

**International
Comparative
Legal Guides**



Practical cross-border insights into aviation finance law

**Aviation Finance & Leasing
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Third Edition

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Insights in flight

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1 General and Contractual

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

Financing structures involving Irish entities often employ the use of a special-purpose vehicle (“SPV”), which is a company established specifically to hold title to the aircraft subject to the financing and to lease those aircraft to the operators. Ireland is a popular jurisdiction for the establishment of SPVs due to the numerous double-tax treaties in place between Ireland and other countries, many of which specifically refer to aviation in their text. Ireland is also attractive due to the confidence in the legal and court system (which is broadly based on English common law) and the number of aviation experts and leasing companies based in Ireland.

There are a number of options for financing both new and used aircraft in Ireland (many of which use SPVs) with the financing being structured as either on- or off-balance sheet and limited or full recourse. Both on- and off-balance sheet transactions can be full and limited recourse, although an off-balance sheet financing will be far more likely to be limited recourse to the aircraft and the related income and any security package. An on-balance sheet deal is a transaction where title to the aircraft being financed is held by an entity in a group structure and the income and liabilities associated with the aircraft are included in that group’s financial statements, whereas off-balance sheet financings sit outside a standard group structure with the aircraft held in a ring-fenced structure, which is created via a trust arrangement.

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

The benefit of using an SPV in a financing structure is that the transaction can be structured in a bankruptcy-remote manner by limiting the activities of the SPV to the holding of title to specific aircraft being financed and the leasing of those aircraft. The SPV will grant security over the aircraft and any key contracts, and the shares in the SPV itself will ordinarily be charged in favour of the creditors.

On the borrower side, off-balance sheet financings result in the debts not being included in the borrower group’s financial statements, which is viewed as beneficial where there is significant exposure under the financing, and limited recourse transactions have the additional benefit of preventing creditors from enforcing the borrower’s obligation beyond accessing revenue

streams related to the aircraft being financed, enforcing security following a default and in some other limited exceptions, such as fraud. Where debt is full recourse whether to the borrower itself or another entity of substance offering credit support, whilst the borrower loses the protection of no winding-up or enforcement claims (beyond those limited exceptions listed above), they would expect to benefit from preferential financial terms.

For lenders, if the transaction is structured as on-balance sheet, where security is properly granted, Irish insolvency would recognise the preferential interests of secured creditors over other third-party creditors of the group, but exercising the security may take longer in an insolvency situation due to the need to engage in the examinership or winding-up process. However, on the positive side, the enhanced credit would usually allow creditors to be made whole by another member of the group.

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

Under Irish law, there are no specific tax arrangements that allow for tax-structured leasing arrangements, such as JOLCOs in Japan or leverage leases in France; however, both operating and financing leases are routinely entered into by Irish companies. The fundamental difference between an operating lease and a finance lease is that with an operating lease, no title passes at the end of the lease term, whereas with a finance lease, there is provision for title to the aircraft to pass to the lessee at the end of the lease term. For Irish tax purposes, the distinction between the two types of lease turns on who actually bears the risk on the aircraft in the event of a loss of value or destruction.

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

International Tax Reform

A key source of potential reform is the OECD’s Base Erosion and Profit Shifting initiative (“BEPS”). One of the main ambitions of BEPS is to align profits with economic activity. It has already resulted in significant changes to Ireland’s tax legislation and further reforms are likely.

Minimum Tax Rates

On 20 December 2021, the OECD published the draft Global Anti-Base Erosion Model Rules, which are aimed at ensuring that Multinational Enterprises (“MNEs”) will be subject to a global minimum 15% tax rate from 2023 (“GloBE Rules”). The GloBE Rules are part of the OECD/G20 Inclusive Framework on BEPS, which currently has 141 participant countries.

The European Commission published a proposal for a directive to implement the GloBE Rules in the EU. This proposes to introduce minimum effective taxation for MNEs with revenues of at least €750 million, operating in the EU's internal market and beyond. It provides a common framework for implementing the GloBE Rules into EU Member States' national laws.

The proposal requires the unanimous approval of the EU Council before it is adopted. The GloBE Rules may be relevant to Irish aviation entities that are regarded as part of an "MNE Group" (or which form part of a large-scale domestic group) with revenues of more than €750 million a year.

EU Proposal Anti-Tax Avoidance Directive III ("ATAD III")

On 22 December 2021, the European Commission published a proposal for a Council Directive to prevent the misuse of shell entities for tax purposes. The new ATAD III proposals are aimed at legal entities that have limited substance and economic activity in their jurisdictions of residence. Where the rules apply, the proposal is that such entities should be denied the benefit of double-taxation agreements entered into between EU Member States as well as certain EU tax directives, including the Parent Subsidiary Directive and the Interest and Royalties Directive.

As currently drafted, the proposals contain exemptions for certain entities including "securitisation special-purpose entities" and entities that have a transferable security admitted to trading or listed on a regulated market or multilateral trading facility.

ATAD III continues a trend towards incentivising taxpayers to increase and centralise their economic activity, employment and resources in the jurisdictions they operate from. In the aviation finance sector, Ireland's established reputation as the global hub for aircraft leasing means that such increased resource and "substance" requirements can be facilitated.

Interest Limitation Rule

As evidence that BEPS reforms are already impacting aviation finance, one notable point is the recent adoption of the EU interest limitation rule ("ILR") as required by Directive 2016/1164/EU (the Anti-Tax Avoidance Directive). This applies to accounting periods commencing on or after 1 January 2022.

The ILR potentially applies where a taxpayer's interest expense exceeds its interest-equivalent income. The ability to claim a tax deduction for the excess interest is restricted to 30% of EBITDA (earnings before deductions for net interest expense, tax, depreciation and amortisation). As leverage plays a key role in aviation finance, the operation and management of the rules is a key focus.

