

**International  
Comparative  
Legal Guides**



Practical cross-border insights into aviation finance law

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## Expert Analysis Chapters

- 1** **New Technology Aircraft and the Environment – The Financing Challenge**  
Philip Perrotta, K&L Gates LLP
- 5** **We Need to Talk About Reserves**  
Peter Aldis, IBA

## Q&A Chapters

- 8** **Austria**  
Benn-Ibler Rechtsanwälte GmbH:  
Dr. Martin R. Geiger & Mag. Irena Gogl-Hassanin
- 15** **Bermuda**  
Conyers Dill & Pearman Limited: Jason Piney &  
Amber Wilson
- 23** **British Virgin Islands**  
Conyers Dill & Pearman: Rachael Pape &  
Audrey Robertson
- 31** **Cayman Islands**  
Maples Group: Sherice Arman, Shari Howell &  
Nick Herrod
- 43** **Congo, D.R.**  
Cabinet d'avocats Thambwe-Mwamba & Associés:  
Camille Yuma Kamili & Linda Bachunge Kambaza
- 50** **Cyprus**  
Montanios & Montanios LLC: Elvina Montanios &  
Yiannis Papapetrou
- 60** **Finland**  
Waselius & Wist: Maria Lehtimäki, Ann-Marie Eklund  
& Ville-Veikko Vanttinen
- 68** **France**  
HENAFF D'ESTRÉES: Yves Hénaff d'Estrées
- 74** **Ireland**  
Maples and Calder (Ireland) LLP: Donna Ager,  
Lynn Cramer & Karole Cuddihy
- 87** **Japan**  
Mori Hamada & Matsumoto: Taro Omoto,  
Makoto Sakai & Masaki Yukawa
- 94** **Kenya**  
MMAN Advocates: Suzanne Muthaura,  
Christopher Kiragu & Edward Kimuma
- 104** **South Africa**  
Christodoulou & Mavrikis Inc.: Chris Christodoulou
- 112** **Spain**  
Augusta Abogados: Sergi Giménez Binder
- 119** **Taiwan**  
Lee and Li, Attorneys-at-Law: Mark Yu &  
Maggie P. Chang
- 129** **Turkey/Türkiye**  
Kartal Law Firm: Ali Kartal
- 136** **Ukraine**  
Jurvneshservice: Dr. Anna Tsirat
- 146** **United Kingdom**  
K&L Gates LLP: Philip Perrotta
- 158** **USA**  
Pillsbury Winthrop Shaw Pittman LLP: Mark Lessard,  
Melissa Jones-Prus, Richard Evans & Dania Slim

# Bermuda

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## 1 General and Contractual

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

Bermuda vehicles are 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 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.

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

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.

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.

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

There is no statutory regulation of the form of aircraft lease which can be entered into by Bermuda exempted undertakings. It should be noted that aircraft registered on the Bermuda Register of Aircraft cannot be operated for hire or reward for the carrying of passengers or cargo without certain certifications from the Bermuda Civil Aviation Authority (BCAA).

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

No, there are no current proposals for reform in the area of aviation finance in Bermuda.

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

Under Bermuda law, letters of intent may be non-binding; however, certain provisions of the letter such as governing law and exclusivity provisions are expressed to be binding.

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

There is no doctrine of ‘good faith’ as a matter of Bermuda law.

## 2 Taxation and Related Matters

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

The Ministry of Finance is responsible for the Office of The Tax Commissioner which administers the collection of the taxes and duties in accordance with Bermuda law.

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

There will not be any taxes or duties payable in Bermuda as a consequence of the sale, lease or financing of an aircraft or engine, unless the relevant 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, there may be customs duties payable as it could be seen as importation of the aircraft.

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

There are no withholding, gross-up provisions or other taxes applicable in Bermuda.

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

Bermuda is a member of the Inclusive Framework on BEPS and has committed to implement the minimum standards thereunder. Currently it is not anticipated that this will have any specific effects in respect of aviation finance or leasing structures in Bermuda.

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

Bermuda is not party to any international tax treaties which would be relevant in the context of aircraft finance and leasing structures.

