

THE AVIATION LAW  
REVIEW

SEVENTH EDITION

Editor  
Sean Gates

THE LAWREVIEWS

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REVIEW

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# CONTENTS

|  |                                 |
|--|---------------------------------|
| PREFACE.....   | vii                             |
| <i>Sean Gates</i>  |                                 |
| Chapter 1  | ARGENTINA..... 1                |
| <i>Ana Luisa Gondar</i>  |                                 |
| Chapter 2  | AUSTRALIA..... 14               |
| <i>Andrew Tulloch</i>  |                                 |
| Chapter 3  | AUSTRIA..... 27                 |
| <i>Dieter Altenburger, Azra Dizdarevic and Georg Schwarzmann</i>       |                                 |
| Chapter 4  | BAHAMAS ..... 40                |
| <i>Llewellyn V Boyer-Cartwright</i>                                    |                                 |
| Chapter 5  | BELGIUM ..... 50                |
| <i>Dimitri de Bournonville and Kim Verhaeghe</i>                       |                                 |
| Chapter 6  | BERMUDA ..... 60                |
| <i>Julie McLean and Angela Atherden</i>                                |                                 |
| Chapter 7  | BRAZIL..... 69                  |
| <i>Guilherme Amaral, Nicole Villa, Renan Melo and Priscila Zanetti</i> |                                 |
| Chapter 8  | BRITISH VIRGIN ISLANDS ..... 79 |
| <i>Audrey M Robertson</i>  |                                 |
| Chapter 9  | CANADA..... 83                  |
| <i>Laura Safrian QC and Prasad Taksal</i>                              |                                 |
| Chapter 10   | CAYMAN ISLANDS ..... 95         |
| <i>Wanda Ebanks, Shari McField and Barnabas Finnigan</i>               |                                 |

## Contents

---

|            |  |     |
|------------|--|-----|
| Chapter 11 | CHINA.....   | 107 |
|            | <i>Gao Feng</i>  |     |
| Chapter 12 | CYPRUS.....  | 118 |
|            | <i>Christos Clerides and Andrea Nicolaou</i>                       |     |
| Chapter 13 | DENMARK.....   | 131 |
|            | <i>Jens Rostock-Jensen and Jakob Dabl Mikkelsen</i>                |     |
| Chapter 14 | DOMINICAN REPUBLIC.....  | 141 |
|            | <i>Rhina Marielle Martínez Brea and Maria Pia Garcia Henriquez</i> |     |
| Chapter 15 | EGYPT.....   | 155 |
|            | <i>Tarek Badawy</i>  |     |
| Chapter 16 | EUROPEAN UNION.....  | 166 |
|            | <i>Dimitri de Bournonville and Charlotte Thijsen</i>               |     |
| Chapter 17 | FRANCE.....  | 186 |
|            | <i>Carole Sportes and Albertine Guez</i>                           |     |
| Chapter 18 | INDIA.....   | 199 |
|            | <i>Ravi Singhania and Rudra Srivastava</i>                         |     |
| Chapter 19 | INDONESIA.....   | 214 |
|            | <i>Eri Hertiawan, Jesconiah Siabaan and Alvin Ambardy</i>          |     |
| Chapter 20 | ISLE OF MAN.....   | 225 |
|            | <i>DQ Advocates</i>  |     |
| Chapter 21 | ISRAEL.....  | 234 |
|            | <i>Eyal Doron and Hugh Kowarsky</i>                                |     |
| Chapter 22 | ITALY.....   | 249 |
|            | <i>Anna Masutti</i>  |     |
| Chapter 23 | JAPAN.....   | 269 |
|            | <i>Tomobiko Kamimura and Miki Kamiya</i>                           |     |
| Chapter 24 | KENYA.....   | 281 |
|            | <i>Sonal Sejpal and Fred Mogotu</i>                                |     |

