



# Aviation Finance & Leasing

in 25 jurisdictions worldwide

# 2014

Contributing editor: Mark Bisset



**Published by**  
**Getting the Deal Through**  
**in association with:**

Advokatfirman Vinge

ÆLEX

Al Busaidy, Mansoor Jamal & Co

Alegre, Calderón y Márquez Abogados

Arnecke Siebold Rechtsanwälte

AZB & Partners

Basch & Rameh

Beijing Run Ming Law Office

Blake, Cassels & Graydon LLP

Camilleri Preziosi

Clifford Chance CIS Limited

Clyde & Co LLP

Conyers Dill & Pearman (Cayman) Limited

Cuatrecasas, Gonçalves Pereira

De Brauw Blackstone Westbroek NV

Herbst Kinsky Rechtsanwälte

Kim & Chang

Maciel, Norman & Asociados

McCann FitzGerald

Meyer Avocats

Patton, Moreno & Asvat

Pillsbury Winthrop Shaw Pittman LLP

Russin Vecchi & Heredia Bonetti

Stephenson Harwood AARPI

Verhaegen Walravens

## Aviation Finance & Leasing 2014

**Contributing editor:**  
**Mark Bisset**  
**Clyde & Co LLP**

*Getting the Deal Through* is delighted to publish the first edition of *Aviation Finance & Leasing 2014*, a new volume in our series of annual reports, which provide international analysis in key areas of law and policy.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 25 jurisdictions featured.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are always referring to the latest print edition or to the online version at [www.GettingTheDealThrough.com](http://www.GettingTheDealThrough.com).

*Getting the Deal Through* gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. *Getting the Deal Through* would also like to extend special thanks to contributing editor Mark Bisset of Clyde & Co LLP for his assistance in devising and editing this volume.

## Getting the Deal Through

London  
June 2014

Global Overview	3	England & Wales	58
<b>Mark Bisset</b> Clyde & Co LLP		<b>Mark Bisset</b> Clyde & Co LLP	
Aircraft Mortgages - English Law or New York Law?	6	France	63
<b>Thomas A Zimmer and Dominic Pearson</b> Pillsbury Winthrop Shaw Pittman LLP		<b>Edward Campbell</b> Stephenson Harwood AARPI	
Argentina	8	Germany	70
<b>María Laura Maciel and Rogelio N Maciel</b> Maciel, Norman & Asociados		<b>Ulrich Steppeler and Katja Helen Brecke</b> Arnecke Siebold Rechtsanwälte	
Austria	14	India	77
<b>Christoph Wildmoser</b> Herbst Kinsky Rechtsanwälte		<b>Ashwin Ramanathan, Nithya Narayanan, Aayush Misra and Manish Jha</b> AZB & Partners	
Belgium	18	Ireland	83
<b>Giulia Mauri</b> Verhaegen Walravens		<b>Hilary Marren and Joe Fay</b> McCann FitzGerald	
Brazil	24	Korea	90
<b>Kenneth Basch</b> Basch & Rameh		<b>Young Kyun Cho, Young Min Kim and Robert L Gilbert</b> Kim & Chang	
Canada	30	Malta	95
<b>Donald G Gray and Jason MacIntyre</b> Blake, Cassels & Graydon LLP		<b>Malcolm Falzon, Steven Decesare and Tara Cann-Navarro</b> Camilleri Preziosi	
Cayman Islands	37	Mexico	102
<b>Matthew Stocker</b> Conyers Dill & Pearman (Cayman) Limited		<b>Javier Alegre and Carlos Campillo</b> Alegre, Calderón y Márquez Abogados	
China	42	Netherlands	107
<b>Liu Yi</b> Beijing Run Ming Law Office		<b>Berend Crans and Thijs Elseman</b> De Brauw Blackstone Westbroek NV	
Dominican Republic	49		
<b>María Esther Fernandez A de Pou and Raul E Rodríguez Pereyra</b> Russin Vecchi & Heredia Bonetti			

### Publisher

Gideon Robertson  
[gideon.robertson@lbresearch.com](mailto:gideon.robertson@lbresearch.com)

### Subscriptions

Rachel Nurse  
[subscriptions@gettingthedealthrough.com](mailto:subscriptions@gettingthedealthrough.com)

### Business development managers

George Ingledew  
[george.ingledew@lbresearch.com](mailto:george.ingledew@lbresearch.com)

Alan Lee  
[alan.lee@lbresearch.com](mailto:alan.lee@lbresearch.com)

Dan White  
[dan.white@lbresearch.com](mailto:dan.white@lbresearch.com)



Published by  
**Law Business Research Ltd**  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 7908 1188  
Fax: +44 20 7229 6910  
© Law Business Research Ltd 2014  
No photocopying: copyright licences do not apply.  
First published 2014  
ISSN 2055-7256

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of June 2014, be advised that this is a developing area.

