

THE AVIATION LAW
REVIEW

NINTH EDITION

Editor
Sean Gates

THE LAWREVIEWS

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PREFACE

The Aviation Law Review continues to be among the most successful publications offered by The Law Review, with the online version massively increasing its reach within the industry not only to lawyers but to all those involved in the various aspects of management touched by laws and regulations that, from certain jurisdictions, flow like a river in full spate. Now that subscribers to Bloomberg Law and Lexus Nexus have access online, that of course has also significantly increased the readership.

This year I welcome a new contribution from Turkey, and extend my thanks and gratitude to all of our contributors for their continued support. I would emphasise to readers that the contributors donate very considerable time and effort to make this publication what it has succeeded in being; the premier annual review of aviation law. All contributors are carefully selected based on their knowledge and experience in aviation law. We are fortunate indeed that they recognise the value of the contribution they make and the value of the *Review* that it enables.

Notwithstanding the risks posed by new variants, at the time of going to press at least the threats posed by covid-19 to the world and the aviation business sector seem to be beginning to recede in some parts of the world, while others continue to languish where vaccinations have yet to become available, and where vaccine hesitancy is encouraged from dark alleys in social media up to the level of irresponsible political figures around the world. The damage wrought on aviation has been particularly severe consequent upon the grounding of airlines, the closure of airspace and the uncertainty as to when, and to where, flights may safely be taken. So far as lessors are concerned, attempts by lessees to moderate their financial exposure by reliance upon the pandemic by arguing that contracts have thereby been frustrated have been denied in several courts. As yet, no decisions have crossed my desk regarding operating leases, and decisions in respect of them will, of course, depend upon the terms of those leases. While there have been some bankruptcies, the majority of carriers have managed to cling on to financial life by virtue of reliance on governmental support, although this has not been routinely and equally available throughout the world.

In last year's preface I referenced the difficulties encountered by Boeing with regard to the damage to its reputation as well as the reputation of the Federal Aviation Administration (FAA) following the 737 MAX grounding. It was eventually, after extensive modification, declared safe to fly, but then came under renewed scrutiny six months later as a result of a potential electrical problem that led to the renewed grounding of more than 100 aeroplanes belonging to 24 airlines around the world in April 2021. The practice of the major aviation authorities around the world of accepting the type certificates of other regulators appears likely to be the most enduring victim of this debacle, with airworthiness authorities under very considerable pressure to make sure for themselves they are satisfied with the certification

of aircraft manufactured in other countries. The European Air Safety Authority has been under a particular spotlight in this respect and, according to European Aviation Safety Agency (EASA) Executive Director Patrick Ky:

we have a bilateral safety agreement (between EASA and the FAA) that was signed some time ago, under which the direction had been taken to reduce more and more the level of involvement of EASA on FAA-approved projects. Of course, given those tragedies for which we have seen, we have stopped this trend and we will increase our level of involvement and our independent review of US projects in order to build our own safety assessment of those projects.

The impact of Brexit on aviation continues to be worked out, although the EU–UK agreement on the subject came into force alongside the trade agreement in 26 pages of the 1,449-page text. The agreement provides in broad measure that traffic rights between the UK and EU are preserved, cabotage rights are removed, cargo fifth freedoms are permitted allowing cargo to be on carried from one European destination to a third country, and vice versa, subject to bilateral agreements between the UK and the individual Member States of the EU. Ownership and control restrictions require that airlines must be owned and effectively controlled by nationals in their headquarters and that airlines must have their principal place of business in their own territory and hold an air operator's certificate from the competent authority in their own jurisdiction. There is an exception to this in that UK airlines are permitted to be effectively controlled by nationals of the EU, the European Economic Area or Switzerland. This ownership provision is echoed in the UK–US bilateral agreement permitting UK airlines to be owned by EU nationals while operating from the UK to the US. Clearly, the principal beneficiary of these provisions is British Airways, owned by IAG headquartered in Spain, which also owns other EU airlines.

The UK is no longer part of EASA, but there is close coordination between the Civil Aviation Authority of the UK and EASA as well as mutual recognition of licences.

