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Aviation Financing & Leasing

Malta
Fenech & Fenech Advocates

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2019

Law and Practice

Contributed by Fenech & Fenech Advocates

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Fenech & Fenech Advocates was established in 1891 and is one of the longest-standing law firms in Malta. It is a widely multidisciplinary firm that offers precise, value-driven solutions and prides itself on achieving results through a practical application of the law. The firm's diverse areas of expertise include corporate and commercial law, M&A, financial services, tax, banking, trusts and foundations, IP, maritime law, aviation law, IT & TMT law, e-commerce, virtual ledger

technology and blockchain, employment law and other related areas. It also has experienced teams of litigators in civil, commercial and family law practising in the courts of Malta and in arbitration on an ongoing basis. Fenech & Fenech is recognised as Malta's leading shipping law firm, with four distinct departments dedicated to shipping (marine litigation, ship registration, ship finance and yachting). The current managing partner is Dr Ann Fenech.

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1. Aircraft and Engine Purchase and Sale

1.1 Sales Agreements

1.1.1 Taxes/Duties Payable Upon Execution of the Sales Agreement

VAT

According to the Fifth Schedule to the VAT Act, the supply of aircraft destined to be used by airline operators for reward chiefly for international transport of passengers and/or goods is exempt from value-added tax.

Stamp Duty

An aircraft or any part thereof is not a chargeable asset for the purposes of the Duty on Documents and Transfers Act (DDTA), and accordingly the transfer of an aircraft or any part thereof falls outside the scope of the DDTA. On the other hand, and with reference to the sale of an ownership interest in an entity that owns an aircraft or a part thereof, the DDTA does bring to charge the transfer of marketable securities, as defined at the rate of 2% subject to any available exemptions.

Income Tax and Capital Gains Tax on the Transfer of the Aircraft or Part Thereof

An aircraft and a part thereof do not fall within the list of chargeable assets for capital gains tax purposes and, accord-

ingly, assuming that an aircraft, or a part thereof, is booked as a fixed asset for accounting purposes then the transfer of said assets would fall outside the scope of capital gains tax in Malta. On the other hand, where a Maltese entity owns an aircraft or part thereof, which is booked as a current asset for accounting purposes (ie, 'Stock in Trade'), then in such a case the revenue generated from the transfer of said assets would be deemed to be income and would be subject to tax in Malta.

Income Tax and Capital Gains Tax on the Transfer of an Ownership Interest in an Entity

The Income Tax Act (ITA) brings to charge an exhaustive list of assets that includes the transfer of securities, as defined. For the purposes of the ITA, securities are defined "as shares and stocks, and suchlike instruments that participate in any way in the profit of the company and whose return is not limited to a fixed rate of return." Therefore, the transfer of securities or an interest in a partnership (eg, owning an aircraft or part thereof) would be subject to capital gains tax in Malta, subject to any applicable exemptions.

1.1.2 Enforceability Against Domestic Parties

A sale agreement to be submitted to the Civil Aviation Directorate (CAD) does not need to be translated into Maltese as long as it is in English. If emanating from outside the EU, copies or translations will need to be notarised and apostilled or legalised. Otherwise, simple attestation will suffice.

1.2 Transfer of Ownership

1.2.1 Transferring Title

Title to an aircraft or engine can be transferred by means of a bill of sale (BoS) and will extend to all installed parts, provided they belong to the same transferring owner.

The sale of the ownership interest in an entity that owns an aircraft or engine will be recognised for what it is; ie, a change in the shareholders of the company owning the asset and by implication a change in the beneficial ownership of the asset.

1.2.2 Sales Governed by English or New York Law

The transfer of title to an aircraft or engine physically delivered in Malta will be recognised if the BoS is governed by English or New York law.

Provided the BoS is valid under its governing law, it will be recognised as valid in Malta.

1.2.3 Enforceability Against Domestic Parties

Article 11 of the Aircraft Registration Act (ARA) imposes an obligation on the registrant to inform the CAD of any change in the particulars that were furnished when the application for the registration of the aircraft was made. Accordingly, where the details of the owner have been annotated in the National Aircraft Register (the Register), evidence of a change in ownership will need to be given to the CAD within five working days from the date of change of ownership. While this is not mandatory, the CAD will generally require a certified true copy of the BoS in English and if emanating from outside the EU, it will also need to be notarised and apostilled or legalised.

1.2.4 Registration, Filing and/or Consent from, Government Entities

No government applications or consents are required as a prerequisite to the execution and delivery of a BoS in relation to an aircraft or engine registered in Malta.

1.2.5 Taxes/Duties Payable upon Execution of a Bill of Sale

No taxes or duties are payable for executing and/or delivering a BoS or consummating the sale of the ownership interest in an entity that owns an aircraft or engine in the three scenarios listed.

2. Aircraft and Engine Leasing

2.1 Overview

2.1.1 Non-Permissible Leases

One should expect that all types of leases will be recognised in Malta and will be enforceable upon their respective terms

to the extent that they are not in breach of any matters of public policy in Malta.

2.1.2 Application of Foreign Laws

A lease involving a Maltese party or an asset situated in Malta may be governed by a foreign law.

2.1.3 Restrictions Concerning Payments in US Dollars

There are no material restrictions imposed on domestic lessees making rent payments to foreign lessors in US dollars.

2.1.4 Exchange Controls

Since Malta's accession to the EU on 1 May 2004, there are no exchange controls that could prevent rent payments under a lease.

2.1.5 Taxes/Duties Payable for Physical Execution of a Lease

No taxes/duties are payable for executing a lease physically in Malta.