Typically, Bermuda companies are simply required to maintain a registered office in Bermuda. It should, however, be ascertained whether the proposed activities of any Bermuda legal entity would constitute a “relevant activity” under the Bermuda Economic Substance Act 2018 as amended, such as “financing and leasing”. If so, the entity will be required to maintain adequate substance in Bermuda to ensure that certain core income generating activities in relation to that activity are physically carried out in Bermuda.

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

This is not applicable.

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

There may be customs duties payable in respect of the

importation of an aircraft; however, there will not be any Bermuda taxes or duties payable in connection with the sale or leasing of an aircraft if the parties to the relevant documents are not Bermuda local companies and if the documents are not physically executed in Bermuda.

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

There will not be any Bermuda taxes or duties payable in connection with executing and/or delivering documents if the parties to the relevant documents are not Bermuda local companies. Stamp duty may be payable where a document is physically executed in Bermuda.

### 3 Registration and Deregistration

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

The Governor of Bermuda is required, by the provisions of the Air Navigation (Overseas Territories) Order 2013 (the Order), to maintain a Register of Aircraft and to accept applications to register aircraft from qualified persons. Some of the Governor’s responsibilities in this regard may be delegated to the Minister of Transport, under the Bermuda Constitution Order 1968 and the Governor may also designate a person to carry out certain functions required by the Order following consultation with Air Safety Support International (ASSI). The Order came into force on 1 January 2014 and should be read in conjunction with the Air Navigation (Overseas Territories) (Amendment) Orders.

Most matters relating to aviation are dealt with by the 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 Register of Aircraft in Bermuda is an owner register; however, it is also possible to register aircraft in the name of the lessor.

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

Registration, and the issuance of a certificate of registration, is *prima facie* evidence of ownership and indicates that the relevant applicant is considered to be qualified for registration. The Certificate of Registration sets out the following information: (i) the registration mark; (ii) the aircraft type and serial number; (iii) the name of the registered owner (and whether such registered owner holds a charter by demise interest); and (iv) the nationality of the registered owner.

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

The requirements for registration are set out in the ANOTO, including who is considered to be a qualified person for registration. This includes:

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

Currently there are no limits or restrictions on the age of the aircraft that may be registered or operated; however, any aircraft can be evaluated prior to entry onto the register to determine its eligibility to enter the register.

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

There is no register of aircraft leases in Bermuda. Leases in Bermuda are not subject to any consent from any government entity in Bermuda. It is generally recommended that lease documents be in English or accompanied by an English language translation.

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

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 such authorised party is the only entity entitled to de-register the aircraft.

The steps for deregistration are as follows:

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

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

## 4 Security

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

Where an aircraft or aircraft engine is owned by or in the lawful possession of a company incorporated in Bermuda, any mortgage of such aircraft registered in the Aircraft Register or capable of being so registered may be entered in the Register

of Aircraft Mortgages and any mortgage of such aircraft engine may be entered in the Register of Aircraft Engine 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 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.

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

A registrable mortgage may cover any store of spare parts for such aircraft or such aircraft engine; however, a mortgage created as a floating charge is not registrable.

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

Yes. The Mortgaging of Aircraft and Aircraft Engines Act 1999 (the Mortgage Act), together with the related Mortgaging of Aircraft (Procedures) Regulations 1999 and Mortgaging of Aircraft Engines (Procedures) Regulations 1999 provides for the establishment and maintenance of a register of aircraft mortgages and a register of aircraft engine mortgages. The register is maintained by the BCAA.

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

In addition to mortgages over aircraft and engines, the following other forms of security may be taken:

- (i) security assignments in respect of leases and/or insurance contracts;
- (ii) equitable mortgages or charges over the shares of the owner/borrower entity; and
- (iii) fixed or floating charges over the assets of a Bermuda owner/borrower.

A charge created over an aircraft not registered in Bermuda or not having any interests registerable under The Mortgage Register but owned by a Bermuda registered company, or a charge over shares of a Bermuda company, may be registered in the Charges Register at the Registrar of Companies, pursuant to the Companies Act 1981 of Bermuda.