Historic structures are adapting to the new provisions and it is likely that there will be some restructuring through 2022 and beyond to take account of the provisions. The ILR contains a number of relevant provisions, including rules governing the tax treatment of finance and non-finance leases. The ILR also includes certain grouping rules that may be relevant to Irish aviation leasing groups. Companies can elect to operate the ILR on a single entity or local Irish group basis (an "interest group"). Where the Irish taxpayer is part of a consolidated worldwide group for accounting purposes or part of an Irish loss group, the entity can elect to be a member of that interest group.

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 Irish law, to have a binding contract there are three essential requirements: agreement between the parties; consideration; and intention to create legal relations. As such, if parties wish to

set out heads of terms or similar in a non-binding letter of intent or term sheet, it is absolutely key to state in clean and unambiguous language that the parties are not concluding a contract or creating a legal relation by virtue of the document. Often this is achieved by stating that the terms of the document are conditional upon certain further actions being taken, whether board approvals, aircraft inspections, payments or similar. If the document is unclear and the terms are sufficiently clear, the Irish court may hold the document to be binding, especially where executed by the parties thereto.

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?

It is a common misconception among parties to commercial agreements that Irish law imputes a mutual duty of good faith or fair dealing between them, whether or not this is expressly stated. However, whilst under Irish law there are certain types of agreement to which a duty of good faith applies, including partnership agreements and insurance contracts, Irish courts have held that there is no general principle of good faith and fair dealing in Irish contract 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 Revenue Commissioners of Ireland ("Irish Revenue") is the Irish government authority with primary responsibility for the collection of taxes and supervision of taxpayers.

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?

The sale, lease or financing of an aircraft or engine can attract the following taxes in Ireland:

- Value-added tax ("VAT") on the acquisition of an aircraft or engine;
- Irish withholding taxes on cross-border payments of interest and dividends;
- VAT on a lease or sale of an aircraft; and
- Irish capital gains tax or corporation tax on the disposal of aircraft.

Irish withholding tax at a rate of 20% is required to be withheld from payments of Irish source "yearly" interest to non-residents. However, there are a large number of exemptions available, including for interest paid to a company that is resident in an EU Member State or a country with which Ireland has signed a double-tax treaty.

A similarly wide range of exemptions are available from the requirement to withhold tax at a rate of 25% on the payment of dividends to non-resident persons. Such exemptions include where payments are made to:

- companies resident in, or controlled by residents of, an EU Member State (other than Ireland) or a country with which Ireland has concluded a double-tax treaty; and
- companies, or 75% subsidiaries of companies, whose shares are substantially and regularly traded on a recognised stock exchange in an EU or double-tax treaty state.

The Irish transfer taxes and VAT implications of a sale, lease or financing of an aircraft or an engine are discussed further under questions 2.7 and 2.8 below.

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?

The provision of a current tax-residency certificate by a payee who is potentially subject to withholding taxes in Ireland is usually sufficient in order to obtain access to reduced withholding rates under Ireland's tax treaty network.

However, the necessity to provide a tax-residency certificate to Irish Revenue rarely arises in practice. Ireland does not typically impose withholding tax on lease payments. Secondly, as outlined above, Ireland offers a range of domestic exemptions with respect to outgoing interest payments by Irish borrowers. These do not require the provision of tax-residency certificates.

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?

In addition to the point noted earlier in relation to potential reform, the introduction of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS ("MLI"), which has the stated aim of counteracting treaty shopping, has become increasingly relevant to aircraft leasing structures.

The MLI introduced a new "principal purpose test" into Irish double-tax treaties. It could deny a treaty benefit (such as a reduced rate of withholding tax) if it is reasonable to conclude, having regard to all facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit.

The MLI came into force in Ireland on 1 May 2019. As a general rule, it has effect for Ireland's tax treaties with respect to:

- taxes withheld at source, from 1 January 2020; and
- all other taxes levied by Ireland, for taxes levied with respect to taxable periods beginning on or after 1 November 2019.

The impact of the MLI with respect to treaty access relief for lessors will be fact-dependant. However, Irish-based lessors are consciously increasing and evidencing the substance they maintain in Ireland. For those who have substantial trading operations in Ireland, this is not a difficult issue. Others are increasing their personnel and resources in Ireland in order to ensure that they can continue to access Ireland's large treaty network.

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?

Subject to the terms of the relevant double-tax treaty, a non-resident company will have a permanent establishment in Ireland if:

- it has a fixed place of business in Ireland through which the business of the company is wholly or partly carried on; or
- an agent acting on behalf of the company has and habitually exercises authority to do business on behalf of the company in Ireland.

A company is not, however, regarded as having an Irish permanent establishment if the activities for which the fixed place of business is maintained or of which the agent carries on are only of a preparatory or auxiliary nature.

In addition, the performance of services in Ireland should not, in itself, create a permanent establishment. The longer the duration of the service, however, the greater the likelihood that other criteria for creating a permanent establishment may be met; i.e. that the non-resident entity will either have a fixed place of business through which the company's business is wholly or partly carried out or that the company's business in Ireland will be carried out by a dependent agent who has the authority to do business on the company's behalf.

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?

The question as to whether an SPV is entitled to a tax treaty is arising more frequently, in light of the MLI. ATAD III is also likely to impact this. The concern is that the vehicle is not the beneficial owner of the income, or is involved in treaty abuse. To date, Ireland's tax authorities have not aggressively questioned the treaty eligibility of SPVs, although this is likely to change.

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?

As a general rule, Irish VAT applies to supplies of goods (including aircraft) made in Ireland by a taxable person. The VAT treatment of the sale of an aircraft will depend on the location of the aircraft at the time of sale and the intended use. If the aircraft were supplied while within the territory of Ireland, the standard Irish VAT rate (23% from 1 March 2021) would apply. However, the supply of aircraft can be zero-rated for VAT purposes where either (i) the aircraft is used by an airline operating for reward chiefly on international routes, or (ii) the aircraft is used and enjoyed outside the EU.