## Contents

---

|            |  |     |
|------------|--|-----|
| Chapter 25 | MALAYSIA .....   | 298 |
|            | <i>Chong Kok Seng and Chew Phye Keat</i>                     |     |
| Chapter 26 | NIGERIA .....  | 314 |
|            | <i>Anthony Nkadi, Kemi Oluwagbemi and Omobola Bakare</i>     |     |
| Chapter 27 | NORWAY .....   | 328 |
|            | <i>Hanne S Torkelsen</i>                                     |     |
| Chapter 28 | PORTUGAL .....   | 340 |
|            | <i>Luís Soares de Sousa</i>                                  |     |
| Chapter 29 | ROMANIA .....  | 351 |
|            | <i>Adrian Iordache and Raluca Danes</i>                      |     |
| Chapter 30 | RUSSIA .....   | 362 |
|            | <i>Alexandra Rodina</i>                                      |     |
| Chapter 31 | SERBIA .....   | 374 |
|            | <i>Goran Petrović</i>  |     |
| Chapter 32 | SWITZERLAND .....  | 392 |
|            | <i>Heinrich Hempel and Daniel Maritz</i>                     |     |
| Chapter 33 | UNITED KINGDOM .....   | 405 |
|            | <i>Robert Lawson QC and Jess Harman</i>                      |     |
| Chapter 34 | UNITED STATES .....  | 422 |
|            | <i>Garrett J Fitzpatrick, James W Hunt and Mark R Irvine</i> |     |
| Appendix 1 | ABOUT THE AUTHORS .....                                      | 449 |
| Appendix 2 | CONTRIBUTORS' CONTACT DETAILS .....                          | 471 |

# PREFACE

I am delighted to continue to be associated with *The Aviation Law Review*, of which this is the seventh edition. Aviation has from the outset been one of The Law Reviews' most successful publications; its readership has been vastly enhanced by making it accessible online to over 12,000 in-house counsel, as well as subscribers to Bloomberg Law and LexisNexis. This year I welcome a new contributor from Cyprus, as well as extending my thanks and gratitude to our seasoned contributors for their continued support. Readers will appreciate that contributors voluntarily donate considerable time and effort needed to make these contributions as useful as possible to readers. They are carefully selected for their knowledge and insights into their subject and we are fortunate to enjoy their support.

At the time of writing, the shocking B737 Max disaster story continues to unfold. The method of self-approval adopted by Boeing with the support of the FAA has been the subject of much criticism, the more so since approval by the FAA has routinely been followed by other regulators hitherto without serious challenge and because the FAA was the last substantial regulator to ground the type following the two fatal accidents. In an unprecedented break with previous practice, EASA has announced that it is conducting its own 'independent' review of the design of the Max and that 'completion of it was a prerequisite for return to service of the aircraft'. EASA itself had adopted the practice of reciprocal recognition. There can be no doubt they knew of its drawbacks. There are eerie parallels between this and the Helios 737 accident where Boeing incorporated a warning system that it had superseded in other models, notwithstanding warnings following other depressurisation incidents from European accident investigation boards and NASA itself! The complacency of both the manufacturer and the FAA following the two fatal accidents has left many aghast.

Inevitably following the news, plaintiffs are seeking a route to the US for their compensation claims and seeking to avoid the *forum non conveniens* rule that in principle directs such lawsuits back to the countries with jurisdiction over the carrier – usually with the requirement of full Boeing cooperation with the plaintiffs' alternative choice of jurisdiction and provision of all discovery that would otherwise be mandated in US litigation. The manufacturer will also be seeking an early agreement with the operators' insurers, and any other interested parties, to a settlement agreement to try to limit its own exposure to non-US jurisdictions. The shortcomings discovered in the regulator's own processes may, however, hamper Boeing's efforts to escape US judicial oversight, as may the involvement of the Federal Bureau of Investigation in the criminal investigation of the certification of the type, following the establishment of a grand jury investigation of the certification process. In the meantime, as a result of the grounding of the 737 Max, claims are mounting from operators that will dwarf the insurance coverage available (reportedly capped at US\$250 million). In the meantime, Boeing's loss of orders will redound to the benefit of Airbus and other

single-aisle aircraft manufacturers, as has been seen from orders announced at the Paris Air Show; notwithstanding the loyalty displayed by the International Airlines Group with regard to its order for 200 737 MAX aircraft.

It is hoped EASA will also reconsider its reliance on other regulators' type certificates, as well as any reliance it places on European manufacturers for type approval. The cost of adequate regulation in all jurisdictions must be met centrally, as was heavily recommended as long ago as 2000 in the Rand Institute's report 'Safety in the Skies' on the aviation accident investigation process.

Inevitably, the European aviation legal scene continues to be dominated by Brexit where reassuring words, at least by regulators in the UK, have yet to be converted into terms of final agreements. This has led major carriers to focus on developing European air operator certificates and some are also now ensuring they satisfy the European tests for majority ownership, which may cause interesting issues in the future for some of the low-cost carriers that heretofore have been able to operate from the UK – although the UK has signalled by means of a draft statutory instrument that it will not apply the EU majority ownership and control rules once the UK leaves the Union.

