mortgagee are very limited (see question 23), and the relevant mandatory legal provisions cannot be circumvented by the granting in advance of a power of attorney to the mortgagee or to any other third party. A power of attorney (governed by Swiss law) qualifies as an agency agreement and is as such mandatorily revocable at any time. If the grantor becomes insolvent, and the insolvency is governed by Swiss law, no act could be performed by the attorney if such acts amount to disposing of the grantor's assets.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

Not applicable.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

The mortgage agreement must be made in writing. It must be filed in original form, together with an official form that summarises the main terms of the mortgage agreement and must contain the following:

- the designation of the aircraft, as or to be registered with the Swiss Aircraft Records Register;
- the name, registered address, address of the Swiss representative (if the relevant party is not a Swiss resident) and contact details of the mortgagor and of the mortgagee;
- the name, description and date of the mortgage agreement;
- the maximum secured amount including principal and interests (in Swiss francs); and
- the rank of the mortgage.

The form must be signed by the owner. Considering that the form is only available and will necessarily be submitted in German or French, the FOCA is flexible as regards the language of the mortgage agreement itself.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

The mortgage agreement and the official form (see question 15) must be submitted in original format. The authority of the relevant signatories must be evidenced by corporate documents or individual passports (provided as originals or as copies, which will have to be notarised and apostilled or legalised in another way depending on the country in which the relevant documents and copies are processed).

The exact requirements of the FOCA as to the form of the documents can and should be discussed with the FOCA in advance so as to allow a timely registration of the mortgage at closing (see question 17). No costs are charged by the FOCA in relation to the documents themselves.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgage interest.

The aircraft mortgage does not exist unless and until it has been registered with the Swiss Aircraft Records Register. As a prerequisite, the aircraft itself must be registered with the Swiss Aircraft Records Register (see questions 6 and 8). Provided that the parties are represented by an experienced and reliable Swiss counsel, it is reasonable to expect the registration of a mortgage to take place immediately upon the Swiss counsel's instruction email to the FOCA. Such speed is possible only to the extent that a PDF copy of all documentation (see questions 15 and 16) has been submitted to and approved by the FOCA in advance and the Swiss counsel can confirm that the original documents are being couriered to the FOCA on the same day. The fees charged by the FOCA for the registration of a mortgage depend on the secured amount (the maximum fee is 17,200 Swiss francs and the minimum fee is 385 Swiss francs).

18 Registration of security

How is registration of a security interest certified?

The FOCA issues to the owner and the mortgagee upon registration of the mortgage, and to interested third parties upon request, an excerpt from the Swiss Aircraft Records Register (see question 11). If the aircraft has to be registered with the Swiss Aircraft Records Register at the same time as the mortgage, the availability of the excerpt will be delayed by the publication procedure (see question 8).

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

Mortgages registered with the Swiss Aircraft Records Register are allocated a fixed rank for a maximum amount. Priority depends on the allocated rank (as opposed to the registration chronology).

The Swiss Aircraft Records Register being public, registrations are subject to a presumption of knowledge. Third parties acting in good faith are protected in their acquisitions based on information contained on the Swiss Aircraft Records Register. The Swiss Confederation may be liable for the damage incurred by third parties as a consequence of inaccuracies in the Swiss Aircraft Records Register.

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

A Swiss aircraft mortgage is a right in rem. It affects and follows the aircraft, even if the aircraft is sold to a third party. Under Swiss law, the mortgagee and the lender are traditionally one and the same entity. However, Switzerland recognises trust and fiduciary structures in general, and the FOCA accepts that a mortgagee is acting as a security trustee (if such is the role of the mortgagee under the financing documentation). This allows a group of lenders to change without amending the Swiss Aircraft Records Register, as long as the security trustee remains the same entity.

However, amending the name of the mortgagee (in the event that the relevant loan agreement or the mortgage has been assigned to a new lender or creditor) is also possible. Such amendment has to be notified by filing a form (similar to the form used for the registration of the mortgage (see questions 15 and 16)) and providing documents evidencing the assignment and novation of the mortgage and the identity and details of the new mortgagee (similar to the documents mentioned in question 16). The fee charged by the FOCA for the registration of the change of mortgage is very small.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

A spare engine cannot be subject to an independent mortgage.

If a spare engine is expressly designated and registered with the Swiss Aircraft Records Register with a specific mortgaged aircraft, it becomes an integral part of the latter and is subject to the same mortgage as the aircraft (even though it is not installed on it or if it is installed on another aircraft). The spare engine can be replaced by another engine provided the registration is modified accordingly with the Swiss Aircraft Records Register, and such modification does not reduce the mortgage value.

The legal regime applicable to a spare engine that is not on the Swiss Aircraft Records Register as integral partly depends on its use. As long as it has not been used, the engine is not considered as an accessory of the mortgaged aircraft and can therefore not become subject to the mortgage (save through application of certain restrictive provisions of articles 29 et seq of the AARR, governing the extension of mortgages to spare parts (such as engines to be stocked in a separate warehouse)).

As soon as the spare engine is used and installed on the aircraft, it becomes an accessory of the aircraft and, as such, it becomes subject to the mortgage registered against the aircraft (a mention may be made on the Swiss Aircraft Records Register) in replacement of the replaced engine. Such replacement is not allowed if it reduces the mortgage value.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

Repossession procedures are usually affected by the current location of the aircraft, rather than by the law applicable to the lease agreement. As owner (or with the assistance of the owner) of the aircraft, the lessor is usually in a position to lead third parties (such as maintenance companies, if the aircraft is undergoing maintenance) to consider its title to the aircraft rather than the right of a lessee.

However, general principles of law, such as the right of any person or entity to deny third parties access to its premises, will generally keep the owner or lessor from (lawfully) exercising any self-help remedy against the lessee. Considering that irrevocable powers of attorney are not valid under Swiss law (see question 13), the usual wording allowing the lessor to enter land and premises of or under the control of the lessee or third parties is of little help.

If the lessor is the owner of the aircraft, it may apply to court (by way of provisional measures) and claim for the return of the aircraft. The lessee may, on its part, apply (by way of provisional measures) and claim for protection of its right to use the aircraft. The FOCA may be entitled and willing, in some circumstances, to force the operator to return the original board documents. This applies in particular in situations where the lessor (as owner) has applied for deregistration of the aircraft (see question 12).

23 Enforcement of security

Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

Aircraft mortgage enforcement must occur by way of forced execution procedure under the compulsory control of the authority. A mortgagee cannot unilaterally engage in the private sale of a mortgaged aircraft.

The mortgagee must file an application with the local Debt Enforcement Office. The Office then serves a payment order to the aircraft owner, upon which the Office takes over the administration of the mortgaged aircraft. The purpose of such administration is to ensure the aircraft remains grounded in Switzerland. While possible, it is therefore in principle not necessary to apply for a seizure of the aircraft. The owner can raise an opposition to the payment order and by doing so force the mortgagee to initiate court or arbitration proceedings. If the outcome of the proceedings is successful, the mortgagee may require

the auction sale of the aircraft. A private sale may only be considered if all parties involved agree.

If the owner goes bankrupt, the aircraft becomes part of the bankruptcy estate and is sold as part of the liquidation of the bankruptcy. The mortgagee has a priority right over the proceeds of sale of the aircraft.

If the owner of the aircraft is not the debtor of the secured obligations, it has the right to settle the mortgagee's claim to prevent the mortgage enforcement. In such case, the owner is subrogated to the rights of the mortgagee.

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

A requisition right is available to the Swiss army and the civil protection in specific circumstances, which may extend to aircraft. In case of requisition, the Swiss Confederation has an obligation to pay the owner a fair indemnity for the use, loss in value and loss of ownership of the aircraft. The mortgagee of a requisitioned aircraft benefits from a legal mortgage over such claim.

HB aircraft that are on the Swiss Aircraft Records Register, and foreign aircraft registered in countries that are parties to the Geneva Convention, may be subject to a legal mortgage (taking priority over contractual mortgages) to secure claims resulting from aircraft salvage or assistance or extraordinary expenses for the preservation of the aircraft or for claiming against third parties having a liability for the confiscation, damage, destruction or loss of the aircraft.

No legal mortgage exists in respect of HB aircraft that are not on the Swiss Aircraft Records Register, but a creditor having possession of such an aircraft may exercise a retention right to secure his or her claims.

The status of customs legal mortgages is uncertain. If such mortgages seem to be available for HB aircraft that are not on the Swiss Aircraft Records Register, they are in general excluded for HB aircraft that are on the Swiss Aircraft Records Register and foreign aircraft registered in countries that are party to the Geneva Convention.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Aircraft purchase prices are subject to Swiss VAT at the rate of 8 per cent if:

- the seller is or shall be registered as a Swiss VAT payer;
- the aircraft is located in Switzerland (on the ground or in the airspace) at the time of transfer; and
- the aircraft is not exported outside of Switzerland after the transfer.

Swiss VAT also applies at the rate of 8 per cent when the aircraft is not in Switzerland at the time of transfer but is subsequently customs cleared in Switzerland (which is generally the case for HB-registered aircraft).

Under Swiss VAT law, a leasing transaction qualifies as a supply of goods. Whether Swiss VAT is due on lease payments depends on where the aircraft is located at the time the lease agreement is entered into, respectively during its term. On the other hand, sale and lease back transactions do not qualify as two subsequent supplies of goods but as a VAT-exempt financial service, provided that the agreement provides for the mandatory (and not optional) re-transfer of title at the end of the lease period.

Swiss VAT on purchase price or lease payments or Swiss VAT paid by the owner or lessee upon customs clearance of the aircraft may be recovered if the owner or lessee may be registered as a Swiss VAT payer, which implies that the aircraft must be used for entrepreneurial purposes. This condition is denied if the aircraft is essentially or only used by its beneficial owner for his or her private needs, even if flights are invoiced to the beneficial owner at market rate. If the aircraft is mainly used within the frame of an entrepreneurial activity but also partly (for more than 20 per cent of the total annual flight hours) used

by the beneficial owner for his or her private needs, a pro rata may apply to input VAT recovery in certain circumstances.

No withholding tax applies on lease payments or loan repayment from Switzerland.

Loans granted to Swiss entities by foreign affiliated companies shall comply with market conditions. In particular, interest rates shall not exceed safe harbour interest rates published by the Swiss tax authorities.

Corporate taxes applicable to the entity holding the aircraft shall also be carefully considered in case such entity is resident in Switzerland for tax purposes.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

There are currently no restrictions on international payments and exchange controls in effect in Switzerland. Considering that such restrictions are almost impossible to apply and can easily be circumvented in an open economy, Switzerland is unlikely to introduce such restrictions.

Depending on the reasons that would lead to such restrictions, the relevant competent authority would be the Swiss National Bank (Switzerland's central bank) for restrictions linked to monetary policy, or the State Secretariat for Economic Affairs for restrictions linked to economic or political decisions.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

The parties to an agreement may determine the default interest rate at their discretion, but courts may adjust a rate they find excessive. The maximum rate acceptable under the consumers' protection legislation (not applicable to aircraft finance) is 15 per cent per annum. By analogy, a default interest rate charged on lease or loan payments, which does not exceed 15 per cent, should not be found excessive by courts.