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



## CONTENTS

Nigeria	114	Portugal	134	Switzerland	154
<b>L Fubara Anga and Chinanu Osuji</b> ÆLEX		<b>Luís Soares de Sousa</b> Cuatrecasas, Gonçalves Pereira		<b>Frédéric Meyer, Raphaël Baeriswyl, Philippe Renz and Antoine Labaume</b> Meyer Avocats	
Oman	119	Russia	142	United States	160
<b>Mansoor Malik and Nathaniel Armstrong</b> Al Busaidy, Mansoor Jamal & Co		<b>Victoria Bortkevicha and Evgeniya Armstrong</b> Clifford Chance CIS Limited		<b>Thomas A Zimmer</b> Pillsbury Winthrop Shaw Pittman LLP	
Panama	128	Sweden	148		
<b>Maria de Lourdes Marengo</b> Patton, Moreno & Asvat		<b>Fredrik Wilkens, Emma Stuart-Beck and Malin Sund</b> Advokatfirman Vinge			

# Malta

**Malcolm Falzon, Steven Decesare and Tara Cann-Navarro**

Camilleri Preziosi

## Overview

- 1 To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Malta is a party to the major air law treaties, including:

- the Chicago Convention on International Civil Aviation (1944), ratified 5 January 1965;
- the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), ratified 22 June 2000;
- the Convention relating to Co-operation for the Safety of Air Navigation (Eurocontrol), as amended (1960), ratified 1 July 1989;
- the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963), ratified 28 June 1991;
- the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970), ratified 14 June 1991;
- the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971) and Protocol (1988), ratified 14 June 1991; and
- the Cape Town Convention (2001) (the Convention) and Protocol to the Convention on Matters specific to Aircraft Equipment (2001) (the Aircraft Protocol), ratified 1 October 2010.

In terms of the European Union Act (Chapter 460 of the laws of Malta), EU Regulations, Directives and other acts adopted by the European Union are binding on and applicable in Malta.

- 2 What is the principal domestic legislation applicable to aviation finance and leasing?

The Aircraft Registration Act (Chapter 503 of the laws of Malta) (the Act) is the principal legislative instrument applicable to aviation finance and leasing, regulating, inter alia, the registration of aircraft and aircraft mortgages, and the leasing and operation of aircraft. The Act also served to transpose the Convention and the Aircraft Protocol and brought about other legislative amendments to the fiscal regime applicable to aircraft registration and financing. The First Schedule of the Act (the First Schedule) is the implementing law of the Convention and the Aircraft Protocol.

- 3 Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

Subject to the relevant provisions of the Rome I Regulation (EC) No. 593/2008 and Rome II Regulation (EC) No. 864/2007, a contract (or part thereof) may be governed by the law chosen by the parties thereto provided that said choice is made clear or expressly demonstrated by the terms of the contract or the circumstances of the case.

## Title transfer

- 4 How is title in an aircraft transferred?

Title to an aircraft object may be transferred by a bill of sale or contract of sale. Title reservation agreements, in terms of which ownership of the aircraft object does not pass until fulfilment of the condition or conditions stated in the agreement, are also possible.

- 5 What are the formalities for creating an enforceable transfer document for an aircraft?

The bill of sale or contract of sale referred to in the preceding section must be in writing, and must contain an obligation whereby one of the parties, having the power to dispose of the identifiable object specified therein, binds himself to transfer to the other the said object for a price which the latter binds himself to pay to the former.

## Registration of aircraft ownership and lease interests

- 6 Identify and describe the aircraft registry.

The National Aircraft Register (the National Register) is maintained by the Director General for Civil Aviation (the DG). This National Register contains, inter alia, details of:

- the aircraft and engines;
- the registrant;
- mortgages; and
- irrevocable de-registration and export request authorisations (IDERA) or any other power of attorney.

The National Register also contains annotations permitted by the Act, most notably any ownership rights in aircraft or engines. No specific engine register exists but interests in engines may be noted in the National Register at the request of the registrant. Where the engines are not the property of the registrant, prior consent of the owner is required for such an annotation to be made.

Applicants who may register aircraft in the National Register include an owner of aircraft under construction, an operator of an aircraft under temporary title (such as a lease) and a buyer under a conditional sale or title reservation agreement (each a 'registrant'). Registration of aircraft and engines under the terms of a beneficial trust is also possible.

If the aircraft is intended to provide air services (ie, not solely for private use) the registrant must be a qualified person (see question 7).

Registrants of private aircraft are not subject to the qualifying requirements of aircraft used for 'air services', which are required to obtain a Maltese operating licence. If the aircraft is not used for air services, it may be registered by any aviation undertaking established in an OECD member state.

- 7** Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

Where an application for registration of an aircraft is made by a registrant, the persons holding an interest by way of ownership or title in the aircraft (or a share therein) may include a request in writing to the DG to have such persons' ownership interests or title noted in the National Register.

