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Practical cross-border insights into aviation finance law

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1 General and Contractual

1.1 What are the typical structures available for financing the purchase of an aircraft?

- Typically, aircraft financing structures involving Cayman Islands entities make use of special-purpose vehicles (“SPVs”), which are set up specifically to participate in aircraft financing and/or leasing transactions. The Cayman Islands’ reputation for being politically stable, tax neutral and having a well-established legal system based on English common law principles has led to the jurisdiction’s preferred status for the incorporation/establishment of such SPVs.
- The SPV will typically hold title to the aircraft. SPVs are highly flexible corporate structures that can be utilised either as a single-aircraft owning company or to hold multiple aircraft in a single entity. The acquisition of the aircraft by the SPV will most commonly be financed by way of a loan from a third-party lender, which will in turn take security over the aircraft in the form of an aircraft mortgage and other security documentation. Other typical features include the granting of security over the issued share capital of the SPV itself.
- Although these traditional debt financing arrangements remain the norm, other alternative forms of financing are becoming increasingly common and, in recent years, there has been a marked increase in the number of aircraft financing transactions accessing the capital markets (e.g. through bond issuances, asset-backed securitisations, use of the Enhanced Equipment Trust Certificates (“EETC”) regime, or through direct equity injection from private equity firms).
- There are two basic structures that are commonly used for the financing and leasing of aircraft through a Cayman Islands SPV. These are: (1) an off-balance sheet, insolvency-remote or “orphan trust” structure; or (2) an on-balance sheet direct ownership structure.
- In a typical Cayman Islands orphan trust structure: (1) the issued share capital of the SPV will be held by an offshore trust company as share trustee on charitable or purpose trusts; and (2) the directors of the SPV will be provided by a third-party corporate administrator (which is often

the same entity as the share trustee) pursuant to the terms of an administration agreement entered into between the SPV, the administrator and the airline or leasing company.

- The SPV will enter into the financing and leasing documents necessary to enable it to acquire the aircraft, and lease it to the lessee in the transaction (which is typically an airline).

1.2 What are the key advantages/disadvantages and main issues arising in relation to these financing structures?

A key advantage of the off-balance sheet structure discussed in question 1.1 above is that ownership of the aircraft does not vest with the airline but with the SPV, which holds title in an off-balance sheet capacity. This ensures that the SPV will not be consolidated on the balance sheet of the lender, airline or the share trustee. From the lender’s perspective, the fact that the bankruptcy of the airline will not have an impact on the assets provides lenders a greater degree of control and certainty over the underlying assets that constitute the basis of their security. Additionally, as the SPV is entirely independent from both the lender and the airline, in a default scenario the lender is likely to experience a greater degree of cooperation from and (through the covenants in the financing documents) control over the SPV.

In a typical on-balance sheet structure, either the airline or operator, or the financier, will establish the SPV directly and will hold the shares in the SPV themselves (rather than these being held on the terms of a charitable or purpose trust). The directors are also commonly employees or nominees of the shareholder (although it is not uncommon for one or more of the directors to be provided by a third-party corporate administrator to act as an “independent director”). The choice of structure will depend on a number of factors including the jurisdiction where the airline is incorporated, the jurisdiction in which the aircraft will be operated, the desired tax treatment of the overall structure and the needs of the financiers. The on-balance sheet structure lacks bankruptcy-remote characteristics and there will be implications up and down the chain upon a default or winding up of one or other of the parties. There is also not the same protection from consolidation as that offered in an orphan trust structure as the assets of the SPV are likely to be treated as being consolidated onto the balance sheet of the parent shareholder.

1.3 What types of leasing are possible under the laws of your jurisdiction? What are their essential characteristics?

The two forms of leases generally used in asset finance would apply and are commonly entered into by Cayman Islands SPVs. These are: finance leases and operating leases. There is no detailed statutory definition of a finance lease or operating lease under Cayman Islands law. The key difference between a finance lease and operating lease is that with a finance lease, the lessee may have the right to acquire the aircraft at the end of the lease for a nominal sum; however, this will not be the case for an operating lease.

1.4 Are there any proposals for reform in the area of aviation finance?

We are not aware of any proposals exclusively related to aviation finance reforms under consideration; however, aviation finance in the Cayman Islands will be considerably affected by a number of broader factors/developments. These factors/developments would include the consequences of the COVID-19 pandemic, the impact of restrictions pursuant to United Nations, and United Kingdom sanctions extended to the Cayman Islands, by Orders in Council and sanctions imposed by Cayman Islands authorities, under Cayman Islands legislation, the exit of the United Kingdom from the European Union and certain reforms of Cayman Islands insolvency laws.

1.5 Is it possible according to the laws in your jurisdiction to enter into non-binding or partially binding pre-contractual agreements (e.g. 'letters of intent') that will NOT take effect as fully enforceable agreements?

The following are the requirements for a contract to be binding under Cayman Islands law: (i) agreement between the parties; (ii) consideration; and (iii) intention to create legal relations. As such, if parties wish to enter into non-binding or partially binding pre-contractual agreements, then it is important to state in clear language that the parties are not concluding a contract or creating legal relations by virtue of the document. We would note that it would be unusual for such pre-contractual agreements to be governed by Cayman Islands law.

1.6 Is there a doctrine of 'good faith' in your jurisdiction that applies to all pre-contractual agreement, financing and leasing transaction documents, and the conduct of parties connected to them?

Cayman Islands law does not imply a duty of good faith into pre-contractual negotiations. Pre-contractual negotiations are not normally legally binding on the parties and in general, either party may terminate negotiations whenever they choose. Each party to negotiations is entitled to pursue their own interest, so long as they avoid making misrepresentations.

However, there is a general principle that a person who has received information in confidence cannot take unfair advantage of it. So, Cayman Islands law may imply a duty of confidentiality in relation to any transaction documents received during negotiations.

2 Taxation and Related Matters

2.1 Which government authority in your jurisdiction has primary responsibility for the accounting for and regulation of revenue control and taxes?