Another current project of note within Europe concerns the infamous EU Regulation 261/2004, which from its beginnings as an attempt to ensure fair treatment of passengers (or, as frequently rumoured, the reprisal of a snubbed EU Commissioner determined to show she was not to be ignored) has become, by virtue of the legislative inclinations of the Court of Justice of the European Union (CJEU), a monster devouring the assets and threatening the safety of European airlines. The Regulation has been grotesquely judiciously distorted since its adoption. The ECJ has devastated the balance of the regulation by destroying the defence of 'exceptional circumstances' as a defence to claims, as well as by applying a time limit for making claims of up to 10 years, and finally by eliding delay and cancellation in determining availability of compensation. This was achieved without any attempt to determine the financial impact on carriers who have seen regional routes in particular become inoperable due to cost resulting in losses of prized European connectivity. All this in return for the sake of a few hundred euros' 'compensation' to individuals for minor inconvenience and perhaps a misguided boost to the popularity of the nanny super state!

The regulation is being reviewed by the EU on the assumption that the UK is leaving, and that Spain will withdraw its blockade on this and other projects as a result. The Steer group has been commissioned to review and report back and has instigated a number of enquiries to various organisations as a result. The omens are not good. The review is being conducted of the effect of the regulation, but has consciously ignored regional carriers in its case studies and has been heavily weighted to claimants' associations whose *raison d'être* is the collection of fancy percentages on claims made.

As was made clear at a recent conference of the European Regions Airlines Association, the uninformed extrajudicial legislative impulses of the CJEU in this area threatens regional connectivity and the operation of routes that are only marginally profitable. The European Regions Airline Association continues, with other industry groups, to lobby for change. Local governments whose industry and regional connectivity is threatened by this project need to join forces with consumer associations interested in consumers' freedom of movement and industry interested in logistics to make their interest in continued connectivity heard.

The second European Aviation Environmental Report (EAER) was published this year and provides an updated assessment of the environmental performance of the aviation sector published in the first report of 2016. It reports that continued growth of the sector has

produced economic benefits and connectivity within Europe and is stimulating investment in novel technology but recognises that the contribution of aviation activities to climate change, noise and air quality impacts is increasing, thereby affecting the health and quality of life of European citizens. Countermeasures are being developed, but their combined effect has reportedly not kept pace with the recent strong growth in the demand for air travel, thereby leading to an overall increase in the environmental impact. If Member States would stop pandering to uninformed sectional national and labour interests to permit the true operation of the Single European Sky ATM Research (SESAR) programme the direction of travel would be altered overnight, but as usual incompetent short termism prevails in politics to the detriment of industry and the environment. It is hoped one day we will see an unfettered SESAR introduced, although the recent EU decision to prevent UK carriers from using carbon offsets does not suggest an overwhelming dedication to pollution reduction.

The tension between ‘just culture’ and the criminal law and their inherent incompatibility has been highlighted again by the convictions in Switzerland of three air traffic controllers in relation to separate incidents of conduct found by the Swiss court to have been negligent. One of the instances involved a separate conviction of the pilot of one of the affected aircraft. The incidents involved serious mistakes by air traffic control, which were corrected either by the controller or the affected pilots, so the Swiss law requirement of a ‘real collision risk’ seems unduly aggressively to have been applied in these cases. Criticisms of the Swiss courts aside regarding the convictions, the fact of prosecutions highlights again the ‘myth’ of ‘just culture’ as being a philosophy in actual practice, as opposed to a touching expression of faith dispelled by the reality that prosecutors and courts will recognise that some priority should be given to safety over criminalisation. Unnecessary prosecutions make confidential reporting an ever more risky approach for those at the sharp end of aviation.

Following the high-profile collapse of Monarch Airlines preceded by a number of other highly expensive forays by the state into the provision of private air transport, an airline insolvency review was established by the Chancellor to research better ways to deal with the collapse of airlines. The review has now reported. The obvious solution adopted elsewhere of using the assets of the insolvent airline to repatriate its customers is one of the alternatives recommended and it is hoped, notwithstanding the current stasis in legislation in the UK for other reasons, will be one given urgent attention. The creation of a special administration regime changing the purpose of an airline’s administration to the repatriation of its passengers as a first priority over payment of creditors and ensuring payments of salaries and costs during rescue efforts would enormously mitigate the cost otherwise imposed on taxpayers via the UK government’s current approach of arranging and paying for alternative air transport from other operators where inevitably the rates charged are at the highest end of the spectrum.