In the absence of a contractually agreed default interest rate, the legal rate that applies is 5 per cent per annum. However, if contractors agreed on a higher interest rate, the default interest rate is equal to such higher interest rate.

Compounding default interest is not allowed.

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

As a matter of principle, goods entering the Swiss territory, whether as part of a repossession process or otherwise, are subject to customs clearance, which generally entails the payment of import duties based on the aircraft weight and import VAT (see question 25). Aircraft

Update and trends

In October 2015, the Federal Tax Administration finally published a VAT Information on Air Traffic, which had been expected since the entry into force of the Federal VAT Act in 2010. Although these guidelines clarify a certain number of questions for the Swiss aviation community, including financiers, there are still some areas of uncertainty, in particular with the input VAT recovery right in cases where the purchased or imported aircraft is used by its beneficial owner for his or her private needs in a proportion that exceeds 20 per cent of the total flight hours. Holding structures of business aircraft are expected to be audited by the Federal Tax Administration within the next few years.

The Cape Town Convention ratification process is still on hold and is unlikely to be completed within the next few years.

In general, Swiss financiers remain strong actors of the aviation finance market, especially in the private or business aircraft segment in spite of the consequences of the financial crisis (depreciation of aircraft values, margin calls and repossessions, new regulatory requirements (Basel III), increased monetary uncertainty, etc).

intended for private use in civil aviation may be exempted from import duties (but not VAT). Other exceptions or exemptions may be available (for both import duties and VAT), based, for example, on temporary import (Switzerland ratified the Istanbul Convention on Temporary Admission (1990)), specific customs regimes (such as inward processing) or, under certain circumstances, in the case of aircraft imported by air transport enterprises operating mainly on international routes.

The responsibility for customs clearance attaches primarily to the persons having operational control over the aircraft (airline, owner or operator) at the time it enters the Swiss territory and their representatives. The liability for the payment of import duties and VAT may extend to certain persons indirectly involved in the operation on a joint and several basis, depending on the circumstances of the case (including owner, consignee or freight forwarding agent).

The export of an aircraft from Switzerland is not subject to customs duties or VAT.

Insurance and reinsurance

29 Captive insurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

There is no captive insurance regime in Switzerland.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Cut-through clauses are legally effective under Swiss law. They are, however, not market standard.

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31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Assignments of reinsurance are legally effective under Swiss law. They are, however, not market standard.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

Liability for damage caused to third parties on the surface or in flight lies with the aircraft 'operator'. The 'operator' is described for such purpose as the person having the power to dispose of the aircraft, using the aircraft for its own account and at its risks and exercising a direct and effective control over the aircraft. The risk that an owner, lessor or financier qualifies as 'operator' for third-party liability purpose is in general remote, but cannot be excluded (in particular in situations such as private flights or repossession).

Liability for death and injury of passengers and damage caused to baggage and cargo is principally governed by the Montreal and Warsaw Conventions and EU Regulation No. 2027/97 as amended by EU Regulation No. 889/2002. The risk for an owner, lessor or financier to qualify as 'carrier' under said rules is marginal.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

As described above, liability lies with the 'operator' or the 'carrier'. An operational interest is therefore required.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

The OAv sets out the minimum insurance cover (for damage incurred by third parties on the ground) as an amount expressed in special drawing rights based on the maximum take-off weight of an aircraft. These amounts and weights are in line with Regulation (EC) No. 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators.

United Arab Emirates

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

The UAE has ratified the following conventions:

- the Convention on International Civil Aviation (1944) (the Chicago Convention);
- the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the New York Convention);
- the Convention for the Unification of Certain Rules for International Carriage by Air (1999) (the Montreal Convention); and
- the Convention on International Interests in Mobile Equipment and its Protocol on Matters specific to Aircraft Equipment (2001) (the Cape Town Convention and its Protocol).

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The main domestic provisions applicable to aviation finance and leasing are found in the Civil Aviation Law of the UAE (Federal Law No. 20 of 1991). The Civil Aviation Regulations of the UAE set out the general provisions applicable to the registration of civil aircraft.

The Aviation Authority Law of the United Arab Emirates (Federal Law No. 4 of 1996, as amended by Federal Law No. 20 of 2001) establishes the General Civil Aviation Authority (GCAA) as the competent authority for the control and regulation of civil aviation in the UAE. Law No. 19 of 2010 defines the powers of the Dubai Civil Aviation Authority together with the conditions of its cooperation with the GCAA.

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

There are no express restrictions to the choice of applicable law in contracts to the transfer of interests in or creation of security over aircraft. As a general principle, the GCAA and the courts of the UAE would recognise the choice of a foreign law by the parties subject to the following:

- such choice is clearly expressed by the parties in the relevant document; and
- such choice does not contravene public policy or Sharia principles.

Under the Protocol to the Cape Town Convention, the parties to a contract may choose the governing law of their contractual rights and obligations under such contract.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

The title to an aircraft may be transferred by two or more parties entering into a legal instrument that meets the following criteria:

- is in a form satisfactory to the GCAA;
- describes the relevant aircraft in sufficient detail;
- expresses the intention of the parties to sell and purchase the aircraft; and
- is executed by the seller and the purchaser in ink.

A bill of sale or any other instrument that fulfils these conditions would be effective in transferring title to an aircraft.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

Pursuant to Appendix 1 of Chapter 1 of Part V of the Civil Aviation Regulations, a request to the GCAA for the registration of the transfer of title to an aircraft must be accompanied by a certified true copy of the document that establishes the owner's property title. The transfer document must comply with the conditions set out in question 4. If the transfer document is executed pursuant to a power of attorney, an original notarised power of attorney should be provided to the GCAA. In case the power of attorney is not available, the GCAA may accept any other original documentary evidence of authorisation (its equivalent) giving full powers to submit the related GCAA application and all required documentation associated to such party granting authorities. The GCAA has a discretionary power to require from the applicant any additional information or complementary supporting documents in order to determine whether the aircraft's ownership may properly be registered in the UAE.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

Section 1 of Chapter 1 of Part V of the Civil Aviation Regulations sets out the conditions under which an aircraft may be registered with and maintained in the registry of the GCAA. In order to be eligible for registration with the GCAA, an aircraft must be owned by or leased to the following:

- a UAE national;
- a corporate body having its principal place of business in the UAE or wholly owned by a UAE national; or
- a UAE government department.

Accordingly, an aircraft may be registered in the name of an operator in the aircraft registry of the GCAA if this operator constitutes a qualified person (eg, a national UAE airline or an airline wholly owned by a UAE national or having its principal place of business in the UAE).

We are not aware of any well-used 83-bis arrangements between the UAE and other states.

There is no specific engine register in the UAE

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

An ownership or lease interest in, or lease agreement over, aircraft can be registered with the aircraft registry of the GCAA and there are no particular limitations under UAE laws as to the owner other than that the aircraft shall be owned or leased as specified in question 6. Pursuant to article 29 of the Civil Aviation Law, other than in the event of a destruction, loss or permanent withdrawal of operation of the aircraft, the deregistration of an aircraft from the registry of the GCAA shall be effected if the owner of such aircraft ceases to be a UAE national or transfers its ownership to a national of another state.

In respect of the registration of lease interests, an aircraft that originally bears a foreign registration can be registered with the aircraft registry of the UAE as long as the operator falls within the scope of the above requirements during the term of the lease agreement in accordance with the Civil Aviation Regulations.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

The aircraft registration process requires the submission of the following documents as provided under Appendix 1 of Chapter 1 of Part V of the Civil Aviation Regulations:

- a GCAA aircraft registration form duly executed by the aircraft owner or its representative together with a notarised original power of attorney or other document evidence of authority;
- in the event of an individual, a certified true copy of the owner's passport and UAE residency certificate (if applicable);
- in the event of a legal entity, a certified true copy of the owner's certificate of incorporation (or equivalent), the list of directors or incumbency certificate (or equivalent) and the managerial title that states that the relevant signatory is the legal representative of the owner or its duly authorised representative; and
- a certified true copy of the underlying contracts or other legal documents in respect of the aircraft registration such as the transfer of title document or the lease agreement over the aircraft and the appropriate certified copies of the documentary evidence of the identity and signing authority in respect of each submitted legal document.

In addition to the above-listed primary documents, the GCAA shall be provided with the following documents with respect to the operation of the aircraft:

- an application for a radio licence to be issued by the UAE's Federal Ministry of Communications' Department of Telecommunications in accordance with article 4 of the Civil Aviation Law;
- a certificate of airworthiness issued by the relevant department of the GCAA;
- an aircraft non-registration certificate in relation to any new aircraft or, otherwise, a deregistration certificate from the previous aircraft's state registry, clear of liens (unless the beneficiary of the registered liens provides a consent letter); and
- a certified true copy of the aircraft's valid insurance certificate.

With respect to specific form requirements, all powers of attorney filed with the GCAA shall have been previously notarised and issued for a fixed expiry date. If the power of attorney is silent in respect of the expiry date and has been granted earlier than three years prior to the date of its submission to the GCAA, the issuer of the power of attorney may be required by the GCAA to confirm in writing that the power of attorney is still valid as of the date of submission. In addition, the practice is that all original signatures are provided in ink.

The above process can be completed online through the GCAA's website after the registration of the applicant, except that the documents required as originals shall be communicated separately to the GCAA. Upon completion of the registration process and the issuance of the aircraft's certificate of registration, the GCAA shall be provided

with a CD-ROM enclosing all the documentation in accordance with Appendix 1 of Part V of the Civil Aviation Regulations.

An aircraft initial registration fee, which ranges from 30,000 UAE dirhams to 400,000 UAE dirhams, depending on the maximum take-off weight of the aircraft, shall be paid to the GCAA. Specific provisions apply to freighters. In addition to the initial registration fee, an annual fee is payable in relation to the airworthiness certificate's issuance and renewal. Other miscellaneous fees in connection with the registered aircraft's certificates and documents issued by the GCAA for the operation of the aircraft are applicable. In the UAE, the official office opening hours of the Abu Dhabi office, Dubai office and Sheikh Zayed Centre Office of Abu Dhabi are 8am to 1pm from Sunday to Thursday. Accordingly, the GCAA is closed and not available for any registration formalities on Fridays.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

Federal Law No. 10 of 1992 on evidence in Civil and Commercial Transactions, as amended by Federal Law No. 36 of 2006 provides for the legal force of documents issued by government entities and sets out that an informal document has no probative force as to its date with regard to third parties unless, inter alia, it has acquired an established date from the day of its registration with a register maintained for this purpose. On this basis and as a general matter, the courts of the UAE would recognise a certificate of registration issued by the GCAA as valid and appropriate evidence of an ownership interest, a lease interest or a security interest such as resulting from a mortgage over an aircraft registered with the GCAA.