The following persons are entitled to register any aircraft in the National Register:

- the government of Malta;
- a citizen of Malta, Switzerland, an EU state or an EEA state (each a 'qualifying state'), having a place of residence or business in a qualifying state; and
- an undertaking established in a qualifying state and having its registered office, central administration and principal place of business within a qualifying state, whereof not less than 50 per cent of the undertaking is owned and effectively controlled by the government of Malta, any EU member state or by citizens of a qualifying state, whether directly or indirectly through one or more intermediate undertakings.

An aircraft in construction and an aircraft not used to provide air services may be registered by a citizen of a qualifying state, but not having a place of residence or business in a qualifying state; or an undertaking established in a qualifying state, but with less than 50 per cent of its ownership held by citizens of a qualifying state, and having its effective control carried out in a qualifying state, provided however that each of its shareholders and directors are a citizen of, or an undertaking established in, an 'approved jurisdiction' in terms of the Aircraft Registration (Approved Jurisdiction) Regulations (2011). For the purposes of the Act, such person or undertaking is referred to as an 'international registrant', provided such person:

- has legal capacity to own or operate an aircraft in terms of law;
- appoints a local resident agent to represent him in Malta for matters concerning the registration of the aircraft; and
- complies with applicable regulations and guidelines.

The Maltese legal framework does not provide for any registries other than the National Register, in which an ownership interest in an aircraft or engine may be registered.

The notations which may be made in the National Register upon a request by the registrant or any other person who with the consent of the registrant demonstrates an interest having such information noted in the National Register, include:

- ownership rights in the aircraft or engines;
- lessor rights relating to the aircraft or engine when the lessor is a person different from the owner, although the same person may appear on the register as lessee;
- the lessee rights in relation to the aircraft or engine and all matters relating thereto;
- the details of the resident agent where the registrant is an international registrant; and
- information on any international interest registered in the International Registry and the debtor thereof.

- 8** Summarise the process to register an ownership interest.

A request for notation in the National Register as to the ownership interest in the aircraft is made pursuant to the application for registration of the aircraft. The relevant part of the application is to be signed by the owner and countersigned by the registrant. A copy of the bill of sale or other proof of ownership of the aircraft

would need to be submitted to the Civil Aviation Directorate (CAD) together with the application.

On a general note, where documentation submitted to the CAD emanates from outside Malta the following conditions are to be satisfied:

- where the document originates from within the EU, this needs to be a certified true copy and legalised; and
- where the document originates from outside of the EU, this needs to be notarised and apostilled.

- 9** What is the effect of registration of an ownership interest as to proof of title and third parties?

The certificate of registration constitutes prima facie evidence of its contents. Accordingly should the holder of an interest, whether by way of ownership or title in the aircraft or a share therein, make a request to have such interest noted in the certificate of registration together with his personal details respectively, this would constitute proof of title which can be relied upon by third parties.

Registration in the National Register, whether by way of notation or record, has the following legal effects:

- it renders information public and considered to be within the knowledge of third parties;
- the registration becomes effective against third parties;
- it creates priority, according to the provisions of the Act and applicable law, between different rights, provided that except for the preservation of special privileges or reservation of title of aircraft or accessories of aircraft in accordance with the provisions of the Act, the notation of ownership or lessee rights shall not imply priority over those of the holder of a registered mortgage;
- where expressly conditional on registration, it shall create legal effects between the parties to certain transactions; and
- all other effects under applicable law.

- 10** Summarise the process to register a lease interest.

A notation in the National Register as to the lease interest in the aircraft is also made at time of registration through the insertion of the necessary information in the application for registration. A copy of the lease or operating agreement for the aircraft would need to be submitted to the CAD together with the application for registration.

- 11** What is the regime for certification of registered aviation interests in your jurisdiction?

A non-transferrable certificate of registration may be requested from the DG. This would include details relating to:

- date of issue;
- nationality marks of the aircraft and the registration marks assigned to it by the DG;
- constructor of the aircraft;
- manufacturer, serial numbers and physical details of the engines attached to the aircraft and any replacement engines to the extent that such are designated for use on the aircraft (no separate certificate of registration is issued for engines); and
- every person holding an interest by way of ownership or title in the aircraft or a share therein, if applicable.

A certificate of registration may be issued when the aircraft is still under construction, but such certificate shall expressly state that the aircraft is not permitted to operate until it complies with the provisions of the applicable law.

- 12** Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

Where an IDERA is in force, the authorised person indicated therein will not be able to deregister the aircraft and procure the export and physical transfer of the aircraft without the prior consent in writing of the holders of any registered interest ranking in priority to that of the authorised person.

Prior to the exercise of such right, the authorised person shall be required to certify to the CAD that all registered interests ranking in priority to that of such authorised person have been discharged or that the holders of such interests have consented to the deregistration and export. Moreover, reasonable prior notice of deregistration and export is to be given to the debtor and any guarantor. Where any other person having rights over the aircraft or aircraft objects has had such interest annotated in the register, reasonable notice is also to be given to such person.