Illicit drone activity has been a significant feature of the past year and has resulted in the closure for significant periods of time of a number of major airports. Those incidents, including threats by environmental groups deliberately to use drones to close Heathrow Airport, highlight the fact that technology has got ahead of regulation and counter technology. Last year ICAO issued guidance material on safety management, seeking a ‘total system safety’ in which all users of the aviation environment operate within a fully integrated safety system. How that might affect rogue users is not clear given the ease with which operators can interfere with any inbuilt protections in the drone itself. Inevitably claims from passengers arise as a result of delays and equally inevitably, by virtue of the operation of EU261, airlines will continue to bear significant costs regardless of fault simply for caring for passengers. This may compel them at last to take seriously the prospects for claims against third parties such

as airport operators, air navigation service providers and conceivably the drone manufacturers themselves.

Once again, I would like to extend my thanks to the many contributors to this volume and welcome those who have joined the group. Their studied, careful and insightful contributions are much appreciated by all those who now refer to *The Aviation Law Review* as one of their frontline resources.

**Sean Gates**

Gates Aviation Ltd

London

July 2019

# BERMUDA

*Julie McLean and Angela Atherden*<sup>1</sup>

## I INTRODUCTION

Bermuda is an overseas territory of the United Kingdom. As such, the Register of Aircraft is governed by a UK statute, the Air Navigation (Overseas Territories) Order 2013 (ANOTO). Air Safety Support International, a wholly owned subsidiary company of the Civil Aviation Authority of the United Kingdom, acts as the oversight regulatory body for the Overseas Territories of the United Kingdom in relation to aviation matters.

## II LOCAL REGISTRATION

### i The regulator

Most matters relating to aviation are dealt with by the Bermuda Civil Aviation Authority in Bermuda (BCAA), which is a government quango with a statutorily appointed board of directors responsible for the performance of the BCAA in accordance with applicable law. The functions of the BCAA include all issues relating to the licensing, certification and regulation of aircraft, flight crew and aerodromes, together with air navigation services, aviation security, management of the Bermuda Air Terminal, participation in the operation of the Bermuda International Airport and all matters concerning the economic regulation of air transport and the development of air services. The BCAA is ranked as a Category 1 Aviation Regulatory Authority by the US Federal Aviation Administration.

The BCAA is subject to the Overseas Territories Aviation Requirements (OTARs) which are similar to those of the EASA, the FAA and Transport Canada and are based on ICAO standards.

### ii Registration of aircraft

Aircraft can be registered in Bermuda in either the private or the commercial transport category.<sup>2</sup> Aircraft can only be registered in the commercial category where the aircraft is to be operated in a jurisdiction with which Bermuda has an agreement under Article 83 *bis* of the Convention on International Civil Aviation (Chicago, 1944) (the Chicago Convention) to which the United Kingdom (representing Bermuda) is party. Under Article 83 *bis* agreements, certain functions and duties normally carried out by a state of registry are transferred to an

---

1 Julie McLean is a director and Angela Atherden is counsel at Conyers.

2 As at 22 May 2019, the BCAA records indicate a total of 899 aircraft on the Register with 100 aircraft registered in the private category and 799 aircraft in the commercial transport category.

operator's state. The BCAA retains airworthiness oversight; an attractive position for lessors and owners as they receive the asset on return with a complete maintenance history, in English, to a very high standard.

Requirements for registration of aircraft are fully set out in the ANOTO. This includes who is considered to be a qualified person for registration. Such qualified persons are:<sup>3</sup>

- a* the Crown in right of Her Majesty's government in the United Kingdom or in right of the government of Bermuda;
- b* United Kingdom nationals;
- c* Commonwealth citizens;
- d* nationals of any European Economic Area State;
- e* bodies incorporated in any part of the Commonwealth and which have their registered office or principal place of business in any part of the Commonwealth; or
- f* undertakings formed in accordance with the law of a European Economic Area State and which have their registered office, central administration on principal place of business within the European Economic Area.

The BCAA uses the Aircraft Information and Records System (AIRS), which is essentially an electronic filing and record-keeping system to be used by authorised persons during the initial registration of the aircraft and to renew certificates and licences while the aircraft remains registered in Bermuda. Registration applications are made on AIRS by authorised and certified users, which includes certain personnel of Bermuda law firms.

Aircraft registered on the Bermuda Register will be subject to various technical directives concerning their maintenance and operation. Such requirements are fully detailed in separate notices available on the BCAA's website at [www.bcaa.bm](http://www.bcaa.bm). The only requirements external to the BCAA are those relating to the Class 6 Aircraft Radio Licence, which, under statute, is administered by the Bermuda Regulatory Authority.

The Register of Aircraft forms the official public record relating to the registration of an aircraft and the particulars recorded in it are the only details that are publicly available. All other records related to the owner, aircraft, etc., are treated as confidential.