Registration constitutes notice to the public of the interest of the charge in or over the aircraft.

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

Only prior charges that have been registered against the subject of the mortgage would take priority over a registered mortgage.

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

Typical security that can be granted over an aircraft and/or engine lease would include security agreements including

assignments of rights to insurance proceeds, lease revenue, etc., bank account pledges and potentially share charges. See also the answer to question 4.4.

## 5 Enforcement and Repossession

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

Upon the event of default, the mortgagee may take possession of the aircraft and subsequently sell it, providing that this has been stipulated for in the mortgage or the mortgagor otherwise consents. The following documentation will be required:

- The original mortgage or a certified copy thereof. Where the mortgage is in a foreign language a certified translation will be required. The loan agreement and any other agreements and documentation relating to the debt should also be provided.
- Evidence of the non-payment of the debt on the due date or the occurrence of an event of default under the mortgage, together with evidence of the service of a notice of default on the mortgagor.

### 5.2 What is the procedure for repossession 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 mortgagor or the owner to take physical possession of the 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.

If the mortgagor 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 mortgage. The mortgagor, after acknowledgment of service of originating process, would need to seek to obtain summary judgment.

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

The judicial system in Bermuda is based upon the principles of English common law, as modified and supplemented by various acts passed by the local legislature. The Bermuda courts will generally uphold such a clause, assuming that such a choice was valid under the applicable foreign laws, and not contrary to public policy.

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

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 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 such 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: (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; (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.

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

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

At present, Bermuda does not have any local airlines; however, an IDERA in the form prescribed by the BCAA can be filed with the BCAA. An IDERA is irrevocable and the BCAA's form of IDERA does not contain a governing law clause.

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

The amount of time to gain possession of the aircraft will be determined by the terms of the court judgment.

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

The payment of rent by a lessee is unlikely to be sufficient to frustrate legal rights of possession or ownership; however, this position has not been tested in Bermuda.

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

There are no restrictions on the export of the aircraft; however, an export certificate of airworthiness in respect of the aircraft may be required if the aircraft is being removed from the register. Otherwise, an export permit is neither required nor issued in respect of an aircraft being exported from Bermuda.

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

Bermuda is independent for the purposes of exchange control, which is operated under the Exchange Control Act 1972 and related regulations.

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 any repatriation of proceeds.

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

Section 3 of the Judgments (Reciprocal Enforcement) Act 1958 provides that where a judgment has been obtained in a superior court of the United Kingdom of Great Britain and Northern Ireland, the judgment creditor may apply to the Supreme Court of Bermuda at any time within six years after the date of the judgment, or such longer period as may be allowed by the court, to have the judgment registered in the court. On any such application the Supreme Court may, if in all the circumstances of the case it thinks it is just and convenient that the judgment should be enforced in Bermuda, and subject to this section, order the judgment to be registered accordingly. On registration, it will be treated as though it were the judgment of the Supreme Court of Bermuda.

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

The procedure set out in response to question 5.2 also applies to the repossession of aircraft under other security interests.

## 6 Conventions

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

The Bermuda International Interests in Mobile Equipment (Cape Town Convention) Act 2016 extends the Cape Town Convention and the related Protocol to Bermuda. Bermuda is not a Contracting State to the Convention in its own right but rather a “territorial unit” of a Contracting State, namely the UK. Bermuda adopted a number of creditor friendly declarations under the Cape Town Convention and Protocol including Alternative A.

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.

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

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

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

Bermuda has made declarations under Articles 39(1) and 39(4) of the Convention; however, they have not yet been enforced by parties in Bermuda.

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

Bermuda made declarations under Article XXX(3) of the Protocol 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 60 calendar days.

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

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).