However, information registered with the GCAA but not recorded on the certificate of registration of the aircraft is not publicly available and is not disclosed by the GCAA to third parties other than to interested parties for inspection purposes. Accordingly, we take the view that any information noted on the aircraft register would not constitute a notification to third parties by the GCAA or the courts of the UAE.

10 Registration of lease interests

Summarise the process to register a lease interest.

The GCAA does not hold any specific registry in respect of leases for registration purposes. However, the lease of an aircraft can be registered under the provisions of section 1 of Chapter 1 of Part V of the Civil Aviation Regulations in respect of an aircraft notably leased to or by a UAE national, or a corporate body having its principal place of business in the UAE or wholly owned by a UAE national. The identity of the lessee as a UAE-qualified person and an owner, as lessor, are recordable with the aircraft registry of the GCAA.

In order to permit such lease registration, the applicant must file with the GCAA a duly executed registration form and certified true copies of the documentary evidence of the existence of both the owner, as lessor, and the lessee in addition to satisfactory evidence of the signing authority of each party (including, as applicable, notarised powers of attorney). Certified copies of the lease documentation and any additional information or document in connection thereto shall also be submitted to the GCAA as it deems necessary.

There is no prescribed form in respect of leases for the purpose of the GCAA's registration other than that the leases that are relevant are those that provide for a transfer of possession of the leased asset. Contractual freedom would prevail in commercial matters as long as the parties have clearly expressed the terms and conditions of the lease. For legal certainty, the parties to a registered lease should determine clearly the main elements of the lease arrangements such as the identification of the leased aircraft, the financial requirements and the duration as well as liability provisions in respect of the operation of the aircraft and the right of the lessee to quiet enjoyment.

No registration fees apply specifically to aircraft lease registrations except in respect of the GCAA's fees applicable to International Registry's registration for the purpose of the allocation of an authorising entry point (AEP) code as detailed in question 14.

11 Certificate of registration**What is the regime for certification of registered aviation interests in your jurisdiction?**

Section 1 of Chapter 1 of Part V of the Civil Aviation Regulations provides that the certificate of registration of the aircraft shall reflect the details listed below. The following details in respect of the parties and the aircraft shall be completed in the registration application form:

- the name of the owner(s) of the aircraft, and more generally, the name of any person or legal entity that holds a legal or beneficial interest by way of ownership of a UAE-registered aircraft or a share therein;
- the name of the parties to the aircraft lease agreement in the event that a lease is registered;
- the aircraft's name of manufacturer and manufacturer's designation;
- the aircraft's nationality, registration mark and serial number; and
- the date of issuance of the certificate of registration.

If a lease agreement is registered, the certificate of registration will only reflect the name of the operator. The name of the owner is registered in the files of the GCAA but may also be reflected on the certificate of registration upon request. Regarding the registration of security interests, a secured creditor as mortgagee may also specifically request that its security interest is reflected in the certificate of registration. Finally, there is no specific engine registry held by the GCAA.

12 Deregistration and export**Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?**

An aircraft may be deregistered by its owner or a secured creditor by giving notice to the GCAA. The GCAA will not permit the deregistration of an aircraft without the consent of its owner or the secured creditor in the presence of registered security interests recorded in its files. In accordance with Appendix 1 (Table 3) of Chapter 1 of Part V of the Civil Aviation Regulations, an aircraft owner would not be allowed to deregister an aircraft without the written consent of a secured creditor in respect of registered security interests. More specifically, such consent shall only be satisfied if a certified true copy of a notarised no objection letter or consent letter is issued by the relevant secured creditor.

Subject to the aircraft being duly registered with the GCAA and no attachment order being issued by a competent court of the UAE, it should be possible for an owner, a secured creditor such as a mortgagee or any other interested party to request the export of the aircraft on the basis of a deregistration power of attorney. The aircraft would be exported under an export certificate of airworthiness issued by the GCAA subject to any objection from the new state of registration to which the aircraft is being exported.

13 Powers of attorney**What are the principal characteristics of deregistration and export powers of attorney?**

A typical deregistration power of attorney in respect of an aircraft would be recognised by the GCAA subject to its notarisation. In the event that such power of attorney is executed outside of the UAE, this document would have to be legalised. The enforcement of a deregistration power of attorney would be recognised for its duration. The duration of a deregistration power of attorney usually mirrors the duration of the underlying supporting contract or other legal document registered with the GCAA. UAE law does not require the interested party or a representative of the interested party to be physically in the territory of the UAE in order to enforce the deregistration power of attorney.

Under UAE law, it should be noted that any power of attorney can be revoked unless it has been specifically and contractually agreed otherwise between the parties. As such, it is advisable that an irrevocable deregistration power of attorney be granted to the interested party and, more particularly, an irrevocable deregistration and export request authorisation (IDERA) under the conditions set out in the Cape Town Convention and its Protocol, should be granted.

14 Cape Town Convention and IDERA**If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.**

Any interested party such as a mortgagee may request the deregistration of the aircraft from the GCAA by submitting an application form by way of the enforcement of an IDERA in accordance with the Cape Town Convention and its Protocol. The conditions for such deregistration by way of the enforcement of an IDERA are set out under Appendix 1 (Table 4) of Chapter 1 of Part V of the Civil Aviation Regulations. The following documents should be provided by the applicant:

- an original executed IDERA;
- a copy of a priority search certificate issued by the International Registry;
- the GCAA application form(s);
- an original power of attorney or other original documentary evidence of the authorised party's representation or its certified designee under the International Registry;
- evidence of the managerial title of the authorised party and a certified true copy of the documentary evidence of its existence;
- an original of the certificate of registration with the reverse side signed by the owner;
- the original aircraft certificates in respect of the operation of the aircraft issued by the GCAA and Telecommunications Regulatory Authority of the UAE (as applicable);
- evidence that Mode S Code (assigned by the GCAA) and emergency local transmitter code have been cancelled (if applicable);
- evidence that the registration mark and identification plates have been removed from the aircraft;
- an original of the certified designee's confirmation letter and the original confirmation letter from the authorised party; and
- a CD-ROM enclosing all of the documentation submitted to the GCAA.

The templates of the request letter for the deregistration of an aircraft by way of the enforcement of an IDERA, the IDERA itself and the certified designee confirmation letter in relation to the IDERA can be found under Appendices 2 to 4 of Chapter 1 of Part V of the Civil Aviation Regulations. The IDERA does not need to be countersigned by the GCAA but the certified designee confirmation letter shall be countersigned, acknowledged and lodged by the GCAA.

In addition to these documentary requirements, article XIX of the Protocol to the Cape Town Convention provides that a contracting state may choose to designate an entry point for the transmission of information to the International Registry. Pursuant to the Regulations and Procedures for the International Registry, and effective as of 24 November 2011, the GCAA has been designated as the entry point for the UAE. An entry point can be designated either as an AEP or a direct entry point (DEP). Unlike a DEP, the GCAA, as an AEP, does not make itself the registration with the International Registry but provides an AEP registration code to the applicant, which uses it in order to effect itself the registrations with the International Registry. The applicant shall be registered with the International Registry prior to serving the request to the GCAA. The website of the GCAA provides all relevant information in respect of the request for the issuance of an AEP registration code: the signed documentation and drafts in relation to prospective interests shall be supplied to the GCAA and fees shall be paid in the amount of 4,074 UAE dirhams. The process usually takes around seven working days.

Security**15 Security document (mortgage) form and content****What is the typical form of a security document over the aircraft and what must it contain?**

Other than in respect of the generic provisions of the UAE Federal Law (Law No. 18 of 1993) in relation to the Law of Commercial Transactions (the Commercial Code) concerning mortgages over moveable assets, there is no significant or specific aviation law in the UAE in respect of aircraft security documents such as aircraft mortgages and, therefore, no typical form for such security document would apply. The Commercial Code's provisions applicable to commercial mortgages over moveable

assets require the transfer of possession of the moveable asset to the mortgagee, whether fully or partially under a joint possession between the mortgagor and the mortgagee. In this context, the affixing of nameplates setting out clearly that the aircraft is mortgaged in favour of a mortgagee would address this requirement up to a certain extent.

As mentioned above, the Civil Aviation Law allows for the registration of a mortgage over a UAE-registered aircraft and the GCAA, in practice, permits the registration of mortgages governed by foreign law and reflects the name of the mortgagee on the certificate of registration on request. This registration may be considered as sufficient to record and protect the interests of the mortgagee and to prevent the mortgagor from deregistering the aircraft or effecting any change of ownership to the aircraft without the prior consent of the mortgagee. In this context, it is advisable that the mortgage or any other relevant security interest is recorded with the International Registry, to the extent registrable.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

There are no specific requirements applicable to security documents concerning aircraft. Generic requirements set out in the Commercial Code apply to commercial mortgages. The Commercial Code provides for the general principles and conditions that apply to mortgages over moveable assets with a transfer of possession. As part of the conditions set out, the commercial mortgage shall contain the amount of the secured debt and shall be notarised before a notary of the UAE. The GCAA does not require a notarised Arabic translation of foreign law security documents but it would be advisable to arrange for foreign law mortgages under English law or New York law (or both) to be translated into Arabic and notarised by a notary of the UAE in order to avoid any potential challenge of the validity of such documents.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgage interest.

The GCAA does not provide for a specific registry for the registration or security documents. In the event of a mortgage being granted over a registered aircraft, the GCAA will register the identification details of the mortgagee in its records. A request shall be made in this regard and accompanied with a certified copy of the mortgage document and any other supporting documents evidencing the existence and powers of the mortgagee.

It is not a condition to the validity or the enforceability of a mortgage that it is filed or recorded by the GCAA under UAE law. As mentioned above, the information recorded by the GCAA other than reflected on the certificate of registration of the aircraft is not available to third parties other than interested parties. In the event that the mortgage is noted on the certificate of registration, this information will be available to third parties but does not create, on this sole basis, any specific rights or priority and it is advisable therefore that this mortgage is recorded with the International Registry as an international interest to the extent possible. No registration fees specifically apply to a mortgage registration except in respect of the GCAA's fees applicable to International Registry's registration for the purpose of the allocation of an AEP code as detailed in question 14.

18 Registration of security

How is registration of a security interest certified?

The Civil Aviation Law provides for the registration of a mortgage over UAE-registered aircraft and the GCAA, in practice, permits the registration of mortgages governed by foreign law under its registry and the notation of the name of the mortgagee on the certificate of registration issued by it to the extent requested by the mortgagee. The registration of the mortgage under the certificate of registration would not specify the rank of the mortgage but would constitute a protection of the mortgagee against the owner's attempt to sell or deregister the aircraft without obtaining the mortgagee's prior written consent.