2.1.6 Licensing/Qualification of Lessors

A lessor does not have to be licensed or otherwise qualified in Malta to do business with a Maltese lessee.

2.2 Lease Terms

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

There are no mandatory terms required to be in a lease (or ancillary documents thereto) governed by English or New York law that would not typically already be included. However, where the lease agreement is required to be submitted to the CAD for the purposes of the registration of the aircraft in the name of the operator, the Registrar will require that the agreement refer only to Maltese registration marks and not to the previous registration marks of the aircraft.

2.2.2 Tax and Withholding Gross-up Provisions

Tax and other withholding gross-up provisions are permissible and enforceable in Malta.

2.2.3 Parts Installed or Replaced After a Lease's Execution

A lease agreement providing that present and future parts installed on an aircraft or engine are subject to the terms of the lease will be valid and binding without requiring further formalities.

2.2.4 Risk of Title Annexation

As a general principle of civil law, where two things belonging to different owners have been united in such a manner as to form a whole but can nevertheless be separated without considerable damage to either of them, each of the owners shall retain the ownership of his own thing and shall be entitled to demand separation. Furthermore, under the ARA, where an engine has been attached to an airframe that is not

also owned by the airframe owner, each of the owners shall retain the ownership of their thing and the engine shall not accede to the airframe.

2.2.5 Recognition of the Concepts of Trust/Trustee

Maltese law recognises the concept of a trust.

2.3 Lease Registration

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

According to Article 4(2)(b)(i) of the ARA, the Director General will also note in the Register, if requested to do so by the registrant or by any other interested person, the lessor rights relating to the aircraft or an engine when the lessor is a person different from the owner. The Director General may also note the beneficial ownership rights in the aircraft when held by a trustee. Where information is inserted in the Register by means of a record or a notation, that information becomes public and is considered to be within the knowledge of third parties.

2.3.2 Registration if Owner is Different from Operator

The Maltese Register is an operator register. The certificate of registration will be issued in the name of the 'registrant', who need not be the owner. The registrant is typically the operator of the aircraft under a temporary title (lease). Where the aircraft is registered in the name of an operator who is not also the owner, the details of the owner will be included and annotated in the Register.

2.3.3 Aircraft/Engine-specific Registers

There is no specific register for leases concerning aircraft or engines.

2.3.4 Registration of Leases with Domestic Aircraft Registry

An aircraft may be registered by the operator of the aircraft under a temporary title provided that the CAD is satisfied that the aircraft is otherwise eligible for registration, that the operator is a qualified person and that there is sufficient evidence of the operator's rights to operate the aircraft. Where the registrant is a lessee, the lease agreement will need to be submitted for the purposes of registration of the aircraft. No consents from other official bodies are required for aircraft leases.

Information Advisory Notice 17 (IAN 17) issued by the CAD sets out the applicable formal requirements that a lease agreement must satisfy (www.transport.gov.mt).

No government applications or consents are required as a prerequisite to the execution and delivery of an aircraft and/or engine lease in relation to an aircraft registered in Malta.

2.3.5 Requirements for a Lease to be Valid and Registrable

The lease/operating agreement must be in English, otherwise it must be accompanied by a certified translation. The date of the agreement and its duration must be indicated. The agreement must be a certified true copy. It should be legalised and apostilled if originating from outside Europe. The signatures on the agreement must be authenticated.

2.3.6 Taxes/Duties Payable for Registering a Lease

There are no other taxes or duties that are payable in respect of the filing of the lease agreement.

2.3.7 Registration of Aircraft in Alternative Countries

Most, if not all, aircraft habitually based in Malta are also registered in the country.

2.3.8 Requirements for Documents Concerning Registration

Documents generally need to be filed in original form or as certified copies. If signed outside the EU, the certification of signatures or copies must be notarised and apostilled.

2.4 Lessor's Liabilities

2.4.1 Tax Requirements for a Foreign Lessor

The fact that a foreign lessor is in business with a domestic party and is registered as such does not, of itself, render the lessor liable to pay any taxes under Maltese law.

2.4.2 Effects of Leasing on the Residence of a Foreign Lessor

The ITA provides that where a person owns, leases, or operates any one or more aircraft(s) or aircraft engine(s) (irrespective of the country of registration of the said aircraft or aircraft engine) that is used for, or employed in, the international transport of passengers or goods, any income of such person that is derived or otherwise arises from the ownership, leasing, or operation of such aircraft or aircraft engine is deemed to have arisen outside Malta regardless of whether the aircraft may have called at, or operated from, any airport in Malta.

Where the lessor is deriving income that does not fall under the above provision, the determination as to whether such income would be considered to arise in Malta would depend on a number of factors, including the terms of the lease (wet lease or dry lease), where the aircraft is based, the tax residence of the lessee/lessor and the provisions of any applicable double tax treaties.

In the event that there is indeed a charge to tax, tax will be withheld at source by the resident payer upon payment to a non-resident payee unless authorisation is obtained from the Commissioner for Inland Revenue (CIR) to withhold tax at a lower rate or to refrain from withholding tax altogether.

2.4.3 Engine Maintenance and Operations

If the lease agreement imposes maintenance and operational obligations on the lessee then the relevant provisions will be enforceable in Malta without exception.

2.4.4 Damage or Loss Caused by an Asset

Strict liability applies only very limitedly, particularly in consumer protection legislation. Vicarious liability applies only in very limited cases, notably where an employer is responsible for damage caused by his employee where the employee was known to be incompetent or who the employer had no reasonable grounds to consider competent.