- 13** What are the principal characteristics of deregistration and export powers of attorney?

A power of attorney or IDERA may be registered in the National Register or in the International Registry. Where a mandate or power of attorney (irrevocable or otherwise) granting powers relating to the exercise of rights relating to the aircraft, or to the closure of the register on behalf of the registrant, is granted for a stated period of time after which it shall lapse, such date must be recorded in the register and the registration of the mandate will cease to have effect after such date.

Where the request in writing is made by an authorised person, pursuant to an IDERA or power of attorney which has been registered in the National Register or in the International Registry, such request shall be acted upon in all cases, provided that the authorised person certifies that all registered interests ranking in priority to that of the authorised person have been discharged or that the holders of such interests have consented to the deregistration and export.

Revocation of an IDERA, where recorded by the CAD, requires the written consent of the authorised person.

An irrevocable mandate by way of security survives the insolvency of the debtor or the creditor and continues to be binding on, or continue for the benefit of, the heirs or liquidator (or similar officer) of the debtor, or the creditor, in accordance with its terms.

- 14** If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

Article 13(2) of the Act and article 25 of the First Schedule provide for the granting of an IDERA by the registered owner to a third party. The IDERA has to be submitted to the CAD in the format specified in the Second Schedule of the Act, and should be signed by the registrant and submitted in duplicate together with sufficient evidence that the signatory has due authority (by way of power of attorney or corporate authorisation) to bind the registered owner by his signature. It may be possible to request the CAD to issue a letter of undertaking acknowledging the IDERA and the registration thereof.

### Security

- 15** What is the typical form of a security document over the aircraft and what must it contain?

### Mortgages

It is possible to register a mortgage in the National Register over an aircraft by means of a statutory form executed by the mortgagor in favor of the mortgagee in the presence of, and attested by, a witness.

The mortgage is drawn up in the English language and may be registered in favour of the creditor himself or a security trustee appointed or acting under a trust for the benefit of the creditor(s).

Mortgages may be registered as security for payment of a principal sum and interest, a current account or the performance of any other obligation, including a future obligation, due by a debtor to a creditor. The Act does not require that the value of the indebtedness is specified in the mortgage unless it is intended to secure a future obligation, in which case a maximum sum by way of principal for which the mortgage is granted must be expressly stated (such sum would also be reflected in the National Register). It is not necessary to record any other economic terms (such as interest and repayment dates).

### Convention and aircraft protocol

In addition to the registration of mortgage referred to above, in terms of the First Schedule creditors and debtors may also create international interests over airframes, aircraft engines or helicopters ('aircraft objects') and register such interests in the International Registry. International interests must be constituted pursuant to an instrument in writing executed by the chargor (or, in the case of title reservation agreements and leases, by the conditional seller or lessor) who has the power to dispose of the aircraft object specified therein. There is no requirement to specify a sum or maximum sum secured, however the agreement must at least specify what obligations are being secured.

- 16** What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

The following is a list of documents to be submitted to the CAD for registration of a mortgage:

- a mortgage form signed by the mortgagor and attested by a witness, in original;
- if the mortgage form is being signed by an authorised attorney in Malta, an original power of attorney granted by the mortgagor; and
- copies of corporate authorisations, authorising the granting of the mortgage and the named attorney to execute the mortgage in Malta.

Other formalities (such as certification of copies, notarisation and legalisation) are required in connection with documents executed outside of Malta. The costs for legalisation and notarisation of such documents vary, typically in our experience within the region of €50–€75 and €50–€150 respectively (exclusive of VAT), depending on the type and length of the document.

The formalities for registration of international interests in the International Registry are set out in question 15.

- 17** Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

The mortgage must be registered with the CAD and will have no effect until it is recorded in the National Register. The mortgage takes its priority from the date and time of its registration in the National Register by the DG.

The process for registration is relatively straightforward. Once all necessary documents (see question 16) are readily available in Malta, these are delivered to the DG for registration for immediate recording of the mortgage by the DG. With a view to avoiding any delays in the recording of the mortgage, pre-vetting is advisable.

At present, no fees are payable upon the registration of mortgages or amendments thereto.



**18** How is registration of a security interest certified?

After the mortgage has been submitted, the DG will note on the original mortgage that it has been recorded by him, stating the date and time of that record. A transcript of the National Register may be requested by the mortgagor or mortgagee. The transcript will show, *inter alia*, the security interest registered on the aircraft and its priority.

With regards to international interests registered in the International Registry, a certificate issued by the International Registry constitutes *prima facie* proof that it has been issued and of the facts stated therein.

**19** What is the effect of registration as to third parties?

The registration of a mortgage renders it effective and also creates priority over subsequent mortgages. If there are a number of mortgages registered over the same aircraft, the mortgagees will be entitled in priority, one over the other, according to the date and the time at which each mortgage is recorded in the National Register.