This is not applicable – the Cayman Islands currently has no form of income, corporate or capital gains tax and no estate duty, inheritance tax or gift tax.

2.2 What are typically the taxes in your jurisdiction that may arise in relation to a sale, a lease or a financing of an aircraft or an engine?

This is not applicable. Please see question 2.1 above.

2.3 Is the provision of a current tax-residency certificate by a payee sufficient for a lessee or a borrower potentially subject to withholding taxes in your jurisdiction on rental or interest payments to avail itself of treaty access and the mitigation of tax liability?

This is not applicable. Please see question 2.1 above.

2.4 Has the advent of BEPS (the Base Erosion and Profit Shifting initiative of the OECD) had any effect as regards structures in aviation finance and leasing or their interpretation?

This is not applicable. Please see question 2.1 above.

2.5 What are the typical thresholds in your jurisdiction for which a permanent establishment may be triggered under the terms of any relevant double-tax treaty or similar?

This is not applicable. Please see question 2.1 above.

2.6 Is the authority at question 2.1 likely to establish a 'look-through' right or similar as regards a lender or a lessor that is a special-purpose vehicle involved for the purpose of tax treaty access?

This is not applicable. Please see question 2.1 above.

2.7 Will the import of an aircraft into your jurisdiction and/or the sale or leasing of the aircraft give rise to any VAT, sales or use taxes or any customs import or excise duties?

Generally, Cayman Islands customs duties will only apply if an aircraft is imported into the Cayman Islands on a permanent basis. If importation is on a temporary basis (which is the most usual basis that, for example, private jets enter the Cayman Islands), it is possible to obtain a waiver of such stamp duty upon application to the applicable Government authority.

2.8 Are there any documentary taxes (for example, stamp duty payable on the execution of documents)?

Stamp duty will be payable in accordance with the Stamp Duty

Act (As Revised) if the original documents are brought into the Cayman Islands in fully executed “wet ink” form or executed in the Cayman Islands.

3 Registration and Deregistration

3.1 Which government authority in your jurisdiction has primary responsibility for the regulation of aviation and the registration of aircraft? Is it an owner registry or an operator registry? If the aircraft register is an operator register, is it possible to record the details of an owner or lessor and any financier with an aircraft mortgage?

The Civil Aviation Authority of the Cayman Islands (the “CAACI”) is the body responsible in the Cayman Islands for ensuring that civil aviation in the Cayman Islands conforms to the standards of the International Civil Aviation Organization (“ICAO”).

The CAACI’s functions include, but are not limited to, the following:

- a) the regulatory oversight of the aviation industry throughout the Cayman Islands;
- b) the certification and licensing of aerodromes, heliports and air transportation services;
- c) registration of aircraft, including maintenance of the Cayman Islands Aircraft Register (the “Aircraft Register”) and the issuance, renewal, cancellation, revocation and variation of certificates of airworthiness of aircraft;
- d) the validation of crew and maintenance personnel licences; and
- e) the safety oversight of Cayman Islands Air Operator Certificate (“AOC”) holders.

The Aircraft Register is an operator register and not a register of legal ownership.

Please see question 4.3 below in relation to the registration of mortgages over aircraft with the CAACI.

3.2 What is the effect of registration of the aircraft? Does registration on your national aircraft register confer proof of ownership of the aircraft and/or engine?

The Aircraft Register does not constitute a register of title. The registration of title to an aircraft on the Aircraft Register constitutes *prima facie* evidence of ownership of the aircraft, but such evidence is not conclusive.

3.3 Can foreign-owned aircraft be registered on your national aircraft register and are there limits or restrictions on the age of aircraft that may be registered or operated?

To register an aircraft with the CAACI, the owner, or, if the aircraft is leased, the charterer by demise of the aircraft, must be a “qualified person” as defined in the Air Navigation (Overseas Territories) Order (As Revised).

3.4 Can aircraft leases be registered? If so, in what circumstances? Must the lease be in a particular form if it is to be valid and enforceable (for example, must it be in a particular language or be notarised, legalised or apostilled)?

Leases are not required to be registered with the CAACI in

relation to Cayman Islands registered aircraft and there is no specific facility for public registration of leases; however, depending on the nature of the registration (e.g. where registration is made by the charterer by demise in its name), the lease should be submitted to the CAACI as a part of the application process. There are no formalities or particular form required for the lease (e.g. notarisation, legalisation or apostille) and it is not required that the original lease be submitted (a copy will be acceptable), although the CAACI will require that the lease be accompanied by an English translation if it is not in the English language.

3.5 How is deregistration affected and what steps can a lessor take to deregister the aircraft on termination of the lease?

The procedure to effect a deregistration of an aircraft is set out below (please note that the references to “registered owner” below mean either the owner or the charterer by demise, depending on in whose name the aircraft is registered with the CAACI):

- The current registered owner advises the CAACI of the intention to deregister the aircraft.
- The aircraft account must be settled with the CAACI and the applicable deregistration fee paid to the CAACI.
- In the event that a Certificate of Airworthiness for export is required by the importing state, a CAACI surveyor is required to inspect the aircraft before the certificate can be issued. In order to initiate this process, a Certificate of Airworthiness Request Form is to be completed and submitted to the CAACI.
- The original Certificate of Registration is to be submitted to the CAACI, with Section III on the reverse signed by the registered owner of the aircraft or person responsible for the aircraft, accompanied by the related notarised power of attorney.
- An aircraft that has a registered mortgage on the Mortgage Register (as defined below) maintained by the CAACI will require a letter from the mortgagee as to how the mortgage is to be handled. If the mortgage is to be discharged, this must be effected. If not, the CAACI will require a certified/notarised confirmation letter from the mortgagee that the mortgage will not be discharged but remains in force and that a notation will remain on the CAACI Mortgage Register. (The CAACI’s obligation under the Regulations (as defined below) is to notify the mortgagee that the registered owner/mortgagor intends to deregister the aircraft, change particulars of the registration or change ownership. Although it is possible for the mortgage to remain registered with the CAACI, if the aircraft is no longer registered with the CAACI, this obligation would fall away as the CAACI no longer maintains particulars on the aircraft to give notification of any changes.)
- The CAACI will advise the new State of Registry of the aircraft being deregistered from the CAACI Register as instructed by the owner or person responsible.
- The CAACI will ensure that the RVSM and Mode S authorisations are deregistered from the relevant agencies. It is the responsibility of the aircraft owner or the owner’s agent to advise the UK rescue coordination centre of changes to the information on file for the 406 MHz ELT.

