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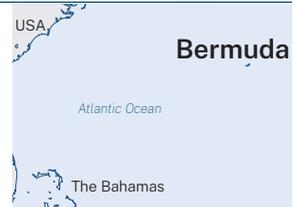
# Aviation: Finance & Leasing 2022

Bermuda: Law & Practice  
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## Law and Practice

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## 1. AIRCRAFT AND ENGINE PURCHASE AND SALE

### 1.1 Sales Agreements

#### 1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

There will not be any taxes or duties payable in Bermuda as a consequence of the execution of an aircraft or engine sale agreement unless the agreement is physically executed in Bermuda and one of the parties is a local Bermuda company in which case there would be stamp duty payable. If the aircraft is physically located in Bermuda when the sale agreement is executed and the purchaser is a Bermuda entity, customs duties may be payable as it could be seen as importation of the aircraft.

#### 1.1.2 Enforceability Against Domestic Parties

It is not necessary for a sale agreement to be translated, certified, notarised or legalised to be enforceable against a Bermuda company in Bermuda.

### 1.2 Transfer of Ownership

#### 1.2.1 Transferring Title

The norm is for a Bill of Sale to be entered into to transfer title to an aircraft or engine although usually there is also a purchase and sale agreement setting out the commercial terms of the sale. Whether such title transfer includes all installed parts (like an auxiliary power unit) would depend on the terms of the contract.

The sale of the ownership interest in an entity which owns an aircraft or engine would not necessarily be recognised as a sale of the aircraft or engine itself. The sale and purchase agreement relating to the entity would need to specifically cover transfer of title to the aircraft or engine to the purchaser.

#### 1.2.2 Sales Governed by English or New York Law

A bill of sale physically delivered in Bermuda, which is governed by either English or New York law in respect of the transfer of title to an aircraft, would be recognised, provided it is enforceable under its governing law.

There are no minimum substantive requirements that must be satisfied for a bill of sale to be recognised in Bermuda.

#### 1.2.3 Enforceability Against Domestic Parties

It is not necessary that a bill of sale be translated, certified, notarised or legalised to be enforceable against a domestic party.

#### 1.2.4 Registration, Filing and/or Consent From Government Entities

It is not necessary for a bill of sale to be registered or filed nor is it subject to any consent from any government entity.

There are no government applications or consents required as a prerequisite to the execution and delivery of a bill of sale in relation to an aircraft or engine registered in Bermuda.

#### 1.2.5 Taxes/Duties Payable Upon Execution of a Bill of Sale

There are no Bermuda taxes or duties payable in connection with executing and/or delivering a bill of sale or consummating the sale of the ownership interest in respect of an aircraft or engine while the aircraft or engine is located in Bermuda, over international waters or in transit to/from Bermuda. However, there may be stamp duty payable if the bill of sale is physically executed in Bermuda.

## **2. AIRCRAFT AND ENGINE LEASING**

### **2.1 Overview**

#### **2.1.1 Non-permissible Leases**

It is not customary in Bermuda for leases to concern only engines or parts. However, they are not prohibited.

#### **2.1.2 Application of Foreign Laws**

It is permissible for a lease involving either a domestic party or an asset situated in Bermuda to be governed by the laws of a jurisdiction other than Bermuda.

#### **2.1.3 Restrictions Concerning Payments in US Dollars**

There are no material restrictions imposed on domestic lessees making rent payments to foreign lessors in US dollars, other than foreign currency purchase tax.

#### **2.1.4 Exchange Controls**

Exchange control is prescribed under the Exchange Control Act 1972, and is regulated by the Bermuda Monetary Authority.

Bermuda exempted companies, exempted limited liability companies, permit companies, exempted partnerships and permit partnerships are normally designated non-resident for exchange control purposes and, as such, are able to conduct their day-to-day affairs free of exchange control formalities. This would include rent payments under a lease or any repatriation of proceeds.

#### **2.1.5 Taxes/Duties Payable for Physical Execution of a Lease**

If a Bermuda local company executes a lease physically in Bermuda, stamp duty will be payable. Provided none of the parties to the lease are local companies, the lease will not attract stamp

duty if brought into Bermuda. There is also no stamp duty in respect of electronic copies.

#### **2.1.6 Licensing/Qualification of Lessors**

It is not necessary for a lessor to be licensed or otherwise qualified in Bermuda to do business with a domestic lessee.

### **2.2 Lease Terms**

#### **2.2.1 Mandatory Terms for Leases Governed by English or New York Law**

Bermuda law does not require any mandatory terms be in a lease (or ancillary documents thereto) that is governed by either English or New York law that would not typically already be included. However, it should be noted that aircraft registered on the Bermuda Register of Aircraft cannot be operated for hire or reward, or for the carrying of passengers or cargo without certain certifications from the Bermuda Civil Aviation Authority (BCAA).

#### **2.2.2 Tax and Withholding Gross-Up Provisions**

Assuming any tax or other withholding gross-up provisions in the lease are enforceable under the governing law of the lease (and do not contravene the laws of any jurisdiction where the aircraft is operated), it would be expected that they would be recognised and enforceable in Bermuda.

#### **2.2.3 Parts Installed or Replaced After a Lease's Execution**

A lease typically cover parts that are installed or replaced on an aircraft or engine after its execution. The terms of the lease should provide for replacements of similar parts or engines provided they are of an equal or greater value.

#### **2.2.4 Risk of Title Annexation**

There is no Bermuda legislation or case law specifically addressing the risk of title annexa-

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tion in respect of aircraft engines installed on an airframe. However, the BCAA does maintain a separate register of engine mortgages as it is possible to identify engines separately from the aircraft with identification plates often being attached. In addition, as the Cape Town Convention has been extended to Bermuda, it is likely that the Bermuda courts would follow the same treatment of the principle of accession for aircraft engines as under the Cape Town Convention.

### 2.2.5 Recognition of the Concepts of Trust/Trustee

Bermuda law recognises the concepts of trusts and the role of an owner trustee under a lease. The 1987 UK Recognition of Trusts Act was extended to Bermuda in 1989 and it incorporates the major provisions of The Hague Convention into the law of the United Kingdom.