Where an Irish-based lessor is leasing aircraft to an entity outside Ireland, no Irish VAT should arise on the basis that the place of supply under a lease arrangement is the jurisdiction where the lessee is located. VAT may be chargeable in the jurisdiction of the lessee. Where the lessee is located in Ireland, the supply may be zero-rated for Irish VAT purposes where the lessee is operating chiefly on international routes. Where the supply is zero-rated, the lessor should be entitled to a credit for any VAT incurred on the acquisition of the aircraft and any related costs.

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

Irish stamp duty is generally chargeable on certain instruments that transfer property (including aircraft). However, Irish tax law provides for a specific exemption from Irish stamp duty on the acquisition, lease or disposal of aircraft or part of an aircraft (e.g. an aircraft engine).

Therefore, Irish lessors should not be subject to Irish stamp duty on the purchase of aircraft, disposal of aircraft or when leases are entered into with lessees even where the documents relating to these transactions are executed in Ireland.

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 Department of Transport, Tourism and Sport is the government department responsible for aviation policy in Ireland. It has established the following entities to assist it in carrying out its functions:

- The Commission for Aviation Regulation.
- The Irish Aviation Authority (“IAA”).
- The Air Accident Investigation Unit, which is responsible for air accidents that take place in Ireland and air accidents that occur outside Ireland involving Irish registered aircraft.
- The Environmental Protection Agency, which is responsible for the implementation of the EU Emissions Trading System.

The IAA is in charge of registration of aircraft in Ireland. In order to access the registry maintained by the IAA, the aircraft must have a connection to Ireland and, save in the rare case where the IAA grants a specific exemption, the applicant must demonstrate that the aircraft is either wholly owned by an Irish citizen, an EU citizen having a place of residence or business in Ireland, or by a company registered in and having its principal place of business in Ireland or the EU with not less than two-thirds of the directors also being Irish or EU citizens. Notwithstanding the foregoing, an aircraft may also be registered in Ireland if it is “chartered by demise, leased or on hire to, or is in the course of being acquired under a lease-purchase or hire-purchase agreement by a citizen or company” where such charter, lease or hire is to an individual or corporate satisfying the requirements set out above with respect to Irish or EU citizenship. When relying on the operator as a connection to Ireland, the IAA may impose any conditions of such registration as it deems fit.

The IAA does not operate a register of aircraft mortgages or third-party rights or interests in aircraft or engines and will not agree to requests to note a mortgage or third-party interest on the aircraft register or related file. The IAA notes, however, that it is working on a method for noting interests in mortgages on the aircraft register. Aircraft mortgages and other “charges” (as defined in the Companies Act 2014 (“CA2014”) over aircraft granted by Irish companies and Irish registered branches of foreign companies) are registrable with the Companies Registration Office (“CRO”) in Ireland within 21 days of the creation of the charge. The register maintained by the CRO operates as a priority register with priority based on the time of filing, not the time of the interest being granted. Under the CA2014, priority interests can be filed up to 21 days prior to the date on which the charge is actually granted with a full filing being made upon the charge actually being granted. Parties may elect to make a single filing upon the charge actually being entered into. If the charge is not registered within 21 days of the date on which it is granted, the charge becomes void against a liquidator and any creditor of the party granting the charge.

The International Interests in Mobile Equipment (Cape Town Convention) Act 2005 (“CTC Act 2005”) provides for the registration of certain interests in airframes and engines with the International Registry of Mobile Assets to ensure priority.

Aircraft mortgages are amongst the interests that constitute “International Interests” (as defined in the Cape Town Convention) to the extent the mortgage is granted by an owner in a contracting state or the aircraft is registered in a contracting state. The International Registry is an online register but, due to it being located in Dublin, disputes over registrations are heard or enforced in the Irish High Court regardless of the country in which the claim originates.

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

The Irish aircraft register operated and maintained by the IAA is a registry of nationality and not of title. Registration of an aircraft in the name of a person does not establish that person’s title to the aircraft and it cannot be regarded as giving notice (whether actual or constructive) of a person’s interest in an aircraft.

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?

Aircraft that are owned by foreign nationals may be registered in Ireland if the aircraft is (i) majority owned by an EU citizen or corporate, or (ii) subject to a lease or charter by demise to an Irish or EU citizen or company. In the case of a corporate, the entity must have a place of residence or business in Ireland or be owned by a company registered in and having its principal place of business in Ireland or the EU with not less than two-thirds of the directors also being Irish or EU citizens.

The IAA does not impose an age restriction on aircraft that can be registered, but commercial aircraft need to satisfy a maximum take-off weight and number of passengers, as well as minimum safety standards on an ongoing basis.

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)?

Aircraft leases are not required to be registered and there are no specific execution requirements for a lease to be recognised in Ireland. In Ireland, leases are commercial contracts and the terms can be freely negotiated between the parties and no specific form is required.

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

Deregistration of aircraft will require the person or corporate who is listed on the register maintained by the IAA to submit forms to the IAA for the deregistration of the aircraft. If there is an early termination and the operator, for example, refuses to allow the owner or financiers to deregister the aircraft, then the IAA will act upon an irrevocable deregistration and export request authorisation (“IDERA”) register pursuant to its obligations under the Cape Town Convention and will acknowledge an IDERA at the time of registration if submitted to them.

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?

Yes. A legal mortgage or an equitable mortgage can be created over an aircraft or engine by corporate bodies and individuals/groups of individuals.

Legal mortgages can be created by oral agreement or in writing; however, in order to register the mortgage (and for contractual certainty), legal mortgages are usually created in writing. An equitable mortgage can be created by an agreement to create a legal mortgage, a mortgage that fails to comply with the formalities for a legal mortgage, or a mortgage of an equitable interest. An equitable mortgage must be in writing.

It is market practice for a mortgage to be registered as a charge with the CRO (if the mortgagor is a company). If the mortgagor is an individual or a partnership, a mortgage can be registered with the Central Office of the High Court.

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?

Yes. Spare parts (including engines and future parts) are often included in an aircraft mortgage and can be registered as part of an aircraft. Please note, however, that a mortgage over spare parts cannot be registered separately unless the mortgagor is an individual or partnership (in which case the mortgage can be registered with the High Court).