In a default scenario, the above deregistration procedure applies save that the following will also be required:

- a notarised original deregistration power of attorney (in favour of the person seeking to instruct the CAACI);

- proof of default under the lease giving rise to this right and details thereof;
- proof to the CAACI of the right to deregister in an event of default (i.e. reference to the relevant section of the agreement); and
- confirmation that the adversely affected party is seeking to enforce its rights under the agreement; an affidavit by the adversely affected party indicating that the original Certificate of Registration cannot be obtained as a contentious enforcement (assuming that this is the case); and a request for deregistration of the aircraft – indicating the new State of Registry (or, if it is a compliant enforcement and the Certificate of Registration can be obtained, then the original Certificate of Registration signed on the reverse by the current registered owner, accepting enforcement due to default).

4 Security

4.1 Is it possible to create a mortgage over an aircraft or engine in your jurisdiction? If so, what are the types of aircraft mortgage and engine mortgage available and what formalities are required in order to perfect it?

Aircraft mortgages may be governed by the law agreed by the contracting parties, including Cayman Islands law. If the contracting parties agree that it will be governed by foreign law, the Cayman Islands courts will uphold contractual terms to that effect unless the selection of the governing law was made in bad faith, illegal or contrary to the public policy of the Cayman Islands, or would not be regarded as a valid and binding selection or be upheld by the courts of the foreign jurisdiction selected.

A mortgage in relation to an aircraft registered in the Cayman Islands may be registered in the Mortgage Register to secure the benefit of priority.

The Cape Town Convention (referenced below) came into force in the Cayman Islands on 1 November 2015 pursuant to the International Interests in Mobile Equipment (Cape Town Convention) Act (As Revised) (the “**Cape Town Act**”). At present, under Cayman Islands law, there exists a dual system for perfection and priority of security interests over Cayman Islands registered aircraft for entities that qualify as follows:

- i) where there is a registerable international interest under the Cape Town Convention (as defined in the Cape Town Act), any such international interest in respect of an aircraft may be recorded on the international registration facilities established under the Cape Town Convention (the “**IR**”). Registration on the IR is permitted for aircraft that qualify under the Cape Town Convention. Cape Town registrations and filings on the IR are made in the usual way. Where an international interest has been registered against an aircraft that is registered with the CAACI in accordance with the Cape Town Convention, priority of a mortgage over that aircraft will be determined solely by the filings on the IR. No additional registrations are required with the CAACI in relation to a mortgage over such aircraft; or
- ii) if the Cape Town Convention does not apply, then the priority of a registered mortgage against Cayman Islands registered aircraft will be determined in accordance with registration on the Mortgage Register pursuant to the Mortgaging of Aircraft Regulations (As Revised) (the “**Regulations**”). The Regulations, among other things, offer a system for obtaining priority for a security interest, perfecting the security interest and protection from deregistration of an aircraft without the registered mortgagee’s

consent. Registration on the Mortgage Register constitutes express notice to all persons of all facts appearing thereon.

4.2 Can spare parts, including future parts, be subject to the aircraft mortgage or engine mortgage (as the case may be)? If not, are there any other forms of security that can be taken over spare parts?

Spare engines and other parts, including such parts as may in the future become attached to the aircraft, can be made subject to an aircraft mortgage. They may also be registered as part of an aircraft pursuant to the provisions of the Regulations though they cannot be registered separately. A mortgage of spare parts that takes effect as a floating charge is, however, not registrable. Practical and legal difficulties can occur when the spare parts are, or become, attached to other aircraft in accordance with pooling agreements or if they become encumbered in other jurisdictions. The mortgage will usually provide that:

- spare parts may only be utilised on other aircraft if the operators of such aircraft know of, and accept, the mortgagee’s interest (notice of the mortgagee’s interest is usually given to such parties by means of the attachment of a plate to the part stipulating that it is mortgaged to the mortgagee);
- all parts removed from the aircraft will remain subject to the mortgage until replaced with other parts that are capable of being mortgaged. The latter, when attached, will immediately become subject to the terms of the mortgage;
- such parts as may subsequently become attached to the aircraft will be unencumbered and shall be of the same or equivalent type, value, condition and (where relevant) with the same time and modification status as any parts they may replace; and
- the mortgage will indemnify the mortgagee in respect of any loss sustained by reason of the fact that spare parts might be, or become, subject to any adverse interest of a third party whether such parts are presently attached to the aircraft or will become attached to it in the future.

Future parts

Mortgages often provide that such engines and parts as may, in the future, become attached to the aircraft will also automatically become mortgaged in favour of the mortgagee. At common law, such a disposition would be ineffective if the goods were not presently owned by the mortgagee (whether because they were owned by a third party or because they had not come into existence at such a date) unless there was some “new act” that had the effect of transferring those parts (when acquired by the mortgagor) to the mortgagee. However, in accordance with the principles of equity, no “new act” is required to transfer the beneficial ownership in the goods to the mortgagee if value is given and the goods are sufficiently identifiable when acquired by the mortgagor. Given this rather uncertain situation, the mortgage usually makes provision for indemnification by the mortgagor, should any future parts as may become attached to the aircraft be subject to any adverse interest of a third party. Such indemnification, in practice, is usually of little financial value since, if the recourse is being had to the security, it is generally because the mortgagor has insufficient other assets. Although no provision is made in the Regulations for the registration of future parts (including engines), in practice, the CAACI will permit mortgages that include a term covering future parts to be registered.