## 2.3 Lease Registration

### 2.3.1 Notation of Owner's/Lessor's Interests on Aircraft Register

Either the interests of the legal owner or of a lessee of an aircraft will be noted on the aircraft register. The registration of title to the aircraft constitutes prima facie evidence of ownership of the aircraft. However, such evidence is not conclusive.

Where an aircraft is registered by the owner of an aircraft, the Register of Aircraft in Bermuda will contain the name and address of every person who is entitled to a legal interest in the aircraft or a share in it. The beneficial interest is not noted. Where an aircraft is registered by the lessee pursuant to a charter by demise, the name and address of the charterer by demise will be noted on the Register.

### 2.3.2 Registration if the Owner Is Different From the Operator

Aircraft can be registered in Bermuda either by the owner of the aircraft or by the lessee if there is a valid charter by demise. If the aircraft operator is the owner or has a valid charter by demise in respect of the aircraft, it may act as registrant, *provided* it is a "qualified person" as this term is referenced in The Air Navigation (Overseas Territories) Order 2013 (as amended).

### 2.3.3 Aircraft/Engine-Specific Registers

There is no register of leases in Bermuda in respect of either aircraft or engines.

### 2.3.4 Registration of Leases With the Domestic Aircraft Registry

There is no register of aircraft leases in Bermuda. Leases in Bermuda are not subject to any consent from any government entity in Bermuda.

At the time of registering an aircraft in Bermuda in the name of the lessee acting as charterer by demise, the BCAA must be provided with a copy of the lease together with an affidavit that the lease is a true copy.

### 2.3.5 Requirements for a Lease to Be Valid and Registrable

A lease does not need to be in a specific form or translated, served, notarised or legalised to be filed with the BCAA.

### 2.3.6 Taxes/Duties Payable for Registering a Lease

As a lease is not capable of registration in Bermuda there are no associated taxes.

### 2.3.7 Registration of Aircraft in Alternative Countries

There are no aircraft habitually based in Bermuda that are registered in other countries.

### 2.3.8 Requirements for Documents Concerning Registration

The BCAA requires the following documents for registration:

- a certified copy of the certificate of incorporation together with a certificate of incumbency or equivalent for the purposes of confirming the authority of the person signing the registration application form; and
- a PDF copy of the dated and executed Bill of Sale (where the registrant is the legal owner of the aircraft) or of Bill of Sale and the Lease Agreement (where the registrant is a charterer by demise) together with an affidavit from someone who has seen the original of the document(s) and confirms the PDF supplied is a true copy.

## 2.4 Lessor's Liabilities

### 2.4.1 Tax Requirements for a Foreign Lessor

Bermuda does not have any domestic lessees operating aircraft in Bermuda. However, if it did, a foreign lessor would not be required to pay any income or capital gains or other taxes in Bermuda upon leasing an aircraft or engine to a domestic lessee.

### 2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

A foreign lessor would not be deemed to be resident, domiciled, carrying on business in Bermuda or subject to any taxes as a result of its being a party to or enforcer of the lease.

### 2.4.3 Engine Maintenance and Operations

It is possible for liabilities in respect of aircraft or engine maintenance and operations to be imposed on a foreign lessor under a lease as a result of its being a party to the lease.

Under Bermuda law, aircraft can be detained and, in some cases, forfeited under the criminal

law. In addition, an aircraft may be detained and sold for the non-payment of aircraft charges.

### 2.4.4 Damage or Loss Caused by an Asset

It is possible that a foreign aircraft or engine owner or lessor under a lease or financier financing the asset on lease could be liable under the doctrine of strict liability as a result of damage or a loss caused by the asset.

Schedule 2 of the Civil Aviation Act (Overseas Territories) Order 1969 (SI. 1969 No. 592) which applies to Bermuda extends Section 40 of the UK Civil Aviation Act 1949 (the "Aviation Act") to Bermuda. The Aviation Act has been repealed in the UK but remains law in Bermuda (by virtue of the combination of Section 108 of the UK Civil Aviation Act 1982 and Section 17(2)(b) of the UK Interpretation Act 1978).

Section 40(2) of the Act provides strict liability on the owner of an aircraft for damage caused to persons or property on land or water by an aircraft in flight. There is an indemnity available to the owner against the actual wrongdoer.

UK legislation contains an exception to this strict liability in the case of an owner where there has been a bona fide demise letting or hiring out of the aircraft for any period exceeding 14 days to any other person and no pilot, commander, navigator or operative member of the crew of the aircraft is in the employment of the owner (Section 49(2) of the Aviation Act, now Section 76(4) of the Civil Aviation Act 1982). This exception was extended to Bermuda via The Civil Aviation Act 1982 (Overseas Territories) (No. 2) Order 2001.

Our understanding is that, as a matter of English law, if the lessor/owner falls within this exception, the lessor/owner would not be exposed to such liability.

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## 2.4.5 Attachment by Creditors

Creditors of a domestic lessee have general common law rights in respect of an aircraft leased to a domestic lessee but owned by a different entity.

## 2.4.6 Priority of Third Parties' Rights

It is possible that third parties' rights could take priority over a lessor's rights under an aircraft or engine lease, whether or not such lease/lessor is registered in the national aircraft register.

An example of such exceptional circumstances would be where the aircraft was subject to a possessory lien in respect of work done on the aircraft or aircraft engine on the express or implied authority of any person lawfully entitled to possession of the aircraft or aircraft engine, or if the aircraft was subject to a right of detention in respect of the aircraft or aircraft engine, under any applicable statutory provision.

## 2.5 Insurance and Reinsurance

### 2.5.1 Requirement to Engage Domestic Insurance Companies

It is not mandatory that either all or part of the insurances of any Bermuda registered aircraft be placed with domestic insurance companies.

### 2.5.2 Mandatory Insurance Coverage Requirements

There are no specific insurance coverage requirements for Bermuda registered aircraft, as this is not prescribed in the Air Navigation (Overseas Territories) Order 2013. As such, we are unable to offer any guidance as to the specific provision. In practice the determination of insurance coverage is undertaken by the operator and is based on multiple considerations such as their base of operations and the places they fly to and from.