The EU–UK agreement also touches upon the thorny and troublesome issue of EU 261 in that it aims for a high level of consumer protection and cooperation between the EU and the UK in this area. The European Union (Withdrawal) Act 2018 provides that regulations such as EU 261 are automatically incorporated into UK law, being known as retained EU law, unless and until they are revoked by an Act of Parliament. The regulation itself, therefore, continues to apply unless and until it is changed by the UK Parliament. That power does seem currently unlikely to be exercised among the myriad issues falling to be addressed by the newly empowered Parliament, although the opportunity may arise if the long-promised review of EU 261 in Europe is finally brought forward by the Commission for decision, when the issue could at least be debated. One can but hope that the regulation will be made more compliant with the terms of its preamble and original content before it is subjected to the legislative whims and activist fancies of the European Court of Justice (ECJ). However, decisions made up until 31 December 2020 will be retained in the UK and will be binding at least at first instance level, with limited powers given to the Court of Appeal and the Supreme Court to depart from past case law. Decisions after December 2020 will not be binding but will continue to be persuasive. The extent to which the UK will depart from ECJ case law has already been reviewed in two Court of Appeal cases, *Tuneln v. Warner* and *Lipton v. BA Cityflyer*. The Court of Appeal held that the power to depart from ECJ decisions should be used as an exception only, and that in the first case actually applied to a post-Brexit ECJ ruling in reaching its decision. In *Lipton*, the Court set out a list of matters to be considered

in determining its approach. These early decisions seem at least to indicate that the Court of Appeal and Supreme Court will require significant reasons to exercise their inherent power to depart from the law promulgated by the ECJ.

In the meantime it is clear that the Court of Justice of the European Union continues on its rampage against the safety, security and financial viability of aviation by its latest decision on the subject in the case of *Air Help v. SAS* of 23 March 2021. In this case, the Court has held, against the recommendation of its Attorney General, that a strike organised by a trade union of the staff of an air carrier that is intended in particular to secure pay increases does not fall within the concept of an extraordinary circumstance capable of releasing the airline from its obligation to pay compensation for cancellation or non-delay in respect of the flights concerned. The Court relied on its earlier decisions to the effect that in order to qualify as extraordinary, the event must not be inherent in the normal exercise of an air carrier's activity, and must be beyond its actual control, because the regulation has to be strictly interpreted to afford a high level of protection for air passengers and because the exemption from the obligation to pay compensation is a derogation from the principal that air passengers have the right to compensation.

As so frequently in the past, the Court has made these comments by ignoring some elements of the preamble to the regulation in favour of others, and misinterpreting other elements of the preamble so as to make the payment of pocket money to passengers take priority over the obligation imposed on Member States to procure general compliance by air carriers with the regulation and appoint an appropriate body to carry out enforcement tasks. In other words, states should make sure operators do not wrongly delay or cancel flights, with compensation being paid in the limited circumstances set out in the regulation, and not as a device to punish errant carriers or to jeopardise their financial viability. It cannot be said too often that the payment of compensation does not protect passengers and can be carried to extremes and, as in this case, actually jeopardise connectivity and safety.

In an act of particular judicial gymnastics in its *SAS* decision, the ECJ held that Preamble 14, which specifically states that extraordinary circumstances 'may, in particular, occur in cases of . . . strikes that affect the operation of an operating air carrier', did not assist *SAS* in the current case because a strike, as one of the ways in which collective bargaining may manifest itself, must be regarded as an event inherent in the normal exercise of the employer's activity and that, therefore, a strike whose objective is limited to obtaining an increase in pilots' salaries is an event that is inherent in the normal exercise of that undertaking's activity. The Court also, extraordinarily, held that 'since a strike is foreseeable for the employer, it retains control over events in as much as it has, in principle, the means to prepare for the strike and, as the case may be, mitigate its consequences'. In a continuing feat of legerdemain, the Court held that just because a carrier may have to pay compensation to passengers for cancellations or delays does not mean that the carrier has to accept without discussion strikers' demands. The air carrier 'remains able to assert the undertaking's interests, so as to reach a compromise that is satisfactory for all the social partners'. The effect of the decision, of course, is to hand to unions a weapon in their armoury of almost nuclear capacity to destroy the undertaking altogether unless its demands are met, since failure to comply leads to what are increasingly becoming ruinous levels of obligations to pay 'compensation' to passengers in respect of cancelled flights. It is becoming increasingly difficult to escape the conclusion that the ECJ has a covert purpose of the destruction of the airline industry in Europe, but it is hopefully difficult to imagine that this decision is one that the UK Court of Appeal would follow without demur.

Airlines in Europe need to stand together to resist the continued assault of the regulation on their very existence, for without such unity, to paraphrase Aesop, division can only produce disaster.

Once again, many thanks to all our contributors to this volume including, in particular, those who have joined the group to make *The Aviation Law Review* the go-to resource.