Since the Convention came into force in Malta on 1 February 2011, all mortgages registered in the National Register rank after any international interest, prospective international interest and any other right or interest registered in the International Registry, irrespective of the date and time of registration in the International Registry.

**20** How is security over aircraft and leases typically structured?

What are the consequences of changes to the security or its beneficiaries?

The concept of a security trustee is recognised in Malta and commonly applied in granting of security over aircraft. A mortgage may be granted in favour of the beneficiary or 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.

The security trustee would be recognised as the mortgagee, and will be entitled to exercise all the rights in relation to the mortgage accorded to mortgagees under the Act. Accordingly, the mortgage will only refer to and recognise the security trustee as the person in whose favour the mortgage is registered, without any reference to the underlying lenders.

A mortgage constitutes a right in rem over the aircraft.

**21** What form does security over spare engines typically take and how does it operate?

Mortgages on aircraft can be registered in the National Register in terms of Part IV of the Act. For the purposes of this Part of the Act, an aircraft includes, *inter alia*, any engines owned by the owner of the aircraft, whether attached to the aircraft or not, as well as any replacement engines which are designated for use on the aircraft and owned by the owner of the aircraft but temporarily not attached to the aircraft.

Security over the aircraft would not, however, extend to any engine attached to the airframe when such engine is not the property of the owner of the airframe granting the security, notwithstanding that the engines may be specifically referred to in the instrument of mortgage, the National Register or elsewhere. In terms of article 573 of the Civil Code (Chapter 16 of the laws of Malta), where an engine attached to an airframe is not also owned by the airframe owner, each of the owners retains the ownership of their respective asset.

Also, in terms of the First Schedule, international interests on aircraft engines may be registered in the International Registry. International interests that may be registered in the International Registry are interests in aircraft objects:

- granted by the chargor under a security agreement;

- vested in a person who is the conditional seller under a title reservation agreement; or
- vested in a person who is the lessor under a leasing agreement.

**Enforcement measures****22** Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?

International interests may be registered in the International Registry in favour of the lessor in accordance with the First Schedule. Such interest is recognised and enforceable under the laws of Malta, and is attributed the status and all rights and powers specified in the First Schedule with reference to a registered aircraft, irrespective of whether it is recorded in the National Register.

In the event of a default under a title reservation agreement or leasing agreement, the conditional seller or the lessor (as the case may be) is entitled to:

- terminate the agreement and take possession or control of any aircraft object to which the agreement relates; or
- apply to court requesting issuance of an order authorising or directing either of these acts.

In addition to the remedies specified above, in terms of the First Schedule the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in such provisions:

- procure the deregistration of the aircraft; and
- procure the export and physical transfer of the aircraft object from the territory in which it is situated. It is important to note that the creditor is only entitled to exercise the said remedies with the prior written consent of the holder of any prior ranking registered interest.

The First Schedule also provides that a creditor may exercise any additional remedies permitted by law, including any remedies agreed upon by the parties to the extent that they are not inconsistent with the mandatory provisions of article 22 of the First Schedule regulating possible derogations from certain specified provisions of the First Schedule.

**23** Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?**Remedies**

The remedies with regards to enforcement depend primarily on the nature of the security interest (ie, whether the person enforcing the security is a chargor, a conditional seller or a lessor).

The rights pertaining to a lessor or a conditional seller are set out in question 22. With respect to a chargee, in the event of a default, it may, to the extent that the chargor has at any time so agreed, exercise any one or more of the following remedies:

- take possession or control of any aircraft object charged to it;
- sell or grant a lease of any such aircraft object; or
- collect or receive any income or profits arising from the management or use of any such aircraft object.

Alternatively, the chargee may apply for a court order authorising or directing any of the acts referred to in the preceding paragraph. It is pertinent to note that, with respect to the rights specified in (ii) and (iii) above, a chargee has an obligation to give reasonable prior notice to interested persons in the manner specified in the First Schedule.

In addition to the above, the holder of a mortgage registered in the National Register is entitled to request extensions, pay fees, receive certificates and do other things in the name of the owner in order to maintain the registration of the aircraft in the relevant registry. Furthermore, a mortgagee must act in a commercially reasonable

manner and is bound by fiduciary duties towards the debtor and any other creditors when effecting the sale of an aircraft.

### Interim relief

A creditor is also entitled, pending final determination of its claim and to the extent that the debtor has at any time so agreed, to obtain from a court speedy relief (no more than 10 calendar days in cases (i) to (iii) below and no more than 30 calendar days in cases (iv) and (v) below, from the date of application for relief) in the form of one or more of the following orders as the creditor requests:

- (i) preservation of the aircraft object and its value;
- (ii) possession, control or custody of the aircraft object;
- (iii) immobilisation of the aircraft object;
- (iv) lease or, except where covered by (i) to (iii) above, management of the aircraft object and the income therefrom; and
- (v) sale and application of proceeds therefrom.

