



Security interests

Aviation

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In terms of the Aircraft Registration Act (the “Act”), aircrafts constitute a particular class of movables forming separate and distinct assets within the estate of their owners. In case of bankruptcy or insolvency of the owner of an aircraft, all actions and claims to which the aircraft may be subject shall have preference, on the said aircraft, over all other debts of the estate. An aircraft includes the airframe, all equipment, engines and replacement engines whether or not attached to the aircraft.

Aircrafts or shares therein may constitute security for debts and other obligations both by agreement and by operation of the law. The Act deals with, inter alia, the registration of mortgages, claims, security interests and privileges, as well as the ranking of such security interests and the rights of mortgagees and holders of security interests in respect of an aircraft.

SPECIAL PRIVILEGES

The Act provides that the following debts are secured by a special privilege upon an aircraft without the need for registration (each a ‘privilege’):

- (i) 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;
- (ii) fees and other charges due to the Director General responsible for Civil Aviation in Malta (the ‘Director General’) arising under applicable law of Malta in respect of the aircraft;
- (iii) wages due to crew in respect of their employment on the aircraft;
- (iv) any debt due to the holder of a possessory lien for the repair or preservation of the aircraft to the extent of the service performed on and value added to the aircraft;
- (v) the expenses incurred for the repair or preservation of the aircraft to the extent of the service performed on and value added to the aircraft; and
- (vi) wages and expenses for salvage in respect of the aircraft.

Note on Ranking: these privileges rank in the order set out above and in preference to all other claims (competing creditors under the same heading of privileges rank equally pro rata to the amount of their claim). It is pertinent to note that a person in possession of an aircraft enjoying a possessory lien shall not be constrained to release the aircraft until the sums due to him are unconditionally discharged or otherwise secured to his satisfaction, and in any such case shall rank first on such security as may be granted.

The following debts are secured by a special privilege only if registered in the International Registry established by the Cape Town Convention (the “Convention”) (each a ‘registrable privilege’):

- (i) taxes, duties and/or levies due to the Government of Malta in respect of the aircraft; and
- (ii) wages and expenses for assistance or recovery in respect of the aircraft.

The registrable privileges constitute a special privilege and enjoy the preference and status of such right in relation to the aircraft only if the claim is a result of the actions of the owner of the aircraft or a person authorised by such owner. When the claim is a result of the actions of an operator of the aircraft, it will not affect the aircraft or the owner thereof, and will only operate in relation to such operator. Upon the termination of the operator’s temporary title the aircraft reverts back to the owner unencumbered.

Note on Ranking: upon registration in the International Registry, registrable privileges (which arise only in relation to the particular title of an operator of an aircraft, whether being the owner or a holder of a temporary title) rank after any privileges (as set out in items (i) to (vi) of the earlier list) and any international interest registered in the International Registry (see below) prior to the date of the registration of the relevant registrable privilege.

INTERNATIONAL INTERESTS

Malta’s ratification of the Convention provides for increased safeguards and legal certainty owing in particular to its recognition of modern practices in asset-based finance.

The Convention also provides for the creation of international interests which are to be registered in the International Registry, an electronic registry which is easily accessible online. Registered international interests are recognised at an international level by all contracting states of the Convention. In terms of the Act and pursuant to Schedule 1 thereof, which transposes the Convention:

- (i) interests or privileges in aircraft, aircraft engines or helicopters may be registered in the International Registry; and
- (ii) an international interest, subject to special privileges, enjoys priority ranking over national security interests irrespective of the date of registration of the national security interest.

International interests that may be registered in the International Registry under the Convention are interests in aircraft:

- (i) granted by the chargor under a security agreement;
- (ii) vested in a person who is the conditional seller under a title reservation agreement; or
- (iii) vested in a person who is the lessor under a leasing agreement.

If an event of default were to arise, the chargee could exercise any one or more of the following remedies:

- (i) take possession or control of any aircraft object charged to it;
- (ii) sell or grant a lease of any such aircraft object; and
- (iii) 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 abovementioned acts.

In the event of default under a title reservation agreement or under a lease, the conditional seller or lessor will have the power to:

- (i) terminate the agreement and take possession or control of the aircraft to which the agreement relates; or
- (ii) apply to the Court to authorise or direct either of these acts.

Note on Ranking: once registered, registrable privileges and international interests rank in order of date and time of registration in the International Registry.

NATIONAL AND FOREIGN MORTGAGES

In terms of the Act it is possible to create a mortgage over an aircraft registered under the Act, as security for a debt or any other obligation. Such mortgage is effective from the date of registration in the National Aircraft Register.

Note on Ranking: mortgages registered in the National Aircraft Register rank after any international interest, prospective international interest and other rights or interests registered in the International Registry on such aircraft or share therein, irrespective of the date and time of registration in the International Registry.

In terms of the Act, foreign mortgages are recognised and granted the status, rights and powers applicable to a mortgage registered in the National Aircraft Register, subject to certain conditions being satisfied.