Sean Gates

Gates Aviation Ltd

London

July 2021

CAYMAN ISLANDS

*Wanda Ebanks and Shari Howell*¹

I INTRODUCTION

i The regulator

The Civil Aviation Authority of the Cayman Islands (CAACI) is responsible for the regulation of the aviation industry within the Cayman Islands. A body corporate originally established under the Civil Aviation Authority of the Cayman Islands Act (2015 Revision),² this self-funding statutory authority is a revenue-generating operation for the government.³

The CAACI's functions include those conferred on the Governor of the Cayman Islands by the Air Navigation (Overseas Territory) Order (As Revised) (ANOTO) and other similar regulations. The CAACI's authority covers all aspects of regulation and supervision of the aviation sector within the jurisdiction, including aircraft registration through the Cayman Islands Aircraft Registry operated by the CAACI (Registry), safety of air navigation and aircraft (including airworthiness), regulation of air traffic, certification of operators of aircraft, licensing of air crew, licensing of air transportation services and certification and licensing of airports.⁴ The CAACI is also responsible for ensuring that civil aviation in the Islands conforms to the standards of the International Civil Aviation Organization, established by the Convention on International Civil Aviation, signed in Chicago on 7 December 1944 (ICAO).

The CAACI is headed by a director general and a statutorily appointed board of directors. The board is responsible for the effective implementation and performance of the CAACI in accordance with applicable law.⁵

The Aircraft Register maintained by the Registry is primarily a 'private-use category' register, and aircraft registered thereon must not be used for commercial operations (i.e., for hire or reward) unless a separate air operator's certificate (AOC) is granted.⁶ Despite its relatively small size,⁷ the Registry has evolved as a highly regarded private aircraft registry.

1 Wanda Ebanks and Shari Howell are partners at Maples and Calder, the Maples Group's law firm.

2 The current law is commonly referred to as the Civil Aviation Authority Act (As Revised).

3 CAACI revenues are generated from regulatory activities and the registration of aircraft (private and corporate) on the Cayman Islands Aircraft Registry. The CAACI's latest annual report indicates that 2016–2017 was another successful year for the CAACI.

4 Civil Aviation Authority Act (As Revised), Section 5(1)(a).

5 Civil Aviation Authority Act (As Revised), Section 7(1).

6 There were seven approved AOC holders reported in the CAACI Annual Report for the fiscal year ending 31 December 2019.

7 As at 20 April 2021, the CAACI records indicated a total of 303 aircraft were registered on the Cayman Islands Aircraft Register (Active Aircraft Register on the CAACI website at www.caacayman.com).

ii Registration of aircraft

Requirements relating to the registration of aircraft are fully set out in the ANOTO.

Eligibility for registration

To register an aircraft with the Registry, the owner, or, if the aircraft is chartered, the charterer by demise, must be a qualified person as defined in the ANOTO.

A qualified person includes:

- a* the Crown in right of Her Majesty's government in the United Kingdom or in right of the government of the territory;
- b* United Kingdom nationals;
- c* Commonwealth citizens;
- d* nationals of any European Economic Area (EEA) state;
- e* bodies incorporated in any part of the Commonwealth that have their registered office or principal place of business in any part of the Commonwealth; or
- f* 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.⁸

An unqualified person holding a legal or beneficial interest in an aircraft or a share therein may still register an aircraft with the CAACI if he or she resides or has a place of business in the Cayman Islands and the CAACI is satisfied that the aircraft may properly be registered. Similarly, if the aircraft is chartered by demise (whether by dry or wet lease) to a qualified person the CAACI may permit registration, notwithstanding that an unqualified person may be entitled as owner to a legal or beneficial interest in an aircraft or a share in the aircraft. Both of the foregoing exceptions are subject to the discretion of the CAACI and the full facts and circumstances must be presented to the CAACI before any such registration will be considered.

The ANOTO also provides that an aircraft shall not be registered or continue to be registered in the Cayman Islands if it appears to the Registry that:

- a* the aircraft is registered outside the Cayman Islands and that registration does not cease by operation of law upon the aircraft being registered in the Cayman Islands;
- b* an unqualified person holds any legal or beneficial interest in the aircraft;
- c* the aircraft could more suitably be registered in some other state (including the United Kingdom and its territories and dependencies) that is a party to the ICAO; or
- d* it would be inexpedient or in the public's interest for the aircraft to be or to continue to be registered in the Cayman Islands.

Requirements for registration of aircraft for private use

Applications for registration are made to the CAACI and applicants can typically take advantage of the CAACI's online portal, VP-C Online, to submit much of the documentation supporting the application.

The application process involves:

- a* submission of an aircraft registration application to the Registry and payment of the applicable deposit;
- b* satisfactory completion of financial and legal due diligence with respect to the applicant;

⁸ Air Navigation (Overseas Territories) Order (As Revised), Article 16(1).