2.4.5 Attachment by Creditors

The aircraft cannot be attached by creditors of the lessee since it is not owned by the lessee. In all types of aircraft lease, ownership of the aircraft remains with the lessor and the lessee only has a right of possession, and use, of the aircraft during the leasing period.

2.4.6 Priority of Third Parties' Rights

A lessor is not given any priority unless the lessor's interest is registered as an international interest in the International Registry, or constitutes a recognised foreign security interest, in which case the lessor will be given priority in accordance with the applicable rules on ranking of creditors under the Cape Town Convention (CTC) and the ARA. Certain privileges will take priority over a registered international interest, however. See **3.2.15 Form and Perfection of Security Over Bank Accounts**.

2.5 Insurance and Reinsurance

2.5.1 Requirement to Engage Domestic Insurance Companies

It is not mandatory that either all or part of the insurances be placed with Maltese insurance companies.

2.5.2 Mandatory Insurance Coverage Requirements

No aircraft can be flown in Malta without having an insurance cover that meets the requirements of EU Regulation No 785/2004 and the Civil Aviation (Insurance Requirements for Air Carriers and Aircraft Operators) Order of 2005.

2.5.3 Placement of Insurances Outside of Jurisdiction

Reinsurances can be placed outside Malta for full coverage.

2.5.4 Enforceability of 'Cut-through' Clauses

On the basis of the doctrine of privity of contract, provided a reinsurer has bound himself in favour of an insured party to make good for losses even if the insurer has become insolvent before the losses have been paid then a 'cut-through clause' should be enforceable in Malta, although licensing issues may arise in the event that the arrangement is characterised as direct insurance. To the extent that the reinsurer has not bound himself directly in favour of the insured party

and the arrangement is agreed between the insured and the original insurer only, there may be doubts as to the enforceability of the cut-through clause on the insolvency of the said insurer to the extent that the provision creates a preference in favour of the insured as a creditor of the insurer.

2.5.5 Assignment of Insurance/Reinsurance

Assignments of insurances/reinsurances are permitted.

2.6 Lease Enforcement

2.6.1 Restrictions on Lessors' Abilities

Where the lease agreement provides for the right to terminate, the lessor will be entitled to terminate in terms of that agreement. If the lessor terminates the lease for reasons that are not contemplated in the agreement, or generally valid at law, the lessee may seek damages for breach. No licences or consents need to be obtained by the lessor to re-export the aircraft after termination, but ferrying the aircraft out of Malta will be subject to general permits and authorisations to fly (CAD, airport, etc). There are no restrictions on the ability of the lessor to sell the aircraft once the lease has terminated. It should not be necessary for the aircraft to be physically located in Malta at the time of any such actions, except, of course, for repossession.

2.6.2 Lessor Taking Possession of Aircraft

If the lessee is in default under the lease, the lessor would be entitled to take physical possession of the aircraft without the lessee's consent. It should be noted that the rights competent to a lessor to terminate a lease in the event of a default by the lessee are exercisable also by a mortgagee of the aircraft. The aircraft can be repossessed without the need for judicial intervention. To the extent that the support of the court is required, the court is bound to render full support as expeditiously as possible.

2.6.3 Specific Courts for Aviation Disputes

Malta does not have any specialised courts to decide aviation disputes.

2.6.4 Summary Judgment or Other Relief

The provisions relating to special summary proceedings in the Code of Organisation and Civil Procedure (COCP) do not apply in the case of a claim for the termination of a lease but they will apply in relation to a claim for payment under a lease agreement. There are a number of so-called precautionary warrants available to a lessor by way of interim/injunctive relief pending final judicial determination. These include the right to arrest the aircraft (where required in the course of a repossession) and the right to freeze or attach assets of the lessee as security for monetary claims.

2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments

The law governing a contract (including its interpretation, the performance of the conditions stipulated therein and its validity) will be the proper law of the agreement in accordance with Private International Law principles and, in a European context, the rules laid down in Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Recast).

When considering jurisdiction clauses, the Maltese courts have on occasion ruled that the Maltese forum would be the proper forum in respect to certain matters, typically procedural matters and other particular matters – such as the ranking of creditors, matters relating to prescription (time-bar), acceptability of evidence and the identity of the parties to the action – where the law of the forum is applicable under private international law rules.

The Maltese courts are also expected to uphold a waiver of immunity.

2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards

A final judgment obtained in the court of an EU member state will be recognised and enforced by the Maltese courts without a re-examination of the merits of the case in so far as it is subject to and in accordance with the Brussels Recast.

The enforcement of a final judgment delivered by a foreign court outside the EU is regulated by the COCP. Any judgment delivered in a competent court outside Malta and constituting a *res judicata* may be enforced in Malta pursuant to a request by application for this purpose. There are certain specific grounds upon which the courts will refuse to enforce a judgment in Malta.

Foreign arbitration awards to which the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 apply will be enforced by the courts of Malta upon their registration with the Malta Arbitration Centre (MAC).

2.6.7 Judgments in Foreign Currencies

Although there is no express legal prohibition concerning the issue by Maltese courts of a judgment in a foreign currency, it is the practice that judgments of Maltese courts are given in euro. Therefore, in actions where the obligation is expressed in a foreign currency, plaintiffs will normally seek to state their claims with reference to the foreign currency and the equivalent value in euro.

2.6.8 Limitations on Lessors' Actions Following Termination

While Article 1852 of the Civil Code provides that the rate of interest in consideration of a loan for consumption or 'mutuum' cannot exceed 8% per annum, in terms of the Interest Rate (Exemption) Regulations (SL 16.06), the limit on the charging of default interest and the compounding thereof is inapplicable to any debts that are due under an aircraft lease. It is immaterial whether the aircraft is registered in Malta or otherwise and whether the lease agreement is governed by Maltese law or a foreign law.