An alternative form of security would include a debenture, which is a security document that creates a variety of security interests, including fixed charges over a company's assets (e.g. spare parts), assignments by way of security (e.g. over contracts), and floating charges.

Fixed charges and debentures are registrable against the company with the CRO.

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

The IAA does not operate a register of aircraft mortgages or third-party rights or interests in aircraft or engines and will not agree to requests to note a mortgage or third-party interest on the aircraft register or related file. The IAA acknowledges the IDERA pursuant to its obligations under the Cape Town Convention as enacted by the CTC Act 2005, but this does not serve to notify third parties or perfect any security interest in an aircraft.

Aircraft mortgages and other "charges" (as defined in the CA2014 over aircraft granted by Irish companies and Irish registered branches of foreign companies) are registrable with the CRO in Ireland within 21 days of the creation of the charge. The register maintained by the CRO operates as a priority register with priority based on the time of filing, not the time of the interest being granted.

Under the CA2014, priority interests can be filed up to 21 days prior to the date on which the charge is actually granted with a full filing being made upon the charge actually being granted. Parties may elect to make a single filing upon the charge actually being entered into. If the charge is not registered within 21 days of the date on which it is granted, the charge becomes void against a liquidator and any creditor of the party granting the charge.

The CTC Act 2005 provides for the registration of certain interests in airframes and engines with the International Registry of Mobile Assets to ensure priority. Aircraft mortgages are amongst the interests that constitute "International Interests" (as defined in the Cape Town Convention) to the extent the mortgage is granted by an owner in a contracting state or the aircraft is registered in a contracting state. The International Registry is an online register but, due to it being located in Dublin, disputes over registrations are heard or enforced in the Irish High Court regardless of the country in which the claim originates.

A mortgage can also be registered against any aircraft that is registered on the International Registry.

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

Aircraft

The principal security agreement over an aircraft will usually take the form of a legal mortgage. However, other forms of security are also available, including a charge. A charge is similar to an equitable mortgage as the creditor obtains a proprietary equitable interest in the aircraft but does not obtain either legal or beneficial title to it.

A security assignment transfers the aircraft title by way of security. A security assignment can either be a legal security assignment or an equitable security assignment.

A lien entitles a party to hold on to the aircraft in its possession pending payment of a debt owed. It can be created by equity, contractual (e.g. a contractual lien), operation of law (e.g. a legal or common law lien), or statute (e.g. a statutory lien).

Engines

All types of security that can be taken over an aircraft can also be created over engines.

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

A registered mortgage will take priority over all other mortgages and charges over the aircraft, except for mortgages registered before that mortgage. However, a registered aircraft mortgage will not take priority over a possessory lien in respect of work done on the aircraft or any statutory rights of detention affecting the aircraft (e.g. air traffic control charges).

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

See question 4.4 above for the other forms of security that can be granted over an aircraft and/or engine.

Security over a lease is usually taken by way of a security assignment from the lessor, with written notice to the lessee.

5 Enforcement and Repossession

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

A mortgagee can take possession of the aircraft (or appoint a receiver to do so) and subsequently sell the aircraft, on

occurrence of an event of default under the mortgage, provided this has been specified in the mortgage document or otherwise agreed in writing. Under Irish law, security can be enforced without judicial intervention. If the mortgagor does not co-operate, it may also be open to a mortgagee to seek a court order for delivery up and possession of the aircraft so as to give certainty of title on the resale of the aircraft.

An owner/lessor can seek repossession of an aircraft as a matter of contract on termination of the lease without a court order. In those circumstances, the lessor must strictly comply with the procedure, as may be set out in the lease, in order to validly take possession of the aircraft.

In addition to the self-help remedies under Irish law, a mortgagee or owner will have remedies available to it under the Cape Town Convention, including taking possession of the aircraft without a court order and deregistering and exporting an aircraft by exercising its rights under an IDERA. Alternative A of the Cape Town Convention has the force of law in Ireland.

5.2 What is the procedure for repossession of the aircraft?

Once there has been an event of default, the mortgagee will typically notify the mortgagor (in accordance with the terms of the mortgage) that there has been an event of default under the loan and that it intends to enforce its security.

If the mortgagor opposes repossession or there is a dispute about whether there has been an event of default under the mortgage, it is open to a mortgagee to apply to the court for an order of delivery up and possession of the aircraft.

Court proceedings for repossession of an aircraft by a mortgagee can be commenced by the issuing of a special summons in the High Court.

At any stage of the claim, including prior to the commencement of proceedings, the mortgagee can apply for interim relief (such as an injunction restraining the mortgagor from disposing of the aircraft or removing the aircraft from the jurisdiction) if there is a real risk that the aircraft will be taken out of the jurisdiction or that the mortgagor will otherwise deal with the aircraft in a way that will irreparably prejudice the mortgagee's position.

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?

Generally, Irish courts will recognise and uphold express choice of law clauses as valid in accordance with the relevant EU Regulations (for disputes within the EU) or under common law rules (for non-EU disputes).

Provided there is no prejudice to the application of Irish law, Irish courts will uphold any governing law clause that specifies a foreign jurisdiction.

Irish courts may, however, refuse to recognise choice of law clauses for public policy reasons, or where there are mandatory Irish law considerations, such as consumer law matters.

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?

Recognition and enforcement of a foreign judgment will depend on the country of its origin and the nature of the judgment.

Essentially, the process of enforcing foreign judgments in Ireland is governed by the following:

- Regulation (EU) 1215/2012 ("Brussels Recast") on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which provides for the enforcement of judgments delivered in any other EU Member State after 10 January 2015.
- Regulation (EU) 805/2004, which provides for the certification of a judgment for uncontested claims in respect of a specific sum from other EU Member States as a European Enforcement Order.
- The Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which provides for the enforcement of judgments made in other states that are a party to the Lugano Convention – namely Iceland, Norway and Switzerland.
- The Hague Convention on choice of court agreements, which provides for the enforcement of judgments made in states that are a party to the Hague Convention – namely EU Member States, Mexico, Montenegro, Singapore and the United Kingdom.
- Where none of the above apply, Irish common law rules will govern the recognition and enforcement of foreign judgments in Ireland.