- c* issuance by the Registry of notice of acceptance of the applicant and a reserved Cayman Islands registration mark;
- d* completion of an airworthiness survey of aircraft by a CAACI-approved surveyor;
- e* completion and submission of supporting documentation (including various technical forms); and
- f* effecting deregistration from the existing state of registry (where applicable).

A Cayman Islands certificate of registration, certificate of airworthiness and all associated certification documents will be issued by the Registry on registration.

Requirements for registration of aircraft for commercial operations

An application for a Cayman Islands AOC permitting the holder to undertake commercial operations requires the provision of certain information, including the following:

- a* the official name, address and telephone number of the applicant;
- b* the types, serial numbers and registration marks of each aircraft for which a certificate is required;
- c* the purpose for which the aircraft will be operated;
- d* the specific location of the principal operating base and any other places at which the aircraft will be operated or based;
- e* the names and addresses of organisations responsible for all maintenance of each type of aircraft;
- f* the names, qualifications and experience of the accountable manager and nominated post holders and details of the duties for which each individual is responsible (with résumés); and
- g* the names, qualifications and experience of persons nominated to be responsible for conducting on behalf of the operator the training and assessments specified in the relevant legislation.⁹

In addition, the CAACI requires that the holder of a Cayman Islands AOC operate a Cayman Islands office. A physical presence can be established in a number of ways, including by means of a Cayman Islands Special Economic Zone company in the Cayman Maritime and Aviation City. An applicant for an AOC is encouraged to seek Cayman Islands legal advice on setting up a physical presence in the Cayman Islands to meet this requirement.

Fees payable on the registration of aircraft

The fees payable on the registration of aircraft are set out in the Air Navigation (Fees) Regulations (As Revised). A summary of these may also be found on the CAACI's website.¹⁰

Effect of registration

The registration of title to the aircraft constitutes prima facie evidence of ownership of the aircraft. However, such evidence is not conclusive. The ANOTO provides that, to the extent its provisions apply to Cayman Islands aircraft, such provisions have extraterritorial effect.¹¹

⁹ More detailed information is available from the CAACI directly.

¹⁰ www.caacayman.com.

¹¹ Air Navigation (Overseas Territories) Order (As Revised), Article 188(1).

No registration of leases

Leases are not required to be registered with the Registry in relation to Cayman Islands registered aircraft and Cayman Islands law does not otherwise provide for their registration by filing or recording in the Cayman Islands.

Deregistration of aircraft registered with the Registry

When it becomes necessary to deregister an aircraft from the Registry (following a sale or otherwise):

- a* the registered owner¹² or the person responsible for the aircraft must provide the CAACI with instructions to deregister the aircraft;
- b* the registered owner's financial account with the CAACI must be fully settled;
- c* if a certificate of airworthiness for export is required by the importing state, a CAACI surveyor must inspect the aircraft prior to issuance. To initiate this process, a certificate of airworthiness request form must be submitted to the CAACI;
- d* the original certificate of registration must be submitted to the CAACI, with Section III on the reverse side signed by the registered owner of the aircraft or the person responsible for the aircraft (accompanied by the related certified power of attorney in the latter case);
- e* if an aircraft has a mortgage registered against it on the aircraft mortgage register maintained by the Registry (Mortgage Register), the mortgagee must confirm in writing to the Registry how the mortgage is to be addressed following deregistration. If the mortgage is to be discharged, this must be effected prior to or simultaneously with deregistration. If not, the CAACI will require a certified or notarised confirmation letter from the mortgagee that:
 - the mortgage will not be discharged;
 - the mortgage remains in force; and
 - a notation will remain on the Mortgage Register; and
- f* if necessary, the CAACI will confirm to the new state of registry that the aircraft is being or has been deregistered from the Register.

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

- a* a notarised or original deregistration power of attorney (in favour of the person seeking to instruct the CAACI);
- b* proof of default under the agreement giving rise to the right to deregister the aircraft and the details thereof;
- c* proof of right to deregister the aircraft in an event of default (i.e., reference to the relevant section of the agreement);
- d* confirmation that the adversely affected party is seeking to enforce its rights under the agreement; and
- e* if the enforcement is contentious and the original certificate of registration cannot be obtained from the owner, an affidavit by the adversely affected party confirming that to be the case and requesting deregistration of the aircraft indicating the new state of registry.