The Register of Aircraft will include the following particulars:

- a* the registration certificate number;
- b* the aircraft's nationality mark and the registration mark assigned to it;<sup>4</sup>
- c* the name of the constructor of the aircraft and its designation;
- d* the aircraft serial number;
- e* the name and address of the registrant; and
- f* relevant dates such as that of registration, change of ownership, cancellation of registration, etc.

### iii Fees

Unlike other jurisdictions, the BCAA has only one principal registration fee and that is for the certificate of airworthiness, calculated by reference to the maximum take-off mass of the aircraft. This fee is payable prior to the initial registration and annually thereafter.

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3 Article 16(1) of the ANOTO.

4 The mark consists of five letters commencing with the nationality mark VP-B or VQ-B and followed by the two letters assigned to the specific aircraft.

#### **iv Security and aircraft mortgages**

Parties to an aircraft financing may agree what governing law they want for an aircraft mortgage and the norm is to use the same governing law as the loan documentation. As a matter of Bermuda law, there is no need to register a mortgage to provide perfection. However, aircraft mortgages and aircraft engine mortgages can be registered under the Mortgaging of Aircraft and Aircraft Engines Act 1999 and related regulations. The relevant registers are maintained by the BCAA. Registration ensures priority over any non-registered mortgages or subsequently registered mortgages.

Fees for registration are set on a sliding scale up to a maximum of US\$800. Mortgages are filed on AIRS and a PDF copy of the executed and dated mortgage must be filed with the statutory registration form.

It is also possible for the priority of a mortgage to be fixed by filing a priority notice with the BCAA pursuant to which the priority of a yet to be executed mortgage can be fixed for a 14-day renewable period. On such an entry being made, and the mortgage being registered within 14 days thereafter (excluding public holidays), the mortgage will be deemed to have priority from the date of registration of the Priority Notice.<sup>5</sup>

All information on the Mortgage Register is deemed to be in the public domain. As such all parties are deemed to have express notice of the information contained within the Register.

Where a charge under a security document has been granted by a Bermuda incorporated company, it is also possible to register the charge with the Bermuda Registrar of Companies. A charge granted by a non-Bermuda company over assets situate in Bermuda may also be registered with the Bermuda Registrar of Companies. Registration will ensure priority over any subsequently registered charge or unregistered charge over the same assets.

#### **v Liens**

While not definitive, it is believed that only the following aircraft liens exist under Bermuda law:

- a* seller's lien – under the Bermuda Sale of Goods Act 1978<sup>6</sup> an unpaid seller may have a lien over the aircraft to the extent the buyer fails to pay the purchase price;
- b* possessory lien – a common law lien that requires that the lienholder has continuous possession of an aircraft on which it has bestowed labour authorised by the owner that has improved the aircraft in some way; and
- c* contractual lien (including pledge) – a lien created by contract, for example, the owner of an aircraft may pledge it to a creditor as security for a debt, or a lien may arise as a result of a person expending labour on an aircraft that improves its value in some way in accordance with a contractual agreement (such as frequently occurs in respect of aircraft repairs).

The law in Bermuda with respect to salvage liens is unclear, since Bermuda has no statutory provision similar to the UK Civil Aviation Act 1982, Section 87. It is uncertain whether

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<sup>5</sup> Mortgaging of Aircraft (Procedures) Regulations, Section 10(2).

<sup>6</sup> 'Goods' are defined to include all personal chattels (Sale of Goods Act 1978 Section 1(1)).

an aircraft salvage lien can be asserted in Bermuda and whether the maritime salvage liens established by the Bermuda Wreck and Salvage Act 1959 and the Bermuda Merchant Shipping Act 2002 would be extended to apply to aircraft.

It is not possible to register liens in Bermuda. Generally, an aircraft lienholder will not have to apply to the Bermuda courts to enforce its lien since it will have a statutory right,<sup>7</sup> or one arising by way of contract, to undertake such actions. An exception is a possessory lien where the lienholder has no general right to sell an aircraft without the consent of the court.