4.3 Is there a register of mortgages or rights over aircraft and/or engine?

Yes. The Regulations provide for the creation of the Mortgage Register (the “**Mortgage Register**”) to be kept by the Director of Civil Aviation. Any mortgage of an aircraft registered on the Aircraft Register may be registered in the Mortgage Register. No separate register is maintained by the CAACI for the registration of ownership rights in engines.

4.4 What other forms of security can be taken over an aircraft and/or engine and can these other forms be registered?

The principal security agreement over an aircraft that is sometimes (but not necessarily) governed by Cayman Islands law is an aircraft mortgage. However, Cayman Islands SPVs routinely enter into various forms of security agreements in the context of aircraft financing and leasing transactions, including English or New York law-governed aircraft mortgages, security assignments, account charges and pledges.

4.5 What claims and rights would take priority in your jurisdiction over a registered mortgage?

Pursuant to Regulation 15(1) of the Regulations, subject to the following provisions of Regulation 15, a mortgage of an aircraft entered in the Mortgage Register shall have priority over any other mortgage of or charge on that aircraft, other than another mortgage entered in the Mortgage Register, but mortgages made before 9 October 1979, whether entered in the Mortgage Register or not, shall, up to and including 9 January 1980, have the same priority as they would have had if the Regulations had not been made. In addition, pursuant to Regulation 15(2), where two or more mortgages of an aircraft are entered in the Mortgage Register, those mortgages shall as between themselves have priority according to the times at which they were respectively entered in the Mortgage Register, but:

- a) mortgages of an aircraft made before 9 October 1979, which are entered in the Mortgage Register before 9 January 1980, shall have priority over any mortgages of that aircraft made on or after 1 October 1979, and shall as between themselves have the same priority as they would have had if the Regulations had not been made;
- b) without prejudice to subparagraph a), where a priority notice has been entered in the Mortgage Register and the contemplated mortgage referred to therein is made and entered in the Mortgage Register within 14 days thereafter, that mortgage shall be deemed to have priority from the time when the priority notice was registered; and
- c) the priority of a mortgage of an aircraft made on or after the date of commencement of the Cape Town Act in respect of which mortgage an international interest exists, shall, with respect to any other security interest in that aircraft granted on or after that date in respect of which security interest an international interest exists, be equivalent to the priority of the international interests corresponding to such mortgage and such security interest in each case as determined pursuant to the rules set out in Article 29 of the Cape Town Convention (as defined in such law).

There is also a system of prior registration. A notice of intention to apply for registration of a mortgage may be entered in the Mortgage Register (a priority notice). On such an entry being

made and the mortgage being registered within 14 working days thereafter, the mortgagee will be deemed to have priority from the date of registration of the priority notice. These provisions as to priority will take effect regardless of any express, implied or constructive notice the mortgagee may otherwise have.

4.6 What other forms of security can be granted over an aircraft and/or engine lease?

Please see the response to question 4.4 above.

5 Enforcement and Repossession

5.1 What are the circumstances in which a mortgagee or owner can take possession of the aircraft and/or sell the aircraft? What requirements must the mortgagee or owner comply with?

A secured creditor’s right of enforcement with respect to the secured property and the steps that must be complied with will be set out in the relevant agreement between the mortgagee and the debtor. Generally speaking, these provisions will provide that, if the debtor defaults on its payment obligations, a secured creditor will be permitted (subject to any liens and other statutory detention or retention rights of third parties) to take the following actions with respect to the secured real property: (i) take possession and exercise its power of sale with respect to the real property; or (ii) appoint a receiver to realise the real property. While these rights may not be governed by Cayman Islands law, they should be recognised in the Cayman Islands and, as a matter of Cayman Islands law, there is no requirement for a receiver to be appointed by the court. These are essentially self-help remedies and they will be governed exclusively by the terms of the document and the common law. In the unlikely event that the security documentation does not contain a right to appoint receivers (or the right is disputed or in doubt), the secured creditor may apply to the court for the appointment of a receiver.

In the context of a liquidation of the underlying debtor, the secured creditor may permit the liquidator to sell the property on its behalf.

In addition, remedies may be available under Article 8 of the Cape Town Convention. These include taking possession of an aircraft without the need for a court order, selling or leasing the aircraft and collecting and receiving any income or profits arising from the management or use of that aircraft.

On an event of default by a lessee under a lease, the lessor will generally re-take possession of the aircraft in accordance with the terms of the lease. Again, the lease is unlikely to be governed by Cayman Islands law, but these rights are likely to be recognised in the Cayman Islands. It may be possible to seek an injunction for the return of the aircraft to the lessor, although the Cayman Islands is unlikely to be the proper forum for such an application.

5.2 What is the procedure for repossession of the aircraft?

Repossession of the aircraft will be carried out in accordance with the terms of the relevant agreement between the mortgagee and the debtor and the underlying governing common law. Where rights under the Cape Town Convention are invoked, the procedure will be governed by that Convention.

As set out above, any litigation concerning the repossession of the aircraft is unlikely to be a Cayman Islands law-governed question or take place in the Cayman Islands.

5.3 Will local courts recognise a choice of foreign law in an aircraft mortgage? Are there any mandatory local rules that apply, despite a choice of foreign law?

As a matter of general conflicts of law rules, the Cayman Islands courts will recognise a choice of foreign law in an aircraft mortgage, provided that: (i) such choice has been made in good faith and would be regarded as a valid and binding selection that will be upheld by the courts of jurisdiction whose law has been selected; and (ii) it is not contrary to the public policy of the Cayman Islands.

5.4 Will local courts recognise and enforce a foreign court judgment in favour of a mortgagee or lessor? Are any interim relief measures available?

Although there is no statutory enforcement in the Cayman Islands of judgments obtained in the relevant jurisdiction, a judgment obtained in such jurisdiction will be recognised and enforced in the courts of the Cayman Islands at common law, without any re-examination of the merits of the underlying dispute, by an action commenced on the foreign judgment debt in the Grand Court of the Cayman Islands, provided such judgment:

- is given by a foreign court of competent jurisdiction;
- imposes on the judgment debtor a liability to pay a liquidated sum for which the judgment has been given;
- is final;
- is not in respect of taxes, a fine or a penalty; and
- was not obtained in a manner and is not of a kind the enforcement of which is contrary to natural justice or the public policy of the Cayman Islands.