12 References to registered owner mean either the owner or the charterer by demise (as relevant).

iii Security and aircraft mortgages

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

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

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

- a* where there is a registerable international interest under the Cape Town Convention (as defined in the Cape Town Act), any such international interest in respect of an aircraft may be recorded on the international registration facilities established under the Cape Town Convention (IR). Registration on the IR is permitted for aircraft that qualify under the Cape Town Convention. Cape Town registrations and filings on the IR are made in the usual way. Where an international interest has been registered against an aircraft that is registered with the CAACI in accordance with the Cape Town Convention, priority of a mortgage over that aircraft will be determined solely by the filings on the IR. No additional registrations are required with the CAACI in relation to a mortgage over such aircraft; or
- b* if the Cape Town Convention does not apply, then the priority of a registered mortgage against Cayman Islands registered aircraft will be determined in accordance with registration on the Mortgage Register pursuant to the Mortgaging of Aircraft Regulations, 2015 (Regulations). The Regulations, among other things, offer a system for obtaining priority for a security interest, perfecting the security interest and protection from deregistration of an aircraft without the registered mortgagee's consent. Registration on the Mortgage Register constitutes express notice to all persons of all facts appearing thereon.

Requirements to register a mortgage with the CAACI

To register a mortgage on the Mortgage Register:

- a* a completed or executed application form must be submitted on behalf of the mortgagee;
- b* the application must be accompanied by a copy of the mortgage (a PDF copy is sufficient and advisable since Cayman Islands stamp duty becomes payable if the original mortgage is brought to or executed in the Cayman Islands);¹³ and
- c* payment of the applicable mortgage registration fee must be made.

¹³ *Ad valorem* duty at a rate of 1.5 per cent of the sum secured is payable if the original mortgage is executed in or brought to the Cayman Islands following execution.

It is also possible to file a priority notice with the Registry by filing the applicable documentation and payment of the relevant fee. Provided the relevant mortgage is filed within 14 days of the date of such a priority notice it shall be deemed to have priority from the time when the priority notice was registered.

Under the current legislation, an international interest (as defined in the Cape Town Act) registered on the IR has priority over any other interest subsequently registered on the IR and over an interest that is not registered on the IR, subject to certain exceptions.¹⁴

Discharge of a mortgage registered with the CAACI

The following is the procedure to effect deregistration of a mortgage with the CAACI:

- a* submission of a mortgage discharge form signed by the mortgagor and mortgagee (together with copies of signing authorities);
- b* provision of a copy of a fully executed deed of release of mortgage. Alternatively, a letter addressed to the CAACI signed by an authorised signatory of the mortgagee instructing the CAACI to deregister the mortgage will suffice; and
- c* payment of the applicable mortgage discharge fee.

Creditor rights

The courts of the Cayman Islands will enforce a foreign money judgment made against the owner or charterer by demise of a Cayman Islands registered aircraft without a retrial of the merits provided the judgment:

- a* is made by a foreign court of competent jurisdiction;
- b* imposes on the judgment debtor a liability to pay a liquidated sum for which the judgment has been given;
- c* is final;
- d* is not in respect of taxes, a fine or a penalty;
- e* is not impeachable on the grounds of fraud; and
- f* does not offend natural justice or the public policy of the Cayman Islands.¹⁵

The judgment creditor holding an enforceable foreign judgment has a wide range of options to enforce the judgment against the debtor. These include:

- a* writs of *fi. fa.* (i.e., seizure and sale of goods);
- b* charging orders in respect of land and securities;
- c* garnishee orders (i.e., attachment of debts including bank deposits);
- d* appointment of a receiver (who might collect receivables or even run a business); or
- e* an attachment of earnings order.

Recent English authorities (which are persuasive, although not binding on the Cayman Islands courts) suggest that foreign judgments that are integral to bankruptcy proceedings may be enforceable without satisfying the usual requirements set out at the first paragraph above and without the need to embark on fresh proceedings in the Cayman Islands. However, these authorities have yet to be fully considered by the Cayman Islands courts.

¹⁴ See Sections 3 and 4 of the International Interests in Mobile Equipment (Cape Town Convention) Act (As Revised).

¹⁵ In any application to exercise enforcement options under Cayman Islands law, the judgment creditor will need to establish the factors outlined above to the satisfaction of the Cayman Islands court.

Assignment of security rights

Security interests may be assigned under Cayman Islands law. If an assignment is to be governed by Cayman Islands law, it should be in writing, and notice of the assignment must be given to the debtor to perfect the assignment. If the document creating the security interest is brought to, or executed in, the Cayman Islands, it must be stamped with applicable Cayman Islands stamp duty.