A judgment from a country subject to Brussels Recast is automatically enforceable in Ireland without a declaration of enforceability being required. To enforce a judgment from a country subject to the Lugano and Hague Conventions, an application to have the judgment declared enforceable must be made to the Master of the High Court. Once the foreign judgment has been declared enforceable, it will have the same force and effect as if it had been delivered by an Irish court, and the usual methods of enforcement can be used by the mortgagee or lessor. For judgments that are not covered by any of the aforementioned regulations or conventions, Irish common law procedures will apply such that recognition and enforcement of the judgment must be pursued by issuing fresh proceedings in Ireland.

If the relevant foreign judgment is: for a debt of a definite sum; final and conclusive; and given by a court of competent jurisdiction, the mortgagee or lessor may be able to obtain summary judgment (without the need for a full plenary hearing) on the grounds that the defendant has no defence to the claim.

Irish courts do, however, have a discretion to refuse to recognise and enforce a foreign judgment in the following circumstances:

- it is impeachable on the grounds of jurisdiction, fraud, public policy or natural or constitutional justice, or the judgment has been obtained or alleged to have been obtained by the commission of a fraud, trick or deliberately misleading circumstances;
- the procedures and rules of the court giving the judgment have not been observed;
- it is inconsistent with a judgment of the courts of Ireland in relation to the same matter;
- it is contrary to public policy or natural or constitutional justice of Ireland;
- Irish courts have no jurisdiction over the matter;
- the jurisdiction of the court giving such judgment has not been exercised in circumstances that an Irish court (as a matter of Irish law) will recognise as justifying enforcement of the judgment; and
- enforcement proceedings are not instituted in Ireland within six years of the date of the judgment.

Interim relief by way of an injunction may be sought from the courts in very urgent circumstances; for example, where there is immediate risk of the aircraft being taken outside the jurisdiction. This can be done on an *ex parte* basis, without notice to the other party.

An interim injunction will only be granted pending an interlocutory hearing of the matter as soon as possible thereafter, with proceedings to be served on the other party in the interim.

Before granting an injunction, the court must be satisfied that:

- there is a *bona fide* or serious question to be determined;
- damages are not an adequate remedy; and
- the balance of convenience lies in favour of granting the injunction.

In any application for injunctive relief, the mortgagee or lessor will usually be required to provide an undertaking and/or security for damages to the court against a wrongful claim.

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?

The aircraft needs to be deregistered in order for it to be remarketed and sold. To deregister an aircraft from the IAA register, a request in writing from the registered owner is required. If there is a lease in place and the operator objects to the requested deregistration, the IAA may need a court judgment before acting even though an aircraft owner, mortgagee or lessor can apply for deregistration of the aircraft without the lessee's or operator's consent.

The IAA will not record a deregistration power of attorney ("DPOA"); however, the IAA will record the existence of an IDERA issued pursuant to the Cape Town Convention and will approve an application for deregistration of an aircraft requested by the beneficiary of an IDERA provided the IDERA has been properly issued and lodged with the IAA. For these reasons, the IDERA has largely replaced DPOAs for aircraft registered in Ireland.

If a DPOA is issued, it does not have to be governed by the laws of Ireland or translated, certified, notarised, legalised or lodged in advance to be effective and where the DPOA is expressed to be irrevocable and granted to secure an obligation, the grantor should not be able to revoke it until those obligations have been discharged.

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 lessor must first serve the judgment.

Possession can be obtained within a few days from the issuance of such a court order, depending on where the aircraft is located or when it is due to land in Ireland.

The lessor may file an affidavit stating that the judgment or order has not been obeyed and he/she may obtain an execution order on foot of that affidavit.

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?

Provided an Irish law-governed lease is properly drafted, there is no risk for an owner or financier that a lessee of an aircraft

or other aviation asset may acquire an economic interest in such aircraft or other aviation asset by payment of rent under such lease. Irish law recognises that the lease rentals paid by a lessee for the lease of an aircraft or aviation asset are not payments to acquire ownership of the aircraft or aviation asset. In the case of an Irish law-governed operating lease, the lease provisions should clearly provide that ownership remains vested in the owner. In the case of an Irish law-governed finance lease, the provisions regarding any purchase option should clearly provide that the owner retains title to the aircraft or aviation asset until certain conditions are met. Under an Irish law hire-purchase agreement, where a hirer has paid an amount equal to or more than one-third of the total amount payable under the hire-purchase agreement, the owner must seek a court order to enforce any right to recover possession.

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

In order to export an aircraft, the registered owner must submit a request for deregistration in writing to the IAA. The request must include the complete description of the aircraft, registration marks, make, model, and serial number of the aircraft. The IAA can accept a request for deregistration of an aircraft only from the IAA's aircraft register.

The formal request in writing must comply with the following requirements:

1. The letter must be signed by:
 - the relevant individual, if the registered owner is an individual;
 - all relevant individuals, if the registered owner is more than one individual; and
 - a current director of the company or the current company secretary (as shown in the current print-out of the CRO), if the registered owner is a company.
2. The request must provide evidence that:
 - the aircraft's nameplate/fireproof plate has been removed;
 - the Irish registration marks have been removed from the aircraft;
 - the aircraft's Irish Mode S code has been negated (if applicable); and
 - the aircraft's Irish emergency locator transmitter code has been negated (if applicable).
3. If the aircraft has an Irish air operator certificate ("AOC"), the AOC must be removed before deregistration.
4. All fees outstanding must be paid in full for the aircraft.
5. If there is an IDERA lodged against the aircraft, the IDERA must first be removed.

In addition to the above, when an aircraft is being exported, the name of the foreign state to which the aircraft is being exported is required and, where an export certificate of airworthiness is required, the applicant must submit Form AWS.D.F.104A with the prescribed fee to the IAA at least 20 working days in advance of the required export date.

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?