### Vesting of aircraft object in satisfaction; redemption

In addition to the above remedies, at any time after the happening of an event of default the chargee and all interested persons may agree that ownership of (or any other interest of the chargor in) any aircraft object covered by the security interest is to vest in the chargee in or towards satisfaction of the secured obligations. The chargee may also request a court to order that the aircraft objects vests in the chargee.

In addition to these remedies, holders of security interests have the right to procure the deregistration of the aircraft and the export and physical transfer of the aircraft object from the territory in which it is situated, as specified in the preceding section.

Holders of international interests and mortgagee may also file an ex parte application in court, requesting the issuance of a warrant of arrest against an aircraft.

### Insolvency

In terms of the Act, aircraft constitute a particular class of moveables and form separate assets within the estate of their owners for the security of actions and claims to which the aircraft itself is subject.

Accordingly, all mortgages, special privileges and all actions and claims to which an aircraft is subject are not affected by the insolvency of the owner, provided the mortgage predates, or the special privilege, action or claim arose prior to, inception thereof.

Any judicial sale proceedings instituted and any other enforcement actions initiated by any registered mortgagee or creditor enjoying a special privilege (see question 24) will not be interrupted or hindered by any liquidator (or similar) for any cause other than a cause that could be set up by the owner of the aircraft.

In addition to the above, given that Malta opted for Alternative 'A' of article XI of the Aircraft Protocol, in terms of the First Schedule the liquidator or debtor must give possession of the aircraft object to the creditor by no later than the earlier of:

- the end of the waiting period (which is defined as 30 calendar days from the date of the insolvency-related event); and
- the date on which the creditor would be entitled to possession of the aircraft object.

Until possession is given to the creditor, the insolvency administrator or the debtor (as the case may be) have an obligation to preserve and maintain the aircraft object and its value and the creditor is entitled to apply for any form of interim relief available at law. In the event that all defaults (other than a default constituted by the opening of insolvency proceedings) are cured and the debtor agrees to perform all future obligations under the agreement with the creditor, within the time specified in the preceding paragraph, possession of the aircraft object would not be given to the creditor.

Furthermore, the CAD shall make available to the creditor any right such creditor may have to procure the deregistration of the aircraft and procure the export and physical transfer of the aircraft

object from where it is situated, no later than five working days after the date on which the creditor notifies the registry that he is entitled to procure those remedies in accordance with the First Schedule.

### Debtor's obligation to co-operate

The Act imposes an obligation on the debtor and the person in possession of the aircraft object to provide its full co-operation to the holder of a security interest which is enforcing his rights including, but not limited to, surrendering and submitting all data, manuals, technical records, parts, accessories and appurtenances belonging to the aircraft object.

### Executive title

Maltese law grants an international interest registered in the International Registry the status of an executive title where:

- it secures the rights of a seller under a conditional sale with reservation of ownership rights; or
- it secures the rights of a lessor under a lease agreement.

Mortgages are also granted the status of an executive title where the obligation secured is a certain debt, liquidated and due and where a maximum sum secured pursuant to the said mortgage is specified in the mortgage.

An executive title is, in effect, equivalent to a judgment, which can constitute the basis for seeking enforcement including, through the issuance of executive warrants (such as an executive warrant of arrest), an order for the judicial sale by auction of the aircraft or the approval of a private sale (which would give the purchaser a title which is free from all privileges and encumbrances).

- 24** Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

The following debts are, in terms of the Act, secured by a special privilege over the aircraft as well as by insurance proceeds (provided that such privilege does not apply in relation to an indemnity payable under a liability policy) and proceeds from any indemnity arising from any mishaps:

- 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 DG arising under the applicable law 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 same applies in the case of the following, however only after registration in the International Registry:

- taxes, duties and levies due to the government of Malta in respect of the aircraft; and
- wages and expenses for assistance or recovery in respect of the aircraft.

Upon the registration of such privileges in the register, the person registering the aircraft, its owner, or its operator is to be notified of the registration by the registrant of the privilege. The requirement for registration of the privilege for taxes, duties and levies due to the government of Malta and the specific ranking position of such claim in terms of the Act is applicable and binding with reference to such



claims notwithstanding the provisions of other special laws of Malta which may govern such claims.

### Taxes and payment restrictions

**25** What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?

Maltese taxation legislation provides for tax measures favourable to both lessors and lessees of aircraft. No WHT is payable on lease payments where the lessor is not a tax resident. The Inland Revenue Department has issued guidance providing clear rules on the tax treatment of the finance charge, available tax deductions to aircraft finance lessors and capital allowances for leases.

Income derived by non-Maltese resident operators from the ownership, leasing or operation of aircraft or aircraft engines used in international aviation business will not be taxed in Malta unless the income therefrom is actually received in a Maltese bank account. This will apply even if the aircraft is registered or is operated in or from Malta.