2.6.9 Lessor's Requirement to Pay Taxes/Fees

The lessor will not be required to pay any taxes or fees in a significant amount when enforcing the aircraft lease in Malta.

2.6.10 Mandatory Notice Periods

Article 1526(5) of the Civil Code provides that the lease of an aircraft or aircraft engine will be immediately terminated by the lessor at any time in the event of a default and upon notice in writing to the lessee, and this notwithstanding any opposition by the lessee and without the need of authorisation from court. In such circumstances the lessor may, after notice to the lessee, take possession of the aircraft or aircraft engine as per the agreement between the parties. Where court intervention is required, the court is legally bound to provide speedy relief.

2.6.11 Lessees' Entitlement to Claim Immunity

Under the restrictive theory, only *acta jure imperii* can attract immunity, but immunity is not available where the State is carrying out commercial activity.

2.6.12 Enforcement of Foreign Arbitral Decisions

See 2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards.

2.6.13 Other Relevant Issues

2016 amendments to the Civil Code and the ARA have strengthened the principle of privity of contract in so far as aircraft leases are concerned, providing further assurance that lease agreements are enforceable on their terms notwithstanding any other provisions of Maltese law relating to leases. Thus, the Civil Code in Article 1526(3) now specifically states that the letting aircraft, including aircraft engines, will be regulated by the provisions of any agreement between the lessor and the lessee in accordance with its terms as well as by the international usages of trade applicable in the context. In the case of conflict with the provisions of the Civil Code, the terms and conditions as agreed to between the parties to the aircraft lease will prevail. An aircraft lease will also be subject to the special laws relating to civil aviation.

2.7 Lease Assignment / Novation

2.7.1 Recognition of the Concepts of Contractual Assignment and Novation

The concepts of assignment (Article 1469 of the Civil Code) and novation (Article 1979 of the Civil Code) are recognised under Maltese Law.

2.7.2 Assignment/Novation of Leases Under Foreign Laws

So long as aircraft contracts of assignment or novation are valid and legally binding under the law by which they are expressed to be governed, and to the extent that the terms of such and the obligations arising thereunder are not considered to be fraudulent or contrary to public policy, these will be enforceable in the Maltese courts.

In the case of an ordinary assignment (as opposed to an assignment by way of security) of an aircraft lease by the lessor, and except where the lease agreement provides otherwise, either acknowledgment by the lessee or notice to the lessee by means of judicial act is required. Where the assignment is by way of security (and provided the lease agreement does not state otherwise), notice in writing may be given by any written means, including electronic.

Therefore, in both cases, consent of the lessee is not effectively required, as notification will suffice.

2.7.3 Enforceability of Lease Assignments/Novations

Documents to be submitted to the CAD can be submitted in English. Certified copies will suffice but where the assignment or assumption/novation emanates from outside the EU then it must also be notarised and apostilled.

2.7.4 Filing/Registration of Lease Assignments/Novations

Since a copy of the lease agreement is generally provided to the CAD on registration of the aircraft, an assignment thereof or an amendment thereto would require notification to the CAD. Other than this, no further consents or acknowledgments are required.

According to Article 11(1)(a) of the ARA, any change in the particulars that were furnished with the application for registration of the aircraft should be notified to the CAD immediately and in writing.

No government applications or consents are required as a prerequisite to the execution and delivery of an aircraft and/or engine lease assignment and assumption/novation in relation to an aircraft registered in Malta.

2.7.5 Taxes/Duties Payable on Assignment/Novation

See 2.4.2 Effects of Leasing on the Residence of a Foreign Lessor.

2.7.6 Recognition of Transfer of Ownership Interests

See 1.2.1 'Transferring Title'.

2.8 Aircraft Deregistration and Export

2.8.1 Deregistering Aircraft in this Jurisdiction

An application for the cancellation of a Certificate of Registration can be made to the CAD by the person in whose name the aircraft is registered. The application may also be made by an authorised person or his delegate in writing, pursuant to an irrevocable deregistration and export request authorisation (IDERA) or power of attorney (PoA) that has been registered in the National Aircraft Register or in the International Registry.

2.8.2 Lessee's/Operator's Consent

The aircraft will be registered in the name of the lessee and therefore it is the lessee who must apply for the deregistration of the aircraft, unless an IDERA or PoA exists as aforesaid.

2.8.3 Required Documentation

Assuming an IDERA or PoA has been registered already, proof of identity only.

2.8.4 Duration of Deregistration Process

Where there is co-operation from the lessee and assuming there is no mortgage, the actual deregistration of the aircraft can be effected promptly. Where there is a mortgage, the deregistration will not be effected without the consent of the mortgagee. If there is no co-operation from the lessee, the time required to achieve deregistration may depend on a number of factors, including whether the lessor has a valid, registered IDERA or PoA or otherwise and whether court intervention is required.

2.8.5 Aviation Authority's Assurances

The CAD has on occasion and by special request provided advance assurances to aircraft owners, mortgagees or lessors regarding the prompt deregistration of the aircraft.

2.8.6 Costs, Fees and Taxes Relating to Deregistration

A fee of EUR50 is payable on application for deregistration.

2.8.7 Deregistration Power of Attorney

While as a general rule a PoA does not need to be notarised or apostilled, if the document emanates from outside the EU, notarisation and apostillation will be needed. Deregistration/export PoAs are generally filed with the CAD and need to be in English.

2.8.8 Documents Required to Enforce Deregistration Power of Attorney

Evidence of the identity of the person should suffice.