The Commercial Code does not contain any specific provisions in respect of the rank and priority of security interest created by the commercial mortgage but the rights of the secured creditors would be governed by the provisions applicable to the international interests of the Cape Town Convention provisions except that the effect of such provisions may be affected in the event of insolvency proceedings and non-consensual rights may have priority over international interests under the laws of the UAE.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

The information registered with the GCAA other than recorded on the certificate of registration of the aircraft is not available to third parties other than interested parties. Regarding the information and documents recorded with the GCAA but not strictly reflected in the aircraft certificate, it is doubtful whether such recorded information and documents would be recognised as enforceable with regard to third parties. However, on the basis of the aforementioned provisions of Federal Law No. 10 of 1992, as amended by Federal Law No. 36 of 2006, the courts of the UAE would recognise a certificate of registration issued by the GCAA as admissible evidence of a security interest such as a mortgage interest.

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

Security over aircraft is typically structured using a security trustee or agent holding the security over the aircraft on behalf of financiers. Most aircraft are owned by special-purpose companies (SPC) in the relevant aircraft structure. The SPC is typically a private limited company incorporated in countries with favourable tax regimes such as the Cayman Islands or Ireland. Under the Civil Aviation Regulations, the GCAA would give effect to the registration of a security (typically a mortgage) and register it in the name of the security trustee or agent against the SPC as owner. Aside from the mortgage, which has been discussed above, a security assignment of the owner's rights under the lease and its rights under the hull and war insurances in respect of the operation of the aircraft would be granted in favour of the financiers and a pledge over the owner's bank account to which the lease rentals are paid would be put in place. Under the Civil Aviation Regulations, international interests as set out under the Cape Town Convention and its Protocol, would be recognised in respect of a mortgage interest as an enforceable item of collateral in the UAE, as the state of registration.

Under a simple finance lease structure, the SPC would lease the aircraft to the operator under a finance lease. The operator would operate the UAE-registered aircraft and pay the lease rentals to the SPC under the finance lease and, in broad terms, that rent would be equal to the principal and interest the SPC must pay to the financiers in respect of the financing documentation. When considering the registration of the lease and the financing documentation with the GCAA, the interested parties should provide originals or certified copies of the relevant transaction documents that reflect the transaction's structure. The term of the finance lease and the loan would coincide and therefore, upon the expiry of the lease term, if the airline has paid all amounts due from it under the finance lease, the SPC will have repaid the loan in full and at that point, the financiers would request from the GCAA the release of the mortgage and any other security documents registered with the GCAA's file such as an IDERA. Typically, under this finance lease structure, the operator would be entitled to purchase the aircraft for a nominal sum and amendments would be made with the GCAA in order to reflect the transfer of ownership of the aircraft and its deregistration if the UAE's registration cannot be maintained under the conditions set out by the Civil Aviation Law.

No specific regulations have been developed under the UAE to govern lease financings and it should be noted, as a general matter, that financial institutions are generally restricted from owning assets and carrying out commercial activities. Sharia-compliant structures, such as Ijaara leases and Murabaha financing structures, can take over as an alternative to the traditional lease financing structures.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

A security over spare engines or spare parts can take the form of a pledge. The pledge is a form of security under Law No. 5 of 1985 relating to the Law of Civil Transactions (the Civil Code). The completion of a pledge requires, as for a commercial mortgage, that the possession of the pledged asset is physically transferred to the pledgee or its agent. Accordingly, this type of security is not applicable to moveable assets such as installed engines or parts that shall continue to be used by the borrower or a third party such as the aircraft's operator, notwithstanding the completion of the security. It is therefore doubtful that a specific security can be created over installed engines and parts under UAE law.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

UAE law has made a declaration under article 54(2) of the Cape Town Convention at the time of its accession and, as a result, any remedies under the Cape Town Convention that do not require a court judgment are not recognised by the UAE. Accordingly, self-help remedies are not available and a court order must be obtained. Under the proceedings applicable in the UAE, the claimant that requires the repossession of an aircraft may file a court application for an attachment. Under such attachment procedure, the aircraft needs to be clearly identified. If the attachment procedure is initiated prior to the substantive proceedings for the recovery of the debt, it is mandatory that, within eight days of the granting of the attachment order, such substantive proceedings are initiated by the claimant. It is possible for the claimant to request that the attachment order is granted ex parte by the relevant court of the UAE. Following the obtainment of a judgment from the court, a public auction would be ordered and supervised by the court to sell the asset. The court has the power to order new public auctions if it considers that the offer of the higher bidder is not sufficient. The auction is published in UAE newspapers. All documents brought to the court shall be in Arabic and the following documents are required:

- original agreements (such as the lease agreement) applicable to the case;
- evidence of non-payment of the debt;
- evidence of any other default than with respect of the debt payment;
- evidence of title and certificate of registration in respect of the aircraft; and
- evidence of the authority of the owner's solicitor before the court.

The proceedings applicable in the UAE entail the payment of court fees, which depend on the value of the claim and have a maximum cap (except in cases filed before the Abu Dhabi court). According to Law No. 21 of 2015 regarding the new fees of the Dubai Court in Dubai, before the court of first instance and civil actions, the court fee represents 6 per cent of the claim, provided that the amount is not less than 500 UAE dirhams, and is subject to the following caps on the basis of tranche values of the claims:

- 20,000 UAE dirhams if the claim value is less than 500,000 UAE dirhams;
- 30,000 UAE dirhams if the claim value is between 500,000 UAE dirhams and 1 million UAE dirhams; and
- 40,000 UAE dirhams if the claim value is more than 1 million UAE dirhams.

If provisional orders, such as an attachment order, are sought, a further fee of 50 per cent of the initial filing fee is payable subject to a cap of 10,000 UAE dirhams. The length of the procedures depends, as in any other jurisdiction, on the nature and the complexity of the matter and, in the event of a case that does not raise any exceptional controversial matters, a proceeding before the courts of first instance usually takes around six months.

Within the UAE, the authority of the Dubai International Financial Centre (DIFC) court to perform functions of arbitration assistance is provided for by the DIFC Law No. 1 of 2008 and the Dubai Law No. 16 of 2011, and the arbitration sentences of the DIFC court are recognised by

the courts of the UAE without examination of the merits of the decision, subject to certain conditions (eg, the arbitral sentence does not contravene public order considerations).

Outside of the UAE, arbitration sentences should be recognised and enforceable in the UAE as it is a party to the New York Convention but only to the extent that such arbitral sentences have been rendered by a contracting state to the New York Convention. Other regional or bilateral treaties such as with certain countries of the Gulf Cooperation Council (GCC) may also facilitate the recognition of foreign judgments and arbitral sentences.

23 Enforcement of security

Outline the basic measures to enforce a security interest.

How may the owner lawfully impede the mortgagee's right to enforce?

In respect of the enforcement of a security interest and the repossession of an aircraft following an event of default, self-remedies are not available under UAE law and the procedure is the same as stated above in respect of repossession by an owner. Regarding the list of documents required before the courts, the secured creditor(s) shall provide an original or a certified copy of the security document and the underlying financing documents in addition to the evidence of the non-payment of the debt, the events of default, the evidence of title and the certificate of registration as well as the proof of the authority of the solicitor that represents the secured creditor before the court.

The only limitation to the strict requirement for a court order in the UAE may reside in the procedures for the enforcement of an IDERA as set out under the Civil Aviation Regulations. The Civil Aviation Regulations do not expressly require the intervention of a court and give effect to the protection mechanisms of the secured creditors under the Cape Town Convention and its Protocol. However, it should be noted that it is doubtful whether the GCAA would give effect to an IDERA in the presence of a serious contestation without requiring a court judgment. In the event of a repossession leading to the deregistration of the aircraft, the Civil Aviation Regulations provides that all fees and amounts due and payable to the GCAA shall be cleared prior to such deregistration. The provisions of article X of the Protocol to the Cape Town Convention, which are applicable in the UAE, provide for an expedite enforcement; however, as we are not aware of any significant precedent, it is not possible to give a detailed overview of a repossession scenario and the enforcement of an IDERA in the UAE.

As to insolvency proceedings under the domestic law of the UAE, the main provisions can be found in the Commercial Code, Federal Law No. 2 of 2015 and, more recently, the new Bankruptcy Law (Law No. 9 of 2016), which provide for a new protective composition procedure. We take the view that this procedure does not interfere with the rights of secured creditors to enforce their respective security with the permission of the court.

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

In the UAE, the liens and rights (including international interests under the Cape Town Convention) in favour of secured creditors have first priority as set out under the new Bankruptcy Law over, inter alia, costs in respect of any liquidation proceedings, unpaid salaries and wages of the employees of the debtor and amounts due to governmental bodies. UAE law does not provide for specific provisions in respect of the state's or government entities' right of confiscation, nationalisation or requisition of assets in particular circumstances, but the government of the UAE, under its constitutional rights and sovereign prerogatives, could decide to operate the requisition, nationalisation, confiscation or take other expropriation actions by way of a national decree in the event of exceptional circumstances such as in times of war.

A claim could be filed against a government-owned operator by the owner of an aircraft or a secured creditor but, in certain circumstances, a non-objection confirmation from the local competent government authority would need to be obtained.

Update and trends

The UAE has announced the introduction of a VAT from the beginning of January 2018. The government has been advised by the International Monetary Fund to set VAT at 5 per cent. Once introduced, it would make the UAE the first Gulf state to tax at the point of sale. The scope and conditions of the VAT have not yet been confirmed.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Generally, there are, at present, no stamp duty or VAT on the purchase of aircraft or withholding tax on lease rentals applicable in the UAE. Furthermore, there is no corporate tax payable in the UAE except from for oil and gas companies and subsidiaries of foreign banks. For all companies, a municipality fee is paid to each Emirate at the time of issuance or renewal of the company's trade licence. This municipality fee corresponds to 10 per cent of the annual amount of the rent of offices and warehouses and 5 per cent of the annual amount paid by a company to accommodate its employees.

Payments under aircraft leases, including rentals, is unlikely to attract any taxes in the UAE. In addition, no fees or charges should be payable in respect of the completion of a lease agreement or security agreement over an aircraft except as stated above in relation to fees payable to the GCAA as part of the International Registry's registration and the obtaining of an AEP code.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

There are no restrictions on international payments and exchange controls in effect in the UAE that would restrict the free remittance of proceeds abroad resulting from a sale or other operations. There is no consent to be provided in respect of the transfer of such proceeds and there is no central bank within the UAE.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

As a principle, article 714 of the Civil Code provides for the prohibition of interests and mirrors Sharia principles. However, the application of ordinary interests by the banks have been authorised by the UAE Federal Supreme Court in 1981 and, further, the interests and delayed payments interests have been expressly permitted by the Commercial Code, which prevails over the Civil Code in relation to commercial transactions where, by definition, one of the persons involved in a transaction is a 'trader'. Accordingly, it is commonly accepted that article 714 of the Civil Code does not apply to matters governed by the Commercial Code.

As to any limitations to the amount of interest, the Commercial Code gives effect to the contractual freedom and the parties are free to determine the interest rate payable in respect of a commercial loan or interest rates applicable to default payments. Under article 76 of the Commercial Code, if the agreement of the parties is silent in respect of the calculation of the interest rate, the interest rate shall be fixed in accordance with the rate prevailing in the market at the time of the transaction. In this case, the interest rate shall not exceed 12 per cent, until full settlement is made.