### 2.5.3 Placement of Insurances Outside of Jurisdiction

As there are no specific insurance requirements in Bermuda, it is permissible for reinsurance to be placed outside of Bermuda.

### 2.5.4 Enforceability of "Cut-Through" Clauses

We would expect that any "cut-through" clauses in the insurance/reinsurance documents would be enforceable provided they comply with its terms under the governing law.

### 2.5.5 Assignment of Insurance/Reinsurance

We would expect any assignments of insurances/reinsurances to be permitted provided they comply with its terms under the governing law.

## 2.6 Lease Enforcement

### 2.6.1 Restrictions on Lessors' Abilities

As a matter of Bermuda law, there are no restrictions on the ability of a lessor to terminate an aircraft lease provided that termination occurs in accordance with the terms set out in the lease.

There are no restrictions on a lessor's ability to re-export an aircraft from Bermuda on terminating a lease. An export permit is neither required nor issued in respect of an aircraft being exported from Bermuda. Sometimes, for various reasons, a lessor may require an Export Certificate of Airworthiness.

There is no restriction on the ability of a lessor to sell the aircraft following the termination of an aircraft lease.

### 2.6.2 Lessor Taking Possession of the Aircraft

Aircraft registered in Bermuda are rarely physically present in Bermuda, therefore the laws of where the aircraft is physically situated will need to be considered in order for a lessor to take physical possession of it.

We would expect the lease to contain express terms giving the lessor the right to take possession of the aircraft following an event of default by the lessee pursuant to the terms of the lease.

Under Bermuda law (which follows English common law), the lessor can exercise its contractual right of possession by self-help without a court order provided that peaceful methods are used.

If the lessor chooses to pursue the judicial procedure for possession, they would not be able to take possession before judgment unless there is a proven probability of damages arising in relation to the aircraft in addition to the event of default under the lease. The lessor, after acknowledgment of service of originating process, would need to seek to obtain summary judgement.

### 2.6.3 Specific Courts for Aviation Disputes

The Supreme Court of Bermuda is the first instance court in Bermuda with unlimited jurisdiction and, as such, is competent to hear aviation disputes. There have not been any reported cases of aviation disputes in Bermuda.

### 2.6.4 Summary Judgment or Other Relief

Summary Judgment can be obtained in Bermuda in relation to the lease, for money awards and also for an Order for Possession in circumstances where there exists no genuine defence to the claim. The requirements of Summary Judgment are that the defendant enters a Memorandum of Appearance and that the application is supported by an affidavit setting out the case and attesting to there being no defence to the claim.

The rules of the Supreme Court of Bermuda provide that a plaintiff who is based outside of Bermuda may be required to post security for costs. The amount of the security would vary depending on the circumstances of the case.

### 2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

Pursuant to the provisions of The Judgments (Reciprocal Enforcement) Act 1958, a final and conclusive judgment in the superior courts of Australia, Bahamas, Barbados, Dominica, Gibraltar, Grenada, Guyana, Jamaica, Leeward Islands, Nigeria, St. Lucia, St. Vincent and the United Kingdom against a Bermuda company under which a sum of money is payable (not being in respect of multiple damages, or a fine, penalty, tax or other charge of similar nature) would, on registration be enforceable in the Supreme Court of Bermuda against a Bermuda company without the necessity of any retrial of the issues which are the subject of such judgment or any re-examination of the underlying claims.

However, where such foreign judgment is expressed in a currency other than Bermuda dollars the registration will involve the conversion of the judgment debt into Bermuda dollars on the basis of the exchange rate prevailing at the date of the judgment as is equivalent to the judgment sum payable.

The courts of Bermuda would recognise as a valid judgment, a final and conclusive judgment in personam obtained in any court other than the foreign courts listed above against a Bermuda company based upon documents under which a sum of money is payable (other than a sum of money payable in respect of multiple damages, taxes or other charges of a like nature or in respect of a fine or other penalty) and would give a judgment based thereon provided that:

- the courts had proper jurisdiction over the parties subject to such judgment;
- the courts did not contravene the rules of natural justice of Bermuda;
- the judgment was not obtained by fraud;

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- the enforcement of the judgment would not be contrary to the public policy of Bermuda;
- no new admissible evidence relevant to the action is submitted prior to the rendering of the judgment by the courts of Bermuda; and
- there is due compliance with the correct procedures under the laws of Bermuda.

The present policy of the Bermuda Monetary Authority is to give consent for the Bermuda dollar award made by the Supreme Court of Bermuda to be paid in the original judgment currency.

## 2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

Final judgments for a sum of money will normally be registered in Bermuda under the Judgments (Reciprocal Enforcement) Act 1958, without re-examination of the merits. If there is no treaty between Bermuda and the corresponding country for the reciprocal enforcement of judgments, it would be necessary to launch a writ action in Bermuda suing on the debt obtained in the foregoing judgment to obtain summary judgment in Bermuda in respect of the writ action. *Res Judicata*s and/or issue estoppels arising from the foreign law judgment would normally prevent the re-examination of the merits in Bermuda.

## 2.6.7 Judgments in Foreign Currencies

Foreign judgments are generally recognised and enforceable in Bermuda subject to certain exceptions. The process for recognition and enforcement will vary depending on the jurisdiction in which the judgment was obtained.

Bermuda Courts are empowered to give judgment in any currency.

## 2.6.8 Limitations on Lessors' Actions Following Termination

Whether there are any limitations on a lessor's ability to recover default interest (or the compounding thereof) or to charge additional rent

following termination of the lease for default, including where the lessee fails to return the aircraft, would be determined in accordance with the terms of the lease and its governing law.

## 2.6.9 Lessor's Requirement to Pay Taxes/Fees

A lessor under an aircraft lease would not be required to pay taxes or fees in Bermuda in connection with the enforcement of a lease in Bermuda.

## 2.6.10 Mandatory Notice Periods

A lessor would be expected to comply with mandatory notice periods in respect of an aircraft lease, whether operated in Bermuda or leased domestically.

## 2.6.11 Lessees' Entitlement to Claim Immunity

A lessee is not entitled to claim sovereign or other immunity from a suit. This cannot be waived.