#### **vi Rights of detention**

As well as aircraft liens, there are various statutory rights of detention exercisable over aircraft. Under Bermuda law, persons are granted a right to detain and, in some cases, to sell (or cause to be forfeited) aircraft in certain circumstances such as:

- a* non-payment of airport charges;
- b* contravention of certain licensing and air navigation provisions of the ANOTO;<sup>8</sup>
- c* forfeiture under Bermuda customs law. Forfeiture of an aircraft may occur if an aircraft has been adapted and used for the purpose of smuggling or concealing goods;
- d* crimes:
  - terrorism: under the Aviation Security and Piracy (Overseas Territories) Order 2000 certain sections of the United Kingdom Aviation Security Act of 1982 were extended to Bermuda.<sup>9</sup> Under the Anti-Terrorism (Financial and Other Measures) Act 2004, the Bermuda courts may make forfeiture orders with respect to any property of a person convicted of financing terrorism that is intended to be, or is suspected might be used, for the purposes of terrorism. This would include aircraft; and
  - drug trafficking: if an aircraft is used for drug trafficking purposes or purchased from the proceeds of crime, a court can order the aircraft to be forfeited;<sup>10</sup> and
- e* war or national emergency: when a state of war or national emergency exists, the Governor of Bermuda has broad powers to make regulations pursuant to the Emergency Powers Act 1963 which includes, inter alia, the power to make regulations that authorise the taking of possession or control of any property.

#### **vii Judgment enforcement rights**

The courts of Bermuda would recognise as a valid judgment, a final and conclusive judgment, in personam, obtained in foreign courts against a Bermuda company 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:

- a* such courts had proper jurisdiction over the parties subject to such judgment;
- b* such courts did not contravene the rules of natural justice of Bermuda;
- c* such judgment was not obtained by fraud;
- d* the enforcement of the judgment would not be contrary to the public policy of Bermuda;

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7 Under Part V of the Sale of Goods Act 1978.

8 Article 8 of Part IX of the ANOTO.

9 See Schedule 1, Article 2.

10 Misuse of Drugs Act 1972 and Proceeds of Crime Act 1997.

- e* no new admissible evidence relevant to the action is submitted prior to the rendering of the judgment by the courts of Bermuda; and
- f* there is due compliance with the correct procedures under the laws of Bermuda.

A final and conclusive judgment in the superior courts of certain foreign jurisdiction<sup>11</sup> against a Bermuda company based upon the finance documents 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 in accordance with the provisions of the Judgments (Reciprocal Enforcement) Act 1958 be enforceable in the Supreme Court of Bermuda against the Bermuda company without the necessity of any retrial of the issues that are the subject of such judgment or any re-examination of the underlying claims; however, where the 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.

### III INTERNATIONAL FINANCE TRANSACTIONS

Bermuda is an important jurisdiction for the complex cross-border finance structures often established for aircraft. Political and economic stability, recognised systems for international financial transparency and information exchange, a respected and consistent judicial system (where the Privy Council is the final court of appeal), a favourable legislative framework and tax regime, no exchange control or currency restrictions, and a strong commercial aircraft registration capability make Bermuda a popular jurisdiction for ownership, financing and securitisation structures.

Historically, one of the reasons for the success of Bermuda as a jurisdiction for commercial aircraft financing is owing to the Article 83 *bis* agreements under the Chicago Convention, especially the Article 83 *bis* agreement with Russia. Russian operators needing new aircraft often need financing from Western-based lenders and export credit agencies. Such lenders do not wish the security to be Russian-law governed. In addition to the other benefits Bermuda offers as enumerated above, the lenders appreciate the fact that Bermuda courts follow English common law principles (which includes recognition of the equitable right of redemption under a mortgage unlike civil law jurisdictions) and are likely to recognise and enforce English or New York law governed security documents. The foreign operators are happy to use Bermuda, which they view as a neutral jurisdiction through which to finance the aircraft.

Bermuda vehicles are also regularly used in both 'off-balance sheet' financing structures, where the owner of the aircraft is an 'orphan' and 'on-balance sheet' structures where the owner will own the aircraft directly in its own name.

Off-balance sheet structures are often used for asset-backed securitisations (ABS). Although many ABS transactions involve a special purpose vehicle (SPV) that is directly owned by a parent, often a transaction will require an 'orphan' SPV, meaning that it is not part of the originator's corporate group. By selling the asset to the orphan SPV, the asset is

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11 Australia, Bahamas, Barbados, Dominica, Gibraltar, Grenada, Guyana, Jamaica, Leeward Islands, Nigeria, St Lucia, St Vincent and the United Kingdom.

removed from the originator's balance sheet. When an orphan structure is required, the SPV is incorporated with all the shares issued to a trustee (also offshore) pursuant to a charitable or purpose trust. A Bermuda purpose trust is of particular benefit in an ABS transaction structured in this manner, as the purpose trust is established to fulfil purposes rather than in favour of beneficiaries, while a charitable trust has charities as the beneficiaries (where, depending on circumstances, a conflict of interest may arise).

Bermuda has in place legislative bankruptcy and corporate structures that are particularly suited to establishing the bankruptcy remoteness of the SPV often used for commercial financing structures. As long ago as 1990 Bermuda enacted the Trusts (Special Provisions) Act enabling the creation of trusts for a broad range of non-charitable purposes and since that time Bermuda has developed a practice establishing purpose trusts.