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

The UAE is a member of the GCC and a unified customs tariff applies throughout the GCC. A 5 per cent entry duty is payable on imports, and once paid, goods can be shipped anywhere within the GCC without incurring further customs charges. This entry duty is charged on the cost, insurance and freight value of the goods at the port of entry. However, aircraft are exempt from customs taxes applicable throughout the GCC by virtue of the GCC's Common External Tariff Schedule, which sets out those items that are not subject to customs duties.

There are no export restrictions and no export duties or tariffs in the UAE.

Insurance and reinsurance

29 Captive insurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

Pursuant to article 24(1) of the UAE Insurance Law (Federal Law No. 6 of 2007), insurance operations in the UAE may be carried out by any of the following entities that are licensed and registered with the Insurance Authority:

- a public stock company established in the UAE;
- a branch of a foreign insurance company subject to article 55; or
- an insurance agent.

Additionally, as provided under article 4 of Insurance Authority Resolution No. 42 of 2009, it is mandatory that insurance companies incorporated in the UAE have at least 75 per cent of their capital owned by UAE or GCC nationals or by juristic entities wholly owned by them.

Pursuant to article 26 of the UAE Insurance Law, property in existence inside the UAE or liabilities resulting thereof shall not be insured with insurance companies outside the UAE but an insurer may reinsure the property inside and outside of the UAE. There is no stated percentage that must be retained within the UAE in the case of reinsurance outside of the UAE.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Insurance and reinsurance policies are generally based on the London market wordings and cut-through clauses are relatively common.

Under the Civil Code, it is not possible for an insured or a third party to claim directly against a reinsurer. However, in certain specific circumstances, a UAE court may decide to allow a claimant to join the reinsurer to a claim issued against the insurer, including in circumstances where an insurance policy includes a cut-through clause.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

Under UAE law, there are no specific restrictions to assignments of insurance or reinsurance and these would be legally effective in respect of UAE insurer or reinsurers. However, reinsurance agreements must be disclosed by insurers that are subject to reporting obligations.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

Under the provisions of section 1 of the Civil Code (Hire in General), a lease (hire) confers to the lessee the right of use of the leased asset as from the date agreed in the contract and for a specific period in consideration of an ascertained rent. Article 763 of the Civil Code provides that the possession is therefore transferred to the lessee, which confers liability on the lessee.

However, it is further stated that the lessor is responsible for maintaining the full and quiet enjoyment of the leased asset by the lessee and that the lessee may cancel the lease and cease to be liable under the lease if its right of enjoyment is infringed, including in respect of any default from the lessor from repairing any defect in the leased asset. These provisions do not appear, prima facie, to be in line with the standard liability and risk allocation clauses customary in aircraft lease agreements regarding the liability of owners, lessees and financiers.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

The Civil Code gives an important place to the determination of the obligations of the parties under contractual arrangements that are listed in the first place under article 174, which provides for the sources of one's personal obligations other than by way of statutory laws or legal events. On this basis, the courts of the UAE may give effect to the typical contractual arrangements agreed between a lessor and a lessee under an aircraft lease agreement in the event of a conflict with the general provisions of the Civil Code.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

Pursuant to article 7(6) of the Civil Aviation Law, the aircraft's crew, passengers and third parties must be insured against ground injury as per the applicable rules. The level of third-party liability coverage is set out in the Safety Decision 14-2016, published by the UAE General Civil Aviation Authority on 4 December 2016. It is expressed under 10 categories in special drawing rights (SDRs) and pegged to the maximum take-off mass (MTOM) of the aircraft in question.

In relation to the level of insurance for passengers, baggage and cargo, the following limits apply:

- in respect of passengers, the minimum insurance coverage is 250,000 SDRs per passenger unless the aircraft in question is a non-commercial aircraft with an MTOM of 2,700kg or less, in which case the minimum insurance coverage is 100,000 SDRs per passenger;
- in respect of baggage, the minimum insurance coverage is 1,131 SDRs per passenger; and
- in respect of cargo, the minimum insurance coverage is 19 SDRs per kilogram.

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United States

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Overview

1 Conventions

To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

The United States is a party to the following major conventions affecting aviation finance and leasing:

- the 1944 Convention on International Civil Aviation (Chicago Convention), effective April 1947, providing that aircraft shall adopt the nationality of the state in which they are registered and cannot be registered in more than one state at any given time;
- the 1948 Convention on the International Recognition of Rights in Aircraft (Geneva Convention), effective 17 September 1953, providing for mutual recognition of rights in aircraft among contracting nations;
- the 2001 Convention on International Interests in Mobile Equipment (Convention) and the 2001 Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Protocol), effective 1 March 2006 (collectively, the Cape Town Convention) establishing a uniform set of rules regarding the creation, enforcement and registration of interests held by certain parties in mobile equipment, including aircraft certified to transport at least eight persons (including crew) or goods in excess of 2,750kg (CTC airframe), all engines of at least 550 horsepower or the equivalent (1,750 pounds of thrust for jet engines) (CTC engine), and all helicopters certified to transport at least five persons (including crew) or goods in excess of 450kg (CTC helicopter and together with the CTC airframe and the CTC engine, the Aircraft Objects); and
- the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) providing common legislative standards for the recognition of arbitration agreements, and court recognition and enforcement of foreign and non-domestic arbitral awards.

The United States is not a party to the 1933 Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft.

For the purposes of this chapter we will assume that the laws of the state of New York have been chosen as the governing law of the principal legal documents and that the aircraft and engines have been registered in a jurisdiction that either has or has not adopted the Cape Town Convention.

Where the Cape Town Convention does not apply either because the jurisdiction in question has not ratified it or because the equipment falls outside the definition of an Aircraft Object, the Geneva Convention will govern the rights in the airframe, engine or helicopter for those countries that have ratified it. Although the Geneva Convention successfully addresses the rules or priority over property rights in aircraft, it presents some perfection and enforcement issues requiring careful assessment of the laws of the jurisdiction where the aircraft is registered, as well as the laws of the jurisdiction where the aircraft is located at the time of delivery. The Geneva Convention is not discussed in detail in this chapter, but should be kept in mind in circumstances in which the Cape Town Convention does not apply.

For a list of contracting states to the Cape Town Convention see www.unidroit.org/status-2001capetown.

2 Domestic legislation

What is the principal domestic legislation applicable to aviation finance and leasing?

The legal framework applicable to the regulation of aviation finance and leasing transactions in the United States is a blend of state, federal and international law.

State law

Article 9 of the Uniform Commercial Code (UCC) governs transactions involving security interests in personal property such as aircraft, engines and helicopters. All 50 states have adopted a version of article 9 and these rules govern the validity and priority of security interests unless pre-empted by federal or international law (see below).

Federal law

Federal Aviation Act

State laws permitting undocumented or unrecorded transfers of interests in aircraft are typically pre-empted by the Federal Aviation Act. The Federal Aviation Act provides that the Federal Aviation Administration (FAA) shall maintain a system for the registration of aircraft and recording conveyances, leases and security interests. The FAA, to the exclusion of the states, regulates the registration of any device used or intended to be used for flight, airworthiness, safety and maintenance issues involving civil aviation, the issuance of operating certificates and licences for civil aviation and the recording of agreements and instruments conveying interests in aircraft registered with the FAA and certain aircraft engines, components and parts. Once a filing has been made with the FAA such filing acts as notice to third parties and thereby perfects an interest over the equipment.

Transportation Code

Title 49 of the US Code (Transportation Code) also pre-empts state law, including the UCC, as to certain matters relevant to aviation finance and leasing transactions.

Title 11 of the United States Code (Bankruptcy Code)

Title 11 of the US Bankruptcy Code sets forth the rules and procedures governing bankruptcy in the United States. Although there are a number of statutory provisions protecting the rights and interests of financing parties, the most relevant is section 1110, which provides a special insolvency regime to govern a creditor's rights with respect to an aircraft, aircraft engine, propeller or spare part that is subject to a security interest granted by, leased to or conditionally sold to an airline that holds an FAA operating certificate for aircraft capable of carrying 10 or more individuals or 6,000 pounds or more of cargo when the airline becomes subject to insolvency proceedings.

International law

The Cape Town Convention and the other aviation treaties to which the United States is a party (see question 1) pre-empt federal and state laws as to certain matters relevant to aviation finance and leasing transactions.

3 Governing law

Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

As a general rule, there are no such restrictions on choice-of-law clauses. The Cape Town Convention allows the parties to an aircraft conveyancing agreement to agree on the law to govern their contractual rights and duties whether or not a 'reasonable relationship' exists to that jurisdiction (thus pre-empting any such requirement under state law). With certain exceptions, the parties to a contract that is subject to the UCC are free to choose, subject to pre-emption by federal or international law, the governing law for their contractual relationship as long as the transaction bears a 'reasonable relationship' to the chosen jurisdiction; however, there are variations in choice-of-law rules from state to state. Therefore, it is important to examine the state law chosen to govern a transaction.

In the state of New York, New York General Obligations Law section 5-1401 allows the parties to a non-consumer contract, notwithstanding the general 'reasonable relationship' choice-of-law rule in the UCC, to choose New York law to govern their contractual relationship without regard to whether a reasonable relationship exists to the state of New York provided that the obligations arising out of the transaction governed by the contract are not less than US\$250,000. Most aircraft finance and leasing transactions would fall within this statute.

Where the Cape Town Convention does not apply, the United States would recognise and enforce a conveyance under an aircraft conveyancing agreement affecting the airframe if such aircraft conveyancing agreement:

- was constituted in accordance with the law of the country where the airframe is registered (the country of registry); and
- was regularly recorded in a public record in the country of registry.

In the case of an aircraft conveyancing agreement, the laws of the country of registry would need to be examined to determine:

- whether those laws would recognise the aircraft conveyancing agreement as a valid conveyancing agreement; and
- whether the aircraft conveyancing agreement is required to be recorded in a public record.

Title transfer

4 Transfer of aircraft

How is title in an aircraft transferred?

Title to an aircraft is transferred through a bill of sale or contract of sale or physical delivery, or both. Generally, the purchaser will expect to see evidence of chain of title in the form of 'back-to-birth' bills of sale so as to trace ownership of the aircraft back to the original equipment manufacturer. Title to goods cannot pass under a contract of sale prior to the time the goods are identified to the contract; that is, the goods must be existing and identifiable at the time title is transferred.

For US-registered aircraft and engines, the practice is to complete a bill of sale in the FAA's prescribed form and file the bill of sale for recording with the FAA Registry and also to obtain a warranty bill of sale that is not recorded with the FAA.

Under the Cape Town Convention, in order to have priority over subsequently registered interests or unregistered interests in the equipment, an interest transferred pursuant to a contract of sale must be registered with the International Registry.

5 Transfer document requirements

What are the formalities for creating an enforceable transfer document for an aircraft?