## 2.6.12 Enforcement of Foreign Arbitral Decisions

Pursuant to the Bermuda International Conciliation and Arbitration Act 1993 (which incorporates the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards), an award granted pursuant to arbitration proceedings in a jurisdiction other than Bermuda and conducted in accordance with the laws of such jurisdiction against a Bermuda company based upon the documents being considered by the Bermuda courts would be enforceable in Bermuda, either by action or by leave of the Supreme Court or a judge thereof, in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in the terms of the award. Enforcement of an award may be refused if the person against whom it is invoked proves any of the following:

- that a party to the arbitration agreement was (under the law applicable) under some incapacity;
- that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
- that the party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present their case;
- that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (save that in such a case an award on matters submitted to arbitration may be enforceable to the extent these matters can be separated from those not submitted);
- that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or
- that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

### 2.6.13 Other Relevant Issues

The present policy of the Bermuda Monetary Authority is to give consent for the Bermuda dollar award made by the Supreme Court of Bermuda to be paid in the original judgment currency.

## 2.7 Lease Assignment/Novation

### 2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

Bermuda law recognises the concepts of contractual assignment and novation.

### 2.7.2 Assignment/Novation of Leases Under Foreign Laws

Provided an assignment and assumption agreement or novation agreement or deed complies with terms under its governing law, the courts of Bermuda will recognise and give effect to such agreement or deed in accordance with its terms.

Whether the lessee's consent is required would be determined in accordance with the terms of any such agreement.

There are not any mandatory terms required to be included under Bermuda law.

### 2.7.3 Enforceability of Lease Assignments/Novations

There is no requirement as a matter of Bermuda law that an aircraft or engine lease assignment and assumption/novation be translated, certified, notarised or legalised to be enforceable. However, it is advisable that such documents be properly witnessed and notarised if applicable.

### 2.7.4 Filing/Registration of Lease Assignments/Novations

It is not possible to register an aircraft and/or engine lease assignment and assumption/novation with the BCAA.

### 2.7.5 Taxes/Duties Payable on Assignment/Novation

If a Bermuda local company physically executes an assignment and assumption/novation agreement in Bermuda, stamp duty will be payable. Provided none of the parties to the agreement are local companies, the document will not attract stamp duty if brought into Bermuda. There is also no stamp duty in respect of an electronic copy.

## 2.7.6 Recognition of Transfer of Ownership Interests

Where there is any change of ownership (including the beneficial interest of a trust), in respect of an aircraft registered in Bermuda, the BCAA must be notified within 28 days. They must also be informed of (i) any change in the particulars which were furnished in the application for the registration of the aircraft; or (ii) in the case of an aircraft subject to a demise charter, the termination of that charter. Such details will be noted on the Register of Aircraft.

## 2.8 Aircraft Deregistration and Export

### 2.8.1 Deregistering Aircraft in This Jurisdiction

Only the person in whose name the aircraft is registered (the “Registrant”) is entitled to apply to de-register the aircraft. However, if the Registrant has granted an irrevocable deregistration and export request authorisation.

(IDERA) naming another entity as an authorised party and such IDERA has been registered with the BCAA, then the authorised party is the only entity entitled to de-register the aircraft.

The steps for de-registration are as follows:

- all outstanding fees must be paid to the BCAA;
- any mortgages registered against the Aircraft in the Register of Aircraft Mortgages must be released (unless the mortgagee consents);
- a letter must be provided from the Registrant addressed to the BCAA, requesting the deregistration and providing the details of the new registry; and
- certified copies of the board resolutions of the Registrant approving the deregistration should be provided to the BCAA.

### 2.8.2 Lessee’s/Operator’s Consent

Only the Registrant or an authorised party pursuant to an IDERA is entitled to apply to deregister the aircraft. This can be done without the operator’s consent.

### 2.8.3 Required Documentation

The Registrant needs to provide (i) a letter, addressed to the BCAA, requesting the deregistration and providing the details of the new registry; and (ii) a certified resolutions of its board approving the deregistration. A mortgagee should provide a copy of the duly registered IDERA or any deregistration power of attorney (POA).

### 2.8.4 Duration of Deregistration Process

The deregistration process typically takes from one to three business days to complete.

### 2.8.5 Aviation Authority’s Assurances

Pursuant to the Cape Town Convention, the BCAA will apply Article X of the Protocol in its entirety. The number of days to be used for the purposes of the time-limit laid down in Article X(2) of the Protocol shall be ten calendar days in Bermuda from the date the application for relief is filed.

### 2.8.6 Costs, Fees and Taxes Relating to Deregistration

There are no significant costs/fees/taxes chargeable in respect of the deregistration of an aircraft. The BCAA currently charges a USD500 fee to process a deregistration. However, all outstanding fees to the BCAA must be settled.

### 2.8.7 Deregistration Power of Attorney

Prior to 1 January 2018, when the Cape Town Convention came into force in Bermuda, it was possible for the Registrant to grant a deregistration POA and obtain a letter of assurance from the BCAA that (i) they had made a notation of such POA and (ii) would not affect a deregistra-

tion if so requested by the Registrant without the consent of the attorney named in the POA. It is no longer possible to file a deregistration POA in Bermuda. An IDERA from the Registrant can be filed instead.

#### **2.8.8 Documents Required to Enforce Deregistration Power of Attorney**

No additional documents are required in order to enforce a deregistration POA.

#### **2.8.9 Choice of Laws Governing Deregistration Power of Attorney**

It is not necessary for a deregistration POA to be governed by the laws of Bermuda.

#### **2.8.10 Revocation of a Deregistration Power of Attorney**

A POA can only be irrevocable when it is coupled with an interest. In practice, a POA that is expressed to be irrevocable is often revoked once the mortgage that it was granted pursuant to has been satisfied.

#### **2.8.11 Owner's/Lessor's Consent**

As a practical matter, aircraft registered in Bermuda are rarely physically present in Bermuda. As such, in order to determine whether consent of the lessor is required in order for the aircraft owner, mortgagor or lessee to export the aircraft from where it is habitually located, both the terms of the lease agreement and the laws of where the aircraft is physically situated need to be considered.

#### **2.8.12 Aircraft Export Permits/Licences**

There are no restrictions on a lessor's ability to re-export an aircraft. An export permit is neither required nor issued in respect of an aircraft being exported from Bermuda. Sometimes for various reasons the lessor may require an Export Certificate of Airworthiness.