One of the areas where a number of such trusts have been used is aircraft financing. In the typical financing structure, a Bermuda exempted company is incorporated to act as owner and lessor or as lessee and sub-lessor of the aircraft. The location of the company in a tax-neutral and flexible jurisdiction may offer certain protections against the bankruptcy of other involved parties (such as the operator) and facilitates innovative and cost-effective methods of asset finance, often utilising cross-back tax benefits.

The issue that then arises is how the shares of the SPV should be held. It is often the case that it is not possible or desirable for any of the parties to the transaction to own the company or include the company as a balance sheet asset. In the past, one solution was to use a charitable trust as the shareholder. The purpose trust, however, provides certain distinct advantages.

With a charitable trust, the duties of the trustees are to invest the trust funds so that the return for charities is maximised and to make appropriate distributions. These duties can conflict with the requirements of the parties to the transaction. With a purpose trust, the duties are to fulfil the stated purposes that accord with the intentions of the parties. These purposes are normally to:

- a* promote the incorporation of the Bermuda exempted company;
- b* subscribe for the shares of the company;
- c* hold those shares;
- d* support the company in pursuing the activity of the particular transaction in question; and
- e* enter into any agreements that may be appropriate in connection with the transaction.

The trustee may also charge the shares of the Bermuda exempted company by way of security.

The main advantages of the purpose trust are twofold. First, the duties of the trustees of a purpose trust are clear, being to fulfil the stated purposes. The duties of trustees of a charitable trust are to maximise the benefits for the charity or charitable purposes. Depending on circumstances, a conflict of interest may arise whereby it is in the interests of the party establishing the structure to minimise the profit of the trust's assets. Ideally, it is usually desired that the company only declare enough dividend to fund its ongoing expenses. The use of a purpose trust, where the stated purposes are to promote the use of Bermuda exempted companies to meet the needs of the arrangements by subscribing for the shares of one or more such companies, holding those shares and supporting the efficient operation of the company or companies, avoids such a conflict.

Secondly, Bermuda, like most jurisdictions that follow English common law principles, would grant a common law jurisdiction to the Attorney-General (or a similar public official)

to enforce charitable trusts that are not being properly administered for the benefit of charity. While we are not aware of any instance where the Attorney-General in Bermuda has sought to enforce a charitable trust that has been used in a commercial structure, the risk cannot be entirely discounted in any jurisdiction where such enforcement powers exist. In the case of purpose trusts, the legislation expressly provides for the selection of a person to enforce the obligations under a purpose trust. This person may be a representative of an interested party to the structure or transaction or any independent professional. The Attorney-General may only become involved to appoint an enforcer where the trustees are aware that the person designated by the trust instrument to enforce the trusts is not able to do so. A well-drafted trust instrument will normally provide for a mechanism to appoint successors to the original enforcer to ensure this problem never arises. In any event, the interest of anyone seeking to enforce the trust will be to ensure that the purposes are complied with, not that charitable benefits are maximised.

At the end of the financing period when the loan has been repaid, the orphan SPV will sell the aircraft for a nominal fee to the operator. The SPV is then liquidated and the purpose trust is terminated.

#### IV EMERGING TRENDS

Owing to increased regulations by the European Union following the introduction of the Market Abuse Regulation (MAR), companies looking to list debt have been looking for alternate markets outside the EU.

The Bermuda Stock Exchange (BSX) has become a popular alternative for companies looking to list debt associated with aircraft finance and intercompany loan note transactions as it avoids the onerous and costly conditions imposed by MAR but still offers the high level of market protection that investors are accustomed to.

Some of the advantages of listing on the BSX are as follows:

- a* it is the world's largest offshore fully electronic securities exchange;
- b* it is internationally respected and recognised by UK, US, Irish, Canadian and Australian tax authorities and regulatory bodies;
- c* it is an affiliate member of the International Organisation and Securities Commissions;
- d* it is flexible, responsive and sensitive to confidentiality requirements;
- e* it is well placed between Europe and the US, which provides real-time same-day access to both markets; and
- f* it is designated as a 'recognised exchange' by HM Revenue and Customs (UK) and Revenue – Irish Tax and Customs.

There were two BSX listings in 2018, which totalled US\$1.7665 billion of ABS notes, and there are more in the pipeline for 2019.

## V THE YEAR IN REVIEW

### i Securitisations and capital markets

The use of Bermuda SPVs for aircraft portfolio securitisations has remained popular.