The Grand Court may recognise and enforce other types of foreign judgments applying common law rules (for example in personal non-monetary judgments).

A mortgagee or lessor could also apply to the Grand Court for an order giving leave to register a foreign court judgment under the Foreign Judgment Reciprocal Enforcement Act (As Revised) as if it were an order of the Grand Court. However, currently the Foreign Judgment Reciprocal Enforcement Act (As Revised) only applies to judgments of certain Australian courts.

As regards foreign arbitral awards, the mortgagee or lessor may apply to the Grand Court for an order recognising the award under the Foreign Arbitral Awards Enforcement Act (As Revised), which largely implements the terms of the New York Convention.

Although remedies will vary depending on the nature of the dispute, generally the following interim relief may be available:

- an injunction relating to the aircraft and other aviation assets (for example, an order for detention of the aircraft or a freezing injunction preventing the disposition of the aircraft); and
- interim relief available under the Cape Town Convention.

5.5 Are powers of attorney from a local airline in favour of a lessor or mortgagee likely to be effective to allow the lessor or mortgagee to deregister the aircraft? Can such powers be irrevocable, be governed by a foreign law and/or do they need to be in any particular form for local recognition?

Powers of attorney from a local airline in favour of a lessor or mortgagee will be effective to allow the lessor or mortgagee to deregister the aircraft if the terms of the power of attorney

permit the lessor or mortgagee to do so and the power of attorney is valid and enforceable pursuant to its governing law.

Provided that a power of attorney governed by a foreign law is valid and enforceable as a matter of its governing law, it would usually be recognised under Cayman Islands law.

If the power of attorney is governed by Cayman Islands law, it must be executed as a deed to be valid and can, in certain circumstances, be irrevocable.

5.6 If recovery of the aircraft is contested by the lessee and a court judgment is obtained in favour of the lessor, how long is it likely to take to gain possession of the aircraft?

It will depend on the circumstances; in particular, where the aircraft is being held and any logistical difficulties involved with repossessing the aircraft. Unless the aircraft is registered on the Aircraft Register, such proceedings are unlikely to take place in the Cayman Islands.

However, from a purely legal perspective, a Cayman Islands court judgment in favour of the lessor confirming that the lessor has the right to immediately take possession of the aircraft may usually be acted on immediately.

5.7 To what extent is there a risk from the perspective of an owner or financier that a lessee of aircraft or other aviation assets in your jurisdiction may acquire an economic interest in the aircraft merely by payment of rent and thereby potentially frustrate any rights to possession or legal ownership or security?

Typically, security documents and lease agreements over Cayman Islands registered aircraft are not governed by Cayman Islands law. As a result, the impact of any issues under the governing law of such documents should be taken into consideration. Cayman Islands law would usually recognise a foreign law security interest subject to the insolvency laws applicable to the grantor of the security interest, and such security interest will usually have priority over any claims by third parties (other than those preferred by law) provided it is a valid security interest under its governing law. An aircraft mortgage would usually include provisions that facilitate the lender's self-help remedy of repossession of the aircraft. In addition, where the security interest has been registered pursuant to the Cape Town Convention, a lender would be able to exercise remedies under the security documents and the Cape Town Convention, subject to the provisions therein (including any waiting period), to take possession of the aircraft and apply for its deregistration, exercise its power of sale or remove it from its location without a court order.

5.8 Are there any restrictions on the ability of the lessor to export the aircraft from your jurisdiction on termination of the leasing?

There are no particular restrictions in the Cayman Islands that would impede the ability of a lessor to export the aircraft (although, in practice, aircraft registered on the Cayman Aircraft Register are generally not physically located in the Cayman Islands).

5.9 Are exchange controls prevailing in your jurisdiction as regards payments in foreign currency? Will any consents be required for the remittance of the sale proceeds abroad?

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

5.10 If the lease is governed by English law and a judgment is obtained by the lessor in the English courts, can that judgment be automatically enforced in your jurisdiction or will the case have to be re-examined on its merits?

Please see response to question 5.4 above.

5.11 What is the applicable procedure for repossession of an aircraft under other forms of security interests?

The enforcement procedure will be determined by the provisions of the relevant security arrangement, which are unlikely to be Cayman Islands law governed. The Cayman Islands is a creditor-friendly jurisdiction that, generally, will respect and uphold the terms of contractual and security arrangements, provided they are valid and otherwise enforceable.

The right to detain (or potentially sell) an aircraft can also arise under the common law or legislation. See the response to question 9.1 below.

6 Conventions

6.1 Has your jurisdiction ratified any of the following: (a) The Chicago Convention of 1944 on International Civil Aviation (the Chicago Convention); (b) The 1948 Convention on the International Recognition of Rights in Aircraft (the Geneva Convention); (c) The 1933 Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft (the 1933 Rome Convention); and (d) The Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the Cape Town Convention) and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment?

- a) While the Cayman Islands is not signatory to the Chicago Convention, certain provisions thereof are reflected in the Air Navigation (Overseas Territories) Order (As Revised).
- b) The Cayman Islands is not signatory to the Geneva Convention and has not otherwise ratified it.
- c) The Cayman Islands has not ratified the 1933 Rome Convention.
- d) The Cape Town Convention came into force in the Cayman Islands on 1 November 2015 pursuant to the Cape Town Act.*

*The Cayman Islands is not itself a Contracting State within the meaning of the Cape Town Convention. Rather, it is a territorial unit of a Contracting State, i.e. the United Kingdom. Article 52(5) of the Cape Town Convention and Article XXIX(5) of the Protocol provide that a company that is a debtor (such as a lessee under a lease or the charger under a security agreement) and is incorporated in a territorial unit (i.e. the Cayman Islands) is considered to be situated in a Contracting State for the purposes of the Convention.

6.2 Has ratification of the Cape Town Convention caused any conflicts or issues with local laws?

We are not aware of any such conflicts/issues.