#### **2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft**

The cost of an export certificate of airworthiness is calculated based upon the weight of the aircraft, per 500 kg, with a minimum fee of USD5,000. It is advisable to contact the BCAA to determine the exact cost. There are no associated taxes payable.

#### **2.8.14 Practical Issues Related to Deregistration of Aircraft**

Any outstanding mortgages must either be released or the mortgagee's written consent will be required before the aircraft can be deregistered in Bermuda. The BCAA will need to know the details of the new register, where the aircraft is going or whether it is being sold for parts.

### **2.9 Insolvency Proceedings**

#### **2.9.1 Overview of Relevant Laws and Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations**

A lessee domiciled in Bermuda can be set up as a company, an LLC or a partnership. Bermuda law distinguishes between those entities which are owned predominantly by Bermudians ("local entities") and those which are owned predominantly by non-Bermudians ("exempted entities"). Only local entities are permitted to carry on and compete for business which is in Bermuda. Exempted entities may be resident in Bermuda and carry on business from Bermuda in connection with transactions and activities which are external to Bermuda or with other exempted entities. Companies are governed by the Companies Act 1981 (as amended). LLCs are governed by the Limited Liability Company Act 2016. Partnerships are governed by the Partnership Act 1902, the Exempted Partnership Act 1992 and the Limited Partnership Act 1883.

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## 2.9.2 Overview of Relevant Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

There are two main forms of liquidations that would be relevant to a lessee domiciled in Bermuda depending on whether the entity is solvent or not. Where the lessee is insolvent, the liquidation may be voluntary and initiated by the creditors, or involuntary where it is court ordered. Where the lessee is solvent, the liquidation may either be done by way of members voluntary liquidation (approved by the shareholders) or by way of creditors' voluntary liquidation.

## 2.9.3 Co-ordination, Recognition or Relief in Connection With Overseas Proceedings

There are no statutory provisions that mandate cross-border co-operation where there are overseas proceedings. However, the Bermuda Court has adopted the principles of modified universalism and has given common law recognition to foreign office holders and co-operated with foreign courts in insolvency proceedings. Parties are not prohibited from proposing and adopting co-ordinating principles, and the Court is willing to enter into co-ordinating protocols with foreign courts where appropriate.

## 2.9.4 Effect of Lessee's Insolvency on a Deregistration Power of Attorney

As a general rule a POA that is conferred for the purpose of supporting or effectuating any security is irrevocable while the relevant security subsists. Subject to the precise terms of the POA, it is likely that an irrevocable POA would not terminate upon the presentation of a petition, upon the appointment of liquidators, or upon the making of a winding-up order. However, this issue has not been considered by the Bermuda Courts. Upon the dissolution of the lessee the POA would cease to operate. In the event further steps were required under the POA, there

would have to be an application to restore the lessee entity.

## 2.9.5 Other Effects of a Lessee's Insolvency

On the assumption that a lessee has possession of the aircraft and is put into liquidation or administration or similar process, whether (i) the lease can be set aside or (ii) the lessor would be prevented or delayed from repossessing the aircraft on the termination of the lease will depend on the law governing the lease and also the law of the jurisdiction in which the insolvency proceedings takes place. On the basis that the lease and the insolvency proceedings are subject to Bermuda law, the lease would not be set aside automatically as a matter of Bermuda law. The lease may be terminated by either party if permitted to do so by the terms of the lease, and the liquidators may disclaim the lease as 'onerous property' with leave of Court.

Upon termination of the lease the right of possession reverts to the owner. Provided there is not stay of proceedings against the lessee, there ought not to be any prevention or delay in obtaining possession in the ordinary course of events. However, this would be subject to the laws of the jurisdiction in which the aircraft was located. It is possible that a third party in possession of the aircraft may claim a lien over the aircraft or exercise some other right of detention.

Bermuda is a party to the Cape Town Convention and has declared that upon an insolvency-related event the liquidator (or debtor where appropriate) must return possession of the aircraft no later than the earlier of 60 days or the time by which the lessor would otherwise have been entitled to possession. Therefore, if there was a stay of proceedings, the lessor would be entitled to apply under those proceedings for an order compelling the liquidator to comply with the lessor's obligations.

The aircraft will not be deemed part of the lessee's property under Bermuda law. The rights of the lessee in relation to the aircraft granted pursuant to the lease do form part of the lessee's property. Whether those rights continue upon insolvency is determined by the terms of the lease.

Save for limited exceptions (eg, employee pay, government taxes) as a matter of Bermuda law all unsecured creditors are given equal priority in any distribution of the assets of the lessee (which, as stated above, would not include the aircraft).

#### **2.9.6 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent**

If a borrower, a guarantor or an entity providing security becomes insolvent, the main risk for the lender is that they will not be able to obtain satisfaction of the loan in the event of the insolvency of the borrower, guarantor or other entity providing security. There is also a potential risk that an 'ipso facto' clause could include such other entities, causing the lessee to be in breach in the event of the insolvency of a guarantor or other security provider, thereby potentially terminating the lease.

#### **2.9.7 Imposition of Moratoria in Connection With Insolvency Proceedings**

After the presentation of a winding-up petition of a Bermuda company, a Bermuda Court may stay proceedings against the company, subject to such terms, including the length of the stay, as the Court thinks fit.

There is an automatic stay on all proceedings against the company if a winding-up order is made or if joint provisional liquidators are appointed. The stay is of an indefinite period. However, a party may seek the leave of the Court to continue or issue proceedings.

#### **2.9.8 Liquidation of Domestic Lessees**

There is no administration procedure in Bermuda. A Bermuda lessee may be liquidated voluntarily without a Court order (i) by the shareholders where the lessee is solvent or (ii) by the creditors or involuntarily by court order.

#### **2.9.9 Ipso Facto Defaults**

Ipso facto clauses are generally valid and enforceable under Bermuda law. In the event the contract was governed by a foreign law, provided the clause was valid under the foreign governing law, Bermuda courts would recognise it.