Since 1 January 1993, there have been no foreign exchange controls in Ireland. However, the Financial Transfers Act 1992

gives the Minister for Finance reserve powers to introduce restrictions on financial transfers between the State and other countries in the form of regulations and orders.

A lessor under an aircraft lease can obtain a judgment in a foreign currency.

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?

See the response to question 5.4 above concerning the enforcement of foreign judgments.

Since the UK's withdrawal from the EU on 31 January 2020, the following should be noted regarding litigation involving the UK and the enforcement of UK judgments:

- The current rules on enforcement under Brussels Recast apply to proceedings commenced before the end of 2020 such that UK judgments in respect of such proceedings will continue to be enforceable in EU Member States, and *vice versa*, in the same way as between EU Member States.
- On 8 April 2020, the UK applied to accede to the Lugano Convention as an independent contracting party. The UK's application for accession was refused on 4 May 2021, and the European Commission announced in a Communication to the European Parliament and Council that it was opposed to the UK's accession. On 28 June 2021, the European Commission formally blocked the UK's accession. In a Communication to the parties of the Lugano Convention on 1 July 2021, the Federal Department of Foreign Affairs of Switzerland announced the European Commission's refusal to provide its consent.
- As a result of the refusal of the UK's application for (re-)accession to the Lugano Convention: (i) the 2005 Hague Convention will apply where a court judgment is obtained pursuant to an exclusive choice of court agreement that complies with the Hague Convention requirements; or (ii) in all other situations, the common law rules for third countries will apply for the enforcement of judgments.

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

The procedure for repossession of an aircraft under other forms of security can either take place by using the remedies provided for under the Cape Town Convention or through court proceedings.

It is worth noting that the IAA has the authority to detain and sell an aircraft for unpaid navigational charges, including EUROCONTROL charges, on an Irish or non-Irish registered aircraft, and an aircraft may be detained in Ireland due to substantial unpaid charges relating to the aircraft or any other aircraft in the relevant operator's fleet.

Furthermore, if a creditor wishes to exercise a remedy available to it under the Cape Town Convention (such as standard default remedies under security agreements to take possession or control of the aircraft), it is not required to make an application to the High Court for leave to exercise that remedy unless the provision expressly requires the creditor to make such an application.

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?

Ireland is a signatory to the following conventions (as amended and updated) in relation to international airline operations:

1. The 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, as amended by the Hague Protocol of 28 September 1955 – ratified 20 September 1935 and 12 October 1959.
2. The 1944 Chicago Convention on International Civil Aviation – ratified 31 October 1946.
3. The 1956 Geneva Agreements on the Joint Financing of Certain Air Navigation Services in Greenland/Iceland – ratified 3 June 1960.
4. The 1962 Rome Protocol Relating to an Amendment to the Convention on International Civil Aviation – ratified 14 February 1963.
5. The 1971 New York Protocol Relating to an Amendment to the Convention on International Civil Aviation – ratified 15 June 1971.
6. The 1971 Vienna Protocol Relating to an Amendment to the Convention on International Civil Aviation – ratified 11 July 1972.
7. The 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft – ratified 14 November 1975.
8. The 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft – ratified 24 November 1975.
9. The 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air – ratified 29 April 2004.
10. The 2001 Cape Town Convention on International Interests in Mobile Equipment – ratified 29 July 2005.
11. The 2001 Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment – ratified 23 August 2005.

Ireland has also signed, but has not yet ratified, the 1948 Geneva Convention on the International Recognition of Rights in Aircraft.

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

The Cape Town Convention came into force on 1 March 2006. Any potential conflicts or issues have successfully been resolved in the High Court; however, due to a relative lack of judicial precedent, practice and procedure, the law in this respect is still evolving.

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

In accordance with Article 39 of the Cape Town Convention, Ireland has declared the following:

- when, under a law of the State, a non-consensual right or interest (other than a right or interest to which Article 40 of the Cape Town Convention applies) has priority over an interest in an object equivalent to that of the holder of a registered international interest, that right or interest has priority over a registered international interest, whether in or outside insolvency proceedings; and
- if the State or any State entity, or any intergovernmental organisation of which the State or any such entity is a member, or any private provider, has provided a public service, nothing in the Cape Town Convention affects the right of the State, entity, organisation or provider to arrest or detain, in accordance with the laws of the State, an object for the payment of amounts owed to the State or any such entity, organisation or provider for those services in respect of that object or another object.

In accordance with sub-article 2 of Article 54 of the Cape Town Convention, it is declared that a creditor who wishes to exercise a remedy that is available to the creditor under a provision of the Cape Town Convention is not required to make an application to the High Court of Ireland for leave to exercise that remedy, unless the provision expressly requires the creditor to make such an application.

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

Yes. Alternative A of the Cape Town Convention has the force of law in Ireland, following signing of an Order by the Irish government on 10 May 2017. Alternative A will apply to leases, security agreements and conditional sale agreements registered on the International Registry.

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

To file an IDERA against an eligible aircraft, the registered owner of the aircraft must complete the appropriate form on the website of the IAA (available at <https://www.iaa.ie>).

The completed form must be signed and returned to the IAA with the appropriate fee.

7 Liability for Damage and Environmental

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

Section 21(1) of the Air Navigation Transport Act 1936 states that aircraft owners are liable, without proof of negligence or intention or other cause of action, for any material damage caused to property or persons other than those in the aircraft, and where any passenger or article falls from an aircraft, whether in flight,

landing, or taking off. However, owners can be indemnified against the risks under section 21 by a third party, as provided for in section 21(1)(b).

Furthermore, section 21(2) provides that an owner will not be liable where the aircraft is subject to a *bona fide* charter or lease arrangement for 14 days or more and the pilot and crew are not in the employment of the owner. In such cases, the person to whom the aircraft is demised is strictly liable.