6.3 What is the legal position regarding non-consensual rights and interests under Article 39 of the Cape Town Convention?

For the purposes of Cape Town Convention Article 39(1), the Cayman Islands has, pursuant to the Cape Town Act, declared that:

- all categories of non-consensual rights or interests under the laws of the Cayman Islands, at the date of the relevant declaration (i.e. 1 November 2015) or created after that date, have priority over an interest in an object equivalent to that of the holder of a registered international interest, whether in or outside insolvency proceedings; and
- nothing in the Cape Town Convention shall affect the right of the Government of the Cayman Islands or any other provider of public services (whether an intergovernmental organisation or a private or public entity or otherwise) to arrest or detain an aircraft object under the laws of the Cayman Islands for payment of amounts owed to such entity, organisation or provider directly relating to those services in respect of that aircraft object or another aircraft object.

6.4 Has your jurisdiction adopted the remedies on insolvency provided under Article XI of the Protocol to the Cape Town Convention?

The United Kingdom made a declaration in respect of the Cayman Islands, pursuant to Article XXX(3) of the Protocol, applying Alternative A in its entirety to all types of insolvency proceedings, with a specified waiting period of 60 days for the purposes of Article XI(3) of Alternative A.

Alternative A provides that, upon the occurrence of an insolvency-related event, the insolvency practitioner or debtor shall either:

- a) give possession of the aircraft object to the creditor no later than (i) the end of the waiting period, or (ii) the date on which the creditor would be entitled to possession of the aircraft object if the Cape Town Convention did not apply; or
- b) cure all defaults (other than that constituted by the opening of insolvency proceedings) and agree to perform all future obligations under the relevant agreement, and retain possession of the aircraft.

If possession is obtained, the creditor may deregister and export the aircraft. The CAACI must make these remedies available to the creditor no later than five working days after the date on which the creditor notifies the CAACI that it is entitled to do so in accordance with the Cape Town Convention.

6.5 What is the procedure to file an irrevocable deregistration and export request authorisation under the Cape Town Convention (IDERA)?

The IDERA must be notarised and submitted to the CAACI with the applicable fee.

7 Liability for Damage and Environmental

7.1 Can the owner be strictly liable – liable without a requirement to prove fault or negligence – for any damage or loss caused by the aircraft assuming the owner is an innocent owner with no operational control of the aircraft?

The owner of an aircraft registered with the CAACI is subject to Section 40(2) of the Civil Aviation Act 1949 (as extended to the Cayman Islands by the Civil Aviation Act 1949 (Overseas Territories) Order 1969), which states that:

“Where material loss or damage is caused to any person or property on land or water 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 without proof of negligence or intention or other cause of action, as if the loss or damage had been caused by the wilful act, neglect, or default of the owner of the aircraft:

Provided that where material loss or damage is caused as aforesaid in circumstances in which:

- a) damages are recoverable in respect of the said loss or damage by virtue only of the foregoing provisions of this subsection; and*
- b) a legal liability is created in some person other than the owner to pay damages in respect of the said loss or damage; the owner shall be entitled to be indemnified by that other person against any claim in respect of the said loss or damage.”*

The normal exemption on which a passive owner relies is contained in Section 76(4) of the Civil Aviation Act 1982 (as extended to the Cayman Islands by the Civil Aviation Act 1982 (Overseas Territories) (No. 2) Order 2001), which states that:

“Where an aircraft has been bona fide demised, let or hired out for any period exceeding fourteen days to any other person 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, Section 40(2) of the Civil Aviation Act 1949 (as extended by the Civil Aviation Act 1949 (Overseas Territories) Order 1969 to any of the Territories specified in Schedule 2 to this Order) shall have effect as if for references to the owner of the aircraft there were substituted references to the person to whom the aircraft has been so demised, let or hired out.”

7.2 Does the EU Emissions Trading System (EU ETS), or ICAO’s Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), apply to aircraft and aircraft operators in your jurisdiction? Will charges levied according to the EU ETS, or its equivalent, give rise to any *in rem* rights in relevant aircraft that are part of the fleet of the operator concerned and, if so, will such rights rank in priority ahead of any mortgage interests properly registered in the relevant aircraft and/or engine?

The Cayman Islands is not a member of the EU, the EEA or EFTA; therefore, the EU ETS does not apply.

7.3 What liabilities (actual or potential) could an owner, lessor or financier of an aircraft incur in your jurisdiction because of a failure to comply with local environmental law and/or regulations on the part of an operator of aircraft leased or financed by it?

As detailed in question 7.1 above, strict liability would be imposed on the owner of the aircraft for loss or damage caused

to any person or property on land or water by a person in, or an article or person falling from, an aircraft while in flight, taking off or landing. However, where the aircraft has been *bona fide* demised, let or hired out for any period exceeding 14 days, this strict liability is transferred to the lessee. Thus, this provision will not, in practice, apply to any financiers, whether the financing is title-based or mortgage-based.

In the international context, it should be borne in mind that the conventions on liability generally provide protection to operators rather than financiers, or have received limited international support. Since the liability for an accident may be determined in the country in which the accident occurs, it is impossible to pre-determine in the abstract which country’s rules might apply.

Therefore, the risks of such liability should be covered in the transaction. Usually, the lease or mortgage will contain an extensive general indemnity to cover such risks (from whatever cause) and, in addition, the lessee/mortgagor will be required to effect third-party liability insurance for the benefit of the lessor/mortgagee.

8 Insolvency and Searches

8.1 Are there any public registers in your jurisdiction where a search can be carried out to determine whether an order or resolution for any bankruptcy, bankruptcy protection or similar insolvency proceedings has been registered in relation to an operator or lessee?

Yes, public searches of the Grand Court register of writs and originating processes will show whether a winding-up petition or a petition to appoint restructuring officers has been filed against the operator or lessee. Further, a petitioner for the winding up of the company or to appoint restructuring officers will usually be required to advertise the winding-up petition or petition to appoint restructuring officers in a newspaper circulating in the Cayman Islands and potentially more widely.