#### **2.9.10 Impact of Domestic Lessees' Winding-Up**

In the event of the winding-up of a Bermuda incorporated lessee, liquidators would be appointed. If the lease agreement contains provision that the lease terminates automatically upon the making of a winding-up order (or on the earlier presentation of a petition) then the liquidators would not be entitled to retain possession of the aircraft, and the lessor would be entitled to obtain possession.

Termination of the lease will result in the automatic termination of any sub-lease or rental. As this is a potential source of revenue, the lessor may prefer a right to terminate upon notice, and require the sub-lessee to make payments directly, which are then offset against the debt of the lessee.

The impact on the lease security deposit and maintenance reserves will depend upon the terms of the lease, to which the liquidator will be bound. The lessor may be able to set off such sums in its possession against any sums owed by the lessee.

## 2.10 Cape Town Convention and Others

### 2.10.1 Conventions in Force

In the event of the winding-up of a Bermuda incorporated lessee, liquidators would be appointed. If the lease agreement contains provision that the lease terminates automatically upon the making of a winding-up order (or on the earlier presentation of a petition) then the liquidators would not be entitled to retain possession of the aircraft and the lessor would be entitled to obtain possession.

Termination of the lease will result in the automatic termination of any sub-lease or rental. As this is a potential source of revenue, the lessor may prefer a right to terminate upon notice and require the sub-lessee to make payments directly, which are then offset against the debt of the lessee.

The impact on the lease security deposit and maintenance reserves will depend upon the terms of the lease, to which the liquidator will be bound. The lessor may be able to set off such sums in its possession against any sums owed by the lessee.

### 2.10.2 Declarations Made Concerning Conventions

Bermuda adopted a number of creditor friendly declarations under the Convention and Protocol including Alternative A. Under the Convention, Bermuda made the declarations under Articles 39(1), 39(4), 53 and 54(2). Under the Protocol Bermuda made the declarations pursuant to the following:

- Article XXX(1) (that it will apply Articles VIII, XII, XIII);
- Article XXX(2) (that it will apply Article X in its entirety and that the number of days to be used for the purposes of the time-limit laid down in Article X(2) shall be ten business

days in Bermuda from the date the application for relief is filed); and

- Article XXX(3) (that it will apply Article XI, Article A in its entirety to all types of all insolvency proceedings and all other insolvency related events and that the waiting period for the purposes of Article XI(3) of that Alternative shall be sixty calendar days).

### 2.10.3 Application of Article XIII of the Protocol on Matters Specific to Aircraft Equipment

As noted, Article XIII applies in Bermuda. An IDERA (in the form prescribed by the BCAA) can be filed with the BCAA as long as it relates to an interest created after 1 January 2018 (the date the legislation became effective in Bermuda).

### 2.10.4 Enforcement of Conventions

Bermuda courts do not yet have any experience in relation to parties enforcing the Convention or the Protocol.

### 2.10.5 Other Conventions

As an overseas territory of the United Kingdom, Bermuda cannot be a party to either the 1948 Geneva Convention on the International Recognition of Rights in Aircraft or the 1933 Rome Convention on the Unification of Certain Rules relating to the Precautionary Arrest of Aircraft, until such time as the United Kingdom has ratified such Conventions and then extended them to Bermuda. The United Kingdom has not ratified either of these Conventions at this time.

### **3. AIRCRAFT DEBT FINANCE**

#### **3.1 Structuring**

##### **3.1.1 Restrictions on Lending and Borrowing**

There are no restrictions on foreign lenders financing an aircraft locally or on borrowers using the loan proceeds.

##### **3.1.2 Effect of Exchange Controls or Government Consents**

Bermuda exempted companies (ie, companies that are not owned by Bermudians resident in Bermuda) are not subject to any exchange controls nor are there any government consents required for repatriation of any realisation proceeds under a loan, guarantee or security document.

##### **3.1.3 Granting of Security to Foreign Lenders**

No land in Bermuda is used as security. Borrowers are permitted to grant security to foreign lenders provided that no land in Bermuda is used as security.

##### **3.1.4 Downstream, Upstream and Cross-Stream Guarantees**

Downstream, upstream and/or cross-stream guarantees in favour of lenders are permitted provided that if there is a question of corporate benefit, shareholder consent must be obtained.

##### **3.1.5 Lenders' Share in Security Over Domestic SPVs**

It is advisable for a lender to take share security over a domestic special purpose vehicle (SPV) which owns the financed aircraft as such security will mean that in the event of default, the lender can take control of the SPV to protect its interest in the financed aircraft. Commercial practice is for the borrower to grant a share charge (where the borrower retains title for so long as there is

no default) rather than a share pledge (where title transfers).

##### **3.1.6 Negative Pledges**

A negative pledge may be recognised.

##### **3.1.7 Intercreditor Arrangements**

There is no Bermuda law material restriction or requirement imposed on inter-creditor arrangements.

##### **3.1.8 Syndicated Loans**

The concept of agency and the role of an agent (such as the facility agent) under a syndicated loan would be recognised by Bermuda courts.

##### **3.1.9 Debt Subordination**

Parties are free to agree contractually to whichever method of debt subordination they choose subject to any prior contractual undertaking given (such as a negative pledge).

##### **3.1.10 Transfer/Assignment of Debts Under Foreign Laws**

The transfer or assignment of all or part of an outstanding debt under an English or New York law-governed loan is permissible and would be recognised by Bermuda courts.

##### **3.1.11 Usury/Interest Limitation Laws**

There are no usury or interest limitation laws in Bermuda, although a Bermuda court may deem an interest clause to be punitive, depending on the facts and circumstances.

#### **3.2 Security**

##### **3.2.1 Typical Forms of Security and Recourse**

Typical security in an aviation finance transaction would include an aircraft mortgage, security agreements including assignments of rights to insurance proceeds and lease revenue, bank account pledges and, potentially, a share charge.

*Contributed by: Julie McLean, Conyers*

### 3.2.2 Types of Security Not Available

There are no restrictions from a Bermuda law perspective on the type of security that can be taken over an aircraft or related collateral such as engines, warranties or insurances.

### 3.2.3 Trust/Trustee Concepts

The concept of a trust and the role of a security trustee would be recognised by Bermuda courts.