A Cayman Islands company must make an entry in its register of mortgages and charges in respect of all mortgages and charges created by it under any transaction documents to comply with local law; failure by the company to comply with this requirement does not operate to invalidate any mortgage or charge, although it may be in the interests of the secured parties that the company should comply with the statutory requirements. The register of mortgages and charges is not a public document, and is maintained by the company's registered office in the Cayman Islands on the company's minute book.

Enforcement of security over aircraft registered in Cayman Islands¹⁶

Enforcement will be determined by the provisions of the relevant agreement.

Taking physical possession of the aircraft is permitted under Cayman Islands law. Self-help remedies are permitted without the need to obtain a court order; however, it is open to the relevant enforcing party to seek a court order.

Permission of the CAACI is not required prior to pursuing remedies on enforcement. However, possession via either a transfer of title or change of details of the entity registered with the CAACI will require the cooperation of the CAACI (and thus compliance with CAACI's transfer formalities for Cayman-registered aircraft).

Liens and rights of detention

Liens are not registrable in the Cayman Islands.

It is commonly understood¹⁷ that the following aircraft liens exist under Cayman Islands law:

- a* seller's lien: pursuant to the Sale of Goods Act (As Revised), an unpaid seller may have a lien over an aircraft to the extent that the buyer fails to pay the purchase price;
- b* salvage lien: based on the principle that a person providing voluntary assistance should recover their costs prior to the other parties with an interest in vessels;¹⁸
- c* possessory lien: a common law legal lien relating to specific aircraft. Applicable where a person carried out work on an aircraft, upon authorisation from its owner, enhancing the aircraft's value. That person will have a lien on the aircraft to the extent that he or she remains unpaid for the work carried out on the aircraft; and
- d* contractual lien (including pledge): parties may create a lien by contract that is 'certain', regardless of whether a possessory lien exists at common law. The owner of an aircraft

16 Enforcement by a Cayman Islands court requires originals of the relevant documents (with Cayman Islands stamp duty paid thereon), and applicable court fees to be paid.

17 It is not possible to be definitive since no legislation and, to the best of our knowledge, no Cayman Islands case law has analysed aircraft liens in detail.

18 The absence of relevant cases makes it uncertain whether an aircraft salvage lien can be asserted in the Cayman Islands.

may pledge it to the 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, or a contractual salvage lien may also arise.

The Cayman Islands are not a signatory to international conventions that relate to aircraft liens.¹⁹ However, the Cayman Islands court will recognise a foreign aircraft lien provided it is valid under its appropriate governing law, subject to qualifications relating to enforceability being met.

In addition to aircraft liens, under the Cayman Islands legislation persons can be granted a right to detention. In the event that more than one detention right exists over an aircraft at the same time, their priority will likely be determined according to the time each contravention occurred. In addition to the statutory rights to detain aircraft, detention may also arise as a result of a breach of contract or in a case where an attachment of an aircraft is sought (e.g., for the non-payment of a debt or on the liquidation or insolvency of the owning company). Statutory detention rights are generally not based on possession and do not seek to prevent other parties with an interest in the aircraft from having access to it.

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

- a* Airport charges: aircraft can be detained and sold for non-payment of airport charges; default of payment creates a statutory lien.²⁰
- b* Customs: where anything becomes liable to forfeiture under the Customs Act (As Revised), any aircraft used for the carriage, handling, deposit or concealment of that thing shall also be liable to forfeiture. Forfeiture of an aircraft may also occur where it has been adapted to be used for or is used for the purposes of smuggling or concealing goods.²¹
- c* Crimes: where a person is convicted of an offence, any aircraft in his or her possession or under his or her control that was used in connection with such an offence or intended to be used for that purpose may be forfeited to the Crown by order of the court.²²
- d* War or national emergency: regulations made under the Emergency Powers Act (As Revised) can give powers to the Governor of the Cayman Islands to authorise the taking possession or acquisition of any property.²³
- e* Terrorism: the court can make a forfeiture order in accordance with Section 28 of the Terrorism Act (As Revised).

The priority of domestic aircraft liens and detention rights will be in the following order:

- a* statutory detention rights;
- b* contractual lien;
- c* salvage lien;
- d* possessory lien;

19 The 1948 Geneva Convention on the International Recognition of Rights in Aircraft or the 1933 Rome Convention on Precautionary Arrest of Aircraft.

20 Airports Authority Act (As Revised) Section 34.

21 Customs Act (As Revised) Section 61.

22 Misuse of Drugs Act (As Revised) Section 25(2). Note also that the court has broad powers under the Proceeds of Crime Act (As Revised) to order the confiscation of property derived from the proceeds of criminal conduct. (Applications for compensation in these situations are dealt with thereunder.)

23 Emergency Powers Act (As Revised) Section 5(2)(b).

- e* registered mortgages; and
- f* unregistered mortgages.