Note on Ranking: foreign mortgages recognised in terms of the Act rank after any privileges, registrable privileges and mortgages registered in the National Aircraft Register but ahead of general hypothecs and privileges arising by virtue of the Civil Code.

One of the principal benefits that secured creditors are afforded in terms of the Act is that a mortgagee may exercise remedies in the event of a default without leave of court. The only pre-condition to the exercise of such powers is the notification in writing to the mortgagor.

The following remedies may be exercised by a mortgagee in the event of default of any terms or conditions of a registered mortgage:

- (i) take possession of the aircraft;
- (ii) sell the aircraft;
- (iii) apply for extensions, pay fees, and do all such things in the registrant's name as may be required in order to maintain the status and validity of the registration of the aircraft;
- (iv) lease the aircraft; and
- (v) receive payment of the price, lease payments, and other income which may be generated from the management of the aircraft.

PROHIBITORY NOTICE

In terms of the Act, where a creditor has registered an international interest in the International Registry, the debtor (being the registrant) may execute and file a prohibitory notice in favour of such creditor. Once recorded in the National Aircraft Register, such Prohibitory Notice will prohibit the recording of any other security interest over the aircraft.

EXECUTIVE TITLES

Under Maltese law, any person who has in his possession an executive title recognised as such by law may sue out executive warrants for the purpose of enforcing same. An executive title is tantamount to a judgment or decree of the Courts of Malta and may be enforced without the need of obtaining a decision on the merits.

In terms of the Act, a registered mortgage is deemed to constitute an executive title:

- (i) where the obligation it secures is a debt certain, liquidated and due; or
- (ii) where a maximum sum secured thereby is expressly stated in the instrument creating the security and such figure is recorded in the register for public notice.

The Act also provides that if the mortgage does not satisfy any one of conditions (i) and (ii) above, the mortgagee may enforce his rights under the mortgage by specifying the sum which is certain, liquidated and due at the time of enforcement by means of an affidavit served on the mortgagor, provided that this is without prejudice to the right of any interested party to contest such amount according to law.

The above mirrors the procedure set out in the tried and tested Merchant Shipping Act which regulates mortgages over marine vessels.

Security interests registered in the International Registry also constitute an executive title where:

- (i) they secure the rights of a seller under a conditional sale with reservation of ownership rights; or
- (ii) they secure the rights of a lessor under a lease agreement.

THE IMPACT OF MALTA'S RATIFICATION OF THE CONVENTION ON SECURITY FOR FINANCIERS

The Convention generally serves to facilitate asset-based financing and leasing of aircraft objects. The Act, in transposing the Convention, gives added protection to secured creditors by providing remedies in the event of a default by the debtor or upon the occurrence of an insolvency-related event.

The provisions of the Convention apply when at the time of the conclusion of the agreement establishing the international interest, or a contract of sale, the:

- (i) aircraft is registered in a contracting State; or
- (ii) the debtor or the seller, as the case may be, is situated in a contracting State.

It is pertinent to note that Malta has made a number of declarations under the Convention which provide the most extensive remedies and highest possible level of security to financiers. In particular, the Act:

- (i) allows a chargee to grant a lease of the charged object while it is situated (or controlled from) Malta;
- (ii) allows remedies under the Convention to be exercised without leave of court;
- (iii) implements Alternative 'A' on insolvency, with a "waiting period" of 30 calendar days within which the insolvency administrator or debtor must: (a) give possession of the aircraft to creditor; or (b) cure all defaults (other than a default constituted by opening of insolvency proceedings) and agree to perform all future contractual obligations; and
- (iv) allows for registration of Irrevocable De-Registration and Export Request Authorization (IDERA). A creditor may procure de-registration (as well as physical delivery) of an aircraft within a maximum of five working days from date of notification to the relevant authorities.

In addition to the aforesaid, the Act also grants a creditor the right to obtain speedy relief from Court in the form of any of the following orders:

- (i) preservation of the aircraft object and its value;
- (ii) possession, control or custody of aircraft object;
- (iii) immobilisation of aircraft object;
- (iv) lease or management of the aircraft object and the income arising therefrom; and
- (v) if at any time the debtor and the creditor specifically agree, sale and application of proceeds therefrom.

In the context of relief the term "speedy" means, in relation to (i)-(iii) above, not more than 10 calendar days, and in relation to (iv) and (v) above, not more than 30 calendar days, in each case from the date the application for relief is filed in Court.



MALTA

- Robust legal system, based on UK and EU law and in tune with the business world
- Member of the EU: easy access to 28 member states through the EU marketing passport
- Reputable regulator while being easily accessible and sensitive to the particular requirements of applicants
- Tax efficiency: favourable tax regime and extensive double tax treaty network
- Skilled and highly qualified workforce and service providers
- English is an official language
- Currency is the Euro

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