### 3.2.4 Assignment of Rights to an Aircraft by a Borrower to a Security Trustee

Pursuant to a security assignment or a mortgage, a borrower may assign to a security trustee its rights to an aircraft or under an aircraft lease (including in relation to insurances).

### 3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

A lessor may assign the rights and benefits only without also assigning the attendant obligations of the lessor under an aircraft lease.

### 3.2.6 Choice of Foreign Law

A security assignment or a guarantee can be governed by whichever law the parties agree to contractually (often English or New York law). There is no requirement for such documents to be governed by Bermuda law in order to be enforceable.

### 3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

There is no concept of “perfection” under Bermuda law. A security assignment would be enforceable in accordance with its terms. However, it is recommended that the security assignment be registered with the Register of Companies to ensure priority over any subsequent charges granted over the same assets. A security assignment need not be translated, certified, notarised or legalised to be enforceable against a Bermuda company.

### 3.2.8 Domestic Law Security Instruments

If an English or New York law-governed security assignment were to be taken in respect of an aircraft registered domestically, the Bermuda courts would recognise the security granted. No domestic law security agreement would be required. Neither domestic law security instruments nor local law filings are mandatorily required in order to make Cape Town Convention filings.

### 3.2.9 Domestic Registration of Security Assignments Governed by Foreign Laws

An English or New York law-governed security assignment or a domestic law security instrument can be registered in Bermuda with the Register of Companies provided that the entity granting the charge is a Bermuda company, or the charge is being granted over assets physically situate in Bermuda.

### 3.2.10 Transfer of Security Interests Over Aircraft/Engines

The Bermuda courts would recognise the transfer of security interests over an aircraft and/or engines under an assignment agreement, assuming that such an agreement is enforceable under its governing law.

### 3.2.11 Effect of Changes in the Identity of Secured Parties

Provided that the security assignment was registered as a charge with the Register of Companies in Bermuda, if the identity of the secured parties under a security assignment changes after its execution, the new secured parties can file statutory forms to reflect the assignment of the right to such charge to themselves, thus maintaining the priority in respect of such security.

### 3.2.12 “Parallel Debt” Structures

It is not common in Bermuda for “parallel debt” structures to be used so that the security trustee has an independent right to the secured debt.

### 3.2.13 Effect of Security Assignments on Residence of Secured Parties

A secured party under a security assignment would not be deemed to be resident, domiciled, carrying on business or subject to any taxes as a result of its being a party to or its enforcement of the security assignment.

### 3.2.14 Perfection of Domestic Law Mortgages

There is no concept of “perfection” under Bermuda law. A domestic law mortgage over an aircraft or engine would be enforceable in accordance with its terms, but it is to be noted that there is no concept of “perfection” under Bermuda law. A domestic law mortgage over an aircraft or engine would be enforceable in accordance with its terms, but it is recommended that the aircraft or engine mortgage be registered on the relevant mortgage register maintained by the BCAA. Such registration acts as notice to third parties and also ensures that such registered mortgage has priority over subsequent mortgages granted in respect of the same aircraft or engine.

### 3.2.15 Differences Between Security Over Aircraft and Spare Engines

From a Bermuda law perspective there is no real difference in the form of security taken over an aircraft versus that taken over spare engines.

### 3.2.16 Form and Perfection of Security Over Bank Accounts

Typically, an account pledge would be the form of security used to take security over a bank account (such as a lease receivables account).

## 3.3 Liens

### 3.3.1 Third-Party Liens

There are essentially three kinds of liens available to a third party to take over an aircraft or engine:

- a seller’s lien where an unpaid seller takes a lien over the unpaid purchase price;
- a possessory lien used where a lienholder has continuous possession of an aircraft or engine it has done labour on (as authorised by the owner) that has improved the aircraft or engine in some way; and
- a contractual lien created by contract.

There is no system of registration of such liens in Bermuda.

Generally, an aircraft lienholder would not need to apply to the Bermuda courts to enforce its lien other than in the case of a possessory lien where the secured party would not be allowed to sell the aircraft without the consent of the Bermuda courts.

### 3.3.2 Timeframe to Discharge a Lien or Mortgage

Once provided with a certified copy of a Deed of Release releasing a mortgage over an aircraft, the BCAA will normally confirm discharge of such registration on the Register of Aircraft Mortgages within one business day.

### 3.3.3 Register of Mortgages and Charges

The BCAA maintains a Register of Aircraft Mortgages pursuant to the Mortgaging of Aircraft and Aircraft Engines Act 1999 (as amended from time to time). Registration of the mortgage on the Mortgages Register means that the mortgage has priority over any subsequent mortgages over the same aircraft. However, the registered mortgage may not necessarily have priority over any possessory lien in respect of work done on the aircraft.

### 3.3.4 Statutory Rights of Detention or Non-consensual Preferential Liens

Statutory rights of detention over an aircraft can arise in certain circumstances, such as non-payment of airport charges or forfeiture under

Bermuda customs laws, if the aircraft is used for criminal activity (such as drug trafficking) or if there is a war or national emergency.

### 3.3.5 Verification of an Aircraft's Freedom From Encumbrances

If a potential purchaser of an aircraft wishes to verify that an aircraft is free of encumbrances, the purchaser could request a mortgage transcript in respect of the aircraft from the Bermuda Civil Aviation Authority. If the owner of the aircraft is a Bermuda company, the purchaser could also run a charges search at the Bermuda Register of Companies. It is not possible to search for liens.

## 3.4 Enforcement

### 3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

There are no relevant differences from a Bermuda law perspective in enforcing a security assignment as opposed to a loan or a guarantee.

### 3.4.2 Security Trustees' Enforcement of Their Rights

Bermuda courts seek to uphold the contractual terms of any legally binding commercial contracts, such as a security document, unless common law or equitable principles would dictate otherwise. As such, if a lessor has granted security under a security assignment and there is an event of default, then whether the security trustee can enforce its rights under the security assignment pursuant only to a notice and acknowledgement executed by that lessor and the relevant lessee respectively would depend on the contractual terms of the security assignment.