The formalities required for an aircraft transfer agreement are determined by applicable state law (see question 4). As between a seller and a buyer, while the applicable statute of frauds may require a written contract for the transaction, a written transfer document is not necessary, and title could transfer by physical delivery alone; however, in the case of an FAA-registered aircraft, a conveyancing instrument must be filed for recording with the FAA Registry in order for the transfer to be

effective against third parties without notice. Further, where the Cape Town Convention applies, the interest transferred must be registered with the International Registry in order to have priority against subsequently registered interests and unregistered interests.

In the United States, the formalities for recording an instrument affecting title to, or any interest in, an aircraft are set out in Part 49 of the Federal Aviation Regulations (14 CFR Part 49), which can be found at www.ecfr.gov.

Typically, a separate warranty bill of sale under state law is issued with an AC Form 8050-2 filed with the FAA. The formal requirements for filing a conveyance instrument for an aircraft with the FAA are:

- the instrument must be in a form acceptable to the FAA, which has provided AC Form 8050-2 as an acceptable conveyancing form (www.faa.gov/documentLibrary/media/form/ac8050-2.pdf);
- the instrument must describe the aircraft by make and model, manufacturer's serial number and FAA registration number or other identifying details;
- the instrument must be an original document, or a duplicate original document, or if neither is available, a true copy of an original document. The signatures on the instrument must be ink originals. No notarisation or other authentication of the signatures is required unless requested by applicable state law. Most states, including New York, do not require authentication;
- the instrument must be accompanied by a filing fee of US\$5 for each aircraft listed. No fee is charged for recording a bill of sale that accompanies an application for aircraft registration and the proper registration fee under Part 47.17 of the Federal Aviation Regulations;
- if the seller is not shown as owner on the FAA records, the instrument must be accompanied by bills of sale or similar documents showing the chain of title; and
- if the conveyance is made by a person or entity doing business under a trade name, or by an agent, corporation, partnership, co-owner or unincorporated association, there are additional formal requirements to evidence the authority of the signer.

Registration of aircraft ownership and lease interests

6 Aircraft registry

Identify and describe the aircraft registry.

The FAA maintains a registry for civil aircraft in Oklahoma City, Oklahoma (the FAA Registry). The FAA Registry is an owner registry, and an aircraft may be registered only in the name of the owner, which must be:

- a US citizen;
- a US-resident alien;
- a US corporation that does not qualify as a US citizen, but only if the aircraft is based in and primarily used in the US; or
- the US government or a state or territory or possession of the United States.

To qualify as a US citizen, the owner must be:

- an individual citizen of the United States;
- a partnership each of whose partners is an individual citizen of the United States; or
- a US corporation or association of which the president and at least two-thirds of the board of directors and other managing officers are US citizens, which is under the actual control of US citizens, and in which at least 75 per cent of the voting interest is owned or controlled by US citizens.

The FAA has also permitted other ownership structures, including limited liability companies (LLCs) (which are treated as associations) and owner trusts, provided that the ownership entity qualifies as a US citizen or US resident alien. In the case of owner trusts, the trustee must qualify as a US citizen or US resident alien and either:

- beneficiaries who qualify as US citizens must hold at least 75 per cent of the power and authority to influence, direct or remove the trustee; or
- the trustee must have the power and authority in respect of the ownership and operation of the aircraft to take actions that in its discretion are necessary to protect the interests of the United States, without interference from the beneficiaries, in which case the beneficiaries need not qualify as US citizens (a non-citizen trust).

In connection with the registration of an aircraft in the name of an owner trustee, the trust agreement and each document affecting a relationship under the trust agreement (such as an operating agreement with the beneficiary) must be submitted along with the application for registration of the aircraft and the proper fee.

There is no separate engine registry in the United States.

7 Registrability of ownership of aircraft and lease interests

Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

An ownership interest in an aircraft can and must be registered with the FAA. The interest of a lessee under a true lease cannot be registered with the FAA. A true lease is a lease of the aircraft from a lessor to the lessee, where the lessor is considered the aircraft owner for FAA, tax and accounting purposes. If the lease does not qualify as a true lease and, instead, is treated as a conditional sale agreement or a security interest, the lessee may be characterised as the owner.

See question 6 as to FAA aircraft ownership restrictions.

The owners', operators' and lessees' interests in aircraft engines cannot be registered with the FAA.

8 Registration of ownership interests

Summarise the process to register an ownership interest.

In order to register an aircraft in the name of the owner with the FAA, the following must be filed with the FAA Registry:

- an aircraft registration application using AC Form 8050-1, signed in ink. In the case of a corporate owner, the application must be signed by an officer or by an authorised person who presents a certified copy of an authorisation from any officer or manager. In the case of a partnership, the application must be signed by a general partner with the names of all general partners listed. In the case of an LLC, the application must include a statement of Support of Registration demonstrating the US citizenship status of the LLC. It is best practice to submit the application in advance to the Aeronautical Counsel at the FAA for an opinion as to the eligibility of an aircraft owned by an LLC for registration because proving LLC citizenship can be an uncertain process;
- evidence of the ownership of the aircraft by the applicant, which can take various forms:
 - if the aircraft has not previously been registered in the United States or any other country, the applicant must submit a bill of sale using Form 8050-2 signed by the seller, or an equivalent conveyancing instrument or other evidence of ownership authorised by the Federal Aviation Regulations;
 - if the aircraft was most recently registered with the FAA and was purchased from the last registered owner, the applicant must submit a bill of sale using AC Form 8050-2 signed by the seller, or an equivalent conveyance instrument or other evidence of ownership authorised by the Federal Aviation Regulations;
 - if the aircraft was most recently registered with the FAA but was not purchased from the last registered owner, the applicant must produce evidence of ownership, such as the chain of title from the last registered owner with the FAA, satisfactory to the FAA; and
 - if the aircraft was registered in a foreign country, the applicant must submit the following:
 - evidence that the foreign registration has ended (normally evidenced by notice from the foreign registry to the FAA);
 - a bill of sale using Form 8050-2 signed by the foreign seller; or
 - other evidence satisfactory to the FAA that the applicant owns the aircraft; as well as the following:
 - if the foreign country has not ratified the Geneva Convention or the Cape Town Convention, evidence that the foreign registration has ended or is invalid;
 - if the foreign country has ratified the Geneva Convention but not the Cape Town Convention, evidence that the

foreign registration has ended or is invalid, and that each recorded interest in the aircraft has been discharged or that each holder of such an interest has consented to the transfer; or

- if the foreign country has ratified the Cape Town Convention, evidence that the foreign registration has ended or is invalid and that all recorded interests ranking in priority have been discharged or the holders of such interests have consented to the deregistration and export of the aircraft;
- certification as to the US citizenship or US residency status of the owner, along with any required evidence to establish that status; and
- the fee for a Certificate of Registration of an aircraft – US\$5.

Pursuant to the UCC, title to an engine installed on an aircraft would not automatically vest in the owner of the aircraft upon its installation on the aircraft as long as the identity of the engine is not lost.

9 Title and third parties

What is the effect of registration of an ownership interest as to proof of title and third parties?

The registration of title to the aircraft and the issuance of a Certificate of Registration constitutes prima facie evidence of ownership of the aircraft, but it is not conclusive evidence of ownership of an aircraft in a proceeding in which ownership is an issue.

The Transportation Code provides that any conveyance, lease or instrument executed for security purposes that may be recorded with the FAA, affecting an aircraft or an engine, must be filed for recording with the FAA in order to be valid against third parties without notice.

Under the Cape Town Convention, in order to have priority against subsequently registered interests or unregistered interests, it is necessary to register an interest in an Aircraft Object with the International Registry. The International Registry is an electronic, web-based system that is located in Dublin, Ireland, and is operated by the Registrar, Aviareto Limited. The International Registry provides a mechanism to determine the priority of registrations made against specific equipment. For Cape Town Convention purposes an interest will be valid if it relates to an Aircraft Object and is an international interest; namely, it is (i) granted by a chargor under a security agreement; (ii) vested in a person who is a conditional seller under a title reservation agreement; or (iii) vested in a person who is a lessor under a leasing agreement. Failure to register an international interest on the International Registry renders such interest junior to competing registered interests and a purchaser would take title subject to all interests on record with the International Registry.

10 Registration of lease interests

Summarise the process to register a lease interest.

There is no registration of the interest of a lessee under a lease of an aircraft or engine registered with the FAA; however, a lease involving an aircraft or engine registered with the FAA can be filed for recording with the FAA Registry, and it must be filed for recording with the FAA in order to be valid against third parties without notice.

In order to file a lease of an aircraft or engine for recording with the FAA, a signed copy of the lease must be submitted to the FAA. The lease should contain chattel paper language which will assist with perfection under the UCC. Chattel paper is the tangible counterpart of a finance lease or operating lease designated the original for perfection purposes.

Under established procedures, the FAA will allow certain economic terms of the lease to be set forth in a schedule and for such schedule to be redacted from the lease filed with the FAA. There is no prescribed form of lease, but the lease should constitute a true lease under applicable state law (see question 7). The same signing procedures for the filing of a transfer document for an aircraft described in question 5 must be met for a lease. The filing fee is US\$5.

Where the Cape Town Convention applies, the international interest pursuant to a lease must be registered with the International Registry in order to have priority over subsequently registered interests or unregistered interests (see question 9).

11 Certificate of registration

What is the regime for certification of registered aviation interests in your jurisdiction?

Certificates of Registration for aircraft are issued by the FAA. A Certificate of Registration, in the form of AC Form 8050-03, identifies an aircraft by registration mark (commencing with the letter N), the manufacturer's serial number, the manufacturer and manufacturer's designation of the aircraft by model number, the name and address of the party to whom the Certificate of Registration is issued (the person who appears to be the owner based on the evidence of ownership submitted to the FAA), the date of issuance of such certificate and its expiry date. A Certificate of Registration issued from or after 1 October 2010 expires three years after the last day of the month in which it is issued, unless it is renewed during the six months preceding its expiry date. The Certificate of Registration does not list the owner, operator or any holder of any interest in the aircraft and expressly states that it is not a certificate of title. There is no separate engine certificate of registration.

12 Deregistration and export

Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

As the holder of the Certificate of Registration, the owner (not the operator under a lease) is the party who must initiate the deregistration of the aircraft for export, subject to the rights of the holder of the Irrevocable Deregistration and Export Request Authorisation (IDERA), or a creditor of the owner that has been granted the authority to deregister and export the aircraft.

IDERA is the name given to the power of attorney granted by an airline or lessor (in the case of an owner registry) to a financing party which enables that financing party to re-register a financed aircraft. If an IDERA has been issued, the operator should not be able to block the deregistration or export by the holder of the IDERA.

The holder of the Certificate of Registration or IDERA (if one has been filed for recordation with the FAA), must submit to the FAA Registry the following in order to deregister and export the aircraft:

- a written request for cancellation describing the aircraft by make, model, manufacturer's serial number and FAA registration mark and the country to which the aircraft is to be exported;
- evidence satisfactory to the FAA that all senior recorded interests have been discharged or the holders thereof have consented to the cancellation; and
- a written certification that all senior recorded interests have been discharged or the holders thereof have consented to the cancellation.