Operators setting up a company in Malta may avail themselves of attractive finance leasing rules which minimise the tax burden considerably. A favourable tax treatment for operating leases is also available.

Leasing of aircraft is chargeable to VAT on the deemed use of the aircraft within European airspace. In order to establish the percentage of use of an aircraft within EU airspace, the VAT Department has issued a formula that takes into account essential features of the aircraft on the basis of which the percentage of use is established. Through such a scheme, the lessor would be entitled to claim the original VAT incurred upon the acquisition of the aircraft as it becomes engaged in performing the economic activity of chartering the aircraft. No VAT is charged in respect of the supply, acquisition, importation, chartering, maintenance, servicing and provisioning of aircraft to be used by airline operators for reward chiefly for international transport of passengers, goods or both.

Accelerated tax depreciation rates (six years for the aircraft and engines and four years for the interior of the aircraft) also apply.

Qualifying companies may benefit from various tax credit schemes and other incentives offered by Malta Enterprise.

No taxable fringe benefit shall be deemed arising in Malta in the case of private use of an aircraft by an individual who is a non-resident employee or officer of an employer or corporate entity whose business activities include the ownership, leasing, or operation of one or more aircraft or aircraft engine is used for, or employed in, the international transport of passengers or goods.

**26** Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

No exchange control restrictions apply.

**27** Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

As a general rule, interest can be charged at up to a maximum rate of 8 per cent per annum. In addition, the compounding of interest is not enforceable in Malta unless the obligation to pay interest is due for a period of more than one year and certain procedures are followed. However, in terms of the provisions of the Commercial Code (Chapter 13 of the laws of Malta) on late payments in commercial transactions, the legal interest for late payment is set at the applicable European Central Bank reference rate plus 8 per cent. Limitations on the rate of interest and the compounding thereof are generally considered not to apply to debts or obligations when:

- obligations arise under a contract governed or otherwise regulated by the law of a country other than Malta;

- the agreed interest rate or compounding of interest are in accordance with international market conditions prevailing at the time that the debt or obligation has been contracted; and
- the payor of interest is not a natural person.

The same position applies in the case of security governed by Maltese law relating to such types of debts or obligations.

**28** Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

No import duty is payable in respect of civil aircraft. Aircraft are not deemed to be chargeable assets for stamp duty purposes.

### Insurance and reinsurance

**29** Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

The Civil Aviation (Insurance Requirements for Air Carriers and Aircraft Operators) Order (SL 499.41) (the Order), which implements the rules promulgated in terms of Regulation EC 785/2004 on insurance requirements for air carriers and aircraft operators (as amended), requires that no aircraft may be flown in Malta without having insurance cover which meets the requirements of such Regulation. The Order does not require that insurance must be placed with a domestic insurer, and there is no prevailing practice to place insurance in the local market. In fact, only a limited number of reinsurance principals authorised by the local insurance regulator to carry on the business of insurance in or from Malta are authorised to provide insurance in relation to aircraft.

**30** Are cut-through clauses under the insurance and reinsurance documentation legally effective?

In terms of the Act, proceeds from an insurance policy related to an aircraft are secured by a special privilege upon the aircraft. Moreover a mortgage would attach to any proceeds from any indemnity arising from any mishaps as well as any insurance proceeds, except in relation to an indemnity payable under a liability policy.

It is possible in terms of Maltese law for a person to stipulate for the benefit of a third party, subject to the satisfaction of the following criteria:

- the third person must be defined;
- the third person must have signified his intention to avail himself of the stipulation; and
- the stipulation must constitute:
  - the mode or condition made by the person for his own benefit (such 'mode' has been interpreted by Maltese courts to refer to an obligation which, if not present in the contract, would render the contract a gratuitous one); or
  - a donation or grant made by him to others.

**31** Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

In terms of Maltese law, a debt, right or cause of action may be assigned subject to the satisfaction of the requisites essential for its validity, namely agreement as to the subject of the assignment and the price, and, except in the case of a right transferable by the delivery of the respective document of title, the execution in writing of a deed of assignment.

An assignee may not, in regard to third parties, exercise the rights assigned to him except where the debtor has acknowledged the assignment, or after due notice of the assignment has been given

### Update and trends

In April 2013, the Aviation Advisory Committee was established for the purpose of providing advice on all matters relating to aviation in Malta to the minister responsible for the sector (tourism), for the efficient and effective management of the local aviation sector, through coordination and consultation with the relevant stakeholders, including public, private and civil society organisations. A National Aviation Policy (the Policy) was also launched at the end of 2013, aimed at providing guidance to the sector for its continued growth in the medium term.

A Civil Aviation Authority (CAA) is to be set up, and a Civil Aviation Authority Act is to be drafted with a view to updating the Authority For Transport In Malta Act (Chapter 499 of the laws of Malta) in so far as aviation is concerned. In terms of the Policy the main functions of the CAA should include regulating civil aviation functions and activities in

Malta and the oversight of the regulatory function, licensing of aviation activities and personnel and to act as the National Supervisory Authority (including on aviation security issues).