### 3.4.3 Application of Foreign Laws

The choice of a foreign law as the governing law of a finance or security document would be recognised and given effect to in any action brought before a court of competent jurisdiction

in Bermuda, except for those laws (i) which such court considers to be procedural in nature; (ii) which are revenue or penal laws or (iii) the application of which would be inconsistent with public policy, as such term is interpreted under the laws of Bermuda. The submission in the finance or security document to the jurisdiction of the courts of a foreign jurisdiction would be valid and binding upon the company.

### 3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

Where the foreign court is based in certain Commonwealth jurisdictions, Bermuda courts will recognise and enforce a final and conclusive judgment in the superior courts of a foreign jurisdiction under which a sum of money is payable (not being in respect of multiple damages, or a fine, penalty, tax or other charge of similar nature). The judgement of the foreign court would, on registration in accordance with the provisions of The Judgments (Reciprocal Enforcement) Act 1958 (the "1958 Act") be enforceable in the Supreme Court of Bermuda against the Company without the necessity of any retrial of the issues which are the subject of such judgment or any re-examination of the underlying claims.

However, where such foreign judgment is expressed in a currency other than Bermuda dollars the registration will involve the conversion of the judgment debt into Bermuda dollars on the basis of the exchange rate prevailing at the date of such judgment as is equivalent to the judgment sum payable. The present policy of the Bermuda Monetary Authority is to give consent for the Bermuda dollar award made by the Supreme Court of Bermuda to be paid in the original judgment currency.

For jurisdictions where the 1958 Act does not apply, the courts of Bermuda would recognise as a valid judgment, a final and conclusive judg-

ment in personam obtained in the foreign courts based upon the documents under which a sum of money is payable (other than a sum of money payable in respect of multiple damages, taxes or other charges of a like nature or in respect of a fine or other penalty) and would give a judgment based thereon provided that:

- such courts had proper jurisdiction over the parties subject to such judgment;
- such courts did not contravene the rules of natural justice of Bermuda; such judgment was not obtained by fraud;
- the enforcement of the judgment would not be contrary to the public policy of Bermuda;
- no new admissible evidence relevant to the action is submitted prior to the rendering of the judgment by the courts of Bermuda; and
- there is due compliance with the correct procedures under the laws of Bermuda.

#### **3.4.5 Secured Parties' Right to Take Possession of Aircraft**

Bermuda courts seek to uphold and enforce legally binding commercial contracts, such as a security agreement or aircraft mortgage, according to their terms unless common law or equitable principles would dictate otherwise. As such, as long as the security agreement includes an express provision that the secured party is entitled to take physical possession of the aircraft without the lessee's or operator's consent, this would be upheld by the Bermuda courts. Bermuda law would also recognise the secured party exercising "self-help" without a court order provided that only peaceful methods are used to take possession of the aircraft.

#### **3.4.6 Domestic Courts Competent to Decide on Enforcement Actions**

The Bermuda commercial courts are well respected and would be competent to decide enforcement actions under a security agreement/aircraft mortgage.

#### **3.4.7 Summary Judgments or Other Relief**

Bermuda did not opt out of Article 13 of the Cape Town Convention as it is consistent with the powers of the Bermuda courts generally. As such, summary judgment is available to a secured party under Bermuda law. There are no conditions applicable to a claim for summary judgment. Interim relief, including injunctive relief, is also available pending final resolution of judicial proceedings. This would include proceedings to enforce security. Injunctions are often obtained to preservation of the aircraft and its value, or to prevent the removal or dissipation of the asset.

Also, receivers can be put in place to (where permitted under the contract) to receive revenue from assets that generate income. There is not usually a requirement to post a bond, but the applicant may be required to give an undertaking in damages, whereby if the claim is not upheld, the applicant undertakes to the Court that it will pay for any loss to the respondent. This undertaking may have to be fortified, for example by a payment into court.

#### **3.4.8 Judgments in Foreign Currencies**

If a secured party obtains a foreign judgment which is expressed in a currency other than Bermuda dollars, the secured party will need to register such judgment under The Judgments (Reciprocal Enforcement) Act 1958. Registration will involve the conversion of the judgment debt into Bermuda dollars on the basis of the exchange rate prevailing at the date of the judgment as is equivalent to the judgment sum payable. The present policy of the Bermuda Monetary Authority is to give consent for the Bermuda dollar award made by the Supreme Court of Bermuda to be paid in the original judgment currency.

#### **3.4.9 Taxes/Fees Payable**

A secured party would not be required to pay any Bermuda taxes or fees in a non-nominal

amount in connection with the enforcement of a security agreement/aircraft mortgage.

#### **3.4.10 Other Relevant Issues**

There are no other relevant issues from a Bermuda law perspective that a lender should be aware of in relation to the enforcement of its rights.

## **4. OTHER ISSUES OF NOTE**

### **4.1 Issues Relevant to Domestic Purchase, Sale, Lease or Debt Finance of Aircraft**

There are no material court judgements or other issues judgements that are relevant to the purchase, sale, lease or debt finance of an aircraft registered in Bermuda and/or involving a Bermuda party.

### **4.2 Current Legislative Proposals**

Currently, there are no Bermuda legislative proposals relating to the foregoing items which could alter the same.

**Conyers** represents many of the world's leading leasing companies on the cross-border aspects of their transactions. The firm's team of eight professionals are leading offshore specialists in the core jurisdictions of Bermuda, the Cayman Islands and the British Virgin Islands. Its client base includes aircraft financiers, lenders, leasing companies, international credit agencies and export-import banks, airline operators and manufacturers. Recently Conyers acted as Bermuda Counsel to Aircastle Limited in connection with a USD100 million senior unsecured

revolving credit facility with Mizuho Marubeni Leasing Corporation. In the Cayman Islands the firm acted as counsel to Sunrise Aircraft Irish HoldCo Designated Activity Company, as Issuer, in connection with the listing of its up to USD350,000,000 unsecured Tranche A Notes and up to USD150,000,000 Unsecured Tranche B Notes, due on 22 December 2028. Conyers also advised a number of leasing companies and worked with the Aviation Working Group in relation to the Russia sanctions affecting Russian operated aircraft registered in Bermuda.

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**Julie McLean** is a Director in the Bermuda office of Conyers and heads both Conyers aviation finance team and the Bermuda regulatory team. She has a broad corporate and

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