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

Yes, the EU ETS applies to aircraft. The EU ETS is implemented in Ireland under Statutory Instrument No. 490 of 2012 and amendments, and Statutory Instrument No. 261 of 2010 and amendments. It is run on a day-to-day basis in Ireland by the Environmental Protection Agency. The current phase (Phase IV) of the EU ETS commenced on 1 January 2021 and runs from 2021 to 2030. Under this phase, sectors under the EU ETS must reduce their emissions by 43% compared to 2005 levels. This will involve a tighter cap on emissions and a removal of surplus allowances from the market. The European Commission adopted the Decision on the free allocation to aircraft operators for the years 2021 to 2023 on 16 December 2020 (Commission reference: C(2020)9188/F1). The Annex to the Decision lists the quantities that may be issued to qualifying aircraft operators in any of the years 2021 to 2023. These allowances cannot be used for compliance against 2020 emissions.

Ireland, along with all other EU Member States, has opted to participate in CORSIA from the pilot phase beginning in 2021. This process involves reporting emissions data and offsetting requirements for Irish airlines directly to the International Civil Aviation Organization (“ICAO”) by the Department of Transport through the online system, the CORSIA Central Registry. The Environmental Protection Agency is responsible for CORSIA data collection from airlines and the IAA has responsibility for much of the technical environmental reporting to ICAO.

The implementing legislation for EU ETS in Ireland provides that the penalties for breaches include fines, imprisonment and potential operating ban.

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?

The European Communities (Greenhouse Gas Emissions Trading) (Aviation) Regulations 2010 (S.I. No. 261 of 2010), which transpose the Aviation Directive (Directive 2008/101/EC of 19 November 2008 amending Directive 2003/87/EC) into national law, impose obligations on operators of an aircraft, which term is defined as being the person who operates an aircraft at the time it performs an aviation activity listed in Schedule 1 thereto or, where that person is not known or is not identified by the owner of the aircraft, the owner of the aircraft.

The key legislation in Ireland for environmental liability is the Environmental Liability Directive (Directive 2004/35/EC), transposed by the European Communities (Environmental Liability) Regulations 2008, which makes “operators” (meaning a director, shareholder or other officer of a company if they exert sufficient control over the operational activities of a business) liable for environmental damage caused by an occupational activity or more generally to activities causing damage to protected species and habitats. However, transport and aviation do not come within the definition of occupational activity for the purposes of the Regulations.

Operators whose occupational activities fall outside the scope of the Regulations (i.e. air transport) can be liable for environmental damage under the Environmental Protection Agency Acts 1992 to 2011, the Waste Management Acts 1996 to 2011, the Local Government (Water Pollution) Act 1977 (as amended), the European Communities (Birds and Natural Habitats) Regulations 2011 to 2015, and the Air Pollution Acts 1987 and 2011.

Section 8(1) of the Environmental Protection Agency Act 1992 (“EPA Act”) provides that a contravention of the EPA Act constitutes an offence. Section 8(2) of the EPA Act provides that “where an offence under this Act is committed by a body corporate or by a person acting on behalf of a body corporate and is proved to have been so committed with the consent, connivance or approval of, or to have been facilitated by any neglect on the part of any director, manager, secretary or any other officer of such body, such person shall also be guilty of an offence”. Section 9 provides for a fine of up to €3,000 or up to 12 months’ imprisonment (or both) on summary conviction, or a fine of up to €15 million or up to 10 years’ imprisonment (or both) on conviction on indictment.

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?

If a company is to be placed into a compulsory liquidation or into examinership, then a petition must be filed in the Irish High Court (or in the case of examinership, in certain instances in the Irish Circuit Court). A search can readily be carried out on the website of the Courts Service to determine whether a petition has been filed. A company can only be placed into compulsory liquidation by an order of the Irish High Court. The fact of a winding-up order having been made will be visible on the Courts Service website. Winding-up resolutions passed by members of companies in respect of voluntary liquidations are filed in the CRO.

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?

The test most often applied by Irish courts, in assessing whether a company is insolvent, is whether the company is unable to pay its debts as they fall due.

There is no absolute obligation on a company to immediately place itself into liquidation when it is insolvent. However, where a company enters the “zone of insolvency” (i.e. where it is imminently likely to be unable to pay its debts), the directors’ duties shift to involving a requirement to keep the best interests

of creditors in mind when making decisions, and the directors must carefully consider whether it is appropriate to commence a liquidation process.

The Irish High Court has power to appoint an examiner to a company if the company is or is likely to be unable to pay its debts as they fall due or if the value of its assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities. A company and its directors are never obliged to enter into examinership.

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?

Examinership involves the appointment of an insolvency practitioner by the High Court, including sometimes on an interim basis pending the hearing of the petition. An examiner, once appointed by the court, remains in place until the conclusion of the examinership. Examinership is a debtor-in-possession process, so while the examiner can exercise certain powers in relation to the affairs of the company, the directors remain *in situ* and they are not *functus officio* as they would be in the case of an insolvent liquidation where the role of directors comes to an end.

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

If the lessee of an aircraft is in examinership, then a statutory moratorium applies and is binding on the creditors of the lessee.

The effect of the moratorium is that no steps can be taken during the protection period to realise security affecting property of the company, without the consent of the examiner. Creditors may not enforce their claims, whether by issuing court proceedings or enforcing security. Proceedings may not be brought to wind up a protected company and appoint a liquidator. In addition, an examiner may, with the leave of the High Court, dispose of assets that are subject to fixed or floating charges where it is likely to facilitate the survival of the whole or any part of a protected company as a going concern. Pursuant to the terms of the Recast Insolvency Regulation, the statutory moratorium shall apply in other Member States, save where “territorial proceedings” (i.e. insolvency proceedings the effects of which are restricted to the assets of the debtor in a particular Member State) have been opened in another Member State.

However, it should be noted that the examinership regime in Ireland has been modified since the coming into operation in 2017 of the Cape Town Convention and in particular the Aircraft Protocol (Alternative A). Alternative A provides that upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to an exception referred to below, give possession of the aircraft object to the creditor no later than the earlier of: (a) the end of the waiting period; and (b) the date on which the creditor would

be entitled to possession of the aircraft object if this Article did not apply. The exception to this is that the insolvency administrator or the debtor, as applicable, may retain possession of the aircraft object where, by the end of the waiting period, it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement. The waiting period in Irish law is 60 days.