Upon cancellation of registration of an aircraft, the FAA Registry notifies the country to which the aircraft is to be exported of such cancellation.

13 Powers of attorney

What are the principal characteristics of deregistration and export powers of attorney?

As ratified by the United States, the Cape Town Convention allows for the issuance of an IDERA (as further described in question 12) by an owner of an aircraft in the form prescribed by the Cape Town Convention.

14 Cape Town Convention and IDERA

If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

IDERAs must be in the form attached to the Protocol to the Cape Town Convention. The IDERA must be signed by the owner that holds the Certificate of Registration. It need not be countersigned by the FAA, but must be filed for recording with the FAA Registry. The IDERA must be linked to a security instrument that is filed for recording with the FAA Registry. When seeking to deregister and export an aircraft using an IDERA, the holder must submit to the FAA Registry a search certificate from the International Registry and evidence of the discharge of any senior registered interest or the consent of the holders thereof to the cancellation.

Where the Cape Town Convention applies, the United States will recognise the holder of an IDERA as the sole person who may procure the deregistration and export of the aircraft. If an IDERA has been filed with the FAA with respect to an aircraft, the FAA Registry will honour a cancellation request only from the authorised party under the IDERA or its designee.

Security

15 Security document (mortgage) form and content

What is the typical form of a security document over the aircraft and what must it contain?

The typical form of aircraft security agreement is an English language agreement, normally called a security agreement, mortgage or trust indenture, which creates a security interest in the airframe or engines. In order to be valid against the grantor granting the security interest, the following requirements must be satisfied:

- the grantor must have rights in the collateral or power to transfer rights in the collateral to a secured party;
- value must be given; and
- one of the following conditions must be satisfied:
 - the debtor has authenticated the security agreement that provides a description of the collateral;
 - the collateral is not a certificated security and is in the possession of the secured party;
 - the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party; or
 - the collateral is deposit accounts, electronic chattel paper investment property, or letter of credit rights, and the secured party has control thereof.

An aircraft security agreement need not be in any specified form as long as it creates a valid security interest under applicable state law. It need not state a maximum secured amount. The economic terms of the transaction do not need to be set out in a public record.

16 Security documentary requirements and costs

What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

The documentary formalities will be determined by applicable state law. If the aircraft security agreement is governed by New York law, there are no documentary formalities besides it being duly signed by an authorised signatory. The only document expenses would be in connection with the filing or perfection of the security interest.

17 Security registration requirements

Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

An aircraft security agreement creating a security interest in an aircraft which is registered with the FAA need not be filed or registered to be valid between the grantor and the grantee, however, in order to be valid against third parties without notice, the aircraft security agreement must be filed for recording with the FAA. This is accomplished by submitting a signed original of the mortgage or security agreement to the FAA Registry, along with evidence of the authorisation of the signing party, and a filing fee of US\$5.

Where the Cape Town Convention applies, the FAA will issue an authorising code to allow for the registration of the international interest created by the aircraft security agreement with the International Registry in order to be valid against third parties without notice.

If (i) the Cape Town Convention does not apply, (ii) the country of registry has a central filing system and (iii) the aircraft security agreement is duly constituted under its laws and duly recorded under its filing system, the effect of such recording and rights under the aircraft security agreement under the laws of the country of registry will be recognised in the United States.

If the foreign jurisdiction does not provide for perfection by filing in a public filing system, perfection can be accomplished by filing a

UCC-1 financing statement with the Recorder of Deeds in the District of Columbia. The purpose of the UCC-1 is to perfect a security interest. The cost of filing a UCC-1 is the sum of the filing fee and the fee charged by the service company performing the filing (typically between US\$80 and \$150). UCC-1 financing statements expire on the fifth anniversary of their recordation date.

It is customary to also file a precautionary UCC-1 financing statement with the Recorder of Deeds in the jurisdiction in which the debtor is organised (and if not US-organised, in the District of Columbia) for the security interest granted by the grantor, even in respect to an aircraft registered with the FAA.

18 Registration of security

How is registration of a security interest certified?

After an aircraft security agreement is recorded with the FAA Registry, the FAA sends a Conveyance Recordation Notice, AC Form 8050-41, to the grantee, identifying the recorded conveyance document by its date, the parties, the FAA recording number, the date of recordation and a description of the aircraft. The Conveyance Recordation Notice does not state the rank or priority of the security interest created by the recorded conveyance document. Registered interests appear in a searchable database maintained by the FAA.

Where the Cape Town Convention applies, the registered interest will appear on the International Registry's searchable database upon the registration of an international interest in an aircraft with the International Registry.

19 Effect of registration of a security interest

What is the effect of registration as to third parties?

Pursuant to the Transportation Code, in order to be valid against third parties without actual notice, a security agreement against an aircraft must be filed for recording with the FAA. The validity and priority of the security interest in an aircraft created by an aircraft security agreement is determined by applicable state law and, in particular, article 9 of the UCC. Under article 9, and subject to certain exceptions, the general rule is that the priority of a security interest in personal property is determined by the order of filing of a UCC-1 financing statement (valid for five years from the date of recordation) or security agreement in the appropriate location, subject to certain exceptions (see question 24).

The Cape Town Convention pre-empts the Transportation Code and state law. Under the Cape Town Convention, a registered interest in an airframe or engine has priority over a subsequent registered interest or an unregistered interest, subject to certain exceptions (see question 24).

20 Security structure and alteration

How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

Security over aircraft in the United States is created by the grant of a security interest against the aircraft, pursuant to article 9 of the UCC as adopted in the applicable state. The document by which the security interest is granted is typically called a security agreement or mortgage. Security over an aircraft lease is created by the grant of an assignment of or security interest in the lease pursuant to article 9. A security interest may be granted to a trustee or agent on behalf of a group of beneficiaries, however, in such a case, the secured party would be the trustee or agent, not the beneficiaries.

If a security interest is granted to a lender to secure the loan from such lender and the lender transfers the loan to a new lender, the security agreement under which the security interest was granted would have to be transferred to the new lender. As among the grantor of the security interest, the original lender that was granted the security interest and the new lender, no filing or registration in respect to the assignment would be necessary in order for the assignment to be effective, although notice of the assignment would have to be given to the grantor, however, in order for the assignment to have priority over third parties, the assignment would need to be perfected.

Under the Transportation Code, in order to be effective against third parties without notice, an assignment of a security interest with

respect to an aircraft or engine would need to be filed for recordation with the FAA Registry. Under the Cape Town Convention, in order to be effective against third parties (whether or not they have notice), the assignment of associated rights in respect to the international interest would have to be registered with the International Registry.

21 Security over spare engines

What form does security over spare engines typically take and how does it operate?

The form of security over spare engines in the United States is the same as that for aircraft – a security interest granted pursuant to article 9 of the UCC, with the typical document being a security agreement or mortgage (see question 20). In the case of engines that are installed on an airframe, a single aircraft security agreement covering the airframe and its installed engines is most commonly used. In the case of spare engines that are not installed, an aircraft security agreement covering that engine or other uninstalled engines may be used.

Engines are typically treated separately from the airframe and, therefore, an aircraft security agreement covering both an airframe and its installed engines should separately identify the engines by manufacturer, model and serial number. An engine need not be installed on the airframe in order to be covered by an aircraft security agreement that appropriately identifies that engine. Subject to the terms of the aircraft security agreement, the engine should remain encumbered by the aircraft security agreement if it is removed from the airframe.

While an engine encumbered by an aircraft security agreement that is installed on another airframe should not cease to be encumbered under the UCC, this could depend upon applicable law of the jurisdiction of where the engine is located when it was installed on the other airframe.

Enforcement measures

22 Repossession following lease termination

Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

Subject to any limitations under the aircraft lease, upon termination of the aircraft lease following the expiry of its term or an event of default by the lessee, the lessor may exercise self-help measures to repossess an aircraft without judicial intervention if it can do so without breach of the peace. If the lessee physically opposes the lessor's repossession efforts, the lessor cannot forcibly take the aircraft and would likely have to seek assistance from a court through a judicial proceeding. The typical procedure for repossessing an aircraft in the United States is to pursue an action in state or federal court where the aircraft is situated under state law procedures. In the same proceeding, the lessor could seek to recover damages under the aircraft lease. In such court proceeding, the lessee could seek to resist the repossession of the aircraft by the lessor or countersue the lessor – actions that could interfere or delay the lessor's attempts to repossess.

If a bankruptcy proceeding is commenced by or against a US lessee, an automatic stay under the Bankruptcy Code would bar any efforts by the lessor to repossess the aircraft absent an order from the bankruptcy court except in respect to an aircraft lease involving certain aircraft that are subject to section 1110 of the Bankruptcy Code. Section 1110 gives special protection to financiers in circumstances in which an air carrier becomes a debtor under Chapter 11 of the Bankruptcy Code. Specifically, it provides that, with respect to aircraft, aircraft engines and certain other items subject to a security interest granted by, leased to or conditionally sold to a grantor that is an FAA-certified air carrier for aircraft capable of carrying 10 or more individuals or 6,000 pounds or more of cargo, the automatic stay is lifted unless the bankruptcy trustee cures all defaults and agrees to assume all obligations under the security agreement, lease or conditional sale contract within 60 days of the commencement of the bankruptcy proceeding (subject to extension by agreement of the parties).

Alternatively, a financier may opt to:

- obtain an ex-parte court order to seize the aircraft while it is on the ground but must be prepared to post a bond in case the financier is seizing the aircraft in error; or

- engage a 'repo team' to take control of the aircraft and fly it to a favourable jurisdiction, if such team can repossess without breaching the peace.

23 Enforcement of security

Outline the basic measures to enforce a security interest.

How may the owner lawfully impede the mortgagee's right to enforce?

Similar to the rights of a lessor under an aircraft lease described in question 22, upon a default under an aircraft security agreement covering an aircraft, pursuant to article 9 of the UCC, the grantee may exercise self-help measures to repossess the aircraft or render the aircraft unusable by the grantor without judicial intervention if it may do so without breach of the peace. If the grantor physically resists the grantor's repossession efforts, the grantor will likely not be able to proceed without breaching the peace, in which case the grantor would need to seek a court order to repossess the aircraft. The typical procedure for repossessing an aircraft in the United States is to pursue an action under state law procedures in state or federal court where the aircraft is situated. In the same proceeding, the lessor could seek a deficiency claim against the grantor if the value of the aircraft is less than the amount secured and other damages. In such a court proceeding, the lessee could seek to resist the repossession of the aircraft by the lessor or counter-sue the lessor – actions that could interfere with or delay the lessor's attempts to repossess.

If the grantee under an aircraft security agreement is able to repossess the aircraft, either through the exercise of self-help or pursuant to a court order, under the UCC, the grantee would be able to dispose of the aircraft either through a public or private sale in accordance with the UCC and the aircraft security agreement, with the net proceeds from the sale, after payment of expenses, being applied against the secured debt, with any surplus proceeds going to the grantor.