2.8.9 Choice of Laws Governing Deregistration Power of Attorney

A deregistration PoA does not have to be governed by the laws of Malta.

2.8.10 Revocation of Deregistration Power of Attorney

As a general rule, mandate (PoA) is always revocable. However, where a mandate is given by way of security and provided it is expressly stated to be so then it can only be revoked with the consent of the secured party.

2.8.11 Owner's/Lessor's Consent

The aircraft owner, mortgagee or lessor should be able to export the aircraft without the lessee's consent for the purposes of enforcing their agreement if they have a registered IDERA or PoA or security interest. The asset need not be physically located in Malta at the time of deregistration.

2.8.12 Aircraft Export Permits/Licences

No licences or consents need to be obtained to export an aircraft, but ferrying an aircraft out of Malta will be subject to general permits and authorisations to fly (CAD, airport, etc).

2.8.13 Costs, Fees and Taxes Concerning Export of Aircraft

A nominal fee will be payable where a permit to fly or export conformity statement is required to be issued by the CAD.

2.8.14 Practical Issues Related to Deregistration of Aircraft

Apart from an application for deregistration, the CAD will require the original Certificate of Registration to be submitted as well as a work order for the removal of registration marks from the aircraft.

2.9 Insolvency Proceedings

2.9.1 Effect of Lessee's Insolvency on Deregistration Power of Attorney

Where a PoA has been drawn up in the form of an irrevocable mandate by way of security it will survive the liquidation of the lessee and will continue to be binding on the liquidator of the lessee in accordance with its terms, which is expressly stated in Article 1886(2) of the Civil Code. According to Article 295 of the Companies Act (CA), the powers of the directors of a company cease upon the appointment of a liquidator, but the company itself will remain in existence for the purposes of the winding-up.

2.9.2 Other Effects of Lessee's Insolvency

The powers and duties of a liquidator in the winding-up of a Maltese company are relatively wide and include the power to carry on the business of the company so far as may be necessary for the beneficial winding-up thereof, to pay creditors according to their ranking at law and to make any compromise or arrangement with persons claiming to be creditors of the company. The terms of the lease agreement will continue to bind the company and the liquidator

will be obliged to observe them, including those terms relating to the redelivery of the aircraft to the lessor. The aircraft cannot be attached by creditors of the lessee since it is not property of the lessee. When a company is being wound up by the court, no precautionary acts or warrants can be issued against the company. The lessor will rank as a creditor for any outstanding dues owing under the lease and the liquidator will be obliged to pay the lessor out of the assets of the company, if any, in accordance with the rules relating to ranking of creditors.

Where the lease has been registered as an international interest on the International Registry, Article 27(4) of the ARA applies and this provision expressly prohibits the interruption or hindrance by any liquidator of proceedings for the termination of any agreement or the taking of possession or control of an aircraft by the holder of a security interest instituted against a lessee.

Additionally, Article 27A(4) states that any person appointed by a court in connection with insolvency proceedings shall not in any way interfere with the exercise of remedies of the holder of an international interest, security interest or other 'aircraft claim' and to the extent that he has any powers under applicable law, he is bound to exercise those powers in support of the said remedies of such creditors.

In terms of the CTC, apart from the obligation not to interfere with the exercise of the security interest holder's right to repossess the aircraft, the liquidator has a positive obligation to give possession of the aircraft to the interest holder within no later than 30 days commencing on the date of the 'insolvency-related event'.

See also **2.9.4 Imposition of Moratoria in Connection with Insolvency Proceedings**.

2.9.3 Risks for a Lender if a Borrower, Guarantor or Security Provider Becomes Insolvent

The main risks are the ordinary risks associated with insolvent companies generally. Non-privileged creditors will share on a pro-rata basis with other unsecured creditors in the distribution of the assets of the insolvent company with the risk of only partial recovery of the debt.

2.9.4 Imposition of Moratoria in Connection with Insolvency Proceedings

As a general rule, creditors cannot sue out warrants against the property of a company nor can they commence legal action against a company in liquidation except with leave of court. Recent amendments to the Civil Code seek to disapply such protection in the context of leases of aircraft. Article 1526(5) states that an aircraft lease is immediately dissolved or terminated at any time that there is an event of default upon mere notice in writing to the lessee without the need for a judicial pronouncement in relation to the default. In

such circumstances the lessor is given an express right to take possession of the aircraft, including an aircraft engine, in accordance with the agreement and may ask the court for an order authorising or directing these acts, and the court must render full support to the lessor as expeditiously as possible. The term default is defined to refer to the events of default agreed between the parties but also specifically includes the insolvency of the lessee. Presumably, a lessor would not be precluded from seeking recourse to the courts for the purposes of the repossession of an aircraft from a lessee that is in insolvent liquidation in spite of the rules applying to creditors of insolvent companies generally. These recent amendments are as yet untested, however.

2.9.5 Liquidation of Domestic Lessees

The instances that may lead to the dissolution and eventual winding-up of a lessee under the CA are as follows: (i) voluntarily by extraordinary resolution of the lessee itself or (ii) by the court:

- if the business of the lessee is suspended for an uninterrupted period of twelve months;
- if the lessee is unable to pay its debts;
- if the number of members of the lessee is reduced to below two and remains so reduced for more than six months;
- if the number of directors is reduced to below the minimum prescribed by the CA and remains so reduced for more than six months;
- if upon application of an interested party the court is convinced that there are grounds of sufficient gravity to warrant the dissolution and consequent winding-up of the lessee; and
- when the period, if any, fixed for the duration of the lessee by the memorandum and articles of association (M&As) expires or the event occurs, if any, on the occurrence of which the lessee is to be wound up.