A priority set out in the Policy is the improvement of Malta's hub connectivity and long-haul services, and for the furtherance of such objectives it is intended to establish both a general and business aviation terminal. The importance of the National Register is also recognised in the Policy, with a commitment being made for the attainment of a quality register which adds value to all concerned and not one based on mere volume. Moreover, the Policy recognises the dynamic nature of the aviation sector and shall be revised as and when necessary to cater for changes in the area. Any material amendments to the Policy will be subject to public and stakeholder consultation, or both.

to the debtor by means of a judicial act by the assignee himself or by the assignor.

As a signatory of the Convention, all associated rights (defined therein as all rights to payment or other performance by a debtor secured by or associated with the aircraft object) including, inter alia, reinsurance contracts associated with the aircraft, are capable of being assigned unless otherwise agreed between the parties.

**32** Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

The Aviation Act requires that if an aircraft is flown in such a manner as to be the cause of unnecessary danger to any person or property, the pilot or the person in charge of the aircraft shall be liable for the payment of a fine not exceeding €2,500 or to imprisonment not exceeding six months or to both such fine and imprisonment.

Where material loss or damage is caused to any person or property by, or by a person in, or an article or person falling from, an aircraft while in flight, taking off or landing, then unless the loss or damage was caused or contributed to by the negligence of the person by whom it was suffered, damages in respect of the loss or damage shall be recoverable.

Where aircraft have been bona fide demised, let or hired out, for any period exceeding 14 days, by the owner thereof, and no pilot, commander, navigator or operative member of the crew of the aircraft is in the employment of the owner, the relevant sections of the Aviation Act whereby liability for damages would attach to the

owner of the aircraft so leased would be applicable to the person to whom the aircraft has been so demised, let or hired out, as if such person were the owner of the aircraft.

**33** Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

No, where the owner can prove to the satisfaction of the court that the aircraft was so flown without his actual fault or privity, liability would not attach to the owner but to the person having the operational interest in the aircraft.

**34** Are there minimum requirements for the amount of third-party liability cover that must be in place?

Aircraft having a maximum take-off mass of less than 500kg, and microlights which are used for non-commercial purposes, or local flight instruction not entailing the crossing of international borders, are required to have a minimum insurance cover per accident of 0.75 million SDR (Special Drawing Right) per passenger. In respect of non-commercial operations by aircraft with a maximum take-off mass of 2,700kg or less, the minimum insurance cover shall be 100,000 SDR per passenger.

The requirements with respect to all other aircraft set out in Regulation EC 785/2004 (see question 29) apply.

## CAMILLERI PREZIOSI

ADVOCATES

**Malcolm Falzon**  
**Steven Decesare**  
**Tara Cann-Navarro**

**malcolm.falzon@camilleripreziosi.com**  
**steve.decesare@camilleripreziosi.com**  
**tara.cann-navarro@camilleripreziosi.com**

Level 3, Valletta Buildings  
South Street  
Valletta VLT1103  
Malta

Tel: +356 2123 8989  
Fax: +356 2122 3048  
info@camilleripreziosi.com  
www.camilleripreziosi.com

# GETTING THE DEAL THROUGH

## Annual volumes published on:

Acquisition Finance	Labour & Employment
Advertising & Marketing	Licensing
Air Transport	Life Sciences
Anti-Corruption Regulation	Mediation
Anti-Money Laundering	Merger Control
Arbitration	Mergers & Acquisitions
Asset Recovery	Mining
Banking Regulation	Oil Regulation
Cartel Regulation	Outsourcing
Climate Regulation	Patents
Construction	Pensions & Retirement Plans
Copyright	Pharmaceutical Antitrust
Corporate Governance	Private Antitrust Litigation
Corporate Immigration	Private Client
Data Protection & Privacy	Private Equity
Debt Capital Markets	Product Liability
Dispute Resolution	Product Recall
Domains & Domain Names	Project Finance
Dominance	Public Procurement
e-Commerce	Real Estate
Electricity Regulation	Restructuring & Insolvency
Enforcement of Foreign Judgments	Right of Publicity
Environment	Securities Finance
Foreign Investment Review	Shipbuilding
Franchise	Shipping
Gas Regulation	Tax Controversy
Insurance & Reinsurance	Tax on Inbound Investment
Insurance Litigation	Telecoms and Media
Intellectual Property & Antitrust	Trade & Customs
Investment Treaty Arbitration	Trademarks
Islamic Finance & Markets	Vertical Agreements



**For more information or to  
purchase books, please visit:**  
[www.gettingthedealthrough.com](http://www.gettingthedealthrough.com)



Strategic Research Partner of the  
ABA Section of International Law



THE QUEEN'S AWARDS  
FOR ENTERPRISE:  
2012



Official Partner of the Latin American  
Corporate Counsel Association