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?

The commencement of insolvency proceedings can result in antecedent transactions being challenged by the insolvency office holder or a creditor under a number of different statutory provisions, including the following:

- i. **Unfair preference:** The creation of security and the making of any payments prior to being placed in an insolvent liquidation can be set aside, where the debtor company carried out the transaction with the intention of benefitting one creditor over the other creditors. An unfair preference can be set aside if it occurred within six months preceding the liquidation (or two years if the beneficiary of the transaction is a “connected person”, as defined).
- ii. **Improper transfer:** If the company’s assets have been improperly transferred (i.e. with the effect of perpetrating a fraud on the creditors of the company), the High Court can order assets to be returned if it considers it just and equitable to do so.
- iii. **A floating charge created within 12 months before the commencement of its winding up may be invalid** (except to the extent of monies advanced or paid or the actual price or value of the goods or services sold or supplied to the company), unless it is proved that the company, immediately after the creation of the charge, was solvent. Where the floating charge is created in favour of a “connected person”, the period of 12 months is extended to two years.

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?

The liquidator of an Irish company may apply to the Irish High Court within 12 months of the commencement of the winding up to disclaim an onerous contract where the contract imposes future obligations, the performance of which might be detrimental to the company’s creditors. Similarly, in an examinership, the company may apply to the Irish High Court to repudiate certain contracts under which some element of performance other than payment remains to be rendered. Such contracts may also be affirmed in an examinership, although this has rarely, if ever, occurred in practice.

If a liquidator causes a company to remain in occupation of a property, the rent will be an expense of the liquidation and will have priority status.

If a liquidator simply decides (to draw an analogy with real property) to “hand back the keys” to the asset, then any arrears under the lease will be an unsecured claim.

If a contract is disclaimed or repudiated, the other party to the contract will have a damages claim that can be dealt with in the liquidation or examinership as the case may be.

Examinership is not in a terminal insolvency process. The company remains bound by its contracts, subject to the statutory moratorium.

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

In a liquidation, certain types of creditors have preferential status, principally certain debts due to the Irish tax authority, which have preference over unsecured claims and over the claims of the holders of floating charges.

If an asset is subject to a fixed charge, the holder of the charge is entitled to enforce its security and realise the asset outside the scope of the liquidation. If a lessee goes into liquidation, the owner of the aircraft will typically assert its contractual rights, which may include a right to terminate the contract and re-take possession of the asset in the event that certain specified insolvency events occur.

If the owner is a creditor in respect of money due and owing under the lease, then, in the absence of security or a trust arising in respect of the asset, the owner’s status in respect of the debt will be an unsecured claim.

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?

Irish law recognises certain liens and rights of detention for unpaid debts or charges. The rights may arise at law, in equity or under contract or statute.

At common law, the third-party liens available are similar to other common law jurisdictions. An unpaid seller may seek to exercise a seller’s lien, although typical aircraft finance structures mean that aircraft manufacturers are not in a position to exercise such rights. A possessory lien may be exercised, for example, where aircraft are subject to a claim for unpaid repairs.

In order to exercise such a lien, the relevant aircraft must remain in the possession of the party who carried out the repairs. The aircraft must have been improved through the labour of that party exercising the lien, with the knowledge and authorisation of the owner, resulting in an unpaid debt. Such a lien would only extend to the cost of unpaid repairs to the specific aircraft in question, and would not allow for a right of sale without court intervention. Contractual liens can also be created in certain circumstances.

Certain airports operated by specified airport authorities have the right to detain and, if necessary, to sell aircraft in respect of certain unpaid airport charges. This power to detain extends beyond the particular aircraft in respect of which the charges were incurred to any other aircraft of the operator or registered owner.

Parties in possession of judgments may also be entitled to exercise certain rights and procedures in order to execute a judgment against (for example) an aircraft or shares in an aircraft holding company.

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?

In an emergency, the IAA can give directions as to the use or possession of an aircraft registered in Ireland.

Irish Revenue can seize and sell an aircraft for unpaid taxes owed by the owner.

The Criminal Assets Bureau has the power to confiscate any property suspected of deriving from criminal conduct in accordance with section 5 of the Criminal Assets Bureau Act 1996 (as amended).

The Irish High Court can make a disposal order under section 4 of the Proceeds of Crime Act 1996 (as amended) in respect of property constituting proceeds of crime.

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?

Irish law recognises certain liens and rights of detention for unpaid charges or debts, arising in law, equity or under contract or statute. For example, a possessory lien may be exercised

where aircraft are subject to a claim for unpaid repairs. In such cases, the aircraft must remain in possession of the party who carried out the repairs and the aircraft must have been improved through the labour of that party with the knowledge and authorisation of the owner. This lien of course would only extend to the cost of the unpaid repairs and there must be court intervention for any sale.

Contractual liens may also exist if provided for in the agreement, pursuant to which aircraft may be detained and sold.

Section 40 of the Air Navigation and Transport (Amendment) Act 1998 provides airport authorities in Ireland with the power to detain and sell aircraft in respect of which airport charges remain unpaid. Such authorities may also detain and sell other aircraft operated by the same defaulting operator in satisfaction of such outstanding charges. Section 40 provides that if the authorities propose to sell an aircraft that has been detained, it is necessary to seek the leave of the High Court before doing so, and it is necessary to take steps to bring the court application to the notice of persons whose interests are likely to be affected by the determination of the court.

The IAA has the power under the Air Navigation (Eurocontrol) Act 1963 to detain and sell aircraft for unpaid EUROCONTROL charges in Irish airspace. Such powers given to the IAA relate only to charges incurred by the operator or registered owner in the airspace controlled by the IAA.

Parties in possession of judgments may also be entitled to exercise certain rights against an aircraft, if appropriate judgment enforcement procedures have been followed. Irish courts will have regard to prior and superior interests before granting any such relief.



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