In September 2018, Avolon Holdings Limited (Avolon), the international aircraft leasing company, did a senior notes offering using its wholly owned subsidiary Avolon Holdings Funding Limited. The offering, which priced on 6 September 2018, comprised US\$1 billion aggregate principal amount of 5.125 per cent senior notes due in 2023, at par. Avolon used the net proceeds from this offering for general corporate purposes, which may include the future repayment of outstanding indebtedness.

START Ltd and START Holding Ltd were the issuers of an ABS comprising three tranches of notes secured on a portfolio of 24 in-production aircraft on lease to 16 global airlines in 15 countries, with an appraised value of approximately US\$700 million. START Ltd is notable as the first aircraft portfolio purchase vehicle structure to include a dedicated asset manager for equity investors.

Aircastle Funding (Ireland) DAC, a wholly owned subsidiary of Aircastle Limited (NYSE:AYR) listed its US\$1.28 billion unsecured senior A and senior B notes to the Official List of the Bermuda Stock Exchange.

Merx Aviation, following on from its inaugural aviation ABS in 2018, completed a further US\$429 million transaction comprising three tranches of notes secured on a portfolio of 19 aircraft. The issuer was MAPS 2019-1 Limited, a Bermudian company. The proceeds from the notes will be used to refinance the original RISE Ltd (RISE) asset-backed secured term loan aircraft ABS transaction, which closed in February 2014 and was renamed MAPS 2019-1 Limited pursuant to this transaction. Of the 19 aircraft in this portfolio, 18 were also securitised in the AABS portfolio.

START II Ltd and START Holding II Ltd were the issuers of an ABS comprising three tranches of notes secured on a portfolio of 20 in-production aircraft on lease to 13 global airlines in 11 countries, with an appraised value of approximately US\$597 million. The notes comprise US\$382 million series A fixed rate secured notes Series 2019-1, US\$69 million Series B fixed rate secured notes Series 2019-1, US\$23 million Series C fixed rate secured notes Series 2019-1, along with US\$99,556,000 Class E participating certificates. This ABS transaction marks another aircraft portfolio purchase vehicle structure which includes a dedicated asset manager for equity investors. In this transaction GECAS sold a portfolio of aircraft to Start II Ltd, which is financing its acquisition through issuance of 144A debt and equity. GECAS will continue to service the portfolio and an affiliate of Oz will serve as an asset manager.

## VI SMALL UNMANNED AIRCRAFT (DRONES)

The operation of small unmanned aircraft, otherwise known as drones must be carried out in accordance with Article 73 of the ANOTO, 'Regulation of small unmanned aircraft provisions'.

Such regulations prescribe that the person in charge must maintain direct unaided visual contact with the aircraft sufficient to monitor its flight path in relation to other aircraft, vehicles, vessels, persons and structures so as to avoid a collision.

If the drone has a mass of more than 7kg, excluding its fuel, it must not be flown in certain airspace unless the permission of the appropriate air traffic control has been obtained. If the purpose of the flight is aerial work, permission must also be obtained. The drone must

not be flown over or within 150 metres of any congested areas, over or within 150 metres of an organised assembly of more than 1,000 people or within 50 metres of any vehicle, vessel, structure or person, unless special permission has been obtained.

The regulations also prohibit the drone being operated at a height of more than 400 feet or any article or animal form being dropped from the drone.

Pursuant to its powers under the ANOTO to prohibit or restrict flying, the BCAA also designated certain restricted fly zones in respect of certain areas and landmarks one of which is the Bermuda Airport.<sup>12</sup> The prohibited area is a 2 nautical mile radius circle around the airport. Anyone who fails to comply with these directions commits an offence under Article 68(4) of the Order, and is punishable on summary conviction of a fine not exceeding US\$4,000.

The above regulations also apply to any small unmanned aircraft that is equipped with and whose purpose is to undertake surveillance or data acquisition.

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12 Air Navigation (Overseas Territories) Order under Article 68(4).

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Julie regularly contributes to industry publications and is the author of the Bermuda chapter of *Aircraft Finance* (Sweet & Maxwell) and the co-author, Bermuda chapter of *Aircraft Liens and Detention Rights* (Sweet & Maxwell). Julie works closely with the Bermuda Civil Aviation Authority and was a leading participant in the industry group considering the Cape Town Convention's extension to Bermuda by the United Kingdom, which took effect on 1 January 2018.

She is recognised as a leader in her industry by *The Legal 500 Caribbean* (corporate and commercial), *Who's Who Legal* (aviation/transport), *IFLR1000* and the *Expert Guides: Women in Business Law* (aviation).

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