It should be noted that Article 27A was added to the ARA in 2016, to allow for the possibility to specify in the M&As of a company – the sole asset of which is an aircraft, aircraft engines or related assets – that the rights to request insolvency proceedings in relation to the company can be exercised only by the holders of a mortgage, an international interest or a security interest over such assets, to the exclusion of any other persons for as long as the interest remains in existence.

2.9.6 Ipso Facto Defaults

The meaning of 'default' for the purposes of an aircraft lease is given in Article 1526(7)(b) of the Civil Code. It contemplates a default in the sense of the fulfilment of a condition under which the dissolution of the lease was expressly covenanted or a failure by a party to perform his obligations (performance default), but a default can also mean a change in the financial condition of the lessee (ipso facto default), or a default that substantially deprives the mortgagee of what it

is entitled to expect under the agreement between the mortgagor and the mortgagee.

2.9.7 Impact of Domestic Lessees' Winding-up

Where the airline company of a lessee is being wound up by the court, a liquidator will assume all powers and duties in relation to the lessee and its business, and will take into his custody or under his control all the property and all the rights to which he has reasonable cause to believe the company to be entitled. The aircraft cannot be attached by the creditors of the lessee because it is not the property of the lessee. Rental payments after the date of deemed dissolution can only be made by the liquidator and provided that he deems that they are necessary for the beneficial winding-up of the company. Unless the M&As otherwise provide, the lease security deposit and the maintenance reserves, even if classified as supplemental rent, are expected to fall within the general pool of assets for distribution to creditors generally.

2.10 Cape Town Convention and Others

2.10.1 Conventions in Force

Malta acceded to the CTC and the Aircraft Protocol thereto in 2010. There is no need to obtain any authorised entry point (AEP) codes to register an international interest.

2.10.2 Declarations Made Concerning Conventions

The declarations made by Malta under the CTC relate to Articles 39, 40, 53 and 54 of the same.

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

Article XIII of the Aircraft Protocol applies domestically and forms the basis for the form of IDERA set out in the Second Schedule of the ARA.

2.10.4 Enforcement of Conventions

The Maltese courts have had very little, if any, experience in enforcing the Convention thus far. In one case the courts were asked to consider whether the arrest of an aircraft by an Italian creditor in terms of detention rights provided under Italian law and enforced in Malta in virtue of Regulation 44/2001 EC was incompatible with the rights of a lessor who was in the process of repossessing the aircraft in terms of his rights under the CTC. While the matter was resolved amicably pending final judicial determination of the issue, it appeared that the courts were inclined to give precedence to European law over the provisions of the CTC in this case.

2.10.5 Other Conventions

Malta is not a party to the 1948 Geneva Convention or the 1933 Rome Convention.

3. Aircraft Debt Finance

3.1 Structuring

3.1.1 Restrictions on Lending and Borrowing

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

3.1.2 Effect of Exchange Controls or Government Consents

See 2.1.4 Exchange Controls.

3.1.3 Granting of Security to Foreign Lenders

Borrowers are permitted to grant security to foreign lenders.

3.1.4 Downstream, Upstream and Cross-stream Guarantees

In terms of Article 136 of the CA, a company is allowed to guarantee the obligations of a third party provided this is not prohibited by its M&As.

3.1.5 Lenders' Share in Security over Domestic SPVs

Article 122 of the CA provides for the pledging of securities. In the case of a private company, the right to pledge is excluded unless allowed in the M&As. The pledge of shares has to be created by means of an instrument in writing entered into between the pledger and the pledgee.

3.1.6 Negative Pledges

Negative pledge is recognised under Maltese law as an undertaking not to perform specific actions.

3.1.7 Intercreditor Arrangements

A creditor may subordinate, postpone, waive or otherwise modify his existing or future rights of payment, enforcement, ranking and the like in terms of Article 1996A of the Civil Code. Such action may be made by agreement with or even by unilateral declaration to another creditor.

3.1.8 Syndicated Loans

The concept of agency and the role of an agent under a syndicated loan are recognised.

3.1.9 Debt Subordination

There is no restriction or limitation on debt subordination methods.

3.1.10 Transfer/Assignment of Debts Under Foreign Laws

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

3.1.11 Usury/Interest-limitation Laws

Any obligation to pay a rate of interest exceeding 8% per annum will be void with regards to the excess in terms of Article 986(2) of the Civil Code. Usury is an offence under Article 298C of the Criminal Code and punishable by

imprisonment and the payment of a hefty fine (*multa*). There are a number of exceptions to this rule, however, in terms of the Interest Rate (Exemption) Regulations – see 2.6.8 Limitations on Lessors' Actions Following Termination.

3.2 Security

3.2.1 Typical Forms of Security and Recourse

Maltese law provides for various forms of security over aircraft, including the creation and registration of mortgages or international interests over aircraft; granting and registration of IDERAs as well as revocable or irrevocable PoAs giving powers relating to the exercise of rights relating to aircraft or the closure of the register; creation and registration of share pledges, and other forms of security over special purpose companies; and security by title transfer that is contemplated in the Civil Code.

3.2.2 Types of Security Not Available

Maltese law does not contemplate the registration of a mortgage over an aircraft engine alone. However, the mortgage of an aircraft will comprise any engines owned by the owner of the aircraft whether attached to the aircraft or not, as well as any replacement engines that are designated for use on the aircraft and owned by the owner of the aircraft but temporarily not attached to the aircraft.

In terms of the CTC, an international interest can be taken in an aircraft engine as an independent object whether or not it is already installed on an airframe.