Once a winding-up order is made, the appointed liquidator is required to publish notice of the winding up in the *Cayman Islands Gazette* (an official publication of the Cayman Islands Government that is available to the public online) and any newspaper in which the winding-up petition was advertised.

Upon the appointment of a restructuring officer, the appointed restructuring officer is not required to publish notice of his or her appointment in any newspaper, however, the Grand Court will make an order setting out the manner in which the appointed restructuring officer must give notice to interested parties, including creditors and contributories of the company. This may require publication in newspapers or some other form of notice.

8.2 In the event that an operator or lessee were to become insolvent either on a balance sheet basis (assets less than liabilities) or is unable to pay debts as they fall due, would an operator or lessee be required to file for insolvency protection?

There is no statutory obligation for directors of an insolvent company to file for insolvency protection. However, the duty of directors of a Cayman Islands company to act in the best interests of the company requires the directors to take into account the interests of creditors where the directors know or should know that the company is or is likely to become insolvent. Therefore, the directors’ duties may require them to file for insolvency, but whether this is the case will always be highly fact-sensitive.

Under the Cayman Islands Companies Act (As Revised), the directors of a company incorporated from 31 August 2022 can file a winding-up petition or apply to appoint provisional liquidators on behalf of the company (unless such power is expressly removed or modified in the company's Articles of Association). For companies incorporated on or before 31 August 2022, the directors can file a winding-up petition on behalf of the company or apply to appoint provisional liquidators only if they have first obtained a resolution of shareholders (or without such resolution if the company's Articles of Association so permit). If a winding-up petition has been presented, it is also possible for the company to apply to the Grand Court for an order appointing provisional liquidators where the company is or is likely to become unable to pay its debts as and when they fall due.

Under the Cayman Islands Companies Act (As Revised), the directors can file a petition on behalf of the company for the appointment of a restructuring officer who, while the company's management will ordinarily be left in control of the company, will help facilitate a restructuring of the company's debts.

In addition to Cayman Islands companies, the Grand Court has jurisdiction to make winding-up orders or appoint restructuring officers in respect of a foreign incorporated company that either has property located in the Cayman Islands, is carrying on business in the Cayman Islands, or is registered as a foreign company under Part IX of the Companies Act (As Revised).

8.3 Do the available forms of insolvency protection in your jurisdiction involve the appointment of either an officer of the court or a specifically court-appointed official to take control of the operator or lessee (an 'Insolvency Official') while in insolvency protection?

Yes, official liquidators, provisional liquidators and restructuring officers will be appointed by the court and are officers of the court. To be eligible for appointment, they must be qualified insolvency practitioners that meet the independence criteria under the Cayman Islands Insolvency Practitioners Regulations 2018. Official liquidators, provisional liquidators and restructuring officers will have ongoing duties to the court while they are appointed, including obligations to report to the court on the status of the liquidation.

If appointed, provisional liquidators and restructuring officers may not necessarily have the power to take control of the operator of the lease. This will depend on the powers granted to the provisional liquidators or restructuring officers in the appointment order.

8.4 Does the commencement of insolvency protection involving the appointment of an Insolvency Official in your jurisdiction have the effect of prohibiting the owner from taking the following actions to enforce the lease after commencement of such protection: (a) applying any security deposit held by the owner against any unpaid amounts due under the lease; (b) accepting payment of rent or other lease payments from the lessee, a guarantor or a shareholder; (c) giving notice of default under the lease; (d) obtaining a judgment or arbitral award for unpaid lease payments; (e) giving notice to terminate the leasing of the aircraft and/or engine; or (f) exercising rights to repossess the aircraft and/or engine?

If the lessee enters official or provisional liquidation:

- a) the owner may apply any security deposit it holds against any unpaid amounts due under the lease – there is no stay on the enforcement of security interests;

- b) the owner may accept rent or other lease payments from the lessee or a guarantor of the lessee. However, shareholders of the lessee will not be liable for the debts of the lessee unless they have contractually agreed to do so by way of a guarantee or otherwise;
- c) the owner may give notice of default under the lease (but, see also the answer to d) below with respect to commencing proceedings against the lessee as a result of its default);
- d) once the lessee is in official or provisional liquidation, a statutory automatic stay on creditor claims against the lessee will apply. The statutory stay applies to claims brought in the Cayman Islands and does not purport to have extra-territorial effect; however, the statutory stay does not prevent a secured creditor from enforcing its security. Accordingly, the owner will be barred from commencing or continuing Cayman Islands court or arbitral proceedings against the lessee. While the owner may seek to commence or continue foreign court or arbitral proceedings against the lessee, the liquidators could take their own action to try to prevent that. For example, depending on all of the circumstances, the liquidators may decide to make an application to the foreign court seeking recognition of their appointment by the foreign court and a stay on enforcement of the foreign proceeding against the lessee. Another option the liquidators might explore is applying to the Grand Court for an anti-suit injunction, restraining the owner from continuing the foreign proceedings against the lessee in liquidation;
- e) the owner may give notice to terminate the leasing of the aircraft and/or engine (but, again, see also the answer to d) above with respect to commencing proceedings against the lessee as a result of the termination of the lease); and
- f) the owner may exercise rights to repossess the aircraft and/or engine if it is in exercise of a valid and enforceable security interest.

If a restructuring officer is appointed in respect of the lessee:

- a) the owner may apply any security deposit it holds against any unpaid amounts due under the lease – there is no stay on the enforcement of security interests;
- b) the owner may accept rent or other lease payments from the lessee or a guarantor of the lessee. However, shareholders of the lessee will not be liable for the debts of the lessee unless they have contractually agreed to do so by way of a guarantee or otherwise;
- c) the owner may give notice of default under the lease (but, see also the answer to d) below with respect to commencing proceedings against the lessee as a result of its default);
- d) upon the filing of the petition to appoint a restructuring officer, a statutory automatic stay on creditor claims against the lessee will apply. The statutory stay applies to claims brought in the Cayman Islands and also has extra-territorial effect (however, it is a question of law of the relevant foreign jurisdiction as to whether the stay will be recognised). Accordingly, the owner will be barred from commencing or continuing proceedings against the lessee. However, the statutory stay does not prevent a secured creditor from enforcing its security;
- e) the owner may give notice to terminate the leasing of the aircraft and/or engine (but, again, see also the answer to d) above with respect to commencing proceedings against the lessee as a result of the termination of the lease); and
- f) the owner may exercise rights to repossess the aircraft and/or engine if it is in exercise of a valid and enforceable security interest.