The priority of foreign aircraft liens before a Cayman Islands court will be determined by Cayman Islands law as the law of the forum deciding the matter (the *lex fori*) since the question of priority is a procedural rather than a substantive matter under Cayman Islands law.

iv Strict liability under Cayman Islands law

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

Where material loss or damage is caused to any person or property on land or water by, or by a person in, or an article or person falling from, an aircraft while in flight, taking off or landing, then unless the loss or damage was caused or contributed to by the negligence of the person by whom it was suffered, damages in respect of the loss or damage shall be recoverable without proof of negligence or intention or other cause of action, as if the loss or damage had been caused by the wilful act, neglect, or default of the owner of the aircraft:

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

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

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

Where an aircraft has been bona fide demised, let or hired out for any period exceeding fourteen days to any other person by the owner thereof, and no pilot, commander, navigator or operative member of the crew of the aircraft is in the employment of the owner, Section 40(2) of the Civil Aviation Act 1949 (as extended by the Civil Aviation Act 1949 (Overseas Territories) Order 1969 to any of the Territories specified in Schedule 2 to this Order) shall have effect as if for references to the owner of the aircraft there were substituted references to the person to whom the aircraft has been so demised, let or hired out.

v Noteworthy services offered by the CAACI

Transition Register

The CAACI is able to accommodate registration of aircraft on the Aircraft Register for short periods; for example, during the fit-out stage following a 'green delivery' or following termination of a lease, repossession by a mortgagee or otherwise. The applicant must qualify to register an aircraft on the Aircraft Register as discussed above. In lieu of a certificate of airworthiness, the CAACI will issue special flight authorisations as may be required to

transport the aircraft. One attractive feature of this offering is that the aircraft may be subject to the financiers' registered security interest. Once the period specified for the registration is concluded, the aircraft can be deregistered and re-registered on an alternative register as may be required; for example, for commercial operations. The deregistration process is simple and low cost and can be completed on a same-day basis. It is important to note that the Aircraft Register is not a register for parked aircraft or aircraft at the end of their useful life.

Article 83 bis arrangements

The Registry is primarily for private use aircraft. Aircraft operating commercially may only register on the Aircraft Register if they are operating under an Article 83 bis agreement or an AOC.

The CAACI has been open to putting in place arrangements under Article 83 bis of ICAO, which permits the Registry to transfer all or part of its functions relating to oversight and operation to the state of operation of the aircraft. The Cayman Islands currently has an Article 83 bis arrangement with Saudi Arabia. This allows aircraft that are operated by certain operators in Saudi Arabia to be operated commercially although registered on the Aircraft Register.

II LEGAL FRAMEWORK FOR LIABILITY

Although commercial aircraft are not commonly registered in or operated out of the Cayman Islands, the jurisdiction plays an important role in the structuring of some of the more complex cross-border transactions used in the acquisition, financing and leasing of aircraft.

The Cayman Islands' long-established reputation for being politically stable, tax-neutral and having a well-established legal system based on English common law principles has led to the jurisdiction's preferred status as a place to establish special purpose vehicles (SPVs) for owning or leasing aircraft.

The SPV will typically hold title to the aircraft. SPVs are flexible corporate structures that can be utilised either as a single-aircraft owning company or to hold multiple aircraft in a single entity. The acquisition of the aircraft by the SPV will most commonly be financed by way of a loan from a third-party lender, who will in turn take security over the aircraft in the form of an aircraft mortgage. Other typical features include the granting of security over lease payments in the structure and a charge or mortgage over the issued share capital of the SPV itself.

Although these traditional debt financing arrangements remain the norm, other alternative forms of financing are becoming increasingly common, and in recent years there has been a marked increase in the number of aircraft financing transactions accessing the capital markets (e.g., through bond issuances; asset backed securitisations; use of the enhanced equipment trust certificates regime; or through direct equity injection from private equity firms).

There are two basic structures that are commonly used for the financing and leasing of aircraft through a Cayman Islands SPV: an off-balance sheet, bankruptcy remote or 'orphan trust' structure; or an on-balance sheet direct ownership structure.

A common advantage of both structures is the choice of the Cayman Islands as the jurisdiction of incorporation of the SPV. In both scenarios, the assets are held by a company incorporated in a first-class jurisdiction with a high degree of political and economic stability

and a familiar and trusted legal system. Financiers find this particularly attractive as they are comfortable that if an enforcement event arises, the financing documents will be capable of enforcement in a jurisdiction where the legal system is based on English common law.