## 7 Liability for Damage and Environmental

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

The owner of an aircraft is subject to strict liability by virtue of section 40(2) of the UK Civil Aviation Act 1949, which is extended to Bermuda. However, section 76(4) of the UK Civil Aviation Act 1982 (which is also extended to Bermuda) provides that loss or damage caused by an aircraft in flight or by a person in, or an article, animal or person falling from, an aircraft is transferred to the person to whom the owner has demised, let or hired out the aircraft, provided that the demise, let or hire is for more than 14 days and no crew member is employed by the owner subject to section 40(2) of the Civil Aviation Act 1949.

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

The EU ETS does not apply to aircraft and aircraft operators in Bermuda and charges levied under it would not give rise to any rights *in rem* over aircraft in Bermuda.

As the United Kingdom voluntarily participates in CORSIA and as Bermuda is a British Overseas Territory, CORSIA currently applies to aircraft and operators on the Bermuda Register.

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

It is rare for aircraft to be physically located or operated in Bermuda. Typically, therefore, liabilities would be incurred in the jurisdiction in which the aircraft is located.

## 8 Insolvency and Searches

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

The Cause Book of the Supreme Court of Bermuda notes all judgments against individuals or companies and also any legal or governmental proceedings pending in Bermuda to which an individual or company may be subject.

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

There is no duty on an insolvent company to file for insolvency protection although a failure to do so may have consequences for (i) antecedent transactions, and (ii) the directors/officers of the company in the event of a liquidation.

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

Yes: in a compulsory winding up by court order or a voluntary liquidation, a liquidator is appointed. However, the liquidator is usually an insolvency practitioner rather than a "court official", save where (exceptionally) the Official Receiver is appointed. A liquidator is "an officer of the court" in that he owes a separate duty to the court to act fairly and impartially.

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

The making of a winding up order by the court in a compulsory liquidation brings to an end the role of any former directors/officers in the company whose management and control are taken over by the liquidator. The situation is slightly more nuanced in a voluntary liquidation, where the committee of inspection/creditors/members can sanction the continuance of a role for directors/officers.

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

It is important to note that the "commencement" of winding up is, in a compulsory winding up by the court, the date of the presentation of the petition (not the date of the winding up order) and, in a voluntary winding up, the date of the passing of a resolution to wind up the company. In a winding up by the court, any disposition of property of the company, including things in action, and any transfer of shares, or alteration in the status of members, made after the commencement of winding up is void unless the court orders otherwise (by means of a validation order). In addition, any conveyance, mortgage, delivery of goods, execution or other act relating to the property of a



company within six months before the commencement of a winding up will be invalid if it is found to be a “fraudulent preference”. A fraudulent preference exists if a disposition was made with the intent to fraudulently prefer one or more of the company’s creditors at a time that the company was unable to pay its debts as they became due. However, these provisions are aimed at disposals of company property and therefore the acts described at (a) to (f) in question 8.4 above would not be caught.

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

A lease is not “adopted” by the liquidator; it will continue to bind the liquidator until “disclaimed”. A liquidator is entitled to disclaim onerous property belonging to the company, whether real or personal, with leave of the court. There is no common practice, it will depend on the factual circumstances. If the lease is disclaimed, the owner will rank as an unsecured creditor and will be entitled to prove his loss in the liquidation.

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

Save for limited exceptions (e.g., 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).

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

There are essentially three kinds of liens available to a third party to take over an aircraft or engine: (i) a seller’s lien, where an unpaid seller takes a lien over the unpaid purchase price; (ii) a possessory lien, used where a lienholder has continuous possession of an aircraft or engine on which it has carried out work (as authorised by the owner) that has improved the aircraft or engine in some way; and (iii) a contractual lien created by contract.

## 9 Detention and Confiscation

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

The law of receivership will also apply. A debenture holder or mortgagee will have the right to appoint a receiver to realise its security. Depending on the powers of the receiver under the instrument of appointment or court order, the owner’s rights can be partially or wholly displaced.

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

Under Bermuda law, persons are granted a right to detain and, in some cases, to sell (or cause to be forfeited) aircraft in certain circumstances without the requirement to inform the owner. Such circumstances include:

- (a) non-payment of airport charges;
- (b) contravention of certain licensing and air navigation provisions of the ANOTO;
- (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) criminal activity:
  - 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. 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; 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.



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