3.2.3 Trust/Trustee Concepts

Maltese law recognises the concept of trusts and the role of a security trustee. Article 2095E of the Civil Code provides that security may be created in favour of a trustee. Moreover, Article 29(4) of the ARA expressly allows the execution and registration of a mortgage over aircraft in favour of a security trustee appointed or acting under a trust for the benefit of persons to whom a debt or other obligation is due. Malta has ratified the Hague Convention on Trusts of 1986 and has given the force of law to most of the provisions thereof.

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

It is possible under Maltese law for a lessor of an aircraft on lease to assign to a security trustee pursuant to a security assignment its rights and benefits under the aircraft lease, including its rights and benefits in relation to relevant insurances.

Assignment by way of security is recognised under Maltese law. Title XXIIIB of the Civil Code, added in 2016, regulates the so-called security by title transfer agreements that are roughly equivalent to security assignment agreements commonly used in English law. Article 2095F, falling under the said Title, expressly envisages a security assignment to

a third party, who is thereby considered to be a trustee for the benefit of a creditor or creditors, present and/or future.

3.2.5 Assignment of Rights and Benefits Without Attendant Obligations

It is possible to assign just the rights and benefits without also assigning the attendant obligations of the lessor under an aircraft lease. The transfer of obligations is achieved by way of novation.

3.2.6 Choice of Foreign Law

A security assignment can be governed by a foreign law.

3.2.7 Formalities/Mandatory Terms to Create and Perfect Security Assignments

Article 2095F of the Civil Code lays down the requisite formalities for the validity of a security by title transfer agreement under Maltese law. Ownership of the property is acquired by the creditor as soon as the debtor and/or the transferor and the creditor enter into an agreement in writing designating the following:

- the property being transferred (in the case of an aircraft lease, the property would be the rights and benefits under the lease agreement or insurances);
- the secured obligations, which may be existing or future obligations; and
- the rights of the transferee in the event of default as stipulated in the agreement.

The perfection of the security assignment will also necessitate notice to or acknowledgement by the debtor concerned (eg, the lessee or the insurer).

Security assignment agreements do not need to be registered. There is a voluntary registration system whereby if the security assignment has been registered on the International Registry, the registrant of the aircraft may request that the Director General insert a note of the existence of the international interest on the register of the aircraft in Malta. Where copies of agreements are submitted to the Registry in Malta, a certified true copy of the original will suffice if the document was signed in Europe. Otherwise the copy must be certified, notarised and apostilled.

3.2.8 Domestic-law Security Instruments

Where a security assignment governed by English or New York law is taken in respect of an aircraft registered in Malta, no Maltese law security instrument is required. In order to make Cape Town filings, it is not mandatory to have a domestic law security instrument. The costs for executing a domestic law security instrument depend on the type of security in question.

3.2.9 Transfer of Security Interests Over Aircraft/Engines
Maltese law recognises the transfer of security interests over an aircraft and/or engine through security by title transfer agreements.

3.2.10 Effect of Changes in the Identity of Secured Parties
A change in the underlying beneficiaries of the security trust held by the trustee will not jeopardise the security assignment.

3.2.11 'Parallel Debt' Structures

Parallel debt structures are used domestically and the security trustee will have an independent right to the secured debt.

3.2.12 Effect of Security Assignments on Residence of Secured Parties

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

3.2.13 Perfection of Domestic-law Mortgages

A mortgage over an aircraft will be perfected once it is registered with the CAD. A mortgage deed must be completed, signed before a witness by the mortgagor and submitted to the CAD in original form. The mortgage deed can be signed by an attorney authorised to sign and deliver the deed on behalf of the mortgagor provided the power of attorney is notarised and apostilled (if originating from outside Malta).

Where a mortgagee opts to have the mortgage registered as an international interest, he must comply with the registration formalities of the International Registry as applying in terms of the CTC. A mortgage on an aircraft registered in Malta can be registered in the National Aircraft Register in Malta or in the International Registry or both.

3.2.14 Differences Between Security Over Aircraft and Spare Engines

See 3.2.2 Types of Security Not Available.

3.2.15 Form and Perfection of Security Over Bank Accounts

Security over a bank account (such as a lease receivables account) can be created by means of a contract of pledge. The pledge is perfected once notice has been given by a judicial act served on the bank or once it has acknowledged the pledge in writing.

3.3 Liens

3.3.1 Third-party Liens

An aircraft repairer, aircraft manufacturer or other creditor in whose care and authority an aircraft has been entrusted is entitled to retain possession of the aircraft on which he has worked until he is paid the debts due to him for any building, repairs or activity. The same would apply in relation

to an engine attached to the airframe. However, repairers, etc, of an aircraft engine not attached to an airframe do not appear to benefit from a similar possessory lien, although the interpretation of the relevant provisions of the law has not been tested in court.

Article 42(2) of the ARA provides that the following debts are secured by a special privilege upon the aircraft and proceeds from any indemnity arising from any mishaps, as well as any insurance proceeds, other than from a liability policy:

- judicial costs incurred in respect of the sale of the aircraft and the distribution of the proceeds thereof pursuant to the enforcement of any mortgage or other executive title;
- fees and other charges due to the Director General arising under applicable law of Malta in respect of the aircraft;
- wages due to crew in respect of their employment on the aircraft;
- any debt due to the holder of a possessory lien for the repair and preservation of the aircraft to the extent of the service performed on and value added to the aircraft;
- the expenses incurred for the repair and preservation of the aircraft to the extent of the service performed on and value added to the aircraft; and
- wages and expenses for salvage in respect of the aircraft.