Another key advantage for both structures is taxation. The Cayman Islands does not currently have any form of direct taxation, and therefore payments made into or out of the Islands will not be subject to taxation under Cayman Islands law. To give additional comfort on this point, the government will, on request, provide an undertaking confirming that the SPV is exempt from direct taxation in the Cayman Islands for a period of 20 years from the date of the issuance of the undertaking.

i Off-balance sheet structures

In a typical Cayman Islands orphan trust structure the issued share capital of the SPV will be held by an offshore trust company as share trustee on charitable or purpose trusts; and the directors of the SPV will be provided by a third-party corporate administrator (which is often the same entity as the share trustee) pursuant to the terms of an administration agreement entered into between the SPV, the administrator and the airline or leasing company.

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

To avoid either a breach of duty or the payment of significant transaction fees to the SPV to balance the commercial risk of the assumption of open-ended loan repayment obligations, the SPV limits its obligations both in amount and recourse to the value of the security granted by the SPV. As the SPV will grant security over all its material assets (namely, the aircraft and its rights under the lease) the lender is not being deprived of recourse against any significant asset.

Following termination of the transaction, the trust will terminate and the trust property (namely, the issued share capital and any transaction fees earned by the SPV net its expenses, (i.e., the net asset value of the SPV)) will be distributed by the trustees to one or more charities as the trust document provides.

A key attraction of this structure is that ownership of the aircraft does not vest with the airline but with the SPV, which holds title in an off-balance sheet capacity. This ensures that the SPV will not be consolidated on the balance sheet of the lender, airline or trustee.

From the lender's perspective, the fact that the bankruptcy of the airline will not have an impact on the assets provides lenders a greater degree of control and certainty over the underlying assets that constitute the basis of their security. Additionally, as the SPV is entirely independent from both the lender and the airline, in a default scenario the lender is likely to experience a greater degree of cooperation from and (through the covenants in the financing documents) control over the SPV.

ii On-balance sheet structures

In a typical on-balance sheet structure, either the airline or operator, or the financier, will establish the SPV directly and will hold the shares in the SPV themselves (rather than these being held on the terms of a charitable or purpose trust). Directors are also commonly employees or nominees of the shareholder (although it is not uncommon for one or more of the directors to be provided by a third-party corporate administrator to act as an independent director).

The choice of structure will depend on a number of factors including the jurisdiction where the airline is incorporated, the jurisdiction in which the aircraft will be operated, the desired tax treatment of the overall structure and the needs of the financiers.

The on-balance sheet structure lacks bankruptcy-remote characteristics, and there will be implications up and down the chain upon a default or winding up of one or other of the parties. There is also not the same protection from consolidation as that offered in an orphan structure as the assets of the SPV are likely to be treated as being consolidated onto the balance sheet of the parent shareholder.

III EMERGING TRENDS

At the time of writing, half of the world's population remains in lockdown due to the global covid-19 pandemic. It is difficult to predict how the industry will react once restrictions (travel and otherwise) are lifted. Prior to the pandemic, there existed a strong interest in alternative sources of funding for aviation financing transactions, and the trend for using transaction structures that allow airlines and lessors to access the capital markets. Asset-backed securitisation platforms structured using Cayman Islands incorporated Irish tax resident issuers to issue notes, the proceeds of which are used to acquire an underlying portfolio of aircraft, remain popular. Even where the issuer vehicles are not incorporated in the Cayman Islands, many of the issuer vehicles are taking advantage of the flexible and user-friendly listing regime of the Cayman Islands stock exchange to list notes and other securities.

The CAACI offers a novel option to lessors and financiers requiring a reputable register to facilitate the temporary registration of aircraft that are transitioning between leases or that have been repossessed. The CAACI will facilitate the temporary registration of an aircraft on the Aircraft Register until the aircraft can be transitioned to the next phase of its useful life, be that the sale, lease or remarketing of the aircraft, or otherwise.

IV THE YEAR IN REVIEW

i Cayman Maritime & Aviation City

The Cayman Islands has distinguished itself from other special economic zones and favourable tax jurisdictions with the addition of the Cayman Maritime & Aviation City to the special economic zone, provided by Cayman Enterprise City, which is designed to make it easier for aviation services providers, including commercial air transport operators, aerospace developers and manufacturers, to set up a physical presence in the Cayman Islands.

ii Registration of the Aircraft Register

The ability to take advantage of the opportunities to set up a business in the Cayman Maritime & Aviation City to, among other things, obtain an AOC and the innovative offering for the temporary register of aircraft during a transition process, are very attractive features of the Aircraft Register that continue to draw financiers and owners alike to registering aircraft in the Cayman Islands.

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