8.5 Can the commencement of insolvency proceedings have retrospective effect in relation to any such actions taken before commencement? If so, for what period can there be a look back?

There are various ways in which payments or dispositions made by a Cayman Islands entity prior to the commencement of its winding up may later be clawed back by that entity or its liquidator. Broadly, the principal bases of clawback under the statutory laws of the Cayman Islands are:

- voidable preferences made within the six months immediately preceding the commencement of the winding up; and
- fraudulent dispositions and dispositions at an undervalue (the clawback period is six years from the relevant disposition).

In addition, there are certain common law clawback actions that may be available:

- knowing receipt of funds paid in breach of trust or duty; and
- payments made based on a mistake or other claims in restitution.

8.6 Is there, either under law or as a matter of practice in your jurisdiction, a period of time within which the Insolvency Official will either 'adopt' the lease and pay rent and other lease payments as an expense of the insolvency or 'reject' the lease and permit the owner to enforce such rights as it may have under the lease? (a) If the lease is 'adopted', will the Insolvency Official also pay any unpaid lease payments due as at commencement of the insolvency protection? (b) If not or if the lease is 'rejected', would the owner's claim for any outstanding sums rank equally with other ordinary unsecured creditors of the lessee?

There is no formal process, similar to chapter 11, by which the liquidators, provisional liquidators or restructuring officers would "adopt" or "reject" the lease. However, even without a power to reject the contract, the liquidators, provisional liquidators or restructuring officers may choose not to make payments under the lease (although it should be noted that, where restructuring officers have been appointed, the power to make payments under contracts will usually still reside with the directors).

Where liquidation proceedings have been commenced, the owner would be required to submit a proof of debt to the liquidators in the approved form and with supporting evidence to substantiate its claim to any unpaid lease payments.

The liquidators would then adjudicate the proof of debt and either accept it, in which case the owner would rank equally with other ordinary unsecured creditors in the liquidation of the lessee, or reject it, in which case the owner would not be accepted as an ordinary unsecured creditor of the lessee. If the liquidators decide to reject the owner's proof of debt, the owner will have a right of appeal to the Grand Court against that decision. There is no prescribed period within which the liquidator is required to adjudicate proofs of debt, although usually the liquidators will adjudicate proofs of debt within a reasonable time after all proofs of debt are received.

Where a restructuring officer has been appointed, there is no formal claims process as the procedure is designed to facilitate a compromise or arrangement with its creditors.

8.7 Are there certain types of preferred creditors whose claims will rank above claims of the owner?

Yes. Assuming the owner only has an unsecured claim, fixed charge claims, liquidation expenses (where a restructuring officer has been appointed prior to a liquidator being appointed any costs and expenses of the restructuring officer proceedings), preferential claims (broadly, certain debts due to employees and certain taxes and fees due to the Cayman Islands Government) and claims under a floating charge are likely to rank above the claims of the owner.

8.8 If the aircraft is in the possession of a person other than the operator or lessee at the commencement of insolvency protection of the operator or lessee, for example, an independent maintenance facility, will such person be entitled, under the laws of your jurisdiction, to assert a lien arising under law or contract over the aircraft in respect of amounts then due and unpaid to such person by the operator or lessee?

If the third party with possession of the aircraft has the benefit of a valid and enforceable common law or contractual lien to the aircraft securing any unpaid amounts due and payable by the insolvent operator/lessee, it will generally be able to assert that lien and retain possession of the aircraft until the outstanding amount is paid and without regard to the liquidation of the operator/lessee.

9 Detention and Confiscation

9.1 Other than insolvency laws (see section 8), are there any laws that may have the effect of defeating the owner's right in the aircraft – for example, government requisition? Do the laws of your jurisdiction provide for any compensation in such circumstances?

Regulations made under the Emergency Powers Act (As Revised) can give powers to the Governor of the Cayman Islands to authorise the taking possession or acquisition of any property (including aircraft) and provide for compensation therefor.

9.2 Are there any rights in relation to third parties to detain or sell the aircraft pursuant to illegal activities, tax or any other laws if the operator or lessee fails to pay when due? If so, can the aircraft be forfeited and sold without the owner being made aware?

Under Cayman Islands law, persons are granted a right to sell (or detain) an aircraft for the following:

- Airport charges: aircraft can be detained and sold for non-payment of airport charges; default of payment creates a statutory lien (Airports Authority Act (As Revised) Section 34).
- Customs: where anything becomes liable to forfeiture under the Customs and Border Control Act (As Revised), any aircraft used for the carriage, handling, deposit or concealment of that thing shall also be liable to forfeiture. Forfeiture of an aircraft may also occur where it has been adapted to be used for or is used for the purposes of smuggling or concealing goods (Customs and Border Control Act (As Revised) Section 69(2)).

- Crimes: where a person is convicted of an offence, any aircraft in his or her possession or under his or her control that was used in connection with such an offence or intended to be used for that purpose may be forfeited to the Crown by order of the court (Misuse of Drugs Act (As Revised) Section 25(2)). Note also that the court has broad powers under the Proceeds of Crime Act (As Revised) to order the confiscation of property derived from the proceeds of criminal conduct. (Applications for compensation in these situations are dealt with thereunder.)
- War or national emergency: regulations made under the Emergency Powers Act (As Revised) can give powers to the Governor of the Cayman Islands to authorise the taking possession or acquisition of any property (Emergency Powers Act (As Revised) Section 5(2)(b)).
- Terrorism: the court can make a forfeiture order in accordance with Section 28 of the Terrorism Act (As Revised).



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