Similar to an aircraft lease agreement, if a bankruptcy proceeding is commenced by or against a US grantor of an aircraft agreement, the automatic stay under the Bankruptcy Code would bar any efforts by the grantee to repossess or dispose of the aircraft absent an order from the bankruptcy court, except in respect to an aircraft security agreement involving certain aircraft that are subject to section 1110 of the Bankruptcy Code (see question 22).

24 Priority liens and rights

Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

The following liens or rights could have priority over a security interest created under an aircraft security agreement:

- US federal tax liens, which are filed with the relevant state and cannot be filed with the FAA Registry or registered with the International Registry;
- possessory mechanics and warehouse liens to the extent provided under applicable state law;
- non-possessory mechanics liens to the extent provided under applicable state law, although these may be subordinate to any perfected security interest and may need to be filed for recordation with the FAA Registry;
- purchase money security interests (being a security interest in favour of a lender that is created in an asset at the time the buyer of that asset uses the lender's loan proceeds to make the purchase), which may be filed up to 20 days after the grantor receives possession and will take priority over any intervening security interests;
- buyers purchasing goods in the ordinary course from persons in the business of selling that type of goods; and
- airport and air navigation charges.

The US Customs Service may seize an aircraft for transporting drugs (except for airlines involved in common carriage).

The US government has the power to require all or any part of the US airline transportation system to be turned over to the government for its use during times of war. The US government would be obligated to provide compensation for any such taking under the US Constitution.

Taxes and payment restrictions

25 Taxes

What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Aviation finance and leasing transactions in the US give rise to a significant number of tax issues, and before entering into such a transaction the parties should thoroughly examine the US and foreign tax consequences and factor them into the structuring and pricing of the transaction. The following is a brief discussion of a few selected tax issues that are commonly addressed in the case of foreign corporation selling, financing or leasing an aircraft to a US resident.

Sales and use taxes

Upon the sale of an aircraft when physically located in a state, or the lease of an aircraft that will be based or used in a state, generally the state will require that the seller or lessor collect from the buyer or lessee and remit to the state's tax authorities a sales tax on the gross sale proceeds or use tax on the gross rentals under a lease when based or operated in such state. State sales taxes are typically around 8.5 per cent of gross sales proceeds. There are often exemptions available, including in many states an exemption for sales or leases of aircraft to air carriers for use in foreign or interstate commerce. Delivering an aircraft when it is located either over international airspace or in another state or jurisdiction that does not impose a sales tax or has an exemption can be an effective way to eliminate sales taxes, but not use taxes. The seller or lessor should require that the buyer or lessee deliver a tax exemption certificate to evidence the availability of any tax exemption. There are no federal sales or use taxes, although there are both federal and state income taxes that could be imposed with respect to income or gain from sale proceeds or rentals.

Federal withholding tax on aircraft lease rentals

Without an exemption or reduction under an international tax treaty or federal tax laws, gross rentals payable by a US lessee to a foreign lessor that is not engaged in the leasing business in the United States are generally subject to US federal withholding tax at the rate of 30 per cent, to the extent that the rentals are attributable to periods of time when the aircraft is located or operated within the United States. The United States is a party to numerous treaties with other countries that either exempt or reduce the withholding tax on gross rentals.

Federal corporation income tax on aircraft lease rentals

A foreign corporate lessor that is engaged in the leasing business through a permanent establishment in the United States is subject to US federal income tax at the graduated rate applicable to US domestic corporations. However, all or part of the lessor's leasing income may be exempt from US federal income taxation under an international treaty or a reciprocal exemption under the US federal income tax statute.

A foreign corporate lessor that is engaged in the leasing business in the United States that does not have a permanent establishment in the United States will be subject to a US federal gross transportation income tax at the rate of 4 per cent on one-half of its rental income for the period when the aircraft is operated between a place within the United States and a place outside the United States. However, all or part of the lessor's leasing income may be exempt from US federal income taxation under an international treaty or a reciprocal exemption under the US federal income tax statute.

State income tax on aircraft lease rentals

A foreign corporate lessor that carries on the business of leasing at a place of business within a state will be subject to income taxation by the state. A foreign corporate lessor that does not have a place of business within a state may nonetheless be subject to income taxation by the state if aircraft leased by the lessor are based or operated within the state.

Property taxes

Certain states and local taxing authorities impose a property tax on the owner of tangible property located within a state during all or a portion of a tax year. Such taxes are usually based on the value of the property.

Update and trends

According to Boeing's Current Aircraft Finance Market Outlook 2017, it is anticipated that this year commercial banks will provide the greatest share of funding for the first time since 2014. The primary factor driving this latest trend is the rising share of deliveries to China, where bank debt is the most prevalent source of financing. Contributions from capital markets and cash are expected to remain steady throughout 2017 and non-US investor participation in enhanced equipment trust certificates is likely to continue to accelerate. This trend is not surprising given the momentum behind the Cape Town Convention and an expanding global investor base.

The number of commercial aircraft deliveries will also continue to build upon 2016 levels. This upward trend is expected to continue through the end of 2017 and, according to the IATA, airlines are expected to take delivery of some 1,700 new aircraft this year, around half of which will replace older and less fuel-efficient aircraft.

Federal withholding tax on interest payments

Absent an exemption or reduction under an international tax treaty, interest payments by a US resident to a foreign lender that is not effectively connected to a US business of the lender are generally subject to US federal withholding tax at the rate of 30 per cent. If the interest payments are effectively connected to a US business of the lender, the lender would be subject to US federal income tax at the graduated rate applicable to US domestic corporations. The United States is a party to numerous treaties with other countries that either exempt or reduce the withholding tax on gross rentals.

26 Exchange control

Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

The United States does not have restrictions on international payments or foreign exchange controls other than certain bank reporting requirements and certain restrictions on dealing with barred or listed countries, persons or entities.

27 Default interest

Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

Pursuant to state usury laws, there are limits on interest payments that may be charged on borrowed money. In New York, the maximum amount of interest that may be charged is 16 per cent, although certain exemptions may apply. Usury limits may not restrict the amount of interest that may be paid following a default on a loan or lease payment if they are not determined to be payments for borrowed money.

28 Customs, import and export

Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

The export of commercial aircraft from the United States, and sale or transfer of a US-origin aircraft outside the United States, are subject to US export laws. Most commercial aircraft are considered US origin aircraft.

Generally, the export of a US aircraft does not have any restricted parts or avionics and does not require a special licence, although certain transfers are prohibited including transfers:

- to certain embargoed countries;
- of aircraft incorporating certain military or technologically advanced components; and
- to certain persons or entities on barred lists, or those located in certain countries.

If an aircraft is being permanently exported from the United States, there is certain paperwork required in connection with the export.

Insurance and reinsurance

29 Captive insurance

Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

There are no captive insurance regimes applicable to commercial aircraft and insurance coverage in the United States; aviation insurance is normally placed through commercial aviation markets.

30 Cut-through clauses

Are cut-through clauses under the insurance and reinsurance documentation legally effective?

A cut-through clause (or endorsement) in an underlying primary insurance policy allows the insured to seek payment directly from the reinsurer in the case of insolvency or similar events affecting the primary insurer policy. The enforceability of cut-through clauses is determined by the governing law for both the primary insurance policy and the reinsurance policy. For the primary insurance policy, the main issue is whether, under the state law applicable to the primary insurer, the proceeds from reinsurance can be paid to the insured, rather than to the primary insurer or a conservator or administrator of the insolvent insurer. While results vary from state to state, many states, including New York and California, permit cut-through endorsements. Among the issues affecting the enforceability of a cut-through endorsement against the reinsurer is whether there needs to be privity between the reinsurer and the insured. Generally, such privity should not be required in the United States, however, the safest approach is to include a cut-through endorsement in the reinsurance policy and to have the insured named as an additional insured and loss payee under the reinsurance policy, so that the insured has a direct claim against the reinsurer.

31 Reinsurance

Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

With the exception of California and Louisiana, assignments of insurance policies (including reinsurance policies), other than healthcare insurance, are excluded from coverage under article 9 of the UCC. There is no uniformity from state to state regarding the process of obtaining priority in an assignment of aviation insurance or reinsurance over competing assignments. As a consequence, assignments of insurance and reinsurance policies are not customary for aviation finance and leasing transactions in the United States. The normal approach is for the financier or lessor to be named as an additional insured and loss payee under the insurance and reinsurance policies, and then include cut-through endorsements in the policies, rather than assignments.

32 Liability

Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

Liability for passenger injuries and death

If an accident or incident involving an aircraft registered with the FAA causes death, injury or damage to third parties, it is not clear under what circumstances an owner, lessor or secured party without any operational control or authority over the aircraft would be liable to such third parties. Pursuant to the Transportation Code, 49 USC, section 44112(b), a lessor, owner or secured party of an aircraft registered with the FAA can be liable for personal injury, death, or property loss or damage on land or water caused by a civil aircraft, engine or propeller only if it was in the actual control of the lessor, owner or secured party. The majority of courts that have considered the federal exclusion from liability under section 44112(b) have construed it broadly to pre-empt state statutes and common law claims that impose liabilities on owners or lessors not in actual possession or control. However, there is a minority view that would narrowly construe the exclusion from liability and allow certain claims under state law. In *Vreeland v Ferrer*, 28 So. 3d 906 (2010), the Florida Supreme Court construed section 44112 narrowly to exclude liability for loss or damage only to

people or property on the ground and, therefore, looked to applicable state law as to whether liability should be imposed on a passive owner.

If the majority view is followed, section 44112(b) would pre-empt state law and owners and lessors not in actual control of an aircraft would avoid liability for accidents or incidents involving FAA-registered aircraft. However, if the minority view represented by the *Vreeland* decision is followed, then the liability of an owner, lessor or financier could depend upon the applicable law in the jurisdiction where a lawsuit is filed. There is no uniform standard under state laws for imposing liability for aircraft accidents upon an owner, lessor or secured party that does not have operation control over the aircraft. Some states impose strict liability upon an owner. Other states impose liability if an owner, lessor or secured party is found to be negligent either on its own or vicariously through its selection of an operator. Although there is very little authority actually holding an owner, lessor or financier liable for aircraft accidents or incidents, the standard practice is to obtain broad indemnification from the operator covering all operational risks, and to require broad liability insurance covering those risks.

33 Strict liability

Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

This is a matter of state law, possibly where the accident occurs, or where the defendant is located, or where the legal proceeding is held.

34 Third-party liability insurance

Are there minimum requirements for the amount of third-party liability cover that must be in place?

Generally, air carriers are required to have US\$300,000 coverage for any one person in any one occurrence and a total of US\$20 million per involved aircraft for each occurrence, except that for aircraft of not more than 60 seats or 18,000 pounds maximum payload capacity, carriers need maintain coverage of only US\$2 million per involved aircraft for each occurrence.

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Construction	Intellectual Property & Antitrust	Securities Finance
Copyright	Investment Treaty Arbitration	Securities Litigation
Corporate Governance	Islamic Finance & Markets	Shareholder Activism & Engagement
Corporate Immigration	Labour & Employment	Ship Finance
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