The following are only so secured if registered in the International Registry established under the CTC: (a) taxes, duties and/or levies due to the government of Malta in respect of the aircraft; and (b) wages and expenses for assistance or recovery in respect of the aircraft.

For these debts to enjoy the preference and status of a special privilege in relation to the aircraft, the claim must have been created by the owner of the aircraft or a person authorised by him. Article 42(2) also applies to an aircraft engine *mutatis mutandis*.

A special privilege grants the person in whose favour it may arise priority over other creditors. It does not entitle such person to take possession of the aircraft or engine, but may constitute the basis for an action in rem against the aircraft or engine. A claimant having an action in rem against an aircraft or engine may procure the issue of a precautionary warrant (or an executive warrant, following judicial determination of the claim) of arrest against the aircraft or engine in accordance with the provisions of the COCP. This remedy is only available if, at the time when the action is brought, the aircraft or aircraft engine in question is beneficially owned by the person who would be liable on the claim in an action in personam.

The possessory lien in favour of the aircraft repairer will cover the works done to the extent of the service actually

performed on the secured asset and the value added to the aircraft.

The concept of fleet lien is not recognised under Maltese law.

The possessory lien or a special privilege entitles the holders thereof to pursue an action in rem against the aircraft or the engine. They do not grant a direct right to sell the aircraft or engine but the holders of a possessory lien or a special privilege can request the judicial sale by auction of the assets to enforce any claim judicially confirmed in their favour, subject, of course, to the rights of prior-ranking creditors.

3.3.2 Timeframe to Discharge a Lien or Mortgage

A possessory lien is extinguished once the aircraft is voluntarily released from the custody of the creditor.

The discharge of a mortgage is procured promptly on submission to the CAD of the mortgage deed signed on the back by the mortgagee thereby authorising the discharge.

3.3.3 Register of Mortgages and Charges

There is no separate registry for aircraft mortgages. Mortgages are recorded in the Register where aircraft themselves are registered.

3.3.4 Statutory Rights of Detention or Non-consensual Preferential Liens

As previously discussed, non-consensual preferential liens arise over an aircraft in terms of Article 42(2) of the ARA but these do not extend to the fleet.

3.3.5 Verification of an Aircraft's Freedom from Encumbrances

The Director General will record the details of any mortgages registered on the aircraft in the Register. When information is inserted in the Register, it becomes public and searchable, and is considered to be within the knowledge of third parties.

3.4 Enforcement

3.4.1 Differences Between Enforcing Security Assignments, Loans and Guarantees

Given that in the event of a security by title transfer the creditor is already in possession and the legal owner of the security, on enforcement he will have the right, by notice in writing to the debtor, to realise the property held by selling the property or (if so agreed) by setting off or netting its value and applying such value in discharge of the secured obligations.

3.4.2 Security Trustees' Enforcement of their Rights

As a general rule, an assignee can only exercise the rights assigned to him after due notice of the assignment has been given to the debtor by means of a judicial act. However,

where an assignment is made by way of security, there is no requirement for notice to be given by judicial act and any writing, including by electronic means, will suffice.

3.4.3 Application of Foreign Laws

See 2.6.5 Domestic Courts' Approach to Foreign Laws and Judgments.

3.4.4 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

See 2.6.6 Domestic Courts' Recognition of Foreign Judgments/Awards.

3.4.5 Secured Parties' Right to Take Possession of Aircraft

A secured party should be able to take possession of the aircraft to enforce a security agreement or an aircraft mortgage without the lessee's or operator's consent where an IDERA or PoA is in place and has been registered.

3.4.6 Domestic Courts Competent to Decide on Enforcement Actions

See 2.6.3 Specific Courts for Aviation Disputes.

3.4.7 Summary Judgments or Other Relief

Article 865A of the COCP provides that the only warrant that can be sued out in respect of an aircraft is a warrant of arrest. A precautionary warrant of arrest serves to secure a debt or a claim, whether in personam or in rem, that could be frustrated by the departure of the aircraft. A warrant may be sued out in security of a debt or a claim subject to the following limitations:

- the amount of the claim must not be for less than EUR7,000;
- with regard to aircraft being used for public transport, if the aircraft is permitted to carry fewer than ten passengers then the claim cannot be less than EUR250,000; and
- for aircraft permitted to carry more than ten passengers, the minimum is EUR1,000,000.

However, these thresholds do not apply where the claim is made by the holder of a mortgage or an international interest or a security interest that is registered in terms of the ARA or the CTC. The court may, upon good cause being shown, and upon the demand of whose aircraft is being detained or by the commander or agent, order the party suing out the warrant to give within a time established by the court sufficient security, in an amount of not less than EUR11,600 for the payment of the penalty, damages and interest, and, in default, to rescind the warrant. An application for a warrant must be made on oath and an action in respect of the right stated in the warrant must be brought within 20 days from the date of issue.

The definition of 'aircraft' for the purposes of Article 865A specifically excludes any engine that is attached to the aircraft and that does not belong to the owner of the aircraft. Where an aircraft is arrested with a third party-owned engine attached, the court must provide such orders as may be required to protect the rights of the owner of the engine. There is an obligation on a court receiving an application by the engine owner in terms of Article 865A(5) of the COCP to order its service upon the person having the possession or control of the aircraft immediately and rule on it expeditiously, within a period of no more than two working days from the date when the application for release was made.

3.4.8 Judgments in Foreign Currencies

See 2.6.7 Judgments in Foreign Currencies.

3.4.9 Taxes/Fees Payable

A secured party will have to pay judicial fees where court intervention is required, but other than that, there are no taxes related to the enforcement of a security agreement or aircraft mortgage.

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